RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr N Champion**

Respondent: **WFL (UK) Limited**

Heard at: **East London Hearing Centre**

On: **14 & 15 November 2019**

Before: **Employment Judge Hallen, Sitting Alone**

Representation

Claimant: Mr I Rees-Phillips (Counsel)

Respondent: Ms S Clarke (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant's claim for unfair constructive dismissal is unfounded and is dismissed.**

2. **The Claimant's claim for unlawful deduction of wages was settled and is dismissed.**

REASONS

Background

1 The Claimant in his Claim Form dated 5 July 2019 made a claim for constructive unfair dismissal and unlawful deduction of wages. Prior to the commencement of the substantive hearing, the claim for unlawful deduction of wages was settled and was dismissed upon withdrawal. The claim for constructive dismissal was the substantive issue in front of the Tribunal. The Respondent in its Response Form dated 12 August 2019 denied that there was a fundamental breach of contract and that the Claimant was constructively dismissed.

2 At the hearing, there was some dispute between the parties in respect of the issues that the Tribunal had to determine in respect of the constructive dismissal claim. The crucial question for the tribunal to determine was what was the reason for the Claimant's resignation and did it amount to a fundamental breach entitling him to say that he was constructively unfairly dismissed? Such a reason must come from the Claimant himself and the Tribunal was principally concerned to consider the matters that the Claimant raised in his letter of resignation which was sent to the Respondent under cover of an email dated 31 January 2019. The test of whether there had been a breach of the implied term of trust and confidence is an objective one for the Tribunal. The question is whether the conduct relied on as constituting the fundamental breach, when looked at objectively, was likely to destroy or seriously damage the degree of trust and confidence the employee was reasonably entitled to have in his employer. The Tribunal was not concerned with any reformulation of the Claimant's case that post dated his resignation on 31 January 2019. The Claimant raised the following matters which he said were the reason for his resignation: –

1. He was not informed that a disciplinary investigation was underway;

2. The minutes of the investigation meeting were inaccurate and had been fabricated by his line manager;

3. The disciplinary procedure did not provide for the specified allegations under consideration;

4. His line manager was in the vicinity of the meeting room during his disciplinary hearing and the walls were thin;

5. He had not been made aware of the fuel delivery standards prior to the incident in question;

6. The Respondent failed to have a further investigation meeting with him;

7. The disciplinary officer who heard his disciplinary meeting was overheard on the telephone after the disciplinary meeting shouting and was "raging" after the Claimant left the office;

8. A colleague went through a disciplinary procedure for the same issue but was afforded an additional investigatory meeting;

9. The Respondent failed to check that the minutes of the investigation meeting were accurate;

10. The Respondent failed to check whether he had been issued with the fuel delivery standards;

11. There was a delay of six weeks between the investigation meeting and the disciplinary meeting;

12. The investigation was a breach of the disciplinary policy.

3 The Tribunal had before it an agreed bundle of documents and heard first from the Claimant who had prepared a written witness statement and was subject to cross-examination. He also called two witnesses who attended with witness statements. First he called his representative Karris Rowbotham who attended the disciplinary hearing and secondly he called Ben Roberts. The Respondent attended with three witnesses namely

Phil James, Operations Specialist; Craig Rollingson, the Claimant's line manager and investigation officer; Glenn Charker, the Regional Operations and Logistics Manager and disciplinary officer and Jane Bashford-Hobbs, Human Resources Business Partner. All of these witnesses prepared witness statements and were subject to questions from the Claimants counsel and the Tribunal.

Facts

4 The Respondent is part of a group of companies that globally provides an integrated platform to optimise energy, logistics and related services for aviation, marine, commercial, industrial and land transportation customers. The Respondent delivers fuels to homes, farms and industry customers. The Respondent employs approximately 850 employees.

5 The Claimant was employed by the Respondent from 17 October 2011 until 21 March 2019 as a Fuel Tanker Driver. The Claimant's depot was located at the Purfleet fuels terminal in Purfleet in Essex.

6 The Claimant's role involved the carriage of dangerous goods, particularly petroleum products, to the Respondent's commercial customers and loading and unloading the contents of the tanker. The Claimant drove a truck with a capacity of 12,900 litres that was used to deliver fuel. A driver of a tanker which carries such fuel must have an ADR license which is the European agreement concerning the international carriage of goods by road ("ADR"). Licenses are valid for five years and are renewable by undertaking a refresher course in every fourth year.

7 The Respondent operates in a highly regulated area governed by legislation designed to protect the health and safety of its employees, customers and the public during the carriage, loading, unloading and handling of dangerous goods. Such regulations include the Health and Safety at Work Act 1974, the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009, and the Dangerous Substances and Explosive Atmospheres Regulations 2002. As a direct consequence of operating in such a high risk and a highly regulated area, the Respondent takes any deviation from its health and safety standards seriously not least because of the gravity of the potential consequences of any such deviation.

8 As the drivers were delivering dangerous goods, fuel delivery drivers had to undergo specific training which included (pages 95 to135 of the bundle): Every five years drivers had to undertake the Safe Urban Driving course. Every five years an ADR course to confirm that the drivers were able and qualified to carry dangerous goods. Drivers had to attend third-party training to conduct their ADR training and gain certification. The ADR training consisted of a five day course followed by a multiple question test with a five yearly review course, followed by a further test. Driver PDP training which was carried out on an annual basis. This was completed to evidence to the fuel terminal that the driver had taken the required training to show that they were skilled enough and able to perform loading fuel onto petrol tankers in a safe and efficient manner. This training was conducted by the Respondent's driver trainer. It consisted of classroom training including a short test at the end and then a practical session. The drivers employed by the Respondent exceeded the expectations of a driver with a HGV and CPC entitlement.

9 To discharge its obligations which are designed to protect health and safety, the Respondent adopted its own health and safety standards and procedures known as fuel

delivery standards that applied to all of its employees including drivers. The Respondent updated its procedure to reduce the health and safety risk to its employees and customers because of the dangerous substances that its drivers delivered. In particular the Respondent revised the fuel delivery procedures prohibiting customer assisted deliveries. The Respondent identified that allowing a customer to assist with deliveries put the public at risk and could put the operating licenses of the Respondent in jeopardy. The revised fuel delivery standards (the 'fuel delivery standards') which came into effect on 30 April 2018 stated:

> *"assisted deliveries*
>
> *The customer is not allowed to assist the driver with the delivery.*
>
> *The driver is not allowed to assist the customer if the customer will be placed at risk.*
>
> *There may be occasions such as marine deliveries or where the tank is in a restricted area where we cannot gain access. On these occasions the customer is allowed to assist with the delivery as long as they have been trained' (page 140)."*

10 Mr Phil James, the Respondent's Operation Specialist had to ensure that each driver including the Claimant attended the site safety briefing on 30 April 2018 and also had copies of the policy with him to place in the drivers in trays. The document was at pages 137 to 140 of the bundle. There was some dispute at the Tribunal hearing as to whether Mr Jones placed the new fuel delivery standard into the Claimant's in tray along with the other drivers on 30 April 2018. It was accepted by Mr Jones that he did not actually present by way of a talk the new fuel delivery standards to drivers on this occasion. However, the Tribunal accepted that he did place the new policy into the Claimant's pigeonhole along with the other drivers on that day. This was apparent because the Claimant later admitted in the investigation meeting with Mr. Rollingson that he was aware of the new fuel standard delivery standards (see later).

11 Along with placing the new fuel delivery standards into the drivers in trays, Mr Jones also delivered a site safety briefing on 30 April 2018 at which the Claimant and other drivers were also in attendance. Mr Jones explained to all of the drivers the introduction of the new fuel delivery standards document and the fact that it would be included in the new driver manual (page 175 to 240) and that he had copies of this particular part to give to all of the drivers. Mr Jones confirmed that he had left copies of the new fuel delivery standards document in the pigeonholes of the drivers. He knew from previous experience that the drivers collected whatever was in there in trays especially when he had made it clear what the new policy was and where to find it. The new policy set out the new guidelines with regard to working at height and in the new assisted delivery policy specifically confirming that the customer was not allowed to assist the driver with the delivery. The Tribunal accepted that the Claimant was aware as of 30 April 2018 of the new fuel delivery standards.

12 On 12 December 2018, the Claimant was instructed to deliver 21,500 litres of DERV (diesel) fuel to D Evans at Thornwood common, Epping (the "customer"). Following the delivery, the customer advised the Respondent that there was a potential contamination because the fuel pumped out looked like gas oil and not DERV. As a consequence of this complaint, Mr Charker commissioned an investigation into the contamination. It was Mr Craig Rollingson who undertook the investigation. It was during

this investigation that it transpired that the Claimant had failed to follow the Respondent's fuel delivery standards as set out above.

13 Mr Rollingson requested the paperwork from the Respondent's stock team to try to work out what had happened (pages 364 to 370). He then phoned the Claimant to ask him to see him at the end of the shift. In the circumstances, he did not explain to the Claimant that it was investigation meeting until the Claimant was in front of him as he did not want him to be concerned or worried whilst he was out on the road with a dangerous load on board his truck. The Respondent's disciplinary procedure at pages 316 to 327 did not require the company to provide prior notification of a disciplinary investigation to its employees.

14 On 17 December 2018, Mr Rollingson commenced his investigation. The Claimant was interviewed the same day. Mr Rollingson informed the Claimant that his role as an investigator was to establish the facts and reach a conclusion about what did or did not happen. The Claimant was advised that this was a potential disciplinary matter and that he would, therefore be deciding whether there was a disciplinary case to answer. The meeting started at 10:55 and concluded at 11.20 am. Mr Rollingson took his own notes which were typed up in real time on his laptop and tidied up after the meeting. These notes were pages 336 to 338. The notes were not verbatim notes. Mr Rollingson did not take handwritten notes. The notes followed a script provided to managers by the Respondent's human resources department which script was at page 495 of the bundle of documents.

15 At the Tribunal hearing, there was a great deal of dispute between the parties about the accuracy of these notes. The Claimant argued that these notes were not accurate and did not reflect what happened at the meeting specifically that he was not told that it was a disciplinary investigation. Furthermore, the Claimant argued that Mr Rollingson gave an indication that the matter would be concluded at the end of the meeting and that nothing further would occur. The Tribunal did not accept the Claimant's contention. It was clear to the Tribunal that the at the commencement of the meeting, Mr Rollingson was following the script provided to him by the human resources department which was a page 495 of the bundle and set out what would happen in the meeting. The next section of the notes at page 336 to 338 was a question and answer section between Mr Rollingson and the Claimant. The Claimant had an opportunity to provide his own notes of this meeting which was at pages 401 to 403 of the bundle of documents. In principle, he made no changes to the question and answer section of the notes except for disputing the words "It was different then you could hand the gun over.' In addition, he disputed that Mr Rollingson said that the investigation was ongoing and he would be notified of any further actions as a result of the investigation. Apart from those minor changes he accepted that the notes were accurate in his own amended notes. Furthermore, in his email to the Respondent dated 29 January 2019 which was prior to his resignation, he confirmed that the question and answer section clearly reflected the discussion between Mr Rollingson and himself. As a consequence, the Tribunal accepted the notes of the investigation meeting were an accurate reflection of what occurred albeit they were not a verbatim account.

16 Mr Rollingson explained the details of the incident on 12 December to the Claimant stating that the Claimant had delivered the fuel to D Evans and that the customer had complained that they fuel was contaminated. He asked the Claimant how he thought the contamination had occurred and the Claimant said that he did follow company procedure when the fuel line change was carried out at the customer's premises. He asked the Claimant how the delivery was made to the customer and the Claimant stated

that he was asked by the customer to use a bulk hose to deliver the fuel into the top of the tanker but was refused this. When Mr Rollingson asked the Claimant who made the delivery, the Claimant explained that the customer did not want him to go onto the top of the tank even though the Claimant was happy to do it. The Claimant confirmed that the customer made the delivery themselves and that they were persistent that they must do it. The Claimant said that every driver who had done the job delivering fuel to D Evans had done it this way. Mr Rollingson went on to ask him that even though it was against company procedures to hand customers the gun to make their own delivery the Claimant still made the decision to do so and asked him why. The Claimant confirmed that the customer was being persistent and was adamant that they had to do it themselves. He confirmed that he had been there before and it was the same then. He stated that it was different then you could handover the delivery gun. The Claimant disputed making this last comment but the Tribunal preferred the evidence of Mr Rollingson. It seemed to the Tribunal that the Claimant was likely to have made this statement as he was aware of the new fuel delivery standards. Furthermore, Mr Rollingson confirmed that at no point in the notes did the Claimant say that he was unaware of the new fuel delivery standards. The Tribunal noted that even in his own amended notes pages at pages 401 to 403, the Claimant did not confirm by an addition to those notes that he was not so aware of the new fuel delivery standards. He had an opportunity to do so but did not do so confirming that the question and answer session was accurate.

17 Finally, at the investigation meeting, Mr Rollingson asked the Claimant weather with the benefit of hindsight he would have done anything differently and the Claimant confirmed that he would not have handed the gun over. Again, this showed to the Tribunal that the Claimant was aware of the new fuel delivery standards. Furthermore, in his own amended notes, he did not dispute that he had said this.

18 Mr Rollingson as part of the investigation collected the following evidence: –

18.1 The investigation meeting minutes (pages 336 to 338)

18.2 The delivery paperwork (page 364 to 370);

18.3 The fuel delivery standards presentation in March 2018 (pages 339 to 363);

18.4 The company disciplinary and grievance policy (pages 316 to 327).

19 The issues that concerned Mr Rollingson were the height at which the customer was delivering the fuel was a breach of the working at height rules (pages 344 and 137). The fuel delivery standards stated that the driver must consider the safest way to perform a delivery at height. If the delivery could not be made from ground level, the driver was required to take extra steps to make the delivery safe and these safeguards were not followed. In addition, the Claimant handed over the fuel gun to the customer to complete the delivery which was a breach of the assisted delivery rules (page 361). All of the above were health and safety concerns and he decided that the appropriate course of action was that the misconduct should proceed to a formal disciplinary meeting (page 312)

20 On 25 January 2019, Glenn Charker wrote to the Claimant to invite him to a disciplinary hearing on 31 January 2019 and provided the Claimant with the findings of the investigation conducted by Mr Rollingson. The Claimant was informed of his right to be accompanied to the hearing and was warned that a possible outcome of the hearing was

dismissal. The Claimant told the Respondent that he did not receive the invitation until 2 8 January 2019 due to the incorrect home address held by the Respondent. However, on 25 January 2019 the evidence pack and letter was also sent to the Claimant via email even though the Respondent posted the same pack to the incorrect address. The email address was correct so the Claimant received the letter and investigation report on 25 January well before the disciplinary hearing on 31 January 2019.

21 The disciplinary hearing did not take place until 31 January 2019 following the investigation meeting on 17 December 2018. However, this was not a contravention of the timescale set out in the disciplinary policy and given the complexity of the issues under consideration the slight delay that occurred was not unusual.

22 The disciplinary invite letter sent to the Claimant which was a page 314 to 315 of the bundle set out the facts and purpose of the meeting to discuss an allegation of potential gross misconduct including the failure to follow the correct delivery standards procedure by handing the delivery gun to the customer and allowing the customer to undertake its own delivery and a failure to follow the correct delivery standard procedure by allowing the customer to undertake a hose reel delivery from the top of the tank. Enclosed with the invitation letter was the company's disciplinary procedure (pages 316 to 327), the investigation report dated 17 December 2018 (pages 328 to 331), the investigation meeting notes dated 17 December 2018 (pages 336 to 338), the fuel delivery standards presentation dated March 2018 (pages 339 to 363) and documents relating to the delivery to the customer in question (pages 364 to 370).

23 The Claimant asked if he could attend with a friend and even though it was not in accordance with the Respondent's disciplinary procedure, the Claimant was allowed to attend with Karris Rowbotham to assist him. Miss Rowbotham gave evidence to the Tribunal as a witness for the Claimant and she was an experienced and qualified human resources professional who helped the Claimant during the hearing as well as taking a full note of that hearing which was at pages 387 to 394 of the bundle. The Respondent also took its own note which was at 376 to 386 of the bundle of documents. The content of the disciplinary note was not challenged at the Tribunal and the Tribunal noted although the notes were not verbatim, they were an accurate description of what occurred at the meeting. Furthermore, they again followed the disciplinary meeting template provided to Mr. Charker by the human resources department of the Respondent which template was a page 495. It appeared to the Tribunal that Mr Charker handled this meeting in a reasonable and sympathetic manner after explaining the formalities to the Claimant. The Claimant confirmed that he received all of the Respondents evidence prior to the disciplinary hearing.

24 There were a few adjournments for example, the Claimant mentioned that the walls were thin and that he was concerned about Mr Rollingson being able to hear the conversation. As a consequence, Mr Charker adjourned the meeting and asked Mr Rollingson to work elsewhere. He wanted the Claimant to be as comfortable as he could be so stopping the meeting briefly to ask Mr Rolllingson was not a problem. Mr Charker asked Mr. Rollingson to move which he duly did.

25 When recommencing the disciplinary meeting, Mr Charker asked the Claimant to voice any concerns that he had or any points that he wished to make in relation to the allegations or the disciplinary investigation. The Claimant raised a number of concerns relating to the investigatory meeting conducted by Mr Rollingson saying that he did not

introduce himself in the meeting, that he did not say the meeting was an investigation meeting, that he did not state that his role was an investigator and that the investigation meeting was merely a fact-finding meeting, that he did not say that he would be provided with a copy of the notes, that he did not say that it was different then and that you could hand the delivery gun over. The Claimant then explained how the investigation meeting had occurred. Mr Charker then adjourned the meeting from 3.03pm to 3:14 pm to take advice from human resources Officer Ms Drake. When he reconvened at 3:14 pm, he confirmed that he wished to delve deeper into the issues that the Claimant had with the notes of the investigation meeting prepared by Mr Rollingson. Mr Charker asked the Claimant to clarify the facts of the allegation from his perspective. The Claimant confirmed that he allowed the customer to take the fuel gun and he said it was fine because the customer had stairs and handrail so it was perfectly safe for the customer to make the delivery itself. He also suggested that it had always been the procedure prior to the implementation of the new for fuel delivery standards. The Claimant also confirmed that he had not been briefed about the new fuel delivery standards as far as he could recollect.

26 Given what the Claimant had said at the disciplinary meeting, Mr Charker decided to adjourn the hearing in order to carry out further investigations to ascertain the accuracy of the notes taken by the investigating officer Mr Rollingson, to check the Claimant's training records as well as checking whether the Claimant had attended the March/April 2018 site safety briefing. The Tribunal noted that the meeting notes appeared to suggest no unusual conduct on Mr. Charker's part at the meeting. When the Tribunal put to the Claimant that the disciplinary hearing appeared to be conducted reasonably he confirmed that this was the case. He confirmed that there was nothing that occurred during the meeting in respect of Mr. Charker's conduct during the meeting that could amount to a final straw.

27 The Claimant and his witness Mr Roberts gave evidence that following the meeting Mr Charker was overheard discussing the Claimant and raging and fuming down the telephone. Mr Charker disputed that this telephone call had occurred or that he was raging and fuming about the Claimant. The Tribunal noted that the Claimant was not a direct witness of this conversation allegedly conducted by Mr. Charker and Mr Roberts could not confirm the details of the incident in any detail nor could he say that Mr. Charker was raging about the Claimant. The Tribunal did not believe that Mr Charker had had a telephone conversation about the Claimant nor had he shouted or fumed down the telephone. This would have been inconsistent with the way that Mr Charker had handled the disciplinary meeting giving the Claimant every opportunity to make his comments and objections and confirming that he would then subsequently make further investigations. It appeared inconsistent to the Tribunal that Mr Charker would behave in a reasonable manner during the disciplinary meeting but then would rage and fume down the telephone so that Mr. Robert's could witness this. Therefore, the Tribunal did not accept that this conversation occurred. It was put to the Tribunal by the Claimant's representative that Mr Charker's enraged telephone conversation witnessed by Mr Roberts was the 'final straw' but as the Tribunal found as a matter of fact that this did not happen, this could not be the final straw. Furthermore, the Claimant made no reference to such telephone conversation as having any part in his resignation as he makes no reference to it in the letter of resignation sent to the Respondent on 31 January 2019.

28 Following the completion of the disciplinary meeting at which Mr Charker confirmed that he would undertake further investigations, at 9:40 pm on 31 January, the Claimant sent the Respondent a letter of resignation. This letter was at pages 396 to 398

of the bundle of documents. In the letter, the Claimant confirmed that he was resigning from the company giving the company seven weeks notice of his resignation. He confirmed that his official leaving date would be Thursday 21 March 2019. However, he was prepared to agree to a shorter period of notice being four weeks. In his letter of resignation, he confirmed that he has made his decision to resign for a number of reasons and strongly believed that there was no alternative but to resign for his own well-being and self-respect. He confirmed that the disciplinary hearing which had occurred on the same date had been arranged by the company without having verified that the investigation meeting notes were accurate and without first checking whether he had been issued with a copy of the fuel delivery standards. He specified that the company considered the matter to be potentially gross misconduct and that there was a clear intent to take action against him without first ensuring the action had foundation and justification to support it. The Claimant acknowledged that the company had informed him that it would make further investigations at the disciplinary hearing that day but the Claimant felt that the action was without justification in any event. The Claimant had concerns about the process timing relating to the 28 delay in inviting him to the disciplinary meeting although he appreciated that management were busy. However, he stated that gross misconduct allegations should have taken priority. He specified that whilst the disciplinary matter was ongoing he suffered stress and anxiety. He stated that he had asked Mr Charker to have Mr Rollingson removed from the vicinity of the disciplinary meeting room as the walls were thin. He also specified that the fuel delivery standards had not been delivered to him and that the investigation notes were not accurate. Even though Mr Charker had adjourned the disciplinary meeting to undertake further investigations the Claimant confirmed that he lost trust and confidence in the company and that he no longer had any more motivation in getting clarity on these points. At the end of the letter he asked that the resignation letter be acknowledged and accepted as well as payment of any monies owed to him.

29 From 31 January 2019 to 21 March 2019, the Claimant was off sick and did not attend work. The Claimant provided the Respondent with a statement for fitness for work that covered the period 20 February 2019 to 5 March 2019. The Claimant did not raise a grievance in relation to the issues raised in his resignation letter.

30 On 8 February 2019, having considered all of the evidence, Mr Charker decided to issue the Claimant with a final written morning for the following reasons: –

31 The Claimant had attended the briefing about the revised fuel delivery standards on 30 April 2018. This was supported by an interview with Mr James and his attendance signature on the attendance sheet.

32 By permitting the customer to participate in the delivery of the fuel, the Claimant disregarded the fuel delivery standard putting himself and the customer at considerable risk. In the light of the Claimant's seven year service and the fact that he admitted that he would have acted differently in hindsight, the Respondent deemed a final written warning was a reasonable sanction in all of the circumstances. The Respondent would have arranged further training for the Claimant on the fuel delivery standards but for his resignation. The Claimant having resigned from his employment did not exercise his right of appeal against the Respondents decision to issue a final written warning.

Law

33 The implied term of trust and confidence provides that the employer "shall not

without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously harm the relationship of trust and confidence between employer and employee" (Malik v BCCI [1997] ICR 606). This term has been applied to different factual situations within the employment context.

34 In a case such as the present one, in which the employee relied on a series of acts as amounting cumulatively to a breach of the implied term of trust and confidence, the leading case remains Omilaju v Waltham Forest London Borough Council [2005] ICR 481. In that case Dyson LJ held that the last straw does not have to be unreasonable or blameworthy, but it must contribute something to the breach, even if what is added to might be relatively insignificant.

35 In the recent case of Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA CIV 978, the court of appeal considered the situation where a course of conduct ending in the last straw included a repudiatory breach which had been affirmed prior to the last straw. In this situation, the later act effectively reactivated or resurrected the earlier fundamental breach so that the employee could rely on it as part of the course of conduct which amounted to a repudiatory breach.

36 In Kaur, Underhill LJ summarised the questions which will arise in a constructive unfair dismissal claim as follows:-

36.1 What was the most recent act or omission on the part of the employer which the employee says caused or triggered his/her resignation?

36.2 Has he/she affirmed the contract since that act?

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

36.4 If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions to which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?

36.5 Did the employer resign in response or partly in response to that breach?

37 The test of whether there has been a breach of the implied term of trust and confidence is objective: the question is whether the conduct relied on as constituting the breach, when looked at objectively, is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.

Tribunals Conclusions

38 In this case, the Tribunal was satisfied that both individually and cumulatively, there was no breach of the implied trust duty of trust and confidence in the Claimant's contract of employment. The Tribunal was satisfied that the Respondent had legitimate concerns relating to the Claimant's conduct in particular his failure to comply with the fuel delivery standard which was provided to him on 30 April 2018 by Mr James at the site safety briefing. When the Respondent had cause to believe that the Claimant had failed to

comply with the fuel delivery standards following a complaint from a customer on 13 December 2018, the Respondent conducted an investigation meeting with the Claimant on 17 December 2018. The Tribunal was satisfied that the investigation meeting was conducted properly and that Mr Rollingson, the investigation officer prepared an accurate summary of that meeting which was at page 307. Indeed, the Claimant confirmed that the majority of the question and answer session noted down by the investigation officer was accurate. As a consequence of the investigation, Mr Rollingson concluded that there was a case to be answered in respect of potential serious misconduct. The Respondent had legitimate concerns which needed to be addressed at a disciplinary meeting and this was a properly constituted. The disciplinary hearing was conducted by an officer of appropriate seniority and unconnected to the investigation. Mr Charker conducted the disciplinary hearing on 31 January 2019 and gave the Claimant a reasonable opportunity to put his case. There appeared to be a fair disciplinary hearing conducted and following that disciplinary hearing, Mr Charker adjourned to consider further questions that needed investigation which were raised by the Claimant. The Claimant resigned shortly after the disciplinary meeting before Mr Charker could undertake any further reasonable investigation

39 Either an individual or cumulative basis the Tribunal concluded that there was no breach of the implied duty of trust and confidence. If anything, the Tribunal was satisfied that the Claimant had 'jumped ship' too soon. His main issue at the time of resignation was that the investigation minutes were inaccurate and that he had not been provided with the fuel delivery standards. Mr Charker decided at the disciplinary meeting at these matters needed to be investigated. The Tribunal was satisfied that the above course of contact did not amount to an individual or cumulative breach of the implied duty of trust and confidence. Based upon the evidence that the Tribunal heard at the hearing, it was satisfied that the Claimant was aware of the new fuel delivery standard and had admitted at the investigation meeting that he was so aware and that he was in breach of that policy. He indicated that if he was to do the delivery again, he would have acted differently. Given these findings of fact, the Tribunal was satisfied that there was no fundamental breach of contract. Indeed, the Respondent had agreed to adjourn the disciplinary hearing in order to undertake further investigations and the Claimant resigned before the Respondent could conclude such investigations. It seemed to the Tribunal that one of the main requirements of an employer is to follow a disciplinary procedure to give an employee an opportunity to put forward their case so that it could be investigated by the employer. This is exactly what happened here. It was entirely proper for the Respondent to investigate such a serious potential breach of the health and safety policy. It was only during the disciplinary hearing that it became evident that the Claimant disputed that he was aware of the policy at which point the process was adjourned for his concerns to be investigated and determined. It was difficult for the Tribunal to see how any conduct on behalf of the Respondent in this regard was likely or calculated to damage the relationship of trust and confidence let alone seriously damage it.

40 The Claimant made a number of additional points in his letter of resignation and Claim Form which the Tribunal will deal with briefly given the above findings. He claimed that he was not informed that investigation was underway and that the minutes of the investigation meeting had been fabricated. The Tribunal found that it was made clear to the Claimant that the meeting was an investigation (page 307) and as made clear in the facts section of the judgment, the Tribunal accepted that the notes were an accurate reflection of what happened at the investigation meeting conducted by Mr Rollingson.

41 It was specified by the Claimant that the disciplinary policy did not provide for the specified allegations. As is common in disciplinary policies and specifically in the Respondents disciplinary policy, gross misconduct included “serious breach of the organisation’s rules, including but not restricted to, health and safety rules and rules on computer use’ (page 322). The fuel delivery standards in this case were an important health and safety document and so it was entirely reasonable for the Respondent to investigate this issue as part of a disciplinary investigation into misconduct.

42 The Claimant asserted that this line manager, Mr Rollingson who undertook the investigation was in the vicinity of the meeting room during the disciplinary meeting on 30 January and that the walls were thin. As specified in the facts section of this judgment, when Mr Charker was notified of this, he adjourned the meeting and asked Mr Rollingson work elsewhere which he did (page 377).

43 The Claimant disputed that he was not made aware of the fuel delivery standards. The Tribunal did not accept this contention as set out in the facts section of the judgment finding that the Claimant was provided with the policy by Mr. James on 30 April 2018.

44 The Claimant contended that the Respondent failed to have a further investigation meeting. This contention was not accepted as the Claimant had resigned before the disciplinary officer could undertake any further investigation meeting.

45 The Claimant submitted that Mr Charker was heard on the phone shouting after the Claimants disciplinary hearing and was raging after the Claimant left the office. As the Tribunal found in the facts section of the judgment, it did not except this contention.

46 The Claimant asserted that a colleague went through a disciplinary procedure for the same issue but was afforded an additional investigatory meeting. Again, this was not relevant to the Claimants decision to resign as any further investigatory meeting with a colleague occurred after the Claimant had resigned.

47 As made clear in the facts section of the judgment, a six week delay between the investigation meeting and the disciplinary meeting did not constitute a breach of the implied term of trust and confidence especially bearing in mind the intervention of the festive season.

48 For the above reasons the Claimant’s claim for constructive dismissal is dismissed.

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Employment Judge Hallen
Dated: 6 December 2019