EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103679/2019

Held in Glasgow on 15 and 16 October 2019

Employment Judge M Robison

Mr G Beck	**Claimant** **Represented by** **Mr G Nesbitt** **Lay representative**
Loch Tay Highland Lodge Park Ltd	**Respondent** **Represented by** **Mr A Philp** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim does not succeed and therefore is dismissed.

REASONS

Introduction

1. The claimant lodged a claim with the Employment Tribunal on 10 April 2019 claiming unfair constructive dismissal. The respondent entered a response resisting the claim.

2. During the hearing, the Tribunal heard evidence from the claimant. For the respondent, the Tribunal heard from Ms Joanna Barrie, park manager and Mr Rupert Barrett, owner and director of the respondent.

3. It had been proposed that an employee of the respondent, John Aitchison (the claimant's line manager), would also give evidence. Mr Philp however chose not to call him. Mr Nesbitt had understood that he would be called by the respondent and wanted the opportunity to cross examine him. After the first day of evidence Mr Philp maintained his position that he did not require to call him. While I had some sympathy with Mr Nesbitt since he had been expecting him to give evidence, I did not understand Mr Nesbitt to be seeking a witness order since he appreciated that he would not be able to cross examine him if he called him.

4. In any event I was of the view that it was not appropriate to issue a witness order either at the instance of the claimant or of my own motion because I did not accept that Mr Aitchison's evidence was sufficiently relevant. It seemed to me that he was a witness as to the events, but the focus in a constructive dismissal claim is of course on the conduct of the employer. Although there was a dispute about what Mr Aitchison had said, the Tribunal heard evidence both from Ms Barrie and Mr Barrett in that regard.

5. Throughout the hearing, Mr Philp objected to certain passages of evidence which the claimant proposed to lead. I was aware that the claimant had completed the ET1 form himself and had only latterly secured the assistance of Mr Nesbitt who described himself as a lay representative. He confirmed at the outset that he was a retired solicitor. Notwithstanding, and in light of the overriding objective, I was aware of the need to ensure that parties were on an equal footing.

6. Thus despite reservations, I thought it right to hear most of the evidence under reservation as to its relevance. However, in so far as Mr Nesbitt attempted to rely on specific breaches of health and safety matters, I ruled during the hearing that these were not admissible. I was of the view that the claimant could only rely on specific breaches to the extent that he had raised these in his pleadings. His pleadings and indeed the documentary evidence supporting the case shows that

the claimant had only brought up health and safety concerns in general and that in regard to specifics he had only brought up his concerns about the drainage of hot tubs. The respondent had no notice that the claimant would be relying on any other alleged breaches. Indeed given that he had not brought these to the attention of the respondent while he was employed there, it would be difficult for the claimant to argue that these contributed to the breach of contract which he was asserting.

7. In particular, in the ET1, the claimant stated in only seven lines that he had raised a grievance against John Aitchison for taking money from an outside contractor for taking rubbish away from the Lodge he was working on; that he had mentioned two witnesses but that the manager had not investigated his claims; and that he had alleged that John Aitchison had taken £20 from the fishing shed and that was witnessed by a colleague Ryan Tanta.

8. On 10 July 2019, Mr Nesbitt lodged further particulars, referencing the failure of the respondent to investigate two grievances. The letter also states that "the "final straw" for the claimant followed a welfare meeting which took place on 11 March 2019 while the claimant was absent on sick-leave. Mr Nesbitt went on to state that "During this meeting the claimant once again raised the issue of health and safety (or lack of) on site. He asked if he returned to work and witnessed a breach of health and safety, would disciplinary action follow. The reply he received was that Joanna Barrie would investigate this. This was unsatisfactory to Mr Beck due to the fact he had previously asked Ms Barrie who the health and safety person on site was…(see minutes of meeting 22/01/19) and she stated she does not need to answer that question. Therefore it was apparent to the claimant after this welfare meeting, that nothing was going to change regarding health and safety on site and given that Mr Beck has twice suffered injury during the course of his employment he felt he had no alternative but to write a letter of resignation. The effect it was also having on his mental health was also a major factor in terminating his contract at Loch Tay Highland Lodge Park Ltd".

9. Having now heard all of the evidence, and reflected in deliberations, I have come to the conclusion that a number of the passages of evidence, heard under

reservation as to their relevance, were not in fact relevant to the claim as it had been plead. While giving appropriate lee-way in fulfilment of the overriding objective to the claimant, I concluded that the claimant could not ultimately rely on certain passages of evidence because no notice of them had been given to the respondent.

10. While some passages of evidence could be viewed as elaboration of events foreshadowed in the pleadings, I accepted Mr Philp's submission that a number went beyond that. In particular I noted that the claimant had asserted in evidence that Mr Barrett had sworn at him and that Ms Barrie had assaulted him. Clearly there were no pleadings to support such serious allegations, and the respondent having had had no notice of these accusations, these events could not be relied on. However and in any event these allegations were never raised while the claimant was employed again it is difficult to see how he could rely on them to support his claim for constructive dismissal.

11. During the hearing, 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 holiday park with a variety of self catering accommodation, including private lodges, a marina and a bistro. They employ 12 permanent staff and up to eight seasonal staff. It is one of four holiday parks in the Largo Leisure group, of which Mr Rupert Barrett is owner and co-director.

14. The claimant commenced employment with the respondent on 1 May 2013 as a groundsman. He resigned by letter dated 14 March 2019, giving notice, and his last day of employment was 1 April 2019.

15. The claimant's contract of employment (pages 31 – 36) states at paragraph 4 that the employee handbook is available to consult in the general office. At paragraph 16 it is stated that the claimant is entitled to statutory sick pay. The contract refers to the grievance procedure at paragraph 20 where it is stated: "the company encourages employees to settle grievances informally with their manager. If however you have a grievance relating to any aspect of your employment which you would like to be resolved formally, you must set out the nature of the grievance in writing and submit it to your line manager, or another manager. You have the right to appeal against any decision taken in respect of your grievance……further details of the grievance procedure are set out in the employee handbook".

16. At paragraph 21, under the heading health and safety, it is stated that: "It is your duty and responsibility to familiarise yourself with, and to comply with, the company's or any third party's health and safety policies and procedures. Breach of these rules may result in disciplinary action, up to and including the termination of your employment without notice for gross misconduct".

17. A poster is displayed in the common area behind the reception desk regarding health and safety law, which identifies Ms Barrie as the designated health and safety contact on the site (page 152). She has held that role since she was appointed manager 25 years ago.

18. The employee handbook includes a policy on "accidents, incidents and near misses" (pages 37 to 38); a grievance policy (pages 39-40) and a policy on business gifts (pages 41). It is there stated that "as a general rule you should not accept gifts from suppliers, clients, customers, contractors or any other person you deal with in your capacity as an employee of the company. If the value of the item is negligible or if the item is presented as a seasonal gift, you should comply with the procedure set out below….."

19. In practice, the respondent turned a "blind eye" to the payment of tips so long as they were not for services which the respondent would otherwise charge for.

20. The claimant's hours of work were 8.30 to 5pm, 5 days each week, with Wednesdays and Thursdays off. He could be rota'd to work alternative hours.

21. On 3 January 2017, the claimant suffered an accident while climbing a loft ladder. This was entered into the accident record book on 22 January 2019 (page 43).

22. In March 2017, John Aitchison took up employment as groundsman supervisor, and in that role line managed the claimant. The respondent became aware of concerns being expressed by the claimant regarding the fitness of Mr Aitchison for the role, although these were similar to general concerns which the claimant had expressed about previous line managers. These concerns were general but not specific. Ms Barrie became aware over time about the claimant's concerns about Mr Aitchison, although there had been no face-to-face confrontations between them.

First grievance

23. On or around late March 2018, the claimant sent a grievance (undated) to Joanna Barrie stating that "On Sunday the 25th of March at approx. 10 past 5 at the big shed there was a discussion about the window in the Viking I asked Emillie what department she worked in housekeeping or grounds then we all went home. On Monday the 26th Ryan was speaking to me and said John told him that Emillie went to him and said I was screaming in her face and there was only me and her there. So on Tuesday the 27th I asked John about it he said Emillie seemed upset and she might make a complaint against me. I asked John if she was talking about it to Hamish in the big shed and he said yes when he went in she was on about it again but this was all lies. I have 3 witnesses Yvonne Susan and Ryan. So I am raising this grievance against Emillie for these allegations she made against me and dragging my name through the mud".

24. Joanna Barrie then spoke to Emillie Bordeaux, a member of the housekeeping staff, who confirmed that she had been upset by the way that the claimant had spoken to her after she had a reported a broken window to the office, when he

thought she should have reported it to him. She confirmed that he had not shouted at her but made her feel uncomfortable and upset.

25. Ms Barrie thereafter spoke to the claimant and while speaking to him, Mr Aitchison also came into the office. Following discussion, he confirmed that he had exaggerated about Emillie's reaction and apologised. Ms Barrie understood the claimant to have accepted the apology. Ms Bordeaux confirmed subsequently that she did not intend to lodge a grievance against the claimant. Ms Barrie considered that the matter had been resolved informally.

26. On 18 December 2018, the claimant completed the accident record book reporting an injury to his finger after the log splitter failed on that date.

Second grievance

27. In or around October/November 2018, Mr Barrett had a discussion with the claimant regarding his attitude to work and raised concerns that had been raised with him by Mr Aitchison, specifically about him spending too much time in the bistro and using the gator (site buggy) with two people when that was not required. He raised concerns about a clash with Mr Aitchison.

28. In or around 18 December 2018, the claimant wrote to Ms Barrie lodging a grievance about Mr Aitchison regarding the allegations he made against him to Mr Rupert Barrett that he was always clashing with him; was always in the bistro during the day; and that he was always on the gator with Ryan Tanta. He concluded, "This is not the first time he has told lies on me and I want it stopped and sorted out today".

29. Ms Barrie discussed this grievance with Mr Barrett.

30. By letter dated 18 December 2018, the claimant was invited to attend a grievance meeting on 24 December 2018. He was advised of his right to be accompanied (page 47).

31. At that meeting, which was conducted by Ms Barrie, Ms Jenna Raybold took notes (pages 48 – 49). The claimant stated that Mr Barnett had "told hm 5 weeks ago at the shed on a Sunday in the afternoon that this was an issue". The claimant advised that he had told Mr Barrett that these were lies.

32. During the course of the meeting, the claimant also advised that he had told Mr Barrett that Mr Aitchison had taken money from the Pearsons (lodge owners) for removing rubbish and that Ryan Tanta had told him that Mr Aitchison had taken £20.00 from the fishing shed for his "coffee fund".

33. The claimant advised, when asked by Ms Barrie what outcome he hoped for, that he wanted the lies to stop and for Mr Aitchison to receive a warning and a "disciplinary for grave misconduct".

34. Ms Barrie advised that she would carry out further investigations and respond by 31 December, although the claimant was subsequently advised that it would be after the busy New Year period.

35. Between 24 December and 6 January 2019, Ms Barnett interviewed a number of members of staff regarding these allegations, namely:

    i. Ryan Tant (who confirmed that he had been instructed to accompany him on the gator, was aware of him spending time in the bistro during working hours, and that he had made negative comments about Mr Aitchison);

    ii. Robbie Robertson (who confirmed that he spent time in working hours in the bistro and was aware of the "clash" with Mr Aitchison and had witnessed him driving around on the gator with Ryan Tant which the grounds staff had been told was not acceptable);

    iii. Rupert Barrett (who confirmed that he was aware for some time that the claimant did not like Mr Aitchison as he had told him he did not consider him suitable for the job, he was aware of a clash although not apparent in any face to face situations but he was made aware

he was unhappy with him; he himself had seen the claimant riding with Ryan Tant on the gator, although staff had been told at a general meeting this was not permitted unless directed, and he had been told by other staff that the claimant was wasting time in the bistro);

iv. John Aitchison (who said he had witnessed the claimant on the gator with Ryan Tant although their employer had told them this was not acceptable; he was made aware of negative feelings towards him by others, and was aware of the claimant spending time in the bistro);

v. Jenna Raybold (who stated that the claimant had told her that the John Aitchison was not fit to be grounds supervisor and was not trustworthy, and had seen him on the gator with other members of staff); and

vi. "Nikki and Ciro" (who operate the bistro, and who confirmed he spent time there).

36. The claimant was furnished with a copy of anonymised statements.

Supplementary grievance

37. By letter dated 27 December 2018, the claimant added a list of points which he wanted Ms Barrie to raise with Mr Aitchison when she met him to investigate the grievance, namely "1. The money he took from the Pearsons for removal of rubbish; 2. The money he took from Alex for removal of rubbish from Catch; 3. £20 taken for coffee fund from the boatshed; 4. An envelope handed to him for me as a tip from fishermen he spent it; 5. The fuel put in Kennedy's Bentley".

38. Ms Barrie interviewed Mr Aitchison regarding these allegations. She did not contact the Pearsons at the time because they had sold their lodge and she was aware of their generosity to staff.

39. Mr Barrett spoke to Alex McFarlane, who was a contractor who did work on site for the respondent as well as private lodge owners, in regard to the second point. Mr McFarlane confirmed to Mr Barrett that the owners of the lodge had been invoiced by him for the removal of the rubbish.

40. A grievance outcome meeting took place on 6 January 2019 at which the claimant was advised that his grievances were not upheld (pages 51-52). The claimant was advised in summary that Mr Aitchison was entitled to bring up the issues with Mr Barrett, which Mr Barrett was in any event aware of from his own observations. Further, Ms Barrie was satisfied with the explanations which Mr Aitchison gave regarding the allegations.

41. The outcome of both grievances was confirmed in a letter dated 8 January 2019. With regard to the references to “clashing with John Aitchison” it stated that, “The comment describing “clashing” between you and John was made by Rupert Barrett during your conversation, these were Mr Barrett’s words based on the fact that he was already aware that you had issues with John as your supervisor, this from previous comments you have made to him expressing your feelings in this regard. At your request we are open to offering a mediation meeting between you and John Aitchison to discuss the way forward in terms of establishing a satisfactory working relationship between you both”.

42. With regard to the reference to being in the gator with Ryan Tant, it stated, “Rupert Barrett has previously brought this matter up himself with all grounds staff on several occasions and given the reasons why he does not want two people driving around the site in a vehicle when the task in hand only requires one person. Rupert Barrett has made this clear and if this matter was discussed with John Aitchison and Rupert Barrett then decided to speak to you, or any other member of staff, on an individual basis regarding this particular issue then this is his prerogative as your employer”.

43. In regard to the reference to being in the bistro, the letter stated that, “It has been confirmed through statements from other staff that most particularly at weekends when John Aitchison was not on site that grounds staff including yourself were

spending an unreasonable amount of time in the bistro. It is understood that grounds staff from time to time are required to attend to repairs etc in the bistro but time wasting during normal working hours is not acceptable. You will be aware that at the end of October last year all staff were told that unless they were in the bistro for a valid reason they were not permitted to take breaks or spend an excessive amount of time in there. Again if Rupert Barrett wishes to bring this up with you personally he is entitled to do so".

44. With regard to the supplementary grievance, the claimant was advised, "As supervisor John Aitchison holds a position of trust and authority and as such is expected to use his judgement to make sound decisions regarding the handling of cash and offering of assistance if required to a guest of lodge owner. He has stated that the cash you refer to with regard to Mr Pearson, The Catch owner, and the fishermen were all tips given to him. Whether or not this was the case and theft was involved there is no evidence to prove otherwise, therefore LTHL as a company is not in a position to carry this matter any further".

45. The claimant was advised of his right of appeal to Mr M Buchanan, General Manager (based at Crail).

Claimant's subsequent behaviour

46. In or around 12 January 2019, the claimant brought up the subject of the grievance at the main reception, although Ms Barrie advised that it was not appropriate in a public space. The claimant followed her uninvited into her office and continued to discuss the grievance. His behaviour was a matter of concern to her.

47. On 14 January, Ms Barrie asked the claimant to attend a meeting to discuss his recent conduct. This meeting was also attended by Jenna Raybold, who took notes (page 55 – 56). Ms Barrie advised that this behaviour was unacceptable.

48. She also advised that she had been made aware by Ryan Tanta that the claimant had advised him that "you better be careful if I see you on the roof of Eldersburn I will be filming you". The claimant admitted raising this because it was a health

and safety issue. Ms Barrie advised that if he believed there was any health and safety issue he should consult with her and no involve other members of staff.

49. This meeting was followed up by a letter dated 14 January 2019 in the following terms (page 57): "The meeting was to discuss a couple of concerns which have arisen since the outcome of your recent grievance was given on 6 January. The concerns discussed included the intimidating manner in which you spoke with myself on 12th January when I advised you I was unable to discuss the grievance with you at that time and you continued to follow me into the office and push the door closed. We also discussed the manner in which you spoke with your colleague Ryan Tant advising that you would be filming him doing his job. During the meeting you explained that this was said due to concerns you had surrounding health and safety. I would like to take this opportunity to mention again that if you have any concerns regarding health and safety on the park you should consult with myself as park manger and not with other members of staff. Should you have any concerns you would like to discuss with me, please let me know. During the meeting you stated on more than one occasion that you were not intending to appeal the decision not to uphold your grievance. We now consider the matter closed".

Salmon Fishing Opening Day

50. On 15 January 2019, the annual opening of the salmon fishing season took place at the park. Although some members of staff started early to make preparations for the opening, the claimant was not asked to come in early as he had been on previous occasions. Mr Barrett attended as he often did but on this occasion he was accompanied by his elderly mother and uncle.

51. Around 11 am, the claimant came up to the office and announced that he was no longer employed by the respondent. He advised Ms Barrie that this was because Mr Barrett had ignored him and that Mr Aitchison only wanted to work with his clique. He said that he was going contact SEPA and get the place shut down. He also mentioned contacting ACAS. He said that his wife (who worked in housekeeping) was not happy because Ms Barrie had ignored her. Later that day

he telephoned and spoke to Ms Raybold and advised that he had changed his mind about resigning.

52. The claimant did not return to work. He submitted a sick note dated 17 January 2019 which stated that he was unfit for work because of depression until 4 February 2019 (page 58).

53. A meeting took place on 22 January 2019 to discuss events of 15 January. Minutes were taken of that meeting by Jenna Raybold (pages 59 – 61). The claimant confirmed that he believed that he had been ignored by Mr Barrett that day.

54. With regard to the reference to SEPA, the claimant stated that he had been making videos for six months, and that the discharge from one of the hot tubs was being emptied into the burn rather than a holding tank. He said “If I tell SEPA this place will be shut down”.

55. He said that he was taking videos because he was concerned that “health and safety on this site does not exist”. He then asked who he should report to, to which Ms Barrie answered, “I do not have to answer that at this time”, the claimant replying, “see that’s my issue, there is none”. Ms Barrie asked the claimant if he was threatening the company, to which he replied, “No you can take this how you want. I am just telling you I have videos”.

56. The claimant also took issue with the statements which had been taken in connection with the grievance, in particular the statements that he had been spending time in the bistro in working hours. He then said that he had spoken to ACAS and would be going to a Tribunal. Ms Barrie advised that they were prepared to extend the time for lodging an appeal against the grievance. He confirmed he had not resigned but he did not intend to appeal because of concerns about Mr Buchanan.

57. Ms Barrie then wrote to the claimant enclosing the minutes of that meeting and advising of an alternative manager to whom to submit an appeal, namely Mr Morley (marketing manager for Largo Leisure group) (page 63).

58. A further fit note was submitted on 31 January to 25 February 2019 (page 64). This fit note stated the reason for absence at “stress at work”.

59. By letter dated 4 February 2019 (page 65), Ms Barrie noted that the reason for absence had changed and offered the claimant an opportunity to meet to discuss the stress at work with a view to alleviating that and to facilitating his return to work. She also gave the claimant another opportunity to appeal the grievance, either to Mr Morley, or to Steve Willett, manager at the Crieff park.

60. On 6 February 2019, Bruce Meikle of SEPA emailed the respondent regarding a complaint from a “member of the public” regarding disposal of water from hot tubs. The respondent was subsequently advised that SEPA had no concerns about that issue.

61. The respondent also received a visit from HSE. Concerns were raised about the staff canteen which was subsequently shut down. HSE advised the respondent they had no further concerns. The claimant was also advised of the outcome of the HSE inspection by letter dated 24 September 2019 (page 90).

62. The claimant submitted a fit note dated 25 February which certified that the claimant was unfit for work until 1 April 2019 due to “stress at work” (page 69).

63. By letter date 5 March 2019, Ms Barrie invited the claimant to attend a meeting to discuss his ongoing absence and current medical condition and whether he needed support or reasonable adjustments to facilitate a return to work.

64. On 6 March 2019, the respondent received a warning from SEPA regarding the burning of waste materials (page 150).

65. The claimant attended a meeting with Ms Barrie, described as a “welfare meeting”, which took place on 11 March 2019. Minutes were taken by Ms Raybold (pages 71 – 74). During that meeting the claimant raised the issue of the grievance. Ms Barrie said that matter was closed since the claimant had not appealed. He advised that he considered that it was never investigated properly. When asked how he was feeling, the claimant said that “he seen a lot of things

going on at the park and it was bringing him down. He said opening day was the final straw for him".

66. Ms Barrie said that the purpose of the meeting was to find a way for him to come back to work. He said that he felt that he would not be made to feel welcome if he returned because he had called HSE and SEPA.

67. Ms Barrie advised that his job was open and that she would ensure that everyone would treat him professionally and in a proper working way and if there were any issues these would be investigated. She offered a phased return and asked if there was anything they could do to alleviate the situation happening again. He raised concerns about staff, which he had raised in his previous grievance, and confirmed that Mr Aitchison was the particular problem and that he still had concerns about health and safety. He asked if he came back to work and witnessed someone breaking health and safety rules whether would they get disciplined and she said she would investigate the matter. The claimant said that if he were to put it in writing then that person should be disciplined straight away. The claimant proposed returning at the beginning of April and Ms Barrie confirmed that she was happy for him to return then.

68. By letter date 14 March 2019 (page 75), the claimant stated: "I would like you to accept my letter of resignation. After the meeting on Monday 11/3/19 I feel nothing has change. I have thought a lot about it. This has caused me a lot of stress you never did investigate the grievance. Therefore I can't work somewhere I'm getting made out the liar. Things could never got back to the way they were so for that matter I cannot return. I will get a signing off line when I got to doctor for 1/4/19 that will be my notice".

69. By letter dated 14 March 2019 in reply Ms Barrie stated "as a valued member of staff the company does not want to lose you and we would try to support you as much as possible when you were able to return to work. I would be happy to arrange an informal meeting with you to discuss the potential for a way forward. I would like to give you the opportunity to reconsider your decision and should you change your mind please let me know by Friday 22 March".

70. The claimant submitted a fit note dated 15 March 2019 stating that the claimant was unfit for wok until 1 April 2019 due to “stress at work” (page 78).

71. On 25 March 2019, Ms Barrie wrote a letter confirming the claimant’s last day at work (page 79).

72. In or around 24 April 2019, Ms Barrie contacted the Pearsons by e-mail and they confirmed that over the years they had given gifts to various members of staff including the claimant (page 80 – 81).

Claimant’s health

73. The claimant’s doctor confirmed that the claimant has suffered depression since March 2017, stating that it appeared that work related stress has impacted on his mental health and subsequent depression particularly since October 2018. He advised that he had over the years had regular GP review, input from a therapist Dr Angus Cameron. He has also been assessed by the community health team (page 87).

74. While the claimant was absent on sick leave during 2017 the respondent exercised its discretion by paying full pay.

Alternative employment

75. The claimant attended an interview with TJ’s Diner on 8 March 2019, was offered a full-time job and due to commence 8 April 2019, but he confirmed he had been offered alternative employment (page 95).

76. The claimant obtained part-time employment with the Co-op in Killin commencing 17 April 2019, but he resigned on 30 August 2019. He commenced full-time employment with the Green Welly in Tyndrum on 1 September 2019, earning equivalent sums to that which he earned with the respondent.

Relevant law

77. 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".

78. 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".

79. 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 (*Mahmud v Bank of Credit and Commerce International SA* 1997 IRLR 462 HL, *Baldwin v Brighton and Hove City Council* 2007 IRLR 232 EAT).

80. 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.

81. 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).

82. 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).

83. The last straw must contribute something to the breach (even if relatively insignificant) (*Waltham Forest v Omilaju* 2004 EWCA Civ 1493).

84. 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).

Claimant's submissions

85. Mr Nesbitt confirmed in submissions that the claimant's case was that neither of his grievances were properly investigated. Emillie Bordeaux was informed that she could raise a grievance against the claimant, whereas the claimant was not informed that he could raise a grievance against Mr Aitchison, despite evidence that he had exaggerated/lied. With regard to the second (supplementary) grievance, the decision was based solely on Mr Aitchison's evidence, despite the fact that his exaggerations were the cause of the previous grievance.

86. The grievance was not properly investigated at the time, and it was not fair that the claimant should only have been forwarded anonymised statements. The first time the claimant had become aware of which witnesses had been interviewed

was when he saw the productions for this hearing. If these had been provided earlier to the claimant, enquiries could have been made to ascertain if these were an accurate reflection of what was said; and there would have been an opportunity to take action. The lack of investigation is also highlighted by the fact that the Pearsons were not contacted until April, nearly three weeks after the claimant had resigned. A proper investigation would have required that to have been investigated at the time of the grievance.

87. With regard to health and safety, while the claimant was unspecific in his concerns about health and safety, his intention was to refer to health and safety on the site as a whole, and his concern was that the respondents were not sufficiently concerned about health and safety. He was never made aware that Ms Barrie was the health and safety officer on site. He had never seen the health and safety poster which was lodged.

88. Given all of this, he did not feel that he could go back to work following the actions which he had taken in regard to contacting SEPA and the Health and Safety Executive about concerns about safety on the site.

89. The final straw was the meeting on 11 March after which he put in his resignation letter on 14 March. While it was alleged that the final straw was on 15 January, the claimant did not resign on that day, but submitted a sick line regarding stress at work. The claimant's case is that the final straw related to his health and his belief that he was suffering depression because he felt he was being ignored by Mr Barrett who was someone whom he believed respected him.

Respondent's submissions

90. Mr Philp first raised a preliminary point regarding the evidence which the claimant could rely on. He submitted that the claimant could only rely on the information in the claim form and further particulars to support his case (by reference to *Ladbrokes v Traynor* UKEATS/0067/06). The only reference in the claim form is to the tips. The further particulars, which were not submitted until 10 July, are very limited in scope and refer to the final straw being the meeting of 14 January. The

claimant has had advice from a former solicitor since that time, but the claimant sought in evidence to expand and alter his claim. The respondent had no notice of much of what he sought to rely on, which was a tactic to "throw in as much mud as possible". He submitted that this does not reflect well on the claimant's credibility.

91. The essence of the claim is that the respondent should have forensically examined each issue raised although the claimant himself had not provided much detail about his complaints. The question however is whether the investigation was reasonable.

92. With regard to whether the last straw is sufficient to amount to a material breach, relying on *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35**,** he submitted that the final straw must add something to the breach. It is an objective test, and account is not taken of the claimant's perception of matters. In this case, it was the claimant's perception that his line manager was lying, but we did not hear any evidence to support that contention (beyond the acceptance he exaggerated).

93. He urged the Tribunal to prefer the evidence of the respondent's witnesses, whom he submitted were calm, credible and reliable and whose evidence is supported by the contemporaneous documents produced. In contrast, the claimant's evidence was contradictory, as evidenced by the claimant shifting between one reason and another in regard to the final straw; and whether he himself had accepted tips. The claimant's anger was evident from the way that he gave evidence, which shows how he reacts to things he does not like, and how difficult it would be for the respondent to deal with him.

94. The claimant accepted many of the points put to him, including the fact that the first grievance was erroneous and that he did not bring it up again until after March 2018; and he accepted that no medical evidence had been produced regarding his inability to drive. None of this assists the claimant's credibility; nor his allegations in evidence that he was assaulted by Ms Barrie or that Mr Barrett had

shouted and sworn at him. As these allegations were not made before this hearing, this was simply an attempt to blacken their name.

95. With regard to the second and supplementary grievances, he never complained that he was unhappy about the statements being anonymous. He states that the statements were lies and explained by the fact that they are "crawlers" and so that there was a conspiracy against the claimant. He simply did not like the outcome because he wanted Mr Aitchison to be dismissed. He was given three opportunities to appeal and gave a variety of reasons why he did not.

96. With regard to health and safety, he accepts that he did not raise any health and safety prior to 14 January. No grievance regarding health and safety was submitted. He accepts too that he received copies of all of the minutes of the meetings; and these make it clear that Ms Barrie had informed him that she was the point of contact for health and safety issues. It does not assist claimant's credibility for him to suggest that he was not aware of that. He accepted that the only specific health and safety issue he brought up was about the hot tubs, although he was the one who had training on that topic. Although he made a complaint to SEPA, they confirmed there was no case to answer. He was asked to be specific about his concerns at the meetings in January and March but was not.

97. With regard to the final straw, he tried to suggest that this included wider health and safety issues, however neither the hot tub issue nor health and safety generally were mentioned in his letter of resignation or claim form. It could not be said then that the final straw was on 11 March. Going back to the events of 15 January, this could not be the final straw either because it was only his perception that he was ignored, so there could be no fundamental breach.

98. He needs to go back then to the outcome of the grievance on 8 January to rely on the failings in regard to the investigation of the grievance, but that is almost three months before the claimant resigns. If the Tribunal were to accept that was the final straw, then the respondent argues in the alternative that the claimant had

affirmed the contract (by reference to the case of *Mari v Reuters Ltd* UKEAT/0539/13, the facts of which are not dissimilar to this).

99. With regard to mitigation and remedy, Mr Philp submitted that as the claimant had failed to supply medical evidence to show that he could not drive (the evidence of Ms Barrie was that he was still driving his wife to work), he could have accepted the higher paid job which he was offered within one week of resigning; any loss should therefore cease on that date. If that is not accepted, then Mr Philp argued that the claimant should have been looking for another job from the end of April when he started the job with the Co-op which was only part-time. He therefore made no attempt to mitigate his losses until he got the job in Tyndrum.

Tribunal's deliberations and decision

Observations on the witnesses and the evidence

100. I found the respondent's witnesses to be credible and reliable. It was clear to me that both Ms Barrie and Mr Barrett were honest and truthful witnesses. Although Mr Barrett could not recall some details, especially in regard to dates, it was clear that he was being careful to ensure that his evidence was accurate.

101. The claimant in contrast gave his evidence in a heightened state of emotion, showing his anger and frustration. I accepted Mr Philp's submission that it was evident from the way that he gave evidence that if these were traits that he had displayed at work then he would be difficult to manage. There were a number of contradictions in his evidence, not least his vacillations about what was "the final straw".

102. Indeed, the claimant only seemed capable of seeing things from his own perspective, and appeared to have something of a persecution complex, which may or may not have been explained by his health issues. I accepted Mr Philp's submission that the claimant's concerns appeared related to the fact that he did not agree with the outcome of the grievances, although he convinced himself that it was about the level of investigation. He said himself that he wanted Mr Aitchison disciplined.

103. Further it is apparent that the raising of health and safety issues is an afterthought, even an act of revenge as Mr Philp suggested, since they come after the outcomes of the grievances are communicated to the claimant. Indeed, I found it very telling that there is no reference to health and safety in the resignation letter or the ET1.

104. As a result, where there was any conflict of evidence between the claimant and the respondent's witnesses, I have preferred the evidence of the respondent's witnesses.

Constructive dismissal

105. 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 I understood it, and Mr Nesbitt confirmed, that the focus in this case is the question whether the implied term of trust and confidence was breached. Following the *Malik* formulation, the requirement is to consider whether the respondent had conducted itself in a matter 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.

106. Thus 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. This is argued as a last straw type case, that is that there are a number of actions by the employer which could not individually be considered to be a breach of that implied term, but which considered cumulatively can be said to amount to a breach. The claimant in this case relies on the conduct of the respondent in relation to two broad issues, namely failure to investigate the grievances properly and health and safety concerns.

Investigation of grievances

107. The claimant argues that the respondent has failed to properly investigate his grievances. He made reference in the papers and indeed during evidence to two

witnesses who had not been interviewed but I did not hear any names of any witnesses whom he thought should have been interviewed but were not. Otherwise it was not entirely clear what additional steps the respondent was expected to have taken, apart from the two issues which Mr Nesbitt focused on in his submissions.

108. The claimant accepted that the first grievance was raised "erroneously" but his position was that it reflected badly on Mr Aitchison, Ms Barrie's view was that this was resolved informally and indeed the grievance policy allows for the informal resolution of grievances, as might be expected.

109. Although in evidence the claimant disputed Ms Barrie's evidence that Mr Aitchison had apologised, no further issue was made of this outcome until the claimant lodge a second grievance - this time against Mr Aitchison - in December. It is this grievance which the claimant argued was not properly investigated. As is clear from the findings in fact, Ms Barrie responded the same day, discussed it with Mr Barrett, arranged a meeting with the claimant, at which he was offered to be accompanied, taking notes and copying these to the claimant. The grievance was lodged around 18 December and the outcome was communicated to the claimant on 6 January, which is a speedy resolution particularly given the time of the year.

110. The respondent might have taken the view that the first grievance was not in any event valid since it concerned Mr Barrett discussing what the claimant's line manager had reported to him, and which confirmed what Mr Barret had himself witnessed. None the less Ms Barrie interviewed a number of members of staff who all confirmed what Mr Aitchison had reported and what Mr Barrett knew for himself. Although this issue had not been raised before, Mr Nesbitt suggested in submissions that it was unfair to have put only anonymised statements to the claimant; that had the names been revealed earlier then there would have been an opportunity to take their own statements from them or even call them to give evidence. I did not accept that submission. In the same way that it was not necessary `to call Mr Aitchison to give evidence, the evidence of these witnesses would not be relevant. This is because the focus is on the conduct of the employer. The employer interviewed witnesses as part of the investigation, they

relied, as it was appropriate to do, on their statements to conclude that there was no merit in the grievance. Even if these witnesses were to come along now and say something different, the fact is that the respondent was entitled to rely on their statements.

111. In regard to the supplementary grievance, Ms Barrie interviewed Mr Aitchison and Mr Barrett interviewed Alex McFarlane. Relying too on her general knowledge regarding the practice in relation to tipping, she was satisfied with what she heard. The claimant did not agree and emphasised throughout the hearing his concerns that the respondent should not have relied on the word of a man who had previously admitted that he had "exaggerated" which if not lying is akin to it. The claimant relied on this (and apparently this alone) to support his view that Ms Barrie should not have accepted the word of Mr Aitchison in regard to the second and supplementary grievances. The respondent was however entitled to rely on the evidence of Mr Aitchison and to take their own view regarding his actions, which had in fact nothing to do with any grievances by the claimant about how he himself was treated.

112. Mr Nesbitt put to Ms Barrie that she should have contacted the Pearsons as part of the investigation and not after the claimant had resigned. However, I accepted Ms Barrie's evidence that she was aware of the Pearson's generosity and did not feel the need to contact them directly (given that they had sold their lodge) until the claimant had advised that he intended to raise the matter in this Tribunal.

113. I could not accept therefore that there could be any suggestion that the respondent's actions in regard to how they handled the grievances might in any way contributed to a breach of the implied term. Indeed, the respondent's actions at least followed the conventions of good practice, and arguably went further.

Health and safety

114. The claimant also sought to rely on breaches of health and safety to support an argument that the respondent's actions viewed cumulatively contributed to the breach of trust and confidence. His pleadings in this regard are limited. It should

be noted that he made no reference to health and safety in his initial ET1 which suggests that it was not forefront of his mind. He sought in the further particulars and in his preparations for and during the course of the hearing to bring up other health and safety concerns which he had not raised during his employment. It is clear from the paperwork and the documentary evidence that no issue of health and safety were brought up before 14 January 2019.

115. Mr Philp argued that the raising of health and safety issues was a malicious response on the part of the clamant to not getting the outcome he had wished from the grievance he had raised. It would appear that there is something in that, given that he did not raise any concerns until 14 January, which was after he was made aware of the outcome of the grievance.

116. The claimant appears to have got it into his head that there was no-one on site who was the designated health and safety contact. I accepted Ms Barrie's evidence that the poster was on display and that he ought to have been aware that she was the contact, not least because she had essentially told him that in the meetings on 14 and 22 January and in the letter of 14 January. The claimant seeks to make much of the fact that Ms Barrie said in the meeting on 22 January that she did not require to answer the question about who to report to, and again in the meeting of 11 March that if he were to report a health and safety breach that an individual would be disciplined straight away.

117. One further difficulty for the claimant is that there is a lack of clarity over what is the last straw. The claimant stated in the welfare meeting of 11 March that "opening day" was the final straw for him. Ms Barrie understood this to relate specifically to his perception that he had been ignored by Mr Barrett. Indeed his evidence was that he had resigned that day, although he subsequently retracted his resignation.

118. He did not finally submit his resignation until some two months later. There is no reference to that incident in his resignation letter. He refers to the failure to lodge the grievance and about being "made out the liar". This is the issue which he raises in his ET1.

119. Mr Nesbitt on his behalf in the further particulars said that the final straw was the welfare meeting. It is suggested in those further particulars that related to the fact that Ms Barrie would not simply take his word that there had been a health and safety breach to conclude that the individual should be disciplined. Not only is that entirely reasonable answer it is entirely inappropriate for the claimant to assume that the respondent should take his word and discipline a member of staff without an investigation.

120. When pressed by Mr Philp, he confirmed that the final straw was the events of opening day. That of course was some two months before and that is the reason why Mr Philp argues that if the Tribunal were to conclude that there was a breach, that the claimant had affirmed the breach and therefore could not rely on it.

121. The claimant was cross examined on this question, and the matter was re-raised in re-examination when he appeared to depart from the very clear evidence he had given the day before (no doubt having reflected overnight). On re-examination he said the final straw was the fact that his health was deteriorating. This would appear to be a third "final straw", since it was also suggested in the pleadings that it was Ms Barrie's answer to the question about health and safety that indicated to him that nothing had changed so that he had no choice but to leave.

122. I should say that I do not think that it is fatal that the claimant might suggest alternative "final" straws, because it might be that actions which at the time may be classed by an employee as the final straw but where the claimant retracts his resignation (as here) may be followed by further actions which may subsequently be classified as the final straw (even if the claimant is argued to have affirmed the contract).

123. But this is nothing to the point in this case. That is because none of the events which the claimant relies on in support of his argument that there has been a cumulative breach of trust could, either individual or cumulatively, be categorised even as unreasonable far less conduct that the claimant or any other reasonable person could not be expected to put up with.

124. While from the claimant's perspective he may well have come to the view that trust and confidence was seriously damaged, I could not however say that the respondent's behavior was conduct which, viewed objectively, was likely to seriously damage the relationship of trust and confidence, or indeed that it was conduct which the claimant could not be expected to put up with, or even that it was unreasonable. In these circumstances, I have found that the employer's conduct, from an objective standpoint, could not be said to breach the implied term of mutual trust and confidence.

125. Indeed, quite the contrary. I was very impressed with the lengths which the respondent went to deal fairly and appropriately with the claimant. There was evidence that he had a good relationship with Mr Barrett. Mr Barrett showed sympathy for him when he was first absent on sick leave, exercising his discretion to pay full pay rather than his contractual entitlement which was only statutory sick pay. Reference was made during evidence to them going for a walk to discuss his health problems and also to the fact that the therapist to whom he had been referred had been suggested by Mr Barrett.

126. I got the impression that Mr Barrett was aware of and therefore approved of all of the proposals which Ms Barrie made, and she too should be commended for the lengths which she went to to try to support the claimant. Not only did Ms Barrie respond quickly to all issues raised, despite no doubt being busy with the day to day running of the park, I consider that she investigated the claimant's grievance thoroughly. Indeed it could be argued that she went beyond what she was required to do given that Mr Barrett had himself witnessed the misdemeanours which had been reported to him by Mr Aitchison. Given that the claimant is still harbouring a resentment regarding the way that his grievance was dealt with, it is not at all clear why he decided not to take the opportunity to appeal. He had no objective evidence upon which he could rely on support his decision not to appeal because he did not trust the outcome. I got no impression from Mr Barrett that he was the kind of employer who would tell his managers what to do in a case like that. Further, the respondent gave the claimant various extensions to the deadlines for submitting the appeal, and offered alternative managers.

127. These are not the actions of an employer which acts in a way which is calculated or likely to seriously damage trust and confidence when viewed from an objective perspective. In all these circumstances, I did not accept that the respondent had conducted itself in a manner which was intended or likely to seriously damage trust and confidence.

128. I find therefore 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 cannot succeed and is dismissed.

Employment Judge: M Robison

Date of Judgement: 24 October 2019

Entered in Register,

Copied to Parties: 25 October 2019