EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107972/2021

HEARING HELD ON 27 TO 29 JULY AND 9 AUGUST 2021 BY CLOUD VIDEO PLATFORM (CVP)

EMPLOYMENT JUDGE CAMPBELL

Mr G Petrie	**Claimant** **Represented by:** **Ms Rhona Patterson**
Starrs Contracting Limited	**Respondent** **Represented by:** **Mr Robin Falconer, Solicitor**

JUDGMENT

The Judgment of the Employment Tribunal is that:

1. the claimant was not unfairly dismissed contrary to section 94 of the Employment Rights Act 1996; and

2. The claim is therefore dismissed.

REASONS

1. This claim arises out of the claimant's employment by the respondent, which began on 6 April 2015 and ended on 8 January 2021 with his resignation. The claimant alleges that he resigned in response to a material breach of his contract by the respondent, and therefore was constructively unfairly dismissed.

2. The claimant gave evidence at the hearing. He was represented by his wife, Ms Rhona Patterson. She also gave evidence. On behalf of the respondent Mr Stuart Starrs gave evidence. He is the owner of the respondent and its de facto managing director.

3. The parties had jointly prepared a paginated bundle of documents which was referred to in evidence, and where appropriate references are made below to page numbers of that bundle in square brackets. This included a schedule of loss and material in relation to the claimant's losses and mitigation efforts.

LEGAL ISSUES

4. The legal questions before the Tribunal were as follows:

   4.1. Did the respondent materially breach an explicit or implied term of the claimant's contract of employment?

   4.2. If so, did the claimant resign promptly in response to the breach, so that he was constructively dismissed within the terms of section 95(1)(c) of the Employment Rights Act 1996 ('ERA')?

   4.3. If yes, was the dismissal fair or unfair, taking into account the requirements of section 98 ERA?

   4.4. If it was unfair, what compensation if any should be awarded?

APPLICABLE LAW

Constructive unfair dismissal

5. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal.

6. An employee may terminate the contract but claim that they did so because their employer's conduct justified the decision. This may be treated in law as a dismissal under section 95(1)(c) ERA, commonly referred to as constructive dismissal. The onus is on the employee to show that their resignation amounted to dismissal in that way. The employer's conduct prompting the resignation must be sufficiently serious so that it constitutes a material, or repudiatory, breach of the contract. The breach may take place or be anticipatory, i.e. threatened. It may be way of a single act or event, or a chain of events ending with a 'last straw'. A last straw in this context may not be a breach in itself, but should not be innocuous. The employee must resign in response to the breach, and not delay unduly in doing so or they may be deemed to have accepted or affirmed the breach.

7. Should dismissal be proven by a claimant, then unless the reason for dismissal is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. If it is able to do so, the dismissal will potentially be fair. If it cannot, the dismissal will be unfair.

8. Whether a dismissal is direct or constructive, if a dismissal is for a fair reason then the tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4) ERA, taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that consideration.

Protected communications

9. Section 111A ERA states as follows:

111A Confidentiality of negotiations before termination of employment

(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111.This is subject to subsections (3) to (5).

(2) In subsection (1) "pre-termination negotiations" means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

(3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.

(4) In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.

(5) Subsection (1) does not affect the admissibility, on any question as to costs or expenses, of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved.

10. These relatively new provisions were designed to create a space within which an employer and an employee could have open and frank discussion about the possibility of the contract being brought to an end, without either party

being prejudiced at a later date, for example in tribunal proceedings, by what they had said. Commonly they are referred to as protected conversations or communications.

11. The protection is not absolute, as is made clear. For example, if one of the parties acted in an 'improper' way then they may lose their right to confidentiality either partially or entirely.

FINDINGS OF FACT

12. The following findings of fact were made as they are relevant to the issues in the claim.

13. The claimant was an employee of the respondent from 6 April 2015 until his resignation date of 8 January 2021. The respondent provides plant and workers to operate that plant to commercial and public sector customers for construction projects. Mr Starrs is the owner and most senior employee of the respondent. There are around seven employees in total.

14. The claimant was a Plant Operator and had several decades of experience in that role.

15. The claimant was paid at an hourly rate of £13.20 per hour. His standard working week involved working and being paid for 40 hours at that rate. If required to perform overtime, his hourly rate increased to £18 per hour.

16. As with many employers, the respondent was affected by the Covid-19 pandemic and in late March 2020 placed its employees on furlough and made payments to them within the terms of the UK Government's Coronavirus Job Retention Scheme ('CJRS'). This included the claimant.

17. In the autumn of 2020 restrictions had eased enough to allow the respondent to operate again and it undertook work under contracts with customers.

18. One of the respondent's biggest customers was a construction company based in Inverness named William Donald Limited ('William Donald'). The respondent provided plant and personnel to William Donald at a number of sites where it operated on a sub-contract basis.

Incident on Tuesday 27 October 2020

19. On Tuesday 27 October 2020 the claimant was working on a site operated by William Donald at Slackbuie, Inverness. He was operating some machinery and moving some pallets. The forks of his machine struck a hot water pump unit and caused it damage. The claimant recognised he had hit the pump and so stopped what he was doing. He took a look at the pump but could not see only minor damage, which he believed he fixed by bending the damaged part back into shape. He continued his work.

20. The claimant considered that the Banksman on site, a William Donald employee, was at least partly to blame for not guiding him properly or alerting him to the proximity of the pump to his machine.

21. The incident was reported to by Chris Brown, a William Donald site agent and the most senior employee of William Donald on that site at the time. His title was Senior Site Supervisor.

22. The following day the claimant attended work at the Slackbuie site. Nothing was said to him about the incident the day before. He suffers from a degree of hearing loss and had forgotten to take his hearing aids. This was noted on site by William Donald employees.

23. Mr Brown telephoned Mr Starrs on either the Tuesday or the Wednesday of that week. He raised that the claimant had hit the water pump with his machinery, and also that his apparent lack of hearing was causing concern to other workers on site. Mr Brown wanted the claimant to be redeployed elsewhere, away from the site.

24. Mr Starrs did not raise the matter with the claimant immediately. He wished to avoid having a difficult conversation about concerns others had raised. He hoped that Mr Brown would change his mind or simply forget the matter, so that the claimant could go on working at the site.

Friday 30 October 2020

25. On Friday 30 October 2020 the claimant attended the site at Slackbuie at the beginning of the day. He was told by Mr Brown that the pump he hit on the Tuesday was damaged and he was not being allowed back on the site, and should go home.

26. The claimant had been able to take a look at the pump unit and could see what he considered minor damage to a pipe, or coupling, connected to it. A photograph bearing to be the damaged unit was produced [42] although the claimant disputed that this was the same unit he hit. He said the unit he made contact with did not have rust on it, unlike the photograph, and had the coupling on the opposite side. The claimant maintained that the coupling he hit had a small dent on it which was more minor than the level of damage shown in the photograph.

27. The claimant telephoned Mr Starrs to report the situation. Mr Starrs told the claimant to go home and wait to be contacted further. The claimant did so.

Saturday 31 October 2020

28. The claimant went to visit Mr Starrs at the respondent's offices on the morning of Saturday 31 October 2020. The meeting was considered by both to be informal and friendly. At this point neither believed the extent of the damage caused by the claimant to be more than minor, and neither understood or expected that William Donald would have any significant or ongoing opposition to the claimant working on their sites. Their mutual view was this was just something that happened from time to time on construction sites. Mr Starrs' understanding at this time was based mainly on what the claimant told

him, as he had not gone to the site to see the unit for himself or received any other detailed reports.

29. Mr Starr asked the claimant to take a couple of days of paid leave while he spoke to Mr Brown about the claimant being allowed to return to the Inverness site. He still expected to be able to smooth things over. He was expecting to be billed for any damage but would only know the amount claimed when he received those details from Mr Brown in the form of a report. In the event he did not receive a report, or notification of the cost of the damage, until March 2021 after the claimant had left his employment. Ultimately William Donald absorbed the cost themselves and to date the respondent has not been asked to pay for the damage.

30. The claimant was content to go along with Mr Starrs' request and went home, expecting to hear further about the situation by the middle of the following week.

Week of Monday 2 to Friday 6 November 2020

31. The claimant waited for most of the following week to hear news of what was happening with his working situation. He sent a text message to Mr Starrs on Tuesday 3 November 2020 [37], saying *"What is happening? I was only supposed to be off for a couple of days".*

32. He sent a further message the next day [38] saying *"Can you pls phone me. I need to know whats happening."*

33. On Thursday 5 November, still having heard nothing, the claimant via his wife Rhona Patterson's email account sent an email to Mr Starrs [44], as follows:

'Good afternoon Stuart

I am very disappointed that despite my texts to you asking to be informed what is happening and stating clearly that I only agreed to take a couple of days holidays, I have heard nothing from you.

I sympathise with you if there is no other work available for me but I did already offer to take redundancy but you declined.

Considering the announcement today from the chancellor I presume that gives you some comfort and I presume I am now on furlough?

I would still appreciate if you would get in touch and discuss this with me as I feel I am being treated very unfairly being kept completely in the dark and not knowing what is happening regarding my employment.

Regards

George'

The reference to the chancellor's announcement was a reference to the extension of the furlough scheme beyond its intended 31 October expiry date.

34. Mr Starrs sent an email back later that day [44] to say:

'Good afternoon George,
I am currently gathering information regarding your performance during the week commencing 26th October 2020.

It has been reported that a collision has occurred on site at Tulloch homes Inverness between your machine and hired in pump from WMD.

When I have gathered all information regarding this matter I will be in touch.

We are glad that nobody was hurt during this incident however it is being classed as a collision by our customers.

Best regards,

Stuart Starrs.'

That email was an accurate reflection of Mr Starrs' knowledge at this time, based on what he had been told by Mr Brown at William Donald.

35. The claimant sent a further email that day [40]:

'Stuart

I am deeply concerned by your response. I met with you last Saturday and my understanding was you were satisfied with my explanation of what occurred on site. The collision with the pump was a very minor incident with no possibility of anyone being injured. The pump sustained a small dent which I repaired prior to leaving the site on Friday.

When I left you on Saturday I had agreed to take a couple of days holidays until you found other work for me. At no time have you made me aware that I am under investigation.

If I am being investigated and therefore suspended then I would be entitled to be informed of this situation surely?

I thought I was only having a few days holiday and kept waiting for a call from you to inform me of the next job.

You have only now informed me of the situation having been contacted twice by text and now by email. I think I deserve better. I need to know what the status of my employment is at the moment as I am not prepared to use up my holidays for this situation without you, at the very least, having a conversation with me.

Regards

George'

36. The claimant received a text message from Mr Starrs on Friday 6 November 2020 asking him if he was able to come into the office for another meeting that day [39].

Meeting on Friday 6 November 2020

37. The claimant agreed to meet Mr Starrs on Friday 6 November 2020 and attended the respondent's offices along with Ms Paterson, who sat in on the meeting with him. Along with Mr Starrs a Ms Deborah Donaldson attended, who is an office administrator with the respondent and works in support of Mr Starrs.

38. The meeting was a protected communication within the terms of section 111A ERA and therefore inadmissible in the hearing of the claim. Accordingly, the details of the discussion are not recorded in this judgment and do not form part of the evidence on which the tribunal's judgment is based.

39. In making this finding, consideration was given to the content of the discussion which was available as a transcript within the tribunal bundle. This was done in order to establish whether either party had acted improperly, and if so whether they should lose the protection they would otherwise have. It is found that neither party acted improperly. The party which came closest to doing so was the claimant, by recording (or allowing his wife to record) the meeting covertly. However, that was not sufficient to remove the privileged nature of the discussion, particularly as that would have been prejudicial to the respondent which had done nothing wrong. Had it been found that Mr Starrs acted improperly in anything he said, it would still have been decided that the privileged nature of the discussion should not be lost, as he had promptly by the end of the meeting rectified any such issue so that no prejudice was caused to the claimant.

40. Therefore, whilst it was competent for the tribunal to consider what was discussed during that meeting in order to establish whether either party acted improperly, the parties' exchanges cannot be included as evidence by virtue of section 111A ERA.

41. On the conclusion of the meeting it was agreed that the claimant would go back home and take two days of paid leave.

Tuesday 10 November 2020

42. Mr Starrs telephoned the claimant at home on Tuesday 10 November 2020. He asked if the claimant had decided what he was going to do. This was a reference to the meeting the Friday before. The claimant was slightly taken aback as he had expected Mr Starrs to be updating him. He didn't understand that Mr Starrs was waiting on him making any kind of decision in the meantime.

43. The claimant passed the phone to his wife who continued the conversation with Mr Starrs, which became more heated as a result of the misunderstanding which existed.

44. Mr Starrs concluded by saying he would be back in touch with the claimant. The call lasted around five minutes.

45. Around 20 minutes later Mr Starrs telephoned the claimant back. He said that he had been in touch with William Donald and the claimant could attend work the next day at another William Donald site, 'Craig Dunain'. The claimant agreed and the call ended.

46. Mr Starrs was ultimately unsure in his evidence whether he obtained confirmation that the claimant would be able to start back working on a William Donald site, albeit a different one, in between the two calls referred to above or the day before. He spoke daily with the various Site Supervisors on the William Donald sites and could not pin the conversation down to a single day. Whilst it is possible that the matter was discussed on the Monday, it is found on the balance of probability that Mr Starrs confirmed with a Site Supervisor at William Donald for definite that the claimant could work on one of their sites in between the two calls made to the claimant on the Tuesday. This is more consistent with the evidence. In any event, the timing and content of the conversations he had with the claimant were the same and in the second of those he was able to give a firm offer of further work the next day, which the claimant accepted.

47. These two calls were of particular importance in the overall narrative of events. They illustrated how differently the main protagonists were viewing the situation at that moment in terms of a preferred outcome. Mr Starrs had felt a sense of responsibility for the claimant and wanted to protect him. He wanted to shield the claimant from some of the more direct criticism made by Mr Brown at William Donald. He did not want to be in a position where he was having to tell the claimant that his main client would not have the claimant on the site. He had hoped the issues would blow over and was disappointed that Mr Brown adhered to his decision not to let the claimant return to Slackbuie. By gaining permission for the claimant to work on another William Donald site, he considered that the problem had been solved. There was no longer a need to focus on any other avenue. Mr Brown's insistence on the claimant not returning to Slackbuie did not extend to any other William Donald site, as each of those had their own Site Supervisor and Mr Brown would not have had the power to keep the claimant away from them. In addition, the posting to another William Donald site was only to be for a few days as Mr Starrs had become aware of some work offered by a different client which was well suited to the claimant and was about to commence. He was going to offer that to the claimant next. He did not mention this to the claimant however.

48. By contrast the claimant now saw the situation as a way to leave his role with the respondent in return for a payment, whether that was termed as redundancy or something else. He believed that he was permanently barred from working on any William Donald site, although that was not the case. Although he had not initiated the discussion, this is where his thinking had taken him to. With help from Ms Patterson, he had asked a few months earlier if he could remain on furlough and ultimately be made redundant. Their preferred outcome was to receive a settlement which would allow the claimant to leave his job with the respondent. They were surprised and frustrated when Mr Starrs indicated he would no longer have to go down that route because work had been found for him.

49. The claimant felt agitated and unwell as a result of the two calls with Mr Starrs. Later that same day Ms Patterson telephoned Mr Starrs to say that the claimant was too unwell to go to work the next day.

50. The call was followed up by an email from the claimant to Mr Starrs which gave his account of the calls which had taken place that day and the effect the claimant considered the process was having on his health [62]. The claimant concluded by saying:

'I feel that my employment status with you is now precarious and I have been treated completely unfairly. If I was to return to work how do I know that this matter is now finished and there will not be further repercussions from the incident on the Slackbuie site?

I don't feel confident to return with these accusations still hanging over me and feel that I may have to pursue a case of constructive dismissal if this matter cannot be resolved to everyone's satisfaction.

In the meantime due to the stress this has caused I am not able to return to work and therefore notify you that I am for now on sick leave.

George'

Subsequent events in November 2020

51. Also on the afternoon of 10 November 2020, the claimant made an appointment to see his GP. He was able to see his doctor on the following Tuesday, 17 November 2020 and he was issued with a fit note dated 23 November 2020 and backdated to 10 November. The condition was described as *"Stress at work"* and the claimant was declared unfit for work altogether. The certificate was valid for 28 days.

52. The claimant provided a copy of the fit note to the respondent on 23 November 2020.

53. The claimant was paid statutory sick pay for his period of absence.

54. Mr Starrs emailed Ms Paterson on Wednesday 11 November 2020 [66]. He accused Ms Paterson of interfering with his business by directly telephoning people at William Donald to ask questions about the incident on 27 October. Mr Brown had gotten in touch with Mr Starrs and requested that Ms Paterson refrain from telephoning the site. Mr Starrs asked her to allow him to sort the matter out with William Donald without her involvement.

55. Mr Starrs arranged with the claimant to pick up his work van from his home on Thursday 12 November 2020. The claimant did not come to speak to Mr Starrs. Ms Paterson dealt with him. Mr Starrs apologised to her for his part in the argument they had had two days before. This was accepted and they parted on better terms.

56. The claimant had no direct contact with Mr Starrs after 10 November 2020.

57. There was a series of emails between Ms Paterson and Mr Starrs between 17 and 20 November 2020 [69A-69B]. This was continued by way of an email from Ms Paterson on 26 November and a reply from Mr Starrs dated 29 November [71]. In essence, Ms Paterson wanted to know whether Mr Starrs was going to provide details of the claimant's redundancy terms, which were understood to be awaited from the respondent's external accountants. Mr Starrs was saying that this had effectively been overtaken by the offer of work made to the claimant on 10 November and then the subsequent commencement of his sick leave. He would resume discussion with the claimant once he was medically certified as fit.

58. The claimant raised queries about his monthly payslip on 30 November 2020. He also reminded Mr Starrs that his wife had suggested placing him on furlough while the situation with William Donald was being resolved. Ms Donaldson for the respondent replied to confirm that the claimant would be paid by way of additional holidays, and so would not receive the lower amount of sick pay or have to use up days from his remaining annual allocation. She

also stated that she considered the claimant's circumstances did not fall within the terms of the CJRS, and so furlough was not an option [72-73].

59. A further fit note was obtained by the claimant dated 8 December 2020 which was to run to 8 January 2021. Again the condition was described as *"Stress at work"* and the claimant was said to be unfit for all work associated with his role [76].

Instruction of solicitors and further exchanges

60. The claimant sought advice on his position from a solicitor. On 2 December 2020 Adelle Morris of A M Employment Law Limited emailed Mr Starrs on the claimant's behalf [74-75]. Although the email is marked 'Without Prejudice' and has the purpose of resolving an existing or imminent claim, the claimant confirmed that he had intentionally included it in the material available in the bundle and wished to waive any privilege in the email.

61. The email narrated the claimant's version of events since the incident of 27 October 2020 and put forward why he was of the view that the respondent had acted unfairly towards him. A proposal was made to have the claimant enter into a settlement agreement in return for a sum to be agreed, reflecting that he would be giving up his employment.

62. On Friday 11 December 2020 Mr Starrs issued a reply to Ms Morris' email, by emailing Ms Paterson's account but addressing the email to the claimant [77]. He was still hopeful of reaching some form of agreement over the situation with the claimant directly. He felt that the involvement of Ms Paterson, and then Ms Morris, was complicating the discussion and that a direct conversation with the claimant would offer the best chance of a solution being found.

63. Mr Starrs' email attached two documents, both authored by him and addressed to the claimant by name. The first was an appeal to the claimant to resume the dialogue with him directly and explore whether a solution could

be found. Mr Starrs outlined how he had been asked by Mr Brown at the Slackbuie site to ask Ms Patterson to refrain from contacting him, and how he had been told by Mr Brown that if she did not do so, there was a risk of all of the respondent's employees being removed from the site [80]. He took that threat seriously and it was of great concern to him. He included a copy of an exchange of text messages he and Mr Brown had had on the subject. Mr Starrs summed up by saying:

'You still work for me. Rhona doesn't and never has. I am not responsible for her. In trying to help you she is putting the jobs of everybody at risk. If I cannot be sure that your wife is capable of behaving in a reasonable and responsible way then for the sake of the business and the rest of the work-force I am ready to let you go.

I want to hear what you have to say about this before I make any decision.

If I do not hear back within the next seven days, I will take it that you do not dispute what I have been told or have nothing to add to it and do what I think is right for the business.

You will find my thoughts on the disciplinary are in the separate note.

Stuart'

64. The second attachment to the email was an attempt to clarify where Mr Starrs stood in relation to (i) the consequences of the incident of 27 October, and whether a disciplinary process needed to be followed to deal with them and (ii) how the claimant's ongoing sickness related absence related to that [81-83]. Towards the end of the email Mr Starrs said:

'Disciplinary is about trying to correct behaviour. Dismissal is a last resort. What kind of example would it set if I just ignore what happened? I am not going to be forced to ignore a serious incident because there are lawyer's letters and we have not had a disciplinary because you are signed off.

I cannot pretend the incident did not happen but if it helps, I can tell you, based on the initial incident I told you dismissal was an option. Based on your past record I would be inclined to a warning not dismissal.'

65. The claimant instructed Ms Morris to write again on his behalf to the respondent. She emailed a letter to Mr Starrs on 18 December 2020 along with a handwritten letter by the claimant [86-89]. Again the letter was marked 'Without prejudice' and contains an attempt to settle a claim which it was made explicit the claimant was alternatively proposing to make. She requested a response from Mr Starrs on or before 6 January 2021. The alternative was to start a formal legal process.

66. The claimant once more confirmed that it was his intention that the letter be considered by the tribunal, and any privilege in it was being waived.

67. That said, the letter describes some details of the discussion at the meeting on 6 November 2020 and for the same reasons as apply to the meeting itself, those passages are not included as evidence.

68. In his handwritten letter the claimant said that he believed Ms Patterson was only acting in his best interests and that he was genuine in his account of how ill he was as a result of the ongoing process.

69. Mr Starrs did not wish to explore further a negotiated settlement of the claimant's complaints or the termination of his employment.

70. On 8 January 2021 Ms Morris emailed a further letter of her own [91-94] together with the claimant's resignation letter [95]. He was resigning with immediate effect.

71. The letter of Ms Morris made clear that *'the issue'* for the claimant was not that a disciplinary process may have had to be followed, nor that steps were taken to progress with that process while the claimant was off work through illness. The issue was said to be related to the protected discussion on 6 November 2020 *'and the treatment that followed.'*

72. The letter went on to describe the events of Tuesday 10 November 2020 when Mr Starrs had called the claimant twice in succession while at home on leave. Ms Morris stated that the claimant had already been stressed, and that the cumulative effect of the two calls left him *'confused, concerned and completely uncertain about where he stood.'* Hence he had commenced a period of sick leave.

73. The letter also referred to Mr Starrs' exchanges with Ms Patterson on that day. She was said to have been *'shocked'* by the way Mr Starrs spoke to her. The fact that Mr Starrs apologised to her two days later was acknowledged.

74. The last event referred to was that Mr Starrs was to have obtained details of the claimant's redundancy entitlement from his external accountants by 13 November 2020, but had not done so.

75. The letter next went on to say:

'My client feels that this treatment amounts to a breach of the implied term of trust and confidence. Going to the root of the employment contract; this renders the breach a repudiatory breach, entitling my client to resign in response.'

76. The resignation letter itself was more concise on the question of the reason for the claimant's resignation. In that regard it read as follows:

'It is with regret that I now have to write to you to offer my resignation with immediate effect. I am sorry it has come to this but due to your failure to respond to my request for an offer of settlement by Wednesday 6th January then I have no option but to proceed with the legal action as described in the letter.

I repeat my intention is to now pursue a claim of constructive unfair dismissal due to your failure to offer any settlement agreement.'

Post-resignation communication

77. The parties continued to email each other after the claimant's resignation. Mr Starrs emailed a document to the claimant recording his response to the resignation [99-100]. He said he would put his side of the story across if a claim was raised. He queried whether the claimant had been legitimately ill throughout his period of absence as he had obtained evidence of the claimant working.

78. With that document Mr Starrs enclosed two photographs taken from social media which showed the claimant operating a digger in the front garden of someone's home. The comments attached confirmed that the work was being carried out by the claimant's son's firm for a customer. Mr Starrs believed the claimant had made a false claim of sickness absence for at least part of the time he was off work.

79. The claimant confirmed in evidence that the photographs did show him operating a digger, but that he was working (and had only worked) on the two days immediately before his resignation, for the good of his health and mental wellbeing. He was not paid for the work and did not carry out any other work during his absence period.

80. The claimant responded by letter dated 12 January 2021 [101]. He only wished to reply to the allegation of making a false claim. He explained how his son had tried to encourage him to get out of the house for the benefit of his health.

81. Mr Starrs emailed the claimant further the next day [102]. He remained sceptical about the claimant's account of his capacity, and whether and when he had been working, but agreed to pay the claimant sick pay and accrued holidays in connection with the termination of his employment.

Mitigation and losses

82. The claimant secured 39 hours of work in the week ending 18 February 2021 with a contractor named Billy Millar. He received £896 gross and £640 after deductions.

83. He carried out further paid work for the same party between the end of February and 1 April 2021. For that period he earned in total £2,844 gross and £2,201.52 net.

84. No further work was provided by Billy Millar after that point and the claimant looked for work elsewhere.

85. The claimant worked for 17.5 hours in the week ending 16 April 2021, this time for John Marshall & Sons. He received £220 net.

86. From early May 2021 the claimant performed work for Mark McAllister Groundworks Limited. He submitted a schedule showing the hours he had worked and what he had been paid on each day in May that he had been working [F26]. He received £1,489.20 net for this work.

87. He received one payment of Jobseeker's allowance in respect of the end of April 2021. The payment was £53.37.

DISCUSSION AND CONCLUSIONS

Nature of alleged breach - mutual trust and confidence

88. A breach of contract founded upon to support a constructive dismissal claim may be the breach of either a specific term or the underlying obligation to maintain mutual trust and confidence. The concept of the latter is described in ***Malik v Bank of Credit and Commerce International SA [1998] AC 20***.

89. As set out in his solicitor's letter of 8 January 2021, the claimant's case is that the respondent breached the term of mutual trust and confidence. This was consistent with his evidence before the tribunal and the submissions made

on his behalf by Ms Patterson. There is no suggestion that an express term of his contract of employment was breached.

The reason for the claimant's resignation

90. The claimant's reason for resignation was set out in his resignation letter of 8 January 2021. That was expanded upon by his solicitor in her letter to the respondent of the same date. His evidence to the tribunal was consistent with that reasoning.

91. The claimant's letter phrases the reason for resignation as *'due to your failure to respond to my request for an offer of settlement by Wednesday 6 January'.* This reason is repeated in the next paragraph. The claimant also refers to (i) *'the way I have been treated'*, (ii) something said during the protected conversation on 6 November 2020, and (iii) the stress he had been under since 6 November 2020.

92. The phrase *'the way I have been treated'* is taken to mean the claimant's treatment by Mr Starrs from 6 November 2020 onwards, with particular emphasis on the exchanges he had with the claimant and his wife on 10 November 2020. This is so because those are the main instances of Mr Starrs doing anything which could be considered 'treatment' in its common sense, and also as those are the events referred to by Ms Morris. Mr Starrs had no direct contact with the claimant after that date and did little save not to progress with the provision of redundancy terms for the claimant, which is separately and specifically referred to by the claimant.

93. As has been explained above, the conversation on 6 November 2020 did not involve either party acting improperly and is given statutory protection under section 111A ERA. It cannot found an allegation of breach of mutual trust and confidence.

94. Nor is it found that the conduct of the respondent, personified principally in Mr Starrs, from 6 November 2020 onwards represented, or contributed to, a breach of mutual trust and confidence. The question of whether an employer's conduct is calculated or likely to destroy the mutual bond of trust and confidence is one which has to be applied objectively. When that is done, his conduct is seen as merely that of an employer reacting to a developing situation, largely out of its control and involving the understanding of newly emerging facts, and then trying to find a solution to the employee's benefit. Offering the claimant a return to work in the circumstances, which was initially accepted before the claimant changed his stance in discussion with his wife, was not the type of conduct which meets the legal threshold required to establish a breach of mutual trust and confidence.

95. In reaching this conclusion it is not denied or overlooked that the claimant was extremely disappointed when the focus of Mr Starrs' efforts switched from considering the terms of a termination package to offering the chance to return to work, and that the claimant found the situation stressful. However, as the nature of the test is objective, the effect on the individual employee does not wholly determine whether the employer was acting in breach of the obligation or not.

96. The final aspect of the respondent's conduct which was referred to in both the resignation letter and Ms Morris' letter of the same date was the respondent's failure to put forward a settlement proposal involving a sum being payable to him in return for the agreed termination of his employment. By extension of the above considerations, this could not amount to a breach of mutual trust and confidence in itself, or as part of a course of conduct amounting to a breach overall. On securing the consent of William Donald for the claimant to return to work on 11 November 2020 Mr Starrs was entitled no longer to pursue the alternative, which was a next best option and not an entitlement.

97. Considering all of the above, the tribunal's finding is that the respondent did not act in a way calculated or likely to destroy the relationship of mutual trust

and confidence between the claimant and itself. This applies to any individual act or omission on the respondent's part and also to any alleged course of conduct said to amount to a breach of the relationship.

Did the claimant resign promptly in response to a material breach of contract

98. For the sake of completeness it is recorded that the claimant would have been unable to satisfy the requirement to show that he resigned sufficiently promptly in response to any breach of mutual trust and confidence.

99. The most serious conduct of the respondent as viewed by the claimant occurred between, at the earliest, 30 October 2020 when the claimant was sent home from the Slackbuie site and 10 November 2020, when Mr Starrs spoke to the claimant and his wife by telephone over two calls. It is notable in particular that the email sent by the claimant to Mr Starrs on 10 November 2020 refers, for the first time, to the possibility of raising a constructive dismissal claim. Those events occurred nearly two months before the claimant decided to resign.

100. Even if the claimant had been entitled to consider the respondent's refusal to offer him a termination settlement as either a breach of mutual trust and confidence, or a 'last straw' as part of a course of conduct amounting to a breach, it was clear from 10 November 2020 when Mr Starrs offered the claimant work the next day (and which he initially accepted) that this was no longer the priority for the respondent. Mr Paterson in her email on that day referred to Mr Starrs *'mov[ing] the goal posts'* in taking this approach. The subsequent emails exchanges up until early December 2020 do not deviate from that and only reinforce the position. The claimant had the benefit of legal advice from 2 December 2020 at the latest, and yet resigned over a month later.

101. Consequently it is found that the claimant did not resign sufficiently promptly in response to anything which could amount to a breach of mutual trust and confidence, whether referred to in his own resignation letter or his solicitor's

own letter of the same date, and whether such breach is taken to mean a single event or a course of conduct.

102. Accordingly it is found that the claimant was not constructively dismissed.

Conclusions

103. On the basis of the above findings it is not necessary to go on to look at whether the respondent had a fair reason for constructively dismissing the claimant, or acted consistently with the requirements of section 98(4) ERA in relation to reasonableness.

104. Nor is it necessary therefore to calculate compensation or make findings in relation to mitigation or any element of contributory conduct.

105. The claimant has been unable to discharge the onus of proof which falls on an individual seeking to show that their resignation amounted to dismissal in law, and the claim therefore must be dismissed.

Employment Judge	**Judge Campbell**
Date of Judgment	**24 August 2021**
Date sent to parties	**24 August 2021**