



EMPLOYMENT TRIBUNALS

Claimant: Mr. M. Rogers

Respondent: Profile Security Services Ltd.

HELD AT: Wrexham by CVP **ON:** 21st – 23rd February 2022

BEFORE: Employment Judge T. Vincent Ryan
Ms. R. Hartwell
Mr P. Collier

REPRESENTATION:

Claimant: Ms D. Phillips (lay representative)

Respondent: Mr. S. Margo, Counsel

JUDGMENT having been sent to the parties on 22nd February 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Issues: the following issues were agreed at a preliminary hearing on 10th December 2020 and set out in Employment Judge Sharp's minutes as follows, save that the respondent now concedes that the claimant was a disabled person, by reason of anxiety and depression, at the material time.

1. Unfair dismissal

1.1. Was the Claimant dismissed?

1.1.1. Did the Respondent do the following things:

Act as alleged in the ET1 in a course of conduct which culminated with a last straw of alleging on 1 September 2020 that the Claimant had broken a "life-saving" rule (later revealed to be smoking on site

in an unauthorised location on an oil refinery) and suspending him pending an investigation.

1.1.2. Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

1.1.2.1. whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

1.1.2.2. whether it had reasonable and proper cause for doing so.

1.1.3. Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

1.1.4. Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach. It is unlikely, given the Claimant's resignation on 1 September 2020, affirmation is an issue for this case.

2. Remedy for unfair dismissal

In view of the Tribunal's Liability Judgment the Tribunal did not address the agreed remedy issues.

3. **Disability** – mental impairment: anxiety and depression - conceded by the respondent; knowledge, actual and constructive, is not conceded.

4. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

4.1. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

4.2. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

4.2.1. That employees in the Claimant's job have to work from time to time alone.

4.3. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he was unable to take regular breaks which he needed due to his disability?

4.4. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

4.5. What steps could have been taken to avoid the disadvantage? The Claimant suggests:

4.5.1. Not making him work alone.

4.6. Was it reasonable for the Respondent to have to take those steps and when should it have done so?

4.7. Did the Respondent fail to take those steps?

5. Harassment related to disability (Equality Act 2010 section 26)

5.1. Did the Respondent do the following things:

5.1.1. Claire Lyford arranged for the Claimant to be left alone with Chris Jenkins (someone who the Claimant had previously raised a grievance about) for approximately 45 minutes on 6 August 2020 for her own entertainment and in order to heighten the Claimant's anxiety, which she allegedly confirmed to Nigel Morgan on the same day (though the Claimant also added that Ms Lyford may have taken this action as part of a personal vendetta as she wanted the same job as the Claimant; he also added that neither he nor Mr Jenkins spoke and a colleague called Courtney Burdon was present in the room for some of the time and described the atmosphere as being something "*you could cut with a knife*").

5.2. If so, was that unwanted conduct?

5.3. Did it relate to disability?

5.4. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

5.5. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

6. Remedy for discrimination

In view of the Tribunal's Liability Judgment the Tribunal did not address the agreed remedy issues.

The Facts:

7. The parties have agreed certain facts and a chronology which is appended to this judgment. The Tribunal adopts the appendix and finds the matters and dates recited to be factual.

The respondent (R):

8. R is a large employer providing security at Valero refinery Pembroke Dock. R operates a suite of personnel policies and procedures, including disciplinary and health & safety rules which its employees, including the claimant, are informed of and trained upon; the significance and seriousness of such rules are emphasised

to all personnel; bearing in mind the inherent dangers of working at an oil refinery many rules were considered safety critical. R avails of professional occupational health and welfare support services for staff. GMB is the recognised trade union on site.

The claimant (C):

9. C was employed at Valero as a Security Officer from 9th January 2019; his employment transferred to R on 1st June 2019 and he was so employed until he resigned on 1st September 2020. C is a disabled person; he lives with anxiety and depression. Ms Phillips who represents C at this hearing is his personal partner. C was advised and represented by his Union during formal internal proceedings.
10. When completing screening for R when his employment transferred, C stated, incorrectly that he had no outstanding County Court Judgments; he had two. Such matters were understood by C to be important to R in terms of trusting the integrity of its employees and because of the risk should a Security Officer have financial problems. R took no action regarding C's misstatement; R's Profile Site Security Manager, Mr James, gave credible evidence to the Tribunal; he is responsible for R's staff at Valero; he vouched for C's general trustworthiness. The failure to disclose was not held against C.
11. All Security Officers are required to hold Security Industry Authority (SIA) licences; the Officers have to make the application and R pays the fee. C's SIA licence was due to expire on 3rd March 2020. R sent C timely reminders in January and February 2020. C took no action until after expiry but before his first shift after 3rd March 2020. In completing its part of the process R made an administrative typographical error which caused a further delay until 11th March 2020; R paid the requisite fee. Initially R withheld payment in respect of four planned shifts when C was unable to work because he was unlicensed. Ultimately when C grieved R agreed to pay wages for two of the four missed shifts.
12. In March 2020 Valero required a change in shift patterns from five shifts (A-E) to four (A-D). E was absorbed. At around this time C was self-isolating due to COVID restrictions and/or guidance in relation to it. CJ became a manager and his supervisor role which had been covered by C before he commenced self-isolation, was then covered by CL. C was not told of this at the time by management; CL let him know saying to him that she felt uncomfortable with that situation. Subsequently C grieved and R acknowledged that it had failed to communicate the changes in responsibility properly; Mr James accepted that he had so failed.
13. On 31st March 2020 C was late for work. He was due to attend for his shift starting at 06:00; he overslept; R telephoned him "several times" and eventually C returned the call at 07:31. He arrived for work at approximately 08.30 a.m. (two and a half hours late). R agreed with C that R would monitor the situation over the following 12 months and immediate improvement by C was expected; any future such instances were to be investigated under disciplinary procedures and could lead to formal performance action or conduct disciplinary action. Nothing further was done on this occasion other than that the discussion was documented (p140). C acknowledges that it was reasonable for R to address his

lack of punctuality on this occasion although he felt noting it on his file was harsh. C agreed to the monitoring and the requirement for immediate improvement. This was his first noted lateness. C did not grieve about R's management on this occasion.

14. C's partner, Ms Phillips, became symptomatic with Covid19 in April 2020. In consequence C self-isolated for 14 days from 2nd April 2020 and was absent from work. During this period he drove his daughter to his local pharmacy for medical attention; he was seen on the High Street by CJ, acting as Manager at the time as above; CJ spoke to C at the time. When CJ mentioned this to Mr James, Mr James was concerned about C's conduct bearing in mind the situation with Covid, paid absences from work and welfare issues. CJ then mentioned to Mr James an issue concerning C and a colleague, RT. During this period RT was shielding ; Mr Jenkins was told by RT during a welfare call that C had delivered a meal to him at his home. R looked into it and obtained emailed answers to questions from RT confirming the visits, which were potentially in breach of existing restrictions and potentially risked the health and welfare of both C and RT. Another colleague, TS, confirmed to management that C had let it be known that his daughter only had hay-fever and so the visit to the pharmacy was not urgent. Mr James was concerned about C claiming sick pay but not abiding by rules in all the above circumstances and with apparent risks involved. He implemented disciplinary procedures.
15. Mr James was appointed Investigating Officer; he investigated the matters concerning potential breaches of Covid rules/guidance while C was being paid. He sent his report (p163-4) to Paul Thomas, Area Manager. Following a disciplinary hearing at which C was given an opportunity to defend and mitigate Mr Thomas imposed a final written warning. C appealed against that sanction. The appeal was referred to Mr P. Hannigan, the Regional Manager for the North of England; he did not know the people involved in this matter, including C. Owing to the Covid situation at the time the appeal hearing was conducted by telephone, by agreement, on 19th May 2020. Having considered all matters and hearing from C, Mr Hannigan downgraded the warning to a written warning; he took account of the mitigation submitted and accepted that C was being compassionate to RT; that said he found breaches of the public health guidance as he understood it and as it affected R and its policies and procedures around Covid absences and pay.
16. On 29th May C grieved (pp239-244) and the outcome is at pp331-336. C's stated concern was about a safe working environment. He wanted R to speak to CJ about victimisation and other alleged behaviour towards him, and he wanted payment for shift work that he missed because of the SIA licence situation referred to above. C, who was again absent from work, wanted to return to work. He also wanted the note about his lateness on 31st March 2020 removed from his file. The grievance was not upheld.
17. On 2nd July 2020 C appealed against the grievance outcome (pp338-9). At this time he was absent from work because of work related stress (the absence having commenced on 8th May 2020). C says that the stress was brought on by the working conditions about which he was grieving and not the strain of the grievance and disciplinary proceedings themselves to date. Mr Beaver (R's Divisional Director (North)) dealt with the appeal and upheld C on the 3 issues

that mattered most to him. In consequence of the successful appeal R agreed to a number of resolutions. R paid to C 50% of the “lost” shift wages (where C had failed to renew his SIA licence in time and then R inadvertently further delayed the issuing of the licence by an administrative error). Management training was to be organised, and CJ was to be spoken to about C’s grievance and CJ’s management of him. C was re-assured by, and grateful for, R’s agreed resolutions. C wanted to RTW.

18. In the light of the above, on 30th July C’s Union representative confirmed to R that C was satisfied and would return to work on the suggested phased basis.
19. As agreed between the parties C returned to work on 3rd August 2020. He took part in further return to work interviews on 6th and 12th August 2020; he expressed himself content with matters and declined R’s suggestion of a referral to Occupational Health. R understood from C that all matters had been resolved to his satisfaction. C said on 6th August that he was content to move to lone working with a view to resuming a normal shift pattern following the 12th August review. On 12th August C confirmed to R that he was ready to resume the normal shift pattern including the requirement for lone working from 13th August.
20. R agreed with C that for the time being it would be unfair for C to have to stand in as supervisor-cover because he had been absent from work for approximately three months and it would create additional stress.
21. At this stage C’s only complaint was his allegation that colleagues had told him he had been placed to work with CJ to cause animosity and because CL thought it would be fun. C working with CJ was not problematic. There was no mistreatment of either of them by the other. C was only concerned at what he had been told of CL’s rationale for placing them together. C only wanted R to document this but not to take any action in relation to CL or CJ.
22. Mr James asked C for details of this complaint and said he would investigate it. C gave details in an email on 12th August 2020; Mr James then went on holiday for some of the time at least between that date and 1st September 2020. Mr James obtained statements from everybody apart from C in that period but wanted to leave C to be interviewed last. Mr James had no time before 1st September to interview C.
23. On 21st August C worked at the “BP gate”. C then took his four days leave 24th-28th August and on 28th August he reported that his partner had symptoms of covid; he isolated until she had a negative test on 1st September 2020; R said that he could return to work.
24. On 1st September 2020 Valero notified R that C had breached a lifesaving rule. C had been photographed smoking in a no-smoking area and Valero said C was to be removed from site for investigation; Valero also notified R that if a breach of rules by C was established then he would not be allowed by Valero to return to the site to work. Mr James responded by telling C on the telephone that he was not to return to site pending investigation; this was on the instruction of R’s client, Valero.

25. On 1st September 2020, following that notification, C resigned with immediate effect (p405). He emailed this to R on 3rd September. C cited undue and disproportionate treatment, breach of trust and confidence. C said that the last straw was that R and Valero had subjected him to “treatment” and breached his contract “on numerous times”. C felt that he had no energy to fight again when he was told about the disciplinary investigation into alleged breaches of lifesaving rules. He felt he had been suspended from work (as opposed to being barred from one customer’s site) and in his own words, he had “nothing left”. The Tribunal finds that C did not want to, or feel he had the energy to, embark on a further formal procedure, knowing what he knew about the incident, the likely path of the pending investigation and formal proceedings, and the available sanctions if misconduct was proven. C opted out of it. He chose not to defend or to mitigate albeit he knew he had the opportunity to do so.
26. C was a conscientious worker for most of his employment and he had received praise from both R and Valero at times; he was in general appreciated and valued. R’s local managers vouched for him over issues such as his misstatements about County Court Judgments, and recognised his compassion and support of colleagues (including RT). C felt that he was ganged up on, and that disproportionate action was taken against him but C’s evidence showed at times a lack of objective analysis and awareness. He gave some credit to R for their management of him but not due credit in that he would not acknowledge his fault in relation to his out of time application for the SIA licence, his lack of punctuality, his being filmed smoking apparently in, or in very close proximity to, a no-smoking area, and that R could be suspicious of him both breaching the no-smoking lifesaving rule in force and of his being out of his home unnecessarily when isolating and being paid. C had no appreciation of the fact, as we find, that R is subject to some degree of instruction and control by its client, Valero, and that Valero was entitled to both insist on a disciplinary investigation of the smoking allegation and his removal from site pending investigation and if there was a factual finding of breach of the safety critical rules.
27. The Tribunal finds no evidence of collusion or conspiracy by R or its personnel against C. The Tribunal finds that C’s conduct on several occasions gave rise to suspicion of conduct reasonably requiring investigation and due process. R followed due processes.
28. R’s witnesses before the Tribunal were all credible, plausible and clear. They repeatedly gave C the benefit of any doubts in disciplinary matters such as his false declaration about CCJs, not imposing sanctions for being very late for work on one occasion, reducing a final written warning on appeal. R upheld the parts of C’s grievance that mattered most to him and paid him for 2 lost shifts even though C’s application for his SIA licence was out of time. R was supportive of C whilst absent sick, at return to work interviews and in welfare meetings. R offered OH referrals. Mr James investigated allegations made about C being placed to work with CJ for fun or to goad, albeit he ran out of time before C resigned.

Facts in relation to the reasonable adjustments claim:

29. R’s relevant provision, criterion or practice: R operated the practice of requiring lone working on occasions. When C’s symptoms of anxiety and depression were exacerbated by work related stress he was certified as unfit to work and he was

absent for some three months. Upon C's phased return to work, when he now complains about lone working, C was supernumerary; during that period he did not work alone. C only undertook any lone working at the relevant time after he had agreed to resuming a normal pattern, including lone working, after 12th August 2020; C was not required to work alone after it became problematic for him due to his disability and before he agreed to do so. R did not know and was not given any reason to believe, that lone working put C at any disadvantage due to his disability before his sickness absence or after he notified R that he wanted to resume his normal shift pattern (which included lone working).

30. "substantial disadvantage" to C: C was not at a substantial disadvantage compared to non-disabled colleague. It is possible that someone who is anxious may need breaks but there is no evidence that C experienced this. C was in fact more concerned about being required to work with colleagues, and in particular CJ, than being on his own. There is no evidence before the Tribunal that breaks were required or requested, or ever refused or prohibited.
31. R's knowledge of disability and disadvantage: R did not know of any disadvantage from lone working because C said he wanted to return to normal working (see 6th Aug return to work interview). R was aware that C had been absent with work related stress but as stated at 3rd August return to work interview, C related this stress to the previous grievance and disciplinary issues, which had been resolved amicably and led to him feeling fit. The only other reference to previous mental health issues was no higher than showing empathy and support for colleagues. C had not declared his disability to R. He had no mental ill-health history until the diagnosis of stress at work on 9th May 2020; there were no prior stress related absences. R did not know of C's medication or medical history because he had not disclosed it and R had no grounds to request it. There was a known requirement in that safety critical working environment that an employee would report such matters including medication, to his line manager; C did not. As soon as C's grievance was resolved to his satisfaction he said he was fit to work and by the end of the phased return to work he said that he was fully fit. R did not know, and could not reasonably have known, that C was a disabled person.
32. Reasonableness of steps to avoid disadvantage: C would not have been required to work alone if R could provide a companion or buddy employee to accompany him on shift. R did not know of C's disability; it did not know of any disadvantage to C from the PCP. The contract with Valero provided for Valero to pay R in relation to essential staff and Valero would not pay for permanent unnecessary cover staff.

In relation to the harassment claim:

33. R's conduct (including its purpose) on 6 August 2020 and relation (if any) to disability: On 6th August 2020 C worked in the gatehouse with CJ, and they were otherwise alone. CL said in a written statement given during the internal investigation that she could not have rostered C to work alone and asked him if he was willing and able to work with CJ; C said he was. C confirmed in an email to R dated 12th August (p505-6) that he wished to stress he had no concerns about this. He was concerned that a colleague said CL had done it deliberately "knowing I had placed a grievance against" CJ. C said this behaviour made him

anxious that she would act in such a way again. C did not complain that it triggered symptoms of anxiety and depression. R was unaware of C's disability and the Tribunal has no evidence that CL was personally aware; given her statement to the internal investigation and the other facts found above the Tribunal does not draw any adverse inference. C attributed CL's action to his grievance. R investigated the matter but had not concluded the investigation (for reasons out of R's control) by the time of C's resignation. R's conduct was not related to disability.

34. Was the conduct wanted or unwanted by C: Being put to work with CJ was unwanted by C only if it was deliberate for CL's entertainment or to goad C. C was not concerned about working with CJ.

35. The effect of that conduct on C: retrospectively, when led to believe that it was to amuse CL or goad him, C was concerned about CL's motives. Working with CJ had no effect on C. Putative motives caused concern.

The Law:

36. Reasonable adjustments:

36.1. S.20 & s.21 Equality Act 2010 (EqA): where a PCP, or a physical feature, puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a duty on an employer to make reasonable adjustments to avoid the disadvantage. It is necessary to identify: (a) the PCP applied by or on behalf of the employer; (b) the identity of non-disabled comparators (where appropriate); (c) the nature and extent of the substantial disadvantage suffered by the claimant (see *Environment Agency v Rowan* [2008] IRLR 20).

36.2 'Practice' connotes something which occurs on more than on a one-off occasion and has an element of repetition about it (*Nottingham City Transport Ltd v Harvey* [2013] EqLR 4).

36.3. Substantial means more than minor or trivial. The disadvantage must arise from the disability (*Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley* UKEAT/0417/11). Identification of a substantial disadvantage involves the accumulative assessment of the PCPs. Physical features or lack of auxiliary aids (*Environment Agency v Rowan* [2008] IRLR 218). Not being able to work as efficiently or productively as colleagues who do not live with disabilities may amount to a substantial disadvantage in this context.

36.4. The duty does not arise if R did not know, and could not reasonably have been expected to know, both that C was disabled and that C was likely to be at a substantial disadvantage in comparison with persons who are not disabled (*Secretary of State for Work and Pensions v Alam* [2010] IRLR 283).

36.5. Paragraph 6.28 of the EHRC Code of Practice recommends that when deciding what is a reasonable step for an employer to have to take some of the factors that should be considered are: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of disruption

caused; the extent of the employer's financial or other resources; the availability to the employer of financial or other assistance to help make an adjustment (e.g. through Access to Work); the type and size of employer.

36.6. Where the duty arises, an employer who was unaware of the duty to make reasonable adjustments may still show that it was not in breach of the relevant duty because a particular step would not have been a reasonable one to take. The question is whether, objectively, the employer complied with its obligations or not (*Tarbuck v Sainsbury's Supermarket Ltd* [2006] IRLR 664, paragraph 71).

36.7. An employee does not have to suggest any, or any particular, adjustments at the material time and may even first make the suggestion during a final hearing (*Project Management Institute v Latif* [2007] IRLR 579).

Harassment:

43. Harassment: S. 26 EqA: a person harasses another if they engage in unwanted conduct related to a relevant protected characteristic that has the purpose or effect of violating the other's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them (the harassing effect). In deciding whether the conduct has the harassing effect the tribunal must take into account the perception of the employee alleging they were harassed, the other circumstances of the case, and whether it is reasonable for the conduct to have the harassing effect.

Constructive unfair dismissal:

44. S.94 Employment Rights Act 1996 (ERA) establishes an employee's right not to be unfairly dismissed. S.95 ERA sets out the circumstances in which an employee is dismissed which includes where an employee terminates the contract of employment (with or without notice) in circumstances in which he or she is entitled to terminate it without notice by reason of the employer's conduct (a constructive dismissal).

45. It is well established that for there to be a constructive dismissal the employer must breach the contract in a fundamental particular, the employee must resign because of that breach (or where that breach is influential in effecting the resignation), and the employee must not delay too long after the breach, where "too long" is not just a matter of strict chronology but where the circumstances of the delay are such that the employee can be said to have waived any right to rely on the respondent's behaviour as the basis of their resignation and a claimed dismissal.

46. The breach relied upon by an employee may be of a fundamental express term or the implied term of trust and confidence and any such breach must be repudiatory; a breach of the implied term will be repudiatory, meaning that the behaviour complained of seriously damaged or destroyed the essential relationship of trust and confidence. Objective consideration of the employer's intention in behaving as it did cannot be avoided but motive is not the determinative consideration. Whether there has been a repudiatory breach of contract by the employer is a question of fact for the tribunal. The test is contractual and not one importing principles of reasonableness; a breach cannot be cured and it is a matter for the employee whether to accept the breach as one leading to termination of the

contract or to waive it and to work on freely (that is not under genuine protest or in a position that merely and genuinely reserves the employee's position pro temps).

47. As to whether a claimant has resigned as a result of a breach of contract, where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, rather than attempting to determine which one of the potential reasons is the effective cause of the resignation.

48. Even if an employee establishes that there has been a dismissal the fairness or otherwise of that dismissal still falls to be determined, subject to the principles of s.98 ERA. That said it will only be in exceptional circumstances that a constructive dismissal based on a repudiatory breach of the implied term will ever be considered fair.

49. "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions" **Kaur v Leeds Teaching Hosp [2018] EWCA Civ 978** (Per LJ Underhill):

- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- (2) Has he or she affirmed the contract since that act?
- (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
- (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju* [that "the function of the Employment Tribunal when faced with a series of actions by the employer is to look at all the matters and assess whether cumulatively there has been a fundamental breach of contract by the employer"]) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)-breach of the *Malik* [trust and confidence] term? If it was, there is no need for any separate consideration of a possible previous affirmation, [because: "If the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the *Omilaju* test), it should not normally matter whether it had crossed the *Malik* threshold at some earlier stage: even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so").
- (5) Did the employee resign in response (or partly in response) to that breach?

Application of law to facts:

The reasonable adjustments claim:

50. R was unaware of C's disability at the material time; such knowledge is essential for C to succeed. R was unaware of the potential for C to suffer a substantial disadvantage from the PCP, where again such knowledge is essential. Knowledge may be constructive, that is the Tribunal is entitled to consider and find whether a respondent ought reasonably to have been aware of disability and disadvantage. There was no way or reason in this case for R to have been aware and it did not have constructive knowledge. In any event, C did not suffer such a

substantial disadvantage. The proposed adjustment, R employing an unnecessary additional worker at its own cost which it could not recover from Valero, would not have been reasonable in these circumstances and the statutory duty had not arisen. This claim fails.

The harassment claim:

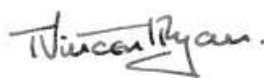
51. R was unaware of C's disability. C does not complain about the conduct of being put to work with CJ but CL's alleged motive; it would have been unwanted motivation but C only knew second-hand about this. It was, if anything, related to his grievance and not to any disability. C only wanted the matter documented and for no further action, which is indicative of how little he was concerned. Mr James took it further. The Tribunal is unable to make a positive finding of CL's purpose as she did not give evidence although she submitted a short statement internally. The Tribunal finds that CL's alleged motive did not have the harassing effect. C working with CJ did not have the harassing effect. C in fact emphasised that he was comfortable working with CJ. This claim fails.

The constructive dismissal claim:

52. The Tribunal finds that there was no fundamental breach of contract by R. R acted to maintain the employment relationship by positive conduct; there is no evidence that R acted in a way intended or likely to damage or destroy the relationship of trust and confidence. R did not breach any express term of the contract either. By his conduct C gave R several issues to consider and to manage, which it did conscientiously, fairly, and proportionately. Even if C had animosity with CJ (which C says was not a problem) the procedures followed and management involvement provided security for C. R sought to placate C and to compromise with him over issues raised in both the grievance and disciplinary processes that were completed. R actively tried to get C back to work after his illnesses. Valero triggered the final disciplinary investigation, a matter out of R's control. There is no evidence that R pre-judged the smoking allegation or that R had decided any sanction.

53. C resigned because he did not want to face a disciplinary investigation. He resigned for his own reasons, knowing what he knew about the matters under investigation and what a disciplinary procedure would entail. He also knew the potential outcomes. He had his own personal reasons for seeking to avoid due process notwithstanding he had been treated fairly and reasonably to date. R did not breach C's contract as alleged. C's resignation was not because of a breach of trust and confidence by R.

54. All claims fail and are dismissed.



Employment Judge T.V. Ryan

Date: 12.04.22

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

APPENDIX**IN THE WALES EMPLOYMENT TRIBUNAL BETWEEN****MR M ROGERS****Claimant****and****PROFILE SECURITY SERVICES LIMITED****Respondent****CHRONOLOGY & AGREED FACTS**

Date	Event	Page no
09.01.12	The Claimant started employment with Wilson James as a Security Officer, based at Valero Energy Refinery, Pembrokeshire (" Valero ")	
08.02.12	The Claimant signed his contract of employment	431-445
21.05.19	The Claimant completed a screening form to apply for his BS7858, required by the Respondent prior to taking over security services at Valero, confirming he had no CCJs	102-112
01.06.19	The Respondent took over the contract for security services at Valero, and the Claimant's employment transferred from Wilson James to the Respondent	
14.08.19	The Claimant emailed the Respondent apologising and explaining the errors on his screening form regarding CCJs against him	119
27.01.20	The Respondent emailed the Claimant with details of how to renew his SIA Licence	122-123
27.02.20	The Respondent emailed the Claimant to ask him to take action on the renewal of his SIA Licence urgently	122
28.02.20	The Respondent wrote to the Claimant regarding his SIA Licence renewal. The letter warned him that if his licence was not renewed by 03.03.20, he would be deallocated from duties	124

28.02.20	The Claimant emailed the Respondent giving details to access his SIA online account. The Respondent replied to query if the details given were correct	128
05.03.20	The Claimant completed his checks with the Post Office. The Respondent checked with the SIA for the Claimant's licence renewal but it had not progressed to "checks in progress"	133-136
11.03.20	The Claimant's SIA Licence renewal progressed to "checks in progress" and the Respondent was able to obtain a licence dispensation notice to allow the Claimant to return to work	137-138
20.03.20	Claire Lydon texted the Claimant about getting the supervisor role over the Claimant	139
31.03.20	Mr Jenkins met with the Claimant to discuss his lateness	140-141
02.04.20	The Claimant reported that he would not be attending work as his partner had symptoms of Covid. He submitted an Isolation Note for the period 02.04.20 to 15.04.20	142
14.04.20	Chris Jenkins, Deputy Support Manager, spoke to Claimant while he was parked outside Boots Chemists	
15.04.20	Mr Jenkins informed Barry James, Site Security Manager, that he had seen the Claimant in town the previous day and Mr James started an investigation against the Claimant for dishonesty. The Claimant was suspended on full pay.	144-155
16.04.20	The Claimant attended a fact finding telephone call with Mr James.	156-159
20.04.20	Mr James completed his investigation and recommended that the matter proceed to a disciplinary hearing.	162-164
22.04.20	The Respondent wrote to the Claimant inviting him to a disciplinary hearing on 24.04.20	165
24.04.20	The Claimant attended his disciplinary hearing with a work colleague, Anthony Jones, Security Officer. Paul Thomas, Strategic Account Manager, held the disciplinary hearing.	167-175
01.05.20	Mr Thomas emailed the Claimant confirming that, as explained to the Claimant the previous week, he had decided to issue the Claimant a final written warning.	183
05.05.20	The Claimant appealed against the final written warning.	185-189

08.05.20	The Claimant rang in sick from work with “eczema, unable to sleep, stresses”	195
12.05.20	The Claimant obtained a fit note signing him off work until 26.05.20 for “Stress at work”	204
12.05.20	The Respondent wrote to the Claimant inviting him to an appeal hearing	213
19.05.20	The Claimant attended an appeal hearing by telephone with his trade union representative. Paul Hannigan, Regional Manager, held the appeal.	214-219
22.05.20	Mr Hannigan wrote to the Claimant to explain that he had reduced the Claimant’s sanction to a written warning.	231-232
22.05.20	The Claimant obtained a fit note signing him off work for 4 weeks for “Stress at work”	234
01.06.20	The Claimant raised a grievance	239-244
05.06.20	The Respondent wrote to the Claimant to invite him to a grievance hearing	251
10.06.20	The Claimant attended a grievance hearing by telephone with his trade union representative. Mr Hannigan held the grievance hearing.	262-275
18.06.20	The Claimant obtained a further fit note signing him off work until 02.07.20 for “Stress at work”	330
25.06.20	Mr Hannigan wrote to the Claimant explaining that his grievance was rejected.	331-336
01.07.20	The Claimant obtained a fit note signing him off work until 15.07.20 for “Stress at work”	337
02.07.20	The Claimant appealed against the outcome of his grievance	338-339
10.07.20	Colin Beaver, Divisional Director, appeal manager, wrote to the Claimant to request more information about his appeal.	344
15.07.20	The Claimant obtained a fit note signing him off work with “Stress at work” from 15.07.20 to 29.07.20	355
27.07.20	The Claimant’s trade union representative provided further details of the Claimant’s appeal and confirmed that the Claimant would not be attending any hearing.	348-354, 365
28.07.20	The Claimant emailed Chris Jenkins, Deputy Support Manager, to confirm his intention to return to work on	369

	expiry of his latest fit note on 30.07.20	
29.07.20	Mr Beaver wrote to the Claimant with the outcome of his appeal. Mr Beaver accepted the Claimant's grievance in part, and rejected the rest of the grievance.	377-383
30.07.20	The Claimant's trade union representative emailed Mr Beaver to say that the Claimant was satisfied to accept Mr Beaver's outcome and was looking forward to returning to work. She raised an issue regarding the Claimant's pay during his phased return.	387
30.07.20	Mr Beaver spoke to the Claimant's trade union representative to confirm that the Claimant would be paid for his full time hours during his phased return.	386
03.08.20	The Claimant attended a return to work meeting with Mr James. The Claimant told Mr James that his stress at work had been resolved after the outcome of his appeal.	390
06.08.20	The Claimant attended a further return to work meeting and reported no issues.	391
12.08.20	The Claimant attended a third return to work meeting. He reported no concerns regarding working hours, workload or tasks. The Claimant did report one issue regarding his work colleague, Claire Lyford and Mr James asked the Claimant to provide a statement so that the matter could be investigated.	391
12.08.20	The Claimant emailed Mr James with further details of the incident with Claire Lyford	505-506
28.08.20	The Claimant rang in sick as his partner had symptoms of Covid	
01.09.20	The Claimant informed the Respondent that his partner's Covid test was negative and he could return to work	
01.09.20	Valero contacted the Respondent to say that the Claimant had allegedly breached a life-saving rule and was not welcome on site. Mr James contacted the Claimant following this call. Mr James asked the Claimant to come in to prepare a report for Valero at 9am on 02.09.20, which was rearranged to 12pm at the Claimant's request	404, 457
01.09.20	The Claimant resigned with immediate effect	405
08.09.20	The Respondent had a documented discussion with Mr Jenkins regarding learning points from the Claimant's grievance	503-504

09.20	Valero sent the Respondent stills showing the Claimant smoking in a red zone.	401-403
08.10.20	The Claimant received his final pay	418
08.10.20	The Claimant emailed the Respondent about his missing holiday pay	419
20.10.20	The Respondent paid the Claimant his outstanding holiday pay (£1,037.82 less statutory deductions)	428

Employment Judge T.V. Ryan

Date: 12 April 2022

JUDGMENT SENT TO THE PARTIES ON 14 April 2022

FOR THE TRIBUNAL OFFICE Mr N Roche

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.