EMPLOYMENT TRIBUNALS

Claimant: Mr K Tagoe

Respondent: Explore Transport Limited

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 22 and 23 June 2021

Before: Employment Judge Brewer

Representation

Claimant: In person
Respondent: Mr K Ali, Solicitor

JUDGMENT

The claimant's claim of unfair dismissal fails and is dismissed

REASONS

Introduction

1. This case was heard via CVP. There was an agreed bundle of documents. The claimant had produced a number of other documents which had only been provided to the respondent and the Tribunal the day before the hearing. Although they were not agreed, Mr Ali said that he was not taking issue with their inclusion as he saw them as irrelevant. The claimant had also provided a witness statement with a number of hyperlinks including links to further documents and recordings of meetings he had attended. Again, these were not part of the agreed bundle.

2. I heard oral evidence from the claimant, and for the respondent I heard from Mr Aaron Head, Transport Depot Controller and Mr Chris Gatheridge, Head

of Operations. All of the witnesses took the affirmation. Their statements were taken as read.

3. Before the taking of evidence, I explained the procedure we would be following. I also explained to the claimant the purpose of cross-examination, in particular the need for him to challenge aspects of the respondent's evidence with which he did not agree. The claimant said that he understood.

Issues

4. This is a claim for constructive unfair dismissal. As such, the issues which fall to be determined are as follows.

    a. Did the respondent breach the implied term of trust and confidence? The Tribunal will need to decide:
        i. whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
        ii. whether it had reasonable and proper cause for doing so.
        iii. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.
    b. If the claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract?
    c. Was it a potentially fair reason?
    d. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

Law

5. The claimant claimed that he had been constructively dismissed. He resigned following, he says, a series of acts by the respondent which, he says, amounted to a breach in the implied term of trust and confidence. The relevant law is as follows.

6. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. That is commonly called constructive dismissal.

7. The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in **Malik v BCCI; Mahmud v BCCI** 1997 1 IRLR 462 where Lord Steyn said that an 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."*

8. In the leading case in this area, **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, CA, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed"*

9. In order to successfully claim constructive dismissal, the employee must establish that:

    a. there was a fundamental breach of contract on the part of the employer;
    b. the employer's breach caused the employee to resign;
    c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

10. I note that a constructive dismissal is not necessarily an unfair one — **Savoia v Chiltern Herb Farms Ltd 1982** IRLR 166, CA.

11. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident even though the last straw by itself does not amount to a breach of contract — **Lewis v Motorworld Garages Ltd** 1986 ICR 157, CA. However, an employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably. This was confirmed in **Bournemouth University Higher Education Corporation v Buckland** 2010 ICR 908, CA, where the Court upheld the decision of the EAT that the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal.

12. There is no need for there to be 'proximity in time or in nature' between the last straw and the previous act of the employer — **Logan v Customs and Excise Commissioners** 2004 ICR 1, CA.

13. In **Omilaju v Waltham Forest London Borough Council** 2005 ICR 481, CA, the Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, nor need it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective. And while it is not a

prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the last straw test. In that context, in **Chadwick v Sainsbury's Supermarkets Ltd** EAT 0052/18 the EAT rejected a tribunal's finding that a threat of disciplinary action was 'an entirely innocuous act' that could not constitute a last straw.

14. In terms of causation, that is the reason for the resignation, a tribunal must determine whether the employer's repudiatory breach was 'an' effective cause of the resignation. However, the breach need not be 'the' effective cause — **Wright v North Ayrshire Council** 2014 ICR 77, EAT. As Mr Justice Elias, then President of the EAT, stated in **Abbycars (West Horndon) Ltd v Ford** EAT 0472/07:

> *"the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon"*

15. Where an employee has mixed reasons for resigning their resignation will constitute a constructive dismissal provided that the repudiatory breach relied on was at least a substantial part of those reasons (see **Meikle v Nottinghamshire County Council** [2004] EWCA Civ 859, [2005] ICR 1).

16. Thus, where an employee leaves a job as a result of a number of actions by the employer, not all of which amounted to a breach of contract, they can nevertheless claim constructive dismissal provided the resignation is partly in response to a fundamental breach.

17. Finally, I note that Mr Ali confirmed that he was not seeking to argue that if there was a repudiation on the part of the respondent, the claimant at any point affirmed the contract.

Findings of fact

18. I make the following findings of fact (references are to pages in the agreed bundle).

19. The respondent is a specialist supplier of transport and plant hire services to a range of customers. The claimant was employed by the respondent from 11 July 2016 until 20 November 2020 as an HGV driver.

20. The respondent has always had installed on its vehicles a camera system. Latterly this was installed and operated by Camera Telematics and the system was known as Street Angel (for ease of reference I refer to the system and the supplier as CTSA in what follows).

21. The primary purpose of the CTSA system is to record footage of incidents for insurance purposes. The secondary purpose is to record incidents involving the vehicle such as hard braking or hitting a kerb (called g force incidents because of the force being the trigger for the recording). The camera is outward looking, it does not film the vehicle's cab. The camera

does not operate after 45 seconds following the vehicle's ignition being switched off.

22. At the claimant's induction he, as with all drivers, was made aware of the camera system and its use on the respondent's vehicles. The respondent's Data Protection Policies [2020 version @ 246 – 250, 2017 version @ 251 - 256] cover the period this case is concerned with and they are in very similar terms. They deal with what information is processed and the purposes for which processing takes place as well as details of protections and rights of access. The policies are held on the respondent's intranet.

23. During March 2020 the claimant began to notice the lights on the back of the camera. In May 2020, the claimant contacted Stephen Carrick, then Transport Depot Controller about the lights. In turn Mr Carrick reported his conversation to Amy Doona, Head of People Operations [emails B67 and B68]. Mr Carrick stated that the claimant said, "*he knows he is being watched by someone"* and although the claimant accepted that the camera was outward facing, he felt that "*his driving and whereabouts are being watched by streaming".* Mr Carrick considered that the claimant sounded paranoid. Ms Doona said that she would make contact with the claimant.

24. On 6 June 2020 the claimant installed a camera in the vehicle he was using in order to film the lights on the CTSA camera.

25. Ms Doona met with the claimant on 7 August 2020. The meeting was to discuss the claimant's wellbeing following concerns being raised by the claimant's colleagues. The meeting went well, and the claimant was comfortable with what was discussed.

26. During late August 2020 the claimant sought information directly from CTSA on the working of the system. He was told by Mark Stamper that the lights on the back of the camera show when the system was charging/charged, when the camera was operating, when it was connected to the network or server and when there was a problem [B170]. The claimant was also sent a lengthy user guide to the system [B171].

27. On 25 August 2020 the claimant raised a grievance "*as regards the monitoring system installed on the truck"* claiming in effect that he was being constantly monitored whether driving or stationary and whether inside or outside the vehicle, including when cleaning the truck. He said that data was being collected on him without him being informed of that fact [B177].

28. Following the grievance submission, on 1 September 2020 Amy Doona emailed the claimant to advise him that the grievance had been passed to Andrew Murphy to investigate [B176].

29. On 2 September 2020 Andrew Murphy emailed the claimant to ask him when he would be free to meet to discuss the grievance [B176]. The claimant failed to respond to that email and Mr Murphy emailed the claimant again on 7 September 2020 [B175]. The claimant did respond to this email [B175]. However, instead of agreeing a time to meet with Mr Murphy, the

claimant said that it was up to the respondent to fix a time for a meeting and that he "*can't help further*".

30. As part of his investigation Mr Murphy contacted Aaron Head who in turn gave Mr Murphy contact details for Mark Stamper of CTSA [B177, B178 and B179].

31. In the meantime, Ms Doona continued to try to set up an investigation meeting between the claimant and Andrew Murphy [see email 8 September 2020 @ B182/B183]. On 9 September 2020 she emailed the claimant asking him to respond to earlier communications and said that if he had nothing to add to his written grievance she would move to set up a grievance hearing [B181/B182]. In response the claimant offered three possible meeting dates in September 2020 [B182].

32. On 17 September 2020, Aaron Head sent an email to Errin McNamee, Managing Director of CTSA, again seeking confirmation of what the lights on the CTSA cameras signified [B185].

33. Errin McNamee responded in an email at [B182]. She gave slightly a different response to that of Mr Stamper. She said that one light indicates power on or off, one indicates when the camera is recording an event or having recorded it, is uploading it. Finally, lights also indicated network/server connection. She confirmed that an event is triggered when the vehicle operates outside certain parameters set by CTSA in conjunction with the respondent. She confirmed that if there is an event a 10 second clip is uploaded. Finally, she confirmed that CTSA do not monitor live streaming on any of the respondent's devices stating, in terms that: "*live streaming is not a feature available in the devices installed in your fleet".*

34. The claimant's grievance hearing took place on 28 September 2020. The notes are at [B194 *et seq*]. Aaron Head chaired the hearing, the claimant had union representation.

35. Following the grievance hearing the claimant continued to be concerned that he was being watched, specifically that his vehicle was being monitored 24 hours a day and that the monitoring was being live streamed. The claimant raised this with several colleagues.

36. On 5 October 2020 Ms Doona wrote to the claimant with a date for an assessment by the respondent's doctor as a result of concerns about his behaviour [B198].

37. On 7 October 2020 the claimant emailed Ms Doona to say that he would not be attending the doctor's appointment [B202].

38. On 15 October 2020 Aaron Head wrote to the claimant with the outcome of the grievance [B203]. Mr Head partially upheld the grievance, and he advised the claimant of his right to appeal.

39. As a result of the ongoing concerns about the claimant's wellbeing, Ms Doona wrote to the claimant on 15 October 2020 [B64]. Ms Doona said that

as the claimant had refused to attend the doctor's appointment he would remain off work, and from 18 October 2020 that would be without pay.

40. The claimant responded by email on 16 October 2020 [B205].

41. On 20 October 2020 the claimant appealed the grievance outcome [B208/B211]. He said that evidence had been manipulated and he had "*proved what I claimed at the outset*".

42. The appeal was passed to Chris Gatheridge to deal with.

43. Ms Doona continued to try to get the claimant to attend the required doctor's appointment and she wrote to the claimant to this effect on 28 October 2020 [B217]. The claimant responded to Ms Doona by email on 3 November 2020, stating that, "*I will not be attending the appointment for Wednesday 4th November or any future Mental Health Wellbeing appointments offered*" [B218].

44. The grievance appeal hearing went ahead on 10 November 2020.

45. The appeal outcome was sent in writing to the claimant on 13 November 2020 [B242/B243]. Mr Gatheridge acknowledged that some different information had been provided to the claimant about the system, but that the respondent operated its system consistently across its fleet. He confirmed that the respondent had a Data Protection Policy and who the Data Protection Officer was. These were two questions specifically raised by the claimant as part of his grievance. Mr Gatheridge also noted that the claimant was made aware of the system at his induction, which was in fact made clear from documents provided by the claimant. He also confirmed that no driver information is held on the system, so CTSA could not identify drivers and limited individuals at the respondent could access the stored data and they in turn could only identify a driver by cross-referencing to a manning sheet. Finally, he clarified the operation of the lights on the back of the camera.

46. Having received the grievance appeal outcome, the claimant submitted his resignation [B276].

Discussion and conclusion

47. I think it important to first note the claimant's approach to the hearing. I accept that as a litigant in person a certain amount of latitude should be afforded to the claimant in relation to how he dealt with his cross-examination of the respondent's witnesses. I shall return to that shortly. When answering questions in cross-examination from Mr Ali, and despite being told several times by me not to do so, the claimant regularly answered a question with a question, not I should say, a question to clarify what he was being asked, but rather as a challenge to the asking of the question in the first place. In relation to his cross-examination of the claimant's witnesses, the claimant started to ask Mr Gatheridge questions about his role, when he started with the respondent, he asked if all trucks had the same system and when the CTSA system was fitted. He then began to ask

detailed questions about the precise specifications of the cameras installed by the respondent in their vehicles. His first question was to ask about their storage capacity. I refused to allow this question and pointed out that in fact the claimant had said in his own responses to questions from me that he did not in fact object to the operation of the system. His complaint was that he had not been informed about how the system was operating. Thus, the specification of the system was entirely irrelevant and not part of the claim. At this point the claimant said he had no further questions for Mr Gatheridge. I asked the claimant if he was sure. I reminded him of the purpose of cross-examination and that I was more likely to accept unchallenged evidence. I asked him to think about it. The claimant confirmed that he had no further questions for Mr Gatheridge.

48. Mr Head then gave his evidence. The claimant asked him only one or two questions. I again checked to make sure that was all he wanted to ask. I again reminded the claimant of the purpose of cross-examination and that I was more likely to accept unchallenged evidence. The claimant confirmed that he had no further cross-examination.

49. The claimant had a good working relationship with the respondent until the issue of the cameras was raised by him. Shortly before he raised the issue of the cameras he had been praised for highlighting a loading issue for example.

50. The starting point for my analysis is the claimant's resignation letter. He resigned for three reasons.

51. First what I might term abuse of the CTSA camera system, in particular the fact that he was not informed of how it was operating. Second because of the failure to address his grievance, and third because of the wellbeing issue. I shall deal with these in turn.

52. In relation to the camera system, as I have indicated above, the claimant's concern seems to have been that the system operation changed from originally monitoring incidents, which he was informed about during his induction, to, in effect, 24 hour surveillance which was being live streamed and about which he was not informed. This of course begs the question: did the system change as the claimant alleged?

53. The claimant's evidence that there was 24-hour surveillance rests entirely on what he understood by the camera being logged on to a network. In answer to a question from me he said, "*I say 'network' means someone is viewing the footage*". He went on to say that this was not a problem in and of itself, it was simply that the claimant wanted to be informed about it.

54. The evidence shows that whatever the claimant thought, he was incorrect. The Managing Director of the company that installed and ran the system said in her email response to Mr Head's enquiry, that in relation to the lights on the camera, one indicates power on or off, one indicates when the camera is recording an event or having recorded it, is uploading it. She also confirmed that an event is triggered when the vehicle operates outside

certain parameters. She confirmed that if there is an event, a 10 second clip is uploaded. Finally, she confirmed that "*live streaming is not a feature available in the devices installed in [*the respondent's*] fleet".* The claimant gave no evidence as to why the Managing Director would be lying about that.

55. In my judgment the claimant has conflated two different things. He has presumed that the fact that a camera is connected to a network is, *per se*, evidence that it is constantly streaming images to that network. But there is simply no evidence that this was happening and there is unchallenged evidence that not only was live streaming not happening, but that the installed system is not capable of live streaming. The claimant seems to have failed to understand the simple point that because an incident could occur at any time, and because when an incident does occur a 10 second video clip is uploaded, the camera must be constantly linked to the network to which the clip will be uploaded. But I stress that the evidence indicates clearly that there was no 24 hour recording or live streaming.

56. In relation to the second point, the claimant was concerned about the grievance process and the outcome.

57. Turning first to the procedure, the claimant raised his grievance on 25 August 2020, and it was dealt with by 15 October 2020, a period of around 7 weeks. During this period the claimant was contacted, and chased, by Andrew Murphy to attend an investigation meeting. He had to be chased because he failed to respond to the first approach. This caused at least a week's delay. There were difficulties with the claimant's representative's availability which also caused some delay.

58. The respondent did not however waste time. There was an investigation ongoing while the respondent tried to set up both the meeting with the claimant and the grievance hearing. In my judgment, in the circumstances, the period of around 7 weeks from instigation to conclusion of the grievance was not excessive and was in fact perfectly reasonable.

59. As to the appeal, that was instigated on 20 October 2020 and the final outcome was delivered on 13 November 2020, a period of less than four weeks which I also consider to be reasonable in the circumstances.

60. As to the substance of the grievance, the claimant agreed in cross-examination that he was able to raise whatever he wanted during the grievance hearing. What he did raise was what he said was the absence of a data protection policy. But as I have found, at all material times the respondent's Data Protection Policy was on their intranet and the claimant at no point said he did not have access to the respondent's intranet. His complaint seems to have been that he was not sent a personal copy of the Policy. I see no reason why he should have expected that, he was told where to find a copy.

61. The claimant also raised the fact that he did not know who the respondent's Data Protection Officer was. He was told who it was in the grievance

outcome letter. Finally, the claimant was given a definitive explanation of the camera operation and what the lights meant. He had been copied into many of the emails regarding the lights on the cameras in any event and knew that the supplier of the cameras said they did not live stream.

62. Finally, in brief, as part of the grievance outcome, the claimant was told that the respondent had always operated a camera system on their vehicles, which the claimant knew, that the fundamental method of data collection had not changed, which at the hearing the claimant said he agreed with, and that the driver was not identifiable from the footage. Other information would be needed. Again, at the hearing the claimant agreed with this.

63. Turning to the wellbeing concerns, the claimant's employment contract [B38 *et seq*] says that his terms and conditions are contained in the contract and associated documents. One of the associated documents is the respondent's Sickness Policy [B53 *et seq*]. This includes the following:

> *"The Company reserves the right to require you to attend a medical examination during or after any absence from work due to sickness or injury or* ***at any time it deems necessary****"* (emphasis added)

64. It is clear from the contemporaneous documents that the respondent had a genuine concern about the claimant's mental health, a matter he did not take issue with in his cross-examination of the respondent's witnesses.

65. I turn then to applying the law to the above..

66. I remind myself that in a claim of constructive dismissal it is for the claimant to prove that the respondent breached his contract. In this case the question is whether the respondent breached the implied term of trust and confidence which is expressed as follows; that the respondent 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."*

67. Taking each of the matters complained about in the reasons for resignation I find as follows.

68. First, it is correct that the claimant was not informed that the operation of the respondent's cameras had altered because, put simply, their operation had not altered. The system was and remained one of fault driven uploading of clips of the incident and there never was live streaming nor 24 hour recording as the claimant alleged. Given the assurances the claimant received about this, he should have been in no doubt as to the correct position well before he resigned and even if he was not, he was certainly aware of it in the outcome of his grievance and the appeal. His continued belief in his own correctness is wholly unsupported by any evidence.

69. Second, the grievance, including the appeal, was conducted procedurally fairly, within a reasonable timescale, following a thorough investigation.

70. Finally, the requirement to attend a wellbeing meeting was made in accordance with a contractual right to do so and in doing so the respondent in no way acted in breach of trust and confidence. I find that the respondent had reasonable and proper cause to require the claimant's attendance at a medical examination.

71. It follows that the respondent did not conduct itself in a manner calculated or likely to seriously damage or destroy the relationship of trust or confidence between it and the claimant whether in respect of any of the specific reasons given for the claimant's resignation or taking all of those reasons together, and therefore the claim of constructive unfair dismissal fails and is dismissed.

_____

Employment Judge Brewer

Date: 23 June 2021

JUDGMENT SENT TO THE PARTIES ON

24 June 2021

.....

.....

FOR THE TRIBUNAL OFFICE