

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100219/2017 Hearing in Portree Sheriff Courthouse on 13, 14 and
15 November 2017

Employment Judge: M A Macleod (sitting alone)

James Cameron

Claimant
In Person

Scottish Hydro Electric Power Distribution plc

Respondent
Represented by
Mr R Bradley
Advocate

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claim of constructive unfair dismissal fails and is dismissed.

REASONS

Introduction

1. The claimant presented a claim to the Employment Tribunal on 18 January 2017, in which he complained that he had been unfairly constructively dismissed by the respondent.
2. The respondent submitted an ET3 response form in which the claimant's claims were all resisted, and dismissal was denied.

3. A hearing was fixed to take place in Portree Sheriff Courthouse on 13, 14, 15 and 16 November 2017, although as it turned out, the final scheduled day was not required as the case concluded on 15 November 2017.
4. The claimant appeared on his own behalf at the hearing. The respondent
5 was represented by Mr Bradley, Advocate.
5. A joint bundle of documents was presented to the Tribunal and relied upon by both parties during the course of the hearing. Additional documents were added, without objection, as the hearing proceeded, and with the permission of the Tribunal.
- 10 6. The claimant gave evidence on his own account.
7. The respondent called as witnesses the following:
 - Matthew Jamie Allan, Human Resources Manager for Networks;
 - Alexander John Murray, Team Manager, Kyle of Lochalsh;
 - Neil Hugh Wilson, Head of Region for North Caledonian Region; and
 - 15 • Simon Angus Latton, Inspection and Maintenance Manager for the Highlands and Islands Region.
8. At the outset of the hearing, Mr Bradley advised that there may be an issue in relation to the precise identity of the respondent. During the hearing, he sought to establish further details from his client, but without
20 success. However, Mr Bradley undertook that in the event of an award being made against the respondent, his client would honour it and not seek to avoid liability by reason of the wrong name being applied to the respondent's company in any Judgment of the Employment Tribunal.
9. Based on the evidence led and the information presented, the Tribunal
25 was able to find the following facts admitted or proved.

Findings in Fact

10. The claimant whose date of birth is 28 May 1968, commenced employment with the respondent on 3 March 2008 as a trainee jointer, based at the Kyle of Lochalsh depot. He was required to work across a wide area from Torridon to the southern half of the Isle of Skye. His training lasted approximately 2 years. His role developed from that of a live jointer to that of a linesman. Between his two roles, the claimant required to attend at domestic and commercial properties to connect and disconnect electrical supplies, carry out live and dead work, cabling and underground network systems, and overhead lines work.
11. The manager of the Kyle depot was Alexander (Sandy) Murray, and he was the claimant's direct line manager.
12. On 7 October 2014, the claimant started a period of sickness absence from work. He wrote to Neil Wilson, Operations Manager based at the Argyll and West Highland Depot in Oban (51), a letter received by Mr Wilson on 28 October 2014. In that letter he said he was too anxious to speak directly to him, but he described himself as *"Being stressed and suffering Anxiety to the point of not being able to cope with Daily duties, including Work."* He went on: *"My problems of both Work and home life became just a bit too much I guess...So with due respect to you, Lucy and the Staff at SSE Oban and Kyle, please bare with me, as basically I get my shit together, to Confront What is basically a headach of events that, Borderline Discrimination, Bullying and Vulger Displays of Power, there are seriouse matters and weather I am disillusions or Correct it brings great stress and Anxiety above all concerned. "*
13. Mr Wilson replied to that letter, on 29 October 2014 (52). He acknowledged that the claimant felt that it would be difficult to speak to them, but wished to meet with him as soon as he felt able to do so. The purpose of the meeting would be, as he said, to understand the claimant's current absence further and discuss the possibility of a return to work. He also asked that the claimant write to him to provide more

information as to the allegations of “borderline discrimination, bullying and vulgar displays of power” described in the letter, including who the allegations concerned. He then offered the claimant the opportunity to have access to counselling services.

- 5 14. On 4 November 2014, the claimant met with Neil Wilson in the depot at Kyle of Lochalsh. Mr Wilson took notes of that meeting, at which he and the claimant attended (53). The notes were signed by the claimant as accurate.
- 10 15. In the meeting, the claimant described an extensive record of absence due to illness. He had had problems with a frozen shoulder, which then led to depression, each of which caused him to be absent from work for approximately 4 to 6 weeks. When he returned to work, he acknowledged that his manager had kept an eye on him and told him to “watch his shoulder”. After a period of good attendance, however, he explained that his attendance deteriorated again, this time “primarily due to the attitude of the manager”.
- 15 16. Mr Wilson noted a number of points raised by the claimant at the end of the meeting:
- *“difficulty in obtaining safety equipment*
 - *Difficulty in obtaining tools and equipment*
 - *Not treated with respect*
 - *Overbearing, domineering management style*
 - *Bullied at work - verbally/psychologically*
 - *Manager was very critical about SEAR being raised and stopped it”*
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- 25 17. A SEAR is a safety report. The claimant acted for a period as a safety representative, and if he considered that there were a safety concern which should be raised, it would be done in a SEAR.

18. On 11 November 2014, the claimant sent an email to Mr Wilson (57), in which he said that he was "at a little ease at" the meeting which they had had, that the problems he had encountered for some time were now in his hands. He said he was trying to collate and duly process "4 yrs of being discriminated against, and all manor of bully boy tact, verbal abuse, so on so forth". He suggested a number of witnesses who could say something about this matter, including Lachie Innes, Doikkan, Johnnie Banks, Bruce Cameron and Donnie Gillies. The claimant then described the financial difficulties he was enduring as a result of his absence from work and the lack of pay as a consequence.
19. Matthew Allan, Human Resources (based in Perth) was forwarded this email by Mr Wilson, and responded on 19 November 2014 (57). He referred to having spoken to the claimant that day, and confirmed that as agreed this would be processed as a formal grievance, copying the procedure to the claimant with the email. He went on: "*When you see your GP this afternoon you could ask them if you may be fit for alternative duties if they did not report into your line manager. If your new fit note confirms this we could then explore if any such suitable duties exist. This would be on a temporary basis whilst the grievance process is undertaken and may be at a different work location.*"
20. On 20 November, the claimant emailed Mr Allan (59) enclosing a copy of a fit note from his GP. In that note, the GP advised that the claimant, having been assessed on 19 November, was suffering from work related stress. It was said then that he may be fit for work taking account of the advice that followed, namely "workplace adaptations", and in particular, as the GP wrote on the note, "Fit to work depending on reallocation of workplace base". This was to be the case for 2 weeks.
21. Mr Wilson suggested to the claimant that he could return to work in Portree, rather than in Kyle, in line with the recommendation of his doctor, and the claimant accepted that. He returned to work there before the end of the November. In evidence the claimant confirmed that he was happy

to do so, as he had expired his sick pay entitlement and was glad to be earning again.

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22. In the meantime, on 25 November, the claimant wrote to Mr Allan setting out further information and detail on his grievance (62ff), in which he nominated a number of witnesses whom the respondent should consult in order to support his grievance.
23. A grievance meeting was scheduled to take place on 2 December 2014, in the Inverness depot (65), in accordance with Stage 2 of the respondent's Grievance Procedure.
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24. On 1 December, the claimant wrote again to Mr Allan (69) to confirm that he would be attending the meeting on his own, as he was not a member of a trade union, but his brother was to drive him to the meeting. He said he was feeling very stressed at the thought of the meeting, and about the fact that while he had been placed to work in Portree, he felt that the men
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- there would know his situation, and would ask him many questions. Mr Allan replied to this message to assure him that he should try not to worry about the meeting, as it was a chance for him to put across his concerns and was potentially just the first stage of the investigation into his grievance.
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25. The grievance meeting took place on 2 December 2014, chaired by David Inglis, Lead Project Manager, Power Distribution, and attended by Douglas Kew, of HR, by video link from Reading. Notes were taken of that meeting, and handwritten and transcribed copies of those notes were produced at 71ff. The claimant set out his concerns at length to Mr Inglis.
- 25
- Although he felt very anxious, he acknowledged that Mr Inglis did his best to make him feel comfortable in the meeting.
26. Following the grievance meeting, Mr Inglis conducted a number of interviews with witnesses, copies of the notes of which appeared at 88ff. Mr Kew wrote to the claimant on 24 December 2014 to advise that due to
- 30
- annual leave the conclusion of the grievance had been delayed, and apologised for the delay (161).

27. Mr Inglis wrote to the claimant on 16 January 2015 to confirm his decision on the grievance (162ff). He set out, in tabulated form, his decision in respect of each point in the grievance.

5 28. With regard to the allegations that Mr Murray had acted in a bullying manner towards the claimant, Mr Inglis decided that the evidence was inconclusive, and did not uphold the grievance. Mr Murray denied having acted in this way, and no support was obtained from witnesses who were questioned.

29. At the end of the letter, Mr Inglis said:

10 *I asked you what you were seeking through raising the grievance and you confirmed that a) you did not want to continue working from Kyle, b) that you would like to have the correct tools and PPE [personal protective equipment], and c) that you would like Sandy to acknowledge that you are trained and qualified.*

15 *You confirmed in the meeting that you would be open to try the suggestion of mediation between you and Sandy to try to put any outstanding issues to bed, but that you would find this difficult.*

20 *From my investigations I have found no evidence that you have been bullied/harassed or treated differently from your colleagues. All of your colleagues and your Manager have also confirmed that they have no issue with you personally. In overall conclusion I find that your grievance is not upheld.*

25 *It is my recommendation that you return to work at Kyle depot reporting into Alexander Murray on Monday 2nd February 2015. I feel that a mediated meeting between you and Alexander may be beneficial, therefore if you would like this to happen please let me know by Monday 26th January 2015..."*

30. Mr Inglis confirmed that the claimant had a right to appeal against the outcome of the grievance.

31. The claimant was disappointed that his grievance was not upheld, as he felt that Mr Inglis had decided that he had "made the whole thing up". However, he did think that a mediated meeting was a good idea if he was going to return to work in Kyle. He gave some thought to leaving the respondent's employment at that point, but decided not to do so.

32. On 27 January 2015, the claimant emailed Mr Wilson (168A). In that, he said:

"Hello Neil,

To further add to an email I sent to Douglas Kew in which I've put forward that I can not return to Kyle. To work under Alexander Murray and feel that resigning is my only alternative which is I feel unfair I am currently seeking advice on what course of action I should take.

I am currently off sick with an ear infection and stress hopefully you can understand my position here, that I feel very stressed at the decision of the grievance to which I feel and the citizens advice feel was very one sided. However I felt that there was no alternative given to me to assess or agree on, other than resignation, with advice and reflection over the weekend I feel that I have to gain further advice before making any solid decision of my employment with SSE.

In respect to yourself for being understanding at the very beginning of this grievance and taking the time to here me out I feel that you will understand why I cannot return to Kyle and Sandy. I will forward my sick line to Oban and any further information I find from citizens advice and The Equality Advisory support services.... "

33. On 6 February 2015, the claimant submitted an email in which he intimated his wish to appeal the outcome of the grievance.

34. Shona Williams, of the respondent's HR department, wrote to the claimant on 23 February 2015 to confirm receipt of the appeal, and to advise that a hearing would take place on 4 March 2015 in Inverness, chaired by David McKay, Director of Transmissions Projects (North).

35. However, on 23 February 2015, the claimant wrote to Ms Williams (174B):

“Dear Shona,

Hi and thanks for your email, please could you cancel meeting, as I have met with Neil Wilson area manager for argyle and west and we have agreed to have a meeting with Alexander Murray my manager on wed 25th to chat and sort this out so I may return to Kyle depot to continue my work with SSEPD in Kyle. I sent Neil an email this morning I’m unaware at moment if he has seen it however. Thanks James”

10 36. Ms Williams replied that day (174A) to acknowledge the email and to confirm that she would cancel the meeting accordingly, which she did.

15 37. Mr Wilson found it very difficult to contact the claimant and secure a response. However, it was possible to arrange a meeting, in Kyle, between himself, the claimant and Mr Murray. Mr Wilson met first with the claimant alone, then with Mr Murray alone, and finally met with the claimant and Mr Murray together. The conclusion of those discussions was that the claimant was willing and content to return to work in Kyle under the management of Mr Murray.

20 38. A second meeting between the three individuals took place in Fort William. It is not clear from the evidence when this meeting was arranged, nor when it was convened, as none of the participants could recall the details or the dates in evidence, but the meeting had the same outcome. Both meetings were amicable and constructive, and Mr Wilson considered that following them there was no ongoing issue in the relationship between the claimant and Mr Murray.

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39. The claimant therefore returned to work at Kyle of Lochalsh from 25 February 2015.

40. On 3 April 2015, Aaron Burton of HR wrote to the claimant (177) to invite him to attend a formal sickness absence meeting, stage 1, on 15 April 2015 in Perth. It was noted in the letter that the claimant had had a number of absences during the previous 12 months, namely:

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- 21 January to 25 February 2015 - 36 days (stress/tension);
 - 5 January to 6 January 2015 - 2 days (sickness) ;
 - 7 October to 2 November 2014 - 27 days (stress/tension) ; and
 - 11 June to 13 June 2014 - 3 days (sickness).

io 41. The purpose of the meeting was to confirm that the information about the claimant's sickness record was correct, to discuss any reasonable adjustments which may be required and to set a review period and targets for improvement in attendance levels as appropriate.

15 42. That meeting took place on 15 April 2015, chaired by Lucy Shearer, Performance Manager. Following that meeting, Ms Shearer wrote to the claimant (179) to summarise the discussion.

43. In the course of that letter, it was noted that:

20 *"...You explained that over that past year or two you have experienced a variety of traumatic events including several bereavements of close friends and family which affected your mental health. You advised that you did have an analysis completed and were advised that your emotions had been heightened due to the personal circumstances.*

You advised that you are feeling better and in general keep fairly well and have no other underlying concerns.

25 *We discussed the support available at work and you confirmed that Sandy has been supportive and in hindsight, you should have spoken to him earlier regarding your personal issues. You also advised that you had previously been a little naive in terms of the support available*

through SSE but it was positive to hear that you are aware of what is available should it be required.

In the past 12 months you have had 4 occasions of sickness absence over a total of 68 calendar days.

5 *Following our discussions, I confirmed that your absence levels have remained excessive; this is despite being issued the previous Improvement Notice. In the circumstances I issued you with a Written Improvement Notice that unless you achieve and sustain a significant improvement in your sickness record over the next 12 months, further*
10 *formal action may be taken, in line with this Procedure, which may result in your dismissal.*

During the period of this notice, you are required to achieve a significant and sustained improvement in your absence levels over the next 12 months... ”

- 15 44. The claimant was also notified of his right to appeal against this decision.
45. By the date of this letter, there had been a significant restructure exercise, and the claimant was now managed by Simon Latton, as second line manager, based in Portree. Mr Murray remained his first line manager.
- 20 46. In February 2016, Mr Latton had cause to seek advice from Mr Allan in respect of a further absence by the claimant. Mr Latton had found it impossible to make contact with the claimant, despite leaving messages for him to respond. Mr Allan suggested, on 25 February, (185) that Mr Latton provide the claimant with details of the Employee Assistance Programme, confirm to him that a referral to Occupational Health would be taking place, that when he returns to work it would be in Kyle and that
25 the respondent would not reinvestigate old allegations which had already been investigated. However, he should be advised that if he had new concerns he should put them in writing.

47. On 22 March 2016, Mr Latton wrote to the claimant (192), noting that he had been absent from work from 22 February 2016 for sickness reasons, and that his fit note stating he was unfit for work due to work related stress had expired on 7 March 2016. He pointed out that the respondent's policy stated that no sick pay would be paid for any period of absence not covered by a self-certificate or a fit note. He then said that he was concerned that he had tried to call the claimant on a number of occasions and left voicemail messages, but had not heard back from him.

48. The claimant did not make any contact with Mr Latton following that letter, and so Mr Latton wrote again, on 13 May 2016 (194) (though the letter erroneously bore the date of 13 April 2016) once more pointing out that he had not heard from him, and proposing that he would visit him at home on 20 May 2016 at 1600 in order to discuss the matter more fully.

49. On 19 May 2016, the claimant emailed Mr Latton (201), in which he said:

"Dear Simon

In respect to your letter and for the benefit of the company, thanks for the update, however I have left messages dates and times will be made available if needed I have a further sick line to update the records for the company that I will forward to you when I can as it is in portree at this time.

Please understand I have been on the understanding after our meeting in portree office that I thought that it was clear that I feel that I cannot return to Kyle depot to continue my duties as an overhead linesman/jointer. For obvious reasons in respect to my previous Grievance with Sandy. And my continued experience of which I found little difference which I'll explain further when or if appropriate to do so.

HR as I remember advised you that I should not follow on from my previously quashed Grievance. So I'm stuck as in what then? I'm at an understanding that perhaps this was partly my fault on not pushing on

with this and I should have contacted the company's HR. But to be honest I can't see what difference it will make I feel very strongly about my continued work. Not in Kyle.

5 *Yours sincerely,*

James Cameron"

50. Mr Latton was unable to visit the claimant on 20 May as one of his staff sustained an injury while at work and he had to take the employee to hospital to be seen. He spoke to the claimant to advise that he would be
10 unable to visit.

51. On 24 May, the claimant wrote to Mr Latton (206/7) to say he was sorry they could not meet up on the Friday (20 May) due to the incident at work. He apologised for the delays in his communications. He went on:
15 *"However I thought I'd express my thoughts on work, as I hope you remember that in March I stated that due to my own health and wellbeing, that I can not return to Kyle depot to work, I feel that in no time at all I would be at the same place I am now, I stress that for 6 years I've been trying in vain to reach a conclusion of my wage level equipment needs and training to further my career with the hydro, I've had including
20 yourself three different area managers. I've asked each one about the same things, with no answer or we're looking into it. As time ticks on this is getting no where I am willing to work but not from Kyle feel that is impossible for me, please understand that I'm at a loss as what to do, as this stems from all the previous problems with Kyle which you told me HR
25 would not look at. What I am willing to do is return to work, not Kyle, a confirmation of what I should be paid for two crafts, standby retainer, so on."*

52. Mr Latton replied that afternoon to ask if he could catch up the following day as he could meet him at any time convenient. The claimant replied
30 the next afternoon (206), and said that following a discussion with his

5 doctor, "...I'm at a conclusion with what's happening with me it might be best to resign from work that I can no longer function as an operative in Kyle with stress, anxiety and frustration, I would fear lack of concentration at or during procedure might then by my own hand cause harm to myself or worse yet another, or customer that would haunt me. I know your trying with the best of efforts I might add and with respect to yourself I know you're a good fellow and that you are trying hard to rectify an ongoing situation with all due respect I feel has been dumped on you sorry mate. I wish things were different perhaps 6 years ago we could have done with your efforts to help with which I know the lads are in appreciation off at the yard. Anyway Simon I'm at a time that I need to make some sort of decisions to what to do next bare with me I will phone on Friday and email you."

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53. Mr Latton wrote to the claimant on 1 June 2016 (208) proposing a meeting on 6 June 2016 at the Portree depot, and apologising for his having to postpone the meeting on 20 May. He noted that the claimant had attached a fit note but said that the company still required a note to cover the period between 8 March and 23 May, during which he was absent without authorisation.

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54. The claimant attended that meeting on 6 June 2016 with Mr Latton. Although he was reluctant to return to work in Kyle, the claimant accepted that he would do so. The claimant wrote to Mr Latton on 7 June reflecting on the meeting (209). He reiterated some of the concerns he had about his work and the way he had been treated, and then said:

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"I know that there have been problems that perhaps could have been dealt with a bit better on my behalf my own lack of communication but being human I'm not invincible kind of stuck my head in the sand. My Doctors quote I've to see my doctor and get an approval for me to return to work that I will notify you with asap but as I've said feel that there was a large gap in communicating with senior staff to relate some of my concerns and general direction of my career in SSSEPD under SSEUS staff, I understand due to area changes and a host of reasons that things

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5 *can slide ie Authorisations, training, so on, somewhat more of consequence rather than hold my management at fault I hope that Sandy my manager probably understands some of my woes are justified as they are not actually directed at him or yourself or anyone in particular. I love my job take a sense of pride in my crafts and believe that I would be better back to work than not there at all we all loose out then do we not."*

55. From then until 27 June, Mr Latton continued to try to contact the claimant, but without success. On 27 June, he wrote to the claimant (212ff) and attached a letter dated 24 June. In that letter, Mr Latton said:

10 *"I write in reference to your absence from work since 22 February 2016 for sickness reasons.*

It was good to finally meet with you on 7 June 2016 in the Portree Depot. At the meeting you indicated that it was your intention to return to work in Kyle.

15 *However, I am concerned that despite your assurances I have been unable to contact you since that day. This is again despite telephoning you, leaving you voicemails asking for you to call me back and emailing you.*

20 *Your absence has now entered its fourth month and I am keen that we work together to facilitate your return to work. To this end I would like to refer you for assessment by the Company's Occupational Health provider.*

In relation to this I would like to visit you at home on Friday 1st July at 3.00pm.

25 *I look forward to meeting you on Monday. If this date, time or location is unacceptable, please contact me to re-arrange.*

Yours sincerely,

Simon Latton."

56. Mr Latton met with the claimant on 1 July 2016, and took handwritten notes, which he showed to the claimant at the end of the meeting (214). The claimant read and signed them as accurate.

57. From the meeting, it was agreed that three things needed to happen on his return to work, namely an occupational health referral, an informal sickness process and a potential disciplinary procedure. The reason for the potential disciplinary procedure was that the claimant had been off sick for a very long time, and had failed to keep in touch with his manager, and Mr Latton felt it was only fair to let him know that this matter would require to be addressed on his return to work.

58. On 12 July 2016, the claimant sent an email to Mr Latton (215) bearing to forward a previous email, which had no address line in it, and which was dated 1 January 1970. It was agreed that the email was sent on 12 July 2016.

59. The email read:

"Dear Matthew [understood to be a reference to Matthew Allan]

I'm writing to you on the outcome of my meaning (sic) with Simon, at Portree Depot a week ago. Firstly I can only thank Simon for his efforts in this Long Drawn out occurrence, of which I have stressed over for some time and though I felt that I could return to Kyle I have come to a conclusion that I am better not to Return to Kyle and therefore resign my position at Kyle and SSE. I feel that the damage is done time to move on, I have been ill over it, And I'm still recovering, feel that it would be best to move on as there is no where else to go as stated.

However I thank Simon for his open friendly understanding of this and regret a little that I had to include someone I know aside from our workplace in this task. And did not fail me in anyway thank you.

Yours sincerely,

James Cameron"

- 5 60. Mr Latton forwarded the email to Mr Allan to ask for his advice. Mr Allan wrote to the claimant on 27 July 2016 (216). He said he had wished to speak to the claimant about his email, but had been unable to make contact with him. He wanted to confirm that this was a decision taken following due consideration. He also wanted to confirm the date of his resignation.
- 10 61. The claimant did not reply to this email, and so Mr Allan wrote again on 5 August 2016 (216) confirming that */ have no option but to assume that your intention is to resign giving your contractual one month's notice. This would mean your last day of employment with SSE would be 11 August 2016."*
62. The claimant's employment ended on 11 August 2016.
63. Amy Fraser, from the HR Service Centre, then wrote to the claimant more formally confirming the effect of the claimant's resignation (218).
- 15 64. Following the termination of his employment, the claimant was unable, to the date of the Tribunal hearing, to obtain alternative employment. He continued to suffer from ill health, and in particular from depression. His General Practitioner, Dr Whitney, submitted a letter dated 17 March 2017 (220), which confirmed that the claimant had commenced taking Sertraline in June 2016, which he felt had assisted him. However, 20 *"...with the situation at work continuing to be an ongoing pressure with the pending tribunal, his mood hasn't been noted to significantly have improved through this time. He has been reviewed approximately once each month for the issue of prescriptions and also further sick lines... I very much hope that Mr Cameron will be able to move on with his life, following this tribunal. He has proactively tried to improve his mental health seeking out resources and considering mindfulness techniques. "*
- 25 65. The claimant applied for and was awarded Job Seekers' Allowance in July 2017, having thitherto received Employment Support Allowance from 30 August 2016 at £73.10 per week (277). The claimant has made

reasonable efforts to obtain alternative employment, when fit to do so, and thereby to mitigate his losses, but without success so far.

Submissions

5 66. The claimant was offered the opportunity to make a submission on his own behalf, but elected not to do so, having been assured that he would suffer no disadvantage.

67. Mr Bradley, for the respondent, made a short submission, which is summarised briefly here.

10 68. He submitted that in order to determine a claim of constructive unfair dismissal, the Tribunal must examine the crucial question of why he resigned. The claim, he said, should be dismissed because when one examines the circumstances of the resignation they are not such as to justify resigning.

15 69. Mr Bradley set out the legal framework, including reference to the well-known authorities, and then addressed the claimant's claim itself.

20 70. He submitted that the claim was based on an alleged breach of the implied term of trust and confidence between employer and employee, and that claim requires the claimant to demonstrate that the employer has conducted itself in such a way as to be calculated to destroy the relationship of trust and confidence.

25 71. In the resignation email (215), it is possible, he argued, to extract some reasons for his resignation. One reason was that he could not return to Kyle due to the damage done, and that related to the possible impact upon his health, and also because, in his evidence, he said he felt strongly about an apprentice being bullied. The evidence does not prove, he submitted, that there was conduct, looked at objectively, on the part of the employer which was calculated to have the effect of destroying trust and confidence between them. It is quite hard to see what conduct could

have destroyed that relationship. It is also clear that there was a link to the previous grievance, which was resolved by March 2015.

5 72. The claimant has not alleged, he argued, that the grievance was not properly investigated nor heard. The claimant underwent mediation as part of the resolution of the grievance. Even if the claimant proved that the conduct forming the basis of the grievance actually took place, that was insufficient to amount to a repudiatory breach of contract by the respondent. In any event, if the link were to the previous grievance, the claimant has affirmed any breach which occurred. He worked without
10 complaint for over a year, and therefore must be taken to have waited too long before resigning. Mr Bradley pointed out that the claimant had resigned in January and then retracted it, and therefore made his mind up to come back and work in Kyle with Mr Murray.

15 73. With regard to compensation, Mr Bradley submitted that if the Tribunal were against him on the merits of the case, it should find that the claimant was unfit to work from August 2016 until May 2017, and that after 9 September 2015 he was no longer entitled to sick pay. Accordingly, there was no loss after termination of employment.

20 74. In addition, the claimant is not entitled to the training costs he seeks as they are not an expense reasonably incurred in consequence of the termination of his employment.

75. Mr Bradley therefore submitted that the claim should be dismissed.

The Relevant Law

25 76. Section 95 of the Employment Rights Act 1996 ("ERA") sets out the circumstances in which an employee is treated as dismissed. This provides, inter alia

“(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only 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"

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77. Where a claimant argues that there has been constructive dismissal a Tribunal requires to consider whether or not they had discharged the onus on them to show they fall within section 95(1)(c). The principal authority for claims of constructive dismissal is **Western Excavating -v- Sharp [1978] ICR 221.**

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78. In considering the issues the Tribunal had regard to the guidance given in **Western Excavating** and in particular to the speech of Lord Denning which gives the "classic" definition:

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"An employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged."

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79. The Western Excavating test was considered by the NICA in **Brown v Merchant Ferries Ltd [1998] IRLR 682** where it was formulated as:

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"...whether the employer's conduct so impacted on the employee that, viewed objectively, the employee could properly conclude that the employer was repudiating the contract. Although the correct approach to constructive dismissal is to ask whether the employer

was in breach of contract and not did the employer act unreasonably, if the employer's conduct is seriously unreasonable that may provide sufficient evidence that there has been a breach of contract."

5 80. What the Tribunal required to consider was whether or not there was evidence that the actions of the respondents, viewed objectively, were such that they were calculated or likely to destroy or seriously damage the employment relationship.

10 81. The Tribunal also took account of, the well-known decision in Malik v Bank of Credit & Commerce International SA [1997] IRLR 462, in which Lord Steyn stated 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 trust and confidence
15 between employer and employee."

82. It is also helpful to consider the judgment of the High Court in BCCI v Ali (No 3) [1999] IRLR 508 HC, in which it is stressed that the test (of
20 whether a breach of contract amounts to a breach of the implied term of trust and confidence) is "whether that conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after discovering it and can walk out of his job without prior notice."

83. The Tribunal also took into account the Employment Appeal Tribunal
25 decision in Wright v North Ayrshire Council UKEATS/0017/13/BS from June 2013. In that case, having examined the line of authorities relating to claimants who resign for more than one reason, Langstaff J cautioned against seeking to find the "effective cause" of the claimant's resignation, but found that Tribunals should ask whether the repudiatory breach
30 played a part in the dismissal.

Discussion and Decision

5 84. The Tribunal must consider the reason for the claimant's resignation, in determining whether or not he was constructively dismissed, but as part of that process must carefully review all of the circumstances of the case in order to decide whether or not the respondent was guilty of a repudiatory breach, or a course of conduct amounting to a repudiatory breach, of the claimant's contract of employment.

10 85. The best evidence of the reasoning behind the claimant's decision is that set out in the email in which he resigned. He said in that email (21 5) that he could not return to work in Kyle because of the likely damage to his health.

15 86. In his evidence before the Tribunal, the claimant spoke about his concerns relating to the treatment of an apprentice employed at Kyle, and in particular to his anxiety that the apprentice was being bullied in a manner which he recognised from his own experience.

20 87. I found the claimant generally to be a credible witness. He approached the rather stressful task of representing himself in a positive and helpful manner to the Tribunal, and did not appear to be dissembling or being in any way untruthful in his factual evidence.

25 88. However, the resignation email of 12 July 2016 is powerful evidence that the reason why the claimant did not wish to return to work in Kyle was because of the impact which he thought that that would have on his health. He makes no reference in that email to any breach of contract in response to which he was resigning, though of course a claimant without legal knowledge might not know to be so specific in his language. However, he does not make any reference to conduct on the part of the employer when telling them that he wishes to resign. In fact, his only reference to his employer's conduct is complimentary, when he thanked
30 Simon Latton for his open friendly understanding.

- 5 89. Having considered all of the evidence, I have reached the conclusion that the claimant's resignation was caused by his general dissatisfaction at the outcome of his grievance in January 2015. He suggested in response to that that he wished to resign (168A), but he did not in fact do so. At this point I should observe that I do not accept the respondent's characterisation of this email as a resignation on the part of the claimant. He does indicate that at that point he felt that he had no alternative but to resign, but said he felt he had to gain further advice before making any "solid decision of my employment with SSE". That solid decision to
- 10 resign did not emerge, and in fact the claimant decided to take up the offer of a mediated meeting with Mr Murray.
- 15 90. The claimant persisted in believing that his grievance was not upheld, and in a sense that was a correct interpretation of its outcome. However, that does not give the full picture. What the respondent did was find that there was no evidence to justify a conclusion that Mr Murray had been guilty of bullying the claimant, but they also acknowledged, very fairly in my judgment, that the claimant was sincere in expressing anxiety about the ongoing relationship with Mr Murray and suggested workplace mediation as a means of resolving that outstanding concern.
- 20 91. Once the claimant agreed to undergo the mediation process, he took a positive approach, and the outcome of the two meetings held with Mr Murray and Mr Wilson was that he agreed to return to work in Kyle under Mr Murray's management. That is one important point; the other is that thereafter he continued to work under Mr Murray's management for
- 25 a year or more without any further complaints about him, and without raising any further grievance or concern about the way in which he was treated.
- 30 92. It is therefore very difficult to understand what caused the claimant to resign when he did, since no further actions were taken against him by Mr Murray amounting to bullying or harassment (by his own account). The respondent did seek to manage the claimant's absences but that was a different process.

93. The claimant did refer to the treatment of an apprentice in the depot at Kyle. That was not a matter which directly concerned him, and in my judgment there was no act which could be construed as conduct repudiatory of the employment contract between himself and his employer in this issue, about which, in any event, the Tribunal heard very little evidence and therefore on which no firm findings could be made.

94. It is my judgment that the respondent did not at any stage act in a manner calculated, or likely, to have the effect of repudiating the contract between the parties and destroying the relationship of trust and confidence between them. The original grievance was taken very seriously; was investigated by an independent manager, whose investigation was disclosed to the claimant in the form of the statements taken in writing from the various witnesses; and a decision was issued following lengthy and careful consideration of all the points raised. The respondent then acknowledged the need to take account of the serious reservations of the claimant in working again with Mr Murray, and offered him the opportunity to participate in a voluntary mediation process, wherein they met together and resolved the issues between them.

95. The mediation process was, in my judgment, a reasonable step taken in the circumstances, and resulted in an outcome which was creditable to all concerned, including the claimant, because of their willingness to engage with each other in a constructive manner. The claimant agreed to return to work in Kyle, withdrew his grievance appeal (before the matter was resolved) and engaged in a successful mediation process with his manager, such that he was able to return to work with him and to do so without further incident for over a year.

96. In my judgment, the evidence points clearly to the conclusion that there was no repudiatory breach of the contract of employment by the respondent in this case. Even if the grievance outcome had amounted to such a breach - and I have concluded firmly that it did not - I would have accepted Mr Bradley's submission that the claimant, by continuing to

work without further protest under Mr Murray for a period of over one year had affirmed the breach in any event.

5 97. I found the respondent's witnesses to be credible and reliable in their evidence, and further concluded that they were acting, at all times, in a constructive and positive manner towards the claimant. The claimant's attendance record was clearly a matter of serious concern to them, and they acted upon that eventually. In my judgment, they would have been justified in acting much earlier to take action against the claimant in respect of his very poor attendance. In addition, the claimant was guilty
10 over long periods of failing to communicate with his employer, and had absences which were for some time unauthorised without medical certification. His failures in this regard would have amply justified his dismissal at a much earlier stage, in my judgment, but the respondent sought to give him the benefit of the doubt at every turn.

15 98. In my judgment, this employer not only did not breach the claimant's contract of employment, but demonstrated considerable patience and good faith in its dealings with him.

20 99. In the absence of any basis upon which it can be found that the respondent breached the claimant's contract of employment, it cannot be said that the claimant was justified in the circumstances in his resignation, and in any event, there is no basis upon which the Tribunal could conclude that the claimant's resignation was offered in response to any such breach, on the evidence before me.

25 100. Accordingly, I have come to the conclusion that the claimant was not constructively dismissed, and therefore that his claim before the Employment Tribunal must fail, and be dismissed.

30 101. I should add my thanks to both parties for the manner in which this case was conducted. The claimant clearly felt very strongly and deeply about his treatment, but conducted himself with restraint and dignity, for which the Tribunal commends him. Mr Bradley for the respondent was entirely fair and professional in his dealings with both the Tribunal and the

claimant, and provided considerable assistance in ensuring that a hearing which could have encountered some difficulties ran smoothly throughout, and again he is to be commended for this approach.

5 Employment Judge: Murdo Macleod
Date of Judgment: 12 December 2017
Entered in register: 13 December 2017
and copied to parties

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