EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR LUKE FORD	AND	SSE SERVICES PLC

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 26TH / 27TH/ 28TH /29TH NOVEMBER 2018 AND 3RD / 4TH DECEMBER 2018

EMPLOYMENT JUDGE MR P CADNEY MEMBERS: MR W HORNE
MR G HOWELLS

APPEARANCES:-

FOR THE CLAIMANT:- **IN PERSON**

FOR THE RESPONDENT:- **MS M SANGSTER (SOLICITOR)**

JUDGMENT

The unanimous judgment of the tribunal is that:-

1. The claimant's claim of constructive unfair dismissal is dismissed.

Reasons

1. This is the decision of the employment tribunal in the case of Mr Luke Ford (claimant) v SSE Services PLC (respondent). By an ET1 received on 26 July 2017 the claimant brings a claim of unfair constructive dismissal. At a preliminary hearing held on 30 April 2018 Employment Judge Beard refused an application to amend to include a claim of public interest disclosure and identified the ten elements which comprised individually or cumulatively the alleged breach of the implied term of mutual trust and

confidence on which the claimant relies as the fundamental breach entitling him to resign.

2. Those ten matters were:-

1) The claimant been placed in the wrong salary grade and his pay band frozen up to 2011.

2) The claimant's grievance in respect of the above was not given an outcome in 2011.

3) On two occasions one in 2011 and the other in 2014 claimant was moved to a new job without documents or explanation for the move.

4) In April 2016 the claimant's appraisal score was reduced from 4 to 3 with a consequent lower pay rate payable without explanation.

5) The claimant raised a grievance about the above change in appraisal and other matters … The appraisal score was changed back but the other issues raised by the claimant were not dealt with.

6) The claimant made a flexible working request in September 2016. After raising the matter following a gap the claimant was told that he was time-consuming and that if he continued to raise matters with senior managers he would be forced to move business areas.

7) In November 2016 claimant applied for annual leave which was refused; he sent an email seeking a swap, the claimant was spoken to about this and told to shut up and get on with his role and be thankful.

8) The claimant become unwell following this and did not work again.

9) During the claimant's absence he made disclosures and raised grievances which he contends were not properly dealt with.

10) The claimant resigned because there was no outcome to his grievance appeal in June and also the claimant was being abusively contacted by employees who had undergone drug and alcohol testing; the respondent had caused the claimant's name to become known by the employees being tested. That the claimant relies on this as a last straw.

3. As this is a claim for constructive unfair dismissal the burden of proof lies upon the claimant to prove that he was dismissed. This involves three elements; firstly the claimant must demonstrate that the respondent was in fundamental breach of contract entitling him to resign; secondly he must not have delayed for such a period that he is taken to have affirmed the contract; and finally he must resign in response to the breach or breaches. The claimant's case is that the events set out above individually or cumulatively amount to a breach of the implied duty of mutual trust and confidence, and were the reason for his resignation.

4. The respondent submits that the claimant's claim falls in any event at the final hurdle, irrespective of the merits of the first two elements, as the claimant did not in fact resign as a consequence of any breach of contract but rather to avoid attending a disciplinary hearing to answer allegations of fraud. The claimant commenced employment on 1 April 2003 and subsequently transferred to the respondent under the terms of a TUPE transfer. On 11 November 2016 the respondent's Fraud Assurance team identified unusual activity in the claimant's personal gas and electric accounts. An initial analysis appeared to show that several meter readings had been taken at his home address. On thirteen separate occasions these had been subsequently amended to lower readings as a result of contact from the claimant calling the respondent and providing lower meter readings. It appeared in consequence that the claimant's account showed an unusually and artificially low usage which had resulted in an underpayment of the amounts actually owed.

5. On 23 November 2016 Mr Simon Neaves from the respondent's Group Security and Investigations division was appointed to investigate these concerns. On 24 November 2016 the claimant was suspended and did not return to active work prior to his resignation. The day following his suspension he went off sick until he was certified fit for work on 24 May 2017, but from that point until his resignation remained suspended. Mr Neaves compiled a report in which he concluded that the claimant had contacted SSE with his own meter readings on at least thirteen occasions from 2013 and that in doing so he was " *using his knowledge of the SSE customer system to gain a financial benefit on numerous occasions by billing his accounts to readings substantially lower than the current readings at the time. This has resulted in Luke Ford avoiding the correct outstanding balances on his gas and electric accounts for a period of three years. The outstanding balances when the correct readings were taken on or around 29 November 2016 of £1015 gas and £1298 electric represent the financial benefit that Luke has gained."*.

6. An Occupational Health report dated 16th of February 2017 confirmed that the claimant was "..fit to attend meetings with HR/ Management.." with a number of adjustments recommended. However the claimant elected not to attend a fact-finding investigation meeting on 10 March 2017. On 9 March 2017 the day prior to the proposed fact-finding meeting the claimant lodged a grievance, and it was agreed that the disciplinary hearing would be delayed pending the outcome of the grievance. The initial grievance hearing took place on 27 April 2017 with the outcome being given on 16 May 2017. The grievance was not upheld. On 16 May the claimant appealed. On 15 June 2017 the grievance appeal hearing took place and he was then invited to a rescheduled disciplinary hearing on 4 July of 2017. On 3 July 2017, the day before the disciplinary hearing, he resigned with immediate effect.

7. Accordingly the respondent submits that the timing of his resignation leads to the inescapable conclusion that the real reason for the claimant's resignation was not the individual or cumulative effects of the alleged breaches of contract, but to avoid the inevitable conclusion which would have been his dismissal. The claimant in evidence denied this saying that the reason for his resignation was that he had reached the point at which he had concluded that even if the disciplinary hearing accepted his

explanation, which he believed it would, that he did not in any event wish to continue working for the respondent because of the earlier breaches and he therefore decided to resign.

8. The burden is on the claimant to demonstrate on the balance of probabilities that the reason for his resignation was the alleged breaches and not to avoid the disciplinary hearing. It is sufficient if the repudiatory breaches played a part in the decision to resign; it need not be the sole cause but must be one of the factors relied on. As set out above in this case the claimant's evidence is that it was the sole cause and that a desire to avoid the disciplinary hearing played no part in his decision. The question for us is whether on the balance of probabilities we accept that evidence.

9. The respondent submits that we should not on the basis that the claimant's evidence is so unreliable that it is not possible to give any credence to it. The first reason for that relates to the disciplinary allegations themselves. The respondent contends that they were serious and, if upheld, would inevitably have resulted in the claimant's dismissal for gross misconduct. The explanation that he has given to the tribunal and which he would have given to the disciplinary hearing had he attended does not bear examination. Firstly the evidence of the investigation demonstrated clearly a consistent pattern of the claimant supplying incorrect meter readings which on every occasion were lower than the true readings, and which was therefore to his financial advantage in at least delaying payment of sums which were due to the respondent. .

10. The evidence that the claimant has given to us and which he would presumably have given to the disciplinary hearing had he attended, is that he lived in a flat. A fellow resident, an eighty year-old gentleman read the meters for him, which was dangerous as one had to use a ladder to view them. The figures the claimant supplied to the respondent with were those which had been supplied to him by his fellow resident and that if they were wrong it was because of errors consistently made by his neighbour and not by himself. Somewhat surprisingly he stated that he had never sought to query with his neighbour why the meter readings taken by the respondent were consistently higher than those he had supplied. In addition he stated that his landlord paid the gas and electricity bills and therefore that he had no financial reason to attempt to secure lower bills than were actually payable. In fact in evidence it emerged that whilst he alleged that his landlord paid the standing order, he then accounted to his landlord for the sums owed. If when he vacated the tenancy there was a balance owing then that would be due to the landlord. It followed automatically that in reality there was a financial benefit to the claimant of deferring a liability of the sums due in exactly the same way as if he had paid the account directly. Even if it is true, for which there is no evidence before us, that the bills were paid by his landlord, which is a little curious given that the account was in the claimant's name, it is not true that he gained no financial advantage by delaying payment. His initial evidence before us, submits the respondent, was therefore demonstrably untrue.

11. Secondly at the outset of the cross examination Ms Sangster on behalf of the respondent took the claimant through a chronology of the events outlined above. During this she took him to the Occupational Health report of February 2017 which states in terms that he was fit to attend meetings although not fit for work. The

claimant denied on at least four occasions that the Occupational Health report said any such thing and stated in evidence that the copy of the report sent to him was not the same as that in the bundle; and in particular did not include the section setting out that he was fit to attend meetings. Although it was not in the bundle the claimant stated that he did have a copy of the Occupational Health report and he was given permission to produce it, which revealed that it was identical to the copy in the bundle and therefore did indeed contain the assertion that he was fit to attend meetings. The respondent again submits that the evidence the claimant gave about this was demonstrably untrue, and must have been known to him to be untrue.

12. Thirdly in paragraph 2 of his witness statement the claimant asserts that "*In 2014 I was redeployed again to a new department FITS which is an area providing a service for the Feed In Tariff customers, I had no documents or explanation for this job move…"* In fact the evidence before the tribunal from Mr James Emery and from Ms Joanne Box was that in the autumn of 2013 a decision was taken that the team in which the claimant worked, the Marks & Spencer and Smart service sales telephony and administration team was to be deleted. This included the role of Ms Box and the claimant. A decision was taken that there would be no compulsory redundancies and that everyone would be redeployed into the FITS department. Mr Emery's evidence was that in January 2014 all of the affected staff across the UK were briefed and that everyone attended at least two one-to-one consultation meetings. Mr Emery himself met the claimant on Wednesday, 27 February 2014 and followed up the consultations with replies to email questions on 18 March of 2014. If this evidence is accepted, which we do not least because it is supported by the contemporary documentation, it follows that the claimant's contention that he received no explanation and no documentation in respect of this job move is again untrue.

13. Fourthly at paragraph 3 of his witness statement the claimant states that having moved to the FITS department was never once after several applications with this department interviewed or provided any feedback. The evidence before us is that he made two applications one for a coaching role within the Department; and one application for promotion to team manager. The application for promotion to team manager was not successful because the claimant's application was discovered to have been partly plagiarised from Wikipedia. The claimant in evidence does not dispute this nor that he did receive feedback and that he was told that this was the reason for his unsuccessful application for promotion. Again it follows that the claimant's witness statement to the effect that he had not been provided with any feedback is demonstrably untrue.

14. Fifthly at paragraphs 6 and 12 of his witness statement that he refers to making calls to the respondent's Safe Call external whistleblowing team in May 2016 and May 2017. In fact following a subject access request Safe Call sent records of his contact with them which began in June 2017. The claimant's explanation for this is that safe call was in error as his initial communication was anonymous. In cross examination it was established that he did not mean that he had supplied the information anonymously but had emailed from his work email address and had he said asked for confidentiality. He could give no explanation of why having sent this from his work email address safe call should have no record of it. The respondent invites us to the

view that in fact the reason safe call has no record of these early communications that is because they did not take place. Again if that is correct which it appears to us to be it follows that the contents of the claimant's witness statement in this regard are not supported by the documentary evidence.

15. Sixthly the same applies in respect of paragraph 9 the claimant's witness statement in which he alleges in 2017 January he wrote to Ofgem, who similarly often have no record of this communication. The claimant attributed this to the fact that Richard Bellingham director of Ofgem has left that organisation and the communication was with him and he having left Ofgem apparently has no record of it. Again the respondent invites us to conclude that the claimant's evidence cannot be correct and that once again contents of his witness statement are not supported by the documentary evidence.

16. Seventhly the claimant alleges that he was given no reason for his suspension. The respondent's evidence is that he was given reasons orally on the day and subsequently written to. The claimant's evidence is that he never received the letter because the address the respondent had was his mother's address and that she was on holiday. The reason that she did not inform him that she had received post for him on her return from holiday and is that she was in the habit of destroying any correspondence received in his name and that therefore he had did not see it until the following June. In our judgement this is an especially implausible narrative and we do not accept that the claimant did not receive this correspondence.

17. Finally as it is set out above the claimant's case is that he blew the whistle on alcohol and drug taking in the Department. That resulted in apparently random drug tests taking place on 19 June 2017. Before his resignation it became known that he was responsible for the allegations and was the person who had blown the whistle. In his witness statement he stated that that Ian Reynolds who had heard his grievance appeal was the person who had notified these individuals. The information he relies on that Ian Reynolds notified these individuals is contained in Mr Reynolds notes of his discussions with them. In our judgement the notes do not bear the interpretation the claimant places on them, but in any event the evidence is that they were only supplied to the claimant by letter dated 6 July 2017 which is three days after his resignation. On 6th July 2017 the claimant by email requested various documents including Mr Reynolds notes which were sent to him by a letter of the same date. If this was the first time he had seen them self-evidently they could not have played any part in his decision to resign. However when in cross examination it was put to the claimant that he cannot have relied for his resignation on a last straw of which he only became aware after he had resigned; his evidence was that he had previously received hard copies of these notes which were difficult to read and that when in his email that he was apparently requesting that they be sent to him for the first time what he was really requesting was that he received electronic copies which would be easier to read. The respondent submits that this explanation bears no relation to the contents of the claimant's email and is a transparent attempt to avoid the consequence of the last straw as identified by him having taken place after the resignation. If this is correct then the claimant has deliberately lied to the tribunal about receiving that documentation before 3 July in order to rescue his claim. In our

judgement the respondent is correct and that this is precisely what the claimant has done.

18. We accept all of the respondent's submissions set out above. It follows that we have the gravest doubts as to the accuracy, reliability and honesty of the claimant's evidence. On the balance of probabilities we are not satisfied that the true reason for his resignation was anything other than the impending disciplinary hearing. It follows that the claimant's case must fall at the first hurdle.

Last Straw

19. In addition the respondent submits that even if we accept that the claimant resigned at least in part as a result of the matters the subject of his claim that it is bound to fail as he cannot rely the last straw doctrine.

20. Firstly they refer to the history of this litigation. On 7th August 2018 at a case management discussion the claimant agreed to provide further and better particulars of his claim giving the names of the individuals he alleged had become aware that it was he who had blown the whistle. He subsequently resiled from that agreement and refused to provide the names. The respondent applied for the claim to be struck out for this failure. I declined to strike out the claim on the basis that fairness to the respondent could be met by the tribunal declining to allow the claimant to rely on allegations which were not fully particularised and which they could not meet. The respondent submits that that is the order which should be made with the result that the claimant could not rely on the last straw and that his claim is bound to fail.

21. Secondly in any event they rely on the matters set out in paragraph 17 above. If we accept the respondent's evidence, which we do, the claimant only received the documents he now describes as the last straw after his resignation the case must equally fail.

22. Thirdly they assert that even if the claimant's evidence is correct and prior to his resignation that some people had drawn the conclusion that he had caused the drug and alcohol testing that his does not in and of itself demonstrate any breach on the part of the respondent. In the absence of calling any of those people to give evidence, or even to identify them, it is not possible to make any primary findings of fact as to how they drew those conclusions nor to draw any inferences from that. The only thing that can said with certainty is that if we accept the evidence of Mr Leslie , which we do, the information cannot have come from him as alleged by the claimant as he did not know himself that the testing had taken place, nor any of those tested, nor that the cause was information provided by the claimant.

23. For completeness sake we note that in his final submissions the claimant asserts that the last straw was being spoken to by Ian McDougall. This allegation is not prefigured in any of the pleadings, nor his witness statement and is therefore not in evidence before us.

24. The leading authority on the application of the "last straw" doctrine is Omilaju v Waltham Forest LBC [2005] ICR 481at paragraph 21 Lord Dyson held " *If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect*." The respondent submits that for each of the reasons given above that the final straw alleged by the claimant is not capable of contributing to any earlier acts and it follows that for this reason too the claimant's case is bound to fail.

25. We accept the respondent's submissions as to the last straw and it is not therefore necessary to determine whether we should permit the claimant to rely on the allegations. Had we not already concluded that we did not accept the claimant's evidence as to the reason for his resignation we consider these submissions to be well founded and would in any event have dismissed the claim for this reason in the alternative.

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EMPLOYMENT JUDGE Cadney

Dated: 10 December 18

Judgment entered into Register
And copies sent to the parties on

.....11 December 2018.....

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for Secretary of the Tribunals