



EMPLOYMENT TRIBUNALS

Claimant: Mr D Dawkins
Respondent: Phillips Fish Bar Limited t/a Shap Chippy
Heard at: Carlisle **On:** 4 June, 2019
Before: Employment Judge Nicol (sitting alone)

Representation

Claimant: Mr Healy, Counsel
Respondent: Mr Howson, employment law consultant

RESERVED JUDGMENT

After hearing the parties, it is the judgment of the Tribunal that

- 1 the claimant was not dismissed by the respondent for the purposes of the Employment Rights Act, 1996, and his complaint that he was unfairly dismissed is not well founded and is dismissed
- 2 the claimant's complaints that he did not receive the notice pay to which he was entitled and that he did not receive all of the wages to which he was entitled from the respondent are dismissed on withdrawal by the claimant

REASONS

1 This is a complaint by Dalvan Dawkins, the claimant, against Phillips Fish Bar Limited t/a Shap Chippy, (named in the application as Phillips Fishbar t/a Shap Chippy) the respondent, arising from his employment by the respondent as assistant manager. The claimant alleges that, although he resigned, he was unfairly dismissed by the respondent. The claimant's employment with the predecessor of the respondent commenced on 1 April, 2013, and the effective date of termination was 11 October, 2018, when the claimant had been in continuous employment for five complete years. It was not disputed that there had been a transfer of undertaking so that the claimant had continuity of service. The respondent denies that the claimant was dismissed.

2 The claimant withdrew his complaints that he did not receive notice pay and that he did not receive all of the wages to which he was entitled from the respondent.

3 The first issue for the Tribunal to decide is whether the claimant was dismissed for the purposes of the Employment Rights Act, 1996. The Tribunal must decide whether there was a fundamental breach of the claimant's contract of employment, either by a single act or omission or a series of acts or omissions, by the respondent such that the claimant was entitled to treat his contract of employment as having been terminated and whether he resigned in response to that breach. Without prejudice to its denial that the claimant was dismissed, the respondent accepts that, if the Tribunal finds that the claimant was dismissed, the dismissal was unfair. In that event, the Tribunal must decide whether there are factors that might affect the remedy to which the claimant could be entitled and, finally, the appropriate remedy, if any. Because of a lack of time, at the end of this hearing, the Tribunal indicated that it would need time to deliberate so that it could not announce the outcome but, if it found in favour of the claimant, it would give directions for a remedies hearing.

4 The Tribunal heard evidence from the claimant and from Ashley Phillips, director of the respondent, and Jo Hampson, joint owner of the company that previously owned the undertaking, on behalf of the respondent. The witnesses gave their evidence in chief by submitting written statements that were read by the Tribunal at the start of the hearing and, subject to any necessary corrections, confirmed on oath or affirmation at the start of each witness's oral evidence and, as permitted by the Tribunal, answering supplemental questions. The witnesses were cross-examined. The Tribunal had before it a bundle of documents produced by the respondent marked 'Exhibit R1'. Both parties made oral closing submissions. From the evidence that it heard and the documents that it has seen, the Tribunal finds the following facts.

5 The respondent is controlled by Mr A Phillips and Matt Phillips and operates a fish and chip shop at Shap, Cumbria. It acquired the undertaking from Hampkins Limited, which was run by Ms Hampson and Georgina Perkins, and the employees were transferred to the respondent in accordance with the Transfer of Undertakings (Protection of Employment) Regulations, 2006, on about 16 July, 2018.

6 The shop provides hot fish and chips which are prepared and cooked on the premises together with other types of food normally available at such a shop. The food may be eaten in a restaurant on the premises or taken away. About sixteen people were employed in the business.

7 The claimant had worked for the Police and had been an area supervisor for a contract cleaning company. The claimant commenced working at the shop in 2013 on a part time basis helping with the preparation of potatoes. He gradually expanded the functions that he undertook and in 2015 he was appointed as assistant manager. He claims to have been trained in and competent at all aspects of the work at the shop, including fish frying, chip frying, counter work, preparation of raw fish, and till operation, but he preferred working in the restaurant and back of house. However, he did claim that when the respondent took over the undertaking he was a bit 'rusty' on some tasks. He also said that he was effective at managing tables, occupancy, upselling and maintaining a happy atmosphere for diners, many of whom were regulars.

8 When giving oral evidence, the claimant expressed a reluctance to discuss his work record before the respondent took over the undertaking. In his statement the claimant states 'this action is in respect of my employment with [the respondent]...and has no connection with my former employer...'. The Tribunal pointed out to the

claimant that he relied upon continuity of employment to bring these proceedings and that his employment situation had transferred with the undertaking so that he was in the same position as he had been previously.

9 In the bundle are various notes prepared by the previous owners which show a history of problems in managing the claimant. In her statement, Ms Hampson states that 'it seems that [the claimant] is continuing with the conduct that we experienced when we employed him. This includes failing to manage staff, feeling undermined, self-promotion, feeling underpaid and overworked while refusing offers of assistance, time-off and ignoring our repeated requests and indeed demands that he should not come in except when required for work'. Her statement concludes the claimant 'could be quite difficult and challenging to manage and wasn't fully versed in all areas of the business such as food preparation and cooking as he only really wanted to do front of house interacting with customers'.

10 Before and at the time of the transfer of the business, the claimant expressed concerns that the incoming management would make his role redundant when they had acquired all of his experience and operational knowledge. This was denied by the respondent, who indicated that he would always be a necessary part of the operation.

11 The respondent informed the Tribunal that its business plan was to improve the already good reputation of the shop and then expand to a second shop and/or a mobile shop, leaving the claimant to manage the original shop. The claimant was never informed of this.

12 At a meeting on the day that the respondent assumed control of the undertaking, the claimant told the respondent that he was actively looking for alternative employment because he was unhappy with his role and had received an offer of an interview. He produced the job description and confirmation of interview. However, as he now expected the work situation to improve, he would not attend the interview. This was taken at face value by the respondent and the claimant's prospects of success if he had proceeded with the job application were not established.

13 The claimant also informed the respondent that he had a criminal conviction and explained the circumstances. The respondent was not concerned about this and there was no evidence to suggest that this influenced the relationship between the parties.

14 The claimant and other employees completed a questionnaire for the respondent. The claimant asked for

- 14.1 We need one in charge, one deputy please
- 14.2 Can we institute a grievance procedure
- 14.3 A review of opening hours/days
- 14.4 Rota system needs an overhaul/hours allocation
- 14.5 Please can we have consistency – in everything.

15 He also stated that 'my personal concern is that two very capable managers will not need my lesser skill set in my present role'. He further stated in respect of

development and training 'hard to say: I am a sponge love to learn and develop – I would like to refresh my EMT qualification + more management skills – try me I will give it a go'. In respect of job satisfaction, he stated 'much of the time I score 11+ [out of ten] the last four months it is zero – I hope and believe it will improve soon' and in respect of recommending the job 'normally 10 right now 0 zero in future that will improve significantly'.

16 In August, 2018, the claimant was issued with a new contract of employment and his salary was increased substantially. He was also issued with a revised job description that was discussed with him. It sets out various duties, including overseeing cleaning and assisting with employee training.

17 In September, 2018, Mr A Phillips and Mr M Phillips took the claimant and Dawn Keeling, the supervisor, out for a meal to thank them for their assistance with the transition following the transfer of the undertaking. The precise date of this event was in dispute, the claimant suggesting that it took place on 17 September, 2018, and the respondent on 10 September, 2018. The date is significant because the claimant relies on the short gap between the meal and the start of the subsequent events to support his case. On the balance of probability, the Tribunal finds that the meal took place on 10 September, 2018.

18 On 12 September, 2018, the claimant was put on 'meat fryer and chips'. Mr A Phillips found that he had to retrain the claimant on cooking chips. Also, the claimant confused eat-in and takeaway orders.

19 On 13 September, 2018, the claimant was on 'till and pack'. He made mistakes about orders and on several occasions forgot to ask customers if they required salt and vinegar, which was standard practice.

20 On 19 September, 2018, the claimant did not allow another employee to run the restaurant despite being asked on several occasions to do so. When he did finally allow the employee to run the restaurant, he failed to provide support and undertook tasks that kept him out of the restaurant.

21 On 21 September, 2018, the claimant was requested to allow another employee to work in the restaurant but he failed to do so.

22 On various occasions, the claimant had to be asked to stop chatting to customers so that he could take orders from other tables.

23 Since the meal, the claimant's performance had been queried on several occasions and on 21 September, 2018, the claimant was given a letter inviting him to attend a performance review meeting on 24 September, 2018. It was described as 'a formal meeting to discuss your performance and capability, re-outline our expectations and to review options best suited to all moving forward...outcome from this meeting may be a Performance improvement plan or an Action Plan being issued'. It was signed by Mr A Phillips and Mr M Phillips. The Tribunal were satisfied that the respondent was entitled to do this, although it was handled in a heavy handed manner.

24 The claimant construed this as the start of a process which was likely to lead to his dismissal. This was denied by Mr A Phillips and Mr M Phillips on several occasions.

The claimant pressed about this and Mr A Phillips conceded that it could lead to dismissal. The claimant says that this seriously damaged his trust and confidence in the respondent but did nothing about it at this time.

25 The Tribunal was satisfied that the claimant was not open minded about the invitation to attend the meeting and assumed that it had to lead to his dismissal. It was also satisfied that, at this time, it was not the intention of the respondent to dismiss the claimant. However, if the review led to an improvement programme, there were only two possible outcomes, either he improved sufficiently or he risked being dismissed. When pressed by the claimant, the respondent could not deny this. It was confirmed that the claimant was still wanted in the business. However, the claimant was also told that if he did not want to work as the respondent required, attempts would be made to find an alternative role for him.

26 On the two days before the meeting, the claimant worked well on his shifts and was working as expected.

27 At the start of the meeting, Mr A Phillips stated that this was not to be a performance review and apologised for the way the letter was worded. Various issues about the claimant's performance were discussed. It was confirmed that the claimant would not be put on a performance improvement plan but would be given an action plan to assist his development with three responsibility areas and four personal development areas.

28 As a result of this discussion, the claimant was issued with an action plan which set out seven targets. The claimant was asked if there was anything that he wanted to change but the claimant did not challenge any of the targets.

29 The claimant now complains that these were not SMART (Simple, Measurable, Achievable, Realistic and within a proper Timescale) targets but under cross examination accepted that most of them did meet these criteria.

30 The targets set were

- 30.1 Cleaning – to manage, direct and ensure that all cleaning tasks are being completed to a high standard, these jobs may include those not documented in the FSMS
- 30.2 Potatoes – to manage all aspects of the process ranging from ordering to peeling.
- 30.3 Restaurant Training – to be the lead on all restaurant related tasks and activity
- 30.4 Managing own hours – to maintain hours at 40 hours per week with minimal owner intervention
- 30.5 Managing staff hours – to maximise productivity through tasking and setting timescales for staff, e.g. potatoes on open and tasks on closedown

- 30.6 Cross training – to be confident and capable enough to work in all areas of the shop floor operations. To move onto areas which may be struggling to help ‘catch up’, such as packing or meat fryer
- 30.7 Run 1 shift per week – owners to be ‘on call’ or on shift as ‘workers’ 1 shift per week and for you to oversee the whole shift from open to closedown.

31 There were to be reviews after three and then six weeks but it was not indicated what the situation would be if insufficient progress was made.

32 The claimant complains that although he was to be in charge of cleaning, he was not able to control the tools and materials to be used. In reality, changes of equipment were usually only made as a result of requests made by employees, which could include the claimant. The claimant also complains that he was not offered any training to assist him with drafting the cleaning schedule and the use of chemicals. The claimant had experience in the cleaning industry and had worked at the shop for some time. There was not any evidence to suggest that the claimant attempted to make any progress with this target or that he tried to enter into discussion with anyone who may have been able to clarify any uncertainties that he may have had.

33 The amount of potatoes used during a shift will vary depending on the time of day, the season and customer demand. However, the main issue seemed to be that the employee peeling potatoes took roughly the same time to peel the potatoes, whatever the quantity involved. It was hoped that the claimant would tackle this make improvements. There was not any evidence that the claimant made any attempt to progress this target or to discuss it with those involved in potato preparation.

34 The training of restaurant staff was significant because of the need to develop junior staff and to have adequate employees available on busy days to ensure a smooth service. The claimant tended to dominate restaurant work and excluded others from doing it. He complains that two employees that he was asked to train were still at school and that one of them was ‘young for his age’. He also complains that he did not have sufficient time to give training and that he was not always on a shift with the employees to be trained. There was not any evidence to suggest that the claimant had made any effort to progress this target by, for example, delegating part of the function to other experienced employees, developing training plans or asking for shift changes to enable him to work with those to be trained.

35 The claimant worked excess hours because he would come into the shop even when he was not actually needed. The respondent wanted this reduced to his actual hours unless there was agreement for an increase. It would appear from the excuses that the claimant made for not tackling other targets that he may have reduced his unscheduled working.

36 The claimant’s complaint about managing staff hours was that part of the task was to send employees home when not require because, for example, there was a low level of trade. However, trade was unpredictable so that a premature decision to release employees could cause problems later. Also, the claimant did not have control over shift allocation. The claimant did not produce any evidence as to what he did about this target or the steps that he took to try to acquire any additional authority that he considered that he required.

37 Cross training should have been something that the claimant should have been able to demonstrate quickly. If he was genuinely only 'rusty', he could have asked to be put on the relevant tasks but he failed to do so.

38 The Tribunal was satisfied that the claimant was extremely negative about the action plan and, recognising that he had planned holiday and unexpected sickness absence, he did not take any steps to demonstrate that he wanted to succeed.

39 Around this time, the respondent informed the claimant that it was recovering an overpayment equivalent to sixteen hours not worked in July, 2018. The claimant accepted that the respondent was entitled to do this but complains that he worked over seventy hours unpaid overtime, which was not taken into account. These were hours that the claimant was encouraged not to work. The claimant accepted that he was paid a salary and that he was not entitled to overtime payments and had never received any.

40 The claimant was absent from work, with agreement, on 28 and 29 September, 2018, whilst he was moving home.

41 After this, there was a conversation between Mr A Phillips and the claimant. It is clear from this that the claimant did not trust that he was being treated fairly and he was still expecting to fail the targets and to be dismissed. Mr A Phillips tried to explain the process and to give the claimant reassurances but he would not accept them.

42 On 2 October, 2018, the claimant suffered a stomach upset and was then absent from work for 3 days. Obviously, this had not been allowed for in the review process.

43 The claimant was sent his wages together with a letter dated 3 October, 2018, confirming the outcome of the meeting about the action plan. It was stated that this had been an informal meeting.

44 On 28 September, 2018, the claimant had consulted a solicitor about his employment situation. Annexed to his statement is a copy of the attendance note made, presumably, by the legal adviser that he consulted. The final sections of the note have been made illegible, presumably because they contain legal advice. The recorded comments are one-sided and the Tribunal was not satisfied that they represented a true picture of what had been required of the claimant. However, it is recorded that the claimant 'is very confident in all areas of the business and has run the chippy very successfully when the previous owners have been on holiday'. There are also the comments that 'all this is undeliverable in three weeks and any dismissal on the basis of the action plan would be unfair dismissal' and 'this is not about performance management, rather it is about dismissal'. Presumably these were comments by the claimant as they remain legible.

45 The claimant's solicitors wrote to the respondent on 4 October, 2018. In some ways, the letter appears confused. However, it is stated that 'such conduct has inevitably led to a complete breakdown in the relationship of trust and confidence and therefore, should our client be dismissed as a result of this process, we are instructed to issue proceedings in the Tribunal for unfair dismissal and our client will submit evidence that the true cause of dismissal is pique or antagonism on the part of you the

employer'. The only complaints appear to be the holding of the meeting and the production of the action plan. It is not clear what is meant by 'pique or antagonism' that goes beyond a simple decision not to have the claimant as an employee. It is also not clear whether the claimant is waiving any preceding breach of contract and affirming the contract in anticipation of being dismissed.

46 With the letter was a settlement agreement by which the claimant's employment would be terminated on payment to him of a compensation payment equivalent to 39 weeks pay and eight weeks pay in lieu of notice.

47 In response to this letter, by a letter dated 8 October, 2018, the respondent invited the claimant to attend an informal discussion 'before your first shift back following your leave and holiday to clear the air between us and address your concerns'. As an alternative, if the claimant so wished, the meeting would be conducted as a formal grievance meeting at which the claimant could be accompanied by a trade union representative or a colleague. The claimant states that his 'trust and confidence in my employer was damaged such that I did not feel I could believe anything they said in respect of this matter and I was certain it was part of the attempt to dismiss me' so he declined to attend the meeting.

48 The respondent was then on agreed leave in Poland.

49 The respondent used a Whats App facility to communicate between Mr A Phillips, Mr M Phillips, the claimant and one other senior employee. Whilst the claimant was on holiday, he received sixteen messages, some of which he responded to. He claims that he did so for fear of criticism in view of the action plan. The respondent uses this facility as a management tool and it would have been open to the claimant to close access to it or to ignore the messages.

50 On 9 October, 2018, whilst still on holiday, the claimant used the Whats App group to send the respondent a message that he would not be able to attend the meeting. He was then asked why he could not attend and offered the chance to reschedule the meeting.

51 The claimant messaged that he did not want a grievance meeting with the respondent as it was the respondent that he was complaining about.

52 On 10 October, 2018, the claimant reported unfit to work and produced a statement of fitness for work stating that he was unfit due to work related stress and that he would remain unfit until 24 October, 2018. From the copy of the statement, it appears that the doctor did not expect to see the claimant before he returned to work.

53 When the claimant took his fitness statement to the shop, he had a long conversation with Mr A Phillips, who tried to persuade the claimant that he was still required in the business but the claimant would not accept this.

54 However, when asked if he would be back to work on 25 October, 2018, the claimant said that depended on his health and what his doctor said. The claimant was warned that if he did not return on that date, capability proceedings would be commenced and that this could lead to his dismissal.

55 The respondent considered the claimant's continuing absence to be significant to the business. He accounted for about twenty five per cent of the working hours so that his absence put extra pressure on other employees and managing the business.

56 The claimant construed this as a further indication that he was to be dismissed

57 By a letter dated 11 October, 2018, the claimant submitted his resignation with immediate effect. In the letter, which was hand delivered on 12 October, 2018, the claimant set out four reasons for his resignation

57.1 Being invited to a 'performance review meeting' that could result in dismissal although there had not been any previous complaints about him

57.2 Sending 18 messages whilst on holiday

57.3 Being invited to a meeting outside normal working hours

57.4 Being caused stress that resulted in ill-health and being threatened with capability proceedings.

The claimant did not specifically refer to other complaints but stated he would commence these proceedings.

58 By a letter of 15 October, 2018, the respondent accepted the claimant's resignation but also offered him the opportunity to discuss his complaints. The respondent then attempted to proceed with a grievance meeting but the claimant refused to participate.

59 The full contentions of the parties were set out in their closing submissions. The claimant contended that he was constructively dismissed by the respondent and that he was entitled to treat her contract of employment as having been terminated because of fundamental breaches of that contract, particularly in imposing an action plan that he was not able to comply with. The respondent refuted these contentions and denied that it had dismissed the claimant.

60 Section 95 of the Employment Rights Act, 1996, ('the Act') states that

(1) For the purposes of this Part an employee is dismissed if (and, subject to subsection (2) and section 96, only if):

(a) the contract under which he is employed is terminated by the employer (whether with or without notice)

...or

(c) 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.'

61 In a case where the claimant may have been constructively dismissed, the Tribunal must consider whether the actions of the respondent amounted to a

fundamental breach of contract such as would entitle the employee to treat his/her contract of employment as at an end.

62 If the claimant was dismissed, the respondent accepted that the dismissal would have been unfair.

63 The claimant relies on an alleged breach of the implied term of trust and confidence. In this case, it is difficult to see if the claimant ever had trust and confidence in the respondent. It appeared that he was losing faith in the previous owner of the undertaking as can be seen from his responses in the questionnaire even before the transfer took place. Clearly, the previous owners of the undertaking were entitled to transfer the undertaking to the respondent and the claimant was kept informed of what was happening. The respondent confirmed the claimant's employment by issuing him with a new contract of employment, which he accepted. It also increased his salary substantially.

64 It is unfortunate that the claimant was not taken into its confidence by the respondent by indicating its future business plans. However, it was not obliged to do this and it was not known at the time how business would actually develop. Provided the respondent did not breach contracts of employment, it was entitled to change working practices to meet the changed circumstances. The claimant made claims about his performance which were not matched by the views of the previous owner. The Tribunal was satisfied that there was not anything to suggest that Ms Hampson's evidence was anything other than genuine and cross examination of her was limited in nature.

65 A more experienced management team might have handled the meeting about performance better and, for example, conducted it as an appraisal, during which future development was organised. However, the respondent was entitled to take the action that it proposed taking.

66 The claimant had assisted the respondent with the transfer of the undertaking but the respondent was entitled to look at the way the claimant was working and the duties that he was undertaking. In the period between the 'thank you' meal and the invite to the meeting, the claimant's performance led to concerns by the respondent which needed to be addressed. There was not any evidence that the claimant complained about the tasks that he was given or indicated that he was not able to undertake them. Indeed, his evidence was that he was competent to do everything, if a bit 'rusty'. The respondent was entitled to invite the claimant to a meeting to discuss the matter. The status of the meeting was downgraded and the respondent was entitled to put in place an action plan that gave direction to the claimant. There is nothing in the action plan that was outside the claimant's experience and capability. The timescales might seem tight but there was not any evidence that failure to meet all of the targets within six weeks would result in dismissal. If the claimant had been acting in good faith and making some progress, the option was there for further reviews to take place. What was required was for the claimant to work with the respondent to demonstrate that he could do what he was being asked to do and organise matters accordingly. For example, he could delegate some functions, such as training, to other experienced employees and to discuss working alternative shifts to be available when needed to supervise what was going on. The claimant did nothing about this.

67 The first three week review period included days when the claimant had booked holiday and he was absent through ill health on others. This therefore limited the part of the three weeks when he could respond to the action plan. However, even on the days when he was working he did not do or seek to do anything that would demonstrate that he was responding positively to the action plan. In any event, the first review did not take place so the respondent's reaction to the claimant's progress in respect of the action plan was not known.

68 The comments about the claimant's final absence again demonstrate lack of experience on the part of the respondent. However, the lack of an indication of when the claimant would be fit to return was likely to present problems for the respondent given the limited staffing resource and the importance of the claimant's position, particularly in terms of the hours he worked compared to others. The respondent was therefore entitled to consider taking action that might protect its position. Hopefully, the claimant's health would have improved and so dismissal would not have been appropriate.

69 In his claim form, the claimant sets out various matters on which he relies. These are

- 69.1 The commencement of a performance review process in circumstances where there had been no forewarning or any dissatisfaction expressed about his performance, output or quality of work – this is simply not true. There had been complaints that had been raised with the claimant in the preceding days and there were also complaints raised by the previous owner of the undertaking.
- 69.2 Informing him that an outcome of the performance review meeting may be dismissal – this did not apply to the meeting but, if intended to be a reference to the process, this had to be a possible outcome unless the claimant demonstrated that he was responding positively to the action plan and any subsequent action. The respondent was entitled to hold the meeting and to put the action plan in place.
- 69.3 The setting of unachievable and subjective performance-related targets – the targets were achievable and were not subjective. On the claimant's evidence he was already capable of doing what was being required of him but he had failed to demonstrate this.
- 69.4 The conscious decision to require attainment within a wholly unreasonable time frame whilst providing the claimant with no or insufficient training, guidance, support or information – the claimant never indicated that any of this was required. He needed to demonstrate that he was positively responding to the action plan. He never attended a further review meeting to know how the respondent would react to what had or had not been achieved.
- 69.5 Requiring the claimant to attend a meeting during his annual leave – this is not true. He was invited to a meeting on the day of his return to work. It was not inappropriate for the meeting to take place before the start of the

working day. However, the claimant's refusal to attend was met with the option of rescheduling the meeting without any threat of a penalty.

- 69.6 Bombarding him with text messages during his annual leave – this is not true. The messages were on Whats App and to a wider circulation than just the claimant. He was not obliged to take notice of them during his absence.
- 69.7 Seeking repayment of alleged overpayments whilst failing to acknowledge many hours of unpaid overtime – the claimant did not dispute the overpayment and accepted that he was not entitled to overtime so that the respondent had acted within its rights
- 69.8 Failing to provide an independent chair for a grievance meeting – such a meeting was never requested by the claimant
- 69.9 Threatening the claimant with ill-health capability proceedings – the claimant had not indicated when he might be fit to return to work and the respondent was within its rights to indicate that capability proceedings on the ground of ill-health might be appropriate. At this stage, the outcome could not be anticipated.

70 In respect of the fourth reason set out in the claimant's resignation letter, which is the only one not referred to in the paragraph above, the respondent was entitled to ask the claimant to attend a meeting to discuss his performance. It is quite likely that anyone in that position will suffer a degree of stress but the actual effect will depend on the individual and cannot be anticipated. The respondent was not in breach of the claimant's contract of employment in proceeding as it did.

71 The claimant's statement repeats most of the above grounds but also includes 'repeatedly lying to me about the nature and possible outcomes of the process'. The respondent did inform him that the process was not intended to result in dismissal but, under pressure, accepted that it could be an outcome. The claimant had already decided that this was the intended and expected outcome. It has to be recognised that dismissal must be an option if an employee fails to improve performance when required to do so but there is the opportunity to improve and thereby avoid any risk of dismissal. The Tribunal was satisfied that the respondent was expecting the claimant to demonstrate improvement and avoid any risk of dismissal. The claimant failed to attempt to improve to any recognisable extent.

72 It is far from clear when the claimant decided to resign. His comments about his employment whilst the undertaking was owned by the previous owners would suggest that he was on the point of resigning and he was seeking alternative employment. By 28 September, 2018, he was seeking legal advice and this resulted in an offer to terminate his employment on agreed terms. At that time, some of the events about which he complained had not occurred. His main complaint is the way in which the invitation to the meeting about his performance was handled. Although it was handled badly, it was not handled in such a way that the claimant's contract of employment was breached and the respondent was entitled to hold the meeting and produce the action plan. Despite this, from this point on the claimant was expecting his employment to

end. However, the Tribunal was satisfied that at all times the respondent was seeking to improve the claimant's performance with a view to him remaining in the business.

73 The Tribunal finds that the claimant resigned at a time when his situation was unclear in that he had done nothing to demonstrate that he was responding positively to the action plan but, despite this, the respondent had not taken any follow-up action such as holding a review meeting or proceeding to the next stage. The claimant had decided that his employment was being terminated and did nothing to promote his continued employment. Effectively, this was becoming a self-fulfilling prophecy.

74 Taking all of the complaints by the claimant separately and in combination, the Tribunal finds that there had not been a fundamental breach of the claimant's contract of employment so that the claimant was not entitled to resign and treat himself as constructively dismissed.

75 With regard to the implied term of trust and confidence, as indicated above, the Tribunal finds that the respondent was not in breach of the implied term when the claimant resigned. When viewed objectively, the respondent had done nothing that a reasonable employer would not have done. The claimant was not performing as required and remedial action was appropriate. Similarly, the claimant's sickness absence posed problems for the respondent and it was entitled to take steps to manage the situation. The claimant was not entitled to construe the respondent's actions as being contrary to his continued employment status. The respondent may not have followed what might be considered best practice but it had not breached the implied term, either fundamentally or at all.

76 Accordingly, at the time when the claimant resigned, he was not entitled to consider that the respondent had acted in a manner which the claimant could treat as a repudiation of his contract of employment. The Tribunal therefore finds that the claimant was not dismissed by the respondent and that his complaint that he was unfairly dismissed should be dismissed.

Employment Judge Nicol

Date 19 June, 2019

RESERVED JUDGMENT AND REASONS SENT TO
THE PARTIES ON

22 June 2019

FOR THE TRIBUNAL

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