EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103193/2019

Held in Glasgow on 27 and 28 January 2020

Employment Judge M Robison
Tribunal Member P McColl
Tribunal Member M McAllister

Mr D Fyall	**Claimant** **In Person**
Glen Transport Limited	**Respondent** **Represented by** **Mr S McGuire -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claims do not succeed and therefore are dismissed.

REASONS

Introduction

1. The claimant lodged a claim with the Employment Tribunal on 26 March 2019, claiming unfair constructive dismissal and a redundancy payment and making public interest disclosure claims. The respondent entered a response resisting the claims.

2. During a preliminary hearing held on 25 July 2019, Employment Judge Whitcombe identified issues relating only to the claimant's dismissal, and specifically that the issues to be determined by the Tribunal were whether the claimant had been constructively unfairly dismissed, was automatically unfairly dismissed and entitled to a redundancy pay. However, he questioned whether on the facts the claimant could establish automatically unfair dismissal for having

made a protected disclosure and further whether a claim for a redundancy payment could have any reasonable prospects of success.

3. No mention was made in his note of the claimant pursuing a claim that he had suffered detriment on the ground of having made a protected disclosure. This is significant because Employment Judge Whitcombe had requested that this case be listed for an Employment Judge sitting alone, whereas were the claim to have included a detriment claim, the rules require that the claims be heard by a full Tribunal.

4. However, the final list of issues which had been prepared by Mr McGuire and approved by the claimant was as follows (page 26):

    a. Did the claimant make a protected disclosure as defined by section 43B of the Employment Rights Act 1996 (ERA) in accordance with sections 43C to 43H;

    b. If so, was the claimant subjected to any detriment by any act, or any deliberate failure to act, by the respondent done of the ground that the claimant has made a protected disclosure;

    c. Was the claimant entitled to resign from employment by reason of the respondent's conduct and, as such was the claimant constructively dismissed by the respondent in terms of section 95(1)(c) ERA;

    d. If the claimant's dismissal was not automatically unfair, was the claimant's dismissal fair or unfair in terms of section 98(4) ERA;

    e. Is the claimant due a redundancy payment;

    f. In the event of any element of the claim being successful, to what remedy should the claimant be entitled?

5. This list thus includes public interest disclosure detriment. Given it appeared that no claim for detriment was specifically plead, Mr Fyall made an application to amend to include that, and Mr McGuire, having prepared the case on the basis that such a claim was being pursued, had no objection to that.

6. Although we had some discussion whether parties could consent to this case being heard by a judge sitting alone, it transpired that two members were not required for another case they had been allocated to, so that it was possible for them to join the panel and for the case to proceed.

7. The Tribunal heard evidence from the claimant. For the respondent, the Tribunal heard from Mr David Taylor, director of the respondent.

8. The Tribunal was referred by the parties to a number of productions from a joint bundle of productions. These documents are referred to in this judgment by page number.

Findings in Fact

12. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved.

Background

13. The respondent is a small family business mainly providing a furniture removals and storage service, currently employing four members of staff. Mr David Taylor is a director and Mrs Elizabeth Taylor is also a director.

14. The claimant worked for the respondent from 11 May 2009 until he resigned by letter dated 3 January 2019. He was based at the depot at Devon Park Mills during the whole of the period of his employment. Although there was a dispute about his specific job title, he was employed primarily in the role of driver, with duties including loading and unloading furniture in regard to house moves.

15. Although when originally established in 1975 the respondent focused on distribution for the textile industry, gradually the focus of operations shifted to house and furniture removals and storage. The respondent used a number of vehicles of various sizes for transporting furniture. One of these vehicles was an articulated lorry for which they had several trailers, registration number R929 OGM. The MOT test certificate for that vehicle had expired on 30 April 2016 (page 150). The claimant was the only employee who had a licence to drive that vehicle. When he was initially employed, he had driven the vehicle relatively frequently,

although that had diminished over time. This was related to the fact that the respondent's business shifted focus from distribution to removals. He had not driven the vehicle since at least 30 April 2016.

16. A "contract of employment statement and particulars of main terms of employment" dated 16 July 2015 was issued to the claimant (page 88). That document stated that his job title was "Class 1 Driver". It stated that his wage "at present is £9.00 per hour for HGV vehicles and £9.50 per hour when driving artic and trailer (reviewed November 2014)". It also stated that his normal hours of work were 8 am to 4.45 pm with a break of 15 minutes in the morning and 30 minutes at lunchtime, and that he "may be expected to work a reasonable amount of overtime (which may include Saturday and Sunday but very occasionally)". For unexplained reasons, this was signed by Mrs Taylor on 14 January 2016 and the claimant on 4 October 2016.

17. Latterly there had been some friction between the claimant and Mr Taylor, who had spoken informally to the claimant on several occasions about his reluctance to follow instructions, his inflexibility and his adverse influence over his colleagues. Mr Taylor became concerned about his attitude in general.

18. The claimant was advised of a wage increase by letter dated 21 February 2018, from £9.00 to £10.00 per hour. In that letter Mr Taylor also raised certain concerns, including the following relevant extracts (page 27a and 27b):

> "Whilst we receive many notes of praise for your work from our customers we are looking for an improvement in the internal attitude whilst dealing with myself and Liz. It is therefore our hope that we will be able to maintain the same standards of service and indeed to a higher standard if possible….there are points that we must again raise with you regarding your employment and these must be addressed by each and every employee. By all employees following these points we hope that it will improve our efficiency and the blame for not doing so cannot be directed at each other as has happened in the past:
>
> 1) time keeping: start time is 8.00 am. You must be present in the office at 8.00 am to start a day's work. Please remain in the office until instructions

are given for the day's work; 2) cleanliness of vehicles and store:….3) break times: as stipulated in your terms and conditions of contract you are allowed 15 minutes break in the morning and 30 minutes break at lunch times. Under no circumstances are you to deviate from the direct route to a removal/job in order to collect provisions for your breaks; 4) vehicle tidiness:….5) waste disposal:…6) loose items from removals:…. 7) smoking:…8) check sheets for vehicles: we are aware that these are not being completed on a daily basis. The driver of each and every vehicle is responsible for completing a check sheet prior to leaving the yard".

19. Although no formal disciplinary process was undergone, Mr Taylor subsequently raised concerns informally with the claimant about incorrect time sheets, and issued a letter dated 6 June 2018 headed up "ref gross misconduct – time sheets" to the claimant (page 27). This letter was stated to be a formal warning of instant dismissal following the discovery that time sheets have been incorrectly completed. The letter stated that "At no time is any member of staff to coerce another member of staff to falsity a time sheet, which has occurred in this instance, nor to manipulate other staff to carry out any action of gross misconduct". He enclosed a copy of the letter of 21 February and expressed concern that no attention had been paid to the directions set out in that letter. He repeated his concerns about break times in particular. The letter concluded, "I expect loyalty and commitment to your employment and the company and from now on to see a much greater improvement in carrying out your duties. It would be a great travesty if you put yourself in a position that your employment had to be terminated under such circumstances as have occurred recently".

20. By letter dated 28 September 2018, with a heading "letter of concern", Mr Taylor raised the following issues with the claimant (pages 28-29):

    i. He made reference to a discussion on 17 September 2018 when the claimant was reminded that it was for customers, and not the claimant, to complete details on customer delivery notes, particularly the time when the removal was completed.

ii. He made reference to the fact that the claimant had walked out of the office on 20 September when he was discussing a customer's complaint with all staff about operatives taking a break as soon as they arrived at the delivery point. He expressed concern that the claimant had referred to the customer as a liar.

iii. He raised concerns about an incident that morning when despite being instructed to do so, the claimant had failed to return to the office at 9.30 following a removal in Dollar in time for Mr Taylor to use the van he was driving for another engagement. This also meant that the claimant was late attending Broughty Ferry where another customer was expecting to get his keys mid-morning, and not at 1 pm as the claimant had suggested.

iv. He stated that the nature of their business and the timing of customers getting keys to properties meant they could not avoid employees having to work overtime, and reminded the claimant that his terms and conditions require him to work a reasonable amount of overtime where necessary, and to work from time to time on a Saturday or Sunday as required. He raised concerns that the claimant had refused to do so on the last two occasions for office moves, having made commitments after being given two months' notice.

v. He said that he expected him to ensure the accurate and honest completion of time sheets and customer paperwork with immediate effect.

vi. The letter then went on to state, "We are a small team and trust and confidence are key ingredients to our success. As one of the longest serving employees, you could easily be an influence for good within the team, however, instead you are manipulative to suit your own ends and ringleader wherever there are issues. You also demonstrate a complete lack of respect for myself and my wife. I expect you to address this with immediate effect. This letter will be

placed on your file and you should note that any further failure to follow company rules, policies and procedure will result in formal disciplinary action being commenced".

vii. The letter concluded by advising the claimant that they had engaged the services of an HR consultancy to provide ongoing support and advice, including assisting with updating contracts of employment and preparing a new employee handbook.

21. A copy of the customer delivery note (page 30) and the tachograph of Mr O'Brien's vehicle (page 31) relating to the incidents referenced were included in that letter.

22. The claimant responded by letter dated 2 October 2018 (page 32-33), addressing each of the points in turn:

i. He said that he accepted responsibility for completing the completion time on the customer delivery note on 17 September, but did not realise the seriousness of this action because no issue was made when other employees did the same, but to "Rest assured this will not happen again".

ii. He said that he had walked out of the office on 20 September because Mr Taylor had not believed his version of events and in an attempt to avoid an imminent hostile situation.

iii. He said that the arrival times on 28 September could be put down to a breakdown in communications as he did not know Mr Taylor needed the vehicle and he understood he was to be in Broughty Ferry by 1 pm.

iv. He explained that he and his wife made plans for the weekend and would commit to family events more than two months in advance, asking if he needed to supply evidence of such commitments in advance and if he was required to cancel those at Mr Taylor's discretion. He asked for confirmation that employees should take turns doing overtime and overnight trips; advising that he did not realise the seriousness of his actions since it appears to be

regularly acceptable for other employees to decline overtime and overnight trips.

v. He said that he was shocked that Mr Taylor was keeping a record of concerns and did not accept the severity of them to be worthy of a written letter of concern, and asked whether such letters had been written to other employees who regularly behave in the same way. He said that he did his utmost "to maintain a professional level of respect for both of you even though, on numerous occasions I (and other employees) have been victimized, humiliated and bullied into carrying out your instructions.

vi. He felt that he was required to perform additional duties on a daily basis which were not included in his job description without recognition or financial benefit and which other employees were unwilling to do. He put this down to the result of them witnessing him being reprimanded when he had no choice but to use his own initiative. He said that although he was referred to as "senior employee", he did not have the role of a supervisor, so additional daily duties should be allocated equally between employees.

vii. He felt that it was appropriate to bring his concerns about the legality of certain actions to their attention, and referenced a number of occasions when he did that Mr Taylor "become hostile and verbally terminated my contract of employment with immediate effect in front of my colleagues. Whilst I am aware this is always in temper and Mrs Taylor has apologised on your behalf. It does not encourage the trust and confidence that you hope to instill in the workforce". He also referenced an occasion when Mr Taylor insisted that he undertake a delivery when there was a red met office warning, implying he would not have a job to return to should he disobey his instructions.

viii. He expressed concern about being called manipulative and a ringleader which he said he found "deeply offensive". He asked for

the contact details of the HR consultant to make an appointment with them and when he would get an opportunity to review the updated contract of employment and employee handbook, requesting with a copy of the current versions in the meantime, and a copy of his employee record under GDPR Regulations.

ix. He concluded, "I sincerely hope that the ongoing support and advice from the HR consultancy improves the equal treatment of staff at Glen Transport and look forward to regaining the trust and professional working relationship we once had".

23. By letter dated 15 October 2018 (page 34), Mr Taylor responded stating that "due to the various points you have raised, I feel these require action as a priority, to try and improve our working relationship going forward". He stated that he had been advised to arrange a mediated discussion facilitated by the external HR consultants to attempt to resolve the various points raised, which were summarised as: communication issues; flexibility with regards to overtime; fair treatment of staff; issues with management/communication style; reporting defects on vehicles. That letter also stated that this had come to a head following the incident regarding falsified time sheets set out in the letter of 6 June 2018, which was followed by a further falsification of a delivery note 11 September and his letter of 28 September.

24. That meeting was due to take place on 19 October. The claimant was asked if he was willing to proceed on that basis and to advise of any additional points he wanted included on the agenda for discussion.

25. The claimant responded by letter dated 16 October 2018, saying he was willing to attend but was unable to do so at short notice and without the information he requested in the letter of 2 October. He said that he wanted to discuss issues outstanding raised in that letter. He said that he was not aware of time sheets having been falsified and had no recollection of a letter dated 6 June 2018. He asked again for a copy of his employee record (under GDPR legislation) and asked when the updated contract of employment and employee handbook would

be available to review; and for a copy of the current company policies and procedures.

26. On 19 October the claimant and Mrs Melville of Grieg Melville HR consultants had an informal and confidential meeting off-site which was designed to allow the claimant to air his concerns with her, and to ensure that Mrs Melville had an understanding of their concerns prior to the mediated meeting.

27. Around this time, the HR consultants worked with the respondent to put in place an up to date employee handbook and revised contracts of employment. Mrs Melville issued the new contracts to staff including the claimant. The claimant was concerned to note that the proposed new contract of employment stated that he would be employed as “driver”, and that there was no reference to a supplement when he drove the class 1 vehicle.

28. Due to end of year accounts preparation, there was some delay in the mediated meeting being rearranged. On 27 November Mrs Taylor advised the claimant that Mrs Melville was due to be attending the depot the next day and it was proposed that the mediated meeting should take place on that day. The mediated meeting took place on 28 November and was attended by the claimant, Mrs Melville and Mr and Mrs Taylor. Although he did not advise the other participants, the claimant recorded that meeting and a transcript of that recording was lodged (pages 124 – 148).

29. During the course of that meeting, the respondent raised issues regarding the claimant’s attitude and behaviour by reference to the incidents which had been brought to the claimant’s attention previously, when the claimant put forward his explanations in mitigation.

30. The claimant also raised his concerns about what he understood to be the change to his contract of employment, and his view that if he was no longer a class 1 driver then he had been demoted (page 133).

31. During this discussion, he stated that the articulated lorry had been used three weeks before and driven to Tullibody when it was not legal for it to have been on the road because it was not taxed, Mot’d or insured, and that the driver (Mr

Thomas Stoddart) did not have a licence to drive it. He expressed concern that this might result in the respondent losing their operator's licence and him being out of a job. Mr Taylor explained that the vehicle was on a test drive. He accepted that what they did was wrong and that it would not happen again and he apologised to the claimant. When pressed by the claimant Mr Taylor asked what he wanted them to do and if he was seeking to blackmail him. He suggested this this might be another matter which was "put into history". The claimant advised that he was raising this matter under the whistleblowing policy.

32. He also expressed concerns about "favouritism" towards Mr Stoddart, because he was prepared to drive the lorry in those circumstances, and that he had heard that Mr Stoddart was boasting about being promoted. He described this as bribery and corruption, and a reward for having undertaken an illegal act. Mr Taylor confirmed that it was his intention to promote Mr Stoddart to general foreman from 3 January 2019 and that this was a matter for the company. The claimant expressed concern that there had been no opportunity for other employees to apply for the job of foreman.

33. He also raised a concern that his private mobile number had been given to a customer (page 139). The claimant raised concerns about Mr Taylor becoming aggressive and both Mr and Mrs Taylor shouting at him during the meeting

34. After the meeting, the claimant understood Mrs Melville to suggest that he could contact her directly, and he wrote to her by letter dated 7 December 2018 to state that he was surprised that Mr and Mrs Taylor were at the meeting on 28 November and had he known he would have preferred a witness to attend. He said that he was disappointed that she allowed Mr and Mrs Taylor to continually raise their voices and become increasingly aggressive towards him; this made him feel too uncomfortable to continue although he said he should have left the meeting earlier than he did. He said that he "found the meeting very overwhelming, one sided and without structure or purpose". He said that he had not yet received a formal response regarding grievances raised in his letter. He also asked for a copy of notes/minutes of the meetings (page 36).

35. He continued, “Since our meeting, I have been made to feel extremely uncomfortable by Thomas Stoddart as he has informed other members of staff that disciplinary action has been taken against me. He has told Scott O’Brien and Mark Brown that I reported them for timekeeping reasons and has also challenged me for reporting him and Mr Taylor for driving the class 1 vehicle illegally. Can you please advise how he obtained this information?” She responded by e-mail to advise that she had not intended him to write directly to her; but rather her intention when she said he could call her directly she did not mean that he could write (page 37).

36. By letter dated 10 December 2018, Mr Taylor advised of the outcomes of the mediated meeting (pages 38-40) as follows:

i. it was deemed useful to detail key areas of concern because the discussion had become “heated at times when our frustration got the better of us”.

ii. that “The intended purpose of the mediated meeting was to provide you and us with the opportunity to resolve outstanding issues between us; to allow our working relationship to improve sufficiently so as to minimise any further negative impact on the business; and to set the expected standards of behaviour from now on”.

iii. that they would find it helpful if he could be more flexible in regard to working practice, and in dealing with changes, and they in turn would do their best to communicate to the team when changes were imminent. They assured him that he was being treated no differently from others and noted that he had been more pleasant and respectful to them since the meeting with Mrs Melville and confirmed that they had complimented him on his excellent customer service reputation during the meeting.

iv. With regard to the removal of letters from his personnel file, they confirmed that these would remain on his file but would be removed after six months, provided that his behaviour improved. It was noted that on two occasions since he had taken more than his thirty

minute break at lunch time and was warned about abusing the rules.

v. With regard to the issue of job title, they confirmed that they did not require a class 1 driver, and that the correct job title was “driver”, and confirmed that he would be paid extra for the very occasional times when they needed to use the class 1 vehicle. They enclosed a copy of the updated contract with a request that he sign it. They confirmed too that they intended to produce a job description and undertake a job analysis exercise after Christmas with all employees.

vi. With regard to the use of Class 1 Vehicle on the journey to Tullibody, he was advised that while the vehicle was fully insured whilst parked in the yard, his concern was appreciated and they apologised unreservedly for this on-off incident and assured him that it would not happen again.

vii. With regard to the promotion of Thomas Stoddart to foreman supervisor, and his concerns about unfairness and favouritism, they confirmed that there was no legal requirement for them to tell the team of their intentions and they were at liberty to decide who best fits that role, which was their business.

viii. Mrs Melville had advised about the letter dated 7 December 2018, and he apologised for the fact that voices were raised and explained that they were hugely exasperated because “you do not listen to what we say, and you continually challenge and question us. Put yourself in our shoes and ask yourself if you wouldn’t feel frustrated ad exasperated too! All we ask is for you to listen to instructions and follow them – if we get it wrong – and we do from time to time, then that is our responsibility. Please remember your responsibility as an employee”.

ix. After summarising how they had built up the company and the employment and training opportunities offered over the years, the

> letter continued, "David we are trying to run our business here at Glen Transport, but it now feels as though we are dealing with behaviour that we would not expect of an employee within our workforce. We are aware of the bickering and back chat which has been going on and consider this to be part of the childish behaviour that we do not expect from grown men. Our advice to you is to put the past behind you and focus on continuing to deliver an excellent service to our customers every day. We intend issuing a note to everyone reminding them of the expected standards of behaviour very shortly. We trust that the foregoing is helpful and look forward to starting 2019 on a fresh footing".

37. The claimant did not receive that letter until 18 December 2018. The claimant consulted his doctor on 21 December 2019 (page 151) to advise that he was suffering stress at work. That telephone call was recorded by the medical practice as follows: "has been a victim of bullying, has been through a mediation meeting which was shut down because of whistleblowing. Has had further problems with person blew whistle about, now finished for holidays. Hasn't been sleeping, worried about repercussions of what has raised. Doesn't think can go back to work".

38. By letter dated 3 January 2019, the claimant advised of his resignation in the following terms (page 41):

> "I write to resign from my position of class 1 driver at Glen Transport with immediate effect and ask you to please accept this as my formal letter of resignation and termination of our contract.
>
> I feel I have been left with no choice other than to resign from my position as my original grievances noted in my letter of 2 October 2018 have been ignored (our informal mediated discussion on 28 November 2018 did not address any of these issues). Also, my issues with your amendments to my employment contract and pay options have not been dealt with satisfactorily. Finally, during our meeting on 28 November 2018 I reported my colleague, Mr Thomas Stoddart, drove the class 1 vehicle and trailer

> on 5 November 2018 on the main road from Glen Transport to Tullibody illegally. The vehicle had no MOT, insurance or road tax and Mr Stoddart did not hold the appropriate licence to drive this vehicle. Although you apologised unreservedly for authorising this unlawful activity and assured me this would never happen again, I feel this matter has not been dealt with appropriately. Given the severity of the incident I consider this to be a fundamental breach of our contract on your part and I can no longer associate myself with Glen Transport".

39. The claimant asked for a blanket reference, which was forwarded to him by letter dated 8 January 2019 along with a P45 (page 42). In that letter Mr Taylor stated,

> "As you are aware, we have been trying to work with you over the last few months to resolve the various issues that have arisen during 2018, with the assistance of a human resources consultant, Alison Melville, and we believed that at the last meeting on 28 November 2018, we had covered the various points that had been raised. We regret that we appear to have reached an impasse and that the action taken by the company to date has been unsuccessful in resolving things to your satisfaction however it is my reasonable belief that we have done everything within our power to try to clarify matters for you. We are now aware that you stated to Alison Melville on leaving that meeting that you felt perhaps it was time to move on. We are sorry that you feel that you cannot continue to be employed by our company after all these years and we'd like to take this opportunity to thank you for your good service and to wish you well in finding suitable new employment"

Relevant law

63. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (the 1996 Act). Section 94(1) states than an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) states that an employee is dismissed if the employee 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. This is commonly known as "constructive dismissal".

64. In *Western Excavating Ltd v Sharp* 1978 IRLR 27, the Court of Appeal set out the general principles in relation to constructive dismissal. Lord Denning stated that "An employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must 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".

65. The duty of mutual trust and confidence is a term which is implied into every contract of employment. This means that an employer must not, without proper and reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee, without reasonable and proper cause (*Mahmud v Bank of Credit and Commerce International SA* 1997 IRLR 462 HL, *Baldwin v Brighton and Hove City Council* 2007 IRLR 232 EAT).

66. The question whether the employer has committed a fundamental breach of the contract of employment is to be judged according to an objective test and not by the range of reasonable responses test (*Tullett Prebon plc v BGC Brokers* [2011] EWCA Civ 131; *Bournemouth Higher Education Corporation v Buckland* 2010 ICR 908 CA). The EAT has since confirmed in *Leeds Dental Team v Rose* 2014 IRLR 8 that it is not necessary to show a subjective intention on the part of the employer to destroy or damage the relationship to establish a breach.

67. When considering whether there has been a breach of the implied term, "the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the

employee cannot be expected to put up with it" (*Wood v WM Car Services Ltd* 1982 ICR 666 EAT, per Mr Justice Browne Wilkinson).

68. There may be a series of individual actions on the part of the employer which do not in themselves amount to a fundamental breach, but which may have the cumulative effect of undermining the mutual trust and confidence term implied into every contract of employment. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal. This is commonly referred to as "the last straw" (*Lewis v Motorworld Garages Ltd* 1985 IRLR 465 CA).

69. Where there is a breach of the implied term of trust and confidence, that breach is "inevitably" fundamental (*Morrow v Safeway Stores plc* 2002 IRLR 9 EAT).

70. Section 103A ERA states that "an employee who is dismissed shall be regarded……as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure".

71. Section 47B ERA states that "a worker has the right not to be subject to any detriment by any act, or any deliberate failure to act, by his employer on the ground that the worker has made a protected disclosure"

Respondent's submissions

72. Mr McGuire made oral submissions by reference to the list of issues (page 26). The respondent admitted both protected disclosures.

73. He submitted that the claimant had not suffered detriment for having made those protected disclosures, relying on Mr Taylor's evidence that he had accepted that he had got it wrong and had apologised and assured him it would not happen again. There was no evidence of any detriment the claimant had suffered as a result. With regard to the allegations regarding Thomas Stoddart he had not been cited by the claimant to answer any allegations, and there was no evidence of the nature of any detriment he suffered at his hands. Mr Taylor's evidence was that he was not aware of the content of any discussions which Mr Stoddart had with the claimant.

74. With regard to the claim for unfair constructive dismissal, Mr McGuire submitted that with regard to the content of the letter of 28 September, these were matters which the respondent was entitled to raise and those actions and the actions thereafter fell well short of actions which were calculated or likely to destroy trust and confidence. Mr Taylor's intention was to allow the claimant to air his concerns and to attempt to draw a line under such matters.

75. With regard to the claim of automatically unfair dismissal, Mr McGuire submitted that any constructive dismissal should be considered fair in the circumstances.

76. With regard to the claim for a redundancy payment, regardless of the job title, the claimant's position remained as it had been, and while the need for class 1 duties had diminished and were non-existent by 2016, his driving duties remained unaffected and no redundancy situation arose. In any event the claimant cannot claim both constructive dismissal and a redundancy payment.

77. Although there was some confusion regarding his job title, as a matter of custom and practice, he had not driven since 2016, so the question about whether his contract had changed was moot; and the evidence was that the matter was still fluid at the time of his resignation. If there was any change to his contract, it should have been three years previously when the articulated lorry was off the road.

Claimant's submissions

78. Mr Fyall argued that there was a change in his contract of employment because the contract he signed in 2016 states that he is a class 1 driver, and the final version of the contract he was being asked to sign in 2018 was for a driver. There was no suggestion to him at the time that the wage supplement could have be put in at a later date. He submitted therefore that he had been demoted and that was the reason that the role was no longer required. He submitted that the change to his contract without discussion was a breach of trust and confidence.

79. Mr Taylor's evidence regarding the criminal offence was contradictory: he said in his evidence that the vehicle was being test driven to find out if it was possible to put it back on the road; then to justify his position with regard to the new contracts, he said that he had no intention of putting it back on the road. This supports his

view that it was not being test driven at all but that it was being driven to make a delivery to Ditch farm. While Mr Taylor accepted that was wrong and apologised, he had apologised many times before for his behavior, and eventually an apology is diluted. In any event, an apology was not sufficient here, because the action put lives at risk so warranted a much more serious approach. This was a criminal offence, and he submitted that an employer had the right not to work for an employer who allows that to happen.

80. He submits that the way that he was treated after he made the disclosure amounts to a breach of trust and confidence. This was because when he first raised the matter, Mr Taylor denied it, then he accepted it but suggested that he was trying to blackmail him and then asked him to put it behind him. He had no reasonable cause to use the vehicle on that day because he had other options but chose the worst, and then tried to get him to conceal his own disclosure which he had raised in terms of the respondent's own policy. Further, after making the respondent aware of the protected disclosure, the respondent allowed the member of staff to confront him, but they should have made him aware of his concerns and ensured that he did not approach him. He made a protected disclosure but they did not protect him. He was left with no choice but to resign.

81. When he raised his concerns about the member of staff (in the letter of 7 December) they failed to deal with them, and instead stated that they were aware of "bickering and back chat" and "consider this to be part of the childish behaviour that we do not expect from grown men. Their failure to act on his complaint was a detriment in terms of section 47B(1).

82. He relied on the fact that they had given out his private mobile number which was a failure to follow policies and procedures and then they failed to act on his complaint except to apologise and ask him to put that behind him.

83. Mr Fyall also made reference to what the respondent had stated in the ET3 and in the agenda; he says that they are saying something different now that the transcript of the meeting is available and they have called different witnesses from originally proposed. Although he accepted that these could not be relied on to

support his reason for resigning, he submitted that these further confirm that he was right to have no trust and confidence in the respondent.

Tribunal observations on the witnesses and the evidence

84. In this case there was in fact very little dispute on the facts. We accepted that both of witnesses were seeking to tell the truth but perceiving events from their own vantage points. What this case comes down to is how the law should be applied to the facts as found.

Tribunal deliberations and decision

Constructive dismissal

85. In order for the claimant to succeed in his constructive dismissal claim, he must show that there was a breach of contract by the respondent. As we understood it, the relevant contractual term which the claimant alleges was breached was the implied term of trust and confidence. Following the *Malik* formulation, the requirement is to consider whether the respondent had conducted itself in a manner which was calculated, or if not which was likely, to destroy or seriously damage the relationship of trust and confidence between the employer and the employee, where there was no proper and reasonable cause for the respondent's behaviour.

86. The claimant also made reference to an amendment to his contract of employment. Although Mr Fyall appeared to argue that as an aspect of his claim that the respondent had breached the implied term of trust and confidence, that matter could also be argued as breach of an express term, and we have given separate consideration to that claim.

87. The focus in a constructive dismissal claim, where it is argued that there has been a breach of trust and confidence, is on the conduct of the employer. As we understood it, this is to be viewed as a last straw type case, that is that there are a number of actions by the employer which may not individually be considered to be a breach of that implied term, but which considered cumulatively can be said to amount to a breach.

88. As we understood it, the claimant relies on the following actions of the employer in support of his claim that there is a breach of trust and confidence, each of which we deal with in turn: the changing of the terms of his contract of employment from class 1 driver to driver, and loss of wage supplement; the fact that the respondent allowed a criminal offence to be committed; the failure of the respondent to properly investigate that criminal offence or to hold the culprit accountable; the respondent's response to the protected disclosure; the favouritism or reward to Thomas Stoddart for driving the lorry illegally by being promoted; the failure of the respondent to allow other members of staff to be considered for the post of general foreman; the giving out of his private mobile number which he claims is also a breach of GDPR legislation; inappropriately disciplining him for misconduct which he had an explanation for and for which his colleagues were not similarly disciplined; failure to deal appropriately with his grievance raised on 2 October 2018; aggressive behaviour and shouting by Mr and Mrs Taylor during the mediation meeting.

89. In respect of each action considered individually, we have found that there was no breach of contract on the part of the respondent, and nor could it be said that those could be said cumulatively to amount to a breach of the implied term of mutual trust and confidence. We have concluded too that there is no breach of any express term. Dealing with each action of the employer relied on by the claimant, we set out our reasons for coming to that conclusion as follows.

90. The claimant raised a concern that the terms and conditions of his employment were being changed without his agreement. In particular, he was concerned that his job title was being changed from Class 1 driver to driver, and that he was losing his wage supplement for driving the class 1 vehicle. He thought he was being demoted. He thought that he was being deprived of the opportunity to work as a class 1 driver, but that work was being offered elsewhere. This was raised and discussed at some considerable length at the mediation meeting. It would appear from the transcript that the respondent was stating that they had no need for class 1 drivers, which is what was confirmed in the outcome letter, and what Mr Taylor confirmed in evidence. The claimant took exception to this by reference to what he called the protected disclosure, that is that the respondent did have

need of it on 5 November 2018 when it was taken on what was called a test drive, but which he said was actually a delivery to a farm. However, it was a matter of general agreement that the claimant himself had not driven the vehicle for around three years, from at least 30 April 2016, and that this was a one-off occasion (or at most two-off, since it had been brought back from the farm on 10 November).

91. Although it is not entirely clear from the transcript, it would appear that the respondent confirmed that the claimant would not lose his supplementary pay, which as the claimant pointed out was a term of his contract as at October 2016. Certainly, this was confirmed in the outcome letter although perhaps surprisingly and certainly to the claimant's concern this was not written into the new contract of employment, as of course it ought to have been if the term was not to changed (although there was never any discussion about a rate).

92. In the context of a breach of an express term, it would appear that the claimant's job title was indeed being amended without his agreement, although it is less clear whether he was being asked to accept less pay; because his salary had increased in February 2018 to £10 an hour which as Mr Fyall pointed out was actually more than the agreed supplementary wage.

93. It may well be that a change of job title and any decision to reduce his pay would have amounted to the breach of an express term. However, even if we were to accept that there was a breach of an express term, in order for the claimant to be entitled to claim unfair constructive dismissal, it is necessary that any breach be sufficiently serious, fundamental and going to the root of the contract. We did not accept in this case that if there was a breach, it was a fundamental breach. The evidence was that the claimant had not driven the class 1 vehicle since at least April 2016. Of particular relevance is the fact that he made no issue of that until he heard that Thomas Stoddart had driven it. Although the wage rise in February 2018 meant that there was now no differentiation in pay between the claimant working as a "driver" and a "class 1 driver", the claimant made no issue of that at the time. In any event, whatever was written in the contract, the respondent stated that he would continue to receive a supplementary rate if he was ever required to drive the class 1 vehicle. Further, where there is a change in job title but not a

change in job duties, we would not consider this to be a fundamental breach of an express term.

94. In regard to relying on any change as a breach of trust and confidence, it might be assumed that a change in job title or certainly a reduction in pay would, if not calculated, be likely to damage trust and confidence, but the second element of the Malik formulation means that it will only be a breach if there is no reasonable and proper cause for the respondent's behaviour.

95. Here the respondent explained both in the mediated meeting and again in Mr Taylor's evidence the rationale for the fact that they no longer required a class 1 driver and it was their intention that all members of staff should be employed on the same "driver" contract. This was because there was no immediate intention to use the articulated lorry and therefore the respondent no longer had any need for a class 1 driver. This change had happened in any event in 2016. The claimant had not raised any concern until he became aware that another member of staff had taken the articulated lorry out, so that the claimant could be said in any event to have acquiesced in any change, as argued by Mr McGuire. This conduct could not therefore be said to be a breach of trust and confidence in these circumstances.

96. The claimant argued that the fact that the respondent allowed a criminal offence to be committed (in regard to the driving of the articulated lorry and trailer) was a breach of trust and confidence because he thought that he should not be expected to work for an employer that would condone such a thing. However, as discussed above, the focus in terms of constructive dismissal is on the actions of the respondent vis a vis the claimant. The respondent in this case admitted that they had acted in the way described; Mr Taylor accepted that it was wrong; and apologised personally to the claimant. This is not a case where it was the claimant who was being asked to commit a criminal offence. Mr Taylor explained why it had happened, that circumstances had dictated the decision; that he realised in retrospect that it was rash and wrong and stressed that it would not happen again. Whatever the specifics of what was said in the mediation meeting (although the transcript is just that and therefore purports to be verbatim, it is perhaps precisely because of that that it is difficult to follow), that was the evidence of Mr Taylor to

this Tribunal. As Mr McGuire pointed out, the incident had happened on 5 November 2018, the claimant was aware of it on that date, and despite how serious he claims the action to have been, he did not raise in until 28 November, and he took no steps then or subsequently to report the matter to any regulator or external body. We did not accept that the fact that the respondent may have committed a criminal offence and indeed had accepted that what they did was a criminal offence (although that cannot be known by this Tribunal with absolute certainty), is sufficient, considered in isolation, in the particular circumstances of this case to amount to a breach of trust and confidence.

97. The claimant was particularly aggrieved by the failure of the respondent to properly investigate that criminal offence and because they failed to hold the culprit accountable. This was also a matter which the claimant pressed at the mediation meeting. Mr Taylor clearly got exasperated (at least) when he was being pressed in the meeting because he was not clear what it was that the claimant had expected him to do in the circumstances. Mr Taylor implied in the meeting and confirmed in evidence that there was nothing further that he thought he should have done; that there was nothing to investigate beyond having confirmed, though a conversation with a VOSA employee, that Mr Stoddart, although a qualified vehicle inspector, ought not to have driven the articulated lorry with the trailer attached; that the reason he asked was because he had doubts and that he should have checked before. He said that he could not lay blame with Mr Stoddart since he had acted on his instruction and he took responsibility for that.

98. Mr Fyall was asked by members of this Tribunal too to explain what he was expecting the respondent to have done. He stopped short of saying that the respondent should have reported the incident, but then as noted he could have reported the incident to a regulator or other external body but for whatever reason chose not to do so.

99. Mr Fyall also said in submissions that he was relying on the way that the respondent had handled the protected disclosure announcement in the mediated meeting: specifically that Mr Taylor had initially denied it (line 44 of page 132); had said that it was no concern if his (line 13, page 142); had accused him of

blackmail (line 40 page 142); and had asked him to "put it into history" (line 45 page 142) and therefore ignore the matter. However, as discussed above, the conclusion of this matter, as confirmed in the outcome letter, was that the respondent said that they appreciated him raising his concerns, apologised unreservedly and assured him that it would not happen again.

100. In these circumstances, we could not say that the conduct of the respondent in the handling of the matter was such that, in isolation, that could be said to be a breach of trust and confidence.

101. Mr Fyall also accused the respondent during the meeting of "bribery and corruption". Mr Taylor said he did not understand what was meant by that; but it was apparent to Mr McGuire that he was suggesting that Mr Stoddart had been rewarded for driving the lorry illegally by being promoted, so that it was a reward or bribe for doing the respondent's dirty work so to speak. There was however no evidence to support that beyond the claimant's speculation.

102. This point links with the more general concern of Mr Fyall which was raised at the meeting of favouritism towards Mr Stobbart. The claimant raised the point that neither he nor any other member of staff were given any opportunity to be considered for the post of general foreman. Mr Taylor said that it was a matter for him as the employer to promote whoever he saw fit. At the mediated meeting and in evidence he said that he had been thinking for some time of bringing in a manager to assist him and his wife so that they could spend less time at the business and he saw in Mr Stoddart a person with the appropriate skills and qualifications. While Mr Fyall may have been aggrieved about that, and while to appoint staff without an open selection procedure would not be considered to be best practice from an equal opportunities point of view, it could not be said that that incident, in isolation, amounted to a breach of trust and confidence.

103. Mr Fyall also relied on the giving out of his private mobile number which he claims is also a breach of GDPR legislation in support of his submission. Mr Taylor explained the circumstances surrounding that in evidence: that he had issued mobiles but they had not been used; that there was a tacit agreement that there were particular circumstances when employees would be called on their private

mobiles in order to meet customer needs; he accepted that he should not have done so. Again Mr Fyall had not raised that at the time and therefore could not himself have considered it to be particularly serious, and indeed we did not consider it to be conduct which amounted to a breach of trust and confidence in isolation.

104. Mr Fyall also argued that he had been inappropriately disciplined for misconduct which he had an explanation for and for which his colleagues were not similarly disciplined; and for the failure to deal appropriately with his grievance raised on 2 October 2018. We did not accept however, from an objective standpoint, that it was inappropriate to have disciplined the claimant in the circumstances but more specifically the claimant said that he was not aware of the letter of 6 June and otherwise the claimant had dealt with his concerns in a mediated meeting. Nor did we accept that the respondent had not dealt with the issues raised in the letter of 2 October. They may not have dealt with them to Mr Fyall's satisfaction, but we did not accept from an objective standpoint, that by bringing in external consultants, and offering the claimant access to Mrs Melville on a confidential basis, and in holding the mediated meeting, and advising of the outcome, it could be said they had not been dealt with.

105. Finally, Mr Fyall relied on the aggressive behavior and shouting by Mr and Mrs Taylor during the mediation meeting. While we got the impression from the way that he gave evidence that Mr Taylor could be easily frustrated and perhaps quick to lose his temper, we also got the impression that the claimant was apt to press his points and repeat himself, and not listen to, or at least not accept, the answers he was given. This matched with the impression we got from what was said during the mediated meeting. During evidence in chief, Mr McGuire raised a question about whether, given the fact that the claimant had recorded the meeting, he was deliberately intending to "goad" Mr and Mrs Taylor into such behavior. We have taken the view in any event that there was fault on both sides, and while clearly the raising of voices and aggressive responses to questioning is at least inappropriate, we did not consider this to be a breach of trust and confidence in regard to this occasion.

106. We did not take the view that any one of these incidents viewed individually was sufficient to amount to a breach of the implied term, but we also considered this as a last straw type of case, where the claimant ultimately resigned in response to the way that he was treated at the mediation meeting, including the aggressive way that Mr and Mrs Taylor behaved and the way they handled his disclosure; so we considered whether cumulatively it could be sufficient to amount to a breach of trust and confidence.

107. It has long been accepted (since *Western Excavating* and more recently confirmed in *Buckland*) that if an employer's behaviour is simply unreasonable then an employee is not justified in terminating his employment. It must be something more than that. The way that it was put by Mr Justice Browne Wilkinson was that, when looking at the employer's conduct as a whole, it is such that the employee cannot be expected to put up with it.

108. While there was a good deal of behaviour in this case which we would certainly categorise as inappropriate and even unreasonable, for example the raising of voices and losing of temper of Mr Taylor, not just at the mediated meeting but prior to that; the failure to deal appropriately with disciplinary matters; the lack of clarity over any changes to the claimant's employment terms; the decision not to interview for the new senior position. We got the impression that Mr Taylor was an old school employer who expected his staff to comply fully with rules and instructions, although the quid quo pro may well have been a more informal way of dealing with other matters such as discipline.

109. We have concluded that there was fault on both sides. The actions of the claimant, no least in the letter responding to the letter of concern, are not the actions of an employee who was keen to repair any fault lines which had emerged and move forward. He seemed determined to make an issue of every point of concern, always had an answer, and would not let up on any of the issues he raised when the response did not suit him.

110. However the focus in a constructive dismissal case is on the actions and conduct of the employer. We take account of the fact that this is a small traditional family business. We came to the view that the respondent's actions in this case were

not the actions of an employer calculated or likely to seriously damage trust and confidence when viewed from an objective perspective. The respondent had a number of concerns with the claimant's attitude and behaviour. They were keen to avoid the disciplinary route. Had they gone down that route it appears that there may well have been material which they could have relied on to have based a decision to dismiss. They were keen for the claimant to stay on. They recognised his skills, particularly with customers. Rather than dealing with the issues they had as a disciplinary, they decided to take the advice of HR consultants with a view to taking the steps necessary to retain the services of the claimant. They raised their concerns and gave him an opportunity to raise his. They put their hand up to errors which they had made. They sought a way forward. Mr Taylor in evidence said that they did not want the claimant to leave and that he would still be working for them had he not resigned. Although an employer does not need to have any subjective intention to damage the relationship, we concluded that it could not be said that this employer did not intend that the claimant's employment contract should not continue (to use concepts from *Western Excavating*)

111. In all these circumstances, we did not accept that the respondent had conducted itself in a manner which was intended or likely to seriously damage trust and confidence. We found that there was no breach of the terms of the contract of employment by the respondent so that it could not be said that the claimant's resignation amounts to a dismissal in terms of the relevant provisions of the Employment Rights Act. His claim for unfair dismissal under the ordinary principles cannot succeed and is dismissed.

Public interest disclosure

112. The claimant argues that he suffered detriment and was subsequently forced to resign for reasons that relate to the fact of having made a protected disclosure. In this case the public interest disclosures are admitted.

113. The claimant in this case argues that dismissal was automatically unfair in terms of section 103A which states that "an employee who is dismissed shall be regarded……as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure".

114. While there may well be circumstances where a constructive dismissal following the making of a protected disclosure is automatically unfair, this certainly is not one of them. As discussed above, although claimant was arguing that he had resigned because of the protected disclosure, as recorded by Employment Judge Whitcombe in the preliminary hearing note, the claimant's position was more appropriately described as a failure by the respondent to address the matters which he had disclosed. As Employment Judge Whitcombe stated this would appear to relate to the content of the disclosure and not the fact that he had made a protected disclosure. Having heard evidence in this case, we have not accepted that there is in any event a dismissal at all, and so the claimant cannot argue that he was dismissed for an automatically unfair reason, when in fact he resigned.

115. Turning to the detriment claim, the claimant must show that he has been subjected to a detriment by an act, or failure to act, by his employer done on the ground that the worker has made a protected disclosure. The focus in such cases is usually whether it has been shown that the detriment was "on the ground of" that is linked or related to the fact of having made the protected disclosure. However, in this case it is denied that the claimant suffered any detriment at all.

116. The claimant in submissions sought to stress that the detriment which he had suffered was in the way that the protected disclosure was handled. We came to the view that were not however able to conclude that any actions of the respondent could be said to amount to detriment or disadvantage for the following reasons.

117. The outcome letter admitted wrongdoings, Mr Taylor apologised unreservedly and assured the claimant that it would not happen again. It could not therefore even be said that it was swept under the carpet, so to speak. It is difficult to conclude that any failure to investigate could be said to be a detriment, given that it is not clear what more it was that the respondent could do in the particular circumstances of this case. It seems that the claimant wanted Mr Stoddart to be held accountable, but it was Mr Taylor who said that he took responsibility for any wrongdoing.

118. Mr Fyall also expressed concern about the failure of the respondent to deal with what appears to be goading or boasting on the part of Mr Stoddart, although having raised it in the letter of 7 December, he simply asked Mrs Melville how other members of staff had obtained certain information. He did not make Mr Taylor directly aware of his concerns and although Mrs Melville apparently brought it to his attention, it would appear that Mr Taylor was not aware of the specifics, and indeed that is what he said in evidence. In any event, he said in the outcome letter that a letter would be sent to all staff reminding them of expected standards of behaviour.

119. Again without further details it is difficult to see what they could have done to ensure that he refrained from behaviour which the claimant took exception to, and in any event the respondent would not be "vicariously liable" for the behaviour of other employees in such circumstances. Any detriment suffered could not be said to be detriment or disadvantage perpetrated by the respondent, since the respondent's evidence was that they did not know about the specifics of the complaint which the claimant was making.

120. Crucially however even if it might be that these actions are properly categorised at "detriments", there was no evidence that could support the claimant's assertion that the respondent had "handled" the protected disclosure in that way or had failed to ensure that Mr Stoddart has not spoken to the claimant the way it was claimed that he did "on the ground that" he had made the protected disclosure. Nothing that we heard suggested that behaviour or treatment was the reason why or even related to the protected disclosure.

121. It seems in this case that the claimant was particularly aggrieved about what he saw as a loss of status, of Mr Stoddart coming on board, and usurping his role, and taking over as senior employee. This seemed to us to be a case where whatever detriment the claimant might have perceived to have suffered in this loss of status, in not being asked to drive the articulated lorry, in being "demoted", in not being invited to become a supervisor or even apply for the role of supervisor, all happened before he had made the protected disclosure. In short, it appears that the claimant made the protected disclosure because of detriment he perceived that he had suffered.

Redundancy

122. Although the claimant had included a claim for a redundancy payment, and had not withdrawn that claim despite directions of Employment Judge Whitcombe, when it came to submissions, I understood that the claimant was no longer insisting on the claim. This was because he now understood that any redundancy payment he thought he might be due was properly pursued as a basic award in the unfair dismissal claim.

Conclusion

123. The claimant has failed to show that the employer's conduct in this case entitled him to resign and claim constructive dismissal. He is therefore not entitled to claim unfair dismissal, either on ordinary principles or that he was dismissed for an automatically unfair reason. Nor does his claim for detriment following a protected disclosure succeed, because we have found that the claimant did not suffer any detriment that could be said to flow from the making of the protected disclosure.

Employment Judge : M Robison
Date of Judgment : 03 February 2020
Date sent to parties : 12 February 2020