EMPLOYMENT TRIBUNALS

Claimant: **Mr S Fleming**

Respondent: **Acomb Construction Ltd**

Heard at: Teesside Justice Centre **On: 11 February 2020**

Before: Employment Judge Sweeney

Appearances

For the Claimant, Mr Fleming, in person
For the Respondent, Mr Richard Stephenson, employment law consultant

JUDGMENT having been given to the parties on 11 February 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

The Claimant's claim

1. The Claimant presented a Claim Form on 13 October 2019 but it was rejected for the reason that the Respondent's name as identified on the Claim Form did not match that on the EC Certificate issued on 10 October 2019. The claim was subsequently accepted on 18 October 2019 and the name of the Respondent was amended to Acomb Construction Ltd.

2. In that Claim Form, Mr Fleming brought a single claim of unfair constructive dismissal.

The Hearing

3. At the hearing on 11 February 2020 Mr Fleming represented himself. The Respondent was represented by Mr Stephenson, an employment law consultant. There was an agreed bundle consisting of 82 pages which included witness statements.

4. The Respondent called two witnesses:

   (1) Mr Dave Philips, (dismissing officer),
   (2) Mr Robin Hunt (appeal officer).

5. Mr Fleming gave evidence on his own behalf and called no other witness.

The issues

6. The issues to be determined were as follows:

   6.1. Did the Claimant resign in circumstances where he was entitled to do so without notice? This involved considering:

      6.1.1. Whether the Claimant could show that the Respondent had fundamentally breached a term or terms of his contract. It was established at the outset that the term relied on was the implied term of mutual trust and confidence;

      6.1.2. If so, whether the fundamental breach caused the Claimant to resign;

      6.1.3. Whether he delayed too long before resigning, thus affirming the contract;

      6.1.4. If the Claimant was constructively dismissed on 03 October 2019, whether the Respondent can show the reason for the dismissal and that it was for a potentially fair reason;

      6.1.5. If so, whether the Respondent acted reasonably in treating the reason as a sufficient reason for (constructively) dismissing the Claimant

7. In reality, the case was going to turn on the issues in 6.1.1 to 6.1.3 (and more so on whether the Claimant could establish a fundamental breach of contract.

Findings of fact

8. Having considered the evidence and the submissions of the parties I make the following findings of fact. These are the key findings of fact to which I then applied the legal principles and on which I based my conclusions.

9. Mr Fleming had been employed by the Respondent as a labourer from October 2016. The Respondent is a small company employing up to 13 employees. There is no-one employed specifically to deal with HR issues and such matters tended to be handled by Mr Phillips who is not particularly experienced in dealing matters such as long term absences.

10. On 27 October 2017 the Claimant resigned from his employment but then asked to return to the company. The respondent accepted him back and he returned on 02 November 2017. At no point was there a gap of more than 7 days between his contract terminating and him returning. Therefore, there was no break in continuity within the meaning of the Employment Rights Act 1996.

11. On 06 October 2018, Mr Fleming sustained a serious injury to his right leg consisting of a double fracture which in the end required two operations. It was described by the consultant orthopaedic surgeon, Mr Eardley (who operated on

him) as a nasty tibial injury requiring a particular procedure known as intramedullary tibial nailing (**page 63**). This injury resulted in a lengthy period of absence – in fact, he never returned to work after it.

12. About 8 weeks after the Claimant's injury he spoke to Mr Philips, the owner of the business – this was in about November 2018. There is a disagreement as to what was said, as to the precise language used and as to whether the meeting was aggressive or not. Mr Phillips accepted he said that the Claimant was costing him money but said it was construction site banter. The Claimant does not agree. However, whatever happened at that meeting in November 2018 it did not play any part in the Claimant's decision to resign, as he confirmed in his evidence. Strictly speaking it is not relevant, therefore, to the claim of constructive dismissal.

13. It might have had some relevance if there had been any suggestion that Mr Philips acted aggressively after that point, especially in the run up to Mr Fleming's resignation on 03 October 2019. However, there was no such suggestion. I conclude that Mr Philips did not intend any aggression towards Mr Fleming on that day but that the Claimant took it as being so, most likely because he was not in a good place having sustained such a nasty injury.

14. It is unsurprising that Mr Fleming would have regarded Mr Philip's attempt at 'construction site' banter as unacceptable to him – there is no reason why he should see the funny side to that comment. The Claimant strikes me as a dedicated young man and a serious one when the occasion demands it. I hope that Mr Philips can accept with hindsight that we all have to adjust how we address people according to the circumstances. Here was a hard-working, respectful young man who was undoubtedly devastated by his serious injury who was being told (whatever the intention behind it) that he was costing the firm money.

15. However, there is no evidence of any other occasion where Mr Philips is said to have behaved aggressively towards Mr Fleming after that date. Although Mr Fleming referred to an incident in about the summer of 2018 (which Mr Philips could not recall and had not been mentioned before today's hearing) that appears, from the Claimant's account, to have been a telling off about a missing still saw. That may be the sort of day to day stuff that happens on a building site but is a far cry from evidence (if it happened as described) which is supportive of a desire to see the back of the claimant. I bear in mind that the Respondent acknowledged its mistake in May 2019 when it allowed his appeal and reinstated Mr Fleming (see below).

16. By May 2019 Mr Fleming's broken bone still had not healed and it was recognised that a further operation was needed which would mean him being off work for 'a good few months' from then (**page 67**).

17. The Respondent took external advice in relation to obtaining the Claimant's consent for the purposes of obtaining a medical report. Mr Phillips sent a letter dated 21 May 2019 (**page 33**) asking the Claimant to return the attached consent form by 28 May 2019.

18. During this period, Mr Phillips' father-in-law had been terminally ill and sadly passed away which meant that he was away from the business for periods of time. In his absence, on 24 May 2019, Mr Hunt, the Commercial Director and Mr Hodgetts, Quantity Surveyor decided to terminate the Claimant's contract owing to his lengthy period of absence (7 months at this stage) and the absence of any imminent return to work date.

19. Mr Hunt genuinely believed that the Claimant's continuous employment was less than two years owing to his resignation back in 2017 and that as such he was not required to follow any particular procedures prior to deciding to terminate Mr Fleming's employment. However, as he later came to acknowledge, he was mistaken in that view because the Claimant had returned to employment with the Respondent less than a week after he resigned. His continuity of employment was not, in law, broken so as to deprive him of the right not to be unfairly dismissed. Had it followed procedures and obtained an up-to date medical report, it might have had reasonable grounds to terminate C's employment but it did not believe that it needed to do this.

20. Mr Fleming appealed the decision to dismiss him. Recognising the error, the Respondent accepted Mr Fleming's appeal. He was accordingly re-instated on 04 June 2019. However, he was still at this point unable to return to work because of his injury. Mr Fleming contemplated not returning to the Respondent at that time but after discussion with his partner he decided to do just that.

21. Mr Fleming then signed and returned the consent form on 12 June 2019 (**page 32**). Although the form asked for contact details for his GP, he did not provide them. Instead, Mr Fleming emailed separately and provided the name of his consultant orthopaedic surgeon, Mr Eardley (**page 45)**.

22. The Respondent tried to obtain a medical report from the consultant. Mr Hunt contacted South Tees Hospital. After several attempts, Mr Eardley's PA told Mr Hunt that he should contact the 'Archive Department'. When he spoke to someone there, he was told to contact Mr Eardley's PA. Mr Eardley eventually wrote to Mr Hunt on 17 July 2019 to say that: *'a full medico-legal report… needs to be done through a different domain and comes at a cost.'* He went on to add '*I am not able to answer any of your questions*.' Mr Eardley then added: *'I suggest if you want a full medical report that you could [sic] through the usual channels for this*.' It was a less than helpful letter.

23. At that point in time, Mr Fleming's sick note was to take him to 22 August 2019. He had told Mr Hunt when he had delivered that sick note that there was no sign of a return to work date yet. He also had an operation booked for 12 august 2019.

24. Mr Fleming's further operation was planned for 12 August 2019 (**page 68**). As of July 2019, Mr Fleming was reporting increased pain around his ankle. It appeared that one of the distal locking bolts had broken (**page 68**).

25. Following the second operation in August 2019, things were looking up. The prognosis from Mr Eardley in his letter to the Claimant's GP on 23 August 2019 was good (**page 70**). As at 01 October 2019, Mr Fleming was mobilising and fully weight bearing and it was hoped that he would soon be able to make a gradual return to normal activities. His then fit-note marked him as unfit to work from 22 August 2019 to 22 October 2019.

26. Mr Fleming called the Respondent's office on 10 September 2019 to ask about things such as paternity leave and holiday pay. Mr Hunt bumped into the Claimant at the dentist on 20 September 2019. He mentioned that Mr Philips was away on leave; that they therefore could not answer his questions at that point and that they needed to obtain a medical report prior to him returning to work. As it happens, the Claimant did not welcome having to discuss these matters in the dentist waiting room. That is fair enough and must be respected. However, there is a marked informality within the workforce and Mr Hunt saw no reason not to mention this informally to the Claimant on seeing him. Had Mr Fleming said to him not to speak of it there, Mr Hunt would have accepted that. In any event, while Mr Fleming was entitled not to want to discuss this outside the work environment, this did not feature in his reason for terminating his employment.

27. Mr Phillips returned on 24 September 2019. That same day Mr Hunt emailed the NHS Trust again with a view to obtaining a report. He also sought advice from Emplaw Solutions on the procedure they needed to follow and on obtaining a report. On 27 September 2019 Mr Hunt emailed the Claimant with the questions they required answering and asked the Claimant to pass them on to his consultant or GP – the Respondent did not have the GP details as they were not provided by the Claimant (**page 49**). On 30 September 2019 the Respondent received an email from the Archive Department of the NHS Trust to say that the Respondent would have to obtain an independent medical report (**page 50**).

28. Mr Fleming emailed the Respondent on 30 September 2019 raising what is certainly a complaint and what I would regard as a grievance (**page 52**). However, Mr Hunt on reading it saw the words '*I would like to raise a grievance*'. He did not see the email as a grievance in its own right and felt that the Claimant was intimating an intention to raise a grievance. Mr Phillips then referred to this in the letter of 01 October 2019 (**page 37**) saying that '*if you wish to raise a grievance you will need to write a formal grievance letter so the issue can be investigated*'.

29. Mr Fleming has taken a particularly legalistic approach to this issue. He is right, in my judgment, to say that the email amounts to a grievance. However, that does not recognise that Mr Hunt still regarded the words '*I would like to raise a grievance*' as meaning there would be a further step, ie. The presentation of a further document amounting to the grievance. The email of 30 September (**page 52**) refers only briefly to the nature of the complaint. It is not unusual for an employer to ask for some more information. The response to the email was not unreasonable in the circumstances. It was measured. the letter at **page 36** – viewed objectively – is a reasonable letter and, in all the circumstances, its

content is unsurprising. It followed on from advice the Respondent had been given by its insurers. At no point did Mr Phillips or Mr Hunt convey the impression that any grievance would not be considered. They were not trying to delay matters. Mr Phillips did not say that the grievance was not or would not be accepted and his response cannot reasonably be interpreted as doing so. His response was genuine and not unreasonable.

30. By now, however, Mr Fleming was becoming more frustrated and anxious. When he received the letter of 01 October 2019 at **page 36-37** he immediately sought advice from ACAS. In that letter, Mr Phillips said, among other things, that he wanted to schedule a capability review meeting after Mr Fleming had next seen his consultant.

31. On 02 October 2019, Mr Fleming emailed Mr Hunt and provided, for the first time, his GP details (**page 53**). Mr Hunt thanked Mr Fleming for this and said that they would contact the GP and obtain the information directly at the Respondent's cost and that once they had heard back from the GP he would contact Mr Fleming to arrange a convenient time for them to meet.

32. Mr Fleming resigned by email on 03 October 2019. His resignation email is at **page 54**. Mr Fleming said that he felt that the Respondent was making it difficult for him to return to work; that he had been treated unfairly and unprofessionally. Mr Fleming said that he was disappointed his grievance had not been accepted; that he had been in touch with ACAS over the last week. In fact, he had contacted ACAS on the day after he received the letter of 01 October 2019 at **page 36**.

33. Mr Fleming said that the ACAS adviser told him that a capability review letter was a way that an employer can get rid of employees. He said that they told him that he could go down the unfair constructive dismissal route if he felt that he couldn't return to work. Whether that is what ACAS actually told the Claimant I do not know. However, I find as a fact that this is the interpretation the Claimant took away from his discussion with ACAS, rightly or wrongly. Mr Fleming decided that the Respondent was going through the motions to dismiss him. Consequently, and because of this belief, he resigned.

34. Finally, as of 18 November 2019, the medical experts were pleased that Mr Fleming was doing very well clinically and mobilising with full weight bearing without any issues. However, by this time Mr Fleming had resigned from his employment on 03 October 2019. He did so because he believed that his employer did not want him to return from a lengthy period of sick leave and that, in particular, the letter dated 01 October 2019 discussing a capability review meeting was, the Claimant believed, simply a means by his employer to terminate his employment.

Relevant law

Constructive dismissal

35. Section 95 Employment Rights Act ('ERA') defines the circumstances in which an employee is dismissed for the purposes of the right not to be unfairly

dismissed under section 94. Section 95(1)(c) provides that an employee is dismissed by his employer 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 known as 'constructive dismissal'.

36. The word 'entitled' in the definition of constructive dismissal means 'entitled according to the law of contract.' Accordingly, the 'conduct' must be conduct amounting to a repudiatory breach of contract, that is conduct which shows that the employer no longer intends to be bound by one or more of the essential terms (express or implied term) of the contract of employment: **Western Excavating (ECC Ltd) v Sharp** [1978] I.C.R. 221, CA.

37. In this case, the breach of contract relied upon by the claimant is of the implied term of trust and confidence. That is expanded upon in a well-known passage from the judgment of the EAT (Browne-Wilkinson J) in **Woods v WM Car Services (Peterborough) Limited** [1981] I.C.R. 666:

> *"It is clearly established that there is implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee* **Courtaulds Northern Textiles Ltd. v. Andrew** [1979] I.R.L.R. 84. *To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: 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*: ***see*** **British Aircraft Corporation Ltd. v. Austin** [1978] I.R.L.R. 332 and ***Post Office v. Roberts*** [1980] I.R.L.R. 347. *The conduct of the parties has to be looked at as a whole and its cumulative impact assessed:* ***Post Office v. Roberts****"*

38. The final incident which causes the employee to resign does not in itself need to be a repudiatory breach of contract. In other words, the final incident may not be enough in itself to justify termination of the contract by the employee. However, the resignation may still amount to a constructive dismissal it the act which triggered the resignation was an act in a series of earlier acts which cumulatively amount to a breach of the implied term. The final incident or act is commonly referred to as the 'last straw'. The last straw must itself contribute to the previous continuing breaches by the employer. The act does not have to be of the same character as the earlier acts. When taken in conjunction with the earlier acts on which the employee relies, it must amount to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial**: Omilaju v Waltham Forest London Borough Council** [2005] IRLR 35.

39. It is enough that the employee resigned in response at least in part, to fundamental breaches of contract by the employer. The fact that the employee also objected to other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the circumstances of the repudiation: **Meikle v Nottinghamshire County Council** [2005] ICR, CA. It follows that once a repudiatory breach is established, if the employee leaves and even if

he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon: **Wright v North Ayrshire Council** UKEATS 0017/13 (27 June 2013); **Abbey Cars West Horndon Limited v Ford** UKEAT 0472/07.

40. It is a question of fact in each case whether there has been conduct amounting to a repudiatory breach of contract: **Woods v WM Car Services (Peterborough) Ltd** [1982] I.C.R. 693, CA. In determining this factual question, the tribunal is not to apply the range of reasonable responses test (which applies instead only to the final stage of deciding whether the dismissal was unfair), but must simply consider objectively whether there was a breach of a fundamental term of the contract of employment by the employer: **Buckland v Bournemouth University** [2010] IRLR 445, CA.

41. Failure to deal properly with a grievance may constitute a contractual repudiation, based on a specific implied term to take such grievances seriously (not just on the more general term of trust and confidence). In **W A Goold (Pearmak) Ltd v McConnell** [1995] IRLR 516, the EAT (Morrison J) held in paragraph 11 that:

> *"…there was an implied term in the contract of employment that the employesr would reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance they may have".*

Conclusions

42. When Mr Fleming spoke to ACAS, he understood them to be telling him that a capability review letter was a way that an employer can get rid of employees and that he could 'go down the unfair constructive dismissal route' if he felt that he couldn't return to work. C decided he would do just that, which is why he refers to constructive dismissal in his email at **page 54**.

43. In my judgment, that advice from ACAS (if it was given as described) or the interpretation of the advice received, confirmed (wrongly in my judgment) to Mr Fleming that the letter of 01 October was a sinister move to dismiss him. I also conclude that the Claimant readily believed this because of what happened to him back in May 2019 when he was dismissed and reinstated. It was the advice (or his understanding of what that advice was) that was the direct trigger for his resignation.

44. Mr Fleming's case is that the Respondent fundamentally breached the implied term of mutual trust and confidence. As described above, this means that the employer must not, without reasonable and proper cause, act in such a way as to seriously damage or destroy the trust of mutual confidence and trust. It is for Mr Fleming to show that there has been a fundamental breach of contract.

45. What then, did the Respondent do that amounted to a breach of this term? It is not the events of May 2019 (the dismissal and reinstatement). Mr Fleming confirmed, in any event, that he does not rely on those events as playing a part in his dismissal.

46. It is what happened thereafter – or more to the point – what did not happen from Mr Fleming's perspective, that Mr Fleming relies on as amounting to a breach of contract. He says that the Respondent delayed in obtaining a medical report on his broken leg. There was certainly delay. However, the delay is reasonably explained by the difficulty which the Respondent encountered in obtaining a report from the NHS Trust and from the fact that it was not provided with Mr Fleming's GP details until 02 October 2019. I also take into account that the Respondent was inexperienced in dealing with matters of this nature and that when they took external advice, they sought consent and tried to obtain information from Mr Fleming's treating consultant (the only contact they had). When provided with the GP records, it was about to take steps to obtain further information but the Claimant resigned.

47. There were a number of reasons for the delay between 17 July 2019 and 24 September 2019 (when Mr Hunt again tried the NHS Trust). Firstly, the Respondent had no internal support and Mr Hunt and Mr Philips who take on this work themselves they were very busy in that period;

48. Secondly, there was no suggestion that Mr Fleming was able to return to work during that period. Therefore, Mr Hunt did not see any particular urgency. Mr Fleming had confirmed to Mr Hunt that he was not able to come back to work; that he had an operation booked in for August. Mr Fleming had been covered by a sick-note up to 22 August 2019, then a further sick-note up to 22 October 2019.

49. It would make more sense in any event to wait until after the operation before obtaining any medical report on prognosis.

50. The delay in receiving a report may have been frustrating for Mr Fleming but it did not delay his return to work in any way. Had Mr Fleming provided his GP details in the original consent form, as requested, it may be that the Respondent might have been able to obtain at least some form of report from the GP. However those were not provided until 02 October 2019 (**page 53**) the day before Mr Fleming resigned.

51. Therefore, difficult though it may have been for Mr Fleming, the Respondent had reasonable and proper cause for the delay in trying to obtain a report from an occupational health physician. Further, looked at objectively, the Respondent's conduct was not such as to destroy or seriously damage the relationship of trust and confidence.

52. Mr Fleming was frustrated by other things as well as the length of his absence: by his injury, by the feeling that his employer was not going through the proper channels to obtain a medical report; by his feeling that because of his dismissal in May they did not really want him around.

53. Those are understandable feelings. Mr Fleming, after all, is and was a responsible, and hard-working individual. However, standing back and looking at the evidence overall, he has not satisfied me on the balance of probabilities that the Respondent was acting so as to prevent his return to work or that they

even wished to prevent his return to work. I conclude that the Respondent was not acting in this way. He has not established that the Respondent fundamentally breached his contract of employment. Mr Fleming was in fact physically unable to return to work on a building site right up to the point at which he resigned. What his complaint ultimately comes down to is that the Respondent did not act fast enough to get an independent report – not that he had been physically able to return for some time and had been prevented from doing so.

54. The Respondent might have acted faster in contacting Mr Eardley between 17 July and 24 September 2019 and had they done so would have been in a position to seek a medical report from someone else sooner than they did. However, in light of what was going on and the lack of clarity from the Trust, it had reasonable cause for the delay and even if it did not, that delay was (in all the circumstances) not so great as to amount to a fundamental breach of trust and confidence. I would add that the Claimant could himself have taken steps to provide the Respondent with up to date contact or could have arranged for or suggested getting his GP to send on the medical reports which were being sent to the practice. However, he did not do so. He did not provide his GP details until the day before he resigned.

55. As for Mr Fleming's grievance, the Respondent was not trying to delay this, nor was it refusing to address any concerns. It merely asked him to set out what his complaints were so that they could be investigated. Insofar as the Claimant relied on the letter of 01 October 2019 as amounting to the 'last straw', I conclude that the letter was not unreasonable. I recognise that the last straw need not be an unreasonable act (although it would be unusual for a reasonable act to amount to a last straw). Therefore, I have considered content of the letter along with the other facts as I have found them to be. Standing back and looking objectively at the whole picture, I conclude that the Respondent's conduct was not such as to entitled the Claimant to terminate his contract of employment with or without notice. Mr Fleming has not established a repudiatory breach of contract and was not constructively dismissed. Accordingly, his claim of unfair dismissal cannot succeed.

Employment Judge **Sweeney**
4 April 2020