EMPLOYMENT TRIBUNALS

Claimant: Mr C Piscopo

Respondent: D Walton Ltd

Heard at: Manchester **On:** 5 and 6 September 2019
5 November 2019
(in Chambers)

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: In person
Respondent: Mr L Bronze, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claim of constructive unfair dismissal fails and is dismissed.

REASONS

1. The claimant by a claim form dated 26 November 2018 brought a claim for constructive unfair dismissal following his resignation on 28 September 2018.

Claimant's Submissions

2. The claimant submitted that the respondent unfairly initiated disciplinary proceedings against him because they were expecting him to do the role of Quality Controller when he was in fact the Workshop Controller, and following some faults with vehicles sought to pin the responsibility for this on him. However, it had never been his job.

3. When the claimant realised that the respondent had predetermined that he would be dismissed for this failure he resigned before the disciplinary hearing took place.

Respondent's Submissions

4. The respondent submitted that the claimant was in charge of ensuring that vehicles that went out of the workshop were fully compliant with all the relevant checks and that he had been doing the Quality Controller job for some time. They had properly investigated the matter and called him to a disciplinary hearing. There was no predetermination of the disciplinary hearing and the claimant had simply resigned because he did not want to face the disciplinary hearing. Accordingly, there was no fundamental breach of contract entitling the claimant to resign and claim constructive unfair dismissal.

5. The respondent argued that if the claimant was constructively dismissed it would have been fair to dismiss for gross misconduct in any event. The respondent further relied on **Polkey** and contributory conduct if the Tribunal found that there was an unfair dismissal.

The Issues

6. The issues in the case were:

(1) Was the claimant dismissed, i.e. –

(a) Was there a fundamental breach of the contract of employment and/or did the respondent breach the so-called trust and confidence term i.e. did it without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant?

(b) If so, did the claimant affirm the contract of employment before resigning?

(c) If not, did the claimant resign in response to the respondent's conduct? (To put it another way, was it a reason for the claimant's resignation: it need not be the reason for the claimant's resignation).

(2) The conduct the claimant relied at tribunal on as breaching the trust and confidence term is:

(a) unjustifiably pursuing disciplinary proceedings against him;

(b) predetermining the outcome of the disciplinary proceedings; in particular the fact the respondent was interviewing for the claimant's job.

(c) the matters raised in his resignation letter

(3) If the claimant was dismissed, what was the principal reason for the dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996?

(4) If so, was the dismissal fair or unfair in accordance with section 98(4) Employment Rights Act 1996 ("ERA")? In particular, did the respondent in all respects act within the band of reasonable responses?

(5) If the claimant was unfairly dismissed and the remedy is compensation:

(a) If the dismissal was procedurally unfair what adjustment if any should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, or been dismissed in time anyway? (See **Polkey v A E Dayton Services Limited [1987]** House of Lords; **Software 2000 Limited v Andrews [2007]**; **W Devis & Sons Limited v Atkins [1997]**).

(b) Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal pursuant to section 122(2) ERA, and if so to what extent?

(c) Did the claimant, by blameworthy or culpable actions, cause or contribute to the dismissal to any extent, and if so by what proportion if at all would it be just and equitable to reduce the amount of any compensatory award pursuant to section 123(6) ERA?

Witnesses

7. For the claimant the Tribunal heard from the claimant himself and from William Graham, valeter and ex employee. For the respondent the Tribunal heard from Jason Gough, General Manager; Danielle Brooks, Admin Officer; and Lisa Sourbutts, HR Consultant. There was an agreed bundle.

Findings of Fact

My findings of fact are as follows

8. The claimant was employed by the respondent from February 2000 initially as a Panel Beater and then as Workshop Controller from September 2016 until his resignation on 28 September 2018.

9. There was a contract of employment signed by the claimant on 2 October 2017 referring to his role as Workshop Controller, with his line manager being Jason Gough. His annual salary was £37,000 a year at that time.

10. The respondent produced a job description and they agreed they had never required the claimant to sign this, it was not usual to require this and also because he was a long-serving employee and very experienced. This included a clause indicating quality control responsibility – it said, "responsible for inspection of vehicle strip, panel and MET quality" and "do a thorough Quality check on the vehicle ensuring all work has been completed satisfactorily in line with QF201 before signing

the vehicle job card to release the vehicle". The claimant said he had never seen the job description. I accept that.

11. On 24 August 2018 a customer brought his car back to the workshop, unhappy with the repairs done and also that a new tyre which had supposedly been fitted had not been fitted. The claimant went to speak to the person responsible for fitting the tyre (JF) and to see where the tyre was. When looking for the tyre he discovered a number of tyres with old job numbers on the mezzanine floor. Concerned that other cars might have left the building without tyres he asked JF to go through them all and make a list of all the tyres with old job numbers. There was a list of nine potentially incorrectly treated vehicles: one was still on site so that could be resolved and the other was a write-off and so was irrelevant. The claimant took his list to the manager, Jason Gough.

12. Mr Gough passed this list over to Derrick Walton, the respondent owner. It was Mr Gough and Mr Walton's view that the responsibility for quality control was part of the remit of the claimant's role. It was highlighted as such on the job description and as far as Mr Gough was aware this was the function the claimant had carried out since he had commenced in his role. He had been paid £37000 a year in recognition of the fact he had taken on this role. He had designed the paperwork he had wanted to do it and would not accept Mr Gough's help. He had asked for assistance and suggested JA could assist with the checking, she was appointed at his request and he raised to further specific issue regarding QC although it was accepted they had been exceptionally busy.

13. The claimant stated that the previous Quality Controller had left and had never been replaced, and at no point had he ever agreed to take on the role of Quality Controller. His own role was simply to do a quick visual check and sign to say in effect he had seen the completed job card. In fact he had complained for a long period about having too much work to do. The claimant said he had raised with Jason Gough that they needed a competent Quality Controller on a number of occasions, however Mr Gough would go on to deny this during the investigatory process.

14. However, I prefer the respondent's version of events particularly as it is implausible the respondent would not have had a quality control function, there was no one else who could conceivably have been undertaking this role, and further the paperwork made clear there was a process. Further it is implausible the claimant was signing the job card for no purpose. If the technician was to be, carte blanche, trusted to do the job and do it to the right standard there would be no need for a signing off process. In addition I accept that the claimant designed the paperwork, particularly as he was evasive in answering questions about this.

15. In respect of the list of tyres, some of the matters resolved themselves but obviously it was a serious issue as driving with unsafe tyres was extremely dangerous. Mr Gough and Mr Walton took the decision to temporarily suspend the claimant and the other worker involved (JF) while they investigated further. Mr Gough said he explained to the claimant face to face what was happening but also gave him a letter on 31 August, stating:

> "Following our meeting of 31 August I am writing to confirm that as of the date of this letter you have been suspended from work until further notice pending investigation into an allegation of gross misconduct regarding new tyres not being fitted to customers' vehicles which could lead to loss of business and has meant vehicles being returned to our customers with safety related issues which could have catastrophic consequences. We reserve the right to change or add to these allegations as appropriate in the light of our investigation. Your suspension does not constitute disciplinary action and does not imply any assumption that you are guilty of misconduct. We will keep the matter under review and we aim to make the period of suspension no longer than is necessary."

16. The claimant was advised that his salary would be paid in the normal way and he was required to cooperate. He could not communicate with any employees.

17. There was an initial investigatory meeting on 11 September with minutes taken by Danielle Brooks. The claimant was asked if he wanted someone with him but he declined. The claimant felt the investigation was unfair and that he was trying to be coaxed into an admission that tyres not being fitted was his responsibility. It is at this meeting that he brought up the fact that he had asked for a competent Quality Controller to be appointed many times, that Mr Gough had denied such a conversation and that he (the claimant) had said "don't dare lie about this". The claimant's view was that the minutes provided were not a true record of everything that was said in the meeting. Key details had been left out or words had been changed, for example it said, "Craig argued" when in fact the claimant had called Mr Gough a "liar".

18. Ms Brooks who took the minutes gave evidence. She said whilst they were not verbatim she believed they were noted accurately. She gave evidence that the claimant had definitely used the word "lynched" as this stuck particularly in her memory. Her handwritten notes accorded with this.

19. According to the respondent's minutes the claimant said that he was not sure whether he had signed off all the jobs. The procedure was that each department would do the work required that was set out on a job card and then at the end of the process it would be returned to the claimant to sign off. In the respondent's view, by signing them off the claimant was confirming that the work had been carried out, so for example they would have expected him to check that if it had been ticked that the tyres had been fitted he would check whether tyres had been fitted, as presumably this was quite an easy matter to ascertain by observation.

20. In the minutes it was recorded that the claimant had queried whether he had signed two of the numbers (134106 and 1339420, because he may have already left for the day. However, the respondent checked this later and they were correct: he had signed them.

21. In relation to 134473 and 134431 the claimant stated that it was his mistake and he had clearly missed them but that other people had made mistakes and did not get suspended. Three other jobs were then referred to: 134690, 133800 and 133652. These were all job cards he had signed off where tyres were required to

have been fitted. The claimant then commented that it was impossible to do "QC" and the work controller's job roles. He felt he was being lynched regarding these. He asked who was doing his job whilst he was on suspension. Mr Gough said himself and "Tom". The claimant then said, "clearly the job cannot be done by one person". Mr Gough's response was that even though both him and Tom were filling in the claimant's job role temporarily they still had to continue with their own job roles within the business. Mr Gough said there were seven jobs that had not been properly completed.

22. The claimant was asked why he had not ensured that that job had been done, and according to the minutes he replied that he put his trust in the technician that was responsible and believed the technician had checked that the job had been done. He should not be held responsible for it. He was asked how many vehicles had left the site without the wheels and tyres being fitted, to which the claimant responded he was too busy to carry out both the QC and the Workshop Controller's job roles "so things will be missed", and also that due to personal things happening in his life at the beginning of the year his mind was not totally on the job. The claimant said he had asked on several occasions for someone to be employed to do the QC job role. Mr Gough said this had been discussed and the claimant had put forward JA's name to be promoted to a role helping with the simpler parts of the QC process. He said that the claimant had never said she was not capable of doing the job.

23. The claimant then said he was being solely blamed even though he had brought the difficulties to his attention, and it was being blown all out of proportion. He should not have been suspended. It was stated that:

> "Craig said the sheer volume of work is too much for one person to fully check off, he would not have taken on the QC job role as the volume of jobs we were doing now compared to what we were doing. He said that with this amount of volume of work we are doing now something was going to be missed and that he could not possibly give full attention to detail as expected."

24. Mr Gough said that:

> "Everyone within the business has had to put extra working hours him to help them with their job roles but Craig hasn't."

25. The claimant said the tyre situation should not just be down to him and JF. Mr Gough said the process was set up between the claimant and JF. The claimant said:

> "JF hides the tyres upstairs and he doesn't know which tyres are for what."

26. The handwritten notes were also produced which were fairly similar to the typed notes. I accept that the minutes were an accurate record of what was said having considered Danielle Brooks' evidence and the inaccuracies raised by the claimant.

27. Mr Gough confirmed that another employee (JA) had been put in to assess the claimant with quality control in April 2018, and there was nothing to suggest the claimant was experiencing any difficulties.

28. On 13 September the claimant was invited to a disciplinary hearing on 17 September. The allegations were as follows:

> "(1) You failed to carry out the appropriate QF201 inspections on the following job numbers, allowing the vehicles to leave the premises without the specified new tyres/wheels having been fitted and therefore were neglectful in carrying out your duties which might have caused unacceptable injury to a customer."

The job numbers were then detailed as follows:

- 133800 – signed off on 17 April 2018
- 133942 – signed off on 20 April 2018
- 134431 – signed off on 5 June 2018
- 134106 – signed off on 18 June 2018
- 134690 – signed on 25 July 2018
- 134473 – signed off on 8 August 2018
- 133654 – signed off on 15 August 2018

29. The second allegation was:

> "You signed the quality checklist for the above jobs indicating that you had carry out these checks and therefore deliberately falsified these records."

30. It went on to say this could amount to gross misconduct and the claimant could be summarily dismissed for the same.

31. An undated statement was provided by Mr Derrick Walton which implied that he had found some new tyres in the valeting area and he asked JF what they were doing there, JF did not know. Whilst Mr Walton was making further enquiries the customer came in on Friday 24 August. Following which three members of staff looked into what had happened including the claimant. The claimant had subsequently given a list of job numbers to Jason Gough and described them as jobs where JF had not fitted the tyre. Mr Walton asked JF to look again and he came forward with three further jobs not on the claimant's list where tyres had not been fitted. Mr Walton said he then looked at who had signed off as completed the jobs listed on then claimant's list.

32. The company employed an outside consultant, Helen Christie, to oversee the disciplinary process and ensure it was objective. They believed she was impartial as she had never been involved with the company before and had never met the

claimant. It was her decision that 3 job numbers were to be removed from the original list for the disciplinary hearing however three more were added.

33. The original date for the disciplinary hearing was postponed as the claimant was on holiday and they rescheduled it for 24 September. The claimant then asked if the hearing could be delayed until the afternoon, which was agreed. The claimant then phoned again and said he would not be attending the hearing as he wanted to see legal advice and the respondent therefore postponed it until 28 September.

34. On 28 September the claimant came into the office and handed in a letter of resignation along with a statement and letter of grievance. The letter of resignation said as follows:

> "Derrick,
>
> I am tending my resignation with immediate effect. After 19 years dedicated service at D Walton's I feel as though I am left with no other choice than to resign from my post as Workshop Controller due to recent events regarding the potential safety of the cars in question in the current investigation. I feel D Walton has failed to provide me with the appropriate training and support needed to run the business effectively and this has consequently led to the current investigation whereby I have been suspended and accused of 'deliberately falsifying' records which could lead to catastrophic consequences of the business. These allegations are completely false and I feel I am being used as a scapegoat for the failings of D Walton to act as a responsible employer.
>
> Furthermore, I have received a phone call from a person not employed by D Walton who asked me the following question, 'have you been sacked by Walton's?' My reply was:
>
> *'clearly you know something I don't as I am merely suspended without prejudice but you are not the first person to say that to me'.*
>
> His reply was, 'My mate told me he's going for an interview for the Workshop Controller position at Walton's. I thought you were the Workshop Controller?' Therefore I believe I have no alternative but to resign in order to maintain my excellent work record even though I feel I have been forced out of a job at a firm I have worked at for 19 years."

35. The claimant accompanied this letter with a grievance running to 2½ pages.

36. Regarding the alleged attempt to recruit to the claimant's post, there was an email trail beginning on 4 February 2019 which started with an email from Jim Monteith at the respondent company to Peter O'Sullivan of Holt Recruitment. This stated as follows:

> "Hi Pete,
>
> During August/September 2018 Derrick contacted you to advise we may need to find a new Workshop Controller. We would like to know:

- When did this happen?
- Do you recall this not being a definite vacancy at that stage more as speculatively seeing who might be in the marketplace?
- What interviews were arranged between mid August and late September in respect of this possible vacancy?
- Did you receive further contact from Derrick late September to confirm the role was then vacant and we were 100% in need of replacement? (For your information the incumbent employee resigned from his employment with us on 28 September 2018)
- If so, what further interviews did you arrange after 28 September 2018?"

37. Mr O'Sullivan replied that:

> "The process started around the beginning of September, approximately 6 September. He stated it was a case of testing the water and a potential vacancy may be arising in the near future. There were four interviews that were scheduled between 10 September 2018 and 23 October 2018. A proposed offer was made to a candidate we put forward on 5 November. Unfortunately he rejected the offer. He confirmed he had received contact from Derrick saying the employee had left and the position needed to be filled. They then arranged two further interviews on 22 and 23 October 2018."

38. It should be noted that the interviews were scheduled before the claimant's investigatory interview but after his suspension. I accept that the agency replied without knowing exactly what the issues were and so their answers should be regarded as truthful in particular because of that context.

39. In relation to the claimant's grievance, the headings of the grievance were:

(1) "Failure to act as a responsible employer" – In relation to this the claimant referred to people asking if he had been sacked because they had heard people were being interviewed for his job.

(2) "Breach of duty of care" – The claimant said no proper investigation had been undertaken. He had been scapegoated by the company for their failure to employ a Quality Controller. That he had repeated the request that this post be filled but that he had been ignored.

(3) "Job Description" – The claimant said this had only been provided after the allegations were raised. He had never seen it and it was not signed.

(4) "Training" – The claimant had never been trained on anything even though he was undertaking completely new duties.

40. The claimant also stated he had never seen QF201 where it stated that an inspection was to be performed by a Quality Controller, currently a competent person, but they did not employ such a person.

41. Minutes dated 11/9/18 – he said that these were wrong as they did not record that he had said it was impossible to do the work controller job and the Quality Controller job at the same time.

42. The claimant said he did not state he was "lynched" nor did he confirm the mistake was his alone.

43. The pointed out that Danielle Brooks was a niece of Mr Walton.

44. The claimant said that when he had signed off a job card the technician had already signed to say that every job required had been done.

45. In regards to JA, the claimant said her job was to check off the valet check sheet rather than the job card.

46. It was not mentioned that he had called Jason Gough a "liar" when he said he had not raised the Quality Controller role after JA had been appointed.

47. The claimant pointed out a number of things that were wrong with the minutes.

48. The claimant referred to a meeting on 28 August 2018 when D Walton and Jason Gough had been sympathetic towards him and that Mr Gough had said, "It's impossible for you to do both jobs" (i.e. the Workshop Controller and unfilled Quality Controller job) and that he had expressed his concerns about the quantity of work and insufficient workforce to complete the jobs to the standard he expected:

> "DW's advice had been to keep my pecker up and they were going to do something about it but nothing happened."

49. It was around the same time that the claimant gave the General Manager a list of job numbers which he had generated himself for investigation following the return of Mr Elliott's car on 24 August. Nobody had raised this with him at the meeting on 28 August. He had uncovered the tyre problem but DW seemed to imply that he had found the problems.

50. There was no evidence of any investigation as none of the technicians had been spoken to to say why they signed off the quality sheets if the tyres had not been done.

51. A further heading was "Failed to carry out appropriate QF201 inspections". The claimant said they had never communicated this document to everyone or heard of it in the 19 years of working for the respondent, but they had referenced it in their letter to him of 13 September; neither had he seen the job description sent to him during the disciplinary process either.

52. As for the heading "Quality Checklist", regarding deliberately falsifying records the claimant said that was unfair and slanderous because the paperwork was completed by the appropriately qualified technician supervisor who signed that they had actually done the work before it was actually referred to him: he merely completed a quick visual check. The claimant emphasised he was not employed as

Quality Controller – his job title is Workshop Controller. The job of Quality Controller to this day remains unfilled and he had been asking for one for two years, particularly as work had grown exponentially in that period.

53. The respondent then instructed an external individual, Lisa Sourbutts from a HR Consultancy to investigate the claimant's grievance with Helen Christie still available to do the disciplinary hearing, which now obviously did not go ahead.

54. The respondent pointed out that JF went through the disciplinary process and he remained employed by the business.

55. Ms Sourbutts did interview Mr Derrick Walton in respect of the claimant's grievance. In this interview Mr Walton stated that there was somebody who used to do quality control who left but the claimant actually wanted to do it: he wanted to be completely in charge, which is why he was given £37,000 a year, and that he did not need training as he had 18 years of experience. After JA was appointed the claimant did not ask for any support again. He denied that at the meeting on 28 August Mr Gough had said it was impossible for him to do both jobs, but they did express sympathy as everybody had been under a lot of pressure given the increase in the number of jobs, and he agreed that he had said "keep your pecker up" because of this. Some of this was recorded in notes but some information only appeared in the outcome letter. The handwritten notes were persuasive in their tone for example DW says ' 2 recruitment companies – if it goes wrong way what do you have. Always said preliminary, will verify in writing. Still not employed'. I find these notes reflected DW's genuine sentiments.

56. The outcome letter was sent to the claimant on 11 October.

57. In relation to the claimant's resignation letter Ms Sourbutts stated that he did not require training after 18 years' service. If he believed the allegations were completely false the disciplinary hearing was a platform to present his case, and she believed his actions were premature. She said Mr Walton had openly admitted that he had contacted two recruitment agencies upon the claimant's suspension as he needed to ensure the business was not left open to risk and he needed the role to be covered. He told both agencies he was in a position that he may need another Workshop Controller but would not know until the internal process was included. He also told the individual who attended an interview that there may not be a role but he wanted to be prepared. Witness statements from both recruitment companies could be provided. The role had still not been filled at the date of her letter. She then turned to the claimant's statement regarding the evidence against him, and he stated that this should have all been presented to the disciplinary hearing and it was unnecessary to interview others as this was about the claimant's responsibilities: separate investigations would have been carried out in respect of any other party that was also deemed responsible. Irrespective of the QF201 document, the claimant knew that by signing the job cards he was signing off that the work had been done to a proper standard. She said, "why would he have been signing off the final inspections for such a long time without saying that this was not his responsibility?".

58. She stated that:

> "DW had advised that approximately three years ago there was an individual in the role but when you were moved into the role of Workshop Controller you wanted responsibility for that too and that was why you were given a £37,000 basic package. You were also given your office in the middle of the base to allow you to focus on your new role."

59. Regarding grievances, Ms Sourbutts referred again to the situation regarding the recruitment agencies. She stated that his queries regarding the investigatory process should have been raised at the disciplinary hearing. She referred to JA being appointed to support him and that he had not complained since then. Further, even if the claimant had not seen the job description, the fact that he signed the quality checklist for years without question with his 18 years' service led her to conclude that he was comfortable with his duties and responsibilities.

60. Again, regarding the claimant challenging the minutes of 11 September, he could have done this in the disciplinary process.

61. Ms Sourbutts upheld the decision to suspend the claimant pending a disciplinary hearing at which he would have had the opportunity to present the evidence that he had given now since resigning.

62. Ms Sourbutts believed the claimant had resigned in haste as he was upset after 18 years' service at going through a formal process for the first time. She understood he had worked under pressure, been a loyal employee and worked to the best of his ability; however, there were potentially life threatening consequences to the mistakes that had been made, including potential corporate manslaughter charges. She found that they had acted in good faith and met their obligations to maintain safety standards to the public, third parties and British standards.

63. Ms Sourbutts submitted her letter to the respondent before it went out and a few alterations were made but only to specific factual matters such as she said that it had cost the respondent £40000 to build the claimant an office but it had only been £4000.

64. Of relevance is that it later became apparent that Mr Gough was responsible for signing off one of the jobs that had been discovered with missing tyres, in evidence to the tribunal he said this was why after the investigatory interview he had had no further involvement with the disciplinary. None of this information was in Mr Gough's witness statement.

65. The claimant obtained a new role on 15 October 2018.

The Law

66. Termination of the contract by an employee can be a dismissal within the Employment Rights Act 1996 if the employee is entitled to terminate because of the employer's conduct.

67. The employer's conduct cannot be simply unreasonable: the employer's conduct must amount to a breach of the contract of employment as set out in

Western Excavating (ECC) Limited v Sharp [1978]. The description in **Western Excavating** was as follows:

> "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 and he terminates the contract by reason of the employer's conduct he is constructively dismissed."

68. The breach of contract includes express and implied terms: the main implied term relied on by employees is the duty of trust and confidence. This is set out most recently in **Malik v The Bank of Credit and Commerce International SA [1997] HL** which says 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."

69. However, as set out in **Leeds Dental Team Limited v Rose [2014] EAT**:

> "The test does not require a Tribunal to make a factual finding as to what the intention of the employer was. The employer's subjective intention is irrelevant. If the employer acts in such a way considered objectively that his conduct is likely to destroy or seriously damage the relationship of trust and confidence then he is taken to have the objective intention spoken of."

70. Conversely, even where an employee subjectively feels that a breach has occurred and hold that opinion genuinely, if on an objective approach there has been no breach the employee's claim will fail (**Omilaju v Waltham Forest London Borough Council [2005] CA**).

71. Fairness in disciplinary sanctions is also a relevant breach of contract issue. In **BBC v Becket [1983]** the EAT accepted that:

> "It can be a breach of contract for an employer to impose a disciplinary sanction which is out of all proportion to the offence. Demotion was far too harsh for the particular misconduct and the employee resigned, the Tribunal finding he was entitled to treat himself as being constructively dismissed."

72. A constructive dismissal claim can also be brought where there is a series of actions ending with a last straw. However, in this case the actions were all quite close together and therefore the last straw issue was not considered to any large extent. For the sake of completeness, in **Kaur v Leeds Teaching Hospitals NHS Trust [2018]** Court of Appeal the claimant relied on her being disciplined as the last straw to various earlier alleged instances of employer misconduct, but it was held on the facts that the employer had acted entirely properly in activating the disciplinary procedure and so that could not constitute a last straw at all.

73. The case law in **Lewis v Motorworld Garages Limited** cited in **Omilaju** and **Kaur** states that:

> "Although the final straw may be relatively insignificant it must not be utterly trivial and the last straw itself need not be a breach of contract, but when taken in conjunction with earlier acts it must amount 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 (i.e. it must not be entirely innocuous).
>
> The employee must resign in response to the repudiatory breach, whether actual or anticipatory, but they cannot rely on anything subsequent to the resignation."

74. The repudiatory breach/breaches need not be the sole cause of the resignation provided they are the effective cause.

75. In **Nottingham County Council v Meikle [2004]** Court of Appeal it was said:

> "The proper approach therefore once the repudiation of the contract by the employer has been established is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to the other action of inactions of the employer not amounting to a breach of contract would vitiate the acceptance of the repudiation. It follows that in the present case it was enough that the employee resigned in response, or at least in part, to a fundamental breach of contract by the employer."

76. In addition, the resignation must be reasonable proximate to the repudiatory breach of contract. That, however, is not a particular issue in this case.

Conclusion

77. The claimant relied on the following as breaches of the implied term of trust and confidence:

(1) The inaccurate minutes which he believed were intentional to make him vulnerable to a dismissal;

(2) That the disciplinary process was unjustified;

(3) That the respondent was seeking to replace him before the disciplinary hearing had taken place.

(4) That the respondent was lying about his being responsible for quality control.

(5) The matters cited in his letter of resignation

78. There is a general issue as to why the claimant resigned as his letter of resignation did not set out all of the matters he now relies on, it does not have to but it is good evidence of why he resigned. Nonetheless many issues were raised in his grievance which I have accepted sets out his concerns.

Disciplinary hearing minutes

79. The claimant relies on these minutes being inaccurate. However, this does not go to the heart of the relevance of the minutes: the heart of the relevance of the minutes is the claimant's acceptance that he was involved in quality control and his acceptance of responsibility for the matters which had gone wrong. The ways in which the claimant challenged the minutes do not affect these matters: he simply says that because the minutes are wrong in some ways they are wrong in relation to this as well. However, having heard from Ms Brooks I am satisfied that the minutes were relatively accurate, particularly in the relevant respects of the claimant admitting QC was his responsibility.

80. The issue to which 'liar' is relevant is whether the claimant had continued to ask for help after the appointment of JA and that Mr Gough's denial of it meant it more likely the claimant would be dismissed in the claimant's view so he saw evidence being skewed to set up his dismissal. He could challenge this through the minutes. I have accepted DB's evidence that the minutes were accurate as to the relevant issues. Accordingly there was no breach of the implied term of trust and confidence.

Whether the dismissal was predetermined

81. The respondent employed an outside firm to consider the disciplinary hearing and someone else separately in respect of the claimant's grievance. The claimant's reason for believing the process was predetermined appeared to be because he learned that the respondent was interviewing for his role and a belief that HR consultants employed by the respondent would be biased. Further the matters referred to in the preceding paragraphs above. The respondent however pointed out that JF was not dismissed. However the claimant did not know at the time he resigned that JF had not been dismissed.

82. Having considered Lisa Sowerbutt's evidence and her response to the claimant's grievance, which was balanced and fair, it appeared to me that it was more likely than not that the disciplinary hearing would be conducted fairly.

83. However what did the claimant know at the time? that Helen Christie was conducting the disciplinary process and hearing. He was advised she was an independent HR consultant. there was no reason for him to assume she would be biased.

84. I find the claimant's grounds for deciding that the disciplinary process would be unfair were flimsy. He knew an outside firm were to conduct it. His attack on the minutes did not detract from some of the statements he made in it. It is more plausible in my view that having seen the minutes the claimant was concerned that he had admitted shortcomings which could lead to his dismissal.

85. It is true that the claimant could have formed the view it was going to be unfair if Jason Gough was going to lie. However, that was a matter for the disciplinary hearing. He would be able to comment upon what Jason Gough had said and bring any evidence in support of his position. It was not going to be held by Mr Walton or

by Jason Gough. He could have mounted a detailed challenge to the minutes through the disciplinary process.

86. I have not made a factual finding that MR Gough was lying when he said that the claimant had not complained since JA had been appointed. There was evidence from Mr Walton that they were all under pressure, that would have come out at a disciplinary hearing. There was insufficient to suggest the employer was in breach of the implied term of trust and confidence.

Contacting the Recruitment Agencies

87. In relation to the recruitment issue, whilst this does look suspicious and the respondent made the error of, to some extent, asking leading questions of the agency when seeking their evidence, Ms Sourbutts makes it clear that Mr Walton was quite open about this process before he ever knew the claimant might bring a claim, as he says that he did go once the claimant was suspended to the recruitment agencies so he was not trying to cover up the fact that he went to the recruitment agencies at an early stage. This is recorded in her notes. Further the agency's evidence was persuasive as they gave a date for the contact and went on to give further details which suggests their information was accurate.

88. Accordingly, I accept the respondent's evidence on this. They had reasonable and proper cause for making these enquiries i.e. they did not want to be left with a long period with no workshop controller/quality controller. To that extent the respondent's intention can be considered in a constructive dismissal claim.

89. The claimant, in my view, jumped the gun. A reasonable person who heard rumours people were being interviewed for his job would challenge the employer about this and ask for an explanation and not simply assume that his was going to be sacked and resign. He would then have been aware of the reasonable and proper cause rather than just assuming the worse.

Letter of resignation

90. The claimant cited in his resignation three reasons for his resignation.

1. Health and safety concerns had been ignored, i.e. by the failure to appoint a quality controller, however I find that the claimant had obtained JA as an assistant and had left matters to lie there. There was no evidence he had raised health and safety concerns anywhere. In addition, it was telling in my view that Mr Walton in his interview with Lisa Sourbutts had agreed to the majority of the claimant's description of the conversation on 28 August (i.e. agreed he had said "keep the pecker up"). He agreed he had said he had been working very hard, however he did not agree that there was any discussion about the need to appoint a Quality Controller.

91. The second reason was training and support. I accept the respondent's position that the claimant did not need any training and that he requested support in the form of an assistant and JA was appointed on his recommendation.

92. Overall, it was reasonable for the respondent to believe that the claimant was in charge of Quality Control and then when signing of the job cards he was signing to

say that he had checked by virtue of inspecting the vehicle that the work had been done. He had devised the documentation which supported this process. There was absolutely no point in him conducting a visual inspection if it was not intended he would pick up on any matters which had not been done or not done to a satisfactory standard. I have accepted the respondent's evidence that the claimant's high salary reflected that that was part of his job as well as Workshop Controller. Further the investigatory interview recorded the claimant agreeing it was his job but that they were now so busy he could not keep up. The fact that the claimant had not seen the job description or QF 201 does not detract from this.

Overall conclusion

93. Accordingly, I find that the respondent has not breached the claimant's contract fundamentally or at all, and consequently his claim of constructive unfair dismissal fails and is dismissed.

Other Issues

94. In view of my finding it is not necessary to make a decision as to whether or not the claimant would have been dismissed in any event or whether he could have been fairly dismissed for his alleged performance failings.

95. Having accepted that the claimant was in charge of quality control and having seen evidence which suggested he had signed off 6/7 cars where is turned out the tyres had not been changed, the respondent clearly had a potential case for dismissal. However, given that it is accepted that Jason Gough had similarly signed a card off without action being taken against him even though this was only one job it still could have had far-reaching consequences. Accordingly if no action was taken against him the claimant may have succeeded in an unfair dismissal claim, had he been dismissed, on the grounds of consistency.

96. Accordingly, I could not find that the claimant would have been fairly dismissed for the matters raised against him in the disciplinary process.

Employment Judge Feeney

Date: 12 November 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

15 November 2019

FOR THE TRIBUNAL OFFICE