EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr M W Newton	AND	Tesco Stores Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 28 February 2020

EMPLOYMENT JUDGE N J Roper

Representation
For the Claimant: In person, assisted by his father Mr B Newton
For the Respondent: Mr D Stephenson of Counsel

JUDGMENT

The judgment of the tribunal is that:
1. The claimant's claims for unfair constructive dismissal and for breach of contract are hereby dismissed; and
2. There are no claims for unlawful deduction from wages and/or accrued holiday pay, and only to the extent that these have been recorded, they are dismissed on withdrawal by the claimant.

REASONS

1. This is the judgment following a preliminary hearing to determine whether the claimant's claims should be struck out on the grounds that they have no reasonable prospect of success, or whether the claimant should be ordered to pay a deposit as a condition of continuing with the claims because they have little reasonable prospect of success.
2. In this case the claimant Mr Matthew William Newton has brought claims alleging unfair (constructive) dismissal, and for breach of contract in respect of his notice period. The claim form raised the possibility of claims for unlawful deduction from wages, and for accrued but unpaid holiday pay, but the claimant confirmed today that there are no claims in this respect, and to the extent that they have been registered as claims they are now withdrawn. The remaining claims are both denied by the respondent.

3. I have considered the grounds of application and the response submitted by the parties. I have considered the oral and documentary evidence which it is proposed will be adduced at the main hearing. I have also listened to the factual and legal submissions made by and on behalf of the respective parties. I have not heard any oral evidence, and I do not make findings of fact as such, but my conclusions based on my consideration of the above are as follows.
4. The respondent is the national retailer Tesco, and the claimant was employed as a Security Guard from 3 March 2008 until his resignation on 26 April 2018. He worked at the respondent's store at Minehead in Somerset.
5. It was argued today on behalf of the claimant that he had 10 years of loyal service with the respondent, but in fact the claimant had already been subject to the respondent's disciplinary procedures for misconduct, and was subject to a final written warning at the times relevant to these claims. This final written warning letter was dated 4 August 2018 and was expressed to last for 12 months. The misconduct in question covered seven different failures to comply with the respondent's requirements and procedures, which were: (i) usage of phone while operating a checkout; (ii) usage of phone while serving a customer; (iii) eating and drinking while operating a checkout; (iv) leaving the garage single manned; (v) taking extra breaks; (vi) failing to pay for a costa coffee from the Costa machine in the PFS; and (vii) keeping money on his person whilst operating at the checkout. This written warning made it clear that any further incidents of misconduct were likely to result in the claimant's dismissal. He was offered the right of appeal against this morning, but the claimant accepted the warning and did not appeal.
6. I am therefore satisfied that at the times material to this claim the claimant was fully aware of the respondent's disciplinary process, and that any further instances of misconduct were likely to result in his dismissal for that reason.
7. During this time the respondent decided to reduce some of its security facility, and commenced formal consultation with regard to possible redundancies. This was dealt with by Mr Alex Redgrave the store manager. He wrote to the claimant on 13 April 2019 confirming that the claimant's role was at risk of redundancy and inviting him to a consultation meeting on 13 April 2019.
8. Unfortunately, the respondent also found grounds to commence further disciplinary proceedings against the claimant. By letter dated 12 April 2019 the claimant was asked to attend an investigation meeting the following day in connection with allegations that he had taken extra breaks on several occasions; had been eating behind the customer service desk; and that he had also asked untrained colleagues to look after the customer service desk. He was informed of his right to be accompanied by a colleague or authorised union representative and referred to the relevant disciplinary procedures.
9. It was clarified at the investigation meeting on 13 April 2019 that Mr Redgrave would deal separately with the redundancy process. The claimant confirmed that he was content to proceed with the investigation meeting and he declined representation. He subsequently requested that the meeting was adjourned. The respondent agreed and it was reconvened on 19 April 2019. The claimant was informed that a further allegation would be added, namely that he had used the phone behind the customer service desk which was not for customer assistance. He was again reminded of his right to be accompanied and referred to the disciplinary process.
10. As a result of this investigation meeting the respondent decided that there was a disciplinary case to answer. By letter dated 22 April 2019 the claimant was required to attend a formal disciplinary hearing at 5 pm on 26 April 2019. The letter made it clear that the hearing would discuss further allegations of misconduct, namely: (i) taking extra breaks on several occasions; (ii) eating behind the customer service desk; (iii) asking untrained colleagues to look after the customer service desk; and (iv) usage of phone behind the customer service desk when not for customer assistance. The letter also made it clear that it was a serious matter which might result in the claimant's dismissal and that the claimant was entitled be accompanied by a colleague or trade union representative.
11. The claimant says that he did not receive this letter. The respondent says that the letter was handed to the claimant personally, and the letter is marked "Delivered by Hand".

12. Meanwhile the claimant had also received an earlier letter dated 13 April 2019 from Mr Redgrave asking him to attend a second consultation meeting with regard to potential redundancy. That meeting was called for exactly the same time, namely 5 pm on 26 April 2019.
13. The formal disciplinary meeting then took place at 5.05 pm on 26 April 2019. The minutes of this meeting have been signed by the claimant as being accurate minutes. Although there had been a clash of dates, it was made clear to the claimant that the meeting was a formal disciplinary meeting with regard to the further allegations. It was clear that the claimant understood the nature of the meeting, and despite a request confirmed that he did not wish to be accompanied or represented. Mr Smith chaired the meeting, and made it clear that either the allegations would be withdrawn if there was no case to answer, there might be a renewal of the final warning, or there might be dismissal, and that these were the three options open to him. The four allegations of misconduct were explained in detail and when asked if he was aware the allegations and whether he understood why he was attending the meeting, the claimant answered "completely".
14. The parties then discussed the allegations against the claimant in detail. During this process he requested breaks and adjournments which were granted. After one such break, the claimant returned, and confirmed that he was fit to continue but then said: "I would like to add before we continue that I would like to hand in my resignation so that I am employable in the future." Mr Smith confirmed he was prepared to accept the claimant's resignation and the claimant then confirmed his resignation in writing to this effect: "To whom it may concern – I am hereby informing you that I am handing in my notice with immediate effect" which letter he then signed.
15. Mr Smith acknowledged the resignation by letter dated 26 April 2019, and stated: "I would like to assure you that the current investigation/disciplinary process has not been predetermined, and I hope you have not resigned on the basis of this belief." The claimant subsequently attended a leaving interview at which he was offered the opportunity to retract his resignation, but he declined to do so.
16. Having set out the relevant background, I now apply the law.
17. The Employment Tribunal Rules of Procedure 2013 are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and are referred to in this judgment as "the Rules". Rule 37(1) provides that at any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on the grounds that it is scandalous, or vexatious, or has no reasonable prospect of success. Rule 39 provides that where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. Under Rule 39(2) the Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
18. In this case the claimant asserts that his resignation should be construed as his dismissal and relies upon sections 95(1)(c) and 98(4) of the Employment Rights Act 1996 ("the Act").
19. Section 98 (4) of the Act provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
20. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
21. I have been referred to and have considered the cases of; Ahir v British Airways Plc [2017] EWCA Civ 1392; North Glamorgan NHS Trust v Ezsias [2007] IRLR 603 CA; Anyanwu v South Bank Students' Union [2001] IRLR 305 HL; Tayside Public Transport v Reilly [2012]

IRLR 755 CS; Mechkarov v Citibank NA [2016] ICR 1121 EAT; Blockbuster Entertainment Ltd v James [2006] IRLR 630 CA; Hasan v Tesco Stores Ltd EAT 0098/16; Balls v Downham Market High School & College [2011] IRLR 217 EAT; and Kaur v Leeds Teaching Hospitals NHS Trust [2019] 1 CA; Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131.

22. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."
23. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
24. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".
25. In Kaur v Leeds Teaching Hospitals NHS Trust the Court of Appeal held that a properly followed disciplinary process or its outcome could not constitute a repudiatory breach of contract or contribute to a series of acts which cumulatively constituted such a breach. The Court of Appeal concluded that an employee might believe the outcome to be wrong, but the test was objective, and a fair disciplinary process could not, viewed objectively, destroy or seriously damage the relationship of trust and confidence between employer and employee.
26. In this case the claimant's claims for unfair constructive dismissal and breach of contract in respect of his notice turn on whether his resignation is construed to be a dismissal, or whether it cannot. If there is no dismissal both claims must fail. In his originating application the claimant complains of three matters, which were again repeated today: (i) he did not

expect the disciplinary meeting to be a disciplinary meeting; (ii) that he had not received 48 hours' notice of that meeting; and (iii) effectively that his resignation was made under duress.

27. With regard to the first two matters, there is a factual dispute about whether the claimant was given more than two days' notice of the disciplinary hearing (as recommended in the relevant procedure). The letter dated 22 April 2019 from Mr Smith requiring him to attend the hearing is marked "delivered by hand", although the claimant denied receiving it. In any event he attended at the relevant time and place, which is not surprising because he was also informed that there would be a redundancy consultation meeting at the same time. However, it is clear from the minutes of the disciplinary meeting (which the claimant signed as being accurate) that he fully understood that there was a disciplinary meeting and that he "completely" understood why he was there and the nature of the allegations which he had to face. He also knew the consequences of the meeting, namely that it might result in his dismissal, and declined representation. The claimant did not request any postponement and confirmed that he wished to continue.
28. It seems clear to me that the respondent undertook a fair and reasonable process (even allowing for the redundancy consultation meeting mistakenly planned for the same time). However, this does not appear to be relevant for this reason. The reason why the claimant says he resigned was that he was pressurised under duress at the end of that meeting into resigning his employment, which is effectively a breach of the implied term of trust and confidence between employer and employee. The claimant did not resign his employment because he was afforded less than two days' notice of the disciplinary hearing, nor because he did not know it to be a disciplinary hearing. These issues do not give rise to an alleged fundamental breach of contract upon which the claimant relied to suggest that his resignation was a constructive dismissal.
29. It seems to me that the claimant can only succeed in his claims if he can establish that there was a fundamental breach of contract, and he relies on a breach of the implied term of trust and confidence. The claimant alleges now that he was pressurised into resigning. However, the following matters are clear: (i) the claimant knew that he was attending a disciplinary hearing; (ii) he knew that he already had an active final written warning in place; (iii) he knew that it was a serious matter and that it might result in his dismissal; (iv) he was offered but declined representation; (v) he received a full explanation of the disciplinary charges against him; (vi) he had every opportunity to state his case in response; (viii) he requested and was granted breaks during that meeting; (ix) on returning from one break, he requested that he should be allowed to resign to avoid a dismissal for misconduct in order to improve his chances of obtaining alternative employment; (x) on being asked to confirm his resignation in writing he was prepared to do so; and (xi) after a cooling off period the claimant was subsequently offered the opportunity to retract his resignation, but declined to do so.
30. In my judgment these circumstances do not give rise to an argument that the respondent was in fundamental breach of the implied term employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It is clear from Kaur v Leeds Teaching Hospitals NHS Trust that a fair disciplinary process could not, viewed objectively, destroy or seriously damage the relationship of trust and confidence between employer and employee.
31. In a nutshell, the claimant was on an active final written warning for misconduct, and was subjected to a fair disciplinary process during which he was required to answer subsequent similar allegations of misconduct which were likely to result in his dismissal. He well understood the position he was in, and requested that he be allowed to resign in order to avoid a misconduct dismissal in the hope of improving his chances of obtaining further employment. That was an entirely reasonable request on the part of the claimant in the circumstances, and equally it was entirely reasonable for the respondent to agree. Most tellingly, the claimant subsequently declined the opportunity to retract his resignation.
32. In my judgment this is not a fact sensitive case and it is clear from the contemporaneous documents that there is no evidential factual dispute relating to the alleged breach of the

fundamental term upon which the claimant relies. In my judgment the claimant has no reasonable prospect of establishing a breach of the fundamental term upon which he relies, and accordingly no reasonable prospect of establishing that his resignation should be construed to be his dismissal. His resignation was simply that, and not his dismissal. Accordingly, I hereby strike out his claims as having no reasonable prospect of success pursuant to Rule 37(1)(a).

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Employment Judge N J Roper
Dated 28 February 2020