EMPLOYMENT TRIBUNALS

Claimant: Mr S O'Brien

Respondent: Vernon Land Transport Ltd

HELD AT: Leeds **ON:** 5 and 6 June 2018

BEFORE: Employment Judge Rogerson

REPRESENTATION:

Claimant: In person
Respondent: Mr Y Lunat (Solicitor)

JUDGMENT

1. The complaints of unfair constructive dismissal and automatically unfair dismissal (section 104) Employment Rights Act 1996, are struck out in accordance with rule 37 of the Employment Tribunal Rules of Procedure, on the ground that those complaints have no reasonable prospects of success.
2. In accordance with the provisions of Regulations 13, 14, 16 and 30 of the Working Time Regulations 1998, the claimant's complaint of any further entitlement to payment for leave taken fails and is dismissed.

REASONS

1. The list of issues to be determined was identified and agreed at the beginning of the case having previously been identified at a preliminary hearing (see pages 38-41 of the bundle).
2. The claimant makes complaints of unfair dismissal and a complaint the respondent had failed to pay the holiday pay that was due to him In accordance with the provisions of Regulations 13, 14, 16 and 30 of the Working Time Regulations 1998.
3. For the constructive unfair dismissal the tribunal has to determine whether the respondent had fundamentally breached the claimant's contract of employment contract, and whether the claimant accepted that breach and resigned in response to it on 11 August 2017. For the fundamental breach the claimant relies

upon six alleged acts of the implied term of trust and confidence which he says culminate in a 'last straw', a letter, dated 9 August 2017 which invited the claimant to a disciplinary hearing on 23 August 2017(see 4.4 below). The claimant contends that one of the 3 allegations of potential misconduct referred to in that letter was fabricated and false and was the reason why he resigned 2 days later.

4. The 6 breaches of the implied term of trust and confidence are:

   4.1 Issues raised by the respondent regarding the claimant's proof of delivery documents (POD's) and the outcome of the grievance procedure which followed.

   4.2 The respondent's alleged failure to honour arrangements for the claimant's working time so as to avoid overnight jobs which could clash with his childcare policies.

   4.3 The respondent allegedly ignoring information from the claimant in June 2017 that he would not be providing fit notes to the employer in future because he was not in receipt of statutory sick pay but was claiming Employment Support Allowance and needed to provide the fit notes to the Department of Work and Pensions/Benefits Office instead.

   4.4 The respondent commencing disciplinary action against the claimant for, amongst other things alleged unauthorised absence from 13 June 2017.

   4.5 Because the respondent's managing director allegedly grabbed the claimant putting his arms around him telling him he would '*not get a penny, not a single penny"*- this during the course of a disciplinary/welfare meeting conducted on 2 August 2017

   4.6 Immediately after the meeting referred to above, the managing director allegedly shouting at the claimant and referring to him as a "*little scrote"*

5. I explained that the burden of proof was for the claimant to establish a 'dismissal' within the meaning given by section 95(1) (c) Employment Rights Act 1996, that he "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". If dismissal was not proved he could not succeed on his complaints of unfair dismissal.

6. The circumstances he relies upon are the fundamental breach of the implied term of mutual trust and confidence by the employers conduct identified above ending with the last straw which was the letter of the 9 August 2017. I explained the meaning of the implied term of trust and confidence which is that "*the employer will not without reasonable or proper cause act in a manner calculated or likely to destroy or seriously damage the implied term of trust and confidence"*. I would consider in relation to each of the acts he relied upon whether there was reasonable or proper cause for the treatment he relied upon, and if there was not, whether it was calculated to or likely to destroy or seriously damage the implied term of trust and confidence

7. For the most recent act the alleged fabricated allegation relied upon as a final straw London Borough of Walthan Forest-v- Omilaju(2004)EWCA CIV 1493(2005)ICR 481 provides guidance on 'what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract?". Lord Dyson answered that question as follows:

"19… *The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*

20. I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. 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. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that later act does not permit the employee to invoke the final straw principle".

8. As well as the 'ordinary' unfair constructive dismissal complaint, the claimant also alleges that his 'dismissal' was automatically unfair under section 104 of the Employment Rights Act 1996. He alleges that he was constructively dismissed on 11 August 2017, for asserting a relevant statutory right on 18 September 2016, by making a request for a reduction of his working hours. It is accepted that the request made did not meet the criteria set out in section 80F of the Employment Rights Act 1996. However an erroneous belief that a statutory right is asserted does not prevent the claimant from making the complaint that he was dismissed for asserting a statutory right provided a 'dismissal' is established. The question then would be whether the principal reason for that 'dismissal' was the assertion of the statutory right.

9. The final complaint made was in relation to the holiday pay where the claimant alleges that on occasions during and at the end of his employment he was paid incorrect rate of holiday pay. At the preliminary hearing on 27 February 2018, the claimant had been ordered to identify the occasions he relied upon and to explain how he calculated a shortfall for each occasion relied upon to support his claim. The claimant had been provided with the relevant wage slips in order to calculate the holiday pay complaint but failed to provide any calculation based on the actual hours he worked/ actual pay in the holiday pay reference period he relied upon.

10. In relation to the evidence I heard evidence from the claimant. The claimant had not produced a witness statement for the purposes of these proceedings but relied upon his claim form and his resignation letter as his evidence in chief. For the respondent I heard evidence from Mr M Dawson who had attended the meeting on 2 August 2017 which the claimant relies upon to allege fabrication of the 3rd charge by the respondent. I also heard evidence from Mr C Bannon (Operations Manager). Mr V Land (Managing Director) was in attendance at the hearing and had provided a witness statement but I did not hear any evidence from him because of my decision to strike out the unfair dismissal complaints on the second day of the hearing. I also saw documents from an agreed bundle of documents.

11. After reading of the witness statements and before hearing the evidence I clarified the last straw event relied upon which was the disciplinary invite letter of 9 August 2017 and in paragraph 3 of that letter containing the disciplinary charge that the claimant "refused to allow the meeting (of the 2nd August 2017) to conclude by walking out".

12. The two accounts of that meeting were consistent. The respondent's account of that meeting (page 352) which was based on the minutes prepared by Mr Bannon and the claimant's transcript based on the voice recording.

13. At that meeting on 2 August 2017 were Mr Land, Mr Bannon, the claimant and his companion Mr Dawson. It was agreed that the meeting which was to be a disciplinary meeting was changed into a welfare meeting. The claimant knew the respondent wanted to discuss his absence from work because since his sick note expired on 13 June 2017 he had not provided any other information to support his ongoing absence. In those circumstances the respondent was reasonably considering treating that absence as an unauthorised absence from work.

14. One of the breaches is about the respondent asking for these sick-notes when they "*ignored information from the claimant in June 2017 that he would not be providing fit notes to the employer in future* ***because he was not in receipt of statutory sick pay but was claiming Employment Support Allowance and needed to provide the fit notes to the Department of Work and Pensions instead****"* (see 4.3 above). At this hearing it became clear this was a false allegation made by the claimant.

15. The claimant's case was that after 13 June 2017 his sick(fit) notes were being provided to the benefits agency instead of to the employer to support a claim for ESA (a benefit available to those in work but incapable of working due to ill-health).

16. During the meeting on 2 August 2017 the claimant's transcript records that Mr Land asked the claimant "*are you on the sick Shaun are you on the sick?*" The claimant replies "*yes*". Mr Land's response is "*right*". The claimant then continues "*because of my work related stress*". Mr Land asks him "*are you claiming sickness benefit"*. The claimant answers "*no not now, I was*". Mr Land asks "*You're not claiming sickness benefit*?" The claimant's answers ***"up until 4 weeks ago Vern I'll tell you straight if you want yeah. My work related stress is when I'm working at VLT – end of. Meeting over. I'm not here on a witch hunt".***

17. It was clear from the claimant's account that he **ended** and walked out of the meeting after he was questioned about his sickness absence. It was also clear he

was telling his employer he had been in receipt of sickness benefit until the 5 July 2017 which was untrue.

18. In view of his evidence I asked the claimant why he was alleging that the letter inviting him to a disciplinary hearing on 9 August was fabricated and false. The letter referred to 3 matters the respondent wished to discuss: (1) the claimant's long term absence from work since 25 October 2016; (2) his unauthorised absence from work since 13 June 2017 and (3) his conduct at the meeting on 2 August, when he "**refused to allow the meeting to conclude by walking out.**

19. The claimant said he had no objection to (1) and (2) which he expected his employer to discuss with him but it was (3) which he relied upon as a last straw. The difficulty I had with this was that his admitted conduct about the meeting supported the 3rd allegation made. He was questioned about his sickness absence which he accepted it was reasonable for the employer to discuss with him given his failure to provide any sick notes since the 13 June 2017.He ends the meeting and walks out. It was reasonable for the respondent to want to discuss this conduct at a disciplinary meeting on 23 August 2017 as part of the other disciplinary charges. The claimant would at that hearing be given the opportunity to explain his case in relation to all 3 charges at that hearing. There was no evidence the allegation was false or fabricated or any explanation of how it was a last straw based upon that agreed factual analysis.

20. At that stage, Mr Lunat made an application for the claimant's claim to be struck out because on the claimant's best case he could not substantiate a breach of trust and confidence. The last straw was not a last straw. The respondent was incurring costs unreasonably having to defend a case for 3 days when it had no reasonable prospects of success.

21. The claimant declined the invitation to reconsider his position in light of that application but understood that it was the respondent's intention to make a costs application if the claim failed to be made out on his own evidence. I decided at that stage that a strike out was not appropriate and the claimant should give his evidence orally and be cross-examined.

22. However, during the course of his cross examination, another issue arose from the claimant's transcript, this time of the welfare meeting on 8 June 2017. The claimant had requested that the meeting was voice recorded and Mr Bannon had agreed. He informed the claimant the minutes would be sent to the claimant for approval/amendment. The claimant's transcript and Mr Bannon's minutes were in the bundle with the claimant's annotations identifying the relevant section of his voice recording.

23. In cross-examination by way of background the claimant accepted that in September 2016, prior to this meeting in June 2017, he had asked the respondent to lay him off because he couldn't work the hours the respondent required him to work in accordance with his contract. The company had refused to lay the claimant off because there was no reason to lay off when work was available.

24. At page 243 the respondent's notes of the welfare meeting of 8 June 2017 state as follows:

    Claimant: "*The issue with holiday pay for what I understand not compliant with health and safety rules to pay for holidays not taken and pay for these after. The advice I have had from ACAS is to contact VOSA and take independent legal*

advice. If we can't come to some sort of agreement/fair way with regards my severance pay.

Mr Banon: "*Severance Pay?"*

Claimant: "*Both companies part way and there is a severance package for me"*. *Forgetting anguish, depression, stress £12,000 by all amounts based on previous year. Not saying to that figure it can't come to some sort of agreement. Only cause of action is to go down Tribunal route whether for unfair dismissal or constructive dismissal, that's about it. £12,000 to go to Tribunal. Just had Child Tax Credit backdated for 9 months so in a position to instruct a solicitor to do that. Obviously this is an action rather not to take be in both parties' interest as costs involved will be relevantly higher than 6 months pay. Being petty, punitive with holiday pay, know* ***on a slam dunk with Tribunal****, if gets that far will be silly money for both of us, by making out a court settlement be 2/ 3 times 6 months pay, not vindictive but being forced into it,* ***never know what information comes out at Tribunal looking into working practices****".*

25. Mr Lunat asked the claimant whether this was an attempt to gain money from the respondent because implicit in it was a threat and expectation that the company would pay him money. The claimant answered **"no, I just wanted them to say my hours and their hours didn't match so there was no possibility going forward. If you leave a job on your own volition your damned as far as social are concerned".**

26. Mr Lunat then asked the claimant "*had they given you a letter laying you off then none of this would have happened*". He answered *"if it wasn't for my child being at home and me being a single parent I would have got another job. Because my child was at home it was difficult"*. Mr Lunat then asked "*were you looking for the work?" "Yes because they couldn't give me the hours I could work*". Asked again whether the claimant expected a payment to be made. The claimant's answer was "*I only wanted a piece of paper to make sure the benefits would be accepted so it didn't look like I'd walked out of a job of my own volition"*. He was then asked "*so this could all have been avoided if the company had simply said you were laid off*". "*If I'd been given a piece of paper to say that I was no longer required*".

27. Mr Lunat then asked the claimant about the entry at page 243. "You were asking for £12,000 and threatening the company with costs". The claimant's answer was "*no it's not a threat it's me making it clear to Mr Bannon because he wasn't listening"*. Mr Lunat also asked the claimant about the last straw that he relied upon and clarified whether the claimant had any objection to the letter including allegations (1) and (2). The claimant's answer was "*I had not got a problem with discussing why I wasn't at work, why I was on sick and why I hadn't handed in sick notes. None of that was a problem. The only problem was the third element. Even to discuss my sickness absence was not a problem as it would be a way of going forward"*.

28. The claimant also agreed that it was likely his admitted failure to provide any sickness evidence or sick notes would have resulted in his absence from work sine June 2017 being treated as an unauthorised absence resulting in disciplinary action on 23 August 2017 which was likely to be dismissal because of his live final written warning.

29. I asked the claimant to confirm the accuracy of the respondent's note. The claimant's response was to request some time to check it with his transcript. As we were at the end of the first day's hearing I suggested the claimant look at it overnight and come back to me with an answer at the beginning of the second day.

30. On the morning of the second day when I asked the claimant about the note and whether he had checked it with his note he said he hadn't had the time. He said that the transcript he had produced and the respondent's minutes of the hearing did not 'marry up'. When he was taken to his transcript and the notes they did 'marry up'. I asked him again if it was an accurate reflection of what he said at the meeting. His answer was "it is pretty much along the lines I was taking". I asked him whether his comments could have been viewed by the employer as 'threatening'. He agreed that any reasonable person would have viewed the comments as threatening. He said that he was trying to seek a settlement because **he had made up his mind that he wanted to leave the company and he wanted a settlement**. His reference to a 'slam dunk' in the notes was because by 8 June 2017 he believed that his case was watertight because his employer was requiring him to work 48Hours in breach of the Working Time Regulations. His reference to VOSA and working practices was about reporting this issue elsewhere, if the severance money he wanted was not paid.

31. He accepted his contract of employment required him to and he did work more than 48 hours a week with the correct driving/break restrictions in place. That contract had never been varied and was not in breach of the Working Time Regulations because the Road Transport Regulations 2005 applied to the respondent as a road transport business. The claimant then said his only issue was with working 'overnights', however the records produced by the respondent showed he had not worked 'overnights' since September 2016.

32. The claimant then said "*can I give you some clarity as far as the threatening comments are concerned. Those words are not my words word for word*". As a result of the claimant's apparent change in his position on the words used I referred him back to his transcript and asked the claimant to identify the relevant parts that were not his words.

33. We again went to the entries in his transcript which supported the respondent's record at page 243. Only then did the claimant acknowledge and accept he had said those words.

34. He accepted that it was in that context that at the meeting on 2 August Mr Land had made the comment that the claimant would not get a penny out of the company and called him a 'little scrout' which was admitted by Mr Land.

35. With all that evidence in mind and the factual analysis of the case with the claimant I raised my concerns about the claimant's credibility and conduct and his prospects of success in his 'dismissal' complaints.

36. Additionally, before the lunch adjournment the claimant had been asked to clarify the dates when he claimed ESA and when he claimed Job Seekers Allowance. After the adjournment despite my repeating the same question several times the claimant did not give a straight answer to the question. He was deliberately being evasive in his answer. He told me he went to see the Department of Work and Pensions after 21 November 2016 in order to claim ESA which is a benefit you can claim for 13 weeks if are you employed and incapable of working due to

sickness. ESA was backdated to 22 November 2016 and was paid for 13 weeks to mid February 2017. The claimant was asked when he claimed JSA. The claimant then provided the date of mid February 2017. His answer then changed and he said actually it was June 2017 and he claimed it for four months from June, July, August and September of 2017. It took a number of attempts of repeatedly ask the claimant the same question to get the answer that I did.

37. The claimant was not being truthful, when he told his employer on 2 August 2017 that he was still sick after June 2017 and claiming ESA, when in fact he had been claiming Job Seekers Allowance from June 2017.That was the reason he was not providing fit notes to his employer. His evidence to me was also untruthful when he said he was supplying fit notes to the Department of Work and Pension for his ESA claim in June 2017.

38. When I asked the claimant how on the one hand he was alleging that he was treating himself as being employed by the respondent from June 2017 when he was at the same time, claiming Job Seekers Allowance and presenting himself as being 'unemployed' and actively seeking work. His response was "***but that's how the system works. You have to claim the benefit to get it"***.

39. There was also an inconsistency between the claimant alleging breach of trust and confidence (see 4.4) because his employer was asking him to supply fit notes from June 2017 when they knew he was claiming ESA, when the real reason why he could not provide fit notes to his employer was because he was not sick but was claiming JSA.

40. The claimant was deliberately misleading his employer, deliberately misleading the benefits agency and deliberately misleading the tribunal.

41. At this point in the hearing I clarified with the claimant the evidence he was presenting to me which was that he had claimed and obtained JSA from June to September 2017. He resigned on 11 August 2017 at a time when he was presenting himself for the purposes of his Job Seekers Allowance claim as unemployed and actively looking for work. At the same time from 13 June 2017 he was untruthfully presenting himself to his employers and to this tribunal as somebody who was signed off as sick and unfit for work and was unable to provide fit notes because they were being sent to support a claim for ESA. He was also trying to extract a severance payment from his employer in June 2017 by threatening these tribunal proceedings. The claimant confirmed that was an accurate summary.

<u>Strike Out</u>

42. In those circumstances, Mr Lunat made a second application to strike out the claimant's claim on the grounds it had no reasonable prospects of success and the claimant's unreasonable conduct of these proceedings. The claimant objected to the strike out.

43. I considered the case of **Kaur –v- Leeds Teaching Hospitals NHS Trust** where an employment judge struck out a constructive dismissal complaint at a preliminary hearing, without hearing witness evidence. That case was also about a last straw relating to the disciplinary process followed by an employer. In that case the Court of Appeal at paragraph 76 of the judgement points out that it is established that an employment tribunal ought to be very slow to strike out a claim where there are disputed issues and evidence which may come out differently at a hearing. Here the final straw relied upon was the respondent

'fabricating' an allegation relating to the claimants conduct which on the claimant's documentary and oral evidence was untrue. The claimant agreed the allegation was about his walking out of a meeting where he was reasonably being asked questions about his absence. The respondent was 'entitled' in those circumstances to send a letter inviting the claimant to a disciplinary hearing to investigate his alleged misconduct. That last act the claimant relied upon was entirely innocuous and was the reasonable action of an employer trying to get to the bottom of a lengthy, unexplained, and potentially unauthorised period of absence, by discussing it with the employee at a disciplinary hearing.

44. I was also persuaded that the claimant's conduct of these proceedings was unreasonable and his motive in bringing these proceedings (as he clearly states in June 2017) was to extract money from the respondent. This was before any of the events in August 2017, he relies upon had happened.

45. By June 2017, he had made his mind up he was not going back to work and had claimed JSA from then until (as he tells me) September 2017. He has deliberately misled the respondent, the benefits agency, and this tribunal.

46. I deliberately gave the claimant 'thinking' time before he answered questions which clearly went to his credibility so he could appreciate the importance of his answers. It is unfortunate he did not use that thinking time to provide a truthful account to the tribunal.

47. Mr Lunat had asked me to consider the respondent's costs and time, with senior managers, out of the business unnecessarily, when the factual analysis was agreed with the claimant, who had the burden to prove dismissal.

48. I did consider whether having another day of hearing was appropriate, but given where we were by the second day and the agreed factual analysis I decided against that because I was satisfied by this point the claims of unfair dismissal had no reasonable prospects of success.

49. Having regard to the overriding interests, the need to do justice to both parties and the need to also consider saving expense not just for the parties but for the tribunal as well, I decided that in accordance with rule 37, the unfair dismissal complaints should be struck out.

50. The claimant then asked me to proceed to determine the holiday pay complaint which I agreed should proceed. (Mr Lunat had no objections). I asked the claimant to ask Mr Bannon questions about the holiday pay claim referenced at paragraph 46 of his witness statement and to put to Mr Bannon his calculations of the holiday pay to explain when why and how there was a shortfall.

51. Mr Bannon's evidence was that the holiday pay was correctly calculated based on a 12 week average of the hours worked in that holiday pay reference period to include overtime worked and any regular supplements. His evidence was supported by the wage slips. The claimant was unable to put to Mr Bannon any specific calculations for any specific pay reference period for holiday pay to present an alternative calculation based on the actual hours worked /pay received in the relevant reference period. All he could do was present a calculation based on the claimant always working 63 hrs with 18 hour a week regular payment of overtime. Mr Bannon explained by reference to a pay slip how SAGE adjusted the pay reflect the actual pay/hours to give a rate of holiday pay to accurately reflect the previous 12 weeks of earnings. Mr Bannon also confirmed that in relation to the sick pay period having sought advice from ACAS

he asked payroll to go back to the last 'worked' period of 12 weeks so that the claimant did not lose out financially.

52. In light of the fact that the claimant was unable to provide any alternative calculation referable to the actual hours/rate of pay in any holiday pay reference period to support his claim I accepted the respondent's calculation that the claimant had been paid the correct amount of holiday pay. In those circumstances the claimant's claim for holiday pay was not made out and fails.

53. One final point to make is that even if the claim had succeeded no compensation would be payable because I would have made a 100% pokey deduction because there was a 100% chance the claimant would have been dismissed on 23 August for his unauthorised absence as he had been issued with a final written warning on 13 September 2016 which was still live at the time of his dismissal. In the alternative I would have made a 100% deduction to the compensatory and basic award as a result of his culpable and blameworthy conduct which would in my view have contributed to his dismissal to the extent of 100%.

Employment Judge Rogerson

22/06/2018