EMPLOYMENT TRIBUNALS

Claimant: Mr S Rowland

Respondent: KMA Motors Limited

Heard at: Liverpool **On:** 3 March 2020
4 June 2020 (In Chambers)

Before: Employment Judge Aspinall

REPRESENTATION:

Claimant: Miss Cummings, Counsel

Respondent: Miss Kight, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for constructive unfair dismissal succeeds.
2. The claimant's claim for unauthorised deductions from his wages is dismissed on withdrawal by the claimant.
3. In addition to any other remedy for unfair dismissal the respondent is ordered to pay the claimant two week's pay under section 38 Employment Act 2002.
4. The claimant's claim for breach of contract (notice pay) succeeds.
5. The claimant's claim for holiday pay fails.
6. The respondent's counter claim fails.

REASONS

Introduction

1. On the 11 October 2019 the claimant presented a claim form which complained that he had been unfairly dismissed (by way of a "constructive dismissal") on 9 July 2019. Five breaches of the implied term of trust and confidence were identified. The claimant said that the last straw for him was being told at a grievance meeting on 8 July 2019 that his resignation (which he said he had not then tendered) was accepted.

2. The claimant entered early conciliation on 16th of August 2019 and received his ACAS certificate on 16 September 2019.

3. The response form dated 5 December 2019 denied that there had been any fundamental breach of contract which had entitled the claimant to resign. The respondent alleged that the claimant verbally resigned on 21 June 2019.

4. The respondent made a counterclaim against the claimant for losses it suffered as a result of the claimant failing to exercise reasonable care and skill in his work.

5. The List of Issues for determination by the Tribunal was as follows:

Constructive unfair dismissal

5.1 Did the claimant resign, giving notice, on 21 June 2019 ?

5.2 Did the respondent commit a fundamental breach of the claimant's contract which entitled him to resign and treat himself as dismissed ?

5.3 The claimant claims that the following alleged acts by the respondent cumulatively amounted to a breach of the implied term of mutual trust and confidence

a. Failing to provide him with written particulars of his employment;

b. Creating an intolerable work environment which he found humiliating and embarrassing;

c. Not paying the claimant an agreed increase to his salary;

d. At the end of April 2019, changing his pay period from weekly to monthly without his permission;

e. At the end of June 2019, making unlawful deductions from his wages of £160

f. Failing to correctly address and investigate his grievance

g. On 8 July 2019 accepting the claimant's resignation on 21 June 2019, when it had not been given (final straw)

5.4 If so, did the claimant resign in response to that fundamental breach, or did he resign for another reason

5.5 Did the claimant delay before resigning and affirm the contract and lose the right to claim constructive dismissal ?

5.6 If the claimant was constructively unfairly dismissed, did the respondent fail to follow ACAS's code of practice in handling the claimant's grievance ?

5.7 If the claimant was constructively unfairly dismissed:

a. Did the respondent nevertheless have a potentially fair reason to dismiss the claimant, namely his conduct, such that any compensation shall be reduced accordingly ?

b. Did the claimant's conduct contribute to his dismissal?

c. Has the claimant taken reasonable steps to mitigate his losses?

Wrongful dismissal

5.8 Was the claimant entitled to receive notice pay following his resignation from the respondent ?

Arrears of pay

5.9 Did the claimant receive all wages due to him on termination of his employment?

5.10 Did the claimant have any accrued but untaken holiday on the termination of his employment?

If so, was he paid in respect of it ?

Respondents counterclaim

5.11 Did the claimant commit a breach or breaches of the implied term of his contract of employment to undertake his duties with reasonable care and skill?

5.12 The respondent alleges that the claimant failed to comply with this duty in respect of the customers set out within paragraph 7 of its counterclaim

5.13 If so, did the respondent suffer damage because of the claimant's breaches?

5.14 If so, what loss flowed from the claimant's breaches and should be awarded to the respondent?

5.15 Has the respondent taken reasonable steps to mitigate its loss and are any losses remote?

The hearing

6. The parties had agreed a bundle of documents. It was 94 pages long.

7. The claimant gave evidence. He gave his evidence in a helpful way on the whole and readily admitted that he had made mistakes at work and that he struggled with short term memory. He was not credible when he said that he had expressly stated on 21 June 2019 *this is not my resignation*.

8. The respondent called Mr Simon Rowland. He gave his evidence in a straightforward and helpful way and was ready to admit that he had not known that to hold back money from someone's pay could be an unauthorised deduction. He acted on the advice from ACAS and informed the claimant that he would repay the deductions and did so. He was credible when he said, in relation to his counterclaim, that he had not addressed the claimant's mistakes formally but had allowed the claimant a lot of leeway because of close family ties. He was plausible in that he had acted on his honest belief formed on 21 June 2020 that the claimant was going to leave his employment following his holiday by advertising for a replacement and recruiting a replacement.

Relevant Findings of Fact

9. The claimant is the nephew of the Mr Simon Rowland, proprietor of KMA Motors Limited, the respondent. The claimant's father died some years ago and until the events of this claim the uncle and nephew enjoyed a close relationship.

10. The claimant trained as a mechanic and on 31 May 2016 came to work for his uncle. There was no written agreement between them. The claimant was paid approximately £ 32 000 per year.

11. The claimant made mistakes at work. These included:

a. In July 2016 fitting a clutch the wrong way round on a Volvo. He worked with the apprentice on this car. The clutch was not marked and the claimant took a 50:50 guess and fitted that clutch the wrong way round.

b. In January 2017 misfitting a cambelt on a VW Touran. The claimant worked on this car with Mr Simon Rowland and under his instruction did a temporary repair fitting a heli-coil and not the specific nut from VW that would have given a permanent repair. The claimant also mis-fitted fuel pipes on this car.

c. After October 2017 failing to clean hubs on a Mercedes.

d. In March 2018 losing parts including a fuel filter on a car he was working on.

e. In June 2018, loaning out a piece of equipment called an engine crane in the mistaken belief that Mr Simon Rowland had approved its loan.

f. In September 2018, despite being warned to work carefully, breaking a window on a car he was working on.

12. Mr Simon Rowland criticised the claimant for these mistakes at the time. He said that they shouldn't be happening and that they were costing him money. The claimant didn't like the criticism and didn't accept that the mistakes were his fault.

13. In relation to the broken car window; in September 2018 Mr Simon Rowland deducted £ 41.33 from the claimant's pay.

14. In September 2018 the claimant told Mr Simon Rowland that he had had a job offer from another employer. He told Mr Simon Rowland it was better pay. Mr Simon Rowland said that he supposed he would have to match the pay at some indefinite date in the future but subject to two conditions. The first was that Mr Simon Rowland wanted to be able to make deductions for what he called breakages; the damage to stock and car parts and the costs of the claimant's mistakes. The claimant did not agree. The second condition was that the increased pay would not be considered again until they moved premises to a new location.

15. The business moved to new premises in November 2018. On or around 12 November Mr Simon Rowland raised the increased pay issue and told the claimant that he would continue to pay rent on the old premises because the claimant was storing a car there. The respondent was paying around £ 50 per week to cover the storage costs (for both his and the claimant's property) and he said he would continue to pay those costs until the claimant moved his property out of the old premises. Only when those costs were no longer being paid would a pay increase be looked at again.

16. In April 2019 the respondent moved from weekly to monthly pay. The claimant found out when he was not paid at the end of a week. He made a sarcastic remark to Mr Simon Rowland, to the effect of *thanks for the notice*, and Mr Simon Rowland, knowing that the claimant had a holiday coming up, asked his wife who was supporting the business administratively to offer the claimant an advance on salary. The claimant did not take up the offer as he had savings of his own.

17. In May 2019 the claimant told the apprentice Liam that he was thinking of setting up his own business. He told Liam that he was going on holiday in July and was thinking of going self-employed after that.

18. In May 2019 Mr Simon Rowland was told by his friend Phil that the claimant was planning to set up his own business and would go on his holiday in July and not return to work for the respondent. The information had come from Liam.

19. In May 2019 the claimant made a mistake at work. He lost parts on a Mazda he was working on. The value of those lost parts was £160.86 The Mazda mistake came to Mr Simon Rowland's attention on 23 May 2019. He decided to make a deduction from the claimant's pay. A payslip was produced showing the deduction. The claimant saw the payslip on 20 June 2019.

20. On Friday 21 June 2019 the claimant raised the deduction with Mr Simon Rowland. Mr Simon Rowland said that he should not be expected to fund the parts and this was the only way the claimant would learn. The claimant said "*I can't take it here any more"* and "*you should look for someone else".*

21. Mr Simon Rowland set about trying to recruit a replacement. On Monday 24 June 2019, the next working day, he put the job board up outside the premises. During that week a mechanic, JL, called in to express interest in the post.

22. On 28 June 2019 the claimant was paid and the deduction was made. The claimant placed a grievance letter, which he back dated to 24 June 2019, on Mrs Rowland's desk on 28 June 2019. The grievance raised three issues: 1) the deduction 2) the change to monthly pay and d) the failure to pay the increased salary following the move. The letter referred to the discussion in September 2018 about any mistakes being addressed through a disciplinary process and said,

> "*Since the agreed proposal, working at KMA was enjoyable again. However, the breach of contract happened when management have decided to change my weekly pay to monthly without discussing this with me or giving me any notice of the changes. This has caused me to rearrange my financial expenses no longer able to receive pay at the end of the week. Even though you have provided us with an advance payment to our wages, I still feel a notice of changes should be taken place. Moving forward to the recent problem, I have received my wage slip for Friday, 21 June 2019 and I have noticed the deduction of £160.86 for lost parts. Once again this was not to my knowledge and it is also breached of contract and it is unlawful deduction of wages.*
>
> *I have sought some advice from ACAS and been advised that there is a case for tribunal. Although I do not wish to go down that route, and hope these problems may be resolved between both parties. However, if unresolved I may be forced to resign and seek legal advice on the matter."*

23. On 2 July 2019 the respondent wrote to JL, following successful discussions and negotiations to offer him the claimant's job. JL accepted the offer. After the 2 July and before 8 July 2019 Mr Simon Rowland told the claimant that he had found a replacement mechanic.

24. The respondent took advice from ACAS and found out that it had made unauthorised deductions on two occasions; one in relation to the broken window for £ 41.33 in September 2018 and once for the Mazda parts at the end of June 2019 in the sum of £160.86. It also had advice from ACAS that a resignation ought to be accepted in writing.

25. On 2 July the respondent wrote to the claimant acknowledging receipt of the grievance, convening a grievance meeting for 4 July 2019 and saying:

> *"You are welcome to have a union representative or work colleague along with you"*

26. The claimant said he could not make the 4 July meeting and wanted the meeting to take place during working hours. The respondent replied on 3 July to say the meeting could not take place during working hours but would take place immediately after work and the claimant could be paid for that time. It also repeated the advice that the claimant could be accompanied at the meeting.

27. At the claimant's request the grievance meeting took place on 8 July 2019. Mr Simon Rowland admitted that he had had no right to make the deductions from wages and said that he would repay the deducted amounts. He said that he had accepted the claimant's resignation given on 21 June 2019 and he handed the claimant a letter formally accepting the resignation. It said

> *" Dear Mr S Rowland,*
>
> *Following receipt of your verbal resignation on Friday 21st June, this is written confirmation that KMA Motors Limited accepts your resignation.*
>
> *4 weeks notice will take your last day employed by KMA Motors Limited to Friday 19th July.*
>
> *You will receive your final pay on Wednesday 31st July in the usual way and your P 45 will follow in the post. "*

28. The claimant took that letter on 8 July 2019 and knew the content of the letter having been told it by Mr Simon Rowland but did not open the letter.

29. At the grievance meeting the claimant's concern was to have the deductions paid. Mr Simon Rowland confirmed that they would be paid and said that the claimant's last day of work would be 19 July 2019. Mrs Rowland's handwritten notes of the meeting record what the claimant said;

> "*He is looking for another job, doesn't agree that he handed his notice in, said he clearly said "this is not my resignation"…..He agrees he told us to look for someone else…….meeting started off by Steven saying "I'm here to see if we can resolve this or its me leaving"*

30. On the morning of 9 July 2019 the claimant came to work and handed Mr Simon Rowland a letter which said

> *"Dear Simon,*
>
> *Re resignation*
>
> *I am writing to inform you that I am resigning from my position of mechanic at KMA motors with immediate effect. Please accept this as my formal letter of resignation. I feel that I am left with no choice but to resign in light of my recent experiences, which created a breakdown in trust and confidence. These include:*
>
> *1. varying my contractual pay from weekly to monthly with no warnings or notices provided leaving me in financial difficulty*

2. *agreeing a pay increase but failing to make payment*

3. *making unlawful deductions relating to damaged parts without consent rather than undertaking disciplinary process*

4. *failure to deal with my grievance properly*

5. *refusing to hear my grievance during working hours*

6. *your use of language towards me in front of customers and colleagues.*

The last straw for me was when you informed me that I had resigned verbally, when I hadn't. I feel you have tried to manage me out of the business

I've tried to raise a grievance about the above but you have not handled it properly in a way that I would expect an employer."

31. The claimant left work immediately taking his tools with him. He handed the unopened letter accepting his resignation from 21 June 2019 back to the respondent.

32. On 12 July 2019 the claimant posted an advertisement on social media for his own business AutoMechanix. He advertised himself as a mobile mechanic. He had done some self-employed work for family and friends during his time with the respondent. He started to work on a self employed basis between 9 July 2019 and 21 July 2019.

33. On 11 October 2019 the claimant brought his employment tribunal claim.

The Law

Constructive Unfair Dismissal

34. The claimant's unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. 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."**

35. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The employee is entitled to treat himself as constructively dismissed only 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.

36. The term of the contract upon which the claimant relies in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the

scope of that implied term and approved a formulation which imposed an obligation 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."**

37. The test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls said at page 611A:

> **"The conduct must, of course, 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. That requires one to look at all the circumstances."**

38. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

39. In **Frenkel Topping Limited v King UKEAT/0106/15/LA** 21 July 2015 the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
>
> > **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.**
>
> **15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on**

> **behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."**

40. In some cases, the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. The decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal affirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.**

In 2020 Auerbach HHJ in the Employment Appeal Tribunal in **Williams v The Governing Body of Alderman Davies Church in Wales Primary School** applied **Omilaju** and **Kaur**:

> "**28. The starting point is that there will be a constructive dismissal, that is to say an dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996 where a) there has been a fundamental breach of contract by the employer b) which the employee is entitled to treat us terminating the contract of employment and c) which has materially contributed to the employee's decision to resign. As to the first element, the fundamental breach may be a breach of the Malik term. That may come about either by a single instance of conduct, or by conduct which, viewed as a whole, cumulatively crosses the Malik threshold. As to the third element, the conduct amounting to a repudiatory breach does not have to be the only reason for resignation, or even the main reason, so long as it materially contributed to, or influenced the decision to resign.**
>
> **30. If there has been conduct which crosses the Malik threshold, followed by affirmation, but there is then further conduct which does not, by itself, cross that threshold, but would be capable of *contributing* to a breach of the Malik term, can the employee then treat that conduct, taken with the earlier conduct, as terminating the contract of employment?**

41. The answer comes at paragraph 34.

> **34. .. so long as there has been conduct which amounts to a fundamental breach, the right to resign in response to it, has not been lost and the employee does resign at least partly in response to it, constructive dismissal is made out. That is so, even if other, more recent conduct has also contributed to the decision to resign. It would be true in such a case that *in point of time* it will be the later conduct that has "tipped" the employee into resigning: but as a matter of causation, it is the combination of both the earlier and the later conduct that has together caused the employee to resign..**

42. A resignation in response to the employer's conduct must be made in unambiguous words. The words can be informal or imperfect and can be taken at their face value without the need for analysis of the surrounding circumstances.

43. Section 95(1)(c) provides that the employee must terminate the contract *by reason of* the employer's conduct. The question is whether the repudiatory breach played a part in the dismissal. It need not be the sole factor but can be one of the factors relied on. If, however, there is an underlying or ulterior reason for the employee's resignation, such that he or should would have left anyway irrespective of the employer's conduct, then there has not been a constructive dismissal.

44. Where there are mixed motives the tribunal must decide whether the employer's conduct was an effective cause of the resignation. The law relating to the reason for a resignation after a repudiatory breach was reviewed by the EAT (Langstaff P presiding) in **Wright v North Ayrshire Council [2014] IRLR 4.** If an employee has mixed reasons for resigning it is enough if the repudiatory breach played a part in that decision. It need not be the sole, predominant or effective cause. That is particularly clear from the decision of the Court of Appeal in **Nottingham County Council v Meikle [2005] ICR 1**. At paragraph 20 of **Wright** Langstaff P summarised it by saying

"**Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause."**

45. An employee who remains in employment whilst attempting to persuade the employer to remedy the breach of contract will not necessarily be taken to have affirmed the contract **W E Cox Turner (International)Limited v Crook [1981] IRLR 443**

46. Under **section 3 Employment Tribunals Act 1996 and The Employment Tribunals Extention of Jurisdiction (England and Wales) Order 1994 SI 1994 / 623** an employment tribunal has jurisdiction to hear a claim which arises or is outstanding on termination of employment. Where an employee brings a breach of contract claim an employer can counter claim a sum arising or outstanding on the termination of employment. The employee must already have brought proceedings under the Order in an employment tribunal against the employer for the employer to be able to bring a counter claim.

47. **Section 207(A) Trade Union and Labour Relations (Consolidation) Act 1992** provides that, where an employee brings a claim **under section 111 Employment Rights Act 1996** for unfair dismissal, an award for compensation can be increased or reduced by up to 25% if the employer has unreasonably failed to comply with the relevant code of practice relating to the resolution of disputes.

48. The relevant code of practice will have been issued either by ACAS or the Secretary of State. **ACAS Code of Practice 1: Disciplinary and Grievance Procedures 2015** is a relevant code of practice. The ACAS code is not engaged unless a grievance is raised in writing.

The ACAS code provides the following keys to handling grievances in the workplace

1. let the employer know the nature of the grievance
2. hold a meeting with the employee to discuss the grievance
3. allow the employee to be accompanied at the meeting
4. decide on appropriate action
5. allow the employee to take the grievance further if not resolved

49. In relation to deciding on appropriate action the code provides that a decision should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken.

50. Employees have the right to be given written particulars of the terms of their employment within 2 months of starting their employment**. Section 1 Employment Rights Act 1996** provides that there is requisite information that an employer must provide to an employee. **Section 11 Employment Rights Act 1996** provides that an employee may bring a claim to a tribunal alleging that his or her employer has not complied with these obligations. The employee has a right to a remedy from tribunal in respect of the section 11 claim, where, when the proceedings were brought the employer was in breach of the duty to give written particulars. Under **section 38 Employment Rights Act 1996** the tribunal may make an award of 2 weeks pay unless it would be unjust and inequitable to do so, and it may, if it considers it just and equitable in all the circumstances make an award of 4 weeks pay.

Submissions

51. At the end of the oral evidence the case was adjourned part heard for the parties to return to make closing submissions summarising their case. The hearing was due to resume on 4 June 2020 but could not do so in person because of restrictions in place for management of the corona virus pandemic. The parties were consulted and each agreed to make written closing submissions and for the tribunal to give a reserved decision.

Claimant's Submissions

52. The claimant's case was that he had not resigned on 21 June 2019. He protested about an unauthorised deduction and brought a grievance, about that and other matters. He says his grievance was not dealt with properly. He relied on a series of acts which amounted to conduct which seriously damaged or destroyed trust and confidence. The last straw came when on 8 July 2019 the employer accepted a verbal resignation which he said he had not given. He resigned with immediate effect the next day and says that his resignation was a constructive unfair dismissal.

Respondent's Submissions

53. The respondent's case was that the claimant resigned on 21 June 2019 when he said *I cant take it here anymore* and *you will have to find a replacement.* The respondent argued that acceptance of (what it believed to be) the claimant's resignation (on 21 June 2019) in a letter dated 8 July 2019 was an entirely innocuous act. It argued that the alleged breaches of the implied term of trust and confidence do not amount to a series of acts which were calculated or likely to destroy or seriously damage trust and confidence. It also submits that the claimant was going to leave after his holiday to set up his own business in any event.

54. The respondent also made submissions on its counterclaim. It submitted that there is an implied term in a contract of employment that an employee will perform

his duties with reasonable care and skill. I was referred to the cases of **Harmer v Cornelius 1858 CB 236 Court of Common Pleas** on the establishment of an implied warranty to the effect that an employee is "of skill reasonably competent to the task he undertakes". I was referred to **Lister v Romford Ice and Cold Storage Co Limited 1957 AC 555, HL** on the right to recover damages for a failure to exercise reasonable care and skill.

Discussion and Conclusions

55. Turning first to the events of 21 June 2019. I had to decide did the respondent commit a fundamental breach of the claimant's contract which entitled him to resign and treat himself as dismissed ?

56. The respondent's intention to deduct the £ 160.86 as signalled to the claimant in the payslip which the claimant saw on 20 June 2019 was a repudiatory breach of contract. The respondent did not have a written contract of employment, there was no authorised deductions clause and the claimant had expressly objected to the respondent's suggestion in September 2018 that the cost of any mistakes or breakages going forward would be deducted. The respondent's decision to deduct was a breach of the implied term of trust and confidence. It crosses the Malik threshold referred to in the case law.

57. The claimant protested about that breach. I had to decide whether he resigned on 21 June 2019. He said *I can't take it here any more* and *you will have to look for a replacement.* They were not unambiguous words of resignation. There was ambiguity in that there was no stated end date.

58. The respondent took the words from 21 June 2019 and placed them in the context of a rumour Mr Simon Rowland had heard from Phil that the claimant was leaving, and further, in the context of his knowledge that the claimant had left his previous employment without notice by not returning from holiday and further in the context that the claimant was going on holiday in mid July 2019 and concluded (wrongly) that they amounted to a resignation. The words were an expression of dissatisfaction and did not amount, in law, to a resignation.

59. I had to decide did the following alleged acts by the respondent cumulatively or individually amount to a breach of the implied term of mutual trust and confidence: failing to provide him with written particulars of his employment, creating an intolerable work environment which he found humiliating and embarrassing; not paying the claimant an agreed increase to his salary; at the end of April 2019, changing his pay period from weekly to monthly without his permission; at the end of June 2019, making unlawful deductions from his wages of £160, failing to correctly address and investigate his grievance

60. The failure to provide written particulars of employment was an ongoing breach of a statutory right which, if the deduction had not been made, neither party would have objected about. The claimant did not raise it in his grievance. I heard no evidence to suggest the claimant protested about it at all during his employment. It did not contribute to the claimant's decision to resign on 9 July 2019. Applying

Tullet Prebon it did not mean that the claimant was abandoning and altogether refusing to perform the contract.

61. The respondent did not create an intolerable work environment which the claimant found humiliating and embarrassing up to and including April 2019. In his grievance letter the claimant said *working at KMA was enjoyable again* referring to the period post October 2018 until April 2019. During May 2019 the claimant made the lost parts mistake at work on the Mazda. If he was humiliated and embarrassed, and he did not persuade me in evidence that he was, then it was because he was reprimanded for the mistake and not because of a general climate of humiliation or embarrassment caused by the respondent. In the resignation letter the claimant protested about language used by the respondent to him in front of customers. I heard no evidence to persuade me that the respondent had used inappropriate language to the claimant in front of customers. The claimant wasn't able to give a specific example of what was said to him and in front of whom. The respondent did not breach the implied term of mutual trust and confidence (deductions aside) in the way it responded verbally to reprimand the claimant about the Mazda lost parts in May. There was no intolerable work environment for the claimant until he was told his resignation had been accepted on 8 July 2019.

62. There was no agreement to pay an increased salary. In September 2018 the respondent offered to consider to increase pay following relocation, subject to a discussion about the cost of mistakes/ deductions and when he was no longer paying rent on the storage premises. The respondent did not accept and the claimant did not establish in evidence that the September 2018 third party job offer was at a higher rate than the rate he was earning with the respondent. At best, the respondent offered to look at pay in the future. Non payment of a salary increase which had not been agreed does not amount to a breach of the implied term of mutual trust and confidence.

63. At the end of April 2019 the respondent changed the pay period from weekly to monthly pay without the claimant's consent. This was a breach of the implied term of mutual trust and confidence and of an express term as to payment terms. The claimant was offered an advance and didn't need it, and didn't protest to insist on weekly pay at the time. His words *thanks for the notice* signalled his reluctant acceptance of the change. There were 7 or possibly 8 instances of non payment of weekly pay from the end of April 2019 until the claimant's grievance on 28 June 2019. The claimant affirmed this breach of contract when he continued to work under the new monthly pay terms from April 2019 until his grievance letter delivered on 28 June 2019.

64. The respondent did not breach the claimant's contract in the way in which it dealt with the claimant's grievance. In applying the ACAS Code it invited the claimant to a meeting to discuss the grievance. It was willing to have that meeting on 4 July, which was within a week of receiving the grievance on 28 June but at the claimant's request moved the meeting to 8 July 2019. The respondent did not prevent the claimant from being accompanied at that meeting. It wrote to the claimant on 2 July 2019 saying *You are welcome to have a union representative or work colleague with you.* That advice was repeated in writing on 3 July 2019. The claimant chose to attend the meeting with a colleague, Martin, as his witness. The outcome was that the grievance in respect of deductions was upheld and the

respondent confirmed that it would repay the deductions made in September 2018 and May 2019. The respondent did not send a written outcome of the grievance or give the claimant notice of his right to appeal but I find that this is not a breach of the ACAS Code because had events not overtaken the respondent, it may well have put an outcome in writing and notified the claimant of his right to appeal. My reason for deciding this is because the respondent, after taking advice from ACAS, had started to put things in writing; it accepted what it believed to have been a resignation in writing on 8 July 2019. If the claimant had not resigned on 9 July 2019 there would have been time for the respondent to have confirmed its response to the grievance and the claimant's right to appeal in writing.

65. I had to decide whether on 8 July 2019 the respondent accepting the claimant's resignation on 21 June 2019, when it had not been given, amounted to a fundamental breach of contract. The respondent's conduct in purporting to accept the non-existent resignation in this case was likely to cause serious damage to the relationship of trust and confidence. There was no reasonable or proper cause for the respondent to do this. The letter dated 8 July 2019 and handed to the claimant at the end of the grievance meeting together with the words spoken by Mr Simon Rowland telling the claimant his resignation was accepted, on 8 July 2019 amounts to a repudiatory breach of contract.

66. Did the claimant resign in response to that fundamental breach, or did he resign for another reason ? The claimant did not rely solely on the 8 July 2019 breach of contract in resigning. The law does not require him to have done so. His reasons for resigning on 9 July 2019 were that 1) the respondent had made an unauthorised deduction in May 2019 and 2) the claimant had been thinking about leaving to set up on his own anyway and 3) the respondent accepted a resignation he had not given on 8 July 2019.

67. The limit of my findings so far is that (a) the claimant would still have resigned even if the respondent had not breached the contract on 8 July 2019; (b) even without the breach on 8 July 2019 the claimant would still have been entitled to resign on 9 July 2019 in relation to the earlier (unauthorised deduction) breach and (c) had there been no fundamental breach of contract at all the claimant might still have resigned to set up his own business but I have not yet quantified the chance that this would have happened. I am persuaded of the findings in this paragraph by the following:

67.1 The claimant told Liam in May 2019 that he was thinking of setting up on his own.

67.2 The claimant told the respondent on 21 June 2019 it would need to replace him.

67.3 The claimant did not protest when the job advertisement board went out on 24 June 2019.

67.4 His grievance focused on payment issues; the deductions, the move to monthly pay and the failure to pay salary increase.

67.5 The claimant did not protest when he was told on 2 July 2019 that a replacement had been found for him.

68. As to the question of whether or not the respondent might have fairly dismissed the claimant had the respondent not constructively dismissed him, I leave this point (and those at paragraph 5.7 a, b and c of the List of issues) open for submissions to be made on remedy.

69. I had to decide did the claimant delay before resigning and affirm the contract and lose the right to claim constructive dismissal ? The deduction on 21 June 2019 was a repudiatory breach of contract which the claimant was entitled to treat as terminating the contract. The claimant continued to work, accepted pay at the end of June (subject to the deduction) and brought a grievance on 28 June 2019. Bringing a grievance was not an affirmation of the breach in this case. It is not necessary for me to decide whether bringing the grievance amounted to affirmation because, even if there had been affirmation, further conduct which by itself does not amount to a fundamental breach but would be capable of contributing to a breach of the Malik term preserves the right for the claimant to resign in response to the fundamental breach. Informing the claimant that his replacement had been found and offered a job on a date between 2 and 8 July 2019 would have entitled the claimant to claim constructive unfair dismissal prior to the events of 8 July 2019, even if his grievance had affirmed the 21 June 2019 breach. I have not found that the grievance was an act of affirmation, there is authority to suggest that an employee can continue to work under protest provided that he does not do so for too long, but it has not been necessary for me to make findings on affirmation because there are subsequent acts of both *contributing* conduct and repudiatory breach. Telling the claimant a replacement has been found is *contributing* conduct. Accepting a resignation that had not been tendered on 8 July 2019 and giving an end date to the employment verbally, crosses the Malik threshold itself and is a repudiatory breach. I draw the distinction between the two because of the later part of the test set out in **Williams** quoted at paragraph 34 of the judgment at my paragraph 41 above.

70. The claimant resigned in response to three things. These were (i) the deduction on 21 June 2019 and (ii) his plan to go anyway and (iii) the respondent's acceptance of a resignation he had not tendered on 8 July 2019. He did not delay in resigning in response to that final act that tipped him into resigning on 8 July 2019. He gave his resignation in writing, clearly and unambiguously on 9 July 2019. This case is different from **Williams** in that the final act that tipped the resignation was, of itself, a repudiatory breach of contract entitling the claimant to resign, which he did, in response to it, (and the 21 June 2019 breach and his plan to go anyway) without delay or affirmation. His resignation meets the requirements of section 95(1)(c). His claim for constructive dismissal is made out.

72. Turning now to the counterclaim. The claimant made mistakes at work. I accept the respondent's submission that a term is implied into contracts of employment to the effect that an employee will perform his duties with reasonbale care and skill. An employer can claim damages for a breach of that term **Janata Bank v Ahmed [1981] ICR 791.** I had to consider whether or not the mistakes amounted to a breach of breaches of the implied term

72.1 In July 2016 fitting a clutch the wrong way round on a Volvo. The claimant admitted that he had worked on this vehicle. I accept his evidence that he worked with the apprentice who took the clutch out and did not stamp it so as to show him which was the right way round so that the claimant had to take a 50:50 guess when replacing it and that he guessed wrongly. Once he was aware it was wrongly fitted he stripped and refitted it. The respondent did not establish that, in the absence of an identifying mark on the clutch to tell which was the right way round, the claimant's decision to take a 50:50 guess was a breach of the implied term.

72.2 In January 2017 mis-fitting a cambelt on a VW Touran. I accept the claimant's evidence that there were issues with the stud that held the time belt tensioner; that there had been a previous bad repair which he had done under express instruction from Mr Simon Rowland to fit a heli-coil. The claimant was convincing when he said that if they had got a proper repair stud from VW then the repair would have held but as he was instructed not to do that and to use a heli-coil instead it was not surprising that the repair did not hold. I also accept the claimant's evidence that Mr Simon Rowland himself worked on this car to tighten the nut. There were also issues with the fitting of the fuel pipes. The claimant accepted that he did not correctly mark the pipes when he had taken them off. He had assumed, wrongly, that they would be sized so as to only fit in their correct positions. This was not the case. I accept his evidence that the damage did not come from the fuel pipes but from the work he had been instructed to do in fitting a helicoil which should only be (and may only have been) done for a temporary repair. The respondent did not establish a breach of the implied term by the claimant in relation to the work on this car.

72.3 After October 2017 failing to clean hubs on a Mercedes. I accept the claimant's evidence that he has no recollection whatsoever of working on this vehicle and that it was possible that another one or two members of staff or even Mr Simon Rowland himself had worked on this vehicle. The respondent does not meet its burden of proof in establishing who did the work. There was no corroborating evidence to show who did the work or when, or how the work done was so seriously deficient as to amount to a breach of the implied term.

72.4 In around 2017 the claimant admitted working on a cam belt for a (different to the one at 72.2 above) VW car. He remembered it because it was the first time he had done that particular kind of job. I accepted his evidence that he had improper tools with which to do this job which caused the cam shaft to move out of place. The claimant accepted that he made a mistake in dislodging the cam shaft. The respondent did not establish that the claimant's mistake was sufficiently serious to amount to a breach of the implied term.

72.5 In March 2018 losing parts including a fuel filter on a car he was working on. The claimant admitted that he had lost the parts and that this caused cost and delay. He could not recall whether he had put them in

the boot or not. The claimant has dyslexia and suffers short term memory loss. This was a genuine mistake. I considered in context that he must have worked on hundreds if not thousands of cars during his employment with the respondent and that the respondent did not meet its burden of proof in establishing that losing parts on this car amounted to a breach of the implied term.

72.6 In June 2018, loaning out a piece of equipment called an engine crane was not a breach of the implied term. The claimant genuinely believed that Mr Simon Rowland wished the crane to be loaned out to the person concerned. He tried to ring Mr Simon Rowland to check the instruction. The claimant said in evidence "I was the middle man". I accepted that he thought he was acting in accordance with Mr Simon Rowland's wishes and that it was not unusual for mechanics to loan one another specialist pieces of equipment. I also accept his evidence that at the time he told Mr Simon Rowland to whom it had been loaned but could not subsequently remember who that was.

72.7 In September 2018, despite being warned to work carefully, breaking a window on a car he was working on. The respondent did not establish that the claimant had not worked carefully. I was satisfied that the claimant might work carefully and the window still break. The respondent did not establish a breach of the implied term.

73. The respondent's counterclaim fails on the ground that the respondent does not establish a breach either individually or cumulatively of the implied term. It was not necessary for me to make findings as to whether or not if there had been a breach or breaches the respondent waived its right to make claims in respect of them. It was also not necessary for me to address the points at 5.12 – 5.15 of the List of Issues.

Conclusions

75. The claimant's complaint of unlawful deduction from wages was withdrawn by the claimant as the respondent admitted that it was wrong to have made deductions in respect of the broken window in September 2018 and the Mazda parts in May 2019 and has repaid those amounts to the claimant.

75. The claimant's claim that the respondent failed to provide a written statement of particulars succeeds. It was agreed that no statement was provided. Applying section 38 Employment Rights Act 1996 it would be just and equitable to award two week's pay.

76. The claimant's claim for breach of contract in relation to notice pay to which he would have been entitled had he not been constructively dismissed succeeds. Had he not been (constructively) dismissed he would have been entitled to the statutory notice pay; having worked for the respondent from 31 May 2016 until 9 July 2019 that amounts to three weeks notice pay.

77. The claimant's claim for outstanding holiday pay is not proven. He claims to have been entitled to 28 days annual leave, his schedule of loss claims two weeks holiday pay as outstanding but his evidence in chief was that he was not sure of his holiday entitlement. I had insufficient evidence from the claimant to be able to make a factual finding as to what his entitlement was and as to how much annual leave he had taken and how much might be due to him. The respondent claimed a right to offset any amounts awarded to the claimant by an overpayment it says it had made in relation to annual leave. Neither party adduced sufficient evidence for me to make findings as to what the annual leave entitlement was, what had been taken, what might be due. The claimant's claim must fail as he does not meet the burden of proof. The respondent's off-set is not proven.

78. The claimant succeeds in his claim for constructive unfair dismissal. A remedy hearing will be listed. The parties are invited to make submissions at the remedy hearing on the issues in paragraph 67 and 68 above. They should say explicitly how long the claimant would have remained in employment beyond 9 July 2019 if he had not been constructively dismissed. I will make case management orders for the parties to prepare for a remedy hearing.

Employment Judge Aspinall

Date: 10 August 2020

JUDGMENT SENT TO THE PARTIES ON

19 August 2020

FOR THE TRIBUNAL OFFICE