Case Number: 2300867/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr M Wood	and	Purecare Care Homes Ltd

Held at Ashford on 20 February 2017

Representation	**Claimant:**	In person
	Respondent:	Mr S Jagpal, consultant

Employment Judge Wallis

JUDGMENT

1. The Claimant was not unfairly constructively dismissed;

2. The claim is accordingly dismissed.

REASONS

Detailed reasons were announced at the end of the hearing. On 27 February 2017 the Claimant requested written reasons. He repeated his request on 23 March 2017. The request was referred to the Employment Judge on 3 April 2017, without the trial bundle. The complete file was referred on 6 April 2017. The Employment Judge was on leave from 5 April until 18 April 2017.

ISSUES

1. By a claim form presented on 5 May 2016 the Claimant claimed unfair constructive dismissal. He relied upon two matters that he contended were breaches of trust and confidence. The first was the request that he undertake a breath test on 3 December 2015. The second was the monitoring of his timekeeping. The issue was whether these undisputed events amounted to a breach of trust and confidence.

DOCUMENTS & EVIDENCE

2. The Respondent had prepared the agreed bundle. There were written statements from the witnesses. I heard evidence from the Claimant himself Mr Marc Wood. I read the statements of his witnesses Mrs Carol Bradley, the Claimant's sister, and Mr David Sullivan, the Claimant's partner. There were no questions for them from the Respondent so they were not called. I also

heard evidence from Mr Rodney Herkanaidu, the Respondent's service director and from Ms Bridea Pearson, a support worker at the home where the Claimant worked.

FINDINGS OF FACT

3. There was no dispute that the Claimant began working for the Respondent on 3 February 2006 as the registered manager, but subsequently became the director of operations. He was the most senior employee; he reported to Mr Herkanaidu. The Respondent operates two sites, with 20 employees providing residential care to individuals with various mental health conditions.

4. The Claimant's contract referred to his hours as 9am to 5pm Monday to Friday. It was the Claimant's case that he often worked such hours as were necessary, including 7.30am to 8pm. However, I noted that in the annual appraisals for 2013 and 2014, timekeeping was not an issue for either party.

5. The Claimant's contract also incorporated part of the employee handbook which referred to 'the contractual right to carry out drug and alcohol testing' of employees at work, at random and without any implication of suspicion.

6. There were no concerns about the Claimant's performance until 2015, when Mr Herkanaidu noticed that the Claimant appeared to be arriving late. This was discussed and recorded in the annual appraisal on 24 April 2015. I accepted Mr Herkanaidu's evidence that there was no improvement, as set out in his email to the Claimant of 16 November 2015, which followed another meeting to discuss those concerns. In the light of the contemporaneous documentation, I rejected the Claimant's assertion that his timekeeping had not changed.

7. On 11 November 2015 Mr Herkanaidu thought that he could smell alcohol on the Claimant's breath. He therefore asked him to undergo a breath test. The Claimant agreed and it was found that he was not over the legal limit to drive. No action was taken, but he was reminded that consumption on the night before could take him over the limit for the working day.

8. On 26 November 2015 Ms Mitchell, the Claimant's deputy, reported to Mr Herkanaidu that the Claimant had arrived late and had undertaken a self-administered breath test in the staff office and had been over the driving limit. It was the Claimant's case that he had not in fact done the test, but had pretended to do so because he suspected that Ms Mitchell was covertly monitoring him. I accepted the Claimant's evidence that he had not done the test, but I found that that was not relevant. I found that what was relevant was that the Respondent understood from his actions that he had attended work under the influence of alcohol. I noted that it was the Respondent's evidence that Mr Herkanaidu had asked Ms Mitchell to check the time of the Claimant's arrival. I found that this was not unreasonable because, in the light of the concerns about timekeeping and about alcohol consumption, there were

reasonable grounds for the situation to be monitored. I noted that there were no other more senior staff who could have monitored the Claimant.

9. On 3 December 2015 Mr Herkanaidu noted that the Claimant had arrived at 9.10am. This was denied by the Claimant, but again was not relevant. What was relevant was that Mr Herkanaidu asked to speak to the Claimant in his office and upon doing so noticed the smell of alcohol. He asked the Claimant to undergo a breath test and proceeded in the direction of the staff office, to find a witness and pick up a test kit. The Claimant left the building. I found that at the time that Mr Herkanaidu asked the Claimant to accompany him to the staff office, neither party knew whether any member of staff was actually in that office. I found that it had not been made clear at that point whether the test would have been administered in front of others or in Mr Herkanaidu's office. In any event, the Claimant himself has previously taken the tests in the staff office in front of others (or had pretended to do so).

10. Mr Herkanaidu later found that the Claimant had handed in his keys and other property belonging to the Respondent, together with his ID badge, cut up.

11. On 4 December 2015 Mr Herkanaidu sent an email to the Claimant asking whether he had resigned, and if so, the reason. On 6 December 2015 the Claimant sent a letter in response to confirm that he had resigned because he felt that Mr Herkanaidu was 'calling me a liar'. The Claimant agreed in evidence that Mr Herkanaidu had not in fact said those words, it was simply that the Claimant felt that was being suggested. The Claimant referred to other concerns he had about events that had occurred in previous years.

12. Mr Herkanaidu wrote to the Claimant on 9 December 2015 suggesting that he reconsider his decision, and explaining that he would treat the letter as a grievance and appoint an independent HR consultant to investigate. The Claimant declined to change his decision.

13. There was a detailed grievance investigation. The report of 3 May 2016 concluded that there was insufficient evidence to support the complaints.

SUBMISSIONS

14. On behalf of the Respondent, Mr Jagpal referred to the relevant test and the evidence that had been heard.

15. On his behalf, the Claimant referred to a breakdown of trust. He understood that the breath test was to be carried out in front of other staff.

BRIEF STATEMENT OF RELEVANT LAW

16. In a claim of unfair constructive dismissal, an employee resigns in response to a fundamental breach of a term of their contract of employment by the Respondent. The Claimant must show that there had been a fundamental

breach of an express or implied term of that contract. The test is whether or not the conduct of the "guilty" party is sufficiently serious to repudiate the contract of employment. In Western Excavating (ECC) Limited v Sharp [1978] ICR 221, Lord Denning said

"if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intended to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employers conduct. He is constructively dismissed."

17. In the case of Woods v WM Car Services (Peterborough) Limited [1981] IRLR 347, the Employment Appeal Tribunal said that it was clearly established that there was implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

18. That test was confirmed in the case of Malik v BCCI [1997] IRLR 462, by the House of Lords.

19. It is recognised that individual actions taken by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust and confidence, thereby entitling the employee to resign and claim constructive dismissal (see Lewis v Motor World Garages Limited [1985] IRLR 465).

20. Once a fundamental breach has been proved, the next consideration is causation - whether the breach was the cause of the resignation. The employee will be regarded as having accepted the employer's repudiation only if the resignation has been caused by the breach of contract in issue. If there is an underlying or ulterior reason for the resignation, such that he would have left the employment in any event, irrespective of the employer's conduct, then there has not been a constructive dismissal. Where there are mixed motives, the Tribunal must decide whether the breach was an effective cause of the resignation; it does not have to be the effective cause.

21. The third part of the test is whether there was any delay between any breach that the Tribunal has identified, and the resignation. Delay can be fatal to a claim because it may indicate that the breach has been waived and the

contract affirmed. An employee may continue to perform the contract under protest for a period without being taken to have affirmed it, but there comes a point when delay will indicate affirmation.

22. If it has been established that there was a constructive dismissal, the last part of the test is whether it was fair or unfair in all the circumstances.

23. It is useful to note two other decisions. In Morrow v Safeway Stores plc [2002] IRLR 10, it was confirmed that any breach of the implied term of trust and confidence is always to be viewed as fundamental.

24. In Croft v Consignia plc [2002] IRLR 851, the EAT held that "the implied tem of trust and confidence is only breached by acts or omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach is very much left to the assessment of the Tribunal as the 'industrial jury' ".

CONCLUSIONS

25. Having made the findings of fact set out above, and having considered the relevant law, I returned to the matters relied upon by the Claimant.

26. I concluded that the request by the Respondent for a breath test on 3 December 2015 was not a breach of trust and confidence. The contract and handbook provided for such tests. The Claimant had agreed to them in the past. There were reasonable grounds for the request on that day. The place in which the test was to take place had not been finalised when the Claimant refused. He could have asked for privacy; he simply left the building. He had himself undertaken the test, or pretended to do so, in front of staff in the past.

27. The request was not a breach of any express or implied term.

28. With regard to timekeeping, although the Claimant suggested that there had been no change, the documentary evidence was clear that the situation had changed in 2015 and he had been spoken to about timekeeping in his appraisal and again later that year. The Claimant had no information that he was being monitored when he resigned, he simply assumed that was the case. In any event, there were grounds for monitoring his timekeeping and the Respondent was entitled to monitor timekeeping. I accepted that involving the Claimant's deputy was arguably not best practice, but there were no other senior staff and I concluded that in the circumstances this did not amount to a breach of trust, particularly when the Claimant was not aware of it and simply made what turned out to be a correct assumption.

29. I concluded that there were a number of matters in past years that had upset the Claimant, although he had not raised a formal grievance about them, and it must be noted that a few were some years in the past. He referred to some in his resignation letter. However, the matters that he relied upon as breaches

did not amount to a breach of trust and confidence, even in the light of his past concerns.

30. As there was no breach, the claim fell at the first hurdle and was dismissed.

Employment Judge Wallis
24 April 2017