EMPLOYMENT TRIBUNALS

Claimant: **Mr G Kinder**

Respondent: **Taylor Smith Fabrications Ltd**

Heard at: **Leeds** **On:** **26 and 27 June 2017**

Before: **Employment Judge Bright (sitting alone)**

Representation
Claimant: Miss L Blackburn (non-legal representative)
Respondent: Mr C Johnson (Consultant)

WRITTEN REASONS

1. These are the written reasons for the judgment delivered orally to the parties on 27 June 2017 and sent to the parties on 30 June 2017 ("the Judgment"), following a request for written reasons by the respondent dated 4 July 2017.

2. The Judgment was that the Claimant was automatically unfairly dismissed for a health and safety reason (section 100(1)(e) of the Employment Rights Act 1996 ("ERA")) and that the Respondent should pay to the Claimant agreed compensation in the sum of £15,640.00. The Recoupment Regulations did not apply.

The issues

3. It was agreed at the outset of the hearing that the issues to be decided were:

   3.1. Was there an express dismissal?

   3.2. If not, did the respondent fundamentally breach the claimant's contract of employment?

   3.3. If so, did the claimant resign in response to the breach and not affirm the contract?

   3.4. If there was a dismissal, what was the reason or principal reason? In that respect:

3.4.1. Was the claimant in circumstances of danger?

3.4.2. If so, did the claimant reasonably believe the danger to be serious and imminent?

3.4.3. If so, was refusing to do the task an appropriate step to protect himself from the danger, considering his knowledge, and the facilities and advice available to him at the time?

3.4.4. Alternatively, has the respondent shown that there was a breakdown of trust and confidence between the claimant and the respondent?

3.4.5. If so, has the respondent shown that that was 'some other substantial reason' of a kind such as to justify the claimant's dismissal?

4. Did the claimant cause or contribute to his dismissal and, if so, to what extent?

Submissions

5. Mr Johnson for the respondent made detailed oral submissions, which I have considered with care but do not rehearse here in full. In essence it was submitted that:

5.1. The claimant resigned and was not dismissed. Mr Taylor's account of the conversation on 15 December 2016 makes more sense in terms of logical progression of conversation. The claimant's evidence that the conversation was calm was not credible given the characters and previous history of the people involved. The evidence that the claimant made any reference to a health and safety reason for refusing to do the task was sketchy because it was not said and was not an issue.

5.2. The claimant was well aware that there were preventative measures (Kemper extraction arm, helmet and masks) that could be used if his main concern was fumes from welding and he chose not to use them. If the claimant had such concerns he would have raised them in writing. The documentation from the Health and Safety Executive ("HSE") post-dates 15 December 2016 and is of very limited relevance in deciding what was in the claimant's mind on 15 December 2016.

5.3. The correspondence after the incident on 15 December 2016, in particular the respondent's letter at page 38 and the claimant's letter at page 39 are consistent with what the respondent says. The claimant would not have been paid until Christmas if he had been dismissed. Mr Berrett's unchallenged evidence supports the respondent's case.

5.4. If there was a dismissal, it was not for a health and safety related matter, but because of Mr Taylor's loss of trust and confidence in the claimant.

5.5. The claimant contributed to his dismissal by his conduct and, if there had been a fair procedure, it would have been carried out in a fair manner within a further 1 – 2 weeks.

6. Miss Blackburn, for the claimant, also made oral submissions which I have considered with equal care but do not rehearse here in full. In essence it was submitted that:

6.1. The evidence is clear that the claimant refused to do the grinding and welding job on 15 December 2016 because it had made him ill on previous occasions and there was no extraction. For that he was sacked.

6.2. There were circumstances of danger which the claimant reasonably believed to be imminent and he took the appropriate steps to protect himself. Mr Taylor was aware of his concerns, as confirmed by Mr Brook. Mr Taylor's evidence was not credible. He blamed others for his failures, had no knowledge of health and safety requirements, employed Citation Ltd but never looked into their background as a company and employed Mr Brook to look after health and safety without any qualifications. The HSE report confirmed that the respondent failed in all these aspects.

6.3. The respondent has tried to twist the case into a personal attack on the claimant with no evidence. The claimant had no disciplinary proceedings or sanctions and at no point has the claimant's integrity or honestly come into question.

6.4. Mr Taylor's credibility is seriously lacking, as is shown by his evidence to the HSE regarding cabling, which was contradicted by both his witnesses, and his evidence about the number of times the claimant had worked on site.

6.5. The claimant's evidence that the Kemper extraction arm did not work and the helmet is not a form of extraction is supported by the witnesses and the HSE. Had extraction been available, the claimant would have used it and would not have refused to carry out the task. The claimant would never have left the respondent by choice a week before Christmas without another job to go to.

The evidence

7. The claimant gave evidence on his own behalf and called no further witnesses.

8. The respondent called:
8.1. Mr E Benn, fabricator and welder;
8.2. Mr A Brook, card office/plasma/health and safety officer;
8.3. Mr P Taylor, managing director; and
8.4. Mr R Berrett, works manager.

9. The claimant also relied upon a written statement from Mr R Fox, managing director of his new employer, and the respondent relied upon a written statement from Mr M Woods, health and safety consultant, Citation

Ltd. I explained that I would attach such weight as I saw fit to those statements, given that the witnesses were not available at the hearing to have their evidence challenged in cross examination.

10. The parties presented an agreed bundle of documents to which additional pages were added by consent at the outset of the hearing, at pages 200 to 215. References to page numbers in these reasons are references to the pages in the agreed bundle.

Facts

11. I made the following findings of fact. Where there was a conflict of evidence I resolved it on the balance of probabilities in accordance with the following findings.

12. The claimant was employed by the respondent from 24 April 2006 as a welder. It was agreed that he was an experienced welder, with more welding expertise than anyone else at the respondent. The respondent's operations moved to a new factory on 14 November 2016. The parties were agreed that there was an altercation between the claimant and Mr P Taylor on 15 December 2016 which led to the termination of the claimant's employment, although how that occurred is in dispute. The claimant says he was dismissed or constructively dismissed following his refusal to do a task which put his health at risk. The respondent says the claimant resigned by or after refusing to do a perfectly safe task. I am therefore required to make findings of fact on the following key questions:

    12.1. Had the claimant complained about welding fumes previously?
    12.2. Did the claimant refuse to do the task because of concern about welding fumes?
    12.3. Was there equipment available which the claimant could have used to remove or minimize any threat to health while doing the task?
    12.4. What occurred on 15 December 2016 and, in particular, what did Mr P Taylor say to the claimant?

13. As the dispute between the parties is primarily one of fact and the key accounts in evidence contradict each other (one person's word against another) I have had recourse to the various factors or tools which a tribunal can use to find the facts on the balance of probabilities. They are well practiced by courts and tribunals and I have used them here, by taking account of:

    13.1. Whether an account is consistent with contemporaneous material;
    13.2. Whether the account is consistent with witness statements given;
    13.3. Evidence available from others about the witnesses' conduct and demeanour at the time, both before and after any allegations;
    13.4. Evidence available about the way the witnesses behaved on other occasions, perhaps not in dispute;
    13.5. An assessment of witness' reliability on relevant matters, including whether they were generally consistent with other material and good historians or whether they were mistaken or vague in their recollections;
    13.6. What the totality of the chronology or circumstances could tell me about the inherent likelihood of the accounts; and

13.7. The witnesses' responses to questioning, although I was cautious in attaching any weight to witnesses' demeanor under cross examination, owing to the existence of complicating factors such as the stress of giving evidence.

Fumes

14. The first key finding of fact is whether the claimant had complained about fumes before. The claimant says, at paragraph 13 of his witness statement, that he had complained on three previous occasions about sickness and headaches as a result of fumes generated when welding painted or galvanized metals. The claimant says he informed the respondent on each occasion and, on the last occasion, he informed Mr Taylor that he would not do that task again because the lack of extraction meant the fumes were endangering his health.

15. The claimant says the first of these occasions was two years previously, when he was welding painted metal on a cremator base. He says he spoke to Mr Taylor about his concerns and asked him to check the toxic levels of the paint. Mr Taylor denies that any such conversation took place.

16. The claimant says the second occasion was when he was making an incinerator. He says he told Mr Berrett that he would not 'grind' the paint off the metal (by welding) because of his previous health issues and concerns about the lack of extraction. Mr Taylor agrees in his evidence that Mr Berrett brought the claimant's refusal to do the job to his attention and that the job was finished by someone else. However Mr Taylor denies that the claimant expressed health concerns. Mr Berrett, in his evidence, confirms that the claimant would not finish the job, but says the claimant did not say the reason was health concerns.

17. The claimant says that the third occasion was when he was asked to weld some galvanized stools. He says he spoke to Mr Taylor after welding four of the stools, telling him how sick welding painted or galvanized metal made him. He says that, as a result, Mr Taylor decided to scrap the remaining four stools. The claimant says he told Mr Taylor that he would never weld painted or galvanized steel again. Mr Taylor denies that the claimant told him he felt ill or would not do it again. Mr Brook, in his evidence, says that the claimant had raised issues of fumes and zinc with Mr Taylor "on a few occasions" and that he knew the claimant had twice raised with Mr Taylor the fact that he was not happy doing that work. Mr Brook also accepted that he had been told by the claimant that there was a problem with a protective helmet and that he was aware that Mr Taylor and the claimant had had a conversation and the claimant "wasn't happy with it".

18. On the evidence available to me I find that the claimant raised his concerns about fumes from welding galvanized or painted steel without extraction with Mr Taylor on the occasions cited above. Although there was no other evidence to corroborate the claimant's account of the first occasion, the evidence of Mr Berrett and Mr Brook corroborates the claimant's objection to such tasks on the second and third occasions and Mr Brook's evidence is that the claimant told Mr Taylor the reasons for his objection. In addition, although Mr Taylor denies that he knew or remembered the claimant's

reasons for his objection, Mr Taylor accepts that the claimant objected to the tasks on the second and third occasions.

19. Separately, Mr Taylor's evidence was that the claimant was someone who was always complaining. I find it likely that the claimant, in refusing to do the welding tasks, therefore would have raised his concerns about fumes with Mr Taylor. On the balance of probabilities, I find that the accumulation of evidence points to the claimant having had concerns about fumes and having raised these with Mr Taylor on three occasions before 15 December 2016.

Reason for refusal on 15 December 2016

20. The second key finding of fact is whether the claimant refused to do a welding job on 15 December 2016 because of concerns that the fumes would harm his health. It was not disputed that the claimant was given the task of 'grinding off' old paint from a piece of steel on 15 December 2016. Although the exact process of 'grinding off' paint in this context was not explained to me, I understood that it involved removing paint from metal by welding. The claimant says he refused to do that task because of concerns about the effect of fumes on his health.

21. The fact that the claimant wrote to the respondent on 20 December 2016, just five days later, referring to the lack of extraction, suggests that that was his primary concern at the time. The fact that he reported the respondent's practices to the HSE by 23 December 2016 (according to the email at page 55) also confirms his concern about fumes at the time.

22. The HSE's report (page 60) records that, "significant non-compliance was found with respect to health and safety management of respiratory sensitisers" and "significant haze in welding bays and no written COSHH assessments". The improvement notice (page 64) states, "You have failed to make a suitable and sufficient assessment of the risks to the health of your employees exposed to a substance, namely welding fume which is hazardous to health" and (page 68) the first recommendation to ensure compliance with the improvement notice was that the respondent should "devise and implement measures including a) extraction design to minimise emissions, release and spread of welding fume". The description of the risks (page 70) also accords with the symptoms reported by the claimant and the respondent's witnesses explained that there is now an extraction system in place. That evidence all suggests that welding fumes were a problem around the time of the claimant's refusal to weld the painted steel on 15 December 2016.

23. Mr Taylor says the HSE report is not representative of the normal state of affairs because the inspector happened to turn up at a bad time. However, it seems to me an implausible coincidence that the HSE inspector turned up, following a complaint by the claimant about fumes, at the precise time when there were unusually high levels of those fumes. In a separate, but not directly relevant, dispute of fact relating to the monitoring of chromium levels, Mr Taylor blamed the results on employees using the monitors incorrectly. I formed the impression that Mr Taylor was keen to shift any blame for a lack of health and safety compliance elsewhere. It seemed to me that, if the respondent's practices relating to welding fumes were safe, the HSE would

not have issued an improvement notice and there would have been no need to improve the system for extraction of fumes since December 2016.

24. I also noted Mr Brook's evidence that he considered that the respondent, Mr Taylor and himself had been a bit "naïve" about health and safety matters. While I treated Mr Brook's evidence generally with caution, because he clearly experienced some confusion arising from the pressure of cross examination, his conviction in this regard was clear. In addition, he repeated on a number of occasions his assertion that the blame lay with the respondent's advisors, Citation Ltd, for failing to properly advise about the need for extraction of welding fumes. It is not for me to establish where the fault for any health and safety deficiency lies, but it is implicit in the blame laid by Mr Brook on the respondent's advisors that he accepted that the respondent was not operating safe practices. Mr Brook's evidence, in combination with the HSE report, suggests that this was a workplace which had not kept up with some of the rigours of health and safety regulation and that the extraction of fumes at the respondent was not satisfactory and those fumes posed a threat to health.

25. I therefore find, on the balance of probability, from the evidence available, that there were serious issues surrounding the extraction of fumes at the respondent at that time. The claimant had been made poorly by the fumes previously, within one hour of doing the work, and he therefore knew that there was a risk it would happen again. Given the speed with which the claimant could become ill if he welded painted or galvanized steel and the dangers highlighted by the HSE report, I find that the claimant was in circumstances of danger and reasonably believed that the danger was serious and imminent. In the absence of any other plausible reason for the claimant to refuse to carry out the welding task, and in light of his expressions of concern about fumes to the respondent before and after 15 December 2016 and to the HSE, I conclude that the claimant's refusal to do the task was because of his concerns about the possible effects on his health.

<u>Protective equipment</u>

26. The respondent says appropriate protective equipment was available to prevent welding fumes causing the claimant harm, consisting of a Kemper extraction arm ("KEA"), a welding helmet and/or dust/fume masks.

27. The KEA was purchased in 2005 and was a mobile extraction system which could be moved into place to provide extraction as required. However, Mr Taylor accepted that it was kept in storage and Mr Benn confirmed he had never used that equipment or seen it used. I therefore accepted the claimant's evidence that it had only been brought out of storage once but that it had been put back because the filter was full. I find that it was clearly not easily accessible or in use. Separately, if the KEA was available and sufficient to alleviate the fume problem, it seems to me that the HSE report would not have made the findings or recommendations it made. I therefore find, on the balance of probabilities, that the KEA was not available or in use and/or sufficient to alleviate the problem of welding fumes.

28. Mr Taylor's evidence regarding the welding helmet was somewhat unclear. At paragraph 6 of his witness statement he describes it as a helmet

with a respiratory filter, while at paragraph 9 he describes it as a helmet with extraction. It is clear from the HSE evidence and evidence of all the witnesses that a filter is not the same as an extraction system in the context of welding fumes. I accepted the claimant's evidence, corroborated by others, that the helmet blows a curtain of fresh air into the wearer's face, to displace any polluted air/fumes and to provide clean air for the wearer to breathe. It is not an extraction device, in that it does not suck fumes out of the air. It does not, therefore, appear to comply with the HSE recommendation for an extraction system, and there is no mention in the HSE report of the helmet being sufficient to alleviate the problem of fumes. Separately, I accepted the claimant's clear and detailed account of his discovery that the helmet was broken. He explained that the helmet visor was permanently dark, when it should have cleared to enable him to see what he was doing. As a result, to see what he was doing he had to take the helmet off and, consequently, was exposed to breathing the fumes.

29. Mr Taylor referred to protective dust or fume masks, however he accepted that these were more for employees carrying out 'tacking' rather than welding. The claimant was the only fully qualified and experienced welder at the respondent and I therefore preferred his evidence that these were dust masks which were not appropriate for welding.

30. On the balance of probabilities, I therefore find that the three items of equipment identified were not sufficient to remove the risk to health caused by welding fumes. Had they been sufficient, I do not consider that the HSE would have issued the report or improvement notice in the terms it did.

15 December 2016

31. The claimant's account is that he was working as normal on 15 December 2016 when he saw that the next job involved "grinding off" (by welding) layers of old paint. He says he spoke to a colleague, Alistair, who told him Mr Taylor expected him to do it. As Mr Taylor was "walking past the area where we were working", the claimant asked Mr Taylor about the instruction and Mr Taylor told him to do the job. The claimant says he told Mr Taylor that he "would not be grinding the old paint off the steel for reason I had advised him on previous occasions that it had made me ill". He says Mr Taylor told him, "If you are not going to do it you might as well go home". The claimant says Alistair was the only person near enough to hear this conversation. He says he walked to near the toilets and Mr Taylor joined him, telling him, "If you're not doing it, you're sacked". The claimant says they then called each other wankers and the claimant told Mr Taylor, "see you in tribunal". The claimant says he went into the washroom and told another employee (who is not here today) that he had been sacked, before leaving the building.

32. Mr Taylor's account of the conversation differs in some key details. He agrees that the claimant refused to do the job but says the claimant told him, "why don't you get one of the numpties to grind and give me a different job". He says the claimant then told him that he did everything wrong as an employer and "why the hell did we move premises". Mr Taylor accepts that he told the claimant "if you don't like working for me then you're free to leave" and that, if he wasn't going to do his job then he might as well leave. Mr Taylor describes what happened next (at paragraphs 9 and 10 of the

response form):

> *at that point the claimant's aggressive and angry demeanour became even more aggressive and angry and said that the new factory was "shit", he hated it, and "didn't give a fuck about Paul Taylor or his business. He called Paul Taylor a "useless prick" who couldn't run a business even if his life depended on it. Throughout this outburst the claimant was pointing aggressively into Paul Taylor's face. Paul Taylor felt threatened at this point. Paul Taylor then raised his hand to try to stop the claimant pointing and talking and said "Gary, stop talking like that, you're going to get yourself sacked". The claimant then said as loud as he could "sacked, sacked, thank fuck for that". The claimant then said "I'll see you in Tribunal". The claimant continued to threaten Paul Taylor. The claimant was very red faced, extremely angry and was snarling, showing his teeth. Paul Taylor believed that the claimant was ready to attack him. He then told the claimant to leave as he feared for his own safety and that of others. The claimant then walked to the toilets to clean off but continued to shout and swear at Paul Taylor. The claimant then returned to his bench, collected a few belongings and left.*

33. According to Mr Taylor's account of the conversation the claimant switched subject matter a number of times, firstly talking about 'numpties' and asking for a different job and then referring to the recent factory move, without logical progression or any clear explanation as to why he would not do the task or what provoked the outburst. I find that, given the reason for the claimant's refusal to carry out the task, the claimant's account that he told Mr Taylor it was because the fumes made him ill is more plausible.

34. Mr Taylor accepts that he twice referred to the claimant leaving his job, firstly when he told the claimant "if you don't like working for me then you're free to leave" and secondly, telling him that if he wasn't going to do the job then he might as well leave. By his own account therefore, Mr Taylor made a reference to the termination of the claimant's employment if he wouldn't carry out the task. In cross examination he accepted that the word 'sacked' was used, albeit not as in "you're sacked".

35. Separately, the claimant's account of the subsequent conversation is also more logical than Mr Taylor's account. By Mr Taylor's account, after a frighteningly aggressive outburst arising from being asked to carry out the task, the claimant then "walked to the toilets to clean off", and returned to his bench to collect a few things. I find the claimant's account in cross examination that, "He told me I was a wanker and I was sacked. I told him he was the wanker and I'd see him in Tribunal", a more plausible chronology. Mr Benn's evidence corroborates the claimant's account of the conversation moving to near the toilets.

36. Mr Benn describes how the claimant became aggressive in the conversation by the toilets. Although the claimant denies becoming unduly aggressive, Mr Benn's account accords with the claimant's account in cross examination that, when told he was sacked, he called Mr Taylor a 'wanker'. I therefore find that the claimant became aggressive after Mr Taylor's reference to 'sacking' him by the toilets.

37. Although I find that the claimant was aggressive to Mr Taylor in the conversation by the toilets, I do not accept that there was the degree of aggression reported by Mr Taylor. For such an allegedly aggressive outburst in the workplace, I find it surprising that there were not more witnesses to what was said. While a subsequent letter from Mr Taylor refers to "very abusive and threatening behavior you also displayed in front of several other co workers", in cross examination he initially said that not many co-workers witnessed the conversation and later that those who did could not have heard what was said. The employee, Alastair, who allegedly witnessed the early part of the conversation, was not available and only Mr Benn was called to give evidence about the conversation although he was wearing ear defenders and was unable to hear.

38. Mr Taylor's evidence painted the claimant as someone who was aggressive, abusive, always complaining, racist and "intolerable" in the last two years. However, the claimant had 11 years of service, with no disciplinary record and Mr Benn called him "friendly and amenable", which is supported by his written reference from his new employer. There was no evidence to support the allegation that the claimant made racist comments and, although reprehensible, racist comments are not relevant to the facts to be decided. Mr Woods, the only one of the respondent's witnesses who states that the claimant was abusive, disrespectful or generally aggressive, was not present to give evidence. The claimant readily accepted that he had been involved in a "slanging match" on a previous occasion, used foul and abusive language and been sent home, but no formal disciplinary action resulted and, having accepted that allegation so readily I find his denial that he was generally aggressive and abusive to be credible. On balance, I do not find that Mr Taylor's account of the claimant discredited the claimant's evidence that Mr Taylor told him on 15 December 2016, "if you're not doing it, you're sacked".

39. The fact that the claimant called ACAS the following Monday and sent a text message to Mr Taylor asking if he could come and collect his tools, confirms that the claimant believed at the time that he had been sacked.

40. The letter to the claimant from Mr Taylor dated 19 December 2016 (page 38) does not, in my judgment, undermine the claimant's version of events. The letter contradicts itself and Mr Taylor's oral evidence and is muddled as to what had happened to the claimant. It says firstly that, "I write to confirm acceptance of your verbal resignation", but Mr Taylor did not dispute that the claimant made no mention of resigning. In cross examination, Mr Taylor said that he took the fact that the claimant was not coming back as his resignation. However, the letter refers to the claimant's refusal to carry out the tasks and duties in line with his contract being deemed a resignation, not the act of leaving and going home. The letter goes on to record that, "it is impossible to employ someone who is not prepared to do what their signed contract requires of them". This appears to imply that the respondent would not continue to employ the claimant if he did not do what was expected, implying that he has been or would be dismissed. The letter notes finally that the claimant's behavior "has made it very clear that you no long wish to be part of this business".

41. On the balance of probabilities, taking account of all the evidence, I

conclude that Mr Taylor told the claimant, "if you're not doing it, you're sacked".

The Law

42. The burden of proof is on the employee to show there has been a dismissal and the standard of proof is the balance of probabilities. Once a dismissal is established, either express or constructive, it is for the respondent to show that the reason for dismissal was a potentially fair one within section 98(1) or (2) ERA. The employee can advance an alternative 'automatically' unfair reason for dismissal, including for health and safety reasons. The employee then has to show, without having to prove, that there is an issue which is capable of establishing the competing automatically unfair reason he is advancing. If the employee can do that, the burden reverts to the employer to prove which one of the competing reasons was the principal reason for dismissal.

43. Section 100(1) ERA provides that where an employer dismisses an employee for a prohibited health and safety reason the dismissal is automatically unfair. Section 100(1)(e) ERA provides that an employee is dismissed for a health and safety reason if, in circumstances of danger, he took or proposed to take, appropriate steps to protect himself or other persons from danger which he reasonably believed to be serious and imminent. What amounts to serious and imminent danger is a question of fact. There is no need for the danger to be life threatening. An employee is however expected to immediately inform the employer of the danger.

44. Whether an employee has taken, or proposed to take, appropriate steps for these purposes is to be judged by reference to all the circumstances, including his knowledge and the facilities and advice available to him at the time (section 100(2) ERA).

45. If the claim is successful, the Tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the claimant and its contribution to his dismissal (section 123(6) ERA) and any basic award may also be reduced when it is just and equitable to do so on the ground of any kind of conduct on the employee's part that occurred prior to the dismissal (section 122(2) ERA).

Determination of issues

46. I find that the claimant has shown, on the balance of probabilities, that he was expressly dismissed by Mr Taylor on 15 December 2016 by the words "if you're not doing it, you're sacked". While those words are on their face conditional on the claimant not doing the task required, as the claimant had already refused to do the task, I find the words constituted a clear express dismissal in the circumstances. While it might have been different if the words were said in the heat of the moment and Mr Taylor had subsequently made clear that he was not intending to dismiss the claimant, in this case Mr Taylor's behavior towards the claimant in the hours and days following that exchange was consistent with there having been an express dismissal. The context and circumstances of the words spoken by Mr Taylor therefore made it clear that he intended by those words to dismiss the claimant.

47. What was the reason or principal reason for the dismissal? The respondent says it was the loss of trust and confidence between Mr Taylor and the claimant, which was 'some other substantial reason' such as to justify the claimant's dismissal in the circumstances. The burden of proof is on the respondent to show that reason. The claimant advances an alternative reason for his dismissal, being health and safety.

48. A dismissal falls within section 100(1)(e) ERA if it is because, in circumstances of danger, the employee took or proposed to take, appropriate steps to protect him or other persons from danger which he reasonably believed to be serious and imminent. In my findings of fact above I conclude that the claimant believed himself to be in circumstances of danger, in that he knew that the fumes from welding painted or galvanized steel made him feel unwell and could be harmful to his health. The HSE report substantiates the danger of welding fumes and failing to have suitable extractors and I therefore agree that the claimant was in circumstances of danger which he reasonably believed to be serious and imminent.

49. Section 100(1)(e) ERA also requires me to consider whether the claimant's refusal to do the welding was an appropriate step to protect himself, i.e. was the reason for his refusal to do the task to protect himself and was that refusal proportionate? I find above that his refusal to weld painted or galvanized steel was to protect himself from the fumes. Section 100(2) ERA requires me to judge whether the claimant's action was appropriate by reference to all the circumstances, including the claimant's knowledge and the facilities and advice available to him at the time. Relevant circumstances include, in my view:

    49.1. The fact that he had raised his concerns about fumes and his ill-health with Mr Taylor, his manager, and Mr Brook (responsible for health and safety) previously but nothing had been done.
    49.2. The lack of appropriate protective equipment. Although there was the KEA and helmet, they were not in regular use, he had failed to use them successfully in the past and they were not adequate to protect him from the welding fumes.
    49.3. The fact that he was being required to weld the item immediately and therefore had no time to properly discuss his objections.

50. I find that refusing to carry out the task was the only step the claimant could take in the circumstances to protect himself from the immediate danger from welding fumes. It was therefore proportionate and I conclude it was an appropriate step.

51. Was that refusal the reason for his dismissal? The claimant has shown that the timing of the dismissal was immediately after his refusal to weld the item and that Mr Taylor referred specifically to his refusal in dismissing him. The claimant's evidence is therefore capable of establishing the competing automatically unfair reason that he is advancing. The burden therefore shifts to the respondent to show that there was some other substantial reason for the claimant's dismissal, namely a loss of trust and confidence between Mr Taylor and the claimant. I find as a fact above that Mr Taylor dismissed the claimant because he refused to do the welding task. While there may be a

loss of trust and confidence arising from an employee's refusal to carry out a management instruction, where that instruction involves doing something which may cause the employee harm and is not therefore reasonable, the employee's refusal does not, in my view, constitute a loss of trust and confidence. The respondent has failed to show that there was a loss of trust and confidence or that that was the reason for the claimant's dismissal. Rather, I find that the dismissal was directly caused by the claimant taking an appropriate step to protect himself from a serious and imminent danger. I find that the claimant was automatically unfairly dismissed for a health and safety reason under section 100(1)(e) ERA.

52. The final issue, relevant to remedy only, is whether the claimant contributed to or caused his dismissal and, if so, to what extent. For a claimant to contribute to a dismissal he must have behaved in a manner which was culpable or blameworthy and that behavior must have contributed to or caused the dismissal. In this case, the claimant was aggressive in the conversation by the toilets and readily accepted he called Mr Taylor a "wanker". That behavior can be characterized as culpable and blameworthy, but I find that it did not contribute towards the claimant's dismissal. The claimant only became abusive in the conversation at the toilets and, in terms of chronology, after Mr Taylor's reference to 'sacking' him at the bench and the express dismissal by the toilets. I therefore find that the claimant was dismissed before he became aggressive, and his behavior did not contribute to his dismissal. His refusal to do the welding task for health and safety reasons was not culpable or blameworthy and is not therefore contributory conduct.

Remedy

53. Following delivery of the judgment on liability, the claimant confirmed he was seeking compensation and the parties agreed the figure of £15,640.00 which I recorded in the judgment.

Employment Judge Bright

Date: 27 July 2017