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EMPLOYMENT TRIBUNALS

Claimant: **Mr M Okpapi**

Respondent: **ISS Facility Services Ltd**

Heard at: **East London Hearing Centre**

On: **Wednesday to Friday, 11-13 September 2019**

Before: **Employment Judge Prichard**

Representation

Claimant: Ms M Hodgson - counsel, instructed by Judith Maurice Solicitors, Edmonton N9
Mr E Ajaku, legal representative

Respondent: Mr O Tahzib - counsel, instructed by Ms N Philp, solicitor ISS UK Ltd, Weybridge

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that: -

(1) The claimant's claim for constructive unfair dismissal fails and is dismissed. The claimant was not constructively dismissed.

(2) The claim for arrears of pay succeeds in the sum of £1,624.32.

(3) The claim for accrued holiday pay fails and is dismissed. The claimant has been paid his full entitlement.

(4) The claim for overtime pay for 3 days fails and is dismissed. Overtime was not a contractual entitlement for 11 to 13 March 2019.

(5) The claim for notice pay fails and is dismissed. It was dependent on the success of the constructive dismissal claim which has failed.

(6) The claim for race discrimination is dismissed on withdrawal by the claimant.

REASONS

1 The hearing got off to a shaky start. The tribunal could only find one lay member to hear what we still thought was a race discrimination complaint. The respondent was anticipating a race discrimination complaint at this hearing. When they received the claimant's witness statement they found no mention whatsoever of race discrimination so they queried this. Finally, it has only been clarified at the start of the first day of the hearing the claimant is not pursuing a race discrimination complaint any more, and has withdrawn that claim. What was left was therefore the constructive unfair dismissal and the freestanding money claims, all of which could, and should, be heard by a Judge sitting alone.

2 The claimant worked for the respondent, ISS Facilities Services Ltd and its predecessor (Mitie) on this contract, from 31 May to 3 September 2018. He resigned by letter dated 9 August 2018 stating that the 3 September 2018 would be his last day of work.

3 He worked at 1 Churchill Place, the global headquarters of Barclays as a security guard on a salary of £27,000 per annum on a 48-hour week. Typically, he carried out day and/or night shifts 12 hours 4 on 4 off, changing at 7am and 7pm.

4 ISS has a very large contract with Barclays International in 1 Churchill Place. They provide not just security but catering, cleaning, logistics and engineering services. ISS is an international Danish based company. They have a global contract with Barclays in 24 other countries; spend is about £350m globally, £150m in the UK.

5 It is above the usual run of security operations. I have been shown the "daily Roll Calls" for the dates 24 March 2017 and 9 March 2018. Just give an example, the 24 March Roll Call in 2017 mentioned the very recent Westminster Bridge terrorist attack and also highlighted that there may be anti-fracking protesters visiting 1 Churchill Place. There is often photographic ID of people who are seen as possible security threats whom security guards need to report to the security control room if they are seen within the building or nearby. The 9 March report mentioned urban explorers, people scaling buildings at the Marriott nearby, and a man, presumably a customer, who had threatened to take his own life on Barclays premises. He said he had not been repaid money he said was owed. There were also possible bomb threats. At that stage the national threat level for terrorism had been reduced from critical to severe.

6 The claimant's line manager was Mr Dave Gooda who in turn reported to Paul Bowler. Above him was Ray Perotte, UK Corporate Director for ISS Barclays who reported to James Lester who at the time was the Managing Director for ISS Barclays UK. I have heard from all those individuals apart from Mr Bowler. They were all witnesses at this tribunal.

7 On a rough count of heads there were 12 guards approximately on the ground floor at any one time. The layout is that their Security Operations room is at Level minus 2, the Security Control room is at minus 1. Mr Gooda spent most of his working day in the Security Operations room at minus 2. At that level there is the guards' Mess Room, and all the ISS staff lockers.

8 The claimant and the respondent's witnesses agree that about 50% of people coming into the building come in through the swing bridge which is on the west side of the building. About 30% come in through the elevators which are on the south west side, which connects to Canary Wharf, Jubilee Line tube, and 20% enter through the rotating doors which is the main front entrance.

9 In the middle of the floor is an oval shaped reception desk which has 5 or 6 receptionists on it. There are 3 banks of lifts (as not all lifts serve all floors). Each bank has a security guard standing on duty outside the electronic access barriers that lead to the banks of lifts from the main reception floor area.

10 There were 5 or 6 receptionists in the main central reception; then 2 on the Wealth desk, 1 on the Events desk just inside the west swing bridge entrance and 1 on the south-east corner at the Tenants desk access.

11 The claimant did not have a good disciplinary record. As stated above, Barclays faces security threats on an almost daily basis; either personal to Barclays, or more generalised terror threats. The vigilance level is set high. I was shown a succession of site memos, and I have seen rotas.

12 Staff are rostered to different positions every 1 hour of their 12-hour shifts. Once security guards are in their positions, they cannot be relieved unless they have consent from a supervisor or manager. If they need the toilet, they need to notify the Security Control room to be relieved. They have to keep their radios on all the time. They must be at their positions at the time they are due to start in those positions.

13 All staff have 2 paid breaks in the course of a 12-hour shift, so they never work more than 4 hours without a break for the purpose of working time legislation. There is an obvious rule about mobile phones, iPlayers, DVD players, and laptops etc. They are not to be used while on duty regardless of position. All personal bags are to be left in the staff lockers. (The claimant's mobile phone will come relevant in the 9 March 2018 incident described below). If the rules were to be stated in a nutshell, staff have to be smartly presented, punctual and vigilant at all times. The site is open, and covered by security 24/365.

14 Ryan McLaughlin took over the claimant's line management around June 2014. This was long after ISS took over from Mitie in October 2012.

15 On 6 June 2014, Mr Martin, then the Security Control room manager, stated that he had seen the claimant sleeping in the car loading bay. Mr Martin asked why he was not in position at the reception area. Apparently, the claimant flew into a rage so Mr Martin reported this as totally unacceptable behaviour. It was on a night shift. (This was part of a pattern that will emerge in the narrative that the claimant seems capable of flatly denying incidents that have been caught on CCTV, and by photographs. There was a picture of the claimant asleep in the car loading bay in the security cubicle).

16 For lower level and early issues of breach of standards the respondent issues "advice and counselling forms". If it goes beyond that matters will be escalated to formal disciplinary investigation under the respondent's disciplinary policy. This is what

happened to the claimant for the sleeping incident.

17 Mr McLaughlin was the Security Control Room Manager for ISS Barclays. He had an investigation meeting on 17 June, this was recorded on a pro forma investigation meeting template in the presence of a formal note-taker. The claimant completely denied that he was asleep despite the fact his eyes appeared in the photograph to be tight shut. (This was a case where Mr Martin had taken a photograph of the claimant, it was not just a matter of using stills from the CCTV).

18 There was a disciplinary hearing held on 7 July at level minus 2. The charges were:-

18.1 being asleep on 5 June at 23:55;

18.2 not being on position on 6 June at the main reception area at 00:35; and

18.3 total lack of respect for the manager on site.

19 As there was no other witness to the claimant allegedly losing his temper with David Martin, the disciplinary officer, who in this case was Dave Gooda, the Security Operations Manager, did not make a finding but he upheld the other 2 allegations - being asleep and not being in position. He imposed a final written warning dated 15 July 2014 which would remain active for 12 months.

20 The claimant appealed against that warning by letter of 19 July. He made points about "….. data protection, the privacy in electronic communications, EC Directive Amendment Regulations 2011, laid before Parliament 5 May 2011, coming into force 26 May 2011". I only quote that because it has been of a piece with certain submissions made by and on behalf of the claimant later at this hearing. The alleged breach of data protection is the act of taking photographs of him. (There was subsequent photographing of him allegedly using a mobile phone on duty).

21 Later the claimant withdrew his appeal against the final written warning, by notice of 3 August:

> "From all the evidence before me and with the utmost love and respect, I have decided that the security and success of all employees at Barclays and other companies operating at 1 Churchill Place are paramount and are therefore glad this issue closed with immediate effect from today."

22 That final written warning expired despite the fact there was a further misconduct of a very different character when the claimant persistently bothered Chris Stocker, the Scheduler, concerned that he was not getting enough pay and other scheduling issues so much so that Chris Stocker told the claimant to take it up with Ryan McLaughlin, as he could not deal with it.

23 The claimant's response again was to completely deny this. The charge was that on 27 February 2015:

> "Michael, although asked by the Scheduler to see me, continued to badger the Scheduler in reference to his missing pay. Although I sympathise with Michael he must go through the correct channels and not badger other staff who are powerless to help him".

24 The claimant's response, written empathically in capital letters, was: "IT IS A LIE I NEVER FOUGHT ANYBODY OVER MY PAY". A decision was made not to trigger the final written warning on this because it was of a different character and could be seen as relatively low level. It did not relate to a security breach which is the most serious.

25 Two further minor incidents were noted: (1) for his appearance having his hands in his pockets on duty, and (2) wrongly stopping a car when it was on the list issued of authorised car park users. The claimant this time apologised and stated it was due to an oversight. It was the first time this had happened with him and he apologised to the car-user in question. Again, this was not a security breach – the opposite.

26 In April 2016, there was a further incident where the claimant had been spotted reading a magazine leaning against a wall, neither of which is permitted. He was taken to a formal investigation meeting with Mr McLaughlin where he showed him CCTV footage showing that he was reading a magazine for 15 minutes and the claimant completely denied it. He denied knowing that he was not allowed to lean on duty, and stated he was only scanning the magazine in order to read it later on his break.

27 Nonetheless as it involved a security breach, and lack of vigilance, Mr McLaughlin recommended it go forward to a disciplinary hearing. It did, and took place again before Dave Gooda, Security Operations Manager, and the outcome was a first written warning on 5 May 2016. Despite his initial denial of the charge he displayed regret and remorse at that disciplinary hearing otherwise the sanction might have been more severe.

28 Then there was a further incident, less than a year later, in March 2017. This incident had been reported by Ray Peyrotte who is the UK Corporate Director for ISS Barclays, based at 1 Churchill Place. It was Mr Peyrotte's practice to walk around 1 Churchill Place checking that standards were being adhered to across all the services that ISS supplied to Barclays.

29 There had been 2 consecutive days, 23 and 24 March 2017, and it was exactly the same problem both days, the claimant was meant to be on duty at the Events desk, just inside to the left of the west swing bridge entrance. Apparently, the optimum position to stand is where you have visibility of the access barriers to the left, the events reception itself, and then across the main floor, with total all round vision of the swing bridge entrance, the Events desk, and the full floor. On this occasion he found the claimant leaning on the events desk apparently talking to the Events receptionist there called Kasia, laughing and joking. That is what Mr Peyrotte reported. He told the claimant he should be where he could see the west swing bridge, not with his back to it. The claimant had said something about handing back passes that had been handed in, and protested his innocence. Mr Peyrotte told him it was not acceptable.

30 The following day, the claimant was rostered there again and, at almost exactly the same time of day, 17:45 when Mr Peyrotte came down in the lift, he walked round to events reception and noticed that no-one was on the post where the claimant should have been. He was again at events desk chatting to the receptionist and facing away from the west swing bridge entrance. This prompted Mr Peyrotte to send an email to Messrs McLaughlin and Gooda, on 3 April, recommending the incidents be formally

addressed.

31 The claimant was very clearly caught on CCTV, and the stills were included in the tribunal bundle. It was 2 days after the terrorist attack on Westminster Bridge, when there were still known terrorist threats. Guards had to report identified suspects if they entered the buildings. The claimant was shown the CCTV coverage in the course of an investigation meeting with Mr McLaughlin who again recommended it go forward to a disciplinary hearing, which it did, again in front of Dave Gooda.

32 One needs to point out that Mr Peyrotte, from whom the information against the the claimant came, is himself black. The claimant is of black Nigerian origin. Mr Peyrotte is black, of Caribbean origin. The claimant later referred to antagonism between Jamaicans and Nigerians as, coincidentally, it was Mr Peyrotte who is a senior manager, who just happened to have seen the claimant in breach of security on 2 consecutive occasions in March 2017, and then again in 2018 (below). This is how the race discrimination complaint originated although, as stated above, it is no longer pursued here. It was mentioned and developed by the claimant in workplace procedures, both disciplinary and grievance.

33 The upshot of the 2016 disciplinary process was that Dave Gooda issued a final written warning which was due to expire on 4 May 2017. These new incidents were within one year of the first written warning for reading a magazine and leaning on the wall. Mr Gooda's decision to issue the final written warning was that it was conduct of the same character exactly – failure to pay attention whilst on duty – aggravated by the fact that it took place over 2 days when Mr Peyrotte had warned the claimant on the first of those 2 days.

34 The claimant says that following the final written warning in 2016 he never appealed. He stated that Dave Gooda had said to him it would only stay on his file for a year and that he should just forget about it. Dave Gooda at this hearing emphatically denies that accusation and says he would never advise one of his security guards in that way. The guards have a right of appeal and that right is real. They must be allowed to exercise it without being dissuaded or improperly influenced by management. I accept Mr Gooda's evidence. As an apparently professional and conscientious manager, he takes his role seriously. He is responsible for hundreds of staff.

35 The next incident was on 9 March 2018. It was between 1 and 2pm on turnstile 1 which is by the access barriers to the low-rise lift bank on the left-hand side as you look at it from the main front revolving doors. The purpose of that duty is to mind the barriers to ensure that nobody tailgates someone through the barriers. It was a day when there were specific threats on the rollcall which the guards had to look out for, including an individual threatening to take his own life, and another who wanted to bring the media with him.

36 Mr Peyrotte was sure he could see the claimant looking at his mobile phone apparently oblivious to what was going on around him. Mr Peyrotte noticed he was looking at it in a sustained way from the time he was spotted and moved towards him and took 3 photographs without the claimant knowing. He says he took the photographs because he was unsure of the precise position of the CCTV in that area,

and did not know what the coverage would be. The CCTV had turned out to be good for the purpose of the events desk incident the previous year. It turns out it was not so good for this because the only cameras were mounted on the wall of the lift bank, on the far side of the barriers and would only catch the claimant's back. Mr Peyrotte took 3 photographs as he moved towards the claimant. They are grainy because they are digitally zoomed on his phone. But it looked like a black mobile phone in the claimant's hand, from the photographs which had been included in the bundle I was given. The claimant appears to be reading it in the photos.

37 Mr Peyrotte has been clear throughout these proceedings, and I accept his evidence, that the reason he took these photographs specifically was that in the incident of the previous year he had effectively been accused of lying about the claimant's whereabouts despite the clear CCTV evidence of the claimant leaning against the reception desk. He was therefore aware that the claimant was most unlikely to make any admissions.

38 The claimant has made a huge issue in these proceedings of breach of his privacy and data protection by the act of taking a picture of him on a mobile phone. He also, bizarrely, invokes the fact that the public are not allowed to take pictures within 1 Churchill Place. Yet, it was different for Mr Peyrotte. Obviously, he is a senior manager with a works mobile and frequently takes pictures all around the building if he wants to report faults with lifts, leaks, or, on this occasion, staff breaches of security. (Without getting too far ahead of myself I considered that the claimant's argument over privacy and data protection to be hopelessly flawed as I explain below).

39 Mr Peyrotte asked the claimant's line management to take it on. It was not for a manager as senior as Mr Peyrotte to take it on himself. Mr Gooda asked if Mr McLaughlin could once more investigate. He had already been called away on some emergency so he asked Michael Alexander, who was an Access Control Manager, at Barclays. He carried out an investigation. Mr Gooda asked Mr Alexander to look at the CCTV and he noted that on the CCTV footage the claimant had taken out something from his pocket and, seen from the back, he put it away. But he took it out again and then appeared to look at it again for between 1 and 2 minutes before putting it away. Apparently, he had just been looking at it, and not doing much else. There was no conspicuous tapping, as there might be for composing a message.

40 At the stage Mr Alexander had been looking at the CCTV, the claimant was on one of his 1-hour breaks between 2 and 3pm. He was at Level minus 2 in the Mess Room. Mr Alexander asked him to come with him. They had an investigation meeting lasting 20 minutes. The claimant said he had looked at his phone to look at the time. This was a significant thing to say, because later he denied that it was a mobile phone at all. He said he needed his phone to see the time because his watch was not working.

41 He said he was not sure if it was him in the CCTV footage despite the fact that the rota put him there on that position at that time. You can see enough in the background to the photograph to recognise where the claimant was standing. You could see the barriers/turnstiles in the picture. The claimant said he was looking at his phone for 1 or 2 seconds. However, the was shown the same CCTV that Mr Alexander

had reviewed which suggested he was looking at it for 1 – 2 minutes.

42 The notes of that meeting were taken by Chris Stocker referred to above, he was the site Scheduler (to whom the claimant had allegedly made complaints about his pay and other scheduling issues back in 2015).

43 During the course of this hearing and for the first time the claimant has suggested that the handwritten notes of Chris Stocker that are included in the bundle are "forgeries" (sic). Mr Alexander formed the view that the claimant was not being honest again because the CCTV footage shows, even though from a distance, the claimant was looking at the object for between 1 and 2 minutes.

44 The claimant's account of the "phone" varied greatly during the course of proceedings and this hearing, which did nothing for the claimant's credibility. At the end of the meeting on 9 March the claimant was suspended. This was confirmed to him by a later letter on 14 March.

45 Subsequently, Mr Alexander carried out another investigation. The reason for a second investigation was that he contacted Emily Whitehouse-Ford of HR to check that he was doing this the right way. Ms Ford suggested to him that there be an extra investigation in order to check whether the claimant knew about the site rules and just to give the claimant a chance to reflect on his conduct, and another chance to explain himself. So, there was a further investigatory interview on 6 April at 5pm, this time noted by Mark Hall who was another Security Control Room Manager similar to Mr McLaughlin.

46 The claimant was shown the photographs and denied it was him. He denied it was a mobile phone as the picture was not clear. He said he never took his phone out of his pocket. He said he never brought a phone to work, and that it could not have been him holding a mobile phone, because he does not have a phone that works and it had been locked since 2016. Exactly what the claimant meant by "locked" is not clear. He did not seem to me, on questioning him, to know what he meant by it himself. It is certainly not what most people understand by the word "locked" in the context of a mobile phone (linked exclusively to one network). The claimant later suggested the phone was not connected to a network at all.

47 The claimant confirmed in answer to a specific question that he did understand that mobile phone use was not permitted while on duty and that he recalled he had signed the documents stating that he knew it was not permitted – the memorandum referred to above which is clearly signed by him in the bundle. Allegedly, according to Mr Alexander, the claimant started ranting and repeating himself. The meeting became heated, so Mr Alexander brought it to a close. He recommended to Mr Gooda that there was a disciplinary case to answer.

48 It has been a controversy at this hearing as to whether Mr Gooda instructed Mr Alexander to suspend the claimant earlier on 9 March. On balance I find that Mr Gooda, who was very used to this process, asked Mr Alexander to investigate with a view to considering suspension on 9 March. Much was made of the policy that no disciplinary action can take place until full investigation has been done. In this case I consider there was adequate investigation on the 9 March when the suspension took

place.

49 The second investigation meeting on 6 July just strengthened the case against the claimant in that he was now seen to be giving inconsistent explanations and coming nowhere to admitting what seem overwhelmingly likely, given that the photographs show him looking at some device with his head angled to read that device, by the turnstile/barriers for the low-rise lifts, turnstile 1. He told Mr Alexander at the second disciplinary hearing that he had never owned a black phone and he pulled out a white iPhone.

50 The claimant was subsequently invited to a disciplinary hearing on 8 May by letter of 1 May. Subsequently he sent a formal written grievance on 4 May in advance of the scheduled disciplinary hearing.

51 The grievance was drafted by Duncan Lewis Solicitors, Harrow. In it there was the remarkable suggestion that the claimant was not holding a phone at all but a calculator. The claimant was insistent that everyone should see this calculator at this tribunal hearing. Oddly, it is a scientific calculator, with cube roots, tangents cosines and other trigonometrical and algebraic functions, and π. He told the Judge in answer to questions that he has that calculator because he has a BSc in financial economics from Birkbeck University of London and he uses it for "financial engineering" calculations. The calculator is black and looks similar, judging only from the appearance of the photographs, to the object in the claimant's hands there.

52 It was not in the body of that complaint but only later in interview with Ciaran Greaves that the claimant raised the question of race discrimination by Mr Peyrotte. He has developed that allegation against Mr Peyrotte at this hearing saying that Mr Peyrotte was responsible for getting him his final written warning. Mr Peyrotte knew what the 12-month period was, and had been determined to catch the claimant out sometime within the 12-month period to bring about his dismissal. He described in detail the animosity between Jamaicans and Nigerians. He relates it back to the history of slavery.

53 Mr Greaves is a very senior manager. He is the ISS Global Operations Director now providing services to HSBC. Before that, he worked as the Account Director for ISS Barclays contract for Europe and Middle East. As the grievance was against a senior manager, Ray Peyrotte, it had to be conducted by a more senior manager, hence Mr Greaves.

54 For the same reason, (and I asked Ms Ford about this), the disciplinary process was parked pending resolution of the grievance. I said to Ms Ford that was quite kind of the respondent. She said she agreed, and that it would not always be their way, but on this occasion, since the claimant had complained about such a senior manager, it seemed the better course to take.

55 At an investigation hearing before Mr Greaves on 24 May, the claimant added the further allegation that Mr Alexander had grabbed him by the collar when taking him to an investigation hearing. The investigation extended then, to see if there were any witnesses to such an event. It turns out there had been. This occasion was also witnessed by another security guard who had been in the mess room called Kamal

who coincidentally was Nigerian too. She gave a statement to Ms Ford saying that she was not at all aware that Mr Alexander had grabbed him by the collar. That is why that other element of grievance was not upheld. Mr Greaves interviewed Ray Peyrotte and the claimant for the purposes of his hearing.

56 Mr Greaves sent an outcome letter on 31 May upholding none of his complaints. I can take this quite swiftly as there is no longer a complaint of race discrimination. It was anyway a very weak complaint because there were other Nigerian security guards who were not targeted. Furthermore, it is interesting that the earlier photograph that had been taken in 2014 of him asleep in the security hut had been taken by a white individual, and he never mentioned a race complaint then despite his outrage at the breach of privacy / "data protection". He seemed to consider that one person texting that photograph to another person involved "putting the photograph on the internet", which is a weird perception of the normal workings of mobile telephones and IT generally (barring sophisticated hacking which is not suggested here).

57 Following that outcome letter, the claimant appealed. The appeal was heard by James Lester was a witness at the tribunal. He was the Managing Director for ISS Barclays in the UK, at the time of the grievance appeal. The grievance appeal was submitted again from Duncan Lewis. The appeal meeting took place on 5 July. Again, the claimant was unrepresented (Duncan Lewis were not permitted to represent the claimant). The claimant stated that none of his colleagues were prepared to get involved.

58 The only concession Mr Lester made was in relation to the taking of the photograph. The respondent has, in fairness, been more uneasy about it than I was. Mr Greaves said:

> "when the picture was taken and sent it was not deemed to be a breach of data protection because the picture was necessary and in relation to work for internal company processes".

Mr Lester stated:

> "In my view this point is very clear and you were unable to demonstrate that there should be a different view. However, I would not want it to be normal practice for photographs to be taken of any employee and I would raise this with my UK management team."

It is clear that the claimant put forward no evidence for his grievance appeal. It was dismissed.

59 Thus, by letter of 8 August the disciplinary hearing was formally restarted. At this stage the respondent knew the claimant was claiming that it was in fact a scientific calculator and not a mobile phone in his hand. The restart letter again referred to it as a "mobile phone", a point of which much was made at this tribunal hearing. Ms Ford explained, to my mind perfectly satisfactorily, that the grievance process and the disciplinary process were separate processes. The respondent did not want to import evidence from one process into the other process. It was up to the claimant to raise it at a disciplinary hearing if he was about to say that it was not a mobile telephone, as he never raised the calculator point until the grievance meeting, (not even in the grievance letter). It was first raised orally at the grievance hearing with Ciaran Greaves.

60 It cannot be any coincidence that the day after the disciplinary process restarted, on 9 August 2018, the claimant resigned by a letter addressed to James Lester. He made the same complaint about data protection. The focus of his resignation letter was on Ray Peyrotte. The claimant has a way of lapsing into grandiloquent legalese when writing such letters. The resignation letter clearly came from him and not from Duncan Lewis. He attached to it a lot of the disciplinary evidence that had been used against him, including rotas, video stills from the March 2017, incident but oddly none of the photographs relating to the latest incident with the phone / calculator.

61 The resignation letter clearly states that the claimant's last day of employment would be 3 September. Why he chose that date, goodness knows. It is not as if he had another job to go to. He did not, as we have been told.

62 Despite the claimant's resignation, a disciplinary hearing was nonetheless held by Chris Phillips who was not a witness at this tribunal, but he provided a witness statement for the tribunal. The claimant had elected not to attend the disciplinary hearing. Mr Phillips sent a disciplinary outcome letter on 28 August 2018 which contains the important conclusion as follows:

> "However, based on previous investigation minutes on 9 March where MO accepted that he used the phone on duty, on balance I believe this is MO and that he is distracted from his duties whilst on position, whether holding a phone or a calculator…
>
> Furthermore, I do believe MO's honesty and integrity are called into question by the fact that his first 2 investigations had conflicting answers and then today again a further conflicting statement with regards to holding a calculator whilst on duty. This is something I would have wanted to cover further with MO. I have also taken into consideration MO's previous disciplinary records that shows this is not an isolated incident …
>
> I recognise that MO has resigned with notice with his final day of employment being 3 September 2018 also that at the time of the incident on 9 March 2018 MO also had live final written warning on his record. Therefore, on balance my decision would fall to a contractual dismissal but due to 4 working days being left of his notice I have decided to accept his resignation and run on that basis and not formally dismiss due to this."

63 There have been several serious credibility problems for the claimant, other than the ones mentioned above. The claimant stated categorically at this hearing that he had never failed to attend a hearing the respondent. Whatever the reason for it, that is simply not true. There was no need, in the logic of his case, for him to commit to a statement like that.

64 On the disciplinary hearing for the 23 and 24 March incidents (where the claimant was leaning on the events desk chatting to the receptionist), the claimant did not attend. Originally there was a hearing set for 7 April, the claimant asked for a postponement to seek legal advice, the hearing was re-arranged for 24 April and the claimant was also asked to send in amended investigation notes if he challenged them and told him that if he did not attend the re-scheduled meeting a decision would be made in his absence. He simply did not attend. Mr Gooda contacted the Security Control Room to see if the claimant had called in and, having been told that he had not, he went ahead with the hearing in the claimant's absence.

65 The claimant's explanation of this at this hearing was quite extraordinary and impossible to accept. He said that he had been at work on duty in the car park and that if he had left his position in order to attend a scheduled disciplinary hearing he would have been sacked on the spot. That evidence is weird. It is obvious that if the Security Room did not know that he had a scheduled disciplinary hearing to attend that he should have radioed and said that he had a pre-arranged meeting with Dave Gooda to attend. Cover would have been arranged for him to be relieved from car park duty. The claimant left the tribunal with the impression that he simply ducked attending that hearing hoping he might later challenge it by the fact that he had not been relieved from duty (even though he never asked).

66 Other aspects of the claimant's evidence at the hearing were bizarre. The claimant was asked why he had not said to Michael Alexander at the first 2 investigation hearings Mr Alexander conducted that it was a calculator he was holding and not a phone at all. He responded "nobody asked me if it was a calculator". That was a ridiculous statement. That it should have been a calculator was so inherently unlikely, that to suggest somebody should proactively have asked whether it was a calculator is laughable.

67 Very few people carry calculators of that sort in their pockets, particularly at work. His explanation got more convoluted as this tribunal hearing progressed. There was an account about swapping a coat with an agency guard because some of the duty had been out of doors and there was snow on the ground and it was a heavy uniform coat and he had had to remove items from the pockets. He said his own pockets were full, he has his pocket bible, his personal diary and his pockets were completely full which is why he had to have the calculator in his hand. His jacket hip pockets were sewn up to prevent unsightly bulging in the uniform. Only the breast pockets could be used. I repeat this merely to show I was listening. I found the claimant's account nonsense. Further, it served no useful purpose, even on the claimant's own logic.

68 On that evidence I have to decide if the claimant was unfairly constructively dismissed. First, was he constructively dismissed? Did the respondent commit a repudiatory breach of contract? I cannot see anything remotely approaching a breach of contract.

69 Even though the respondent has expressed misgivings about the taking of photographs of the claimant. It was not the first time it had happened. It had happened previously in 2014 in exactly the same context and given that the claimant had a history of denying the undeniable. Nothing much less than a photograph would constitute enough evidence for disciplinary purposes.

Conclusions

70 On the law, the tribunal's task is to decide whether the claimant was constructively unfairly dismissed under s 95(1)(c) of the Employment Rights Act 1996. He is relying upon a breach of the well-known implied term of trust and confidence, (*BCCI v Malik* [1997], IRLR, 462, HL), arising from an alleged succession of breaches of contract.

71 The alleged last straw, if there is one, appears to be re-starting the disciplinary process against the claimant. The case of *London Borough of Waltham Forest v*

Omilaju [2005], ICR, 481, CA is therefore in point here, as is the more recent affirmation of it in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ, 978, CA. The alleged last straw here was amply justified, given the antecedent history. It had been on hold for a long time in order to accommodate the claimant's grievance.

72 There is a high threshold test for causation under s 95(1)(c) of the Employment Rights Act 1996. The employee must be "entitled to terminate without notice by reason of the employer's conduct".

73 Constructive dismissal is judged from the claimant's point of view with the major proviso that that point of view must be objectively reasonable. I consider that the claimant's point of view was palpably not, as should be clear from the descriptions above.

74 Under Section 95(1)(c) of the Employment Rights Act 1996, therefore, the claimant has to be entitled to resign "without notice". (See *Western Excavating (ECC) v Sharp* [1978], IRLR, 27, CA). Constructive dismissal is the mirror image of gross misconduct by the employer, not the employee. Gross misconduct is also defined as a fundamental breach of the contract of employment. Statistically it is a rare thing to find constructive dismissal at this tribunal. This comes nowhere near to that. The employer's conduct towards the claimant was patient and restrained, given his persistent and obvious breaches of security.

75 Mr Tahzib, generously, submitted that the claimant appears to rely on 6 breaches in this case. I accept his analysis for the purposes of my own findings: -

75.1 failure to deal with the claimant's grievance;

75.2 failure to address his complaints regarding loss of pay;

75.3 the respondent suspending the claimant for an unreasonable length of time;

75.4 the respondent inviting the claimant to a disciplinary hearing based on an allegation which they knew was inaccurate (phone not calculator);

75.5 the respondent not informing the claimant if or how using a calculator was a disciplinary offence (calculator not mentioned in the signed memorandum);

75.6 the respondent not subjecting Mr Peyrotte to a disciplinary process for taking a photograph of the claimant.

76 Taking these in turn, the respondent did not fail to deal with the claimant's grievance; they dealt with it comprehensively, at a high management level, and were fully professional, answering every point the claimant raised. Furthermore, the disciplinary process was completely put on hold pending disposal of the claimant's grievance and the grievance appeal. The claimant does not say how the respondent could have done better, (other than the outcome).

77 Regarding the pay query, breach no. 2, this was more complex. When on suspension, the claimant was paid full basic pay. It has been established from the contract that overtime, of which the claimant did much in the past, is not a contractual entitlement. Therefore, he was not entitled to earn averaged out overtime on suspension pay as he might have been in a claim for accrued averaged out holiday pay under EU law. Because he worked 4-on 4-off shifts, his fortnightly payslip total was hardly ever the same. He worked for the A team. When he was off on suspension he was tracked to the A team. Because the suspension had lasted for 6 months from 9 March 2018 to 3 September, the last day worked, the claimant had 6 months' pay due at basic rate.

78 I advised the parties that the most accurate way to analyse this would be a fortnight by fortnight tracking of the A team, to check if, in every 6-month period, he would have half a year's basic pay. This exercise resulted in the partial success of the claimant's arrears of pay claim as above. It depended on the precise incidence of dates when the suspension started (relative to the 4-on / off shift pattern) and when dismissal took effect.

79 However, the basis of this assessment was first suggested by myself. It was never part of the claimant's allegation about underpayment which was a far more extravagant one, and without any legal merit, because he had failed to appreciate the necessary discrepancy in fortnightly payslips that resulted from the 4-on / off pattern and how it meshes in with individual calendar fortnights. His was a completely misconceived contention.

80 The respondent was not in breach of that, but the exercise suggested by me revealed that there was a discrepancy, although way smaller than the claimant was claiming. In that event I do not consider the respondent to be in breach of the term to pay the claimant correctly in any substantial or fundamental way. It was a technicality. The claimant simply failed to understand the basis of his pay periods and put a false case to the respondent, which they rightly resisted, even though there was ultimately an arithmetical discrepancy on a final, and wholly different, analysis.

81 The point of this, for the purpose of constructive dismissal law, is that the actual discrepancy cannot, subjectively, have been the cause for the claimant resigning, because the claimant was claiming far more, on a false basis. If, hypothetically, he had put my analysis to the respondent, they would doubtless have readily agreed, as they have here. The causation for a resignation is one of the indispensable *Western Excavating* criteria for constructive unfair dismissal. This alleged breach therefore fails.

82 Breach number 3 is the respondent suspending the claimant for an unreasonable length of time. I cannot possibly uphold that. The claimant asked for certain delays for his own benefit, but above all, he decided to raise a grievance, they generously decided to take the grievance first, at a high level of management, and to deal with it completely, including an appeal, before re-starting the disciplinary process. This was all to the claimant's benefit. He would have been quick to complain if they had not done so.

83 Allegation 4, about the phone / calculator, is a ridiculous allegation. It is technical, over-literal, and nugatory. Just because the policy states because the signed memo states: "Mobile phones, iPlayers, DVD players and laptops etc. are not to be used

while on duty regardless of position". How that would not include scientific calculators by the use of the word "etc", I do not know.

84 Allegation 5 is just as ridiculous. Holding anything that distracts one and stops one from being vigilant is a disciplinary offence. Mr Gooda apologised to the tribunal for his seeming flippancy when he said: "It could have been a bunch of bananas". The point is the claimant was distracted and not vigilant while on duty.

85 Breach 6 was not subjecting Mr Peyrotte to disciplinary process. This, again, is an absurdly extravagant alleged breach. Mr Peyrotte was not in breach of data protection so far as I can see, nor as Mr Greaves or Mr Lester could see. All his actions were in the course of work, for legitimate (disciplinary) business purposes. The information was treated in confidence. The claimant's image was not "put on the internet" as explained above. It was texted via SMS to local management. Any third party seeing those grainy pictures would not have understood their significance without the context of security, and could hardly have cared less. That whole contention is hyperbole.

86 The claimant has not come anywhere near to establishing a breach of any sort let alone a fundamental breach of his contract of employment, either cumulative or on individual breaches. His claim for constructive dismissal therefore fails.

87 It was accepted by the end of this hearing that the claim for accrued holiday pay must fail because it could be seen that the claimant was paid his full entitlement up to and including 3 September, his chosen termination date.

88 I have dealt with the arrears claim, and how that was worked out over a 6-month period of the claimant's suspension, worked out precisely fortnight by fortnight, and day by day, tracking the A team, the claimant's team.

89 It is clear from the claimant's contract, a Mitie contract, that there was no contractual right to overtime. Overtime pay could therefore not be included in the claimant's suspension pay.

90 For all those reasons the claimant's claims other than the above claim for arrears of pay all fail and are dismissed.

Employment Judge Prichard

Dated: 02 December 2019