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**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4100438/2021 (V)**

**Public Final Hearing held in Glasgow by Cloud Based Video Platform  
(CVP) on 14-16 September 2021**

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**Employment Judge Mr A Tinnion**

**Mr. Stuart Aitken**

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**Claimant  
Represented by  
Mr. Ashby**

**Scottish Fire and Rescue Service**

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**Respondent  
Represented by  
Ms Macdonald  
(Solicitor)**

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**RESERVED JUDGMENT**

1. The Claimant's complaint of unfair dismissal (ss.94(1), 95(1)(c) and 98 of the Employment Rights Act 1996) is not well-founded and is dismissed.
2. The Claimant's complaint of wrongful dismissal is not well-founded and is dismissed.

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**REASONS**

**Pleadings**

1. By an ET1/Paper Apart presented on 1 February 2020, Claimant Stuart Aitken presented complaints of (i) unfair (constructive) dismissal (ii) wrongful dismissal. Although not specifically pleaded, for both claims the Claimant

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relied upon a resignation in response to an alleged breach of the implied term of trust and confidence (the “**Implied Term**”) in his employment contract.

2. By its ET3/Paper Apart, the Respondent denied both claims. The Respondent knew the Claimant was relying upon a breach of the Implied Term and took no issue with the adequacy of his pleadings in this regard.

### **Evidence**

3. The claim was heard on 14-16 September 2021. The Tribunal heard evidence from the following witnesses: Claimant; WC Hutcheson; GC Harkins; C Bruce; L Miller (HR). All witnesses sought to assist the Tribunal by giving their honest recollection of events. A joint production of c.120 pages was provided. References in square brackets are to the relevant page(s) of that production.

4. At the hearing, the Claimant’s representative confirmed that the only breaches of the Implied Term the Claimant relied upon pleaded in the ET1 [9] were those alleged to have occurred on 13 January 2020 and 9 April 2020.

### **Findings of fact**

5. The Tribunal makes the following findings of fact on the balance of probabilities.

### **Respondent**

6. The Respondent was established in 2005 for the purpose of promoting fire safety, firefighting, and attending road traffic accidents (amongst other matters).

7. The Respondent has a hierarchical operational structure. Group Commanders (**GC**) manage and oversee Station Commanders (**SC**), who command one or more fire station in particular locations. Station Commander in turn manage and oversee one or more Watch Commanders (**WC**) at a fire station. Watch Commanders manage and oversee one or more Crew

Commanders at a fire station. Crew Commanders manage and oversee the firefighters serving the fire station.

8. The Respondent distinguishes between ‘retained’ and ‘wholetime’ firefighters. Wholetime firefighters work at a manned fire station on a full-time basis, mostly in urban areas. Retained firefighters, who work within what is called a ‘Retained Duty System’, do not work at their assigned fire station on a full-time basis. They are paid to be on call and respond to emergencies. Many retained firefighters have full-time jobs outside the fire service. Because of the critical need to respond quickly in the event of an emergency, retained firefighters usually live or work near the fire station they serve. To maintain competency levels, retained firefighters are generally required to attend at least one weekly training session in the evening. Most of the time, retained fire stations are unmanned.
9. It is possible for someone to be both a wholetime firefighter (working full-time at a manned station) and a retained firefighter serving another fire station in their spare time – this is called ‘dual contract working’. Relations between wholetime and retained firefighters vary from station to station. Based on the evidence in this case, those relationships are not always harmonious.

**Claimant**

10. In 1993, the Claimant joined the Respondent as a retained firefighter in Tillicoultry Fire Station, Tillicoultry (40 miles north-west of Edinburgh). In 2001, the Claimant was appointed to the post of Retained Leading Firefighter. By 2019, the Claimant was employed as a Crew Commander at Tillicoultry Fire Station - a job description is at [37-40]. The Claimant greatly enjoyed his job, and it meant a lot to him to be able to serve his local community this way. The Claimant experienced no substantive issues in his employment before November 2019.

**2019-2020**

11. In 2019, the operational structure at Tillicoultry Fire Station was as follows: the Group Commander was GC S Harkins; the Station Commander was SC A McCutcheon; below him was Watch Commander WC C Hutcheson; the two  
5 Crew Commanders were the Claimant and CC R McAinsh; the Claimant managed and oversaw Firefighters Campbell and Lapsly.
12. In 2019, in addition to his Crew Commander post, the Claimant was also employed as an NHS driver driving Emergency doctors in the GP out-of-hours service, which required him to work Monday evening shifts (530pm –  
10 midnight).
13. In 2019, regular training for retained firefighters at Tillicoultry Fire Station was conducted on Monday evenings. Retained firefighters who were not able to attend would attend catch-up training during the week. Prior to the events in question, the Claimant had been involved in training retained firefighters, on  
15 Mondays evenings in the rare circumstances when he was available, otherwise later on during the week, for many years. There was never a question about the Claimant's competence as a Crew Commander, his ability to conduct appropriate training of the retained firefighters serving Tillicoultry Fire Station, or the appropriateness of his being involved in being involved in  
20 that training, even though he was not himself a wholetime firefighter.
14. In 2019, two new retained firefighters were assigned to Tillicoultry Fire Station.
15. In November or December 2019, SC McCutcheon decided training for the two new retained firefighters (ie, training other than on Monday evenings) would be provided by the two wholetime, dual contract firefighters at the station  
25 (Nigel and Craig), based on his view that they were in a better position to deliver training as their skills and knowledge were more up to date. SC McCutcheon discussed this decision with CC McAinsh. SC McCutcheon did not consult the Claimant before making this decision. The Claimant found about it when he was on annual leave in November 2019 when he read an  
30 email from CC McAinsh sent on 10 November 2019 at 19:04 [119-120].

16. The Claimant was taken aback – as part of the management team at the fire station, the Claimant had expected to be consulted before a decision like this was taken. In fact - unknown to him at the time - an arrangement whereby wholetime firefighters are given primary training responsibility for new retained  
5 firefighters was not uncommon in the service in other parts of Scotland. The Claimant, whose career had been at Tillicoultry Fire Station, was unaware of this.
17. By email on 10 November 2019 at 19:53 [119], the Claimant asked whether training was open to all competent, experienced firefighters in the station. By  
10 email to the Claimant on 11 November 2019 at 08:06 [119], CC McAinsh replied “no”, but stated crew members were welcome to part in making up a crew.
18. On his return from annual leave, the Claimant raised this again with WC  
15 Hutcheson, who told him there had been a discussion but training of the two new firefighters was not meant to be exclusively a role given to the two wholetime firefighters at the station.
19. On Monday 6 January 2020, the Claimant was able to attend the training that evening. Firefighter Campbell delivered training on First Aid and Trauma, during which he made reference to a video clip which caused a spirited  
20 “debate” (the Tribunal infers tempers became heated). As a result, training finished early. Following that, WC Hutcheson and CC McAinsh exchanged a series of emails.
20. In an attempt to clear the air, on 13 January 2020 a meeting was convened in  
25 an attempt to discuss matters and resolve outstanding various concerns including training. In attendance were the Claimant, WC Hutcheson, CC McAinsh and SC McCutcheon. By all accounts, the meeting did not go well - it was highly charged, and uncomfortable:
- a. the Claimant asked if the meeting was going to be minuted, which led to a negative reaction from Messrs. McAinsh and McCutcheon;

- b. early on, CC McAinsh told the Claimant to “*take a good look at yourself*” (several times), and also told him to “*pull your weight around here*”;
- c. neither the Claimant nor anyone else at the meeting challenged CC McAinsh when he said this;
- 5 d. it became apparent during the meeting that the Claimant was to be excluded from delivering additional training for the new firefighters;
- e. the Claimant was shocked, and said to SC McCutcheon “*you can’t be serious*”, and SC McCutcheon replied “*I do not want you coming to the station with your Crew Manager’s head on, interfering*”;
- 10 f. the Claimant replied that he was the Crew Manager and this was his role, to which SC McCutcheon said that he had made his decision;
- g. the Claimant sought to raise other issues, including communication issues (firefighters not responding to his messages);
- h. SC McCutcheon accused the Claimant of forcing catch-up training on  
15 firefighters who missed Monday evening training. The Claimant denied this, and asked who had said that. SC McCutcheon said that he had been told that, and that was good enough for him. The Claimant offered to show SC McCutcheon the messages he had sent regarding organising catch-up training, but SC McCutcheon was not interested in seeing them.
- 20 21. The Claimant left the meeting dumbstruck by events. He went home. Later that evening, he called WC Hutcheson and told him he needed to take a couple of days off away from the station.
- 22. On 14 January 2020, the Claimant commenced a period of sickness-related absence (stress). He remained off work until his resignation on 18 November  
25 2020.
- 23. The Claimant was asked to complete a Stress Risk Assessment (**SRA**), which he did on about 10 February 2020 [57].

24. By letter dated 6 March 2020, SC Gemmell invited the Claimant to attend an Attendance Support Meeting to discuss his absence, attendance record and identify support mechanisms. The meeting was held on 18 March, and at it the Claimant outlined the issues he said he was having to deal with. It was  
5 agreed a mediation should be held in an attempt to clear the air and address all outstanding matters. The main subject-matter of the mediation was to address/resolve (i) removing the Claimant from delivering additional training/development to the new firefighter recruits (ii) communication issues at the station.
- 10 25. On 9 April 2020, the mediation was held. In attendance were the Claimant; his representative Mr. Ashby; WC Hutcheson; SC McCutcheon; SC Gemmell; Firefighter Campbell; and Mr. Jupp. At the mediation, SC McCutcheon accused the Claimant of trying to force catch-up training. The Claimant denied this, asked (again) who said this, and (again) offered to show his  
15 communications to firefighters. SC McCutcheon was not interested. SC Gemmell stated "*we are not here to discuss what has happened.*" Firefighter Campbell at one point said "*Is it just me, or is there no point to this meeting?*" SC Gemmell, who was leading the meeting, did not respond directly.
26. A discussion occurred about the training and development of new recruits. SC  
20 Gemmell referred to selecting the "*best took from the toolbox*", suggesting the two wholetime firefighters were best placed to carry out training. The Claimant disagreed with that judgment: although both were wholetime, they were both newly wholetime, and still themselves in development.
27. At the mediation, some progress was made - the following matters were  
25 discussed and agreed: (i) quarterly meetings with the WC and the two CCs to discuss station issues (ii) following those meetings, an update to all staff at the next available drill night (iii) a training planner prepared and available for all staff to review a month in advance (iv) all training to go through WC Hutcheson.

28. SC Gemmell stated that the Claimant should attend if Firefighters Campbell and Lapsly asked him to attend the station to make up a crew for drill purposes. The Claimant found this suggestion offensive – it would mean he could not speak to the new recruits during the training itself. SC Gemmell said that if anything about the way the way the drill was constructed was bothering him, the Claimant was to wait till after the drill was over and speak to Firefighters Campbell and Lapsly in private. The Claimant was numbed by this comment, and found the idea humiliating. After that, he took in almost nothing said at the meeting. He waited till the meeting ended (it lasted approximately an hour), then left to go home. The Claimant’s perception, rightly or wrongly, was that he had been “*ganged-up on*”.
29. On 10 April 2020, the day after, SC Gemmell telephoned the Claimant. The Claimant told him was not satisfied with the outcome of the mediation and stated “*you will just have to sack me*”. The Claimant expressed frustration that the mediation had not gone through the incidents which the Claimant had noted in the notebook he brought. The Claimant was upset. By email on 12 April 2020, SC Gemmell told GC S Harkins about his 10 April call with the Claimant [51].
30. On 22 April 2020, the Claimant attended an Occupational Health appointment (by telephone) with RGN Smithson. According to the OH Report [88-91], the Claimant was absent from work with symptoms consistent with reduced psychological wellbeing which he attributed to work-related stressors (he reported no abnormal stressors in his wholetime employment or personal life). RGN Smithson anticipated a complete resolution of his current symptoms over time following his work-related stressors being addressed and a satisfactory resolution for all parties concerned being achieved. In the meanwhile, RGN Smithson advised that the Claimant was not fit for work in any capacity.
31. By letter dated 21 May 2020, GC Harkins invited the Claimant to attend a further Absence Support Meeting on 1 June 2020.



32. By letter dated 28 May 2020, F Munro (Respondent Head of People and Organisation Development) noted the Claimant's absence from duty since 14 January 2020 and advised him that "in accordance with your conditions of employment you are due to be placed on half sick pay allowance with effect from 09 July 2020" [54].
33. On 1 June 2020, an attendance support meeting took place. Present were the Claimant, his representative Mr. Ashby, GC Harkins and HR representative L Miller. At the meeting, they discussed the Claimant's Stress Questionnaire, an action plan, and the Claimant's last Occupational Health appointment. The Claimant stated he was still feeling angry with the situation and continued to suffer from anxiety and stress. However, the Claimant stated he was happy with the actions taken and proposed by local management, and confirmed he spoke regularly with his line manager WC Hutcheson. GC Harkins and the Claimant agreed the following action plan to facilitate the Claimant's return to work: (i) GC Harkins to meet SC McCutcheon and WC Hutcheson to discuss the outcome of this 1 June 2020 meeting (ii) SC McCutcheon to contact Occupational Health to discuss a phased return to work for the Claimant (iii) GC Harkins to ask the TED team to contact the Claimant to put a development plan in place to facilitate his return to work (iv) GC Harkins to discuss holding more group LCMS training sessions with WC Hutcheson (v) GC Harkins to arrange a further Attendance Support Meeting in 4-6 weeks' time.
34. The Claimant and his representative confirmed they were happy with the outcome of the 1 June meeting and felt it was a positive step in the Claimant's return to work, which he stated felt could be achievable in the short term. GC Harkins mentioned the Claimant had the option of a grievance if he wished, to which the Claimant replied he did not wish to take that action. GC Harkins also reminded the Claimant that he was due to move on to half-pay, but that he did have the option of appealing against that, which Mr. Ashby stated he would do. GC Harkins subsequently summarised the content and outcome

of the 1 June 2020 meeting in a letter to the Claimant dated 24 July 2020 [55-56].

35. On 9 June 2020, the Claimant attended a further Occupational Health appointment (by telephone) with RGN Smithson [92-96]. The Claimant continued to be absent from work due to perceived work-related stressors. The Claimant advised RGN Smithson that the 1 June meeting with management had resulted in some progress being made, and the meeting was positive. However, the Claimant stated he still had concerns about a return to work and did not feel a return to work was achievable at this time. RGN Smithson advised that while there appeared to have been some progress in the case since his last assessment, the Claimant's ongoing absence appeared likely until such time as his remaining work-related concerns were addressed and the Claimant felt he could return to work.

36. By email on 23 June 2020, the Claimant lodged an appeal against being placed on half pay from 9 July 2020 – cf [70].

37. On 6 July 2020, the Claimant attended a further Occupational Health meeting (by telephone) with RGN Smithson [97-99]. The Claimant advised there had been no progress regarding a return to work being achieved despite the recent mediation meeting.

38. By letter to the Claimant dated 6 July 2020, J McNeill (Deputy Assistant Chief Officer, East Service) acknowledged receipt of the Claimant's appeal against being moved to half-pay on 9 July 2020. The letter stated (in relevant part):

*"In response to your email, please be aware that whilst I appreciate the circumstances around your case, the Service is required to adopt a consistent approach in the application of sick pay, and this consists of sick pay allowance being reduced by half when an employee has been absent for 6 months. As you are aware the appeal process affords the employee the opportunity to appeal against this course of action, and are given the opportunity to explain why they believe an extension to full pay should be considered,*

5                    *For clarification around your points raised around Service injury, in accordance with the Grey Book, full pay for 12 months will be paid as a result of an illness or injury incurred whilst carrying out authorised duties, an illness may be linked to mental health, therefore the service is in no way suggesting that there requires to be a physical injury in order for this to be considered. My understanding is that your illness is not as a result of attending an incident. Having taking into account your individual circumstances, and the reasons why you are currently absent from work, I have however taken the decision to extend your full pay up to and including*  
10                    *8 October 2020. I have asked Laura Miller to make the necessary arrangements with Payroll.” [70]*

15                    39. Between 9 July and 8 October 2020, the Respondent paid, and the Claimant accepted, his full contractual pay for this period. The Tribunal is not aware what happened to the Claimant’s pay in the period 8 October – 18 November 2020.

20                    40. On 10 August 2020, the Claimant attended a further Occupational Health appointment (by telephone) with RGN Smithson [100-102]. The Claimant stated his ongoing symptoms were worsening. RGN Smithson stated there appeared to a need for further open, honest discussions/mediation around the Claimant’s workplace concerns.

25                    41. On 11 August 2020, the Claimant attended a Health & Wellbeing meeting (by Skype). Present were the Claimant, his representative Mr. Ashby, HC Harkins and HR representative L Miller. When asked how he was feeling, the Claimant stated he was “*not in a good place*” and intended to resign from the Service. Ms. Miller asked the Claimant if anything had changed since the last meeting (1 June 2020) which had influenced his decision as the Claimant had stated then that he was content with the action plan proposed to work towards a return to work. The Claimant replied he couldn’t face the reality of working with certain individuals again at Tillicoultry Fire Station. The Claimant stated  
30                    the situation was affecting his other employment as an NHS driver, which he intended to also take some time off from in the near future. GC Harkins and

Ms. Miller suggested that the Claimant take some time to think over his next steps, and their aim remained to continue to support the Claimant and support his return to work. It was agreed that Attendance Support Meetings would continue unless the Claimant advised otherwise in light of his intentions regarding resignation. A summary of the meeting was sent to the Claimant by letter dated 7 September 2020 [71-72]

42. On 9 September 2020, the Claimant attended a further Occupational Health appointment (by telephone) with RGN J Smithson.

43. On 23 September 2020, the Claimant lodged a grievance [74-75] which gave a detailed narrative (from his perspective) of the events and treatment which he complained of. The Claimant stated the resolution he sought was for certain identified individuals to acknowledge their behaviour was inappropriate, and they needed to change their attitudes and bias. By letter dated 12 October 2020, the Claimant's grievance was acknowledged, and he was invited to attend a grievance meeting on 29 October 2020 to be chaired by GC C Bruce.

44. On 22 October 2020, the Claimant attended a further Occupational Health appointment (by telephone) with RGN Smithson. According to the OH Report [106-108], the Claimant continued to report ongoing symptoms impacting on his psychological and physical well-being such as anxiety, ruminating thoughts, interrupted sleep, low mood, irritability and poor concentration. The Report noted that it appeared that the cumulative effect of these ongoing perceived stressors had impacted even further on the Claimant's overall well-being since his last review. RGN Smithson advised the key to progressing the case will be whether it is possible for the Claimant and the Service to agree how his workplace concerns might be resolved, requiring arrangements that were operationally feasible for the Service whilst being sufficiently reassuring to the Claimant that he feels his work will be manageable. If it was not possible to reach agreement of this kind, RGN Smithson advised it was predictable that the Claimant would continue to feel stress which may persist

as a barrier to returning to work, and the longer this situation remained ongoing the poorer his prognosis would be.

5 45. On 29 October 2020, the Claimant attended a grievance meeting chaired by GC Bruce, noted at [77-79]. The Claimant was updated on the fact that SC McCutcheon had retired and B Walker was now undertaking the role of Station Commander at Tillicoultry Fire Station and would be in a good position to support the Claimant. The Claimant stated that the 9 April mediation had not helped, and complained about the attitudes of some of those present. The Claimant said that at the mediation the situation remained that he still had to wait to be invited to support the new recruits. The Claimant stated the 1 June meeting with GC Harkins was productive, positive and supportive, but he was still not in a position to return to work.

15 46. On 10 November 2020, GC Bruce interviewed WC Hutcheson (by Skype) to obtain information relating to the Claimant's grievance – see note at [80-82]. WC Hutchinson stated (i) the Claimant had felt isolated and ignored because he was excluded from the extra training (outwith the routine Monday night training) (ii) there was a clique within the fire station which made the Claimant felt uncomfortable (iii) new younger firefighters had joined the station with new ideas, which had led to friction with the "*older hands*" (Claimant, WC Hutcheson, CC McAinsh) (iv) WC Hutcheson had been unaware of how the Claimant had been felling until after he went off sick.

25 47. On 16 November 2020, the Claimant attended what would be his last Occupational Health appointment (by telephone) with RGN Smithson. According to the OH Report [109-110], the Claimant continued to report ongoing symptoms impacting on his psychological and physical well-being such as anxiety, ruminating thoughts, interrupted sleep, low mood, irritability, anger and poor concentration. RGN Smithson stated his advice in his report dated 22 October 2020 remained unchanged.

30 48. By letter dated 12 November 2020 [83-84], GC Bruce informed the Claimant that his grievance was upheld. GC Bruce accepted SC McCutcheon had

made a decision that the Claimant was not to be involved in training new trainee firefighters, however SC McCutcheon had since retired, hence his reasons for that decision were not understood. GC Bruce reiterated what the Claimant had been told at his Attendance Support Meeting on 1 June 2020 that all personnel – including the Claimant in his role as Crew Commander – were to have the opportunity to be involved in training. GC Bruce stated it was evident that there was a failure in individuals following the appropriate communication channels in terms of the management structure, and had this been complied with, the Claimant’s feelings of being isolated and ignored may not have occurred. GC Bruce considered that there remained a breakdown in the Claimant’s relationship with CC McAinsh, and recommended mediation by an impartial mediator. The Claimant was informed that he had the right to appeal if he was dissatisfied with the grievance decision.

49. On 18 November 2020, the Claimant resigned. His resignation letter [85] stated (in full) as follows:

*“Dear Colin*

*I write to give you/the service my resignation which will take effect immediately. You will be aware of my ongoing situation and that I’ve been on sick leave with stress brought about by the actions of certain members of the station for a number of months. The recent discussions I have had with Occupational Health has made me realise that I cannot return to work at the station and that these certain individuals at Tillicoultry have made my position untenable.*

*This is obviously not the way I had envisaged leaving the service after 27 years of commitment, but the treatment and behaviour I have experienced by staff including a Station Commander is unacceptable. They have shown no desire to change their behaviour and I genuinely feel that if I returned to the station I will be subjected to further treatment whereby my position will be undermined and I will be excluded as part of the crew.*

*My decision is in no way a reflection of you, who I have had the pleasure of serving with for 27 years. It has been an honour and privilege to work with you.*

*Yours sincerely,*

5 *Crew Commander*

*Stuart Aitken*

*[signature]*”

50. When asked why he had resigned when his grievance had been successful, the Claimant gave the following explanation:

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*“The individuals who had lied about me would still be on the appliance and you’ve got to be able to trust the people with your life. I became aware that Group Commander Harkins was leaving his post as senior officer of our area and Group Commander Jupp would take his [ ] post. There were no other reasons why I resigned. I resigned because I did not want to work with these people. If the staffing had been different, some way of working it, I would have come back and not resigned. The deciding factor was that Group Commander Jupp was going into that position. He had been in total agreement with the decisions made earlier.”*

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20 51. On 27 November 2020, SC Walker (SC Alloa, Tillicoultry, Bridge of Allan) telephoned the Claimant. He stated his decision to resign was for his family and his health and wellbeing. He stated that he believed resigning had been the correct decision, but he did have days where he felt he made the wrong decision.

25 52. The Claimant made no effort to mitigate his loss in income arising from his resignation. In his evidence, the Claimant explained he had no desire to replace that lost income, and had never done the job for an income.

**Relevant law**

53. Under s.95(1)(c) of the Employment Rights Act 1996 (**ERA 1996**), termination of the employment contract by the employee will constitute a dismissal for the purpose of Part V of ERA 1996 (unfair dismissal) if the employee terminates that contract (with or without notice) in circumstances in which the employee is entitled to terminate it without notice by reason of the employer's conduct. This is colloquially known as a 'constructive dismissal'.
54. It is not enough for the employee to leave merely because the employer acted unreasonably - the employer's conduct must amount to a repudiatory breach of a term of the employment contract. *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27, [1978] ICR 221. In order for an employee to be able to claim constructive dismissal, the following conditions must be met:
- a. there must be an actual or anticipatory breach of an express or implied term of the employment contract by the employer;
  - b. that breach must be repudiatory, ie, sufficiently important to entitle the employee to resign, or else be the last in a series of incidents which justify the employee in resigning;
  - c. the employee must terminate their employment contract wholly or at least in part in response to that breach, not for some other unconnected reason;
  - d. at the time of resignation, the employee must not have affirmed the employment contract after the breach;
  - e. the employee must not delay too long in terminating the contract in response to the breach, otherwise the employer may be deemed to have waived the breach.
55. If an employee leaves in circumstances where these conditions are not met, they will be held to have resigned and there will be no dismissal for the purpose of a claim under Part V of ERA 1996.



56. Not all breaches of an employment contract are repudiatory. That having been said, certain breaches will almost always be repudiatory, eg, an employer's failure to pay an employee's wages on time in full.

57. The resignation must be in response to the breach, but need not be the sole reason. So if an employee did not know about the employer's conduct said to be repudiatory until after they resigned, the employee is unlikely to be able to establish that they resigned in response to the breach.

58. In *Western Excavating*, Lord Denning stated the employee "*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.*"

59. Generally, mere delay alone before resigning will not defeat a constructive dismissal claim - there is no fixed time by which an employee must resign. However, the longer the employee's delay in resigning after the breach, the greater the chance a Tribunal will find the breach to have been waived.

60. An employee will not be able to resign and claim constructive dismissal if they have affirmed their contract before resigning. Whether an employee affirmed their contract after the repudiatory breach but before resignation will be a fact-sensitive question. In *Hadji v St Luke's Plymouth* [2013] UKEAT/0095/12, para. 17, His Honour Judge Jeffrey Burke QC summarised the position as follows:

*"The essential principles are that:*

(i) *The employee must make up his [her] mind whether or not to resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed. Western Excavating v Sharp [1978] ICR 221 as modified by W E Cox Toner (International) Ltd v Crook [1981] IRLR 443 and Cantor Fitzgerald International v Bird [2002] EWHC 2736 (QB) 29 July 2002.*

- (ii) *Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay - see Cox Toner para. 13 p446.*
- 5 (iii) *If the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation: Fereday v S Staffs NHS Primary Care Trust [2011] (UKEAT/0513 judgment 12/07/2011) paras. 45/46.*
- 10 (iv) *There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive: Fereday, para. 44.”*
61. The following conduct has been held (on the facts of the particular case) not  
15 to constitute an affirmation of the contract:
- a. mere receipt of sick pay for a limited period (without more);
- b. the raising of a grievance/complaint/appeal about the conduct constituting the repudiatory breach, and a delay in resigning until the employer’s response is known. *Gordon v J&D Pierce (Contracts) Ltd. [2021] IRLR  
20 266, paras. 23-24 (“It appears to me that where an employee intimates that he considers the contract has come to an end, he is not to be taken to affirm that the contract has come to an end for all purposes. In particular I do not consider that the parties can be presumed to intend that a clause  
25 designed to procure the resolution of differences should be regarded as being evacuated because one party asserts that the implied obligation of trust and confidence has been breached. Although pragmatic considerations are not always a sure guide, it would be unsatisfactory if an employee was unable to accept a repudiation because he or she wished to seek a resolution by means of a grievance procedure.”).*

62. In contrast, a combination of the following conduct was held to constitute an affirmation of the contract preventing the employee from claiming constructive dismissal: continuing to accept sick pay for 39 weeks; making repeated requests to use work email; actually using work email; making repeated requests to join employer's permanent health insurance; engaging in discussions regarding continuing employment with employer. *Mari v Reuters Ltd* [2015] EAT/0539/13.

*Implied term of trust and confidence*

63. An employment contract will normally contain an implied term requiring the employer not to, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee ("**Implied Term**"). *Malik v BBCI* [1997] IRLR 462. Whether the employer subjectively intended to breach the Implied Term is irrelevant. *Leeds Dental Team Ltd v Rose* [2014] IRLR 8.

64. Examples of a breach of the Implied Term include (i) serious breaches of internal disciplinary and grievance procedures (*Blackburn v Aldi Stores Ltd*. [2013] IRLR 846) (ii) failing to give employee reasonable support to enable them to carry out their duties without disruption or harassment from fellow workers (*Wigan BC v Davies* [1979] IRLR 127 [1979] ICR 411) (iii) accusing an employee of an act of gross misconduct falsely and without reasonable cause (*Robinson v Crompton Parkinson Ltd* [1978] ICR 401) (iv) undermining a supervisor by upbraiding them in the presence of subordinates (v) reprimanding an employee in a degrading, intimidating or humiliating manner (*Hilton Int'l Hotels (UK) Ltd. v Protopapa* [1990] IRLR 316) (vi) failing to treat a long-serving employee with dignity and consideration (*Garner v Granger Furnishing Ltd*. [1977] IRLR 206).

65. The categories of conduct which might breach the Implied Term are open-ended. In almost all circumstances, a breach will constitute a repudiatory

breach of contract entitling the employee to resign and claim constructive dismissal.

**Issues**

66. The Claimant's complaint of unfair dismissal gives rise to the following issues:

5 67. First, whether by the conduct on which the Claimant relies (in his pleading) the Respondent breached an Implied Term in his employment contract.

68. Second, whether the Claimant timely resigned in response to any established breach of the Implied Term by the Respondent.

10 69. Third, linked to the above issue, whether the Claimant affirmed his employment contract after any last breach of the Implied Term before his resignation.

70. Fourth, if the Claimant was entitled to treat himself as constructively dismissed, (i) what was the reason/principal reason for the Claimant's dismissal, and (ii) was that reason a potentially fair reason for dismissal.

15 71. Fifth, if that reason was a potentially fair reason, whether the Claimant's dismissal for that reason was fair or unfair, ie, whether in the circumstances (including the Respondent's size and administrative resources) the Respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the Claimant, determined in accordance with equity and the substantial merits of the case.

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72. The complaint of wrongful dismissal gives rise to the following issues:

73. First, whether by conduct on which the Claimant relies the Respondent breached an Implied Term in the Claimant's employment contract.

25 74. Second, whether the Claimant timely resigned in response to any established breach of the Implied Term by the Respondent.

75. Third, linked to the above, whether the Claimant affirmed his employment contract after any last breach of the Implied Term before his resignation.

### **Submissions**

5 76. Both parties lodged written submissions, which the Tribunal read. Those submissions are incorporated by reference.

### **Conclusions**

10 77. First, this issue being essentially undisputed by the Respondent, the Tribunal finds that the Claimant's employment contract did contain an Implied Term, ie, a term imposing a duty on the Respondent not to, without reasonable and proper cause, engage in conduct calculated or likely to destroy or serious damage the relationship of trust and confidence between the Claimant and the Respondent.

78. Second, for the reasons set out below, the Tribunal finds that the Respondent did not breach the Implied Term by the conduct referred to below:

15 79. *Giving responsibility for delivering additional training to new firefighters to the two wholetime firefighters.* The Claimant's representative confirmed this was not a breach relied upon, but the Tribunal addresses it because this was clearly an important issue to the Claimant, and it appears to have been the trigger for much of what came later. In sum, the Tribunal accepted the evidence of GC Harkins that a decision to this effect, although outwith the Claimant's own knowledge and experience, was not unprecedented. The practice is not uncommon throughout Scotland, and serves (or is at least aimed at serving) a legitimate aim—seeking to ensure that training to new firefighter recruits is delivered by those firefighters most likely to have the most up to date training and knowledge:

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*“In my experience, and I have visited over 100 fire stations in Scotland, it is common for various individuals to do training because of specific strengths. I surmise that these two [wholetime firefighters] were used*

*because of their experience of completing a portfolio. This [decision] would have been done in good faith.”*

5 80. The Tribunal was satisfied that this 2019 decision (subsequently retracted in 2020 after the Claimant complained about it) was not made out of spite or malice towards him. The Tribunal accepts the Claimant was not consulted about this decision, and might reasonably have expected to have been at the very least informed about it. However, the Tribunal does not accept that the Respondent’s failure to inform or consult the Claimant about this decision beforehand was so unreasonable as to amount to a breach of the Implied  
10 Term. The Respondent operates a hierarchical structure/chain of command, and it was never suggested that the decision SC McCutcheon made under that structure was one he was not authorised or entitled to make.

15 81. *Words said to Claimant during meeting 13 January 2020.* The Tribunal does not accept the Implied Term was breached when CC McAinsh told the Claimant during the meeting to *“take a good look at yourself”* (several times), and *“pull your weight around here”*. Those words were undoubtedly unpleasant and unwelcome, but the Claimant was an experienced Crew Commander of 27 years standing, not an inexperienced junior recruit, and CC McAinsh was not the Claimant’s superior officer or anyone whom the Claimant  
20 was incapable of challenging. There was no evidence the Claimant was especially vulnerable, or not capable of standing up for himself.

25 82. After the Claimant found out he was to be excluded from delivering additional training for the new firefighters and said *“you can’t be serious”*, the Tribunal does not accept the Implied Term was breached when SC McCutcheon replied *“I do not want you coming to the station with your Crew Manager’s head on, interfering”* and stated (when the Claimant remonstrated) that he had made his decision. The Claimant was entitled to an explanation for this decision, and got one, admittedly in robust terms.

30 83. The Tribunal does not accept that the Implied Term was breached at the 13 January 2020 meeting when (i) SC McCutcheon accused the Claimant of

forcing catch-up training on firefighters who had missed Monday evening training (ii) in response to the Claimant's denial, SC McCutcheon told the Claimant that he had been told that, and that was good enough for him. (iii) SC McCutcheon's refused to see the messages the Claimant had sent regarding organising catch-up training. What happened here was a workplace argument between SC McCutcheon and the Claimant. Unlike *Robinson v Crompton Parkinson Ltd*, there was no suggestion that SC McCutcheon was accusing the Claimant of misconduct (or anything approaching misconduct) here. The argument was collateral to the major point of dispute at the time, which was SC McCutcheon's decision to give responsibility for delivering additional training to the new recruits to the two wholetime firefighters.

84. *Words/conduct at 9 April 2020 mediation.* Both parties' representatives confirmed the 9 April mediation was not conducted on a 'without prejudice' basis such that it would be wrong for the Tribunal to make findings of fact about what others said and did at the mediation and apply those findings to determine whether there was a breach of the Implied Term. With that preface, the Tribunal approached the issue of whether there was a breach of the Implied Term at the mediation with an appropriate degree of caution, as the purpose of a mediation (at least in part) is usually to allow those present to speak honestly and candidly about what they think and feel. With that said, the Tribunal finds that what happened at the mediation was in many ways a largely non-productive repetition of the 13 January 2020 meeting, with significantly more heat than light generated. However, the Tribunal does not find that anything said to the Claimant, taken individually, was so unreasonable that it constituted a breach of the Implied Term. Looked at in the round, the 9 April 2020 mediation was not an unmitigated failure – a series of positive actions were identified and agreed – see para. 27 above. On that basis, the Tribunal does not accept that the conduct of the Respondent's other officers and agents at the mediation, taken collectively, breached the Implied Term.

85. Third, if the Tribunal is wrong to find that there was no breach of the Implied Term on either or both 13 January 2020 and 9 April 2020, the Tribunal finds that after the last breach/alleged breach of the Implied Term relied upon (9 April 2020), but before the date on which he resigned (18 November 2020),  
5 the Claimant affirmed his employment contract by (i) applying via email on 23 June 2020 against being placed on half-pay with effect from 9 July 2020 (ii) pursuant to Mr. McNeill's letter dated 6 July 2020 [70], accepting full contractual pay from 9 July 2020 (date on which he was due to go on half pay) to at least 8 October 2020, a period of approximately 3 months. An employer's  
10 duty to pay, and an employee's right to be paid, their full contractual wage entitlement goes to the heart of an employment contract. By asking the Respondent to continue to pay his full contractual wage entitlement, when the Claimant would ordinarily have gone onto half-pay following six months sickness absence, and then accepting that full contractual pay for at least 3  
15 months, the Claimant effectively asked the Respondent not just to continue to comply with the terms of his employment contract but to continue to comply with the contract terms most financially advantageous to him. In the Tribunal's judgment, that conduct constituted an affirmation of his employment contract.
86. Fourth, the Tribunal is not satisfied, and does not find, that the reason (in  
20 whole or in part) for the Claimant's resignation on 18 November 2020 was because of the aforementioned alleged breaches of the Implied Term. The Tribunal finds as a fact that by 18 November 2020 any alleged breaches of the Implied Term were no more than background, and the reason for the Claimant's resignation was in substance entirely "*forward looking*". See  
25 findings of fact at para. 50 above. In making this determination, the Tribunal is conscious that an employee's desire not to work alongside certain individuals is not necessarily inconsistent with a decision to resign because of their previous mistreatment of him. However, the Tribunal finds that in this case a distinction can properly be made between (i) the previous conduct  
30 complained of (ii) future working relationships.



87. Fifth, given the findings above, the Tribunal finds that the Respondent did not dismiss the Claimant either constructively or at all. In the absence of a dismissal, the Claimant's complaint of unfair dismissal is not well-founded and is dismissed.

5 88. Sixth, had the following issues arisen for determination, for the avoidance of doubt the Tribunal's findings would have been as follows:

a. if the Claimant was constructively dismissed because he timely resigned in response to one or more breaches of the Implied Term, the Respondent has not shown that the reason for the conduct which breached the Implied  
10 Term was a potentially fair reason for dismissal under s.98(2) of ERA 1996, hence the Claimant's dismissal was unfair;

b. if if-esto-the dismissal was for a potentially fair reason, the Claimant's dismissal for that reason was both procedurally and substantively unfair, the Claimant was not guilty of culpable conduct causing or contributing to  
15 his dismissal, and there was no prospect of the Claimant being fairly dismissed had a fair dismissal procedure been applied;

c. the Tribunal would have made a basic award for unfair dismissal but not made a compensatory award for two reasons:

20 i. it is clear that by 18 November 2020 there had been an irretrievable breakdown in the necessary relationship of trust and confidence between the Claimant (a firefighter) and several of his firefighter colleagues at Tillicoultry First Station in a job which, because of its potential life-threatening consequences, required the utmost  
25 degree of trust and confidence between frontline firefighting staff;

ii. the Claimant accepted he made no attempt to mitigate his losses arising from the termination of his employment on 18 November 2020 by looking for alternative employment. Even if appropriate alternative employment had been available to him, he would not  
30 have applied for it. In these circumstances, the Tribunal would

have found that the Claimant breached his duty to mitigate his loss arising from his dismissal (s.123(4) ERA 1996).

89. Seventh, for the reasons already given, the Claimant's complaint of wrongful dismissal is not well-founded and is dismissed. It is not in dispute that the  
5 Claimant resigned without notice on 18 November 2020. As of 18 November 2020 (i) the Respondent had not by its conduct breached the Implied Term in his employment contract (ii) by that date the Claimant had affirmed his employment contract by requesting and accepting full contractual pay for a period of at least 3 months in circumstances where he would ordinarily have  
10 gone on to half-pay (iii) the Claimant did not resign in response to any (alleged) breach of the Implied Term.

15 Employment Judge: Antoine Tinnion  
Date of Judgment: 11 October 2021  
Entered in register: 18 October 2021  
and copied to parties