EMPLOYMENT TRIBUNALS

Claimant: Mr M Johnson

Respondent: Able Joinery Limited

HELD AT: Manchester **ON:** 15 December 2017 & 19 December 2017 (in chambers)

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: In person
Respondent: Mrs M Peckham, Consultant

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint in respect of holiday pay is dismissed on withdrawal by the claimant.

2. By consent, the respondent made an unlawful deduction from wages and is ordered to pay the claimant the sum of £108.75 being the gross sum unlawfully deducted.

3. The complaint of constructive unfair dismissal is not well founded.

REASONS

Claims and issues

1. The claimant claimed constructive unfair dismissal and brought complaints of unlawful deductions from wages in respect of holiday pay and failure to refund payments made into the "cock up fund" on termination of employment. During the course of the hearing, the claimant withdrew the complaint of holiday pay, being satisfied that he had, in fact, received his entitlement to accrued but untaken holiday.

Also during the course of the hearing, the respondent agreed to pay to the claimant the sum of £108.75 in respect of the amounts paid into the "cock up" fund and not repaid to the claimant. The parties agreed that judgment could be given by consent that there had been an unlawful deduction from wages and that the amount of £108.75 should be repaid to the claimant.

2. The only claim remaining to be determined by the tribunal was, therefore, the complaint of constructive unfair dismissal.

3. The issues in relation to the complaint of constructive unfair dismissal were agreed to be as follows:

(1) Did the claimant resign because of an act or omission (or series of acts or omissions) by the respondent?

(2) If so, did the respondent's conduct amount to a fundamental breach of contract? The claimant was uncertain which contractual term he was relying on. It was agreed that I would consider whether there was a breach of any express contractual term and whether there was any breach of the implied duty of mutual trust and confidence. In relation to the implied duty of mutual trust and confidence, I would consider whether the respondent, without reasonable or proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties.

(3) Did the claimant affirm any breach by conduct or delay?

4. In the response, the respondent had pleaded, in the alternative, that, if there was a constructive dismissal, this was a fair dismissal for some other substantial reason. Mrs Peckham informed me that the respondent did not pursue this alternative argument.

5. If the complaint of constructive unfair dismissal was successful then the respondent might argue that compensation should be reduced on the basis that the claimant would have been fairly dismissed within a certain period and/or that he had contributed to his dismissal by his conduct.

The Facts

6. The respondent business installs UPVC windows and wooden frames and other types of maintenance and glazing. The business is jointly owned by Mr and Mrs Reed who are both directors of the company. Mrs Kim Reed mainly deals with the office side of the business whilst her husband deals with the operational side.

7. The claimant began employment for the respondent on 6 November 2014. His job title on the contract of employment issued in November 2014 is given as joiner/glazier assistant.

8. In February 2015, the claimant was given a daily bonus of £15, £2.50 of which was allocated to a breakages scheme and was repayable at the end of the year if there were no breakages (referred to in some documents as the "cock up fund"). The

hourly rate remained unchanged, at £7 per hour. The additional pay was shown as part of his basic pay on his payslips.

9. In September 2016, the claimant was given a further pay rise. His basic rate of pay was increased to £9 per hour (£360 per week). Mrs Reed says she told the claimant that she would pay him an additional £12 a day to manage his own workload on an ad hoc basis when the claimant was working on his own. The claimant disputes that this was an "ad hoc" payment. The letter of 15 September 2016 does not refer separately to a payment of £12 per day and it does not appear as a separate item in the payslips. It appears likely that this formed part of the increase in basic pay.

10. In addition to the increase in basic pay, Mrs Reed informed the claimant that he would be paid an extra £45 a week bonus. In a letter dated 15 September 2016, Mrs Reed informed the claimant that this would be payable for a full working week "based on no remedials to go back to, timekeeping, communication (answering mobile/responding to texts etc). This bonus is not paid when off sick or on holiday". It is common ground that Mrs Reed did not tell the claimant, at this time, that his job title was changing. However, the claimant made an assumption that he was being promoted to foreman since he was managing his own workload and he was given the use of a company van. The claimant accepted that the van was only provided for use on company business. However, when he started managing his own work, he was able to take the van home at night so that he could come to work in it in the morning. Previously, the claimant had only used a company van during the working day when required, for example, to collect supplies. He would then hand the keys back to the employee managing the job who would use it to travel to and from work.

11. No employee had a contractual right to use of a company van. However, employees were allowed to take vans home at night so they could go straight to a job in the morning. Where they were working in teams of two, the one who was in charge of the particular job would take the van home and collect the other worker. The company has a number of different vans, suitable for different tasks. The vans are switched around between staff, depending on what job they are on.

12. The target related bonus was introduced in May 2014 for those described as foremen in an undated explanatory note to employees. The claimant accepted that the bonus was later paid to all employees. He gave evidence that there was only one employee who was not a foreman, Jordan, and that Jordan told him that he was being paid the bonus.

13. I find there was no formal change to the claimant's job title in September 2016. However, by giving the claimant additional pay for managing his own work and allowing the claimant the use of a company van to travel to and from work, I find that the respondent was recognising that the claimant was no longer an assistant joiner/glazier but could work in his own right as a joiner/glazier. This was formally recognised some months later by Mrs Reed issuing a new contract dated 18 April 2017 describing the claimant as "joiner/glazier" rather than "joiner/glazier assistant" as on the initial contract.

14. It was a small workforce. There were around five employees who worked on site at the time the claimant started. Two left shortly before the claimant's pay was

increased although one subsequently returned. I accept Mrs Reed's evidence that employees are paid different basic pay rates depending on the respondent's view of their level of skills and capability in running a job and supervising others. I accept Mrs Reed's evidence that none of the employees have "foreman" in their formal job title. The main title is "joiner/glazier". Mrs Reed gave evidence that some of the employees choose to call themselves "foreman". However, from the undated memo about the bonus and "cock up fund", which refers to the bonus having been introduced for "foremen", it is apparent that the respondent also sometimes used this term. It appears that the claimant understood that all but one employee working "on the tools" were foremen. From this, it appears that the term "foreman", as used in the respondent's business, was not used in the more usual sense of one working permanently in a supervisory capacity. Rather, it seems to be a recognition of skills and experience and that the employee will manage particular jobs themselves and may, at times, supervise others.

15. Some of the other employees had a higher basic rate of pay than the claimant, reflecting what the respondent regarded as their greater skills and experience.

16. I accept Mrs Reed's evidence that there is no formal rigid hierarchy amongst the small workforce. A particular employee will be in charge of a particular job, depending on the skills and experience needed for that job and workload. If employees finish on the job to which they have been allocated, they will go and help others in any capacity needed to finish another job e.g. sweeping floors.

17. I accept that the claimant genuinely regarded himself as a "foreman" following the pay increase and being allowed to use the van from September 2016, although the respondent did not use that as a formal title. The claimant was clearly pleased at what he perceived as his career advancement.

18. In about late September 2016 there was a dispute between the claimant and another employee, AG. The claimant went to see Mr Reed about the dispute. The claimant says that he asked Mr Reed where he stood in relation to AG and Mr Reed told the claimant that he was a junior foreman whereas AG was more senior to him and was a foreman. Mr Reed disputes that he said that. I find that, whatever exact words were used, Mr Reed was making it clear to the claimant that AG was more senior to him. Since the claimant had regarded himself as a "foreman", I accept that he understood himself now to be a "junior foreman", although this was not a formal title used by the respondent. I consider it possible that Mr Reed may have used the term in response to the claimant asking if he was a foreman, and in comparison to AG, given the common usage of the term "foreman" in the respondent's organisation, although this was not anyone's formal title.

19. On 13 March 2017, the claimant began a period of absence from work due to back pain. The claimant says this was due to an accident at work on the previous Friday. The respondent says they were not aware that the injury was due to a work related accident. It is not necessary for me to make a finding as to the reason for the back injury and I do not do so.

20. Mr Reed offered details of physiotherapists and, in a text on 17 March 2017, offered that the company would pay part, or all, of the cost of physiotherapy.

21. At some point during the claimant's sick leave, the respondent collected the company van which the claimant had been using to travel to and from work as well as when at work. When the claimant attempted a return to work, he was collected by a colleague.

22. The claimant attempted a return to work on 3 April 2017. It is common ground that he was unable to continue working after half a day and was taken home by his colleagues. The claimant was given an assurance by Mr Reed that his job and pay were safe. Both the claimant and the respondent were hoping that the claimant would be able to return to work before long.

23. On 4 April 2017, the claimant visited his GP again and was assessed as unfit for work due to back pain for four weeks starting on that day. The copies of the statements of fitness for work in the bundle are missing parts of the text. However, on each of the statements, including the one dated 4 April, the GP has not deleted the part which says that the GP will not need to assess the patient's fitness for work again at the end of the period. The claimant says he understood from his GP that he could return to work without further assessment when he felt fit enough to do so.

24. On or around 18 April 2017, Mrs Reed sent to the claimant an updated contract. I accept Mrs Reed's evidence that she reissued contracts to all the employees at this time because some of the contracts were quite old, employees were often asking her questions about their contracts such as their holiday entitlement, and there were new people starting. The updated contracts also reflected any pay increases there had been. Since he was off sick, Mrs Reed sent the claimant's contract to him at home. No covering letter has been produced and Mrs Reed thinks that she may just have sent this with a post-it note on it. The claimant's job title in the reissued contract was given as "joiner/glazier" rather than "joiner/glazier assistant" as on the initial contract. I accept Mrs Reed's evidence that this was because the claimant had now been with them a couple of years and he was not just helping others. His rate of pay was given as £9 an hour. Both parties agreed he was paid for 40 hours a week so his basic pay was £360 per week. The contract refers to the bonus scheme being in operation, details of which were issued separately. The claimant never signed the updated contract to indicate his agreement to the terms.

25. I accept Mrs Reed's evidence that the reissued contract was not attempting to change the claimant's terms of employment to his detriment. The claimant has not persuaded me that the new contract did, in fact, make any change to his detriment. The contract does not demote the claimant to his original level of assistant joiner, as asserted in the claimant's witness statement. The title stated is "joiner/glazier". The claimant says that he understood the new contract to be imposing a reduction in pay. However, I consider this a view that the claimant formed at a later date, when he had sought advice from the Citizens Advice Bureau following his attempted return to work on 2 May. I accept that the claimant may have been confused as to why he was being reissued with a contract. However, it appears that the claimant raised no query about this prior to his attempted return to work on 2 May 2017. This supports my finding that the claimant was not particularly worried by the reissued contract until a later date.

26. On 2 May 2017, the claimant attempted to return to work. Information in the claim form confirms that, at this stage, the claimant was waiting for a postponed scan and did not know the full extent of his injuries or what the prognosis might be.

27. During the course of the few hours when the claimant was on site that day, the claimant had a number of conversations with Karl Reed and Kim Reed separately and together. There is a dispute about some of what was said. It is common ground that, during the course of the time on site, the claimant sought advice from ACAS before speaking again to Mrs Reed. This suggests that the claimant was concerned about some matters, at least prior to speaking again to Mrs Reed.

28. It is common ground that Mr Reed told the claimant that he would not be able to take the van home and use it to come to work and that the claimant would assist other employees. It is also common ground that the claimant said his back was not 100%. I find that the claimant asked if he could have lighter duties or be “eased” into work, as recorded in Mrs Reed’s letter of 2 May. I accept that Mr Reed was concerned, because of the claimant's comment about his back not being 100% and the previous unsuccessful return to work, about whether the claimant would be fit to carry out a full range of duties immediately. I accept that Mr Reed proposed that the claimant assist others rather than be responsible for his own job so that they could see how the claimant got on. I accept it was Mr Reed’s intention; whether or not he expressed this clearly to the claimant, that this would be a temporary measure until the claimant was fit enough to go back to his normal range of duties. I also accept that he claimant was not to be given a van which he could take home and drive to work in because he was not at that time to be working on his own or managing a job. The claimant expressed concern about not being able to afford to drive his car to work because of its fuel consumption. It is common ground that the claimant refused to go out on a job assisting others. Mr Reed understood that the claimant felt his status was being reduced because he was not going to be driving a van.

29. Mr Reed said in evidence that it was a busy Monday morning. He was keen to get the jobs underway. The claimant was upset that he was not going to have a van to travel to and from work. It may be that the discussion between the claimant and Mr Reed was not as calm and clear as it might have been in different circumstances. I accept that the claimant may have genuinely formed the view that he was being demoted and that his pay might be reduced. However, the claimant has not satisfied me that Mr Reed said anything which was clearly to that effect.

30. Mrs Reed overheard part of a conversation between the claimant and Mr Reed and, on hearing that the claimant was saying that his back was not 100% and that Mr Reed did not have any light duties for the claimant, she sought advice from Health and Safety Advisers at Citation Ltd. After getting this advice, Mrs Reed went to find the claimant who was by then waiting with his tools for a taxi to arrive. She told him that they should have something from his doctor to know that the doctor assessed him as fit for work, and, on his return to work, they would carry out a return to work interview and do a risk assessment. Mrs Reed says that the claimant had received similar advice from ACAS to the advice that she had received from Citation. She said the claimant seemed OK when she told him about this advice. I accept Mrs Reed’s evidence that she told the claimant they would do things by the book; this is consistent with Mrs Reed seeking advice immediately from Citation as to what to do.

31. The claimant disputes how things were left. The claimant asserts that Mr Reed told him that there would be a reduction in pay. Mr Reed denies this and said that, if the claimant had raised an issue about an impact on pay of his assisting, then he would have referred the claimant to Mrs Reed who dealt with matters to do with pay. I accept Mrs Reed's evidence that this was not raised with her. If it had been, I consider that the discussion about this would most likely have been recorded in her letter of 2 May. I find, on a balance of probabilities, that the claimant was not told that his pay was going to be reduced. However, the claimant may have made this assumption since he was being told he was to assist others and, as an assistant, he had had a lower rate of pay.

32. The claimant says that he told Mr Reed that they had five days to reverse their decision about the demotion otherwise he would have to consider resigning and claiming constructive unfair dismissal. Both Mr and Mrs Reed say that the claimant never said anything to this effect and did not express concern about his pay being reduced. Neither Mrs Reed's letter of 2 May 2017 or the CAB's letter of 22 May 2017 referred to the claimant having given such an ultimatum on 2 May. The CAB's letter refers to the claimant having indicated verbally to the respondent that he regarded what had happened as a fundamental breach of his contract of employment but does not say when the claimant is alleged to have said this and it follows a mistake in the chronology of events about the issues of an amended contract. I consider it likely that, if the claimant had given such an ultimatum on 2 May, this would have been referred to in these letters. I find, on a balance of probabilities, that the claimant did not tell Mr Reed that they had five days to reverse their decision about the demotion otherwise he would have to consider resigning and claiming constructive unfair dismissal. It may be that, with the passage of time, the claimant has confused what was later written on his behalf by the CAB with what he said on 2 May.

33. On 2 May 2017, Mrs Reed wrote to the claimant. She referred to his conversation that day with Mr Reed and herself and recorded that the claimant was still unsure of the issue with his back, that he had said to Mr Reed that he was not "100%" and that he was hoping to be "eased in" on his own jobs. Mrs Reed wrote: "Unfortunately Marc due to this and you not providing a note from your Dr to say you are fit for work, you have chosen not to work and to go home." She noted that the claimant had mentioned he was due to have a scan on his back but had not got an appointment yet. She wrote: "therefore you would be risking your health as you have no clue to what is causing the problem. I have said that once you get a note from your Dr saying that you are 100% fit to do the job, we will do a risk assessment and a return to work." Mrs Reed asked that the claimant keep her updated on the outcome and provide any notes from his Dr as soon as possible.

34. From this letter, and from the respondent's witness statements, it appears that the respondent had a mistaken understanding that GPs will, and are expected to, sign someone off as fit after a period of sickness absence and that they may have received incorrect advice, or misunderstood the advice they were given. Mrs Reed's witness statement states that she was advised by the company's HR advisers that, if the claimant had not been signed off as fit by his GP to undertake work, that he could not work. The "statement of fitness to work" is only completed where an individual is completely unfit for work or only fit to work if some adjustments are made to normal work. The GP specifies the period for which this applies and has options to say whether they will need to assess the person again at the end of the

period or that they will not need to do so. If the GP has selected the option that they do not need to assess the person again, the expectation is that the person will be fit to return to work at the end of the period, unless the person returns to their GP because they do not feel fit to work and the GP issues a further statement covering a further period of absence.

35. The claimant visited the office the following day and saw Mrs Reed. He told her that he was going to be visiting his GP the next day. I accept Mrs Reed's evidence that the claimant did not express any concerns about his position with the respondent at that time. I accept Mrs Reed's evidence that she thought the claimant seemed quite happy and it was a shock when they later got a letter from the Citizens Advice Bureau.

36. The claimant returned to his GP and was given another fit note on 4 May 2017 saying that he was not fit for work for four weeks beginning on that date. The GP did not suggest that the claimant would be fit for work if some adjustments were made to his duties.

37. On 15 May 2017, the claimant's CV was uploaded on a recruitment website. The claimant says that his partner did this for him and he was just updating it. By taking this step, I find that the claimant was beginning to market himself, indicating that he was considering leaving the respondent. However, no reason has been suggested as to why the claimant should have wished to leave the respondent other than concern about his position with the respondent. There is no evidence before me that the claimant was offered or obtained another position before resigning his job with the respondent.

38. The claimant took advice from the Citizens Advice Bureau which suggests that he had some concern about his position. On the claimant's account, from this point onwards he not only took advice from the Citizens Advice Bureau but understood himself to be doing what they told him to do. It appears from the claimant's evidence that he did not understand everything that the adviser was saying e.g. the claimant told the tribunal that the adviser had told him the contract showed a reduction in pay but the claimant was unable to explain the basis for this view. I have not seen any record of the advice given by the adviser from the Citizens Advice Bureau and have not heard any evidence from the adviser. I make no finding as to what advice was given.

39. Following advice from the Stockport District Citizens Advice Bureau (the CAB), an adviser from the CAB wrote to the respondent on 22 May 2017. This letter asserted that, when Mr Johnson attempted to return to work on the second occasion, Mr Reed had indicated that:

> "On returning to work our client would be demoted from junior foreman to joiner/glazier with a corresponding reduction in his pay and no further access to a company van.
>
> Although our client indicated that this was not acceptable to him, this decision was confirmed in writing and our client issued with an amended contract that he was asked to sign."

40. It is apparent from this letter that there was some misunderstanding of events by the claimant and/or the adviser. The claimant now accepts that the reissued contract was given to him prior to his second attempt to return to work but this letter suggests that the amended contract followed his attempted return to work. None of the respondent's letters inform the claimant that he had been demoted and that his pay was to be reduced. As previously noted, the reissued contract did not include a reduction in pay. The claimant informed the Tribunal that the adviser from the CAB had told him that the contract involved a reduction in pay but the claimant did not understand how the adviser had come to this conclusion. The letter from the CAB continued:

> "We are writing on his behalf to confirm his position that unless he hears from you in writing within a period of seven days that you have reversed your decision and can reconfirm his employment as junior foreman with the same terms and conditions of employment as before, he will have no alternative but to resign and claim constructive unfair dismissal with an accompanying claim for appropriate compensation."

41. On 23 May 2017, Mrs Reed replied to the CAB. She enclosed a copy of the claimant's original contract with the job title "joiner/glazier assistant" and a copy of the letter dated 2 May 2017. Mrs Reed wrote that the claimant was not employed as a junior foreman and was not provided with a vehicle for his sole use, but like other employees had the use of a pool vehicle for work purposes. She did not write that they now regarded the claimant as a joiner/glazier (as identified in the contract issued on 18 April) rather than as an assistant. She wrote:

> "As Mark has been attempting to return to work following a long period of sickness he suggested he might be able to do lighter duties as he was currently not fit enough to resume his normal joiner duties. The only work we had available was assisting another colleague which Mark flatly refused as he wanted to work on his own. We have had no other communication with Mark apart from him coming into the office the following day and telling me he was going to book another appointment with his GP and get another sick note, which he sent across via text/email.
>
> "As he seems to have several issues with his employment then I propose to arrange a grievance meeting with Mark as per our standard procedures. I will send Mark a letter inviting him to a grievance meeting. A copy of this will be sent to you tomorrow, 24 May."

42. The claimant had no further conversations with Mr or Mrs Reed prior to his resignation and, as noted below, decided not to attend a grievance hearing. The claimant did not write himself to the respondent but the CAB corresponded on his behalf.

43. On 24 May 2017, Ms Reed wrote to the claimant offering to hold a grievance hearing on 2 June 2017 and advising him of his right to be accompanied at that meeting. She wrote that, alternatively, the matters could be dealt with on his return to work.

44. The CAB representative wrote on 25 May 2017 that he had a further appointment to see the claimant on 5 June 2017 when they could discuss the whole situation and he could make a decision. Mrs Reed replied, offering to make the grievance hearing later after the adviser had seen the claimant. The Citizens Advice Bureau adviser replied that it would be helpful to postpone the meeting until after the claimant had seen the adviser. Mrs Reed confirmed that she had postponed the meeting until she heard from them further.

45. The claimant obtained a further fit note on 1 June 2017 stating that he was not fit for work due to back pain for a further month.

46. The claimant gave evidence that he considered there was no point in a grievance hearing because they had discussed everything on 2 May 2017.

47. On 5 June 2017, the CAB adviser wrote to the respondent. The letter asserted that correspondence shown to them showed categorically that the claimant was upgraded to the position of foreman in September 2016 and given the corresponding improvements in pay and conditions of service. The letter continued:

> "It is clear to both us and our client that you are in fundamental breach of your contract of employment with him. He is left with therefore no alternative but to resign from his employment and claim constructive unfair dismissal in accordance with the indication which he gave in the letter of 22 May."

48. Mrs Reed replied directly to the claimant on 5 June. She wrote that she was concerned by the contents of the letter and felt that the claimant may have resigned in haste. She invited him to reconsider his decision to resign and to allow the company an opportunity to resolve his issues. She asked the claimant, if he wished to retract his notice, to do so in writing within the next seven days. She invited him to attend a grievance hearing on 13 June 2017. She asked that he send them a copy of the letter referred to by the CAB adviser which had been asserted as confirming the claimant's role as foreman, "…so that we can review it as we have nothing on file".

49. On 9 June 2017, Mrs Reed wrote again to the claimant, extending the deadline for reconsidering the claimant's resignation until the claimant had taken advice from the CAB. She suggested that the grievance hearing stand for 13 June 2017 and again asked for the letter which the claimant had asserted confirmed his job role as foreman.

50. On 12 June 2017, the CAB adviser wrote to the respondent saying that they had discussed the matter further with the claimant and he had confirmed that he had no wish to withdraw his resignation. He regarded his employment as having ended on 5 June 2017. The letter stated that the claimant claimed constructive unfair dismissal.

51. On 13 June 2017, Mrs Reed wrote to the claimant, stating that, with regret, they accepted his resignation.

52. On 19 June 2017 Mrs Reed wrote to confirm the outcome of his grievance, having considered this on paper since the claimant had not attended the meetings arranged. Included in this letter was a finding that no alterations had been made to the claimant's contract of employment. Mrs Reed found that there had been no

demotion or reduction in the claimant's basic pay. Mrs Reed wrote that the claimant was employed as a “joiner/glazier”. She referred to the claimant mentioning on his attempted return to work that he was not 100% fit and that he asked to be “eased in” on possible “lighter duties”. Mrs Reed referred to the letter which had been sent by the CAB, saying this was a general letter sent to all and not addressed to the claimant personally. She wrote that the bonus was a “target related bonus, part of everyone’s pay, not only foremen but for joiner/glaziers also”.

53. The claimant was offered an opportunity to appeal against her decision to Karl Reed. The claimant did not appeal.

54. The claimant notified ACAS under the early conciliation provisions on 26 June 2017. The ACAS certificate was issued on 26 July 2017. The claimant presented his claim to the Tribunal on 17 August 2017.

Submissions

55. Mrs Peckham spoke to a written skeleton argument. In summary, she argued that the respondent had not been in breach of contract so there could be no constructive unfair dismissal.

56. The claimant made brief oral submissions. He asserted that he was employed as a junior foreman. He asserted that he had been promoted due to company need. He loved working for the respondent and when promoted had been proud and had a sense of achievement.

The Law

57. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) provides that an employee is to be regarded as dismissed 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.”

58. An employee will be entitled to terminate a contract of employment without notice if the respondent is in fundamental breach of that contract and the employee has not waived the breach or affirmed the contract by conduct or delay.

59. An implied term of an employment contract is the term of mutual trust and confidence. This is to the effect that an employer will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Limited* 1981 ICR 666, said that the tribunal must “look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.”

Conclusions

60. I find that the claimant resigned because he had a perception, formed because of the events of 2 May 2017, that he was being demoted and his pay would

be reduced. The claimant was clearly concerned about his position following conversations with Mr and Mrs Reed on 2 May since he sought advice from ACAS on that day. He later sought advice from the CAB. The claimant was concerned that he was not going to have the use of a van which he could drive to and from work and that he was going to be assisting someone else, rather than working on his own jobs. This led to the assumption that he was being demoted and would suffer a reduction in pay.

61. The claimant was told that he would not have the use of a van. He was also asked to go out on a job with another employee. However, this was in the context of the claimant returning from sick leave because of a bad back, where he had unsuccessfully attempted a return to work once before. The work involved heavy manual duties. The claimant told Mr Reed that he was not 100% fit. It may be that Mr Reed, on a busy Monday morning when he was keen to get jobs underway, did not clearly explain to the claimant that assisting someone else and not driving a van himself were temporary measures whilst they assessed whether the claimant was fully fit to work by himself again. However, I conclude that Mr Reed did not say or do anything which could reasonably be understood as breaching any express term of the claimant's contract. I have found that Mr Reed did not tell the claimant he was demoted or that his pay would be reduced. There was no contractual right to the use of a company van to travel to and from work. There is no evidence of any other conduct by Mr or Mrs Reed that could potentially be regarded as a breach of an express term of the claimant's contract.

62. Mrs Reed sought advice on what to do, when she learnt that the claimant was saying he was not 100% fit and had declined the work of assisting other employees. Mr and Mrs Reed were understandably concerned that the claimant should not undertake work which could exacerbate the claimant's back condition. They appear to have misunderstood the nature of fitness to work statements, after taking advice, not appreciating that, on the face of it, the claimant was expected by his GP to be fit to work at the expiry of the period during which the claimant was certified as unfit to work. However, since the claimant was telling them that he was not 100% fit, he was still awaiting a scan and was asking for lighter duties, the respondent had proper cause to want reassurance that the claimant was fit to undertake his normal duties before he resumed them. The respondent acted reasonably, in the circumstances, in suggesting the claimant should assist others at first and in not giving the claimant the use of a van since he would not be working on his own. I conclude that the respondent, by its actions on 2 May 2017 did not act in breach of the implied duty of mutual trust and confidence. It did not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

63. There were no conversations between the claimant and Mr Reed after 2 May. The only conversation between the claimant and Mrs Reed was on 3 May when the claimant said he would be seeing his GP the following day. The claimant does not rely on anything in this conversation as being, or forming part of, a breach of contract on the part of the respondent.

64. After the CAB's letter of 22 May 2017, the respondent offered the claimant the opportunity to have his grievance heard. If the claimant had participated in this process, there would have been an opportunity to clear up any misunderstandings

and miscommunications which had left the claimant with what I conclude was a mistaken understanding that he was being demoted, with a consequent reduction in pay. Unfortunately, the claimant took the view that there was nothing to be gained by a further discussion, so declined to attend a grievance meeting.

65. I conclude that nothing in the respondent's actions after 2 May 2017 can be regarded alone, or in conjunction with the respondent's actions on 2 May 2017, as constituting a breach of the implied duty of mutual trust and confidence.

66. I conclude that the respondent was not in breach of contract. The claimant did not, therefore, resign in response to a fundamental breach of contract and his complaint of constructive unfair dismissal must fail.

Employment Judge Slater

Date: 19 December 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
28 December 2017

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: 2403990/2017

Name of case: Mr M Johnson v Able Joinery Ltd

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 28 December 2017

"the calculation day" is: 29 December 2017

"the stipulated rate of interest" is: 8%

MR S ARTINGSTALL
For the Employment Tribunal Office