EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100407/2021

Held in person in Edinburgh on 23, 24, 25,26,27,30 August, 1 & 29 September 2021

Employment Judge: A Strain
Members: L Grime and J McCaig

Mr J Kelly	**Claimant** **Represented by:** **Ms P Abladey** **Barrister**
Prestonfield Golf Club	**Respondents** **Represented by:** **Mr P Maratos – Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is:

(1) the Claimant was constructively and unfairly dimissed by the Respondent;

(2) that the reason (or principal reason) the Claimant was dismissed was not that the Claimant had made a protected disclosure contrary to section 103A of the Act and his claim for automatic unfair dismisal is accordingly dismissed;

(3) the Claimant suffered detriment on the grounds of a protected disclosure;

(4) The Respondent shall pay the Claimant the sum of £13,817.02 in compensation;

(5) The Recoupment Regulations do not apply to the award.

Background

1. The Claim came before the Tribunal for determination of an Agreed List of Issues which included the following:

   1.1 Was the claimant constructively dismissed on 22 September 2020 in response to the Respondent's alleged repudiatory breaches;

   1.2 Was the sole or principal reason for the claimant's dismissal because of his alleged protected disclosures (section 103A of the Employment Rights Act 1996);

   1.3 Did the claimant make protected disclosures to the Respondent;

   1.4 Did the claimant suffer any detriment on the ground that he had made any protected disclosures contrary to section 47B of the Employment Rights Act 1996 (**ERA 1996**).

2. The remedy sought by the Claimant was compensation.

3. The Parties had lodged an agreed Joint Bundle of Documents with the Tribunal.

4. The Claimant gave evidence and the Tribunal heard from Douglas MacKenzie (Retired Head Greenkeeper), Mark Scott (ormer greenkeeper) and Robert Deavy (Union Organiser – GMB).

5. For the Respondent, Ian Cowan (Club Captain), Colin Gibson (Accountant), Adrian Innes and Lynne Abernethy (Lady Captain) gave evidence.

Findings in Fact

6. Having heard the evidence of the Parties and considered the documentary evidence before it the Tribunal made the following findings in fact:

   (1) The Respondent is a private members golf club at Prestonfield in Edinburgh. The Respondent is managed and run by an elected

Council. Members are elected into posts within the Council such as Captain.

(2) The Claimant was employed by the Respondent (latterly as a Greenkeeper) from 15 August 2008 until his employment was terminated on 22 September 2020;

(3) The Claimant was paid Gross weekly pay: £360.97 (Net weekly pay: £290.96). He aso received an employer contribution towards his pension of £44.30 per week;

(4) The Claimant was a keen camper and stored camping equipment and tools in lockers within the Greenkeepers' Shed where all the Greenkeepers worked from. This was done with authorisation in writing from the Respondent. His lockers were padlocked and secure. 3 of his lockers were on the mezzanine floor upstairs in the shed.

(5) The Claimant's line manager was the Head Greenkeeper Mr MacKenzie.

(6) Mr Cowan was appointed Club Captain in or around March 2019.

Washing Down Machinery

(7) From 2016 the Geenkeepers had adopted a practice of "blowing down" the machines that they had used to avoid environmental contamination which they believed would happen if the machines were washed down. The Respondent did not have a filtration system and any water from washing machines that could contain oil, grass and contaminents would go into a nearby field drain and potentially Dudingston Loch.

(8) The greenkeepers (Mr MacKenzie, Mr Scott and the Claimant) all considerd the washing down of machinery to be contrary to SEPA Regulations and unlawful.

Transportation of Petrol for machinery

(9) Mr Scott had transported petrol in his van for use in the petrol fuelled machinery for roiughly 20 years. He was insured to do so, had fire extinguishers in his van, appropriate hazard warning signs and also contained the petrol in jerricans which were stored in a metal box in his van. This was to ensure conformity with health and safety requirements.

(10) Mr Scott had a fuel card in the name of the Respondent and for which he was an authorised signatory.

(11) In or around late 2019 Mr Scott was told by his insurers that his premium was going up due to his transportation of the fuel on the Respondent's behalf. The Respondent was asked to cover this but due to its financial position refused and Mr Cowan said he would transport the fuel.

(12) As a consequence of that Mr Cowan transported up to 120 litres of fuel in his private car. He did not confirm with his insurers (until after the Claimant's grievance) how much fuel he was permitted to carry or what health and safety requirements applied to the safe transportation of fuel.

(13) In June 2020 the Claimant reported to Mr Mackenzie that Mr Cowan was still transporting fuel in his private car.

(14) Following the Claimant's Grievance about the transportation of fuel Mr Cowan discovered that he may only transport 30 litres of fuel in 2 x 20 litre containers. He had a fire extinguisher in his car but no metal container for the fuel or hazard signs.

Financial Situation of the Respondent

(15) In or around December 2019 Mr Mackenzie was told by the Club Secretary (Gareth Pugh) that the Respondent was going to go into administration by Christmas due to serious financial difficulties.

(16) The Respondent secured finance by a levy on members and overdraft facilities with its bankers.

(17) A new Council was elected at an AGM in January 2020 which included Mr Cowan as Captain and Mr Innes as Vice-captain. This galavanised the Respondent and new sub-committees were formed to better monitor and manage the financial situation of the Respondent.

(18) The Respondent stopped greenkeepers' overtime to save money. Further, the Respondent believed that the quality of the course was not reflected in the amount of overtime paid. The Respondent was losing members due to the perceived quality of the course.

Furlough

(19) Following the onset of the Covid-19 pandemic all the greenkeeping staff (including the Claimant) were called to a meeting on 25 March 2020 conducted by Ian Cowan and Gareth Pugh. The greenkeeping staff were told by Mr Cowan that if they did not agree to go on furlough then the Respondent would go into administration. The greenkeeping staff felt they had no option other than to agree. Mr Cowan gave the greenkeeping staff 30 minutes to pack up their belongings and leave the premises. The greenkeeping staff felt threatened by Mr Cowan's language and manner at the meeting.

(20) Mr Cowan's language and conduct of the meeting was threatening

(21) The Respondent then wrote to the Claimant and secured his written agreement to furlough (Page 53).

(22) The Respondent trained members who volunteered to assist with greenkeeping duties to maintain the course following the furlough of the greenkeeping staff.

Discovery of Tyres

(23) Following the greenkeeping staff being put on furlough Mr Cowan accessed the greenkeepers' shed and discovered a large quantity of car tyres, sized, with charts and information which suggested to him that the greenkeepers were undertaking a business on the Respondent's premises.

(24) The Respondent determined to investigate this and wrote to Mr Mackenzie and Mr Scott as part of that investigation.

(25) At no time did the Respondent include the Claimant in that investigation.

(26) The investigation concluded in September 2020 that no further action was to be taken.

(27) Members were generally aware of the discovery and investigation. This caused members to take a negative view of the greenkeepers collectively. There were a lot of negative remarks about the greenkeepers on social media.

Claimant's Return to Work

(28) On 1 June 2020 the Respondent produced a Covid-19 Risk Assessments – Greenkeepers (Page 77-79) which was shared with the greenkeeping staff.

(29) The Claimant was contacted by the Vice Captain Adrian Innes and agreed to return to work from furlough on 8 June 2020. The Claimant was made aware that he would be working alongside volunteers and under the direction of Mr Cowan.

(30) By email of 5 June 2020 (Page 94) the Claimant intimated health and safety concerns at the proposect of returning to work along with and under the direction of untrained and unqualified staff. He further intimated that he had observed 2 volunteers sitting

together on a machine not maintaining social distancing. No response was received from the Respondent.

8th June 2020

(31) The Claimant returned to work on 8 June 2020 and met with Mr Cowan and Ms Abernethy. They went through the Covid-19 Risk assessment with him. The Claimant raised the fact that he had seen 2 people sitting side by side on a machine. Mr Cowan dismissed his concern and explained that the 2 people were members of the same household. Mr Cowan was "upset" that the Claimant raised this issue at the meeting.

(32) The Claimant then went to the greenkeepers' shed where he discovered that 2 of his personal lockers (one upstairs in the shed and one in the workshop floor) had been brocken into and his belongings scattered around the floor. He reported this immediately to Mr Cowan and Ms Abernethy. Both were dismissive of his concerns. The Claimant asked Mr Cowan if he had opened them. Mr Cowan denied this and told him that his possessions were stored at his own risk. The Claimant asked Mr Cowan to investigate. Neither Mr Cowan or Ms Abernethy considered that the matter should be investigated.

(33) Ms Abernethy then left and Mr Cowan asked the Claimant in a condescending manner if he knew how to cut fairways. The Claimant confirmed that he did. Mr Cowan asked him to take a machine and start at the 10th.

(34) The Claimant's practice as a greenkeeper was to cut the fairways from the 10th to the 9th to the 8th and so on so he could finish back at the shed.

(35) Whilst cutting the 6th fairway Mr Cowan approached him and asked "What the fuck are you doing?". The Claimant responded that he was cutting fairways as instructed. Mr Cowan told him he

should have been cutting 10th to 11th and so on. The Claimant told Mr Cowan it was normal practice to cut 10th and work backwards towards the clubhouse and that if he wanted the Claimant to do it a particular way then he should have told him. Mr Cowan responded "You can't do anything fucking right!".

(36) The Claimant completed his shift at 4pm after having parked his machine at the shed.

9th June 2020

(37) On the morning of 9th June 2020 the Claimant reported for work at his usual start time and was met by Mr Cowan at the door to the shed. Mr Cowan asked him why he hadn't washed his machine down after using it the previous day. The Claimant informed him that the greenkeepers didn't wash down machines. Mr Cowan instructed the Claimant to wash down the machine. The Claimant refused to do so and said SEPA would not allow it. Mr Cowan again instructed the Claimant to wash down the machine and again the Claimant refused saying to do so would be illegal and contrary to SEPA Regulations. Mr Cowan told him to get it done or he would be sent home without pay. Mr Cowan told him to do what "I fucking tell you". The Claimant felt he had no option other than to comply in light of this threat.

10th June 2020

(38) The following day, 10 June the Claimant asked Mr Cowan for 2 days leave to remove his personal belongings from the shed. Mr Cowan approved the Claimant's request for leave but stated that the Claimant could not remove any tools unless he could provide receipts and prove ownership. The Claimant challenegd this as some of his tools were 10 to 15 years old and he did not have receipts for them. Mr Cowan insisted that he produce receipts before he would be allowed to remove the tools. The Claimant challenged him saying that there was no way the

Respondent could prove ownership of the tools. At this point Mr Cowan told the Claimant to get on with his work or he'd be sent home without pay.

(39) The Claimant could not believe the way he was being treated by Mr Cowan and his mental health suffered. He hadn't slept for the previous 2 days and was glad to take the next 2 days off to get some respite from Mr Cowan.

(40) The Claimant consulted his GP and was signed off on 11 June 2020 with "work related stress" (page 99).

Grievance

(41) The Claimant was party to a collective grievance raised by email of 29 May 2020 by Mr Deavy (Page 71 - 74).

(42) The collective grievance was in the folowing terms:

"We believe that the club has developed a culture of bullying, harassment, and intimidation at the club. This has left us feeling threatened, frightened and in fear for our jobs. Examples of this behaviour are but not limited to: • Allowing rumours of administration of the club to circulate prior to the Covid-19 outbreak • Threatened with administration if we did not agree to furlough • Told to leave our place of work within 30 minutes • Threatened with investigations and disciplinary for non-existent issues • Club captain arriving at employee's door despite being told in writing he was in isolation due to Covid-19 symptoms • Refused representation at investigatory hearings • Lack of support, information and clear communication specifically during furlough with no regards to staff's mental health and wellbeing. As stated, issues such as the above have created a culture of fear and intimidation at the golf club. It is now an extremely unpleasant place to work in. This has caused great stress to all of us and has had a detrimental impact upon our mental health and well-being. This has left us feeling with a profound sense of lack of confidence and trust in the golf club's management structure. We would ask that our issues are investigated as a matter of urgency. We wish to thank you for taking the time to consider the point we have raised, and we look forward to hearing

from you in due course. Your Sincerely Douglas Mackenzie Mark Scott John Paul Kelly"

(43) The Respondent appointed Colin Gibson to investigate and hear the grievances.

(44) 4 additional grievances were raised by Mr MacKenzie and Mr Scott at the Grievance Meeting which took place on 18 June 2020 (Notes of which were produced Pages 115-124). The 4 additional grievances were the uplift and transportation of fuel by Mr Cowan; the wash down of machinery being contrary to SEPA Regulations; a potential GDPR issue and attendance at Greens' Committee Meetings.

(45) The Claimant raised additional personal grievances in a further document dated 28 June 2020 (Page 125 – 127).

(46) Mr Gibson issued his findings relative to the collective grievance by email of 14 July 2020 (Pages 128-132). Mr Gibson did not uphold any of the collective grievances.

(47) Mr Gibson issued his findings relative to the 4 additional grievances by email of 30 August 2020 (Pages 136-140). Mr Gibson did not uphold any of the 4 additional grievances.

(48) Mr Gibson issued his findings relative to the Claimant's additional grievances by email of 20 September 2020 (Pages 141-147). Mr Gibson did not uphold any of the additional grievances.

(49) The Claimant was surprised how the Grievances had been dealt with and didn't feel they had been adequately addressed.

Claimant's Return to Work in September 2020

(50) The Claimant remained signed of from work due to work related stress from 11 June 2020 until his return to work on 22 September 2020. During that time he suffered stress, anxiety, endured sleepless nights and was not eating or functioning properly.

(51) The Claimant was invited to and attended a fitness for work inerview with Ms Abernethy on 3 September 2020 (Page 133).

(52) The Claimant understood that Mr MacKenzie would be returning to work from furlough. The Claimant decided to return to work on the basis that he would once again be reporting to Mr MacKenzie and not Mr Cowan.

(53) On 22 September 2020 he attended a return to work meeting with Ms Abernethy (Page 149) and agreed to a phased return to work.

(54) He found out that Mr MacKenzie had not yet returned to work and he would be reporting to Mr Cowan. This was the last straw for the Claimant. He could not work with Mr Cowan due to the way Mr Cowan had treated him. He considered that Mr Cowan had bullied, harassed, threatened and humiliated him. He was concerned he would be asked to wash down machines conrary to his reasonable belief that to do so was illegal. He resigned by email of 22 September 2020 (Page 148).

(55) The Claimant attended an Exit Interview with Ms Abernethy on 25 September 2020 (Page 150). Ms Abernethy did not question the Claimant on what he meant by he was leaving due to the "current situation".

(56) The Claimant has suffered no ongoing loss since his resignation.

The Relevant Law

Constructive dismissal

7. Section 95(1) ERA, so far as relevant, provides as follows –

8. "….an employee is dismissed by his employer if – ….(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

Reason for dismissal

9. Section 98 ERA provides as follows – "(1) In determining….whether the dismissal of an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason)for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. (2) A reason falls within this subsection if it – (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, (b) relates to the conduct of the employee, (c) is that the employee was redundant, or (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment…."

Fairness of dismissal

10. Section 98(4) ERA provides as follows – "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case."

Meaning of constructive dismissal

The question of whether (a) the employer's conduct, in response to which the employee resigns, has to amount to a breach of contract or (b) it is sufficient if there has been unreasonable conduct causing the employee to resign was settled in **Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27**. The contract test prevailed. Lord Denning expressed it as

follows – "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. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

The implied term of mutual trust and confidence is expressed, from the perspective of the employer's obligation, by Lord Steyn in **Malik and Mahmud v Bank of Credit and Commerce International S.A. (in Compulsory Liquidation) [1997] UKHL 23**. It imposes an obligation that the employer shall not - "….without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

Automatically unfair dismissal (protected disclosure)

Section 103A ERA provides as follows – "An employee who is dismissed shall be regarded….as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

Detriment (protected disclosure)

Section 47B(1) ERA provides as follows – "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

The onus of proof is upon the Claimant (***Kuzel v Roche Products Ltd 2008 ICR 799 CA*** and ***Smith v Hayle Town Council [1978] I.C.R. 996***.)

Qualifying protected disclosure

11. In terms of sections 43B – 43H of the Act to be a qualifying protected disclosure the Claimant needs to satisfy the Tribunal that:

(a) There was a disclosure of information;

(b) The subject matter of this disclosure related to a "relevant failure";

(c) It was reasonable for him to believe that the information tended to show one of these relevant failures;

(d) He had a reasonable belief that the disclosure was in the public interest; and

(e) the disclosure was made in accordance with one of the specified methods of disclosure.

Disclosure of information (*section 43B(1))*

12. The Employment Appeal Tribunal in the case of ***Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325*** provide guidance to the Tribunal highlight a distinction between "information" and an "allegation". The EAT held the ordinary meaning of "information" is conveying facts". ***Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436, CA*** highlights a distinction between "information" and an "allegation". The Court of Appeal in ***Kilraine*** noted that there can be a distinction between "*information*" (the word used in ERA 1996 s.43B(1)) and an "*allegation*". However, the concept of "*information*" as used in ERA 1996 s.43B(1) is capable of covering statements which might also be characterised as allegations.

There must be a Qualifying Disclosure (section 43B(1)(a-f))

13. A "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

14. This requires the Tribunal to consider whether or not the disclosure was (in the reasonable belief of the Claimant) (i) in the public interest and (ii) showed one or more of the matters contained within section 43B(1)(a-f).

Reasonable Belief

15. It is the Claimant's belief at the time of disclosure that is relevant and it is not necessary for the Claimant to prove that the infoirmation disclosed was actually true (***Darnton v University of Surrey 2003 IRLR 133)***. The Tribunal must assess the Claimant's belief on an objective standard (***Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4***).

16. The EAT in ***Phoenix House Ltd v Stockman and anor 2016 IRLR 848***, give further guidance on the approach to be adopted : "*on the facts*

believed to exist by an employee, a judgment must be made as to whether or not, first, that belief was reasonable and, secondly, whether objectively on the basis of those perceived facts there was a reasonable belief in the truth of the complaints."

Public Interest

17. The approach to be adopted by a Tribunal in considering whether a disclosure was in the public interest was as set out by the Court of Appeal in ***Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979***. The Tribunal should determine whether the employee subjectively believed at the time of the disclosure that disclosure was in the public interest. If it was then the Tribunal should ask whether that belief was objectively reasonable.

Disclosure must be made to person specified in section 43C to H.

18. In order to be a protected disclosure the Tribunal must consider to whom the disclosure was made and whether they fell within sections 43C-H.

The reason (or, if more than one reason, the principal reason) for his dismissal

19. Once the Claimant has established that he made a qualifying protected disclosure he must then establish that the fact of making the disclosure was the reason (or, if more than one reason, the principal reason) for his dismissal.

20. In determining what the reason or principal reason for the dismissal was the Tribunal should ask itself whether, taken as a whole, the disclosures were the principal reason for the dismissal (***El-Megrisi v Azad University (IR) in Oxford EAT 0448/08***).

Injury to Feelings

A Tribunal may make an award of compensation for injury to feelings in a discrimination case. The guidelines for awarding compensation for injury to feelings are set out in the case of ***Vento v Chief Constable of West***

Yorkshire Police [2003] IRLR 102 CA (updated by Simmons v Castle [2012] EWCA Civ 1039).

Factors a Tribunal will take into account when assessing the level of an award for injury to feelings is the impact of the discriminatory behaviour on the individual affected rather than the seriousness of the conduct of the employer or the individual responsible for the discrimination.

Submissions

21. Both Parties made submissions orally. The Claimant also submitted written submissions at the conclusion of the hearing.

Discussion and Decision

22. The Tribunal considered the evidence before it.

The Claimant, Mr MacKenzie, Mr Deavy and Mr Scott

23. The Tribunal found the Claimant's evidence and that of Mr Mackenzie, Mr Deavy and Mr Scott to be credible and reliable. Their evidence was consistent and coroborated each other.

24. All 3 greenkeepers had considerable length of service. They all spoke of the treatment they had been subjected to by the Respondent and in particular by Mr Cowan.

25. Mr Mackenzie was of the view that Mr Cowan had an "agenda" and that was to get rid of the greenkeeping staff and replace them. In reality that appeared to be what had transpired as Mr MacKenzie, Mr Scott and the Claimant had all left the Respondent's employment.

26. All 3 confirmed the conduct and content of the meeting on 25 March 2020. All 3 confirmed Mr Cowan's practice with regard to the transportation of fuel.

Mr Cowan

27. The Tribunal did not consider Mr Cowan to be either credible or reliable for the following reasons:

Locker Incident

28. Mr Cowan attempted to justify his failure to investigate the Claimant's complaints about his locker being broken into on the basis that the Claimant had stored property there at his own risk. He stated in evidence that if a crime had been committed he may have given the Claimant the benefit of the doubt and investigated.

29. The Tribunal considered this an unstatisfactory and unsustainable position for Mr Cowan to adopt. No reasonable employer would have treated a long serving employee with such contempt and utter disregard. The Tribunal consider that this betrayed Mr Cowan's animosity towards the Claimant. Mr Cowan continued to defend and attempt to justify his approach before the Tribunal.

Washing Down of Machinery Incident

30. Mr Cowan initially denied saying that he had told the Claimant to wash down the machinery and that if he didn't then he would be sent home without pay. When pressed he then conceeded that he had said this.

Transportation of Fuel

31. Mr Cowan initially told the Tribunal that he had checked with his insurers that he could transport fuel in his car. He later confirmed that he had told his insurers he would only carry the maximum permitted fuel. He never told his insurers he would be transporting up to 120 litres of fuel. It was only after the grievance about his transportation of fuel that he checked and found out the maximum he could transport was 2 x 15 litres in 2 x 20 litre cans. It appeared to the Tribunal that he was trying to present a picture that he had insurance and appropriate health and safety requirements in place when clearly he had not.

32. The Tribunal were particularly unimpressed by his attempt to lay the blame for his transporting so much fuel at the door of the greenkeepers. He did so on the basis that he thought the greenkeepers would not allow him to do anything illegal. If they left out 6 or 7 jerricans for filling then they (the greenkeepers) must have risk assessed this and be satisfied that it was lawful for him to do so.

33. The Tribunal accordingly prefer and accept the evidence of the Claimant, Mr MacKenzie and Mr Scott where their evidence is contradicted by Mr Cowan.

Ms Abernethy

34. The Tribunal accepted Ms Abernethy's evidence as her honest recollection of events. She gave her evidence in an honest and straighforward manner.

35. The Tribunal did, however, find it of concern that she sought to support Mr Cowan's approach to the locker incident. She shared his view that no investigation was required and it was not the Respondent's problem.

36. Furthermore, the Tribunal found it surprising that she had conducted an exit interview with the Claimant at which she did not seek to clarify what the Claimant meant by saying he was leaving due to "the current situation".

Colin Gibson

37. The Tribunal accepted Mr Gibson's evidence as his honest recollection of events. He gave his evidence in an honest and straighforward manner.

38. The Tribunal did, however, question the thoroughness of his investigation into the various grievances, the conclusions reached and his acceptance of what was said by Mr Cowan without question.

39. For example, he found that Mr Cowan's language at the furlough meeting on 25 March 2020 "could be considered threatening. This approach was

not discussed or approved by the club council". Yet he did not find the allegation in the grievance substantiated.

40. He also accepted without qualification Mr Cowan's evidence that he was transporting the fuel in a safe manner. Mr Gibson did not undertake any further investigation on this point and readily accepted and preferred Mr Cowan's evidence.

41. Mr Gibson appeared unable to accept that Mr Cowan's conduct was the conduct of the Respondent. He sought to distinguish Mr Cowan's conduct from that of the Respondent. He was wrong to do so.

Adrain Innes

42. The Tribunal accepted Mr Innes's evidence as his honest recollection of events. He gave his evidence in an honest and straighforward manner.

Constructive Dismissal

43. The Tribunal then went on to consider whether or not the Claimant had been constructively dismissed.

44. The Tribunal considered the incidents relied upon by the Claimant chronologically.

Furlough Meeting on 25 March 2020

45. The Tribunal accepted the Claimant's evidence (and that of his colleagues) that the meeting was conducted by Mr Cowan in a threatening way. This was corroborated by Mr Gibson's findings.

46. The Claimant was put into the position whereby he had to accept furlough or the Respondent would go into administration. There was no attempt to consult with the Claimant or provide any explanation. It was presented in a take it or else fashion.

47. For Mr Cowan to then give the Claimant 30 minutes to pack up his belongings and leave was also completely inappropriate and insensitive.

48. The Tribunal was in no doubt that the conduct of the meeting by Mr Cowan was conduct that (without reasonable and proper cause) was calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee as defined in **Malik**.

8 June 2020

49. The Tribunal found that the actions of Mr Cowan and Ms Abernethy at the meeting was conduct that (without reasonable and proper cause) was calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

50. The Tribunal consider that no reasonable employer would have disregarded the Claimant's complaints about his lockers being broken into and property thrown all over the place in such a dismissive and disrespectfull manner. The Claimant was a long serving employee and it betrayed Mr Cowan's contempt for the Claimant that he conceeded he might have given the Claimant the benefit of the doubt if a crime had been committed.

51. The Tribunal found that Mr Cowan approched the Claimant on the 6th fairway and swore at him. He also accused him of not being able to do anything "fucking right". The Tribunal was in no doubt that the conduct of Mr Cowan was conduct that (without reasonable and proper cause) was calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. His conduct was wholly inappropriate and unacceptable.

9 June 2020

52. The Tribunal found that Mr Cowan had told the Claimant that he would be sent home without pay if he did not wash down the machines despite the Claimant's protestations that it was illegal to do so. Mr Cowan told the Claimant to do what he "fucking tell you". The Tribunal once more find Mr Cowan's conduct to be completely inappropriate and unacceptable.

No reasonable employer would have behaved in such a manner where the employee is clearly expressing concerns about the legality of a course of action. Once again Mr Cowan's animosity towards the Claimant is displayed. The Tribunal was in no doubt that the conduct of Mr Cowan was conduct that (without reasonable and proper cause) was calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

10 June 2020

53. The requirement for receipts from the Claimant for his own property by Mr Cowan was completely unreasonable. Mr Cowan in his own evidence conceeded that he would not know where to start in trying to track down receipts for equipment and tools purchased by the Respondent yet he expected the Claimant to be able to do so in respect of what he claimed to be his own property. Once again this gave the Tribunal an insight into Mr Cowan's attitude and approach towards the Claimant. Mr Cowan was being deliberatley difficult and distrustful of the Claimant. He had no reason not to believe the Claimant that the property was his.

54. The Tribunal was in no doubt that the conduct of Mr Cowan was conduct that (without reasonable and proper cause) was calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

55. The Tribunal find that the conduct of the Respondent led directly to the Claimant being unfit for work due to stress on 11 June 2020 until his return on 22 September.

22 September 2020

56. The Claimant had been led to believe that Mr MacKenzie would be rerturning to work and that he would once again be reporting to him as his line manager. When the Claimant returned he found out that Mr MacKenzie wasn't back yet and he would again be reporting to Mr Cowan. He felt he had no option other than to resign to protect his

mental health and avoid any futher bullying or harrassment as set out in his resignation email.

57. The Tribunal accept that this was the “last straw” for the Claimant.

58. The Tribunal consider that the conduct of the Respondent (through Mr Cowan) constituted conduct which was a significant breach going to the root of the contract of employment. It was a breach of the implied term of trust and confidence. The Claimant had not affirmed nor had he delayed resigning in response to the breach.

59. The Claimant was constructively and unfairly dismissed.

Automatic Unfair Dismissal

60. The Tribunal considered that even if it were accepted that the disclosures asserted to have been made were protected (as set out in the Agreed List of Issues) that the Claimant was not dismissed because of them. The Claimant was dismissed due (in the main) to the conduct of Mr Cowan which was not motivated by the protected disclosures (save in so far as Mr Cowan’s conduct referred to below in the context of the detriment claim).

61. The Claimant’s claim in this regard is unsuccessful.

Did the Claimant suffer any detriment on the grounds of having made a protected disclosure?

62. The Tribunal carefully considered whether or not there was any detrimental treatment of the Claimant on the grounds that he had made a protected disclosure.

63. The Tribunal considered whether or not (accepting the Claimant made the disclosures set out in the Agreed List of Issues and that these were protected) whether any detriment had been suffered by the Claimant on the grounds of those disclosures.

64. The only detriment that the Tribunal considered was on the grounds of a protected disclosure was Mr Cowan's threat to send the Claimant home without pay if he refused to wash down the machine on 9 June 2020. The Claimant was in effect forced to comply with this instruction despite his reasonable belief that it was illegal and would damage the environment.

65. The Tribunal were satisfied that the Claimant's statement to Mr Cowan on 9 June 2020 that washing down the machine was illegal was a qualifying protected disclosure to his employer and such disclosure was in the public interest.

Injury to Feelings

66. The Tribunal considered the severity of the treatment at the hands of Mr Cowan. The Claimant was patently forced to undertake a task he felt was illegal and would damage the environment. This caused him stress and upset. It was a contributing factor to the Claimant becoming unfit for work and being signed of from 11 June 2020 until 22 September 2020.

67. It was also a contributing factor to his decision to resign – that there was a risk he would be instructed to undertake such a task again.

68. The Claimant described his sleepless nights and how he was not eating or functioning properly. This was a job he loved and would have stayed in.

69. The Tribunal had regard to the Vento guidelines for making injury to feelings awards. The Tribunal considered that an award at the lower band in ***Vento*** was appropriate (taking into account ***Simmons v Castle [2012] EWCA Civ 1039***) .

Remedy

70. The Tribunal make a Basic Award as set out in the agreed Schedule of Loss in the sum of £6,317.02;

71. The Tribunal award £500 in respect of loss of statutory rights;

72. The Tribunal make no award in respect of pension loss as no evidence was led on whether or not the Claimant receives pension contributions in his current employment;

73. The Tribunal make an award of £7,000 in respect of injury to feelings.

Employment Judge: Alan Strain
Date of Judgment: 29 September 2021
Entered in register: 07 October 2021
and copied to parties