EMPLOYMENT TRIBUNALS (SCOTLAND)

5 Case No: 4100458/2017 Held in Inverness on 19 and 20 July 2017

Employment Judge: Iain F. Atack

Mr R Taylor — Claimant
10 In Person

G & A Barnie Group Limited — Respondent
Represented by:
15 Mr E Stafford
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgement of the employment tribunal is that the claimant was not unfairly constructively dismissed in terms of section 98 of the Employment Rights Act
25 1996 and that his claim is dismissed.

Reasons

Introduction

30 2. The claimant's claim was one of constructive unfair dismissal. He alleged that the respondent had committed a fundamental breach of the implied term of trust and confidence. The respondent denied that the claimant had been constructively unfairly dismissed claiming that he had simply resigned.

35 3. The parties lodged a joint bundle of documents consisting of 36 documents extending to 154 pages to which was added, on the first day of the hearing, a psychiatric report which formed document number 37, page 155-165 of the bundle. Reference to the bundle will be by reference to the page number.

4. The claimant gave evidence on his own behalf and led evidence from Samantha Johnston who had been his girlfriend at the relevant time. For the respondent the tribunal heard evidence from Alexander Barnie, their managing director; from Michelle M Barnie one of their employees, and from Mrs. Sheila B Barnie one of their directors. The tribunal considered that all the witnesses provided their evidence in an honest fashion.

5. From the evidence which it heard and the productions to which it was referred, the tribunal found the following material facts to be admitted or proved.

Material Facts

6. The respondent is a mechanical and electrical engineering company which operates throughout Scotland. They employ approximately 350 people.

7. The claimant was employed by the respondent from 11th February 2013 until 9th November 2016 when his letter of resignation was accepted by the respondent. The claimant worked for the respondent on a construction site in Shetland from May 2016.

8. Whilst working in Shetland the claimant resided in accommodation provided for him by the respondent.

9. On 7th July 2016 the claimant became involved in an issue involving an apprentice electrician. The apprentice informed the claimant that he had been threatened with a verbal warning giving the reason that he had been caught making brackets whilst sitting down in a container. The claimant felt that the threat of a written warning was unfair and spoke to his supervisor about the matter.

10. The supervisor, Stephen Knowles, informed the claimant that it was not his business and told him to leave the supervisor's office. This information was conveyed in robust language.

11. I accepted Mr Barnie's evidence that the apprentice had been disciplined for possessing a mobile phone on site, which is strictly prohibited by the respondent's rules, rather than for the reason given by the apprentice to the claimant. The claimant had not been present when the apprentice had been given the threat of a warning and in the discussion with Mr Knowles the actual issue which had given rise to the threat of warning had not been discussed. Mr Barnie had been informed by the supervisor of the real reason for the apprentice being given a warning and as a result at a tool box talk on 18th July 2016 the issue of mobile phones not being permitted on site was specifically discussed, page 82. I preferred Mr Barnie's evidence on this point as being likely on balance to be more accurate.

12. On the same day the claimant had a further altercation with his supervisor regarding another apprentice. The claimant had asked that other apprentice, from a different work squad, to assist him in a task without obtaining permission from the supervisor. When the supervisor learnt of this he removed the apprentice from the claimant.

13. The claimant was aware that before requesting that apprentice to assist him he should have sought permission from the supervisor. It is only the site supervisor and his deputy who had authority to remove labour from one squad to another.

14. The claimant's reason for not speaking to his supervisor and obtaining permission was that he was not speaking to the supervisor as a result of the earlier incident involving his own apprentice.

15. The site manager, Anton Lennon and his deputy Stephen Knowles, who were the claimant's supervisors, were concerned that the claimant's actions were undermining their positions and requested that Mr Barnie attend on-site in Shetland to resolve the matter.

16. Mr Barnie travelled to Shetland and met the claimant on 9th July 2016. He discussed with the claimant the alleged undermining of management position and

the procedures which had to be followed. He explained it was not an option open to the claimant to move labour and only site managers could do that.

17. The claimant's request to change site was rejected by Mr Barnie as there was a job to be done in Shetland.

18. Mr Barnie convened a meeting of the claimant, Mr Lennon and Mr Knowles on Sunday 10th July. Following that meeting Mr Barnie understood matters to be resolved.

19. Following that meeting there were no further problems involving the claimant and the site managers.

20. Accommodation was provided for the claimant and other employees by the respondent in Shetland.

21. On the night of 24/25th September 2016 the claimant was assaulted in his accommodation by another employee. As a result of the assault the claimant was taken to hospital for treatment for his injuries.

22. Whilst in hospital claimant was visited by Anton Lennon and by another employee Craig Carmichael. They brought some personal effects from his accommodation to the claimant.

23. The claimant was discharged from hospital on Monday 27th September. The respondent arranged a flight from Shetland to Aberdeen for him and for Michelle Barnie to drive him from Aberdeen to his home in Inverness.

24. After the morning flight, there is only one other flight from Shetland to Inverness. The respondent did not know on which flight the claimant's attacker would be travelling and the claimant had indicated he did not want to be on the same flight. For this reason it was decided to fly him to Aberdeen and then return to Inverness by car.

25. The claimant produced fit notes covering the periods of 25th September to 28th October 2016, from 31st October to 11th November and from 18th November until 6thJanuary 2017, pages 89,91 and 98. He was unable to work during those periods as a result of the injuries sustained in the assault. It was indicated initially that he might require a phased return to work depending on progress.

26. On 30th September Mr Barnie contacted the claimant to ascertain how he was and if he was fit for work. At that stage the claimant had not submitted the first fit note which was dated 3rd October 2016.

27. Mr Barnie required to know if the claimant was to returning to work so that flights and accommodation could be arranged.

28. In terms of the claimant's contract of employment the duty was incumbent upon him to notify the respondent of absence and to provide an appropriate medical certificate, page 54.

29. The respondent does not operate a sick pay scheme other than paying statutory sick pay. The respondent paid the claimant during his period of absence for the basic 37½ hours of work. This was a discretionary payment.

30. On 27th October the respondent wrote to the claimant seeking his consent to obtaining a written report from his own GP about his health. It was explained in the letter that the purpose was to assess his fitness for and likely return to work and the range of reasonable adjustments they might need to put in place for a phased return to work.

31. The claimant did not understand why the letter had been sent to him as there had been no previous enquiry from the respondent. He felt the letter was aggressive and expressed no concern for his wellbeing.

32. He was upset by the letter and felt he had no longer any trust and confidence in the respondent. He felt he had no option but to resign his employment.

33. On 31st October the claimant sent an email to Mr Barnie giving notice of termination of employment, page 97. He also asked how much notice was required.

34. Mr Barnie responded on 8th November by email advising no notice period was required and the last day of work would be regarded as being 9th November 2016.

35. The claimant had a net weekly basic pay with the respondent of £625. The respondent made a payment of £7.11 in respect of pension contributions.

36. The claimant did not seek employment until about March or April 2017. Prior to that he worked with his father but did not receive any remuneration. He attended a training course in Denmark with a company called Vrogum Svarre and obtained a certificate for completing that course, page 153.

37. The claimant has now obtained new employment with A J Morrison Ltd at a basic weekly gross rate of £580 for a 40 hour week. This produces a net pay of £529.24.

<u>Submissions</u>

<u>Claimant</u>

38. Mr Taylor accepted that he had to show that he had been treated in such a way that he had no alternative but to resign.

39. He referred to the incidents he had raised regarding the apprentices and the refusal by Mr Barnie to allow him to leave Shetland after those incidents in July. He was concerned that there had been no contact from the respondent's health and safety Department or HR Department to discuss his injuries following the assault, until he received the letter of 27th October.

40. It was his position that there was an obligation on the employer to offer help and assistance and that had not happened. There was a breach of the duty of care and attention.

5 41. In his ET 1 Mr Taylor stated that after receiving the letter of 27th October he decided he did not want to add to the stress he was already under by returning to work for a company in which he had lost trust and confidence and decided to resign.

10 42. It was his position that the way in which the respondent had treated him left him with no alternative but to resign.

Respondent

15 43. For the respondent Mr Stafford set out the legal tests contained in **Western Excavating (ECC) v Sharp [1978] IRLR 27** and submitted that it was for the claimant to show there had been a fundamental breach of contract namely that the employer had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of
20 confidence and trust between them.

44. He also referred to the cases of **Lewis v Motorworld [1985] IRLR 465**; **L B Waltham Forest** v **Omilaju [2005] IRLR 35; GAB Robins (UK) v Triggs [2007] IRLR 857 and Abbycars (West Horndon) Ltd v Ford**
25 **UKEAT/0472/07/DA**.

45. It was his position that the respondent had not breached the duty of trust and confidence at all in respect of any of the complaints made by the claimant. He did not accept that the claimant being counselled as to his dealings with site
30 management could be said to amount to the respondent acting in such a way as, without reasonable and proper cause, conducting itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the claimant and the respondent. The activities of the site management and Mr Barnie in addressing the issues could not amount to a repudiation of the

contract. In any event the claimant had not resigned until some three months after those events had taken place. That submitted Mr Stafford was too late.

46. Mr Stafford also submitted that the assault on the claimant was committed outside working hours and did not trigger the usual accident/incident process under which a health and safety adviser would have been asked to investigate. There was no repudiatory breach of contract in the way in which the respondent reacted after the assault.

47. It was necessary to consider whether the "last straw" doctrine applied. In Mr Stafford's opinion following the tests set out in **Omilaju**, it did not. It appeared that the key reason for the claimant resigning was the letter of 27th October. The letter of 27th October was entirely innocuous and not a breach of contract. An innocuous act cannot be a final straw even if the employee genuinely but mistakenly interprets the employer's act as destructive of the necessary trust.

48. Mr Stafford submitted there was no constructive dismissal and the claim should be dismissed.

Decision

49. In this case the claimant claims he has been constructively dismissed as described in section 95 (1) (c) of the Employment Rights Act 1996. This states that there is a dismissal where the employee terminates the contract in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

50. In the case of **Western Excavating (ECC) v Sharp** (above) it was made clear that the employer's conduct must be a repudiatory breach of contract: "**A significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the terms of the contract"**. It is clear that it is not sufficient that the employer's conduct is merely unreasonable: it must amount to a material breach of contract.

51. The employee must then satisfy the tribunal that it was this breach that led to the decision to resign and not other factors.

52. Finally, if there is a delay between the conduct and the resignation, the employee may be deemed to have affirmed the contract and lost the right to claim constructive dismissal.

53. The term of the contract which the claimant relies on in this case is that commonly called "trust and confidence". This was defined in **Malik v Bank of Credit and Commerce International SA (In Liquidation) [1997] IRLR 462** where Lord Steyn said 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"**.

54. In this case the claimant refers to various incidents which he alleges amount to a breakdown in trust and confidence. These can be summarised as follows: –
   - The claimant's purported treatment after the matter involving an apprentice being disciplined;
   - The claimant's purported treatment after his involvement where site management removed an apprentice without permission from the claimant;
   - The claimant being assaulted;
   - The respondent's alleged failure to engage with the claimant following the assault;
   - Flying the claimant to Aberdeen instead of Inverness and
   - The respondent writing to the claimant to obtain a medical report.

55. It was clear from the evidence that the claimant was not aware of the all circumstances leading to disciplinary action being taken or threatened against his apprentice. In any event whatever the reason it was a matter for management to the deal with any disciplinary action which was required and not the claimant. The fact that he may have been told somewhat robustly that the matter was none of his business cannot of itself amount to a breach of contract. The site managers

were acting in accordance with the respondent's procedures in dealing with the issue of an employee having a mobile phone on site, which was against their rules.

5 56. It was not for the claimant to take another apprentice from a different squad to assist him. It was only the site managers who could move labour around the site. The claimant did not seek permission for his actions in removing the apprentice from the squad to which he had been assigned. The claimant was aware he should have sought permission but chose not to do was because he was not at
10 that stage speaking to his supervisor because of the earlier incident with the claimant's own apprentice.

57. The claimant may well be justified in thinking that it was unreasonable for the supervisor to take away the apprentice but that is not to the point. It was perfectly
15 within the supervisor's authority to act in that way and to remove the apprentice. It is for management to decide who works where to ensure that the work is completed and carried out in an orderly manner.

58. I did not consider that either of these matters either singly or cumulatively could
20 be regarded as a fundamental breach of contract by the respondent. However, even if I am wrong, I consider that the claimant has waited too long in resigning in response to these alleged breaches of contract. He carried on working on the site after the intervention by Mr Barnie and gave no further sign to the respondent that he was dissatisfied with the treatment received or the outcome of his discussions
25 with Mr Barnie. In my opinion, if there was a material breach of contract in respect of these two matters, the claimant has by his subsequent actions affirmed the contract.

59. The assault upon the claimant had a devastating effect upon him as was clear
30 from the psychiatric report produced in the bundle. His complaint in this case however was the respondent's failure to engage with him after the assault. He was upset that Mr Barnie had not contacted him until 30th September. His impression was that Mr Barnie was not particularly concerned about his health but more concerned to know whether he was returning to work on the following

Monday. Mr Barnie's position was that he needed to know if the claimant was returning to work on the Monday because he had heard nothing from the claimant and travel arrangements had be made depending upon the claimant's ability to return to work or not.

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60. At this stage the respondent had not received the first fit note and had no official information about the claimant's condition and ability to work. In terms of the claimant's contract of employment the duty was upon him to inform the respondent if he was unable to work.

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61. It may well be that another employer might have handled a situation such as this in a very different way and might have contacted the claimant directly at an early stage to enquire about his injuries and offer any help that might be required. However I do not consider there is any legal obligation upon them to do so and 15 have not been referred to any authority to that effect. The claimant provided the respondent with fit notes which indicated he was not fit to work. As a result the respondent was aware of the position. I do not consider that the failure to contact the claimant regarding as well is could be regarded as a breach of the term of trust and confidence as set out by Lord Steyn in **Malik**.

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62. The act of flying the claimant to Aberdeen rather than Inverness was explained by the fact that neither the respondent nor the claimant wished him to be on the same flight as the person who had assaulted him. The respondent was not responsible for arranging that employee's return to the mainland and that did not 25 know what flight he would be on. There is only one flight each day to Inverness after the morning flight and in any event by the time the claimant was released from hospital it was, in the respondent's opinion too late to be able to catch the afternoon flight. For these reasons they chose to fly him to Aberdeen and have Michelle Barnie to drive him to Inverness. Those actions could not be seen as 30 being a breach contract or as a breach of the implied duty of trust and confidence.

63. The act that appeared to be the trigger for the claimant deciding to resign was the respondent sending a letter to him on 27th October 2016 requesting access to his

GP to obtain a medical report. The purpose of the letter is clearly set out in it as being to assess his *"fitness for and likely return to work, the impact of your absence from or resumption of duties on our workflow and resources, the effect of your condition on your day-to-day activities, the range of reasonable adjustments we may need to make any short-term measures we can put in place for a phased return to work".*

64. The claimant took exception to this letter as there had been no prior communication from the respondent and felt it was aggressive and showed no genuine concern for his well being. He felt he had no option but to resign and sent the email of 31st October to Mr Barnie. His position was that he felt the respondent had failed in their duty of care to him and put him in a position where he had no alternative but to cease his employment with them.

65. Viewed objectively the letter is a relatively standard style of letter sent by an employer to an employee absent due to ill-health, seeking information about future health and ability to return. It might well have been preferable if the respondent had sent along with that formal letter an informal one setting out the need for formality and what they were trying to do. That might have allayed the claimant's concerns. However there is no obligation on them to do so and the act of sending the letter cannot be construed as a material breach of contract.

66. The letter was regarded by the claimant as the final straw. Mr Stafford pointed out that the final straw act need not be of the same quality as the previous acts relied upon as cumulatively amounting to a breach of the implied term of trust and confidence but it must when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial. I agreed with that submission and that sending of the letter was not a breach of contract.

67. Mr Stafford also submitted that where an employee, following a series of acts which he alleges amounts to breach of contract, but does not accept the breach and continues in the employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous. In this case I accepted that the sending of the letter, that is to say the final straw, was an

entirely innocuous act on the part of the respondent. It therefore cannot be in the circumstances of this case the final straw.

68. In my opinion the claimant has not in this case been constructively dismissed in 5 terms of the Employment Rights Act 1996 and his claim of unfair constructive dismissal is dismissed.

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15 Employment Judge: Iain F Atack
Date of Judgment: 01 August 2017
Entered in Register: 03 August 2017
and Copied to Parties