EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr JJ Norman	**AND**	(1) Dolphin Lifts Midlands Ltd (2) DLM Building & Maintenance Ltd

REASONS FOLLOWING A JUDGMENT MADE AT A CVP/HYBRID HEARING

HELD AT Birmingham **ON** 14, 15 & 18 January 2021

EMPLOYMENT JUDGE Hughes

Representation
For the Claimant: Mrs Wilcox (family member)
For the Respondent: Mr D Flood, Counsel

REASONS

Background and issues

1 This claim for constructive unfair dismissal came before me on 14 to 18 January 2021. I made the following judgment:

> "**The decision of the Employment Tribunal is that:**
>
> 1 The second respondent was the claimant's employer at the material time and is the correct respondent to these proceedings.
>
> 2 The claimant's claim for unauthorised deductions from wages in respect of accrued annual leave is well-founded and the second respondent is ordered to pay the agreed net sum of £691.04 in respect of that claim.
>
> 3 The claimant's claim for constructive unfair dismissal is well-founded. The second respondent is ordered to pay compensation of £14,607.60 net in respect of that claim. The compensation comprises of a basic award of

£3,600.00, loss of statutory rights of £500.00 and wage loss for the period 29 April 2019 to 31 October 2019 of £10507.60 net. The recoupment regulations do not apply.

4 The total sum payable to the claimant by the second respondent is £15,298.64."

2 I gave oral reasons after hearing evidence and submissions. The respondent's representative requested written reasons.

3 The claimant was represented by his daughter. The respondent was represented by Mr Flood of Counsel.

4 There was a bundle of documents, R1. References in square brackets in these Reasons are to pages in the bundle, unless otherwise stated. The claimant gave evidence in support of his claim. He provided witness statements for the following people, which were unsigned and undated: Mr J Tethington (former employee); Mr K Machin (former employee); and Mr P Harmon (former employee). I read them and I attached such evidential weight to them as I considered to be appropriate given that the witnesses were not available to confirm the content or to be cross-examined. The respondent called the following witnesses: Mr Lee Farrington, Managing Director; Mr Steve Wilson, Director: and Mr M Buckler, Building Manager, and the claimant's line manager at the relevant time. Witness statements were produced for all witnesses, and were taken as read. The hearing was by CVP/hybrid, with the claimant and his daughter attending at the hearing centre to participate by video link.

5 The claimant presented a claim on 30 July 2019 claiming constructive unfair dismissal. In summary, his case was that he had worked for the respondent with no difficulties until Mr Buckler was appointed. Very shortly afterwards, Mr Buckler held a meeting during which, the claimant alleges, his shortcomings with paperwork, were targeted; this was followed by two warnings; and then an invitation to a disciplinary meeting. The claimant's case is that he resigned because he was targeted, bullied, and harassed by Mr Butler.

6 The respondents submitted a response (in time) defending the claims. The second respondent argued that it was the employer but that the claimant lacked sufficient service because the claimant's transfer to it was not a TUPE transfer. The second respondent has now been clarified to be the correct employer (see 7.1 below) and the TUPE argument has been abandoned. I shall refer to the second respondent as "the respondent" throughout. The respondent denies the claimant was targeted; accepts two warning were issued but says they were informal; and alleges that the invitation to a disciplinary meeting about work performance was proper. The respondent's case is that following a grievance meeting, the claimant was offered work reporting to Mr Farrington not Mr Butler. The respondent argues that the claimant was not constructively dismissed – he resigned. In the alternative,

the respondent argued that if the claimant succeeded his compensation should be reduced because of contributory conduct.

7 The issues to be determined were identified in a case management hearing by Employment Judge Flood. In summary, they were:

7.1 The correct identity of the employer and whether there was a continuity if service issue (this had been resolved by the hearing to be that the first respondent was not the correct employer because there was a TUPE transfer to the second respondent).

7.2 Whether there was a breach of the implied term of trust and confidence; and, if so, whether the claimant resigned in response to it, or affirmed it.

7.3 Whether there was a potentially fair reason for dismissal and, if so, whether the respondent acted reasonably in treating it as sufficient reason to dismiss the claimant.

7.4 Whether the claimant should be reinstated or re-engaged and, if not, the proper amount of compensation having regard to Polkey and contribution.

8 it is fair to say that the affirmation point (7.2 above) was not argued before me. Nor was the Polkey point, or the issue of contribution. The claimant no longer sought reinstatement or re-engagement.

Primary findings of fact relevant to the issues to be determined.

9 The claimant commenced employment with Dolphin Lifts Midlands Ltd on 22 July 2013 as a General Builder with responsibility for plumbing work. The claimant signed a contract of employment with that entity on 12 February 2014 [43-53@49]. Appendix 1 of the contract set out a non-contractual disciplinary policy. It provided that minor faults would be dealt with informally through counselling and training. For matters classed as too serious to be minor, a letter would be sent inviting the employee to a disciplinary hearing and giving the employee the right to be accompanied. The hearing could result in a written warning; a final written warning; or dismissal. There were also provisions about gross misconduct [50]. There was also a grievance procedure (Appendix 2).

10 To begin with there was a Manager for Building Works, but later the work was overseen by Mr Lee Farringdon, the Managing Director. The claimant's evidence was that this could cause problems on site because it was only rarely that complete information on specific jobs was available, which meant he had to use his own judgement to complete them. The claimant's evidence on this point

was not disputed and was corroborated by the statements made by his witnesses. I accepted it.

11 In January 2019, without notice or consultation, the claimant's employment was transferred to the present respondent. An argument that the claimant's contract did not transfer has been sensibly abandoned. The claimant has not been issued with any additional contractual documentation by this respondent.

12 it was common ground that through the course of his employment, the claimant and other employees were expected to use their own mobile phones to contact the respondent's office from site and for the office to contact them. They received no allowance for this. They were not provided with company mobile phones. There was nothing in the claimant's contract requiring him to provide his own phone.

13 Mr Farrington's evidence was that on several occasions he had asked the claimant to wear a company issue high viz jacket rather than his own which had the word "Cuckoo" on it. The claimant continued to wear his own jacket and this caused no issue at the time.

14 Mr Farrington decided to engage Mr Buckler in the capacity of Operations Director, to oversee the claimant and other employees in the building team. The claimant's evidence was that a few weeks before Mr Buckler commenced employment, Mr Farrington held a meeting with the building team and informed them that Mr Buckler would be joining to manage them, and made a point of telling him that he would not last two weeks with the new manager, to which the claimant replied: "if he knows his job, we'll get along fine". Mr Farrington denied making the comment about Mr Buckler, but I concluded that he had said it because the claimant's account of the conversation rang true. Possibly it was intended as a joke, but it caused the claimant to have concerns about Mr Buckler.

15 Mr Buckler commenced employment on 4 March 2019. On 7 March he held a meeting with the building team and two office staff. The claimant's evidence, which was supported by the minutes, was that most of the meeting concerned paperwork, and the need to complete it and return it to the office promptly, so that invoices could be raised [71]. The claimant said that he had never been good at paperwork, and felt that Mr Buckler was targeting him, and that his colleagues told him that they thought so too. The claimant's evidence was that because he believed Mr Buckler was targeting him, he tried to stay out of his way when he attended the office to collect worksheets.

16 On 12 March 2019, the claimant was given two verbal warnings by Mr Buckler. The first was for wearing the "Cuckoo" high viz jacket. The second was for leaving his personal mobile phone at home in error. The claimant had contacted the office to ask if he should return home to fetch it, but was told it was not necessary. He explained this to Mr Buckler, but was told that if it happened again,

he would be sent home without pay. The claimant said there was no meaningful discussion about the two items and that Mr Buckler handed him written confirmation of the informal warnings which had already been prepared. The letter stated: “This “informal warning” will not be recorded on your record but does form part of the Disciplinary procedures of DLM Building & Maintenance Ltd”. The claimant, who had never been given a written warning previously, was very upset to receive it, and it reinforced his concerns about Mr Buckler. Mr Buckler’s evidence was that he issued an informal warning to another employee the same day [74]. It is unclear who that employee was. The claimant said he was verbally informed that it was Mr Machin. Mr Machin provided a witness statement denying that he had received an informal warning. The disciplinary procedure does not make any reference to informal verbal warnings, but rather to counselling and training. It is also notable that Mr Buckler had been in work less than a week before the paperwork meeting, and for less than two weeks at the point he started issuing informal warnings.

17 The claimant was offended when Mr Buckler telephoned him later that same day to say that he should be on site in Birmingham at 8.00 a.m. the following day to meet a lift engineer, and that: “If you are late I shall not be happy”. The claimant explained that he had never been late on site, even when having to travel to Hereford to be on site for 7.30 to 8.00 a.m. I thought it understandable that the claimant was offended by that gratuitous and unnecessary remark.

18 The claimant explained that he told Mr Buckler (and had previously told Mr Farrington) that he had concerns about the job because of information contained in the manufacturer’s literature, but was by Mr Buckler that told he must complete the job by 4.30 p.m. because it was “political”. The claimant said that he felt very uncomfortable being asked to undertake the work because of concerns for the tenant’s safety.

19 The claimant also explained that around that time he returned to a job in Walsall to correct an error to a job and that Mr Buckler had inspected the job, and said it was “a good, clean installation”, and took photographs. He also said the customer rated the work as “good”.

20 Mr Buckler’s evidence was that on 22 March 2019, he received a complaint from a tenant’s son, relating to work carried out at his mother’s property by the claimant. His evidence was that the complaint concerned the quality of the work, a failure to clean up properly, and requiring the complainant’s mother to complete a customer satisfaction sheet. Mr Buckler denied saying the claimant’s work was fully acceptable. Assuming this was a reference to the Walsall job, clearly there was a conflict of evidence. I preferred the claimant’s evidence because I thought it very clear that by this point Mr Buckler was in fact targeting him. Furthermore there was no record of concerns being raised about his work before and Mr Farrington later offered him his job back (see below at paragraph 30).

21 On 29 March 2019 Mr Buckler posted a letter to the claimant inviting him to a disciplinary hearing on 8 April 2019. It stated that the key issues causing concern about the claimant's performance were: standards of work completed, leading to return visits to satisfy customer complaints; and unauthorised hire of equipment. It advised the claimant that he had a right to be accompanied. There are two points to be made about this letter. Firstly, it indicated disciplinary action but did not state the possible consequences; and secondly, even if there was a case for disciplinary action (which I did not accept, by reference to the respondent's policy), the claimant was provided with no detail of the allegations.

22 The claimant went to the office as normal on 4 April 2019. At that point he had not seen the letter. Mr Buckler's evidence was that he approached the claimant privately to check if he had received the letter, and that the claimant said he had not. His evidence was that he explained the contents and the claimant reacted by going into the office shouting; "Lee, [i.e. Mr Farrington] Boardroom now!"

23 The claimant's evidence was that Mr Buckler confronted him in the office and asked him three times If he had received the letter, implying that he was lying because he said he had not. The claimant said he went outside to phone his wife, and that she checked the post and found the letter and read it to him. He said that he then asked for a meeting with Mr Farrington. The claimant accepted that he was angry and very likely raised his voice.

24 Mr Farrington's evidence suggested that the exchange took place in front of him. Mr Wilson's evidence also suggested that he overheard what was said, and that he decided to follow them into the Boardroom.

25 I concluded that the exchange was not private and that the claimant was embarrassed and upset for the content to be discussed publicly and to be questioned more than once about whether he had received it. He was understandably upset by having to call his wife and ask her to read the contents to him.

26 The claimant was angry and upset during the meeting. He made it clear that he believed Mr Buckler was unfairly targeting him. He said that Mr Buckler told him he had issued a warning to Mr K Machin. As already noted, Mr Machin produced a witness statement denying this, but it was not possible to ascertain who the warning had been issued to [74]. The claimant became upset and tearful and said he was leaving to see his G.P.

27 The claimant was signed off sick with stress from 5 April 2019 and was taken to hospital with chest pains on 7 April. He continued to be signed off as unfit for work until he resigned.

28 The claimant sent a letter to the respondent on 29 April 2019 complaining that he had been bullied and harassed by Mr Buckler. He explained that the Walsall job was signed off by Mr Buckler as “good and clean” He said that he had been authorised to take two acrow props (steel safety props) to a job and to hire two more, so the work could be safely undertaken. He complained about the way Mr Buckler had confronted him over the disciplinary hearing letter. He explained that this had made him ill, and he was under medical treatment for stress. The claimant then stated that due to a total breakdown of trust and respect, he was resigning in circumstances amounting to a constructive dismissal.

29 A grievance meeting was arranged for 13 June 2019. The claimant was accompanied by his wife and daughter for support. The claimant’s evidence was that the respondent had arranged for Mr Buckler to conduct the meeting, but that he objected and asked for Mr Farrington to do so. Mr Buckler refused, so the claimant left. Clearly the proposal that Mr Buckler should hear the grievance against himself was wholly inappropriate.

30 On 16 July 2019, the claimant met Mr Farrington [90 to 91]. The claimant asked for an apology from Mr Buckler, and Mr Farrington said he would arrange for that to happen. Mr Farrington also said he had always been happy with the claimant’s work and that he was a valued employee. He offered to line manage the claimant instead of Mr Buckler, if the claimant was willing to return to work, and that he could carry out radiator work for Dolphin Lifts Midlands Ltd, rather than the respondent.

31 The claimant discussed the proposal with his family, but decided he could not accept it because of the impact of the events on his health and because his family thought that Mr Farrington must have been aware of the letters from Mr Buckler, and sanctioned them.

32 The respondent included some documents in the bundle about jobs the claimant allegedly worked on [101 to 102]. As these were not sent to the claimant in advance of the proposed disciplinary hearing, I was not satisfied they were relevant.

33 The claimant’s daughter helped him to apply for some jobs she found online. He was interviewed for handyman jobs at two care homes but was unsuccessful. He distributed about 20 CVs. He also contacted about six friends in the same line of work as him. said he became discouraged about applying for work because of his age (69) and the need for a reference from the respondent. The claimant accepted that he had not asked Mr Farrington if he would provide a reference. He accepted that if he had done so, it was possible that Mr Farrington would have agreed. The claimant said that he applied for no jobs after October 2019 because he was scared of rejection.

<u>The Law</u>

Constructive unfair dismissal

34 The relevant legislation as regards constructive unfair dismissal is section 95 of the Employment Rights Act 1996:

> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if) –
>
> (c) 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."

Section 95(2) is not relevant in this case.

35 The legal framework for constructive unfair dismissal claims is well established by case law. In order to claim constructive dismissal there must have been a breach of contract by the respondent, which was a fundamental or significant breach going to the root of the contract (Western Excavating (ECC) Ltd v Sharp [1979 IRLT 27 CA). It can be a breach of an express contractual term or an implied contractual term. In this case the claimant was alleging breaches of the implied term of mutual trust and confidence. In the case of Malik v BCCI [1997] IRLR 462, the House of Lords considered the implied term of mutual trust and confidence. It was held that the implied obligation extends to any conduct by the employer calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. There must be an objective consideration of the conduct concerned. In addition, the conduct must be without reasonable or proper cause [my emphasis added]. The latter point is often neglected, but is of great importance. See, for example, Hilton v Shiner EAT/2405/00 – in which it was stated: "To take an example, any employer who proposes to suspend or discipline an employee for lack of capability or misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence between employer and employee, whatever the result of the disciplinary process. Yet it could never be argued that an employer was in breach of the term of trust and confidence if he had reasonable and proper cause for the suspension, or for taking the disciplinary action" [my emphasis added].

36 If the conduct concerned is, viewed objectively, likely to cause damage to the relationship between the employer and employee, a breach of the employer's obligation may occur. The motive of the employer is not relevant (see also Lewis v Motorworld Garages Ltd [1985 [IRLR] 465 CA). It has also been established that the function of the tribunal is to look at the conduct as a whole and to ask whether, judged reasonably and sensibly, the employee cannot be expected to put up with it (Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 EAT). Any breach of the implied term will amount to a fundamental breach of contract

(Woods). In addition, it has been established that the fundamental or significant breach of contract could be an individual incident or could be a series of events that cumulatively amounts to a breach of the term. The final straw must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term. It does not have to be of the same character as the earlier acts, but must contribute something to the breach, although what it adds may be relatively insignificant (London Borough of Waltham Forest v Omilaju [2005] IRLR 35 CA)

37 If there has been a fundamental breach of contract, the claimant must prove they resigned in response to it, and that they did not delay in doing so, thereby affirming the breach. If the claimant establishes the above, their resignation is to be treated as a dismissal - a constructive dismissal. If there has been a constructive dismissal rather than a resignation, the tribunal must technically move on to consider whether the dismissal is fair or unfair, in accordance with the provisions of section 98 of the 1996 Act. In practice, this point arises infrequently.

38 As regards remedy, it is for the respondent to show that a claimant has failed to mitigate loss. Where an offer of re-employment is made, the questions is whether the claimant did act unreasonably in refusing it, taking into account the history and all the circumstances of the case, including the claimant's state of mind – see Wilding v British Telecommunications Plc [2002] EWCA Civ 349: "In other words, it is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed. Wilding concerned an unfair and discriminatory dismissal. As has been pointed out by the EAT in Wright v Silverline Care Caledonia Ltd EATS/0008/16, in a constructive unfair dismissal case, it is very firmly for the respondent to show that a claimant who was well entitled to leave, was somehow unreasonable in refusing to return.

Submissions

39 The respondent's representative submitted that there was no fundamental breach of contract. The disciplinary hearing invitation was in reality an invitation to a meeting to discuss concerns. The claimant regarded the disciplinary process as insulting and preordained, but that was not a reasonable belief. The respondent's representative suggested that the claimant would have reacted the same way of the letter had not used the term "disciplinary hearing" or if full details of concerns [100 to 101] were included. The warning was simply a written record of an informal process. Mr Flood argued that the claimant was used to 'light touch' management whereas Mr Buckler 'ran a tight ship'. The claimant did not respect Mr Buckler because, as he said in evidence, he thought he "hadn't a clue". The respondent

accepted that the letter from Mr Buckler caused the claimant to resign, and did not seek to argue that the alleged breach was waived – simply that it was not a fundamental repudiatory breach. The respondent did not argue that if there was a constructive dismissal, it was fair.

40 The respondent also argued that the claimant had failed to mitigate loss. He unreasonably rejected an offer to return to work, which would have been feasible because he had happy working relationships with everyone except Mr Buckler. In the alternative, Mr Flood argued that the claimant had failed to mitigate loss after September or October 2019.

41 The claimant's representative submitted that the claimant had no problems during his six years employment until Mr Buckler became his manager. Mr Buckler had a lot of power very quickly, and used it to issue warnings and the invitation to a disciplinary hearing, which made the claimant ill. The claimant had justifiably felt targeted by Mr Buckler. Mr Buckler had insulted the claimant by his comment about not being late. The claimant's concerns about the safety of a job were disregarded and he was ordered to complete it by 4.30 p.m. – he tried, but did not feel it could be done safely, which caused him to feel a weight of responsibility for the safety of the tenant. Mr Buckler had suggested that the claimant was lying about not receiving the disciplinary hearing invitation. This was embarrassing because it was a public discussion. In the circumstances, the claimant became upset during the meeting and had to leave because it made him ill.

42 Mrs Wilcox also argued that the claimant had tried to find alternative employment. It was not reasonable to expect him to return to work for the respondent. His confidence was knocked. Covid and his age made finding work more difficult. The claimant was used to work finding him, not to having to make applications which could be rejected. In the circumstances, she argued that the claimant should be compensated for losses to the date of the hearing.

Discussion and conclusions

43 I decided that the actions of Mr Buckler were without reasonable and proper cause and that the claimant's belief that he was being targeted was both genuine and, viewed objectively, reasonable. The claimant had worked for the respondent for a long time without any problems. Mr Farrington had expressed the view that the claimant "would not last two weeks with the new manager", and Mr Buckler's actions after commencing employment confirmed the claimant's apprehensions. As can be seen from my findings of fact, Mr Buckler targeted the claimant for criticism, and failed to follow the respondent's disciplinary procedure by issuing two written informal warnings, with no proper discussion, which were prepared in advance, for what can only be described as (1) a trivial issue (the high-vis jacket); and (2) a farcical issue i.e. failure to bring his personal mobile phone to work, plus a threat of being sent home without pay should it happen again.

44 The admonishment not to be late was, in the circumstances, insulting, because the claimant had no history of being late for work. It was a gratuitous remark. Similarly, being instructed to complete a job despite his concerns about health and safety concerns, was unprofessional, and potentially a breach of the respondent's legal obligation to provide a safe working environment.

45 The letter inviting the claimant to a disciplinary hearing was not in line with the respondent's disciplinary policy. The claimant was provided with no details of the alleged performance concerns and, in my judgement, treating any such concerns as a disciplinary matter was wholly disproportionate. The allegation that the claimant had hired equipment without authorisation was, at least on the claimant's case, factually wrong – and the issue could have been cleared up by asking him about it rather than treating it as a disciplinary issue.

46 I concluded that the respondent's actions, specifically those of Mr Buckler, constituted a fundamental breach of the implied duty of trust and confidence. I think it very likely that the claimant was right to say that Mr Buckler had an agenda to dispense with his services, or to force him to resign.

47 The claimant resigned in response to the breach. Affirmation had not been argued but, if it had, I would not have accepted the argument because the claimant was unwell.

48 The respondent did not pursue Polkey or contribution arguments and that was sensible because neither could have been made out on the facts. The respondent did not seek to argue that the constructive dismissal was fair.

49 Having heard evidence on remedy, I concluded that the claimant had not failed to mitigate loss by not returning to work for the respondent. He, and his family, having considered the offer, decided against it because of a genuine concern that Mr Farrington must have sanctioned Mr Buckler's conduct, and because the events in question had made the claimant ill.

50 However, I decided that the claimant had shown failure to mitigate loss as from the end of October 2019. The amount of compensation payable as a result of those findings was agreed to be £15298.64.

Employment Judge Hughes
9 March 2021