# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Lulat

**Respondent:** Bushell & Meadows Limited

**Heard at:** **Bristol** **On:** **21 and 22 August 2019**

**Before:** **Employment Judge Midgley**

**Representation**
Claimant: Mr Otche, Counsel
Respondent: Mr Margo, Counsel

# JUDGMENT

1. The Claimant's claim of constructive unfair dismissal is not well founded and is dismissed.

# REASONS

1. By a claim form presented on 13 February 2019 the claimant, Mr Lulat, brought a complaint of constructive unfair dismissal against his former employer, the Respondent, alleging a breach of the implied term that his employer would not act in a way likely or calculated to damage or destroy the mutual relationship of trust and confidence between them.

2. The respondent contends that the claimant resigned, that he did so in circumstances where its actions were fair and reasonable and did not individually or cumulatively amount to a breach of contract and thus that there was no dismissal for the purposes of s.95 ERA 1996.

**The Hearing**

3. I was presented with the following documents:

   (a) a list of issues (which had been agreed between the parties' solicitors),

   (b) a cast list and chronology prepared by the respondent,

(c) Statements: for the claimant, Mr Lulat, and for the respondent from: Paul Vedmore, (Production Manager), Mr Broady (Quality Assurance Manager) and Mrs Wansbrough (Commercial Director) of the respondent company.

(d) An agreed bundle of documents (140 pages).

4. At the end of the hearing I received written closing submissions from Mr Margot for the respondent, and a summary of the relevant principles of law relied upon by the claimant from Mr Otche, the claimant's counsel.

5. I heard evidence from all the witnesses who had provided statements. There was a degree of conflict on the evidence. I heard the witnesses give their evidence and observed their demeanour in the witness box.

**The Issues**

6. The list of issues was refined at the start of the hearing with the result that the issues identified and agreed were as follows:-

(a) Did any of the following conduct of the respondent amount to a breach or breaches of the implied term of mutual trust and confidence in the claimant's contract of employment?:

6.a.1. The respondent's handling of the grievance raised by the claimant regarding the conduct of Mr Jason Easthope on 5 March (including any action taken in respect of Mr Easthope)?

6.a.2. The decision to change the working pattern of the claimant from the twilight to the day shift? (Was the decision made because the claimant had raised a grievance on 14 March?)

6.a.3. The content of the back to work proposal made to the claimant in a letter dated 21 December 2018, in particular on the grounds that (a) the proposal consisted of a fundamental change to the nature of the work carried out by the claimant, (b) that it required the claimant to report to Mr Illingworth but to continue to work with Mr Easthope and (c) that the claimant would be isolated and would work alone?

(b) Did the claimant resign in response to any breaches found?

(c) Did the claimant delay too long before resigning, and thus affirm the contract through his conduct?

(d) If the claimant were dismissed by the respondent was the dismissal fair or unfair having regard to section 98(4) ERA 1996?

(e) What compensation is the claimant entitled to if the dismissal were unfair - should any reduction pursuant to section 207A TULR(C)A 1992 be made to any award on the grounds that the claimant unreasonably failed to follow the ACAS code of practice relating to grievance procedures?

**The Background facts**

7. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

8. The respondent is an engineering business that produces precision engineering products to a variety of customers including the medical, aerospace, defence and industrial sectors. The respondent has two main areas of expertise: firstly, precision machined components, and secondly surgical blades and fabrications.

9. The claimant was employed at the respondent's site in Tewkesbury as a machine operator on the twilight shift. The Tewskebury site primarily undertook orders from the aerospace client. The claimant was employed in that role from 30 October 2006 until his resignation on 9 January 2019.

10. Five other employees worked the twilight shift with the claimant; Mr Jason Easthope, was the supervisor on the shift. He was the only supervisor of the twilight shift and consequently if there were problems with the machines during the shift which the employees could not resolve themselves, they would have to raise them with Mr Easthope.

11. The employees who worked in the twilight shift with the claimant were both machine operators and machine setters. The claimant was a skilled machine operator but had not been trained to set the machines. Therefore he required the other employees or supervisors to set his machine so that he could operate it. The machine that the claimant predominantly used was the Harding T42 lathe, although on occasion he would undertake deburring and other work on different machines.

12. Shortly after his appointment in October 2006 the claimant had expressed an interest in being allocated to the twilight shift. The twilight shift hours were 4:30pm until 2:45am. The shift entitled the worker to a 30% premium to their hourly rate (see contract of employment at paragraph 8.4 page 64). The claimant commenced work on the twilight shift on 2 January 2007 (see page 81).

13. The claimant's contract of employment required him to work 39 hours a week and specified that his normal hours of work were 8am to 5pm Monday to Thursday and 8am to 2:30pm on a Friday (see clause 8.2 of the contract employment page 64). The provision to work the twilight shift was set out in clause 8.4 of the contract.

14. By clause 9.1 of the contract an employee could "due to the demands nature of business… be required to carry out different or additional tasks or duties from time to time.' The requirement could include 'a move to another job either temporarily or permanently without reduction in pay except in exceptional circumstances.'

15. In 2007 the number of orders from the aerospace sector was declining. That work was predominantly conducted in the T42 section where the claimant worked. In addition, the respondent had purchased three new multi-axis Mazax Integrex machines. These enabled the respondent to complete on one machine (and in one operation cycle) the activities that had previously been

produced by four or five machines in 10 or 12 operations. The consequence of both of those matters was that the work that was required to be conducted by the twilight shift for those operating the T42 machines was reducing to the level that it was no longer operationally economic to undertake.

16. The claimant accepted in cross examination that he was aware both of the decline in the work and of the purchase and use of the new machines. He was not aware (until the point discussed later in this judgement) that the impact of those matters was that his role on the nightshift was no longer required.

17. On 5 March 2018 following a series of discussions and interactions between the claimant and Mr Easthope relating to the breakdown of the various machines to which the claimant had been allocated, the claimant was repeatedly sworn at by Mr Easthope. It is clear, and I accept the claimant's evidence on this point, that the claimant was deeply distressed by the manner in which he was spoken to, but it is right also to record that the claimant accepted (during the investigation meeting that was occurred after the incident) that he had also sworn during the exchange with Mr Easthope.

18. It is of further relevance that it is not uncommon for profanities to be used in the engineering sector indeed, it may be said to be relatively common; I accept Mr Vedmore's evidence to that effect. There is, of course, a distinction between the use of swear words and a tirade that is directed at one individual by another, but it is important to view the incident of 5 March in its proper context.

19. The claimant began a period of sickness absence on 6 March. On 19th March he returned to work and handed to Mr Vedmore a grievance (page 83 to 85). Whilst the grievance identified the claimant's complaints about the conduct of Mr Easthope, it did not identify what action the claimant required to be taken to resolve it.

20. On receiving the grievance, Mr Vedmore took the claimant to see Mr Broady. Mr Broady had known the claimant for some 30 years and regarded himself as being on good terms with the claimant (as set out in his witness statement). He immediately suggested that there should be a meeting between himself, Mr Vedmore and the claimant to discuss the contents of his grievance. The claimant agreed to that suggestion, attended the meeting but became visibly distressed during it. As a result, the meeting was drawn to an early conclusion.

21. Prior to the meeting ending, Mr Broady had discussed the contents of the letter with the claimant and asked him what outcome he wished to achieve. The claimant had then become withdrawn and visibly distressed and, Mr Broady having been told by the claimant that he was unwell and had a doctor's appointment arranged for the following day, stopped the meeting and offered to drive the claimant home assuring him he would receive full pay for the day. The claimant preferred to drive himself home.

22. Mr Vedmore and Mr Broady were both credible and honest witnesses. I'm entirely satisfied that their efforts to engage with the claimant to discuss the

grievance on 19 March were genuine, well-meant and were sensitively conducted. There is no suggestion from the claimant to the contrary.

23. The claimant was absent from work until 23 April 2018. A return to work meeting was conducted on his return to work that day (pages 88 to 89). During the meeting Mr Broady proposed that whilst the subject of the grievance was investigated the claimant should work on the day shift (so as to avoid any further contact with Mr Easthope). The claimant did not object to that proposal. The claimant was asked what outcome he wanted from his grievance, the only proposal that he made was that he should receive an apology from Mr Easthope.

24. There is a dispute between the parties as to whether the claimant insisted that that the apology should be a written or a personal apology. I find that the claimant asked for a personal apology for the following reasons:

    (a) Firstly, that is what he says in his witness statement at paragraph 6. He does not there say that he insisted upon a written apology. Indeed, he complains at paragraph 7 that he didn't receive a personal apology but was only given a form by the respondent to sign under duress.

    (b) Secondly, I find that had the claimant asked for a written apology there was every likelihood that Mr Broady and/or Mr Vedmore would have asked Mr Easthope to provide one as part of the resolution of the complaint against him (notwithstanding, as Mr Broady accepted in cross examination, that they had no power to force him to provide one).

25. On 30 April Mr Vedmore and Mr Broady met the claimant again. Mr Easthope was also required to attend. During the meeting Mr Easthope apologised for his actions on 5 March 2018, stating that he was unaware that he had upset the claimant. The claimant accepted the apology and the pair shook hands. During his evidence and/or through the questions put by his counsel, the claimant sought to suggest that the apology was not a sincere one. Whatever form it took, it was accepted by the claimant in front of the two managers and it was reasonable in my view for them to have regarded that as satisfying the claimant's request for a personal apology.

26. At the meeting and in the presence of the claimant Mr Easthope was read a letter advising him that his conduct (using swearwords which he regarded as 'banter' during his conversation with the Claimant) was regarded as unnecessary and offensive, and warning him that disciplinary action could result if it were repeated in the future (page 93). Sections of the letter read as follows:

    '*I'm obliged to inform you that whilst the issue this letter does not form part of any disciplinary process reward, it will be held on file and may be referred to should you commit acts of a similar nature in the future. Due to the seriousness of the allegation one possible outcome could be a summary dismissal from Britain Meadows if it is found that you have committed misconduct as per the company's disciplinary procedures*.'

27. The Claimant should, therefore, have understood that the respondent was taking his complaint against Mr Easthope very seriously, and that if there

were any repetition of Mr Easthope's behaviour it was very likely that formal disciplinary action would result.

28. The respondent has a disciplinary procedure (page 76). Clause 2.3 provides that if an employee's conduct is unsatisfactory, a manager has a discretion to arrange an informal meeting to explain any shortcomings and suggest ways of correcting them in the future. The clause also provides that matters would not be addressed through the formal procedure unless they had first been discussed informally, unless the conduct was sufficiently serious to move immediately to the formal procedure.

29. Mr Vedmore's evidence, which I accept, was that there had been a series of low-level complaints across the workforce in relation to employees' language and conduct (where the line between banter and offensive language had been crossed). The management's usual and preferred approach was to seek to resolve these informally with the individuals involved so that good relations could continue.

30. That is precisely what I find he and Mr Brady sought to do here. Mr Vedmore and Mr Broady informed me, and I accept, that they were exercising that discretion when they decided to follow an informal process which resulted in the meeting at which Mr Easthope was warned about his future conduct. They regarded the letter at page 93 as being a record of that informal process.

31. The claimant accepted the apology and signed a copy of the letter recording the content of the meeting (bundle page 90). In his statement and to an extent in his evidence the claimant sought to suggest that he was forced to sign the statement under duress and/or that he did so without having had an opportunity to read and understand its contents. I cannot accept that suggestion as, in answer to my question, he told me that he understood that his signature on the document represented the end of his grievance against Mr Easthope.

32. Furthermore, the claimant's stance is entirely inconsistent with the letter he wrote on 7 June 2018 (page 96) in which he wrote 'the matter [the grievance] was resolved on 30 April but I was still not allowed back on the original shift, the twilight shift, I was working at the time after the grievance was closed.'

33. In my view that letter demonstrates that in the claimant's mind the grievance had been resolved and closed on 30 April. He makes no reference there or in any other contemporaneous document to his signature having been provided under duress (see for example the minute of the meeting of 19 October (page 101 to 103), or in his account to the occupational health physician (119 to 121) or in the meeting with Mrs Wanbrough (126 and 127).

34. Certainly, Mr Broady and Mr Vedmore considered that the concerns relating to Mr Easthope had therefore been resolved. In my view it was entirely reasonable for them to have formed that view given that the claimant did not suggest the contrary at any point and that, on the face of it, the claimant had signed a letter indicating that that was the case. Indeed, the claimant taken away a copy of the letter and if he was unhappy with its contents then he had

every opportunity to consider it at leisure and to raise his concerns at a later point. He did not do so.

35. The claimant also alleges that he was told that if he signed the letter he would permitted to return to the twilight shift. That account is disputed by Mr Broady and Mr Ventnor and there is no contemporaneous record which supports it. Indeed the letter of 7 June does not make that complaint (see page 96); whilst the claimant did raise a complaint that his move to the day shift was detrimental, he made no reference to any promise that had been made on the 23rd or 30th of April as he alleges.

36. In addition, I have found that Mr Broady and Mr Vedmore are credible and honest witnesses and that they were doing all that they could in a genuine and reasonable way to assist the claimant. There is no basis against that background for them to have sought to secure his agreement under duress, and I note that that allegation was barely put to them in cross examination.

37. On 4 May the claimant was informed that as a result of the reduction in workload the T 42 lathes on the twilight shift and an impending reduction of the day shift staff due to retirement, the respondent had taken the decision to reorganise its workforce to align the company's business needs. He was handed a copy of the letter (page 94 – 95). The letter referred to clauses 8.2 and 8.4 of the claimant's contract of employment, and gave the claimant notice that the 30% premium which was attached to the twilight shift would continue until 25 May 2018 (in effect providing three weeks' notice of the change to the claimant's pay).

38. The Claimant complains that that transfer to the day shift was a breach of the contract of employment and/or was capable of contributing to a series of events which judged cumulatively amounted to a breach of the implied term of mutual trust and confidence.

39. I accept without hesitation that the impact of the shift change upon the claimant was significant was as he describes in his statement. Since 2007 his body clock had become accustomed to the hours of the twilight shift. The claimant therefore struggled to sleep and in consequence suffered from increasing fatigue, exhaustion and loss of concentration.

40. The claimant stated in evidence (it was not in his statement) that on either the 15th or 16th of May sought to raise his concerns with Mr Vedmore in person. The claimant says that Mr Vedmore stated that he was too busy to meet at that point, and the claimant did not pursue his request for a meeting. Mr Vedmore had no recollection of that discussion. It is of importance that those concerns were limited to concerns about the day shift, and did not include any ongoing concerns in relation to the grievance. It seems clear to me that as a consequence the claimant elected to write the letter of 7 June.

41. The claimant did not suggest that Mr Vedmore was in any way being deliberately obstructive, or that his suggestion that he was too busy to meet on the 15th or 16th of May was not genuine. It is quite likely, given the introduction of the new machines and the decline in the aerospace work that led to discussions between Mr Vedmore, Mr Broady and Mr Attwood

(Operations Director), that Mr Vedmore would have been busy at about this time.

42. On 7 June (96) the claimant wrote to Mr Vedmore complaining that he had not adjusted to the day shift working arrangement and it was having a detrimental impact upon his family life, "not to mention the loss of premium to the pay." He therefore requested that he be transferred back to the twilight shift. It was not in dispute between the parties that that letter was not received by Mr Vedmore.

43. In any event, the claimant did not seek to raise his concerns again with Mr Vedmore at any point before he began a further period of sickness absence on 4 September.

44. The claimant's personal circumstances were complicated by a significant and deeply sad diagnosis in respect of his wife which had occurred sometime in the period prior to 19 October (there is reference to this in paragraph 9 of the minutes of the meeting of 19 October (see page 102)). Although this was not referred to in oral evidence nor indeed addressed by the claimant in his statement, I have no doubt that it had a significant impact on his mental resilience and may well have served to exacerbate any feelings of vulnerability that he had in respect of a return to the twilight shift with Mr Easthope.

45. The claimant makes no complaints about the respondent's conduct towards him or its contact with him himself during the period between 4 September and 21 December 2018. In my view he is right not to do so. The respondent made reasonable and sympathetic efforts to understand the nature of the claimant's concerns and to resolve them. Those matters are set out in the chronology and included:

    (a) a meeting on 19 October 2018 (101-103) at a neutral venue at which his concerns were discussed,

    (b) obtaining an occupational health report relating to the claimant's health (with the claimant's consent and cooperation) to be discussed at the meetings; the report recommended a return to the twilight shift and arbitration with Mr Easthope (see 119-121);

    (c) a meeting on 29 November 2018 (126-127) to discuss the content of the occupational health report and to listen to the claimant's concerns in light of the matters raised within it;

    (d) a meeting on 12 December 2018 (127) - at the meeting Mrs Wansbrough, following discussions with the Operations Director, Mike Attwood, made a proposal that the claimant could return to work on night shift but would be required to carry out different roles by working in the blade section, undertaking laser marking, press work and deburring. She indicated that the work would be set by Mike Illingworth, who worked on the day shift. Whilst Mr Easthope would remain the supervisor for the twilight shift, it was not anticipated that the claimant would need to have any dealings with him but rather would only do so on rare occasions, for example if there were a fire in the building. The claimant was given time to consider

the proposal, and reassured that any return would be on a phased return basis if required;

(e) allowing the claimant to be represented by his brother during those meetings; and

(f) Providing proposed solutions to the claimant in writing and allowing him time to consider them (following the meeting on 12 December 2018).

46. The respondent's approach to the claimant (through the actions of Mr Vedmore, Mr Attwood and Mrs Wansborough) was at all times sympathetic, collaborative and supportive.

47. The claimant was assured at a sickness absence meeting in October that the respondent would do all that it could to support him and it was in consequence of that meeting that the occupational health report was obtained and provided to the respondent on 19 November.

48. The occupational health report (pages 119 to 121) manifests that the claimant had still not, to his view, achieved a satisfactory resolution to the grievance. However, that does not mean that it was unreasonable for the respondent to have formed the view that the matter had been resolved, for the reasons that I have given.

49. The occupational health report makes specific reference to:

(a) the claimant's concerns that he may be subjected to further verbal abuse from Mr Easthope were he to return to the twilight shift.

(b) the potential need for training in relation to new machines; and

(c) the possibility of arbitration with Mr Easthope as a means of solution to those concerns.

50. Mrs Wansbrough was allocated responsibility for overseeing the claimant's return to work following receipt of the occupational health report. She wrote to the claimant's brother, who was then acting as the point of liaison, on 23 November proposing a meeting to discuss possible solutions. In consequence the claimant met with Mrs Wansbrough and William De Souter (the Director of the Respondent), in the presence of his brother.

51. The claimant gave a history of the matters that had led to his ill-health which included reference to the treatment he had received from Mr Easthope and the circumstances in which he had received a letter by which he indicated that the matter had been resolved. He did not say at that meeting that his view was that the grievance had not been resolved, or indeed that he been forced to sign the letter under duress. He did say that he hadn't been able to take the letter away before he was asked to sign. It was suggested to Mrs Wansbrough that the claimant complained at the meeting that he had been promised a return to the nightshift if he signed the letter. Mrs Wansbrough rejected that suggestion and I find her to be a honest and credible witness in that regard.

52. During the meeting claimant confirmed that he would be able or willing to return to work but only if he were able to return to the nightshift. He expressed concerns about any continuing contact with Mr Easthope, but did not say that he would be unable to return to work unless he was able to avoid any contact in the future with him. It was agreed that a further meeting would take place on 10 December to discuss the next steps.

53. In the event a meeting took place on 12 December by which time Mrs Wansbrough had discussed the matter with the directors to see what proposals could be made. A minute of that meeting and was prepared. The claimant was told that the company would be able to accommodate his request to return to the nightshift and that in so far as it was possible his contact with Mr Easthope would be reduced to the lowest possible level. In order to achieve the latter objective, the claimant would no longer report to Mr East hope, but to Mr Illingworth

54. Mr Illingworth was to be present for the first 30 minutes of the shift and would set the work to be undertaken by the claimant. The work that would be set was intended to be sufficient to last throughout the nightshift and therefore avoid the need for the claimant to have to seek further work from Mr Easthope.

55. The claimant complains that there was still a high degree of possibility, if not probability, that he would need to speak to Mr Easthope because he was the only individual who could assist him if there was a problem with machine. That proposition was put to Mr Broady in cross examination and rejected. Mr Broady gave evidence that any number of the setters who worked on the operation would be able to assist with the machines, and in event in the new work that the claimant was being undertaken were on machines that the Mr Easthope was not trained in or familiar with. I accepted that evidence - it seemed to me that there was no reasonable basis on which the claimant was able to challenge it given his limited knowledge and experience of the new machines.

56. The claimant was told that his return to the twilight shift could be facilitated if he worked in the blade section using the machines undertaking press work, deburring and laser marking.

57. The claimant was not experienced to any great extent in any of those functions. However, the return to the twilight shift would ensure the claimant recovered the 30% twilight shift premium, and would enable the claimant to work as part of a team of three, albeit the particular section upon which he worked would be staffed in the main by him alone, there were others in other departments working on machines within close proximity.

58. The claimant was told that there was still a small risk that he would have to deal with Mr Easthope, but as Mr Easthope was the twilight shift supervisor, that possibility couldn’t be avoided. He was given time to consider the offer.

59. Accordingly, Mrs Wansbrough wrote to the claimant on 21 December setting out the offer so that he could reflect upon it and meet again to discuss it (page 128). Within the letter Mrs Wansbrough clearly explained that the start date could be negotiated between the parties and that a phased return to work

could be offered if needed. In addition, it is plain from the letter that the proposal was only that. It was an offer that could be considered and amended through discussion between the claimant and the respondent. Mrs Wansbrough said

> *"we should continue discussions over the next few months so that we can assess how the proposed arrangement is working for you and if there are any other reasonable changes that we would need to make."*

60. In my view, therefore, it should have been apparent to the claimant that even if he did return to work on the basis of the proposal, further amendments and adjustments could be made as the need was identified, provided that they were reasonable within the business context.

61. The claimant did not meet with Mrs Wansbrough to discuss the proposal but rather wrote a letter of resignation on 9 January 2019 (page 133).

62. The basis of the claimant's resignation was expressed to be because of the treatment he had experienced following the grievance he raised in March 2018. It is clear from the second paragraph of the letter that he still perceived that his move from the twilight shift to the day shift was an act of victimisation because he had raised the grievance. Even during cross-examination the claimant maintained the argument that that was the sole reason for the change to his shift, despite his acceptance of the circumstances which established the business need, in particular the reduction of work.

63. The claimant complains that Mr Easthope had been given the company's full support whereas he had been moved. That allegation was misplaced as Mr Easthope had been warned that any repetition of his behaviour might lead to his summary dismissal, and the nature of that warning had been delivered to him in the presence of the claimant on 30 April 2018.

64. The claimant complained that his health had suffered as a result of working on day shift. As I have found that was a genuine accurate and heartfelt complaint. However, he suggested that that change had been responded to by management that were unconcerned with his concerns and unwilling to show any real support to him. In my view that complaint was ill founded. The respondent had taken genuine and reasonable efforts to seek to resolve the claimant's concerns.

65. The claimant finally complained that he was being punished because he was isolated from all his work colleagues. As I have found above, again, that complaint was ill-conceived; although the claimant would be working alone on his station, there were others working the twilight shift within close proximity to him. When asked, the claimant said that the most significant factors in his resignation were his move to the day shift, and the requirement for him to continue to work with Mr Easthope.

**The Law**

66. Having established the above facts, I now apply the law.

67. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if 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.

68. If the claimant's resignation can be construed to be a dismissal, then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides

"…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and –

(b) shall be determined in accordance with equity and the substantial merits of the case".

69. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27:

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

70. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."

71. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. It need not be the predominant, principal, major or main cause for the resignation.

72. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA:

> "The following basic propositions of law can be derived from the authorities:
>
> The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761.
>
> It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".

73. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.

74. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".

75. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as:

    (a) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied;

    (b) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed;

    (c) It is open to the employer to show that such dismissal was for a potentially fair reason;

    (d) If he does so, it will be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."

76. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then

the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465).

77. In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA). The final act must be more than merely innocuous.

78. The judgment of Dyson LJ in Omilaju has recently been endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust. Having reviewed the case law on the "last straw" doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee.

79. Contractual Discretion

80. The manner in which an employer exercises an express contract right may still constitute a breach of the implied term of mutual trust and confidence (United Bank Ltd v Akhtar [1989] IRLR 507, EAT para 50)

81. If the claimant is objecting to the manner in which the employer exercised a discretion under the contract (to the claimant's detriment), it is not enough for the claimant to argue that the decision was unreasonable; he or she must show that it was irrational under the administrative law Wednesbury principles, which is a much harder test to satisfy; the rationale for this is to restrict the judge to consideration of the process adopted by the employer, rather than re-making the decision judicially (see Braganza v BP Shipping Ltd [2015] UKSC 17)

82. In IBM Holdings Ltd v Dalgleish [2017] EWCA Civ 1212 the Court of Appeal extended this principle to applications of the implied term relating to trust and confidence. If the alleged breach of the terms arises from generally bad behaviour by the employer, then the normal rules apply. However, if the term is being used to attack what is fundamentally an exercise of the discretion given to the employer by the contract of employment, the claimant must establish Wednesbury unreasonableness/irrationality as mandated by Braganza.

**Decision**.

83. I then turn to consider whether the respondent's conduct amounted to a breach of the implied term of mutual trust and confidence. I address each of the alleged breaches in turn:-

The handling of the claimant's grievance.

84. For the reasons set out above in my findings, I have found that the respondent's conduct in investigating and resolving the claimant's grievance was reasonable.

85. In particular, the respondent sought the claimant's input as to how best his complaints could be resolved and secured the personal apology that the claimant had requested from Mr Easthope. In addition it had taken reasonable action to prevent any recurrence of Mr Easthope's conduct by providing him with an informal warning recorded in writing, and indeed, in a manner which many employers would not have done, by delivering that warning to Mr Easthhope in the presence of the claimant (his reportee) and in the presence of managers.

86. The claimant was then asked to confirm that he was content with the manner in which the grievance had been resolved and indicated that he was.

87. During the hearing the claimant sought to argue that the respondent breached the implied term because his grievance was not properly addressed on the basis that the respondent did not adopt the formal disciplinary process or subject Mr Easthope to any formal disciplinary sanction.

88. I reject that argument on two grounds:

89. First, the allegation that the respondent failed to follow a formal disciplinary procedure is not an argument which is identified in any intelligible way in the claim form nor is it clearly articulated in the agreed schedule of issues. Indeed, the claimant's complaint about the grievance process as articulated in his witness statement was that he had not received a personal apology, no mention was made of the lack of a formal process of formal sanction. In any event, I find that that complaint is entirely without basis for the reasons I have set out at paragraphs 28 and 29 – the respondent was permitted to and did in fact follow the informal disciplinary process. It did not act perversely in exercising it discretion to do so, and the claimant therefore fails to establish any breach of the implied term as a consequence.

90. Secondly, I find that it was entirely within the ambit of the policy and the discretion afforded to Mr Vedmore and Mr Broady as managers to have conducted an informal process in the circumstances. The factors taken into account in the exercise of that discretion were relevant (namely the prior practice of using the informal process) and were not perverse.

91. In those circumstances the respondent neither acted unreasonably nor did it act in a manner which could have been regarded of itself as amounting to a breach of implied term or indeed as contributing to a cumulative series that resulted in a breach of the term.

    <u>Breaching the claimant's contract and/or acting unreasonably in changing the claimant shift from the twilight shift to the day shift in 4 May 2018</u>.

92. The claimant has to demonstrate that the decision was Wednesbury unreasonable because it consist of the exercise of a contractual discretion which is contained in clauses 8.2, 8.4 and 9.1 of the claimant's contract of employment.

93. There is some issue between the parties as to the proper construction of clause 9.1. Mr Otche for the claimant in effect argues that the clause should be construed so that the term "job" should refer to any move from day shift to nightshift and therefore argues that in moving the claimant from the day shift

to the nightshift and removing his shift allowance in May 2018 in circumstances where the claimant argues that there were no exceptional circumstances, the respondent breached clause 9.1.

94. In my view clause 9.1 cannot be construed in the manner in which the claimant argues. The plain reading of the English language in the clause suggest that the discretion to alter an employee's tasks or duties remains with the employer and is not limited or feted by the requirement to establish exceptional circumstances as is suggested.

95. The discretion is contained in the first sentence of the clause. The second sentence deals with the types of additional tasks and duties that may be required of an employee, including working overtime or a different shift pattern or a requirement to move jobs. Where an employee is required to move jobs (either temporarily or permanently), the clause provides that that will be without reduction of pay except in exceptional circumstances.

96. A distinction is being drawn between a job (which inevitably takes one to cause 3 of the contract 'job title') and a 'shift.' Pay in respect of a shift is to be governed by clause 8.4, the contract provides that pay related to a job (i.e. a specific job role) would not be reduced except in exceptional circumstances.

97. In the present case the claimants job remained unaltered even after the change in shift. He remained a machine operator. The change to his pay was consequent upon the loss of the shift work (although the shift allowance was maintained until 31 May 2018) and was made pursuant to clause 8.4.

98. Mr Vedmore and Mr Brady gave evidence specifying how the aerospace sector work was reducing and, in the instance of Mr Vedmore, how the introduction of the new machines had reduced the number machines that was required for the work and, in consequence number of operators required to use them (as described in paragraph 15 above. I accepted that evidence). It is consistent throughout the documents and the claimant accepted in cross examination that there had been a general reduction in work for the T42 lathes and that the new machines had reduced the amount of work. In answer to my question, he confirmed that he understood that his role on the night shift had not been replaced after his move and the reason for that was because of the impact of the new machines.

99. Those are genuine business reasons, entirely unconnected to the claimant's grievance, for the reallocation of the claimant to the daytime shifts. The decision was therefore made on the basis of relevant factors, did not take into account irrelevant factors and was not therefore perverse or Wednesbury unreasonable. Were the issue to be determined under the Western Excavating principles I would have had serious pause and concerns given that only 3 weeks' notice was provided and there had been no prior consultation with the claimant in circumstances where he had worked on the night shift for 12 years. However, that was not the test to be applied for the reasons I have set out above.

100. The respondent's conduct in reallocating the claimant to the day shift was therefore not perverse or Wednesbury unreasonable, and secondly was not in breach of his contract.

101. In consequence, the respondent's conduct which is the subject of the allegation is not capable of itself of amounting to a breach of the implied term nor of contributing to a cumulative series of events that did.

The handling of the back to work proposal on 21 December 2018.

102. *Requiring the Claimant to undertake work for which he was not trained and in respect of which he was not experienced*. Whilst the proposal contained a change to the work the claimant was to undertake, I accept the evidence of Mr Broady that the respondent's policy was that there should be a three-month training period. Indeed, if the claimant had concerns about his lack of experience or lack of training to undertake the work, those were matters that could and should properly have been discussed with Mrs Wansbrough at a reconvened meeting. The claimant jumped the gun in this regard by resigning because of the concerns that he had.

103. *Reporting to Mr Chillingworth but still being required to work with Mr Easthope*. In the circumstances where the respondent had not taken formal disciplinary action against Mr Eas hope, and I found that that course was reasonable, and within the band of reasonable responses open to an employer, it was not therefore open to the respondent to remove Mr Easthope from his role in order to secure a situation where the claimant no longer had to work with him. Indeed, such a course would be unreasonable in general circumstances where Mr Easthope was an employee of 10 years or more standing, and where the evidence available to me suggested he was the only individual who worked in a supervisory capacity in the nightshift, and therefore there was no readily made alternative to him. Insofar as efforts could be made to mitigate the risk of contact between the claimant and Mr Easthope they were reasonably made.

104. *Working in isolation*. For the reasons set out above, I have found that the claimant would not have been isolated in his work, and indeed these are matters which he could have discussed with Mrs Wansbrough and received the assurances that were necessary. Again, unfortunately for the claimant, he jumped the gun and resigned before that discussion could occur.

105. In respect of this allegation my conclusion is not only that the conduct taken alone did not amount to a breach of the implied term of mutual trust and confidence but further that it was not capable of contributing to a series of events that take cumulatively would amount to a breach of implied term trust and confidence.

**Conclusion**

106. Accordingly, I have found that there was no breach of implied term of mutual trust and confidence.

107. The claimant's claim of constructive unfair dismissal is therefore not well founded and is dismissed.

_____

Employment Judge Midgley

_____

Dated 30 August 2019