Case Number: 2302354/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr K Belle	and	HSS Hire Service Group Limited

Held at London South on 28 February 2017

Representation	**Claimant:**	Mr A Bershadski, counsel
	Respondent:	Ms L Gould, counsel

Employment Judge Pritchard (sitting alone)

RESERVED JUDGMENT

The Claimant's claim that he was unfairly dismissed is not well-founded and is accordingly dismissed.

REASONS

1 The Claimant claimed that he had been constructively and unfairly dismissed. The Respondent resisted the claim.

2 For the Claimant, the Tribunal heard evidence from the Claimant and from Kenneth Duncan (probationary Transport Manager at relevant times). For the Respondent, the Tribunal heard evidence from Davy Rendell (Operations Manager at the Respondent's Mitcham depot), Paul Barrow (Logistics & Distribution Operations Trainer), Daniel Fenwick-Boylan (Transport Co-ordinator at the Respondent's Mitcham depot), and Laura Wood (the Respondent's HR Advisor for the South of England). The Tribunal was provided with a bundle of documents to which the parties variously referred. At the conclusion of the hearing, the representatives for the parties made oral submissions. There was insufficient time for the Tribunal to deliberate and deliver judgment on the day of the hearing and judgment was accordingly reserved.

Issues

3 At the commencement of the Hearing, the Tribunal was provided with an agreed list of issues which reads as follows:

Did the Respondent constructively unfairly dismiss the Claimant in accordance with section 95(1)(c) of the Employment Rights Act 1996?

1 Factual

1.1 Was the Claimant told that his salary would, or may be, increased once he had obtained a Driver Certificate of Professional Competence (CPC) so that he could drive the Respondent's 7.5 tonne vehicles?

1.2 When did the Claimant discover that he had been permitted by the Respondent to drive 7.5 tonne vehicles without the requisite CPC?

1.3 When did the Respondent discover that the Claimant had been permitted to drive 7.5 tonne vehicles with the CPC?

2 Factual and legal

2.1 If the Respondent knowingly permitted the Claimant to drive a 7.5 tonne vehicle without the CPC, was the Respondent in fundamental breach of the Claimant's contract of employment, and if so, was such a breach repudiatory?

2.2 If the Respondent unknowingly permitted the Claimant to drive a 7.5 tonne vehicle without the CPC, was the Respondent in fundamental breach of the Claimant's contract of employment, and if so, was such a breach repudiatory?

2.3 In failing to increase the Claimant's salary [WHEN?], was the Respondent in breach of the Claimant's contract of employment, and if so, was such a breach repudiatory?

2.4 Did the Claimant resign in response to any repudiatory breach(es) by the Respondent?

2.5 Did the Claimant resign timeously in response to any repudiatory breach(es)?

3 Remedy

3.1 Polkey

3.1.1 Insofar as the Respondent was not aware that the Claimant was driving a 7.5 tonne vehicle without the CPC, and had the Respondent become aware of that fact, would it have dismissed the Claimant for gross misconduct, and would such a dismissal have been fair?

3.2 Contributory fault

3.2.1 Was the Claimant blameworthy in his conduct, such that his actions contribute to his dismissal?

3.2.2 If so, what percentage was the Claimant's contribution to his own dismissal?

3.3 Has the Claimant mitigated his loss?

4 As to whether or not the Claimant had been constructively dismissed, it was agreed that the test to be applied was:

4.1 Did the Respondent commit a repudiatory breach of contract i.e. a breach going to the root of the contract?

4.2 If so, did the Claimant leave his employment because of the breach?

4.3 Did the Claimant affirm the contract or waive the breach?

5 Mr Bershadski told the Tribunal that the Claimant relied upon alleged breaches of the implied term of trust and confidence and an implied term that drivers would not be required to commit criminal offences.

6 Ms Gould conceded that if the Tribunal were to find that the Claimant had been constructively dismissed, the dismissal would be unfair.

7 The Tribunal determined that it would consider liability only at this hearing but that the parties should adduce any evidence and address any issues relating to Polkey and contributory fault. If the Claimant succeeded, a further hearing would be held to determine remedy.

Findings of fact

8 The Respondent is a national tools and equipment hire company and a provider of specialist services.

9 The Claimant commenced employment with the Respondent on 8 November 2010. He was employed as a driver and drove commercial vehicles up to 3.5 tonnes. He was based at the Respondent's Mitcham depot. The evidence before the Tribunal made it clear that the Claimant was a hard worker and was well-regarded by his colleagues.

10 In early 2016, Davy Rendell made a request for the Claimant's salary to be increased from £17,470.96 to £19,208.00. This request was evidently agreed and the Claimant was paid at the increased rate from April 2016.

11 Davy Rendell suggested to the Claimant that if he completed the Respondent's internal CPC course it would lead to the Claimant being qualified to drive 7.5 tonne vehicles and thus, given the extra duties that would be undertaken, provide Davy Rendell with good reason to request a further salary increase for the Claimant.

12 The Tribunal is unable to accept the Claimant's assertion that Davy Rendell promised a salary increase upon CPC qualification. The Tribunal prefers Davy Rendell's clear and credible evidence that he told the Claimant that he would not receive an automatic increase but that the qualification would be taken into account by management when considering a further salary increase. In the Tribunal's view, it is highly unlikely that Davy Rendell

promised the Claimant a further salary increase in circumstances in which approval would evidently have to be granted by more senior management. As Davy Rendell told the Tribunal, he was not authorised to increase salaries. Further support for the Tribunal's finding that there was no agreement to increase the Claimant's salary was his own evidence that when he spoke to Davy Rendell after his presumed CPC qualification (referred to below), "Davy told me he was working on it".

13 Driving a 7.5 tonne vehicle without the required qualification, evidenced by the driver holding a CPC Card (also known as a Driver Qualification Card (DQC)) is a criminal offence. Similarly, causing or permitting another to drive a 7.5 tonne vehicle without the required qualification is a criminal offence.

14 In order to qualify and thus be entitled to hold a CPC Card, a driver must complete 35 hours training.

15 Davy Rendell made arrangements for the Claimant to attend a CPC course at the Respondent's training centre at Wakefield. It was thought by both Davy Rendell and the Claimant that successful completion of the course would lead to the Claimant being issued with a CPC card by the DVSA.

16 The Claimant attended the course over 4 days in May 2016. In cross examination the Claimant was extremely vague as to whether he had seen certain power point slides which had been shown to him on the training course. The Tribunal prefers Paul Barrow's clear evidence that on each morning of the course he would have made the same presentation to attendees using power point slides (which were reproduced in the hearing bundle) which clearly showed that a DQC would be issued upon 35 hours training. The Tribunal also accepts Paul Barrow's evidence that he explained at every daily presentation that one day on the course would only entitle attendees to have 7 hours training recorded for CPC purposes.

17 At the end of the course the Claimant had not therefore completed the requisite 35 hours training, only 28 hours.

18 For reasons which the Tribunal does not need to determine, the Claimant thought he had fully completed the CPC course and awaited his CPC Card. Davy Rendell also assumed that the Claimant had completed the necessary number of hours training. The Claimant asked Davy Rendell why he had not received his CPC card. Davy Rendell checked the relevant pages of the GOV.UK website which stated:

> *You can still drive professionally if you've done your periodic training and you're waiting for your new Driver CPC card to arrive*

19 Thereafter the Claimant undertook his duties, sometimes driving a 7.5 tonne vehicle while awaiting receipt of a CPC card.

20 On Saturday 30 July 2016, the Claimant attended work, collected a printed copy of his route for the day and loaded his vehicle. The Claimant was driving a 3.5 tonne vehicle. He drove away from the Respondent's premises but

returned about 20 minutes later. The Claimant complained to Daniel Fenwick-Boylan about his route allocation because it required him first to go to another branch to collect kit before he could continue his route. The Claimant told Daniel Fenwick-Boylan that he "wouldn't be back". The Claimant collected his bag and left the Respondent's premises.

21 By letter dated 2 August 2016, Laura Wood wrote to the Claimant asking him to explain his unauthorised absence from work.

22 By email dated 7 August 2016, the Claimant informed the Respondent, among other things:

> *I have decided to terminate my employment with HSS but feel I was forced to resign due to the unfair treatment that I have been receiving for the reasons which I have listed below:*
>
> *I have qualified as a CPC driver and was told that when I qualified it would be reflected in my pay. I have been doing the work as a cpc driver and am still waiting for the increase in my wage. I have been doing the job accordingly and have asked my manager about the non existent pay rise but have not received an answer.*
>
> *There are several younger members of the team that are fairly new and less well qualified earning a much larger salary than myself.*
>
> *It has arisen on several occasions that I have to go and pick up kit a fair distance from my given route that has to be delivered in the opposite direction. I have tried to speak to my manager about the logistics of extending my working day in this manner but any comments/questions I have asked have been disregarded*

23 The following day, the Claimant sent a further email to the Respondent stating, among other things:

> *Further to my email of yesterday I would also like to point out to you that I attended a cpc driver training course at the HSS centre in Wakefield earlier in the year. It came to my attention that I have not received my cpc card. I called the department that issues the cards only to be told that my attendance had not been recorded with sufficient hours. This has also left me with the doubt in my mind that HSS has allowed me to drive a 7.5 tonne van representing the company illegally had I been stopped I would have received a fine for this. My question to you is do HSS not check to see if the relevant documents are in place for drier [sic] activities?*

24 Laura Wood subsequently wrote to the Claimant to inform him that she had carried out some initial investigations and addressed the reasons he had given for having resigned. Laura Wood did not address the further issue about CPC qualification which the Claimant had raised in his second email.

25 The Claimant replied by email dated 17 August 2016 expressing his expressed his disappointment that he had been sent out as a 7.5 tonne driver without the relevant paperwork. He added, among other things:

> *Since leaving I have found out that my insurance would have been invalid if I had any sort of accident…. I have also been told by the DVLA that I do not have enough hours registered to enable me to drive a 7.5 tonne lorry. This information has been verified by the in house training company who also said that HSS only provide a 28 hour course which does not qualify with enough hours to drive a 7.5 tonne lorry, Acas, the DVLA and my solicitors have also confirmed this to me*

26 As part of a further internal investigation, the Respondent subsequently obtained written statements from Daniel Fenwick-Boylan and Benjamin Muir who had heard what the Claimant had to say when he walked out of work on 30 July 2016.

Applicable law

27 Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

28 In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:

28.1 *that there was a fundamental breach of contract on the part of the employer* or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach; (the final act must add something to the breach even if relatively insignificant: Omilaju v Waltham Forest LBC [2005] IRLR 35 (CA)). Whether there is a breach of contract, having regard to the impact of the employer's behaviour on the employee (rather than what the employer intended) must be viewed objectively: Nottinghamshire CC v Meikle [2005] ICR 1. In submissions, Ms Gould sought to persuade the Tribunal that the Respondent's ignorance of the fact that the Claimant had not qualified to drive 7.5 tonne vehicles meant that the Respondent did not therefore intentionally require or permit the Claimant to drive such vehicles; that this must lead to the conclusion that any such breach was not sufficient to justify the Claimant resigning. Without citing the case in any detail, Ms Gould mentioned the case of Bournemouth University v Buckland [2010] ICR 908. The Tribunal is unable to agree with that submission. The subjective intention of an employer is irrelevant; see Leeds Dental Team Ltd v Rose [2014] ICR 94 at paragraph 25;

28.2 *that the breach caused the employee to resign* – or the last in a series of events which was the last straw; (an employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to plead constructive unfair dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract; see Logan v Celyyn House UKEAT/2012/0069. Indeed, once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon; see: Wright v North Ayrshire Council EATS/0017/13/BI). Mr Bershadski also relied on Meikle as authority for the proposition that it is enough that an employee resigns in response, at least in part, to fundamental breaches of contract; and

28.3 *that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal*.

29 All contracts of employment contain an implied term that an employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores plc [2002] IRLR 9.

Conclusion and further findings of fact

30 The effective date of termination of the Claimant's employment was 30 July 2016 when he walked out of work and did not return.

31 The Tribunal has found that the Claimant was not promised a pay increase and no breach of contract can arise therefore as a result of no further pay increases being implemented upon the Claimant driving a 7.5 tonne vehicle (for which, in any event, he was not qualified to drive).

32 In the Tribunal's view, allowing the Claimant to drive a 7.5 tonne vehicle, regardless of Davy Rendell's ignorance of the fact that the Claimant had not completed sufficient hours, was capable of giving rise to a fundamental breach of contract which might have entitled the Claimant to resign in response to the breach and claim constructive dismissal.

33 The Tribunal uses the word "might" in the paragraph above because on the facts of this case it is arguable that the Claimant himself may have already been in breach of contract by failing to inform the Respondent that he had not completed sufficient hours training and was not therefore qualified to drive 7.5 tonne vehicles, a fact of which he should have been aware given Paul Barrow's daily instruction. The law is unclear as to whether an employee who is himself already in fundamental breach of contract can rely on the employer's subsequent breach; see for example: RDF Media Group plc v

Clements [2008] IRLR 207; cf: Atkinson v Community Gateway Association 2015 ICR 1.

34 Leaving aside the question of whether or not the Claimant was entitled to resign in response to a breach if he himself was already in breach of contract, it is the Tribunal's view that by not having an established system for checking drivers' qualifications (or, if the Respondent did have such a system, failing to adhere to it in this case) the Respondent demonstrated serious failings which exposed the Claimant to risk of criminal prosecution. Against that background, causing or permitting the Claimant to drive 7.5 tonne vehicles was, in the Tribunal's view, a breach of the implied term of trust and confidence.

35 However, the real question in this case is, if there was such a breach of contract, did the Claimant resign in response to it? If, when the Claimant walked out of work on 30 July 2016, he was unaware that he did not have the CPC qualification, he could not have resigned in response to a breach of contract arising from it.

36 The Claimant's evidence was that he was informed by DVLA on 29 July 2016 that he had only completed 28 hours of the course. When giving evidence (but not in his witness statement) the Claimant said that he used the Respondent's mobile telephone to make the call to DVLA.

37 The Tribunal is unable to accept that evidence. The Claimant expressly gave his reasons for resigning in his email of August 2016. He did not complain that he had not gained the CPC qualification or that he had not been qualified to drive 7.5 vehicles. On the contrary, the Claimant's complaint that he had not been awarded a pay increase strongly suggests that the Claimant assumed at the time he wrote that email that he had indeed qualified.

38 Not least because the Claimant felt able to complain to Davy Rendell about his salary not being increased and the fact had he had not received his CPC card, in the Tribunal's view it is more likely than not that the he would have also complained that he was not qualified to drive 7.5 tonne vehicles before resigning if he was aware of it.

39 The Tribunal notes too Davy Rendell's evidence that that he only discovered that the Claimant had not completed sufficient training hours until the Claimant resigned.

40 The statements of Daniel Fenwick-Boylan and Benjamin Muir taken in the Respondent's further investigation are broadly consistent with each other and both attest to the fact that the Claimant complained about his route when he walked out of work on 30 July 2016, not that he had been driving 7.5 tonne vehicles. Indeed, in evidence the Claimant did not seek to contradict that his allocated route was the substance of his complaint on the day.

41 As for the Claimant's email of 8 August 2016, its context suggests that the Claimant's understanding about insurance and other matters concerning the CPC was gained *"since leaving".*

42 The Claimant has failed to prove, on the balance of probabilities, that he resigned in response the Respondent's fundamental breach of contract. Accordingly, his claim of unfair constructive dismissal does not succeed.

Employment Judge Pritchard
3 March 2017