EMPLOYMENT TRIBUNALS

Claimant: Mr T E Gorczyca

v

Respondent: Global Outdoor Media Limited

Heard at: London Central (via CVP) **On:** 3 and 4 February 2022

Before: Employment Judge Fredericks

Appearances
For the claimant: Ms G Churchouse (Counsel)
For the respondent: Ms C Jennings (Counsel)

RESERVED JUDGMENT

The claimant's claims are not well founded and are dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a Multi Media Technician, installing adverts in outdoor locations from April 2008 until his employment ended in the summer of 2020. The respondent is one of the UK's largest outdoor media companies employing approximately 185 people.

2. The respondent asserts that the claimant's was dismissed fairly on 26 August 2020 and that the claimant was dismissed for gross misconduct following his persistent absence from work, and failure to return to work when instructed on 24 July 2020 and again on 5 August 2020.

3. The claimant's claim is broadly that his dismissal was unfair under s98 of the Employment Rights Act 1996 because he was subjected to an unduly long suspension for another matter from February 2020, on an unfair and unfounded basis, such that the subsequent decision to dismiss him was unfair having regard to equity and substantial merits of the case.

4. The claimant also claimed that his long suspension was a repudiatory breach of contract which was not waived by the claimant (Counsel for the claimant expressed the breach to have been 'accepted') to the effect that he was constructively dismissed on 23 July 2020 (when he made clear his intention to not return to work). Further, the claimant claimed that he was owed wages for the period of time where he was employed but did not attend work.

5. The claimant was represented by Ms G Churchouse of counsel, and gave evidence himself in support of his claim. The respondent was represented by Ms C Jennings of counsel. The respondent's sworn witnesses were: Mr James Dapaah (Shift Lead at the respondent); Ms Karen Gilbert (Commercial Manager at the respondent); and Mr Adrian Lovejoy (Operations Director – Outdoor at the respondent).

6. I also had access to an agreed bundle of documents which ran to some 742 pages. Page references in this document refer to the pages of that bundle.

Issues to be decided

7. There was a discussion at the outset about the relevant issues. Ms Jennings had produced a list of issues, which was adopted, but had not appreciated that the claimant intended to pursue a claim for constructive unfair dismissal. Those issues were therefore added to the adopted list of issues.

8. The issues were:

    a. ***Constructive unfair dismissal –***
        i. *did the respondent breach clause 12 of the claimant's contract of employment when placing him on suspension between 12 February 2020 and 23 July 2020?*
        ii. *did the suspension in (a)(i) above constitute a breach of the implied term of mutual trust and confidence, and/or -*
        iii. *breach an implied duty to conduct a disciplinary process promptly and fairly?*
        iv. *were any or all such breaches, if found, repudiatory in nature?*
        v. *if so, did the claimant accept or waive any such breach(es)?*
    b. ***Ordinary unfair dismissal –***
        i. *has the respondent shown that the claimant was dismissed for reason of his conduct?*
        ii. *did the respondent carry out such investigation into the claimant's conduct as was reasonable in the circumstances?*
        iii. *did the respondent, at the time the decision to dismiss was taken, have a genuine and reasonably held belief that the claimant had committed the misconduct?*
        iv. *did the respondent act reasonably in treating the misconduct as sufficient reason to dismiss the claimant?*

v. *was the dismissal fair or unfair in accordance with s98(4) ERA 1996 and, in particular, was dismissal within the reasonable range of responses which a reasonable employer might have adopted?*

c. ***Remedy (if the dismissal was unfair) –***
   i. *is the claimant entitled to any compensation?*
   ii. *should any compensation be reduced to reflect the extent to which the claimant's culpable or blameworthy conduct contributed to or caused his dismissal?*
   iii. *if there were procedural shortcomings, does the respondent show that, absent those failings, the claimant would still have been dismissed in any event and, if so, what is the percentage chance he would have been dismissed?*
   iv. *has the claimant mitigated his loss?*

d. ***Unlawful deduction from wages –***
   i. *did the respondent's decision to not pay the claimant for the period he was absent from work in August 2020 constitute an unlawful deduction from wages? Were those wages properly payable?*
   ii. *was the respondent entitled to withhold wages?*
   iii. *what if any sum is due to the claimant following any unlawful deduction?*

Findings of fact

9. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are references to the bundle of documents I was provided with prior to the hearing starting.

Background

10. The claimant began employment at the respondent as a multi-media technician on 7 April 2008. His job role required him to work at various sites operated by Transport for London, and other sites of other organisations where the respondent had work. In the period immediately prior to the termination of the claimant's employment, he was generally working on night shifts on the London Underground network. The shift cycles usually ran on a fortnightly basis, which each shift cycle beginning with a safety briefing to ensure that staff had important updates before commencing work on the London Underground network. It was compulsory to attend the safety briefing and there was a sheet for attendees to sign to confirm they had received the briefing. At some point just prior to the dispute between the parties, the sign in sheet also required the staff to declare that they understood the safety briefing received.

11. On 23 January 2020, the claimant requested confirmation about whether his hard hat had an expiration date. He also requested a personal head torch, and he was told he would be given new ones of each (page 115). He replied on 24 January 2020 saying that he considered that his hard hat had expired, and asked questions about how this could have happened and who was responsible for personal protective equipment (page 114). He was told that his hat was unlikely to have been in use long enough to have expired, even though the hard hat was

manufactured some time previously. On 25 January 2020, the claimant e-mailed to say that he was really sorry that the respondent could not *"follow their own good practices policy procedures like replacing hard hat after three years"*.

12. Ms Harker also responded to the e-mail chain. She reminded the claimant that he had attended safety briefings about hard hats and other protective equipment, which included how to keep and store it, and that it was the claimant's responsibility to report damage and present equipment for replacement when it needs replacing because it is out of date (page 112). She told the claimant that she had attached a sign in sheet confirming that the claimant had attended the training she described.

13. The claimant replied on the same day and described the safety briefings as being *"full of empty words and uselessness [sic] information"*. He said that he was not sure if he attended the training or not. He asked for the safety briefings to be accompanied by documentary paperwork which communicated the relevant information. He said that without this information, he did not feel that he could understand everything that he should. This request was not granted.

14. On 30 January, the claimant e-mailed Ms Harker to request that refresher training is done with all key documents disseminated with time for questions reserved at the end. There was no response to this e-mail.

The claimant's suspension from work

15. The claimant was unsatisfied with the lack of response to his e-mail requests. On the evening of 4 February 2020, the claimant attended a safety briefing at the onset of a new shift cycle. The claimant did not sign the sheet to confirm attendance or that he understood the briefing (pages 117-119). Ms Harker noticed this and asked him about it. The claimant explained that he would not sign a briefing sheet until he had had a response to his earlier e-mails. The claimant worked but did not sign the attendance sheet.

16. The claimant was called to a meeting with his supervisor Mr Heard on 7 February 2020. The claimant says that Mr Heard got heated and shouted about the claimant's refusal to sign the attendance sheet. Mr Heard was not present to give evidence about the meeting, but the respondent's witnesses denied that this was in keeping with Mr Heard's character. It is not in dispute that Mr Heard told the claimant that he was 'stepped down' without pay as a result of his refusal to sign the attendance sheets with effect from 7 February 2020. The first time the claimant complains about Mr Heard's manner is in his grievance hearing on 26 August 2020 (page 268). His contemporaneous account from an e-mails sent on 8 February 2020 and 10 February 2020 make no mention of Mr Heard being angry or that he behaved inappropriately (pages 121-124). He also made no complaint about Mr Hearn during the meeting relating to his suspension (pages 133-139). I find that, in that meeting on 7 February 2020, Mr Heard did not conduct himself angrily or inappropriately. He did, though, wrongly advise the claimant that he was able to be kept away from work without pay.

17. On 10 February 2020, the claimant was advised that his suspension would be with pay pending the outcome of the investigation and possible disciplinary action for

what had taken place. This position was confirmed to the claimant in a letter dated 12 February 2020 (pages 125-127). The letter advised him of his rights and options in the circumstances and also enclosed the respondent's disciplinary policy. The allegations against the claimant were: (1) that he had failed to follow a reasonable management instruction by failing to sign the attendance sheets; and (2) failing to confirm understanding of the safety briefing on 7 February 2020, which rendered him unable to work on health and safety grounds. The claimant's investigation meeting was rearranged by letter dated 19 February 2020, and was to take place on the evening of 21 February 2020 (pages 130-132).

18. The contract of employment between the parties notes, at clause 12, that the respondent may suspend the claimant for the period of time *"during which the [respondent] is carrying out a disciplinary procedure concerning you"* (page 80). The applicable disciplinary policy states that suspension *"will be for no longer than is necessary to investigate the allegations"* (page 53).

19. The claimant states that this period of suspension was expressed to be *'indefinite'*. It is clear to me that the end point of the suspension was not defined because it would only end when the investigation/disciplinary process was completed. It was not the case that the claimant was placed on suspension indefinitely as a punishment. I find that there was no intention for the suspension to last longer than was necessary at the point it was imposed; there is no cogent evidence to support a contrary position.

20. The investigation meeting in relation to the refusal to sign briefing sheets was held on 21 February 2020 by Mr Chris Scott. The handwritten notes to the meeting were from pages 133 to 137, with typed versions at pages 138 to 139. It is plain from the notes that the claimant did not trust the process and challenged Mr Scott's brief to conduct a neutral factual investigation. The meeting terminated because Mr Scott felt that the claimant was not answering the questions he felt he needed answering to progress his investigation (page 139).

21. Mr Scott's investigation report was completed and dated 18 March (pages 140-141). The report notes that Mr Scott had also spoken to Mr Heard, although those notes were not included within the bundle. The report recommended that the claimant should face disciplinary action because he had not followed a reasonable request to sign the attendance sheets and had not interacted with the investigation in a way which allowed Mr Scott to consider if there was an alternative to disciplinary action. Mr Scott said that the claimant would have the opportunity to explain his position fully at the disciplinary hearing.

22. On 23 March 2020, the United Kingdom entered the initial period of 'lockdown' in response to the Covid-19 pandemic and the respondent's core operations paused as a result. The respondent's evidence is that the senior managers involved with the claimant's case were unable to deal with Mr Scott's report due to the unprecedented situation they found themselves in.

23. On 8 April 2020, the respondent wrote to the claimant *"following up on recent discussions"* to invite the claimant to agree to go on to furlough (pages 142-143). The rules attached to the furlough offer include reference to government requirements (pages 148-150), and make clear that the claimant was unable to

engage in *"any work whatsoever"*, nor could he respond to or send e-mails or make work telephone calls. The list of things the claimant could do include activities to 'stay connected' to colleagues, so long as no work is completed. It is clear from the evidence that the respondent considered that it could not continue to progress the disciplinary action against the claimant whilst he was on furlough.

24. On 15 April 2020, the claimant confirmed his agreement to the conditions of the furlough scheme in writing, and was placed on to furlough (page 144). He agreed for the scheme to be extended again on 13 May 2020 (155-157) and again around 30 June 2020 (pages 168-169).

The claimant's refusal to return from suspension

25. On 10 July 2020, the claimant was informed that his period of furlough was ended and he was told about a return to work induction to take place on 16 July 2020 (pages 176-177). He did not attend the induction on the understanding that he was still suspended, and he informed Mr Dapaah of this on the same day.

26. The respondent decided that it would not pursue the disciplinary action against the claimant given the amount of time that had passed and the effects of the pandemic on the respondent. The claimant was asked to meet with Mr Scott and Mr Dapaah on 22 July 2020 so that he could be informed of the outcome of the process. Mr Dapaah was asked to read out notes prepared ahead of the meeting, which was treated as a script to be followed (pages 200-201). The notes included the respondent agreeing to provide written notes alongside briefing attendance sheets where possible, but not in all circumstances.

27. There is some disagreement about how far through the script Mr Dapaah got during the meeting. The claimant recalls being told that the respondent proposed to 'draw a line in the sand' and that that was effectively the end of the meeting. Mr Dapaah reported internally that he had 'diligently read the script' (page 202). It is clear from the claimant's understanding, though, that he was indeed told that the respondent did not intend disciplinary action to proceed such that the claimant would return to work; his suspension would end with the ending of the investigation/disciplinary process.

28. In his report of the meeting on 23 July 2020 (page 202), Mr Dapaah notes that the claimant did not agree to draw a line in the sand and that the claimant still considered himself to be on suspension until the process formally ended. He reported that the claimant chose to return home rather than work. This is what the claimant agrees he did.

29. On 3 August 2020, the respondent sent the claimant a letter (pages 204-206) outlining in writing that the disciplinary process had ended, the suspension ceased, and requiring the claimant to return to work on 5 August 2020. The claimant replied on the same date to advise that he would be *"unable to return to work"* because his queries about the training process and documentation had not been answered and so he felt that the same sort of incident would happen again (pages 207-208). He said that he would be very happy to return to work, but only when *"everything will be clearly explained"*. In response, Ms Ly told the respondent that these issues

should not stop him attending work on 5 August 2020 where those issues could be discussed (page 207).

30. The claimant did not attend work as instructed on 5 August 2020. Ms Ly wrote to the claimant on 6 August 2020 to express that the claimant was expected to return to work on that evening. The claimant was reminded that his suspension had ended and that the disciplinary process had finished. The claimant did not return on 6 August 2020 either.

31. The claimant has not been paid his salary by the respondent following his failure to return to work as instructed on 5 August 2020. Clause 6 of the employment contract between the parties states that the respondent may withhold pay from the claimant for any period of unauthorised absence (page 78).

The respondent's disciplinary process and the claimant's grievances

32. On 8 August 2020, Mr Dapaah sent the claimant e-mail which contained several attachments (page 218). Most of the attachment related to documents the claimant had already seen ending his suspension, but the first untitled attachment was a notification of a new disciplinary investigation about the claimant's absence from work, which was to take place on 10 August 2020 (pages 219-220). In cross examination, the claimant says that he did not think the attachment was important because it bore no title. He also said that when he opened it, it had the second page as the front page and so he did not read it. He did accept that he had read the attachment and opened it. He also accepted that the very top of the page he did see referred to unauthorised absence and an investigation meeting.

33. That untitled attachment also contained the respondent's updated disciplinary policy, which lists *'serious act[s] of insubordination'* and *'persistent or lengthy unauthorised absence from work'* as offences amounting to gross misconduct (page 224).

34. The claimant did not attend the investigation meeting on 10 August 2020. Ms Ly wrote to the claimant on 12 August 2020 to ask why he had not attended the meeting and to enquire about his wellbeing (page 231). The claimant did not reply to that e-mail.

35. On 17 August 2020, the claimant submitted a grievance relating to his period of suspension and asked for information about the investigation which had been undertaken (pages 232 – 233).

36. On 21 August 2020, Mr Dapaah submitted his investigation report recommending that a disciplinary hearing be convened for the claimant's refusal to return to work following his absence from the investigation meeting. The allegations recommended to be brought to the disciplinary stage were:-

    a. the claimant had been persistently absent from work without authorisation since 23 July 2020;
    b. the claimant had failed to follow a reasonable management instruction to return to work on 23 July 2020; and

c. the claimant had failed to follow a reasonable management instruction to return to work on 5 August 2020.

37. On 22 August 2020, the claimant submitted a second, lengthy grievance relating to the way the respondent had conducted its investigation process since 8 August 2020. It included allegations of harassment by Mr Dapaah and that the documents and attachment were calculated to be confusing and misleading for him.

38. On 23 August 2020, Ms Gilbert wrote to the claimant to advise him that he would be required to attend a disciplinary hearing on 26 August 2020 (page 237-238). The e-mail laid out in detail the allegations against the claimant and the evidence that the respondent had gathered in its investigation. The e-mail also proposed to deal with the claimant's first grievance at the same time because the grievance related to the reasons for the disciplinary action. Ms Gilbert included all of the relevant documents and correspondence with the e-mail again (pages 239-255). Ms Gilbert wrote again on 24 August 2020 to confirm that the claimant's second grievance could also be discussed at the same time (page 260).

39. On 26 August 2020, the claimant attended his disciplinary and grievance hearing. Ms Ly and Ms Gilbert were present for the respondent. At the start of the hearing, the claimant was asked whether he would prefer for the disciplinary element or the grievance element of the hearing to take place first. He indicated that the respondent should decide and then agreed for the disciplinary hearing to take place first. There are detailed but not verbatim notes of the hearing from page 261 to 266. When presented with the allegations, the claimant did not initially accept that he had been instructed to return to work from 23 July 2020. He said he was instructed to return by letter dated 3 August 2020. When asked whether he recalled being given information about returning to work on 23 July 2020, he deflected the subject by saying it was not an official meeting and asking how he was invited and whether it was an official meeting. He then refused to answer a question unless he felt his challenge about the status of the Mr Dapaah meeting was answered. He then said that he felt that Ms Gilbert *"should have prepared for the meeting"*. It clear from the notes that the hearing was disjointed because the claimant refused to answer questions and was not satisfied unless he received answers he felt entitled to.

40. In relation to the 5 August request to return to work, the claimant confirmed that he did not attend work because he felt that he would again refuse to sign the briefing sheet and would be suspended again. The claimant did not deviate from this view in cross examination, and indeed suggested that the respondent should have kept him on suspension as a result of his attitude. Page 263 records the claimant's attitude about Ms Ly's efforts to inform the claimant that he should return to work. The notes record his response as: *"she (Ha) can repeat the same email every day and I will not come"*. He further said that he had not replied to that e-mail because there was no point. The claimant confirmed that he understood the allegations which were the subject of the disciplinary, but he did not agree with them.

41. The claimant was asked to confirm that he had been given access to the respondent's new disciplinary policy which applied to the hearing. He said that he had received it but had not read it. He said he considered that the older policy was still valid. He refused a suggestion to adjourn the hearing so that he could read the

new policy. There followed an exchange on pages 265-266 which I find to be indicative of the claimant's overall approach to the disciplinary process, and which left the respondent with little assistance from him in terms of avoiding the ultimate sanction given:

"KG: on the 23rd you were told that you were no longer suspended. You agreed that you decided you were still suspended, and you would not return to work. Can you confirm?

TG: I refuse to answer this question because you've asked this a number of times

KG: you refuse to answer this question?

TG: the answer was made already

KG: can you remind me what the answer was? I'm trying to give you a fair hearing

TG: thank you very much

TG: let's go to next question

KG: I'd like to answer that one, are you going to answer?

KG: I take it by your silence you are not going to answer

Silence from Tomasz continues.

KG: Ok, I've gone through everything I need to. You've answered everything the best you can. Factually I've gained everything that I need. Is there anything else you'd like to add?

TG: no"

42. The claimant did not abandon or ameliorate this attitude under cross examination, and he did not dispute that the notes were an accurate record of the disciplinary hearing. The meeting went on to discuss the claimant's first grievance. The claimant was taken to the correspondence and exchanges in relation to his suspension. He was unhappy about the lack of clarity about what it was he was supposed to have not signed, and focused on a lack of detail about that as a reason to be unhappy with the process as a whole. He repeated his wish to have had documents outlining the contents of the briefings circulated with the briefings and said he did not understand why he was suspended. He complained about being told he was suspended verbally before the situation was clarified and formalised in writing. It was agreed that the claimant's second grievance could be answered in writing and the meeting adjourned to consider the outcome of the disciplinary process.

43. Around twenty-two minutes later, the claimant was informed that he was being summarily dismissed because the allegations of gross misconduct were to be upheld (pages 270-271). The respondent confirmed the outcome in writing on 28

August 2020 (pages 272-275) and the claimant was informed of his write to appeal. The letter confirmed that, because the claimant was found to have been absent from work without authorisation from 5 August 2020, his August 2020 pay would be stopped from that point.

44. On 4 September 2020, the claimant submitted a short letter to appeal against his dismissal (page 276) on the grounds that the disciplinary hearing was unfair because (1) the disciplinary was heard before the grievance, (2) the first grievance was not taken seriously, and (3) he had not received any outcome from the second grievance.

45. On 29 September 2020, the claimant's second grievance was addressed in writing with each of his questions and complaints comprehensively addressed in a detailed letter (pages 277-288). On 30 September 2020, the claimant was invited to attend a hearing of his appeal against the decision to dismiss him (pages 298-300). The appeal was to take place on 2 October 2020.

46. On 1 October 2020, the claimant asked for more time to lodge an appeal against the outcome of his second grievance, and the respondent agreed to extend the dealing to 12 October 2020 (pages 315-316). The claimant was also provided with typed notes from the investigation meeting he had attended on 21 February 2020.

47. The appeal meeting took place on 2 October 2020 and was chaired by Mr Lovejoy. Notes of the meeting are at pages 303 to 307. The meeting was recorded, with a copy of the recording sent to the claimant on the same day (pages 301 and 302). In the meeting, the claimant outlined his unhappiness with the initial failure to provide information in writing in relation to the briefings. He also referred to Mr Depaah's investigation and the issue with the 8 August 2020 email attachments which he said he had not realised included an invitation to a new investigation meeting. The claimant said that he would like to understand what had happened.

48. Ultimately, the claimant said that he had lost his job because he did not sign something, and that he would like his job back. This is important, because Ms Churchouse advanced on the claimant's behalf that he had accepted a repudiatory breach of contract on 23 July 2020 by not returning to work at any point after that date. The claimant's engagement with the disciplinary and appeal process indicate that he did not consider himself to have resigned, and his indication that he had 'lost his job', and a job that he would like back, further indicate that the claimant's mind was not that he had terminated the contract of employment, but rather that the respondent had dismissed him with effect from 26 August 2020. I find that the claimant did not intend to end his employment contract following the meeting of 23 July 2020. The claimant is not afraid to be strident and forthright with his views and intentions. I consider that if he meant his employment to end upon a perceived breach of contract of the employer, then he would have done so.

49. Mr Lovejoy continued to investigate the appeal after the appeal hearing. He spoke to: Ms Gilbert on 5 October 2020 (notes at page 308); Mr Dapaah on 5 October 2020 (notes at pages 309-311); Mr Hearn on 6 October 2020 (notes at page 312); and Ms Harker on 8 October 2020 (notes at page 314). Each confirmed their actions and assessments during the respondent's dispute with and handling of the

claimant. Mr Dapaah and Ms Gilbert's contribution to Mr Lovejoy's appeal investigation are consistent with their evidence in this tribunal hearing.

50. On 28 October 2020, Mr Lovejoy wrote to the claimant confirming that his appeal against his dismissal had been rejected (pages 330-337). The letter set out a comprehensive summary of the issues considered and also addressed in detail the claimant's complaints about the order in which his disciplinary and grievance hearings were covered. In short, Mr Lovejoy felt that the order was irrelevant because the claimant had been (page 336):

"unwilling to provide any reassurance that:
(a) [the claimant] would agree to return to work as per the original instructions issued;
(b) [the claimant] would be willing to engage with Health and Safety briefings going forward;
(c) [the claimant] understood the seriousness of [his] actions; or
(d) [the claimant] showed any remorse or indication that [he] would change [his] behaviour in the future."

Relevant law

Constructive dismissal

51. An employee is entitled to treat themselves as constructively dismissed where they terminate their employment contract following the employer seriously breaching that contract in a way which goes to the root of the employment contract (*Western Excavating (ECC) Ltd v Sharp [1978] QB 761*).

52. The serious, or repudiatory, breach of contract may be to express provisions of the employment contract or to provisions which are implied into the contract by case law. All employment contracts contain a term 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 confidence and trust between employer and employee"* (*Malik v BCCI SA (in Liquidation) [1998] AC 20*, as amended by *Varma v North Cheshire Hospitals NHS Trust [2007] 7 WLUK 116*).

53. Whether or not there has been a breach to the implied term of trust and confidence is an objective question and the employer's intentions are irrelevant. If the employer commits conduct which is likely to destroy or seriously damage mutual trust or confidence, then it will be deemed to possess the subjective intention (*Leeds Dental Team Ltd v Rose [2014] ICR 94*) and the employee is likely to be able to accept that repudiatory breach and terminate the employment contract (*Morrow v Safeway Stores Plc [2002] IRLR 9*).

54. In *Lim v Royal Wolverhampton Hospitals NHS Trust [2011] EWHC 2178 (QB)*, Slade J was asked to find that the delay to a disciplinary process was a breach of an implied term of proceeding fairly and without undue delay. She declined to do so, stating that the previous case of *RSPCA v Crudden [1986] IRLR 83* did not establish that there is such a blanket duty and that each case is fact sensitive.

55. The existence of an implied term to deal with disciplinary process, as distinct to the dismissal process, fairly was also discussed in obiter remarks made in *Burn v Alder Hey Children's NHS Trust [2021] EWCA Civ 1791*. In this case, Underhill and Singh LJJ both stated that there was or may be such a duty, but it did not form part of the reasoning for the case before them and so is not binding on tribunals faced with similar claims.

56. The determination as to whether a breach is sufficiently serious as to constitute a repudiatory breach is an objective test, and it does not matter that the employer might genuinely believe a breach to not be repudiatory (*Tullett Prebon Plc v BCG Brokers LP [2011] EWCA Civ 131*). The overall repudiatory breach may be a single act or a collection of smaller breaches or a series of events which are not individually breaches but which amount to a breach when put together (*Garner v Grange Furnishing [1977] IRLR 206*.

57. To accept a repudiatory breach of contract and claim constructive dismissal, an employee must resign or treat the employment contract as having ended in response to the breach. It is sufficient for these purposes for the breach to have played a part in the decision to resign (*Wright v North Ayrshire Council [2014] ICR 77*). The tribunal is able to ascertain the true reason for the employee's resignation (*Weathersfield Ltd v Sargent [1999] ICR 425*).

58. When faced with a repudiatory breach of contract, an employee can choose to either accept the breach, which ends the contract, or affirm the contract and insist upon its further performance. Failure to resign or act in a way which treats the employment contract as ending risks the employee either affirming the contract or waiving a breach of the contract of employment. When considering whether a contract has been affirmed, the tribunal will look at all of the circumstances of the case (*WE Cox Turner (International) Ltd v Crook [1981] ICR 823*).

59. Employees should be careful when choosing to continue to work for a period if they intend to rely upon a repudiatory breach of contract in a constructive dismissal claim. In *Quilter Private Client Advisers Ltd v Falconer [2020] EWHC 3294 (QB)*, Calver J said, at para 121:

> *"It is undoubtedly the case that if the employee decides to accept the repudiatory breach, he must do so unambiguously and with sufficient dispatch. If his purported acceptance is delayed, he runs the risk of a court finding that his action has not been sufficient to discharge the contract. However, in my judgment it is what happens during the delay which is the critical feature: provided the employee makes unambiguously clear his objection to what has been done by the employer, he is not necessarily to be taken to have affirmed the contract by giving a short period of notice, and continuing to work and draw pay for a limited period of time ... It all depends upon the facts of the particular case whether the employee has nonetheless unambiguously accepted the repudiation of the employer and with sufficient dispatch. The length and circumstances of the delay require to be examined in each case."*

Unfair dismissal

60. Under *s98(1) of the Employment Rights Act 1996*, it is for the employer to show the reason for the dismissal and that it is either for a reason falling with *section 98(2)* or for some other substantial reason of a kind such as to justify the dismissal of the employee. The respondent asserts that the claimant was dismissed by reason of the claimant's conduct. Dismissal for conduct is a potentially fair reason falling within *section 98(2)*.

61. Where the employer has shown a reason for the dismissal and that it is for a potentially fair reason, *section 98(4) of the Employment Rights Act 1996* states that the determination of the question whether the dismissal was fair or unfair depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and must be determined in accordance with the equity and substantial merits of the case.

62. In *Iceland Frozen Foods v Jones [1982] IRLR 439*, it was held that, when considering s98(4), the tribunal should consider the reasonableness of the employer's conduct and not simply whether the dismissal is fair. In doing so, the tribunal should not substitute its view about what the employer should have done. The case also outlined that there is a range of responses open to a reasonable employer; although different employers could come to different decisions in the same circumstances, all might be reasonable. Consequently, the tribunal must consider whether, in the particular circumstances of the case, the decision to dismiss the employee fell within the reasonable range of responses which a reasonable employer might have adopted. If a dismissal falls outside that band, then it is unfair. The tribunal should consider the whole dismissal process, including any appeal stage, when determining fairness (*Taylor v OCS Group Ltd [2006] ICR 1602*).

63. When considering cases of alleged issues of conduct, it is important to consider the case of *British Home Stores v Burchell [1980] ICR 303*. This case establishes a three stage test for dismissals:

    a. the employer must establish that it believed that the misconduct had occurred;

    b. the employer had in its mind reasonable grounds upon which to sustain that belief; and

    c. when the belief in the misconduct was formed, the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

64. The band of reasonable responses test applies as much as much to the respondent's investigation as it does to the decision to dismiss (*Sainsbury's Supermarkets v Hitt [2003] IRLR 23*). The tribunal must focus on whether the employer's investigation was reasonable in all the circumstances (*London Ambulance v Small [2009] IRLR 563*).

Reductions to any award for unfair dismissal

65. If a finding of unfair dismissal is made as a result of an unfair procedure, then the tribunal should consider the likelihood that the employee would have been dismissed in any case had a fair procedure been followed. The compensation to be awarded should be reduced to reflect that likelihood (*Polkey v AE Dayton Services Ltd [1987] UKHL 8)*.

66. *Section 122(2) of the Employment Rights Act 1996* provides that the tribunal should reduce the basic award to reflect any circumstances where the tribunal considers the conduct of the claimant before the dismissal makes it just and equitable to do so. By *s123(6) ERA 1996*, where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding. The tribunal must make a reduction where there is a finding of contributory fault (*Optikinetics Limited v Whooley [1999] ICR 984*). The reduction may be as much as 100% (*W Devis & Sons Ltd v Atkins [1977] ICR 662*).

67. When considering whether or not to make a reduction for contributory conduct, it is helpful to keep in mind guidance from *Nelson v BBC (No 2) [1980] ICR 110* which said:

    a. the relevant action must be culpable and blameworthy;
    b. it must have caused or contributed to the dismissal;
    c. it must be just an equitable to reduce the award by the proportion specified.

68. Broadly, it is understood that the reduction should be: (1) 100% where the employee's conduct is wholly to blame for the dismissal; (2) 75% where the employee is mostly to blame; (3) 50% where there is equal blame; and (4) 25% where the employee is partly to blame.

Unlawful deduction from wages

69. *Section 13(1) Employment Rights Act 1996* provides that an employee shall not suffer a deduction from wages due unless the deduction is required or authorised by statute or a provision of the employment contract, or because the employee has previously agreed to the deduction in signed writing. *Section 13(3) of the Act* provides that the wages which might be subject to a section 13 claim must be 'properly payable'.

Discussion and conclusions

Constructive dismissal

70. Two of the three alternative bases for the claimant's unfair dismissal claim revolve around him accepting the respondent's repudiatory breach of contract – either because the respondent breached clause 12 of the claimant's employment contract by keeping him suspended for longer than is necessary, or because the respondent breached an implied term of mutual trust and confidence and/or an

implied term to conduct a disciplinary process promptly and fairly. In the hearing, Ms Churchouse argued that the respondent had left the claimant on indefinite and unjustified suspension for a period far in excess of what was fair or reasonable in the circumstances. It is argued that the claimant accepted the breaches and that his contract terminated on 23 July 2020, because he did not return to work after that date when instructed to.

71. Neither of these bases for claims were pleaded clearly. Whilst there was the briefest hint at the claimant's suspension being a breach of contract, the ET1 did not particularise the breach or set out how the breach was accepted. It did not explain how the obvious facts following 23 July 2020 did not amount to the claimant affirming the contract of employment had there been in any repudiatory breaches of it. The claimant's witness statement did not cover these bases of claim at all, and the respondent's counsel was clearly surprised by their sudden introduction at the start of the hearing.

72. In my judgment, these claims must fail because the facts are not simply consistent with the claimant resigning from his employment and accepting any breach, either with his words or with his conduct. It is frankly surprising that these claims were presented in this way in the circumstances where the claimant:

    a. engaged with his disciplinary process after 23 July 2020;
    b. attended all stages of the disciplinary process;
    c. appealed the respondent's decision to dismiss him;
    d. submitted grievances relating to his employment and his disciplinary;
    e. said that he lost his job, rather than left his job; and
    f. said that he wanted to have his job back.

73. None of these points are indicative of the claimant having determined the contract in his own mind and acting in a way which is clearly in accordance with the contract having been terminated. When he was asked whether he had resigned during July 2020, the claimant said he did not understand what this would mean. Ms Churchouse then submitted that he had not used the word resign because he did not understand it. This is irrelevant; the point is that he could not be perceived to have resigned by his conduct for the reasons outlined above. On the contrary, he acted in accordance with key parts of his contract of employment by engaging with the disciplinary and grievance process with the ultimate aim of being reinstated to his post.

74. If I am wrong on that point, and I do not consider that I might be, then it is important to identify whether there were in fact any breaches of contract. In my judgment, the respondent did not breach the employment contract. The respondent was entitled to suspend the claimant during the investigation and disciplinary stage by clause 12 of the contract. The investigation stage did not conclude until 18 March 2020, when the investigation report recommending disciplinary action was submitted. The respondent then felt compelled to pause that action during the pandemic, and especially when the claimant was on furlough and unable to conduct any work. In circumstances where the claimant would be unable to work anyway if the suspension was lifted, it does not strike me as unreasonable for the respondent to pause dealing with the matter whilst faced with such an unprecedented situation.

75. For the same reasons, I do not consider that the respondent breached the implied term of mutual trust and confidence or any implied term to deal with disciplinary action promptly and fairly. Ultimately, the respondent decided not to pursue the disciplinary action recommended by the investigating manager, opting instead to give the claimant another opportunity to engage with the issues and talk about them. I do not see how the respondent deciding not to consider applying a sanction to the claimant could be an act for which it could be criticised in these circumstances.

76. It follows that I do not consider, objectively on these facts, that there was a repudiatory breach of contract which would have allowed the claimant to terminate the contract even if he had attempted to do so.

Unfair dismissal

77. Ms Churchouse submitted that, should I not be minded to find that the claimant had been constructively dismissed, then I should find that the claimant has been subjected to an ordinary unfair dismissal because:

    a. the respondent had not fully investigated and addressed the claimant's two grievances prior to deciding to dismiss the claimant;
    b. the decision to dismiss was pre-determined; and
    c. dismissal was too severe a sanction in the circumstances.

78. I decline to do so. The claimant was informed that his suspension had ended on 23 July 2020, and he was instructed to return to work on 5 August 2020 and 6 August 2020. He did not do so. The respondent acted reasonably, in my judgment, by launching a disciplinary investigation process following this failure to follow an instruction to return to work following the ending of his suspension. The claimant did not attend that meeting, but has admitted that he had opened the document inviting him to it. The claimant still did not return to work. In the circumstances, the respondent had no realistic option but to progress the disciplinary process to a disciplinary hearing. In my judgment, with reference the respondent's policy, the respondent reasonably categorised the claimant's actions as gross misconduct. It was in a situation where a member of staff was refusing to attend work unless certain matters were addressed precisely to his satisfaction, when the respondent had determined and tried to tell the employee that it could not always provide what it was the employee wanted.

79. The claimant's grievances were addressed as part of the appeal process and I consider that the respondent made reasonable conclusions in respect of those grievances. In any case, the claimant did not express a wish for his grievances to be considered first at the time of his disciplinary hearing. The respondent reasonably gave him the choice about which order he wished the matters to be heard, and he declined to make a decision. In the disciplinary element of the meeting, he then confirmed that he would act in the same way again and gave no information to the respondent which could have led it to a different conclusion.

80. Specifically considering the ***Burchell*** test, the respondent was justified in its belief that the claimant had committed the misconduct alleged because he admitted it and he confirmed that the same thing would happen again if he returned. In my

judgment, the respondent's actions in dealing with the claimant always fell within the band of reasonable responses. In the circumstances, faced with an employee acting as the claimant did, the decision to dismiss was plainly well within the band of reasonable responses.

81. Consequently, the claimant's claim for ordinary unfair dismissal must fail and should be dismissed. There is no need to go on to address either *Polkey* or contributory conduct. The claimant's effective date of termination is therefore 26 August 2020.

Unlawful deduction from wages

82. The claimant was absent from work without authorisation from the date he was notified his suspension had ended to the date of dismissal, and the employment contract between the parties provides that the respondent may withhold wages to cover such an absence. This falls squarely within one of the circumstances where an employer is entitled to deduct from wages, and so it follows that this claim must also fail and should be dismissed.

Employment Judge - Fredericks

25 April 2022

Sent to the parties on:

27/04/2022.

For the Tribunal Office: