EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Mr Kio Clarke-McKnight

Respondent: Frencon Construction Ltd

Heard at: Croydon (London South Tribunals) **by** CVP

On: 10th October 2021

Before: Employment Judge Clarke

Appearances:
For the Claimant: In Person
For the Respondent: Mr Munro (Consultant – Peninsular)

WRITTEN REASONS

Introduction

1. The Claimant was employed by the Respondent as an Assistant Site Manager from 30th October 2017 until his dismissal on or after 13th February 2020 (the date is disputed, further details are set out below). The Claimant notified ACAS under the early conciliation procedure on 16th March 2020. The ACAS certificate was issued on 16th March 2020.

2. By a claim presented to the employment tribunals on 17th March 2020 the Claimant complained that his dismissal was unfair and claims compensation. His primary grounds for asserting that the dismissal was unfair are: (1) procedural unfairness in the process and (2) the dismissal was substantially unfair on the facts. He also relies on 2 acts of the Respondent subsequent to 13th February 2020, which led to a loss of trust and confidence, namely:
   (i) The Respondent making an approach to his GP for medical information without his consent; and
   (ii) The Respondent blocking access to his work account during his period of notice/sick leave.

3. The Respondent resists the claim by a Response submitted on 17th July 2020 in which it is asserted that the Respondent initially dismissed the Claimant on 13th February 2020, but that following the Claimant's appeal against the dismissal, on 5th March 2020 the decision to dismiss was overturned and the Claimant was notified that he was re-instated with immediate effect. The Respondent asserts that the effect of this is that it is as if no dismissal in fact occurred. Further, that the Claimant subsequently resigned on 6th April 2020.

4. The Respondent denies that the Claimant was unfairly dismissed, or that it breached the Claimant's contract of employment or acted in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent.

5. The Respondent further asserts that any breaches by the Respondent were waived by the Claimant and that he is not therefore entitled to rely upon them. Alternatively, the Respondent asserts that the Claimant was fairly dismissed by reason of his conduct, namely serious negligence of his duty and the Respondent acted reasonably in treating that reason as sufficient to dismiss the Claimant.

6. By e-mail dated 29th January 2021 the Respondent made an application to strike out the Claimant's claim under Rule 37(1) of the Tribunal Rules on the grounds that the Claim has no reasonable prospects of success. Alternatively, the Respondent asks that the Tribunal make a deposit order on the basis that the claim has little reasonable prospects of success.

7. A 2 day hearing listed on 8th and 9th April 2021 was postponed and various case management directions have been made.

4. The hearing of the Respondent's application to strike out the Claimant's claim and/or for a deposit order took place at an open preliminary hearing on 10th October 2021. At the conclusion of the hearing, an oral judgment and reasons were given. I dismissed both applications. No request was made for written reasons at that time but the Respondent made a request for written reasons by e-mail dated 8th November 2021 in advance of the judgment having been promulgated.

The Hearing

5. At the Hearing, the Claimant attended in person, the Respondent was represented by Mr Munro.

6. No oral evidence was called.

7. I was referred to, and considered, the application dated 29th January 2021 and a number of the documents contained in a final hearing bundle comprising 270 pages. References in square brackets hereafter are to the page numbers of this bundle. In addition, I was also referred to a document prepared by the Claimant which described itself as a response to the

application and I heard oral submissions from both the Claimant and Mr Munro.

8. Both parties also referred me to, and I considered, the Court of Appeal decision in ***Patel –v- Folkestone Nursing home [2019] IRLR, [2018] EWCA Civ 1689***. In particular, I was asked to consider paragraphs 22, 25, 26 and 43 of *Patel* and I have done so.

Relevant Law

11. Tribunal Rule 37 confers on the Tribunal a discretion to strike out all or part of a claim or response, provided that the party liable to be struck out has been given a reasonable opportunity to make representations, either in writing or at a hearing (if requested), on any of the following grounds:
    (a) That it is scandalous or vexatious or has no reasonable prospects of success;
    (b) That the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
    (c) For non-compliance with any of these Rules or with an order of the Tribunal;
    (d) That it has not been actively pursued;
    (e) That the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

12. The burden is on the Respondent to establish that the Claim has no reasonable prospect of success and should be struck out and is a fairly high one. Correspondingly, the bar for the Claimant to get over in order to be able to pursue his claim is a fairly low one.

13. Tribunal Rule 39 confers on the Tribunal a power to require a party to pay a deposit, not exceeding £1,000.00, as a condition of continuing to advance an allegation or argument if the Tribunal considers that the specific allegation or argument has little reasonable prospect of success. The Tribunal must make reasonable enquiries into the party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

14. When the Tribunal is considering whether or not to exercise its power to strike out all or part of a claim on the grounds that it has no reasonable prospects of success, or when considering whether the claim has little reasonable prospects of success for the purpose of deciding whether or not to make a deposit order, the Tribunal must consider the Claimant's claim at its highest.

15. When exercising its powers under Rule 37 or 39 the Tribunal must also have regard to the overriding objective in Tribunal Rule 2 and deal with the case fairly and justly. This requires the Tribunal to, so far as is practicable:
    (a) ensure that the parties are on an equal footing;

(b) deal with the case in a way which is proportionate to the complexity and importance of issues;
(c) avoid unnecessary formality and seek flexibility in the proceedings;
(d) avoid delay, so far as is compatible with proper consideration of the issues; and
(e) save expense.

The Issues

16. The Respondent's case for strike out and/or a deposit order is based on a jurisdiction issue, namely whether or not there was a dismissal. Alternatively, whether or not to the Claimant was entitled to resign and claim constructive dismissal.

17. This issues arising from this are:
    (i) Does the claim for ordinary unfair dismissal have no reasonable prospects of success? This requires consideration of"
        (a) whether there was a contractual right of dismissal; and
        (b) if not, whether the Claimant accepted the Respondent's offer of re-instatement.
    (ii) Does the Claimant have an alternative claim for constructive dismissal and, if so, does that claim have no reasonable prospects of success?
    (iii) If the claim is not dismissed, does the claim (or either part of it) have little reasonable prospects of success?
    (iv) If so, should a deposit order be made?

Background Facts

18. Having not heard oral evidence, I make no findings of fact in relation to this case. In particular, I make no finding as to whether or not the Claimant was dismissed or re-instated by the Respondent or as to whether or not the Respondent has acted in a manner which amounted to a repudiatory breach of the employment contract. However, save where I have expressly indicated, the facts set out below were not suggested to be contentious.

19. The Claimant was employed as by the Respondent as an Assistant Site Manager from 30th October 2017. His employment was subject to a contract of employment [**50-53**] and a disciplinary and appeals procedure set out in the Respondent's Company handbook [**77-81**].

20. The Claimant's contract of employment includes the following wording:

"*Disciplinary and Capability Procedure*

The Company's disciplinary and capability procedures are set out in the Employee Handbook and do not form part of your contract of employment. The Company reserves the right not to follow our full Disciplinary and Capability procedures in the first two (2) years of service." [**51**]

And

"*Appeals Procedure*

The Company's appeals procedure can be found in the Employee Handbook. It does not form part of your contract of employment." [**52**]

21. At a meeting on site on 13th February 2020 the Claimant was orally dismissed by the Respondent with 1 months notice. The Claimant indicated that he wished to leave immediately and did not attend work on 14th February 2020. Following the Claimant's request for written reasons for his dismissal, these were provided by e-mail dated 18th February 2020 [**218**].

22. The Claimant was signed off from work on sick leave for the period 18th February 2020 to 25th February 2020 and from 26th February 2020 to 28th March 2020.

23. On 24th February 2020 the Claimant sent an e-mail to the Respondent in which he sought to formally appeal his dismissal and expressed his desire to stay in the business [**219**-**220**].

24. In response to the Claimant's appeal, on 5th March 2020 the Respondent wrote an e-mail to the Claimant stating "*I welcome the sentiments expressed in your e-mail and your wish to continue your employment with Frencom*". [**220**].

25. That e-mail also noted that the Claimant was currently on sick leave and that it had attempted to contact him on several occasions to see how he was and "… *to find out when you might be able to return to work."* It noted that from the phonecalls made by the Respondent it appeared that the Claimant was presently out of the Country and further stated:

"*Please be assured that I look forward to discussing with you your return to work with the company. As you are aware here is no longer any work for you on the Battersea project and I am presently reviewing the company's current requirements to determining where there will be a suitable role for you.*

Please confirm receipt of this email and when you will be in a position to discuss your return to work further"

26. At no point in that e-mail does it refer to the Claimant's appeal or expressly state that his appeal had succeeded. The Respondent relies on this as being a re-instatement.

27. The Claimant wrote to the Respondent on 12th March 2020 an e-mail in the following terms [**221**]:

"Hi Michel,
I appreciate the sentiment.

As I am currently signed off sick until 28/03/2020, I will be in full contact once I have been declared fit to return to work.
However has my previous expenses been processed? I have yet to receive a cheque for expenses occurred in 2019. Also please see attached for additional expenses previously discussed with Yeolanda.
Please confirm receipt of this email.

Kind Regards,
Kio Clarke-Knight"

28. The Claimant did not return to work on 30th March 2020 on the expiry of his fit note or at any time prior to 6th April 2020, when he confirmed in writing that he no longer wished to return to work [**217**]. The Respondent asserts that by this letter of 6th April 2020 the Claimant resigned.

29. On 28th February 2020 by telephone and subsequently by e-mail, and without the Claimant's consent the Respondent contacted the Claimant's GP and requested additional medical information about the Claimant. The requested information was not provided, the Claimant's GP responding by noting that information could only be provided with the Claimant's consent and asking the Respondent to obtain the Claimant's consent before making enquiries.

The Submissions

30. The Respondent made submissions to the effect that the e-mail of 5th March 2020 amounted to the success of the appeal and the re-instatement of the Claimant to his original position. Further, that pursuant to *Patel* the effect of the appeal followed by the offer of re-instatement is that the Claimant forfeits the right to bring a claim for unfair dismissal as his appeal has succeeded and it is as if no dismissal has ever taken place. Accordingly, the claim for ordinary unfair dismissal must fail. Further, that in any event, even if the mere offer of re-instatement did not undo the dismissal, the Claimant's e-mail of dated 12th March 2020 amounted to an acceptance in writing of the offer of reinstatement such that thereafter the contract of employment continued.

31. The Respondent also submitted that the enquiry made by the Respondent to the Claimant's doctor was not a breach of the implied term as to trust and confidence and that there could be no breach of trust as he was not in work at that time. Also, that the blocking of the Claimant's access to his work account was not a breach either as it was simply the process which happens when an individual does not return to work. It was merely an IT security matter and a procedural point. Further, and in any event, that the matters complained of date back to prior to the re-instatement offer and the re-instatement offer cancelled them out. Consequently, any claim for constructive dismissal, even at its highest point, was very unlikely to be successful.

32. The Claimant's submissions were largely as set out in his written response to the application. He added oral submissions to the effect that there was no contractual right of appeal and that after the offer of re-instatement, around 10th March 2020, he found out about the Respondent having contacted his

doctor without his permission and the termination of his access to his work account was not an oversight as it would have gone through many hands to be finalised.

Tribunal's Reasons

In relation to the strike out application:

33. In this case, as set out in the clauses cited at paragraph 20 above, the contract of employment expressly states that the disciplinary policy and the appeals procedure do not form part of the contract. That is a substantial difference between this case and that of *Patel* (and all the other cases cited in *Patel*), where the right to appeal a disciplinary decision was contractual.

34. If the right of appeal of a disciplinary decision were contractual, as per *Patel*, it is implicit that if an employee exercises their contractual right of appeal and that appeal is successful, both the employer and employee would be bound to treat the employment relationship as remaining in existence throughout. Essentially it is as if the dismissal never happened in the first place.

35. Mr Munro on behalf of the Respondent, ultimately conceded that there is no contractual right of appeal in this case. Indeed, that is self-evident on the face of the express terms of the contract. I must therefore decide what the impact of there being no contractual right of appeal has on the Claimant's prospects of success. *Patel* offers nothing to assist in this determination.

36. I was asked by the Respondent to consider that it must nevertheless be implicit in the Claimant seeking to exercise a right of appeal that he intended be bound by the outcome of it. There may be some merit in that submission, I make no findings specifically in relation to it. However, the contrary must also be true, there may also be merit in the submission that the situation is somewhat different.

37. Where there is no contractual right of appeal, it is strongly arguable that *Patel* is distinguishable and that any offer of reinstatement made following a non-contractual appeal is something which has to be accepted by the employee and, if not accepted, would not automatically negate the dismissal.

38. It is by no means clear to me that the e-mail from the Respondent dated 5th March 2020 can or should be construed as providing the outcome of the Claimant's appeal or an offer of re-instatement. As indicated, the Claimant had not been summarily dismissed without notice,

39. Further, even assuming that e-mail of 5th March 2020 was construed by both parties as being the outcome of the appeal and/or an offer of re-instatement (as it appears both did), looking at the terms of the e-mail sent by the Claimant dated 12th March 2020, I do not consider that it must necessarily be

read as an acceptance of such an offer by the Claimant. The Claimant does not state that he will be returning to work or that he accepts that his employment is continuing. He merely indicates that he appreciates the sentiments of the Respondent, refers to the Claimant being signed off sick and says that he will be in contact once he has been declared fit to return to work.

40. Taking the Claimant's case at highest, and in light of submissions he made both in his written response to the strike out application and in his oral submission, I consider it more than merely arguable that his e-mail of 12th March 2020 was not an acceptance of an offer of re-instatement contained in the Respondent's e-mail of 5th March 2020 but merely a deferral of a decision about whether to accept or reject the offer until after his period of sickness absence had come to an end.

41. For the above reasons, I do not find that the Claimant has no reasonable prospects of establishing that there was no ordinary dismissal by the Respondent. The Respondent admits that there was a dismissal prior to the e-mail of 5th March 2020 and there are reasonable prospects that a Tribunal could find that even if that e-mail amounted to an offer of re-instatement, it was required to be accepted by the Claimant in order to be effective and the Claimant did not do so.

42. Even if I am wrong about that, having considered the contents of the Claimant's Claim form [**15**] it is apparent that in his claim the Claimant also refers to a number of other matters which occurred, or came to his attention, after the offer of re-instatement was made on 5th March 2020. He states "*After the behaviour shown by my employers, it has become untenable for me to return to work. I have no confidence in management, and I cannot trust Frencom as my employer and under these toxic conditions I don't feel I can return to work*".

43. In section 15 of the Claim form he refers to having been off-sick with stress related issues subsequent to being dismissed and providing a Doctor's fit note. He then states that, without having gained his permission, the Respondent called his doctor and followed up that call by an e-mail enquiry to his doctor questioning and requesting more information relating to the Claimant's health. He notes that the doctor declined to provide further information on grounds confidentiality. He also refers to being "*blocked from access my work computer in this time*".

44. The Claimant clearly considered the Respondent's behaviour to be a significant breach of the implied term in his (as in all) employment contract as to trust and confidence. That an implied term as to trust and confidence exists is well established: *Malik and Mahmud -v- BCCI [1997] ICR 606 [1997 IRLR 462* where the House of Lords formulated the obligations as being that the employer shall not "without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of trust between employer and employee".

45. I am satisfied that on the basis of a fair reading of the contents of section 15 of the Claim form, the claim the Claimant is seeking to advance is wide enough to raise an alternative potential claim of constructive unfair dismissal.

46. *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221* sets out the approach to be taken when considering whether there has been a constructive dismissal: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

47. In order to claim a constructive dismissal, the employee must therefore show that:
    (i) there was a fundamental breach of contract on the part of the employer;
    (ii) the employer's breach caused the employee to resign; and
    (iii) the employee did not lose the right to claim constructive dismissal by delaying too long before resigning and thus affirming the contract.

48. Whether there has been a repudiatory breach is an objective test, the employer's subjective intention is irrelevant: *Leeds Dental Team Ltd -v- Rose 2014 ICR 94, EAT.*

49. A fundamental breach may either be a one-off breach or a course of conduct on the employer's part which cumulatively amounted to a fundamental breach (providing that the final act adds something to the breach): *Omilaju v Waltham Forest LBC [2005] IRLR 35 CA)*.

50. Further, where an employer breaches the implied terms as to trust and confidence that is inevitably fundamental: *Morrow -v- Safeway Stores plc [2002] IRLR 9, EAT*.

51. In *Patel* there was also a potential alternative, and (in the view of the court of Appeal) strongly arguable, claim for constructive dismissal. This was because there had been a number of conduct grounds that led to Mr Patel's dismissal, including allegations of gross misconduct. The employer's letter confirming the success of the appeal and Mr Patel's re-instatement failed to deal with all of those grounds thus leaving Mr Patel with uncertainty as to the position he would be returning to work under. Both the EAT and the Court of Appeal found the appeal outcome letter to be unsatisfactory as a result of its failure to resolve the most serious allegations that had been brought against Mr Patel and which had led to his dismissal.

52. The Court of Appeal considered that it was strongly arguable that the employer's failure to withdraw the complaint that it had made, and to explain that it had done so to Mr Patel, amounted to a breach of the employers implied duty to maintain trust and confidence. The Court of Appeal therefore concluded [**at paragraphs 47-48 and 57 of the report**] that, even where an

employee was offered reinstatement in the context of a contractual right of appeal, and the contract continued as if there had been no dismissal, there may nevertheless be a potential claim for constructive unfair dismissal that could be sustained in relation to a serious breach of contract by an employer in its handling of the contractual appeal.

53. The Claimant's written submission refers to several acts by the Respondent which he says breached the implied term of trust and confidence (not merely those acts detailed in section 15 of his claim form). He also points to the handling of the disciplinary process and appeal and draws parallels with paragraphs 47 & 48 of *Patel*.

54. As I have indicated at paragraph 45 above, on a fair reading of the Claimant's claim form, I consider that the claim being advanced is wide enough to encompass an alternative claim for constructive dismissal.

55. That alternative claim might potentially be brought on 3 possible basis:
    (i) the Respondent's contact with the Claimant's doctor without the Claimant's consent;
    (ii) the Respondent's suspension or blocking of the Claimant's access to his work systems even after the offer of reinstatement made; and/or
    (iii) in relation to the Respondent's handling of the appeal and re-instatement and the Respondent's failure, as in *Patel*, to set out what terms the re-instatement would be on and how the allegations which originally led to his dismissal had been dealt with.

56. As set out above, the Respondent's e-mail of 5th March 2020 does not mention the Claimant's appeal and gives no indication within it as to the basis of the reinstatement. It does not say that the appeal has been successful or anything about the matters which led to the Claimant's dismissal. It does not specify what terms the Claimant would be returning to work on and in fact, it specifically sets out that there is no longer any work for the Claimant on the project that he was working on and that it was impossible at the current time to determine where there would be a suitable role for the Claimant.

57. Specifically, it does not state the Respondent's position as regards the Claimant's conduct or whether the Respondent had withdrawn the allegations which led to the Claimant's dismissal or remained concerned about the Claimant's conduct.

58. These are points made by the Claimant in his written submission on the application. I also take into account other points made by the Claimant in paragraph 7 of his written submission regarding the lack of investigation by the Respondent in relation to the Claimant's alleged poor performance and to other failings in the Respondent's disciplinary procedure leading to the Claimant's dismissal.

59. Nothing in *Patel* prevents an employee relying on events taking place, or discovered, after the appeal process as the basis of a claim for constructive dismissal. The Claimant's submissions make the point that he did not discover

the approach to his doctor until after the e-mail of 5th March 2020. Further, that even after the e-mail of 5th March 2020, the Respondent continued to block the Claimant from access to both his work account or his information. In the Claimant's view this did not reflect the actions of an organisation that was willing and open to him returning to work for them.

60. I did not hear detailed submissions as to whether or not there was effectively a resignation by the Claimant following the correspondence on 5th March 2020 referred to above. That is a matter which would be determined by evidence and would require hearing from both the Claimant and the Respondent. However, I note that it is accepted by both parties that the Claimant's employment with the Respondent has come to an end and if, as the Respondent advances, the end of the employment was not at the Respondent's instigation then it must be the case that it was at the Claimant's instigation.

61. I find that for the reasons set out above, any one of the 3 possible basis for an alternative claim of constructive dismissal has some prospects of success that are significantly more than minimal or nominal.

62. Taking all of this together, and the Claimant's case at its highest, I do not find that the Claimant's case has no reasonable prospects of success. To summarise, there is an arguable case that:
    (i) *Patel* is not directly applicable because there was no contractual right to appeal the disciplinary decision;
    (ii) Consequently, the Claimant's employment would only continue following dismissal if the Claimant accepted the Respondent's offer of re-instatement,
    (iii) The Claimant's e-mail of 12th March 2020 was not such an acceptance;
    (iv) Even if the Claimant cannot successfully argue at final hearing that the consequences of the e-mail of 5th March 2020 and/or 12th March 2020 were not such as to reverse his dismissal, there is a strongly arguable alternative constructive unfair dismissal claim, as was the case *Patel*.

63. For all those reasons and notwithstanding that I have had careful regard to submissions made by the Respondent and the binding authority of *Patel*, I consider that this is a claim which is not suitable for disposal by way of strike and that should be heard at final hearing by way of evidence and the submissions of parties based on that evidence.

64. I therefore dismissed the application to strike out the Claim.

In relation to the deposit order:

65. The Tribunal is given a wide discretion as to whether it makes a deposit order, but that discretion is only available where the Tribunal determines that there is little reasonable prospect of the claim succeeding.

66. For all reasons already set out above in respect of my decision not to strike out the Claimant's case, I do not find that the Claimant's case has little reasonable prospects of success such as to give rise to discretion to make a deposit order.

67. Even had I considered that the Claimant's claims (or any of them) had little reasonable prospect of success, although I received no evidence as to the Claimant's means, in light of the Claimant's written submissions that he has been out of work some time and that a deposit order would significantly inhibit his ability to pursue his claim, I would have taken view that, having regard to the overriding objective, imposing a deposit order of even a small amount might risk inhibiting the Claimant's access to justice. I would therefore have exercised the wide discretion available to me and would have refused to make a deposit order in any event.

68. I therefore dismissed the Respondent's application for a deposit order.

Employment Judge Clarke
Date: 6th March 2022