



**EMPLOYMENT TRIBUNALS**

**BETWEEN**

**Claimant**  
Mr I Hieron

AND

**Respondent**  
Construction Site Scaffolding  
Limited

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**HELD AT Bristol**

**ON**

**14 and 15 October 2019**

**EMPLOYMENT JUDGE J Bax**

**Representation**

**For the Claimant: Mr I Hieron (in person)**  
**For the Respondent: Ms J Nevins (solicitor)**

**JUDGMENT**

**The claims of unfair dismissal/constructive unfair dismissal and breach of contract are dismissed.**

**REASONS**

1. This was a sad case in which two friends, for over 20 years, ended up before the Tribunal.
2. In this case the Claimant, Mr Hieron, claimed that he had been unfairly or constructively unfairly dismissed and, in the alternative, he brought a claim breach of contract for notice pay. The Respondent contended that the Claimant resigned, that there was no dismissal, and in any event that its actions were fair and reasonable.
3. A Telephone Case Management Preliminary Hearing was conducted by Employment Judge Harper on 11 April 2019 at which the issues were

discussed. In terms of constructive dismissal, it was confirmed that the claim related to an allegation of a breach of the implied term of trust and confidence and the alleged breaches were identified. It also appeared that there might be a dismissal in that it was suggested that the Claimant was told to resign.

4. At the start of the hearing the issues were discussed. The Claimant said that he was forced to resign by reason of the actions of Mr Hawtin. He confirmed that it was his case that he left due to what happened on 6 September 2019 and that this was a fundamental breach of contract or the final straw.
5. In preparation for the final hearing, the Respondent included some text messages at the end of the bundle, which the Claimant in correspondence had complained about. When this issue was discussed at the start of the hearing the Claimant said that he did not object to their inclusion.
6. During the course of the Claimant's evidence he referred to a diary entry he had made. At the end of his evidence the Claimant showed the diary entry to the solicitor for the Respondent and there was no objection to its inclusion in the bundle. The Claimant was recalled so that the Respondent could put some additional questions to him in relation to that diary entry.

### **The evidence**

7. I was provided with witness statements and heard from the Claimant, and Mr Hawtin, the owner of the Respondent company. The Claimant also called two-character witnesses, Mr Carter and Mr Anderson, who also had provided witness statements.
8. I was provided with a bundle of 110 pages, any references in square brackets, in these reasons, are references to page numbers in the bundle.
9. There was a large amount of conflict on the evidence. I heard the witnesses give their evidence and observed their demeanour. Both the Claimant and Mr Hawtin became rather animated when giving evidence and both were inconsistent in aspects of their accounts.
10. The Claimant's character witnesses were not present for the events in question.

### **The facts**

11. 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.

12. The Claimant commenced employment with the Respondent as a booking manager on 4 September 2013. His role involved looking at plans and determining the amount of scaffolding required, providing a tender, negotiating and agreeing a contract. The Claimant worked 3 days per week between 07.30 am and 04.30 pm [p33]. Mr Hawtin was the owner of the Respondent and his role also included the negotiation of contracts.
13. Prior to the commencement of the Claimant's employment he had been friends with Mr Hawtin for about 20 years.
14. The relationship between Mr Hawtin and the Claimant was good and neither party suggested that there were any difficulties before July 2018.
15. It was not disputed that during the summer of 2018 the Claimant had told Mr Hawtin that his partner's hours had changed, and it would cause problems with childcare needs. Mr Hawtin told the Claimant that it was not a problem and the Respondent worked around the Claimant. The Claimant was asked to keep track of any holiday he took or needed.
16. The Respondent had undertaken scaffolding work for Bellway Homes and one of the Respondent's employees had been suspected of theft and the Bellway Homes site manager had banned the employee. Both Mr Hawtin and the Claimant thought that the employee had stolen cash from the site. Mr Hawtin decided not to dismiss the employee on the basis that he thought he could keep an eye on her and that there was no cash in his business.
17. In the lead up to July 2018, the Respondent was asked if it wanted to tender for a Bellway Homes contract at a site in Hanham. Mr Hawtin initially said not to put in a tender. He subsequently changed his mind and the Claimant rushed to put a tender together, during the week of 9 July 2018. The tender was unsuccessful, however the Respondent was unaware of this until after the Claimant returned from holiday on 9 August 2018. The Claimant alleged that after it was discovered that the contract had not been awarded, Mr Hawtin's behaviour towards him changed. This was disputed by Mr Hawtin.
18. There was a telephone conversation between Mr Hawtin and the Claimant, when the Claimant was collecting his son from school. The Claimant's evidence in relation to this issue has been inconsistent. In the claim form [p7] no date was suggested but it was said that he was picking his child. During the Case Management Preliminary Hearing on 15 April 2019 [p29] the Claimant said that Mr Hawtin ranted down the telephone about 3 weeks before his resignation when picking his son up from school. In the grievance

meeting [p76] the Claimant said that he thought the incident was on a Thursday. In his grievance letter [p64] it appeared that he suggested the incident was on a Tuesday. In the Claimant's witness statement at paragraphs 44 to 45 he suggested that it was on about 9 July 2018 and referred to his diary entry [p110]. There was also a text message on Monday 9 July 2018 [p102] in which the Claimant said that he was working in the morning on Bellway and on Thursday and Friday. In his witness statement at paragraph 44 the Claimant said that Mr Hawtin spoke to him in a raised voice and said, 'is that all I'm getting'.

19. Mr Hawtin was not consistent on this issue either. In his witness statement at paragraph 20, Mr Hawtin said this occurred on a Thursday. In his written response to the grievance [p69] he said that he had asked the Claimant to work on a Tuesday and did not know that he would be picking up his son when he telephoned at 1450. In the grievance meeting notes [p84] Mr Hawtin said that he only once telephoned him and asked him to do something and was told rudely that the Claimant was picking his son up. In cross-examination Mr Hawtin was adamant that a telephone conversation occurred on 22 August 2018 about a tender for a Bellway site in Oxford. He also accepted that he spoke to the Claimant in June or July and pointed out that the Claimant had arrived on Monday at 0930 and left at 1430 but had paid him for the day and that he asked him to keep an eye on his hours.
20. Although the Claimant's evidence was confused, on the balance of probability the incident on the telephone occurred in July 2018 during the week of 9 July 2018. It was common ground that the Claimant was picking up his son from school and Mr Hawtin accepts that he spoke to the Claimant about his hours at that time. I accepted Mr Hawtin's evidence about what was discussed and on the balance of probability, Mr Hawtin did not raise his voice or rant down the telephone. The Claimant's evidence was that Mr Hawtin's behaviour changed after the Bellway contract was not awarded. This conversation took place during the tendering process of that contract, i.e. before the Claimant said Mr Hawtin's behaviour changed and therefore this was inconsistent with Mr Hawtin raising his voice or ranting at him.
21. The Claimant's evidence was that the next time he saw Mr Hawtin, he attempted to show him the number of calls he had made on his designated day off, however Mr Hawtin refused to look at them and then Mr Hawtin unilaterally changed his hours. In the grievance interview Mr Hawtin said that the Claimant always worked flexibly [p85] and this was reiterated in his witness statement at paragraphs 11 and 12. Mr Hawtin, in cross-examination, said that following the telephone conversation, the Claimant sent a text message on 16 July stating which days he would be working [p106] and that this evidenced that the Claimant would say when he would work. This was the last working week before the Claimant's holiday. The text message is more consistent with Mr Hawtin's version of events and on

the balance of probability, it is unlikely that Mr Hawtin unilaterally changed the Claimant's hours.

22. On 9 August 2018, it was discovered that the Respondent had been unsuccessful in its tender for the Bellway site in Hanham. The Claimant's evidence was that Mr Hawtin was unhappy about losing the contract and had told him that he should have checked earlier. However, in his grievance letter [p65] the Claimant said that Mr Hawtin had also said that he thought that Bellway's surveyor was being childish, which was inconsistent with Mr Hawtin being critical of the Claimant. Mr Hawtin's evidence was that they were only successful with about half of their tenders and he did not blame him for not succeeding in the Bellway tender. I preferred Mr Hawtin's evidence. On the balance of probability, Mr Hawtin was disappointed not to have succeeded in the Hanham contract, however it was unlikely that he was critical of the Claimant. Mr Hawtin's reference to the Bellway surveyor being childish, tends to suggest that Mr Hawtin was being supportive of the Claimant and contradicts that he was critical. The Claimant subsequently put together a successful tender for a contract at Melksham worth £845,000 to the Respondent, which was its largest ever contract. The Claimant accepted in cross-examination that his effort was appreciated at the time, but that he had said he was not appreciated on 6 September 2018.
23. The Claimant alleged that during the last 2 months of his employment, Mr Hawtin micromanaged him and removed aspects of his role. Mr Hawtin's reply to the grievance said, that nobody was able to do the Claimant's job [p71] and in the grievance meeting he said that the Claimant made the Respondent a lot of money and far more than he could have done [p85]. In cross-examination, the Claimant accepted that he performed his role better than Mr Hawtin had done, before he had started working for the Respondent. He also said that Mr Hawtin was disorganised. The Claimant gave 2 examples of removing aspects of his role.
24. In his witness statement, the Claimant said that his negotiating role was taken away from him (paragraph 52), and in oral evidence suggested that this was on the Melksham contract. No reference to this was made in his grievance letter or interview. In cross-examination it was put that there was no negotiation and the tender was accepted. The Claimant said that he was told to send an e-mail saying that the price would not be dropped. He was then told that the Respondent was the only company that put in a tender. Mr Hawtin gave evidence that negotiating only ever happens when the contractor wanted a cheaper price and that the Claimant would pass it to him so that he could speak to the scaffolding manager to see how much could be taken off. Mr Hawtin also gave evidence that contractors would sometimes contact him and that negotiating was also a part of his role. I accepted Mr Hawtin's evidence on this issue. On the balance of probability Mr Hawtin did not remove part of the Claimant's role with the Melksham

contract. It is more likely than not that the contractor tried to reduce the price and the Claimant referred the matter to Mr Hawtin. Mr Hawtin then told the Claimant to reply and say that the price would not be dropped.

25. In relation to the second example, the Claimant gave evidence that Mr Hawtin put together a tender for Persimmon Homes, on a site in Oxford and was therefore taking his role. The Claimant said that Mr Hawtin knew he was at work. Mr Hawtin's evidence was that the Claimant had been working on the Oxford tender on a Friday and that the tender was due on Tuesday for a meeting on Wednesday (22 August 2018). Mr Hawtin said that the Claimant had been unable to complete the tender on the Friday because the download was not working on the computer and that he was not working on the following Monday to Wednesday. Mr Hawtin's evidence was that he had telephoned the Claimant a number of times for help with the tender. The notes of the Claimant's grievance meeting confirmed that the download was not working on the Friday [p78]. On the balance of probability, Mr Hawtin undertook the tender to ensure that it was submitted in time for the meeting on the basis that the Claimant was not working before it was due. It was unlikely that this was done in order to remove an aspect of the Claimant's role.
26. At the end of August 2018, the Claimant attended Barratt Homes, in order to agree the cost of some extras on a site. When he arrived, Mr Dowden, contract manager, said words to the effect of, 'who is this? I have never seen him before.' Mr Dowden's colleague said that Mr Dowden knew the Claimant, but Mr Dowden replied he had never seen him before. The Claimant gave evidence that he smiled and left. On 30 August 2018 the Claimant telephoned Mr Hawtin and said that Mr Dowden had been rude to him. The Claimant in his grievance letter referred to ignoring a subsequent telephone call from Mr Dowden because he had previously denied knowing him to his face minutes earlier. Whilst cross-examining Mr Hawtin, the Claimant tried to suggest that he had not taken the call because he was driving, which was inconsistent with his grievance letter.
27. On 3 or 4 September 2019, Mr Hawtin received a telephone call from Mr Dowden asking if Barratt's had done anything to upset them and told him that he had made a joke and had said that he did not know the Claimant, because he had not seen him for a while. He said that the Claimant looked him up and down, ignored him and then spoken to someone else.
28. There was a dispute between the parties as to what occurred on 6 September 2018. This was not easy to resolve as it was one word against another and both men provided written accounts shortly afterwards and both gave interviews in the grievance process. There were no other documents from an independent means to assist with this issue. The Claimant was alone with Mr Hawtin in the portacabin office. The Claimant

alleges that Mr Hawtin told him that he had no work for the next day and said that he had been rude to Mr Dowden, a contracts manager from Barratt homes, however he did not want him to speak to him. Mr Hawtin told the Claimant that he did not want him to speak to surveyors or go to sites and that he could not sack him, but it was in the Claimant's best interests that he left. The Claimant said that he told Mr Hawtin that he had been different towards him lately and work had not been pleasant, to which Mr Hawtin replied that if he stayed the next 4 weeks it would get worse. It was also alleged that Mr Hawtin said that the Claimant's job was easy and anyone could do it. The Claimant said in cross-examination that Mr Hawtin was standing over him and he felt threatened because Mr Hawtin had been in the army and did Judo. The Claimant said that he remained calm. The Claimant also said that he had seen Mr Hawtin arrange a scaffolder's work, who could not travel, so that he had to leave and therefore he thought that Mr Hawtin would do the same to him. It was alleged that Mr Hawtin said I will pay you two weeks money if you go now. The Claimant's witness statement detailed that he said, "I am not going to stay where I am not wanted, but I do want the job." The Claimant's grievance letter dated 19 September 2018 [p63 to 66] broadly corresponded with the witness statement. In the grievance meeting the Claimant said that Mr Hawtin said "I don't have any work for you. I can't force you to go. If you stay it will get worse." [p77]. In cross-examination the Claimant's account altered slightly in that he said he told Mr Hawtin that there was work and Mr Hawtin replied that he did not want him to do it. He also said that he had offered to telephone Mr Dowden, but Mr Hawtin told him not to. The Claimant said that he told Mr Hawtin that he did not appreciate him and listed all of the things that he had done. Mr Hawtin left the office. The Claimant said that he then left details of extras to be claimed on his desk with the iPad and then sent text message to scaffolders who had been kind to him when he started and then returned the company van to Mr Hawtin's house, although he did not suggest that he was asked to do this. The Claimant's evidence was that he had no reason to leave unless he was forced out because the job gave him sufficient flexibility to meet his childcare needs and he did not have a job to go to.

29. Mr Hawtin's account was that he approached the Claimant and raised what Mr Dowden had said to him on the telephone and suggested that Mr Dowden was joking. Mr Hawtin said that the Claimant was being defensive and when he suggested he contacted Mr Dowden to apologise he became aggressive. Mr Hawtin denied saying that he did not have any work for the Claimant or that he could do his role. It was denied that he said it would be in the Claimant's best interests to leave or if he remained the treatment would get worse. In his response to the grievance letter Mr Hawtin said that he asked the Claimant for his version of events and that the Claimant ranted at him. In the grievance meeting [p83] Mr Hawtin said that he tried to have a conversation with the Claimant and that he needed to treat customers

better and that the Claimant ranted at him. He said that the Claimant told him "I'm not working where I am not appreciated, I'm going to leave. I'm not going to make it difficult for you, I'm leaving." In cross-examination the Claimant asked why he was not offered his job back and Mr Hawtin said that the Claimant had said many hurtful and personal things about his wife's car, flash holidays and his children being at private school and that the company was on its ass when he started. He also said that the Claimant referred to the money that he earned Mr Hawtin and the lifestyle that he led. The Claimant said about the things he had done for the company and was being personal. Mr Hawtin's unchallenged evidence was that he left the office. Mr Hawtin said he did this because the Claimant was getting worse. The detail of the conversation was not in the witness statement or in the grievance response or meeting. Mr Hawtin's evidence was that he did not want the Claimant to leave because he was good at his job and he did it much better than Mr Hawtin could do. In cross-examination Mr Hawtin said that it was the worst time for the Claimant to 'chuck your job in' and it meant Mr Hawtin was in a lot of trouble.

30. Both parties were inconsistent in their evidence to some extent. The Claimant's rationale for saying that he was forced to leave has merit in that the job suited his childcare needs and gave him sufficient flexibility. Equally the Claimant was very good at his job and made the Respondent more money than Mr Hawtin was able to manage and therefore Mr Hawtin's rationale has equal merit. Doing the best I could and on assessing all of the evidence, it was unlikely that Mr Hawtin simply approached the Claimant and said that he did not have any work for him to do, because such an opening line did not appear logical. On the balance of probability, it was more likely that Mr Hawtin raised the subject of Mr Dowden with the Claimant. It was unlikely that the Claimant offered to telephone Mr Dowden, on the basis that he accepted that he had previously ignored a telephone call from him. It is more likely that Mr Hawtin suggested that the Claimant contacted Mr Dowden. The Claimant was an important part of the Respondent's business and had been responsible for making it very profitable. The Claimant accepts that he listed the things that he had done for the company. It is more likely than not that he was annoyed by Mr Hawtin raising the issue of Mr Dowden and he responded angrily and did make reference to Mr Hawtin's lifestyle. This is supported by the Claimant's evidence that he told Mr Hawtin that he was not appreciated and then listed the things that he had done. The Claimant said words to the effect that he was not going to stay where he was not wanted or appreciated, however such words were consistent with both versions of events. The Claimant said that he had seen Mr Hawtin force out a scaffolder, however that appeared inconsistent with his treatment of the employee suspected of theft. I was not satisfied on the balance of probability that Mr Hawtin forced out a scaffolder in the past. The letter inviting the Claimant to a grievance meeting also said that it was hoped the Claimant would reconsider his resignation, which



accorded with Mr Hawtin's view of the Claimant's ability in his job. The Claimant suggested that Mr Hawtin wanted to take over his role and was trying to avoid making him redundant. Taking into account that Mr Hawtin thought the Claimant was "brilliant at his job" [p85] and that Mr Hawtin was not able to do it anywhere near as well as the Claimant, it was unlikely that he wanted to take over the Claimant's role. It was also likely that Mr Hawtin considered that it was a bad time for the Claimant to leave his job and his leaving caused the Respondent difficulty in covering his work.

31. The order of events suggested by the Claimant was not probable. Taking into account the amount of time that the Claimant had worked for the Respondent and the success he had displayed in his role and that he had been friends with Mr Hawtin for more than 20 years and the amount of work that the Respondent was doing and the sizeable contract the Claimant had recently won, it was unlikely that Mr Hawtin simply said that he did not have any work for him the next day. Mr Hawtin's account is more likely to be correct in that, when he saw the Claimant he raised the issue about Mr Dowden, because this had an effect on the business relationship. This cast some doubt on the remainder of the Claimant's evidence as to what was discussed. Further, the Claimant's evidence changed from Mr Hawtin saying that 'there was no work for him' to that Mr Hawtin said that he 'did not want him to do the work' and this change cast further doubt on the Claimant's account. The burden of proof was on the Claimant to establish the circumstances of his departure and I was not satisfied, on the balance of probability, that Mr Hawtin told him that there was no work for him, that he did not want him to do the work, that he did not want him to work on sites, that he would pay him 2 weeks money if he left, or that it was in his best interests that he left or that if he stayed things would get worse. It was more likely than not that Mr Hawtin's account of what took place was correct and that the Claimant told him that he was not working where he was not appreciated and that he was leaving.
32. On the balance of probability, Mr Hawtin did not suggest to the Claimant that he left his employment. It was more likely that the Claimant made the decision to leave and told Mr Hawtin that he was leaving and this was then confirmed by his subsequent actions, including returning the van without being asked.
33. On 14 September 2018 the Respondent wrote to the Claimant accepting his resignation [p61]. I accepted Mr Hawtin's evidence that he did this after taking advice from his HR consultant and on the basis that the text messages the Claimant sent and that the van was returned.
34. On 19 September 2018, by way of a letter, the Claimant raised a grievance [p63-66]. HR Dept. acknowledged the grievance on 25 September 2018 and

invited the Claimant to a meeting. Mr Hawtin provided a written account in response on 27 September 2018

35. The grievance meeting was held with the Claimant on 3 October 2018 [p74-81]. The Claimant disputes the accuracy of the notes, although this was not mentioned in his claim form or during the Case Management Preliminary Hearing. The Claimant said in his witness statement that there were errors. During the hearing the Claimant did not identify any matters of substance that were incorrect. The Claimant was cross-examined on why he did not challenge the notes or provide comments. The Claimant's explanation was that he did not think they could be relied upon if they had not been signed and referred to his experience as a police officer and the need to get a suspect to sign a note. There is a significant difference between criminal and civil proceedings, and it is unlikely that the Claimant thought that the Respondent would not rely on the notes of the meeting. In the grievance meeting the Claimant said that he did not resign. the Respondent suggested that this was because the Claimant was trying to get his job back. The Claimant said in evidence that he understood a resignation as being where you decide to leave voluntarily and not by being forced out. The Claimant had taken some advice. It is generally understood that a resignation is where an employee decides to end their employment. The Claimant is articulate and intelligent, and it was unlikely that the Claimant genuinely believed that a resignation of an employee only occurred if they left their employment in a content fashion.
36. A grievance investigation meeting was held with Mr Hawtin on 19 October 2018 [p82-85]. The outcome of the grievance was sent to the Claimant on 7 November 2018 [p86].

### **The law**

37. Under section 95(1)(a) of the Employment Rights Act 1996 ("the Act") and employee is dismissed by his employer if the contract under which he is employed is terminated by the employer (whether with or without notice).
38. Under section 95(1)(c) of 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.
39. 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”.

40. It has long been established that if an employee is told that he or she has no future with an employer and is expressly invited to resign, then that employee is to be regarded as having been dismissed (see, for example, East Sussex County Council v Walker [1972] ITR 280, NIRC).
41. If a party uses unambiguous words, he cannot normally say that they did not have the meaning which might ordinarily have been taken from them. The undisclosed intention of an employee is irrelevant (Gale v Gilbert [1978] IRLR 453). There are some special circumstances where exceptions can apply, however, for example, where words are spoken by someone with a mental impairment or where they are spoken in the heat of the moment, as in Sovereign Services v Savage [1989] IRLR 115, but the special circumstances exception will only apply if there was doubt as to the intentions which were expressed at the time (Denham v United Glass UKEAT/581/98).
42. The principles to be considered in such circumstances were set out by the Court of Appeal in Martin v Glynwed Distribution Ltd [1983] ICR 511, CA. Sir John Donaldson MR said that: ‘Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, “Who really terminated the contract of employment?”. If the answer is the employer, there was a dismissal.’ He went on to hold that this question was one of fact for the tribunal to decide in the circumstances of the particular case.
43. I also took into account the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009 (“the ACAS Code”).
44. 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.”

45. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131, 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.”
46. In Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329 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 Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT, 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.
47. 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: 1. 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. 2. 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”. 3. 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. 4. 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”.

48. This was reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) 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; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will then 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.”

49. 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). 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).

50. The judgment of Dyson LJ in Omilaju has recently been endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978. the Court of Appeal reviewed cases on the 'last straw' doctrine and Underhill LJ formulated the following approach in relation to the Malik test;

*"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*

*(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*

*(2) Has he or she affirmed the contract since that act?*

*(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*

*(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions*

*which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)*

*(5) Did the employee resign in response (or partly in response) to that breach?"*

51. In addition, it is clear from Leeds Dental Team v Rose [2014] IRLR 8 EAT, that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT, that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.

## **Conclusions**

### Did the Claimant resign or was he dismissed?

52. In the light of my findings of fact, Mr Hawtin did not tell the Claimant that he had no work for him, that he did not want him to do the work, that he did not want him to work on sites, that it was in his best interests that he left or that if he stayed things would get worse. This was not a situation in which the Claimant was invited or told to resign. The words used by the Claimant on 6 September 2018, that he was not working where he was not appreciated and that he was leaving, coupled with his subsequent actions, such as returning the company van without being asked made it clear that he was resigning. The Respondent accepted the resignation by letter dated 14 September 2018.

53. The words used by the Claimant were unambiguous. The return of the van was confirmation that the Claimant had resigned as were his text messages to the scaffolders. Those subsequent actions did not cast doubt on his intentions at the time that he had resigned. The Claimant did not suggest that he resigned in the heat of the moment.

54. Accordingly, the Claimant resigned, and that resignation was not forced by Mr Hawtin.

### Was the Respondent in fundamental breach of contract by:

Mr Hawtin, on 6 September 2018, telling the Claimant that there was no work available and if he stayed things would get difficult?

55. The Claimant had not proved that Mr Hawtin told him that there was no work available or if he stayed things would get difficult and therefore, he was unable to establish that the Respondent was in breach of contract. Mr Hawtin had reasonable and proper cause to raise the issue with Mr Dowden in order to understand what had happened and to repair any damage to the relationship the Claimant had with him. The Claimant failed to establish the facts necessary to support this allegation and failed to establish that it was a breach of contract.

On the same day the Claimant felt threatened as he had seen what Mr Hawtin had done to other employees?

56. It was found that Mr Hawtin had not forced out a scaffolder in the past and therefore the Claimant did not establish that this was a breach of contract.

About 3 weeks before Mr Hawtin had ranted down the telephone at the Claimant?

57. The telephone conversation did not happen 3 weeks before the Claimant's departure, but occurred during the week of 9 July 2018. Mr Hawtin raised the subject of the Claimant's hours, however he did not raise his voice or rant at him. Mr Hawtin had reasonable and proper cause for asking the Claimant to keep an eye on his hours, because his contracted hours were 07.30 am to 04.30 pm and the Claimant was not at work when he made the telephone call at 02.50 pm. The Claimant failed to establish that this was a breach of contract.

Mr Hawtin did not want the Claimant to go out on site and wanted to take over the Claimant's role?

58. In the light of my findings of fact, the Claimant did not prove that Mr Hawtin did not want him to go out on site or that he was trying to take over his role. The Claimant's negotiating role was not removed in the Melksham contract. The Claimant had referred the potential contractor's request to Mr Hawtin and was told not to drop the price. The Claimant communicated this to the potential contractor and was therefore involved in the negotiation. This was in accordance with the normal practice that when a reduction in price was sought the Claimant would refer the issue to Mr Hawtin, so that Mr Hawtin could check with the scaffolding manager to see whether it could be reduced. Mr Hawtin was acting in accordance with the normal practice and was acting with reasonable and proper cause. The Claimant did not establish that this was a breach of contract. In relation to the Oxford tender the Claimant was not at work when the tender needed to be submitted and

he had been unable to complete the tender the previous Friday due to an IT problem. Mr Hawtin acted with reasonable and proper cause by finalising the tender, with the Claimant's assistance, as he needed to ensure that the tender was submitted before the Claimant was due to return to work. The Claimant did not establish that there was a breach of contract in this respect.

The Respondent did not recognise the Claimant's contribution to the increase in turnover and an £850,000 contract had been signed as a result of the Claimant's work?

59. The Claimant accepted in evidence that his securing the contract had been appreciated at the time it was won. The Claimant failed to establish that Mr Hawtin did not recognise his contribution or that the Respondent was in breach of contract in this respect.

The Claimant could not face spending weeks on end in a portacabin with no work to do?

60. In the light of my findings of fact, that the Claimant was not told that there was no work for him and that his departure caused difficulties for the Respondent in covering his work, he did not establish that he was faced with weeks in a portacabin without any work to do. Accordingly, the Claimant did not prove that the Respondent was in breach of contract.

The Respondent's HR adviser sought a meeting with the Claimant to see if he wanted to retract his resignation, but the Claimant was not happy with the way the meeting went?

61. This post-dated the Claimant's resignation and termination of his employment. The Claimant did not rely on this as a breach of contract.

Did the Respondent have reasonable and proper cause for the way it acted?

62. In the light of my findings, as set out above, the Respondent had reasonable and proper cause for the way it acted. In particular Mr Hawtin had reasonable and proper cause to raise the issue of Mr Dowden with the Claimant in an attempt to repair their relationship.

Was such conduct calculated or likely to destroy or seriously damage the trust and confidence the Claimant had in the Respondent?

63. On the basis of the above findings in relation to the alleged breaches and that Mr Hawtin had reasonable and proper cause for the way he acted the Claimant failed to establish that the conduct was likely to destroy or seriously damage the trust and confidence he had in the Respondent.



Was the last of the alleged breaches sufficient to constitute a final straw?

64. In the light of my findings about the alleged breaches of contract, all of the matters taken together were not sufficient to amount to a fundamental breach of contract and the incident on 6 September 2018 was not sufficient to amount to a final straw.

Conclusion on whether the Respondent was in breach of contract

65. The Respondent was not in breach of the implied term of trust and confidence and accordingly was not in fundamental breach of contract.

Did the Claimant resign in response to a fundamental breach?

66. Although the Claimant resigned, he did not resign in response to a fundamental breach of contract by the Respondent.

Was the Claimant entitled to receive notice/notice pay?

67. The Respondent was not in breach of contract. The Claimant resigned with immediate effect and therefore the Claimant was not entitled to notice pay.

68. Accordingly, the claims were dismissed.

Employment Judge Bax

Dated: 10 December 2019

Reasons sent to parties: 11 December 2019

FOR THE TRIBUNAL OFFICE