



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE MARTIN sitting alone

**BETWEEN:** Mr Muhammad Fahad Khan Claimant

AND

Asda Stores Ltd Respondent

**ON:** 22-24 January 2020 and 28 January 2020 in chambers

**APPEARANCES:**

**For the Claimant:** In person

**For the Respondent:** Mr Rozycki - Counsel

## **RESERVED JUDGMENT**

The judgment of the Tribunal is that the Claimant's claims for constructive unfair dismissal unauthorised deductions from wages fail and are dismissed.

## **RESERVED REASONS**

1. Evidence was heard over two days with submissions being given on the third day. I sat in chambers on 28 January 2020. I heard oral evidence from the Claimant and from Mr [Andrew Perera (Operations Manager), Mr Gavin Town (General Manager), Mr Darren Coker (former General Manager) and Mr Craig Fisher (Shift Manager) on behalf of the Respondent. I have carefully considered such documents as I have been taken to in the bundle and read and listened to the closing submissions of the parties. These reasons are confined to those matters which are relevant to the issues and necessary to explain the decision reached. All matters were however considered.
2. The Claimant was employed as a Warehouse with the Respondent between 17 October 2005 until he resigned with his effective date of termination being 15 March 2018.

## The law

3. It is for the Claimant to show that he was dismissed. Section 95(1)(c) states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is commonly referred to as 'constructive dismissal'.
4. I referred myself to **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA**, where the Court of Appeal ruled that for an employer's conduct to give rise to a constructive dismissal it must *involve a repudiatory breach of contract*. This occurs where 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. In these circumstances the employee is entitled to treat himself as discharged from any further performance and if he or she then terminates the contract by reason of the employer's conduct he or she would be constructively dismissed.
5. I also considered **Malik v Bank of Credit and Commerce International SA [1997] IRLR 42** which held that the Tribunal should ask itself the following questions:
  - a) What was the last act (or omission) on the part of the employer which the employee says caused, or triggered, his resignation?
  - b) Has he affirmed the contract since that act?
  - c) If not, was that act (or omission) by itself a repudiatory breach of contract?
  - d) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions, which, viewed cumulatively, amounted to a repudiatory breach?
  - e) Did the employee resign in response, or partly in response, to that breach?
6. Therefore, a claim for constructive unfair dismissal requires a Claimant to show that there was a breach of contract and that it was sufficiently serious to justify his resignation or that he resigned in response to the last of a series of incidents. The Claimant must have left in response to that breach and must not have delayed his resignation.
7. In **Western Excavating (ECC) Ltd v Sharp** the Court of Appeal expressly rejected the argument that S.95(1)(c) ERA introduces a concept of reasonable behaviour by employers into contracts of employment. This means that an employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably. This was confirmed in **Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA**, where the Court upheld the decision of the EAT

that the question of whether the employer’s conduct fell within the range of reasonable responses is not relevant when determining whether there is a constructive dismissal.

**Key events**

8. The Respondent helpfully set out key events in submissions. I have used this as the basis for an overview. I have made some alterations and additions as required.
9. The Claimant worked for the Respondent without anything of note happening until July 2015 when he had an extended period off work because of problems with his knee.
10. The key events therefore run from this date. The Claimant was given time to consider his response to the Respondent’s submissions before giving his own and did not add to or detract from this list.

a) Between July 2015 and January 2016, the Claimant was on sick leave due to knee problems;
b) In the course of the above period, the Claimant had received 23 weeks of CSP. which was then withheld. The Respondent’s position is that this was due to his refusal to undertake alternative duties as recommended by an occupational health nurse;
c) In February 2016, the Claimant commenced another period of sick leave following a road traffic accident as a result of which he suffered whiplash injuries;
d) In January 2017, a disciplinary investigation was conducted by the Respondent in respect of an allegation that the Claimant had a second job while on sick leave;
e) By letter of 27 February 2017, the Respondent confirmed, through its Mr Perera, that it had found no case to answer against the Claimant in respect of the above allegation;
f) On 5 March 2017, the Claimant raised a grievance regarding issues arising out of the above disciplinary investigation;
g) On 1 and 2 April 2017, the Claimant raised further grievances in respect of holiday pay and the organisation of a taxi to take him to an occupational health appointment respectively;
h) On 13 April 2017, Mr Coker informed the Claimant of his findings in respect of the above grievances which were not upheld;
i) On 11 July 2017, the Claimant commenced a phased return to work plan with the assistance of Mr Perera. This comprised a four-week

rehabilitation plan;
j) On 17 September 2017, the Claimant raised a grievance in relation to having been sent home by Mr Perera on 1 September 2017;
k) On 12 October 2017, Mr Coker informed the Claimant of his findings in respect of the above grievance. The grievance against Mr Perera was upheld;
l) By letter dated 17 October 2017, Mr Perera apologised to the Claimant for sending him home on 1st September 2017 - the Claimant said the apology was insincere;
m) On 17 October 2017, the Claimant agreed to an extended rehabilitation plan with Mr Fisher and then attended weekly review meetings with him;
n) The Claimant received Mr Perera's written apology on 7 November 2017;
o) On 15 November 2017, the Claimant completed his first 8-hour shift following his return to work, but did not reach the required pick rate and remained on adjusted duties;
p) On 17 November 2017, the Claimant commenced a further period of sick leave due to stress;
q) On 14 December 2017, the Claimant raised a grievance in respect of not receiving Company Sick Pay ("CSP") for the above period of sick leave;
r) The above grievance was determined, and it was found that the Claimant was not entitled to CSP, but that he should have been paid for meetings which he had attended in the workplace;
s) In early January 2018, the Claimant was investigated in relation to an allegation by Ms Tanner that he was abusing CSP;
t) On 11 January 2018, the Claimant appealed Ms Tanner's decision regarding his CSP entitlement;
u) Several grievance appeal hearings were held by Mr Coker with the Claimant throughout January and February 2018 with the intention of determining all the complaints that had been raised by him so he would return to work;
v) On 26 February 2018, the Claimant raised a grievance alleging that Ms Watkins, a manager, had been pulling faces at him during a meeting of 21 February 2018.
w) On 6 March 2018, Mr Coker communicated the outcome of the grievance

appeal regarding CSP and other grievances (save for the grievance relating to Ms Watkins which was dealt with separately) to the Claimant and said a letter confirming the outcome would be sent within 7 days;
x) On 14 March 2018 at about 2 pm, the Claimant chased Mr Coker by email for a letter confirming the outcome, referring to an exacerbation of his depression and requesting a copy be available for him that day;
y) On 14 March 2018 Mr Coker signed a lengthy letter confirming the outcome of the grievance which had been already been given orally.
z) On 15 March 2018 the letter written by Mr Coker was sent to the Claimant by recorded delivery.
aa) On 15 March 2018, the Claimant attended the Respondent's warehouse at around 2pm and handed in a letter of resignation;
bb) After the Claimant's resignation, a further grievance hearing was arranged for 21st March 2018 to consider the grievance about Ms Watkins, but the Claimant did not attend.

## Policies and procedures

11. The Respondent has various policies and of relevance to this case is its Sickness Absence Management Policy. This policy states:

### **“Managing Sickness Absence – Payment Arrangements**

.....

- **The maximum amount of Company Sick Pay that a colleague will receive for any single period of absence is 26 weeks.**
- **When Company sick pay expires and a colleague continues to be absent into the start of a new Company Sick Pay year they will not receive a new yearly entitlement. This can only happen after the colleague has returned to work although a continuation may be considered, by exception in compassionate cases.**
- .....
- **Sick pay takes precedence over all other paid absences. In some cases it may be possible to support a colleague back to work by reducing their working hours. In those cases, Company Sick Pay may be processed to help make up wages, provided Company Sick Pay has not been exhausted and a return date to full duties can be agreed. Such cases will not be included in the sickness absence monitoring process”.**

12. The entitlement to sick pay is calculated in financial years from 6 April when the entitlement resets.
13. In addition, the Respondent has an occupational health provider who can

provide counselling, physiotherapy and other occupational health services. This is provided by the Respondent to try to get an employee who is absent from work back to work quicker. Counselling is referred to in the policy: "Asda may offer counselling services at appropriate stages in the procedure....".

14. The policy states that: "Managers must not withhold Company Sick Pay, except in these circumstances: ..... Reasonable belief of abuse of the Company Sick Pay Scheme".

15. The Respondent has a grievance policy which, as relevant, states:

**This procedure does not form part of the contract of employment.....**

.....

**Grievance meetings**

**The purpose of a grievance meeting is to enable the colleague to explain their grievance and how they think it should be resolved and to assist in reaching a decision based on the available evidence and the representations made.**

....

**A written outcome will be provided usually within five days of the final grievance meeting to inform the colleague of the outcome of the grievance and any further action to be taken to resolve the grievance. The Colleague will also have right of appeal. Where appropriate a meeting will be held to give this information in person.**

**Appeals**

**Of the grievance has not been resolved to the colleague's satisfaction, they may appeal in writing to the General Manager, stating the full grounds of appeal within seven days of the date on which the decision was sent or given.**

**An appeal meeting will be held normally within five days of receipt of the written appeal. This will be dealt with impartially by a manager who has not previously been involved in the case (although they may ask anyone previously involved to be present).**

**Confirmation of the final decision will be given in writing usually within five days of the appeal hearing. This is the end of the procedure and there is no further right of appeal.**

**If it is not possible to comply with any of the time limits set out above, then the colleague will be informed about the delay and the reasons for it".**

16. Grievances about a manager should be heard by the General Manager. The General Manager was Mr Coker.

17. The Claimant relies on a series of acts culminating in a last straw and relies on a breach of the implied term of trust and confidence.

18. As can be seen from the key events set out above, the Claimant raised several

grievances and appeals. The key matters in these related to Company Sick Pay. The Claimant was not paid company sick pay when he went on sick leave in November 2017. The reason given by the Respondent is that he was not entitled to it as he had not returned to work on full hours and full duties which was a pre-requisite to company sick pay being 'reset'. The Claimant had received 23 weeks' CSP between July 2015 and January 2016. The remaining three weeks was extinguished on 6 April 2016 when a new sick leave year started in accordance with the Respondent's policy.

19. As noted in the key events, the Claimant was off work for a substantial period with issues relating to his knee returning in January 2016. The following month he had whiplash injuries following a road traffic accident resulting in a further prolonged absence from work. He was again absent from work, this time for stress from 17 November 2017. He never returned to work after this time. He was not paid CSP for this final period of absence. The first time it should have been paid was in his December 2017 pay.
20. The policy as set out above, states that the Claimant would only receive further CSP if he returned to work on full hours and full duties. The question is therefore whether the Claimant did this before he resigned.
21. There is no dispute between the parties that the Claimant did return to work under a rehabilitation plan in accordance with the Respondent's policy. This plan, which the Claimant signed, provided for a four-week rehabilitation period after which the aim was that the Claimant would be working his full contracted hours (eight hours) and that his pick rate was on target. There was a phased increase in hours and in the target to achieve.
22. The Claimant did achieve working an eight-hour day; however, he did not reach his pick rate target. His role was to pick orders from the warehouse to be loaded on to a van and taken to the Respondent's stores. The evidence was that not only had he not achieved the targets but that there was also no evidence of any improvement in performance over the four-week period. At the end of this period, the Claimant was achieving 67% of his target. The Claimant blamed this on him not being able to use the headsets and having to get a paper order to pick which took more time. The Respondent's evidence was that other employees also worked on a paper basis and reached their targets, and also that had the Claimant shown improvement week on week, then it would have accepted that he had returned to full duties even if he had not achieved 100% of his pick rate. The Respondent's evidence was that as the Claimant's pick rate did not improve, he had not returned to full duties and was therefore not entitled to CSP.
23. The Tribunal accepts the Respondent's evidence and finds that the Claimant was not entitled to CSP under the Respondent's policies. There was no breach of contract as the Respondent was operating within the terms of the CSP policy. The Tribunal accepts the Claimant was not happy about this.
24. If the Tribunal had found there to be a breach (which it has not) even though pay should have been made in December 2017, this was something that the Claimant subsequently challenged through his series of grievances and it cannot

therefore be said that he affirmed the breach as suggested by the Respondent.

**January 2017 onwards**

25. As can be seen from the key events set out above, the Claimant raised numerous grievances. In considering these grievances the Tribunal has noted the terms of the grievance policy, the relevant parts are set out above. First the Tribunal notes that is it non-contractual and second the Tribunal notes that the timescales contained in it are indicative rather than mandatory.
26. The Tribunal accepts a submission by the Respondent that the Claimant has not identified any procedural failings on part of the Respondent to save for what he says happens from January 2018. This will be dealt with later. The Tribunal finds that prior to this date the Respondent dealt with the Claimant's grievances in accordance with its policy. Given the Tribunal's ultimate findings which are set out below, the Tribunal does not intend to give a lot of detail about the times and dates of meetings, save to say that there was no complaint about for example, timescales being missed. The Claimant did not agree with the outcome which is a different issue to the Respondent conducting the process in breach of contract or breach of the implied term of trust and confidence.
27. The Tribunal particularly notes that there was not a blanket dismissal of the Claimant's grievances and that on three occasions the Claimant's grievances were upheld. These related to his allegations that: Mr Watkins used a false name when telephoning the shop at which the Claimant's wife worked (this was in relation to a suspicion on the Respondent's part that the Claimant had been working for another employer whilst on sick leave); that Mr Perera wrongly sent the Claimant home on 1 September 2017 (for which Mr Perera apologised) and that Ms Tanner wrongly suggested that the Claimant did not attempt to use different earpieces (this was in relation to the Claimant saying that he was unable to use headsets used in the warehouse because of irritation to his ears). The Tribunal finds that the Respondent applied its grievance policy properly in relation to these matters and where it found that it had acted incorrectly it acknowledged that.
28. In relation to the grievance process from January 2018 onwards, this was a mixture of appeals against previous grievances and new grievances which the Claimant brought all (except one) were dealt with by Mr Coker. Mr Coker as General Manager had ultimate responsibility for the running of the whole depot. His evidence, which the Tribunal found to be convincing, was that he treated the Claimant's appeals and grievances very seriously and that he recognised that unless he dealt with them in some detail, the Claimant would be unhappy and would not return to work. The Tribunal accepts that his focus was to resolve the outstanding grievances with the Claimant so that the Claimant would return to work. The Claimant had said he was not returning to work until these matters had been resolved.
29. As can be seen from the key events set out above, there were several meetings. At the same time, the Respondent instigated a disciplinary investigation in relation to the allegation that the Claimant had a second job while he was on sick leave. This issue was resolved with the Respondent (Mr Perera) finding



that there was no case to answer against the Claimant in relation to this allegation and confirming this in a letter dated 27 February 2018. The Tribunal's finding is that the information the Respondent received was enough to raise a suspicion that the Claimant had been working elsewhere whilst on sick leave. Having had that suspicion, it was reasonable for the Respondent to investigate it and to move to a disciplinary hearing. The fact that Mr Perera found there was no case to answer shows that he listened to the Claimant and the Claimant's explanations and that the process was applied properly and worked.

30. In relation to the grievance appeals the Claimant accepts that there were several meetings in January and February 2018. Meetings were held and then were adjourned as there was insufficient time to complete them. At the same time, an early January 2018 the Respondent initiated an investigation relating to an allegation by Ms Tanner that the Claimant was abusing company sick pay. The reason for this investigation is that the Claimant, having returned to work under a rehabilitation plan, (as set out above) then very quickly went on sick leave again expecting to be paid CSP. The suspicion was that he had only returned to work in order to reset the sick pay entitlement so that he could go on sick leave and be paid. The Claimant appealed Ms Tanner's decision on 11 January 2018 not to pay company sick pay. This matter has been dealt with above.
31. Mr Coker had a meeting with the Claimant on 6 March 2018 during which he told Mr Coker the outcome of the grievance appeal relating to company sick pay and the other grievances he had raised. This is a long meeting lasting over two hours. In this meeting, Mr Coker also dealt with issues relating to the use of a headset and he accepted that the previous conclusion that the Claimant had never attempted to use different earpieces was incorrect as the Respondent hadn't provided them. He concluded the meeting discussing how the Claimant could return to work and how the Respondent could help him.
32. Mr Coker told the Claimant that he would write to him within seven days confirming the decision he had reached and the reasons for it. Seven days expired on 13 March 2018. On 14 March 2018 at 13:58 the Claimant sent an email to Mr Coker chasing this letter and asking Mr Coker to have it ready for him to collect that day. On the same day, Mr Coker signed a five-page letter to be sent to the Claimant confirming the content and outcome of the grievance appeal hearings. This is a detailed letter confirming what he had said in the meeting on 6 March 2018 and set out the meetings and rationale behind his decisions. It was sent to the Claimant by recorded delivery on 15 March 2018.
33. The Tribunal is satisfied that this letter would have taken some time to compile given its length and detail and the Tribunal finds that Mr Coker finalised this letter on 14 March 2018. The only criticism there could be is that Mr Coker could have emailed the Claimant to say the letter was finalised and would be posted the next day. However, this is a minor point and not sufficient to amount to a breach of the implied term of trust and confidence.
34. The next day, on 15 March 2018 at about 2 pm the Claimant hand-delivered a letter of resignation. In this letter the Claimant refers to his previous grievances and the other investigations which had taken place exacerbated his depression

and associated symptoms. He referred to the meeting with Mr Coker on 6 March 2018 and complained that the outcome letter had not been given to him despite Mr Coker saying it would be with him within seven days.

35. He further referred to a grievance meeting which was held on 14 March 2018 (in relation to the grievance he raised on 26 February 2018) which was to be heard by an Operations Manager. The Claimant's complaint was that the policy says it should have been heard by a General Manager. His complaint is he notified the Respondent of this but was still required to attend the meeting and when he challenged it in that meeting the Operations Manager accepted his argument and adjourned the grievance to a later date to be heard by General Manager. The Tribunal notes that a date was set but the Claimant did not attend. The Claimant concludes the email by saying **"As a result of ongoing issues, the added stress and depression in the matters above, I feel I am no longer able to continue my employment with Asda and thus I consider myself to have been constructively dismissed. It should be noted that my mental and physical health has been seriously affected due to matters and yet I have received no support or indeed any appropriate welfare contact from Asda since on or around 4 December 2017 despite the clear Absence Policy"**.
36. The reference to support his in relation to counselling services which initially the Respondent arranged via its third-party provider for the Claimant. A telephone counselling session had been set up for the following day, however the Claimant said it was not convenient. The Respondent did not set up a subsequent session because it reasonably believed that the Claimant was receiving counselling services via the NHS and that to have another counselling arrangement would conflict with this and not be for the Claimant's benefit. The Claimant says that he was on an NHS waiting list and was not actually receiving the counselling session, but this is not what the Respondent understood at the time.
37. Given the circumstances, it may have been preferable that a further appointment was arranged, however the Tribunal accepts that the Claimant was not forthcoming with the full reasons as to why he could not take the telephone call from home (he said his wife was ill but that does not explain why he could not take the telephone call) and the Respondent's view that to give other counselling treatment could conflict with the treatment it thought the Claimant was getting on the NHS. The Claimant said he was not receiving treatment at this time but was on a waiting list.
38. As the Respondent submitted it was difficult to establish what the final straw was. The Tribunal agrees. When the Claimant was giving evidence, the Tribunal asked him several questions to try to establish what the last straw was that he relied on. In response the Claimant referred to the ongoing situation with the Respondent and that the letter from Mr Coker was not sent within 7 days. The thrust of the Claimant's evidence was that he disagreed with the outcomes.
39. If the last straw was that Mr Coker was late in sending confirmation of his decision, then this does not amount to a breach of contract. This is particularly so in the circumstances where the Claimant had been notified of the decision already in a previous meeting. It was unreasonable of the Claimant to have only given 24 hours for Mr Coker to respond to his email. This is especially so given

the number of issues that Mr Coker had to deal with, the detail and length of Mr Coker's letter and the fact that Mr Coker as General Manager had other substantial duties to undertake. I do however find that it would have been preferable if Mr Coker had responded to the Claimant on 14 March 2018 to say that a letter was on the way - however his failure is not enough to amount to a breach of contract required for a last straw.

40. In submissions, the Claimant referred to the previous grievances and ongoing situation as being the last straw. However, that is a set of circumstances which had been going for a long time and does not amount in law to a last straw but a continuation of what had been happening.
41. Ultimately the Tribunal finds that the Respondent operated its grievance policies reasonably and they took the Claimant's grievances seriously. It is clear the Claimant was unhappy with the outcome of the grievance process but that is not the same as there being a breach of the implied term of mutual trust and confidence. Similarly I find that the Respondent was entitled to investigate matters when suspicions arose as set out above and the Tribunal notes that the processes worked in the Claimant's favour, in that the Respondent listened to what the Claimant had to say and as appropriate did not pursue matters further. The Tribunal accepts that the Claimant may have been unhappy, but this is not the same as the Respondent committing a fundamental breach of contract.
42. The Claimant complains that his depression and stress were exacerbated by the length of time it took for the grievance process to be concluded. Having looked at the process overall and bearing in mind the indicative timescales in the grievance procedure, the number of grievances raised, and the Claimant's absence on sick leave I do not find this to be a breach of the implied term of trust and confidence but a consequence of the grievances raised.
43. In all the circumstances I find that the Claimant was not dismissed but resigned and his claim for constructive unfair dismissal is dismissed.

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Employment Judge Martin  
Date:30 January 2020