EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107944/2020

Held by Cloud Video Platform (CVP) on 6 July 2021

Employment Judge: J Young
Tribunal Members: Miss E Coyle
Mr R Taggart

Paul McWhir	**Claimant** **Represented by** **Mrs Robyn McWhir:**
John Miller Limited	**Respondent** **Mrs T Patalla:** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that:

1) the claimant was not unfairly dismissed in terms of s98 of the Employment Rights Act 1996;

2) the complaint under s23(1) of the Employment Rights Act 1996 that the respondent has made an unauthorised deduction from the wages of the claimant is well founded and the respondent shall pay to the claimant the sum of Four hundred and ninety six pounds and forty pence (£496.40).

REASONS

Introduction

1. In this case the Claimant presented a claim to the Employment Tribunal complaining that he had been unfairly (constructively) dismissed; that he was due holiday pay; and that there had an unlawful deduction from his wages. At the hearing it was confirmed that the claim for holiday pay had been resolved and no adjudication was necessary.

2. At a Preliminary Hearing on case management it was confirmed that the complaint of unfair (constructive) dismissal was based on a breach of the implied term of trust and confidence between employer and employee arising from the claim that the claimant had been refused reasonable time off to provide assistance to a dependant contrary to section 57A of the Employment Rights Act 1996 (ERA). The resignation had come in response to that breach. The claim of unlawful deduction from wages related to the respondent deducting from the claimant's final salary the sum of £496.40 in respect of the fee for the claimant attending training courses. The claimant maintained that there was no contractual right to make that deduction.

3. At the Preliminary Hearing on case management issues it became clear that the respondent had not received with the ET1 the claimant's detailed statement of claim attached to that ET1. Thus when the respondent came to respond to the claim its position was that while a claim of unfair dismissal had been raised there was no particularisation of that claim. In any event they denied unfair dismissal. Their position was that before resignation the claimant had requested to take some annual leave between 20/23 October 2020 but when the claimant made that request he had utilised his full entitlement and so the request was refused. He then resigned. It was stated that the respondent was entitled to deduct the cost of the training course fees from the claimant's final salary in terms of an agreement signed by the claimant. It was also stated that the most likely reason for the claimant leaving employment was because he had obtained a new job and not as a result of conduct on the part of the respondent.

Issues for the Employment Tribunal

4. The issues for the Tribunal on the claim of unfair dismissal were whether the respondent had refused time off under s 57A of ERA; if so was there a breach of the implied term of mutual trust and confidence which entitled the claimant to resign; and did the claimant resign in response to that breach. In the event of success in that claim what compensation should be awarded.

5. Additionally, in respect of the claim of unauthorised deduction of wages under Section 13 of ERA the issue for the Tribunal was whether the respondent was entitled to make the deduction in terms of that section. The respondent's position was that it was entitled to make that deduction in terms of training fee agreements signed on 19 June 2020. The claimant's position being that those agreements did not give the requisite permission for a deduction to be made.

Documentation.

6. The parties had helpfully liaised in the lodging of a Joint Inventory of Productions paginated 1-260 (J1-260). In addition, there was lodged a wage slip for the claimant in respect of the pay period 2-8 November 2020 in his new employment (J261); and an exchange of text messages between the claimant and his colleague Keith Taylor (J262).

The Hearing

7. The case management discussion had determined witness statements be utilised in this case. The Tribunal heard evidence from :-

   (1) The claimant who adopted as true and accurate his witness statement dated 21 June 2021 extending to 6 pages along with his additional witness statement extending to 2 pages. He also answered supplementary questions in clarification and also questions in cross examination.

   (2) Ewan Miller who at the relevant time was employed by the respondent as their Traffic Planner and at date of hearing as Compliance Officer. He adopted as true and accurate his witness statement extending to 5

pages. He also answered supplementary questions in clarification and questions in cross-examination.

8. From the documentation produced, relevant evidence led and admissions made the Tribunal was able to make the following findings on the issues.

Findings

9. The Respondent is a private Limited Company conducting the business of General Haulage. At the relevant time the respondent operated in excess of 100 vehicles combining employed drivers and dedicated subcontractors. At the date of hearing the company employed 92 personnel and engaged a further 25 dedicated subcontractors.

10. The respondent operates a Tanker Division and in that respect work for one client Argent Energy who supply high grade sustainable diesel from waste products. The respondent collect raw products and then deliver the finished product on the client's behalf. The claimant was employed within the Tanker Division which operated 28 vehicles on contract to Argent Energy with a pool of 35 drivers.

Contract terms

11. The claimant had continuous employment with the respondent as an "*LGV Class 1 Tramper Driver*" in the period between 13 April 2015 and 23 October 2020. He received a Statement of Particulars of Employment setting out the details of the main terms of his employment (J38/41).

12. In terms of that statement the holiday year ran between 1 April – 31 March. The respondent required a period of notice of 2 weeks termination of employment from an employee.

13. The claimant worked a 4 on 4 off shift pattern. That entailed 4 days working away from home with overnight stays and 4 days at home. He shared that shift pattern with his colleague Keith Taylor. They shared the same tanker

vehicle. That shift pattern meant that the claimant was entitled to 19 days holiday in the holiday year.

Training terms

14. In the course of employment, it was necessary for the claimant along with other drivers to hold a current ADR Certificate which lasted for 5 years after which he would require to take a refresher course or sit a full course again. In either case the course would be paid for by the respondent subject to entitlement of the respondent to recover the costs in terms of a sliding scale. Those terms were set out in a letter to the claimant dated 20 July 2018 and which he accepted on 19 June 2020 (J43).

15. Separately, it was a requirement that the claimant along with other drivers achieved 35 hours of CPC Training within a five-year period. Either the driver could arrange for his own CPC Training and pay for the course or the respondent would arrange and pay for the course subject again to recovery on a sliding scale. Those terms were set out in a letter of 15 March 2019 to the claimant and which he accepted on 19 June 2020.

16. The claimant undertook CPC/ADR Training in June 2020. The cost of the courses was £540.00.

17. In terms of the ADR Training Fee Agreement (J43) the relevant term was that after gaining the ADR Certification funded by the respondent then should the employee decide to leave the business:-

"*in the first six months we would look to recover 100% of the training costs..".*

In respect of CPC Training Fee Agreement (J44) it was stated that:

"To protect the business from potential loss the following scale will be implemented upon completion of each CPC Training Course:-

- *In the first six months we would look to recover 100% of the training cost…"*

Additionally, the claimant accepted the term:-

"I confirm that I wish John Miller Limited to arrange my driver CPC Training and I am fully aware of the training cost to be repaid should I wish to leave the company early after completing my training "

18. The claimant was also provided with a Driver's Handbook divided into various sections being: Section One entitled "*Driver General Information"* (J51/60) and which included a Grievance Procedure (J57); Section 2 entitled *"Load Security and Strapping Guide*" (J61/74); Section 3 entitled *"Company Policies"* divided into 19 different policies (J75/137); Section 4 entitled *"Risk Assessments*" (J137/198); and Section 5 entitled "*Health, Safety and Wellness Policy"* (J199/212). No provisions for recovery of training costs was included within the drivers Handbook.

19. As of 6 January 2021 and subsequent to the termination of the claimant's employment, an amended Contract of Employment was issued to employees of the respondent. That included a specific clause on "*Company Funded Courses*" again referring to recovery of respondent funded courses such as ADR or CPC should the individual should leave within a certain time (conform to the training fee agreements signed by the claimant) being:-

"*Any amount owed to the Company will be recoverable from the individual's final pay"*

The amended Contract also included the statement that *"any unaccrued holiday entitlement taken will be deducted from the employees final pay"*

Request for Time Off

20. The claimant commenced a 4 day "*on shift*" on Monday 5 October 2020. That day his wife accompanied his son to Dumfries & Galloway Royal Infirmary for prearranged adenotonsillectomy surgery. (J219). It was anticipated that his son would be discharged in the morning of 6 October 2020. However while the procedure and anaesthetic were uneventful and without complication there was difficulty in his son taking medicine orally and this required him to

be put "*on a drip".* Accordingly his son was not discharged on 6 October 2020 as originally intended but remained in hospital overnight. His wife stayed with his son.

21. At this time the claimant's daughter was aged 7/8 weeks and arrangements had been made for her care to be provided by his sister over 5/7 October 2020. She could not continue that care on 8 October 2020 due to other pressing commitments. (J260).

22. The claimant was in contact with his wife on the morning of 7 October 2020. His wife indicated that it may be that their son would require to remain in hospital overnight 7 October 2020 if matters did not improve during the day. In those circumstances the claimant would require to be at home on the evening of 7 October 2020 and remain there on 8 October 2020 to look after his daughter who could not then be looked after by his sister.

23. Around 12 noon/1.00 pm on 7 October the claimant spoke with his colleague Keith Taylor to see if he could arrange a "*shift swap"* meaning that Keith Taylor would start his 4-day shift one day early i.e. on 8 October 2020 finishing 11 October 2020. The claimant would then commence his 4-day shift on 12 October 2020.

24. The text from Keith Taylor timed 13:24 on 7 October 2020 (J262) confirmed the arrangement with Keith Taylor advising "*U sort it with office that a finish Sunday and all set off tomoz morning ok let's no…."*

25. The claimant considered he had *"solved a problem for management*" and was being *"helpful*" as it meant disruption was at a minimum. He acknowledged that the company had been accommodating on a previous occasion when his wife had gone into early labour when he was on duty and an arrangement had been made for him to return home.

26. On the afternoon of 7 October he required to driver his Tanker from Bradford to Motherwell and decided to stop at the Lockerbie Office of the respondent to advise them of his plans. There was some dispute as to the conversations which then took place. There was no dispute that he spoke with Ewan Miller

at that time. There was no dispute this took place around 2.00 pm. The position of the claimant was that he explained to Mr Miller in a brief conversation that his son was in hospital and that he needed to be at home on 8 October to care for his daughter. He advised that he had made arrangements for a shift swap with Mr Taylor to cover the duties the following day.

27. The position of Mr Miller was that the claimant "*came to the window"* and said "*need to take tomorrow off"* and that he had the shift covered. Mr Miller's response was that the claimant would require to fill out a holiday form if he wanted to take a day off to which the claimant advised that he didn't want to take a day's holiday. He had made arrangements for the shift to be covered and considered the company should be flexible. Mr Miller's position was that the claimant advised that there was "*something at home"* and "*he needed to be there"* but there was "*no detail about the family*" and that the first time he was aware of the family circumstances involving his son was when the respondent saw the Statement of Claim subsequent to the Preliminary Hearing of 26 April 2021.

28. There was also some dispute as to whether or not the claimant spoke at any length to the Transport Manager, Kenny Anderson at that time. However, in any event the response from Ewan Miller after taking some advice further up the management line was that the claimant could not take a day off without taking it as a holiday and that it was not appropriate for drivers to "*shift swap*". While it was appreciated that the claimant had made this arrangement to be helpful it was not one that could be allowed. If it became commonplace then there would be *"mayhem"* as regards management knowing who was on what shift if drivers were allowed to arrange shift swap amongst themselves. While the arrangement was more possible with the claimant and his colleague because they shared a truck on a 4 on 4 off shift basis, only a few drivers were on that regime and it was necessary to consider the whole workforce. If 90 drivers were all arranging shift swaps then the situation would quickly *"become chaotic".*

29. The claimant was not willing to take a day's holiday saying that he had no holidays left as he had taken a number of days earlier in the year. However Mr Miller was aware that the claimant had booked four days holiday between 21/24 October 2020 and did not see why the claimant could not utilise one of those days. Neither were the respondent allowing unpaid leave. In terms of the Witness Statement from Mr Miller *(Paragraph17) "the claimant was advised that the respondent does not allow drivers to take unpaid leave as if we allowed all our workforce to just take days off unpaid would be unsustainable".*

30. Later in the afternoon of 7 October 2020 (around 3.30pm) the claimant was advised that his son would be discharged from hospital that day and that both his son and his wife would be return home on the evening of 7 October 2020. That meant that his wife would be at home on 8 October to care for his daughter. However the claimant explained that his son was a strong individual who could be difficult and that he and his wife would both require to restrain him as the oral medication (effectively pain control by way of Paracetamol) was administered. Accordingly he would still require to be at home on 8 October 2020. It had taken restraint from nurses in hospital to administer the medication.

31. Around 5.00 pm that afternoon Mr Miller phoned the claimant to *"try to offer all options".* His position was that the claimant was "*irate*" about the issue and adamant that the company were *"being awkward".* The options put by Mr Miller at that time were :-

    (a) That the claimant utilise one of the four days holiday between 21/24 October 2020 which he had booked so that he could be off on 8 October.

    (b) He could work the following Saturday or Sunday 10/11 October 2020 in lieu.

    (c) That he could take one of the holidays over Christmas. The only days which were mandated to be holidays were 25 December and 1 January

and there would be some capacity to utilise a holiday over the Christmas period (e.g. 24/26 December 2020).

32. The claimant did not see why he would need to use up any of his holiday booked over October to which he was committed; and he could see no difference in requiring to work 10/11 October 2020 rather than the shift swap arranged with his colleague on Monday 12 October 2020. He considered the respondent was just being "*difficult for the sake of it."* The position of Mr Miller was that there would be duties available over 10/11 October 2020 which did not interfere with the 4on/4off shift arrangement with the claimant's colleague. It was easier to accommodate the claimant with a shift on 10/11 October 2020 rather than a weekday.

33. The claimant's witness statement on this issue states:-

> *"several hours later I received a phone call from Ewan explaining that the only other option was that I repay the missing day bv working either Saturday 10 October or Sunday 11 October. I told Ewan that I could not guarantee that I could work those days as I could not predict the situation with my son nor would be able to arrange childcare for my daughter should my son remain in hospital. I told him this would not work for me and that I would be returning home that evening. I reinstated my intent on resigning over the matter. Ewan told me to think about his suggestion and let him know…"*

34. Subsequent to that call Mr Miller was not sure whether the claimant would appear for work on 8 October 2020. The claimant did not attend but remained at home. He thought about matters during the day. On the morning of 9 October he phoned Ewan Miller and told him he was resigning. He was asked to formally advise the company and did so by email timed at 11:14. which stated:-

Hi Ewan

Please accept this email as my letter of resignation as of immediate effect. This has not been a decision I have made lightly but in light of recent events it is the only option for me.

I thank John Miller Limited for the opportunity given to me, I just wish it was the same company I started working for over five years ago. On three separate occasions this year I have had the security of my job threatened by office staff. This along with a lack of empathy and understanding shown to me this week has led to my decision.

I wish you personally all the best"

35. The claimant explained that the separate occasions referred to concerned a period in March 2020 when he had Coronavirus symptoms and had to self-isolate; a visit to Argent energy when there was difficulty accessing toilet arrangements and running water; and travel to the ADR Course in June 2020 was apparently a difficulty.

36. Mr Miller responded to the claimant's email stating:-

"Thanks for confirming. Your two-week resignation notice period starts from today meaning your last day with the company will be Friday 23.10.2020".

37. The claimant then cancelled his holidays for 21/23 October 2020 He worked until 20 October 2020 but advised Mr Miller on the morning of 21 October 2020 that he had been "*up all night with sickness*" and would not be in that day and that was repeated for 22/23 October 2020.

38. The claimant denied that he had any arrangement in place for any further employment subsequent to resignation. He advised that he looked for another job as soon as he handed in his notice and he had a friend/former colleague in business named Cameron Greaves and he made enquiry and commenced employment there on 29 October 2021. However he was only taken on as a "*casual relief driver for 3/4 days a week".* He left that company and started driving for West Coast Touring on 1 February 2021. He is now a

LGV Instructor having qualified to that position. In terms of loss the compensatory claim was for 3 week's pay at the claimant's basic weekly wage with the respondent of £559.06. A basic award was claimed of £2,690.00 and award for loss of employment rights of £300.00. There was also a claim made for a Preparation Time Order of £600.00.

39. The final salary slip of the claimant discloses deduction of £496.40. This was the cost of the ADR Course less expenses claimed by the claimant and to which he was entitled leaving the net sum of £496.40 due to the Company. That sum was deducted from the claimant's final pay.

40. At termination of employment there required to be resolved a dispute over holiday pay. A deduction was made in the final wages of the amount which the respondents stated was due in respect of holidays taken in excess of holidays accrued to date of termination of employment. After correspondence on that issue, particularly pointing to the absence of any contractual provision which allowed deduction, the claimant was reimbursed the sum of £628.07 on 18 January 2021 (J22-J245 and J254).

Matters Arising in the Evidence

41. The particular dispute that arose in the evidence and on which the Tribunal require to make a finding was whether the claimant had advised the respondent on 7 October 2020 of the particular circumstances which affected the family and which required him to take time off. There were two issues on this aspect namely (i) did he advise of the particular circumstance around 2pm that day being that his son was unlikely to be discharged and he needed to care for his daughter and (ii) did he advise Mr Miller later in the day of the changed position that his son was to be discharged but he still required to be at home to assist in administering the oral medication.

42. Both the claimant and Mr Miller gave evidence in a credible manner and a finding could not be made on that basis. However there were inconsistencies which affected the reliability of the evidence in certain respects.

43. On (i) above the claimant's position was that he had explained his circumstances to both Mr Miller and the Transport Manager, Mr Anderson around 2.00 pm that day. The position of Miller was that he had not been told of any particular circumstances other than that the claimant said that he needed to "*take tomorrow off*" and "*had the shift covered"* and "*needed to be at home the next day".*

44. The unreliability of the respondent's position was :-

(a) In Mr Miller's witness statement (paragraph 16) he states that when he was contacted on 7 October 2020 by the claimant he was advised that "*another driver would cover this day, the other driver was at the end of his working (explained as 8 day) shift pattern for his salary, to work the additional shift he wished to be paid extra for this day at a higher rate as he had worked his shift pattern for his salary, to be flexible we originally agreed to this (which would cost us extra in wages) but asked the claimant to take a days holiday for that day which he refused to do and wanted to take it without pay".* There was no real sense to this statement and Mr Miller in his evidence confirmed that he had got this wrong. It was clear from the exchange of texts between the claimant and his colleague Keith Taylor that he had not reached the end of his 8-day working shift pattern and would require extra money. Neither was there any agreement that Mr Taylor would be paid more. Texts from Mr Taylor (J262) at 19.06 on 7 October 2020 asked the claimant "*any idea what's doing are u just carrying on down to AOT av not heard out ".* That would not suggest there was any conversation with Mr Taylor about an extra day's pay. Mr Taylor's last shift pattern prior to the week in question ended 4 October 2020 and he would not have been due to start again until Friday 9 October 2020. There was no evidence that there had been any discussion on extra pay.

(b) The same paragraph advised that the respondent had offered that *"another driver would cover the day (the claimant) wished if he (the claimant) covered that driver's day the following Monday as he was not*

working that day due to his shift pattern but also refused that offer". In the evidence there was no offer that the claimant work the following Monday. The offer was to work was either on the following Saturday or Sunday.

(c) The ET3 lodged by the Respondent stated in their grounds of resistance that "*shortly before his resignation the claimant requested to take some annual leave from 20-23 October inclusive. The respondents holiday year runs from April to March . At the time the claimant made the request he had already used his full entitlement for the year and therefore the request was refused".* This was untrue. While it is appreciated that at the time the grounds of resistance were lodged there was no statement of claim available to the respondent and so they may have been "shooting in the dark" as to the nature of the claim for unfair dismissal, there was no basis for this statement at paragraph 12 of their grounds of resistance. The claimant had made a holiday request and received a text message confirming those holidays on 27 July 2020 (J46). Accordingly the respondent's records would show that the claimant had made no request for holidays immediately before handing in his resignation but three months or so in advance of that time. Also on the 29 of September 2020 the claimant received a text message seeking confirmation if he was "*still off on the 21st October for 4 days?"* (J213). Neither would it appear to be true that, at the time the claimant made his request (even it was just before resignation) *"that he had already used his full entitlement for the year and so the request was refused".* The statement from Mr Miller indicates that of the 19 days holiday due to the claimant in the holiday year he had used 13 days to the end of September so even if he had requested 4 days holiday there were still unused holidays in the holiday year.

45. While Mr Miller maintained that the claimant was a very private person and was not in the habit of discussing personal matters within the family (and that is accepted) it did seem unlikely that faced with a refusal for time off that the

claimant would not have explained the circumstances which led to the request other than just "*I need to be at home that day".*

46. The claimant advised that he had spoken to Mr Anderson around 2.00 pm on 7 October 2020 as well as Mr Miller and had given him the same information regarding his son (at that stage) being the likely delayed discharge from hospital. Mr Anderson gave no evidence. The witness statement of the claimant which was provided to the respondent in advance of the hearing made it clear that the claimant had advised Mr Anderson *"that I needed to be at home as my son was still in hospital and there was no one to care for my daughter…."* Thus the respondent was aware of the dispute on this evidence but did not produce any rebuttal from Mr Anderson.

47. On the basis of the above the Tribunal find that the claimant had advised the respondent on or around 2pm on 7 October 2020 of the circumstances then prevailing and why it was that he required time off on 8 October 2020 namely to care for his daughter.

48. On (ii) above namely whether the claimant had advised Mr Miller of the changed circumstances in his son being discharged but still requiring to be at home the evidence of claimant was in question.

49. The claimant agreed that Mr Miller had telephoned him around 5.00 pm on the afternoon of 7 October in relation to options which were considered to be available to the claimant in taking time off. His witness statement (paragraph 7) suggested that his response to not being able to work either Saturday 10 October/Sunday 11 October was that he *"could not predict the situation with my son nor be able to arrange childcare for my daughter, should my son remain in hospital".* However, by that time he knew his son was to be discharged from hospital as he had been given that information earlier in the afternoon.

50. That is not to say there were still circumstances which would require him to be at home on 10/11 October but (a) that was some days off and if there were such circumstances requiring him to cancel that shift then further discussion

could ensue and (b) there seemed the same possible issue with him being able to work on 12 October as he had arranged but there was never any concern expressed by him on that arrangement.

51. There was cause for the Tribunal to consider whether he was being entirely frank in this respect and whether he had, as he stated, told the respondent that his son was to be discharged but he would still require to be at home to assist in restraining him in order that he took oral medication.

52. On balance the Tribunal did not consider that he had given any particular information to Mr Miller at that time namely that his son was to be discharged after all but he still required the time off to assist in the oral medication.

Submissions

53. Each party made submission on the matter. No discourtesy is intended in making a summary

For the claimant

54. It was submitted for the claimant that the claimant had told Mr Miller of the reason for requiring time off. He had been a good driver for over 5 years with the respondent and there was no reason to disbelieve him.

55. The shift swap had been arranged to be helpful to the company and it had not been stated at the time that would create any problems.

56. As at 7 October 2020 the claimant was still employed and there was no need for him to have to save holidays in case there was a family emergency. The claimant had made the respondent aware of the difficulties and should have got unpaid leave.

57. The respondent had wrongly deducted the training fee from final pay as there was no authority for that to be done. The wording was only that the respondent would “look to recover” the amount. The amended contract now covered the position which demonstrated a change was required. It also included provision

for deduction for overpaid holiday pay which had been wrongly deducted from the claimant's final pay and it had taken some time for that to be repaid.

58. The respondent had made false allegations on reasons for resignation such as being refused holidays and that the claimant had found another job. He had lost trust in the respondent due to the failure to allow unpaid time off and the only option was to resign.

For the respondent

59. It was emphasised for the respondent that their initial response had required to be made without sight of the initial statement of claim.

60. Reference was made to the leading cases on constructive dismissal and that it was necessary to find a breach of an express or implied contractual term. Unreasonable actings by an employer were not enough. There required to be a significant breach going to the root of the contract. The test was whether looked at objectively the employer had chosen to abandon the contract.

61. In this case the respondent had sought to find a solution. The shift swap could not be allowed because of the knock on effect with other drivers and the chaos which was likely if they were allowed to make such arrangement amongst themselves. It would quickly become unmanageable. The respondent had put forward use of a holiday and alternative shift but the claimant was only interested in his shift swap. He had taken the day off. There was no threat of discipline. The circumstances did not disclose a breach of trust and confidence.

62. The respondent evidence should be preferred as regards the claimant not disclosing the reasons why he wanted time off.

63. The claimant was well aware that training fees could be conducted from final pay. It was accepted the money was owed and it would not be a good use of judicial resources to order repayment simply for a court action for recovery to ensue.

Discussion and decision

Relevant law

64. The claimant claims that he has been constructively dismissed as described in s95(1) of the Employment Rights Act 1996 (ERA). This states that there is a dismissal where the employee terminates the contract in circumstance such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

65. **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221** makes it clear that the employer's conduct must be a repudiatory breach of contract:"*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 terms of the contract"* It is clear that it is not sufficient that the employer's conduct is merely unreasonable. It must amount to a material breach of contract.

66. The employee must then satisfy the Tribunal that it was this breach that led to the decision to resign and not other factors. If there is a delay between the conduct and the resignation, the employee may be deemed to have affirmed the contract and lost the right to claim constructive dismissal.

67. The test of whether there has been a fundamental breach of contract is an objective one. There is no need to make any finding as to an employer's intention in acting the way it did. It makes no difference to the issue of whether or not there has been a fundamental breach that the employer did not intend to end the contract.

68. Reliance was placed by the claimant on breach of Section 57A of ERA to found his claim for a constructive dismissal. That section is a creature of statute and is not incorporated expressly or by implication into a contract of employment. Thus, it is necessary for him to rely on a breach of the implied contractual term commonly called "trust and confidence". This was defined in **Malik v Bank of Credit and Commerce International SA (in Liquidation) [1997] 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".

Was Section 57(A) of ERA Breached?

69. In so far as relevant Section 57(A) of ERA states:

"(*1*) *An Employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary –*

(a) to provide assistance on an occasion when a dependent falls ill, gives birth or is injured or assaulted;

(b) to make arrangements for the provision of care for a dependent who is ill or injured;

(c) ……..

(d) because of the unexpected disruption or termination of arrangements for the care of dependant, or

(e) ……...

(2) Subsection (1) does not apply unless the employee :-

(a) tells his employer the reason for his absence as soon as reasonably practicable and;

(b) except where paragraph (a) cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be "absent".

(3) ……"dependant" in relation to an employee means… a child.

70. Section 57B of ERA provides that in the event that an employer has "*unreasonably refused to permit"* an employee to take time off then that

employee may present a complaint to an employment tribunal. In that case an employment tribunal may make an award of compensation which it considers to be just and equitable in all the circumstances.

71. The facts here would disclose that when the claimant originally made his request for time off that was *"because of the unexpected disruption or termination of arrangements for the care of a dependant"* in terms of Section 57A(1)(d) of ERA.

72. The particular arrangements were that his sister would look after his 3-week-old daughter whilst his wife accompanied his son when in hospital undergoing the adenotonsillectomy. It was expected that his son would be at home on 7 October 2020. There was suggestion from the nurses in the hospital that he may require to spend another night and so not come home until sometime on 8 October 2020. At that time the care that was arranged was for his daughter would not be available on 8 October. On that day his wife would still be required to accompany his son in hospital. And so there was "*an unexpected disruption or termination of arrangements for the care of a dependant"* namely his three week old daughter.

73. At that time he had arranged for a shift swap and in his view considered that was a reasonable measure to take to provide the necessary cover. However that did not suit the respondent and they indicated that he would require to take a day's holiday cover for the absence on 8 October 2020.

74. The right is to time off during the employee's working hours. It is not reasonable for an employer to require an employee to rearrange his or her working hours to make up for lost time and neither would it be reasonable for an employer to insist that the employee take annual leave to cover a situation that falls within the ambit of Section 57A.**(Gomez -v- Topclass Investments Limited ET case number 2204585/03).**

75. From the evidence and given the finding that the respondent had been told of the need for time off, the respondent, in stating that the day be taken as a holiday, were in breach of s57A at that time.

76. However the situation changed as the day progressed and about 3.00 or 3.30 on the afternoon of 7 October 2020 the claimant was aware that his son was coming home and in those circumstances his wife would be at home to care for his daughter. So there was no unexpected disruption or termination of the arrangements for care as that was always the arrangement. In that respect therefore the need for time off under Section 57A(1)(d) had fallen away.

77. The reason why the claimant needed the time off then became that he required to be at home to assist in the provision of oral medication (pain relief) for his son who had been discharged from hospital. At that stage the claimant was unable to rely on Section 57a(1)(d).

78. At that point the reason for the absence would required to fall within Section 57a(1)(a) or (b) which are:-

- *"To provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted" or*
- *"to make arrangements for the provision of care for a dependant who is ill or injured"*
- In so far as the second of those reasons is concerned the phrase *"make arrangements for the provision of care …."* suggest that this subsection is concerned with the making of longer-term care arrangements for a dependant who is ill or injured such as making arrangements to employ a temporary carer or taking a sick child to stay with relatives. The circumstances here were not concerned with *"making arrangements"* but in providing the care and so it is not considered that this provision would apply.

79. However it is considered that the first reason was in line with the circumstances facing the claimant namely the provision of assistance *"on an occasion when a dependant falls ill…".* In ***Morancie -v-PVC Zendo ET case 3300938/01*** a broad interpretation was given to the meaning of the phrase *"occasion when a dependant falls ill*". The discharge sheet (J219) advises that the child *"remained well post op and was fit for discharge home with no ENT*

follow up" but does say that the hospital stay was marked by "*poor oral intake requiring some supplemental parenteral fluids".* The Tribunal are prepared to consider that this procedure resulted in the claimant's son falling ill in that he required pain relief to deal with the procedure. Assistance was required to be given by the claimant given that there needed to be some physical effort involved in administering the oral medication. His son did not require pain relief before he went into hospital but did after the procedure and in that sense *"fell ill*".

80. Although Section 57A did bite in the circumstances here the difficulty for the claimant was not providing the reason for absence when circumstances changed. The obligation within Section 57(A) on the employee is to tell the employer of the *"reason for his or her absence as soon as is reasonably practicable".* In this case the reason changed and the finding of the Tribunal is that was not communicated to the respondent. In that sense therefore he had not complied with the terms of Section 57(A) when he became aware of the changed circumstances.

81. However it is a narrow issue in stating that the section did not apply because of the failure to give a reason on the change of circumstances. While the precise reason may not have been given on the change of circumstances the finding is that the respondent was told that the reason for absence related to childcare due to his son's attendance at hospital. It would be too narrow a distinction to make to indicate that it was necessary to provide a further exact but still compliant reason when the circumstances changed.

82. In those circumstances the Tribunal were able to accept that there was a right to time off in this case under s57A of ERA. It was considered that the time off was reasonable and that compliance was not made by the respondent in requiring that the claimant work an alternative shift on another day or take the day as a holiday.

Was there is a constructive dismissal as a result?

83. The Tribunal did not doubt that the claimant resigned in response to the events over 7/8 October 2020 and not that he had lined up another job.

84. As indicated it is necessary for the Tribunal on an objective view of matters to consider whether this was a breach of the contract which was significant and went to the root of the contract. As indicated a breach of the implied term of trust and confidence requires there to be an assessment made that the behavior of the respondent was calculated or likely to destroy or seriously damage the relationship of trust and confidence. The Tribunal did not consider the actings of the respondent in these circumstances were such that had been made out. The Tribunal had the following reasons for that view.

85. The Tribunal accepted that the respondent had good reason for not being able to accept an arrangement for a shift swap made between drivers. It is accepted that the claimant considered he was being helpful but the Tribunal did consider that such arrangements could easily lead to confusion and get out of hand and control. The Tribunal considered that the respondent did require to manage driving shifts in a manner they thought best. The Tribunal did not consider that the respondent was just being *"difficult for the sake of it"* It may have seemed to the claimant to cause no issue but the respondent did have to consider the broader view as to how that might impact elsewhere if others used this as a precedent. Mr Miller did have good reason to suggest that performing a Saturday/Sunday shift in lieu was a better option for the respondent.

86. The Tribunal did consider whether breach of Section 57A (whether or not the respondent was aware that they were doing so) was on its own sufficient to breach the implied term of trust and confidence. The Tribunal did not consider that a breach of a statutory employment right would in all circumstances mean that there was a breach of the implied term. The Tribunal considered that would depend on the circumstances for example, threat of sanction such as dismissal or other disciplinary measure.

87. The Tribunal was also conscious that the claimant had a right in terms of Section 57B to make complaint to an Employment Tribunal about any denied right and for the Tribunal to assess what compensation might be appropriate in those circumstances. That entitlement does not depend on the employee having terminated the contract.

88. There was no sanction being expressed by the respondent if the claimant were to take the time off on 8 October 2020 as he did. It was not the case that the claimant was threatened with dismissal or disciplinary proceedings were he to take the day off. It was left as a matter for him as to whether he would take the day. It was not clear to the respondent whether the claimant would arrive at work or whether he would resign but there was certainly no sanction being threatened or suggested.

89. The respondent did try to make arrangement albeit not compliant with Section 57. They were aware the claimant had holidays which could be utilised. They had offered a solution of him performing another shift (which was what the claimant had suggested) on the Saturday or Sunday following. The claimant's position was he wasn't sure whether his son would be well enough for him to work such a shift and he could see little difference between that and the arrangement he had made. The Tribunal considered there was some stubborness in his position. If it had come to the Saturday/Sunday and his son was still requiring assistance then either he could have explained that position to the respondent and have some other arrangement made or he could have made arrangements for other assistance to be provided. The actings of Mr Miller showed an attempt to try and resolve the situation without acrimony.

90. The claimant could have instituted a grievance in terms of the respondent's procedures had there been any action taken by them as a result of him not attending on 8 October 2020.

91. In the Tribunal's view the actings fell short of a breach of the implied term and so the claim of constructive dismissal does not succeed.

Claim of unauthorised deduction

92. Employees have the right not to suffer unauthorised deductions under Section 13 of ERA. That states:-

"(1) An Employer shall not make a deduction from wages of a worker, employed by him unless –

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this Section, "relevant provision" in relation to a workers contract means a provision of the contract comprised:-

(a) in one or more written terms of the contract of which the Employer has given the worker a copy on an occasion prior to the employer making the deduction in question or ;

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker, the employer has notified to the worker in writing of such an occasion.

93. The particular provision relied on by the respondent in making the deduction were contained in the letters of 20 July 2018 and 5 March 2019 (J43/44) where it states that should the employee decide to leave the business within a particular time of completion of the training then, on a sliding scale, the respondent would "*look to recover"* a percentage of the training costs.;

94. It was a matter of agreement that meant that there was a sum due by the employee to the respondent in the event they left within a certain period of time from the training event. However those words would not comply with

Section 13 of ERA as there is no provision which authorises deduction from wages. The Tribunal did not consider an entitlement that the respondent would *" look to recover*" certain sums from an employee meant compliance with the statutory provision that deduction was *"required or authorised to be made"*. Accordingly the Tribunal considers that claim succeeds and that the respondent would require to pay to the claimant the sum of £496.40 by way of an unauthorised deduction from wages.

95. It was stated by Mr Miller that deduction from final wages was a common enough way of dealing with the matter but there was a lack of evidence to suggest that by custom and practice this had become a relevant term of the claimant's contract which was "certain and notorious".

96. The respondent may still seek to recover the costs through the ordinary court. The claimant stated that he had been advised that given it was an unauthorised deduction from wages then there would be no entitlement for the respondent to make recovery. That is not a matter upon which we express any opinion.

Employment Judge: Jim Young
Date of Judgment: 23 August 2021
Entered in register: 31 August 2021
and copied to parties