EMPLOYMENT TRIBUNALS

Claimant: Mr O Letchford

Respondent: Saica Flex UK Limited

HELD AT: Manchester **ON:** 19, 20, 21 & 22 October 2021 Discussion in chambers – 19 November 2021

BEFORE: Employment Judge Johnson

MEMBERS: Mr R Cunningham
Mr B Rowen

REPRESENTATION:

Claimant: In person/unrepresented
Respondent: Ms L Kaye (counsel)

JUDGMENT

The judgment of the Tribunal is that:

(1) The claimant's resignation on 15 November 2019 should not be treated as a dismissal.

(2) The claimant presented his complaint of constructive automatic unfair dismissal contrary to section 100 Employment Rights Act 1996 while still employed by the respondent and before his effective date of termination and this complaint should be dismissed.

(3) Even if the complaint of automatic unfair dismissal contrary to section 100 Employment Rights Act 1996 arose from a dismissal and the Tribunal had jurisdiction to hear this complaint, the Tribunal finds that this complaint was not well founded and should be dismissed.

(4) The complaint of direct age discrimination contrary to section 13 Equality Act 2010 is not well founded and is dismissed.

REASONS

Introduction

1. This claim arises from the claimant's employment with the respondent from 27 February 2018 until 15 December 2019, when his employment ended having first given notice of resignation on 15 November 2019.

2. The claimant presented a claim form to the Tribunal on 15 October 2019 following a period of early conciliation from 10 October 2019 until 10 October 2019. He brought complaints of automatic unfair dismissal relating to health and safety and direct discrimination on grounds of age.

3. The respondent presented a response resisting the claim.

4. The case was subject to case management before Employment Judge Franey (as he then was), on 3 February 2020. It was noted that the claim form had been presented before the claimant was dismissed, but he was permitted to amend his claim to include the complaint of unfair dismissal by Employment Judge Ross on 28 September 2020. The respondent was permitted to present an amended response. Employment Judge Johnson agreed to the final hearing being heard as a hybrid hearing with the respondent's witnesses being permitted to give their witness evidence remotely by CVP.

Issues

5. The issues were identified at the preliminary hearing on 3 February 2020 and in anticipation of the claimant's application to amend his claim. Although remedy was identified, the case being heard by the Tribunal in this judgment related to liability only.

<u>Preliminary Issue – Dismissal?</u>

6. Can the claimant show that his resignation on 15 November 2019 should be construed as a dismissal in that:

   a) The respondent fundamentally breached the implied term as to trust and confidence by the following matters, whether taken individually or together:

      i) Overloading the claimant with work during his shifts; and/or,
      ii) Giving him even more work to do when he complained about it.

   b) That the breach was the reason for the claimant's resignation; and,

   c) The claimant had not lost the right to resign by affirming the contract after the breach, whether through delay or otherwise?

<u>Direct Age Discrimination – section 13 Equality Act 2010 ('EQA')</u>

7. Are the facts such that the Tribunal could conclude that because of age, (the claimant being in the age group of 35 and over), the respondent treated the claimant less favourably than it treated his comparators in the age group 25 and under, (the comparators being Chris Stone, Benny Sheldon and Kamile [surname unknown]):

    a) By requiring the claimant to cut cores for two or even three shifts during his own shift; and,

    b) If dismissal is established, by dismissing the claimant?

8. If so, can the respondent nevertheless show that there was no breach of section 13 EQA, whether because the treatment was a proportionate means of achieving a legitimate aim, (to be specified in the amended response) or otherwise?

Unfair dismissal – Part X Employment Rights Act 1996 ('ERA')

9. If the claimant was dismissed, can he show that the reason or principal reason for the treatment which amounted to a repudiatory breach of his contract was that he had brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety in accordance with section 100(1)(c) ERA?

Remedy

10. If any of the above complaints succeed, what is the appropriate remedy? Issues likely to arise include:

    a) The basic award for unfair dismissal;

    b) Compensation for financial losses;

    c) Injury to feeling for any age discrimination.

Evidence used

11. The case proceeded as a hybrid hearing. The Tribunal's Members appeared remotely (Mr Rowen attending in person from day 2), as did the respondent's witnesses.

12. The claimant attended in person, along with Ms Kaye of counsel, Mr Rowen from day 2 and Employment Judge Johnson.

13. The claimant gave witness evidence followed by the respondent's witnesses. They were in order, Peter Wild (formerly D shift manager and claimant's line manager), John Holden (number 1 printer on D shift and Unite trade union representative), Craig Shipstone (formerly C shift manager), Andy Richards

(Print team Leader C shift), Dave Grindey (Process Manager Slitting), Keith Greasley (formerly General Manager) and Karen Bain (Head of UK Human Resources).

14. There was a hearing bundle in excess of 1,000 pages, although approximately 500 of those related to remedy documents. They included training records, a number of shift rotas and core operator log sheets which recorded the activities of core operators including the claimant during 2019. The claimant sought to rely upon a graphologist's report which he had obtained without seeking permission from the Tribunal for an expert's report to use as part of the proceedings. The respondent objected to its inclusion and the Tribunal determined that it had no relevance to the issues under consideration and as there was no previous permission given for its inclusion in the evidence by the Tribunal. It was not in interests of justice to include in hearing bundle.

Findings of fact

15. R ('Saica') is a company which employs approximately 500 people across 6 sites in the UK and Ireland. This includes Saica's site in Buxton, which was where the claimant ('Mr Letchford') worked and at the time of his resignation, 120 people were employed at that location. The Tribunal understood that Saica made flexible packaging for use in the food and drink industry.

16. Mr Letchford was employed by Saica as a 'Factory Operative – Core Cutter/Trainee Slitter' when he started work for the company in February 2018. This role mainly involved operating a core cutting machine, but with the additional work of operating the slitting machines when required, shrink wrapping pallets and general duties. He worked on D shift on 12 hours shifts with Saica using a continental shift pattern of 48 to 72 hours per work at £9.09 per hour. Mr Letchford said that he aspired to become a full time operative on the slitting machines as this would entitle him to an increased hourly rate as a B grade employee at £12 per hour.

17. A clear area of disagreement between the parties in this case related to workload and Mr Letchford's belief that he was doing 2- or 3-people's work during a 12-hour shift. Mr Andy Richards, who in addition to being a team leader was a Unite union representative and health and safety champion for C shift, provided credible and reliable and evidence concerning the way in which shifts operated, and the Tribunal found that on balance of probabilities, this evidence accurately reflected how the workplace operated.

18. First of all, the factory operated 24 hours a day, 7 days a week (known as '24/7') continuous production cycle. This meant that each shift when starting work, simply continued with the work which had not been completed by the previous shift. The work was configured by the production managers Dave Grindey and Chris Heath, who produced a production plan and that was what core cutters and slitters operated to. Operators were allowed one hour's break time which could be taken as single break or split into a number of shorter breaks, the entitlement to this break included Mr Letchford. The Tribunal accepts that the timing and duration of breaks would normally fit into

the production cycle and when a natural moment to pause arose. If necessary, a job would be covered during a break by a colleague.

19. If the production plan for a particular shift was completed, employees were expected to progress to the next job in the plan or to carry out other duties such as wrapping pallets or moving them. It was understood that operatives would not be restricted to their primary roles and if necessary, they might operate another machine where particular jobs had to be completed. Mr Richards gave an example of slitters moving onto a core cutter machine for a period because the shift did not have a core cutter working and Mr Letchford referred to his *'jumping on'* to a slitting machine for periods of time.

20. Mr Letchford believed that he was asked to do the work of the previous 12-hour shift and the next 12-hour shift when working, which meant that he would be doing 24 or 36 hours work during a 12 hour shift. For the avoidance of doubt, Mr Letchford and his colleagues were not expected to work for periods longer than 12 hours as required by the shift and his argument was therefore that his workload was doubled or trebled during this period. Indeed, he said that *'[management] expected me to produce double meaning when I was working 72 hours I was doing 144 hours of production.'* Mr Letchford accepted that he signed a waiver under Working Time Regulations which enabled him to lawfully work the continental shift pattern and he acknowledged that he did not have a problem with the shift pattern per se, rather the workload that he believed was imposed upon him.

21. Mr Holden and Mr Richards both confirmed that the core cutter machine only operated *'at one speed'* producing an average of 75 to 100 cores per hour, depending upon the lengths of the cores being cut. This meant that it was not possible to operate the machine more quickly and therefore squeeze the work of additional shifts when operating it. Although there were two core cutting machines adjacent to each other and one operator……Mr Letchford said that it was possible to *'calibrate'* the core cutting machine, but the Tribunal understood that this related to the lengths of the core being cut, rather than the speed at which the machine operated. Ultimately, the Tribunal acknowledges that Mr Letchford could do double or triple work on the core cutter each shift but having considered the credible and reliable evidence of the Saica's witnesses, it does not accept that this additional workload was possible.

22. Mr Letchford said that when the A shift core cutter and the C shift core cutters were absent through ill health, (May/June 2018 and August to 2018 respectively) he was told that he had to produce enough cores to cover for the missing shifts. Mr Letchford did not provide the Tribunal with any meaningful evidence concerning the identity of the managers who might have told him to work in this way. The only suggestion that he gave regarding management pressure being applied was when Craig Shipstone the C shift manager said he *'was too important to have breaks'.* However, Mr Shipstone strongly denied having said this and denied that Mr Letchford was ever refused breaks while working his shifts. On balance the Tribunal felt Mr Shipstone's evidence was more reliable and credible and it is unable to find that Mr Letchford was treated in the way which he alleged.

23. Mr Letchford referred to a meeting on 7 November 2018 which took place with Ms Sutton (HR Manager) and Mr Holden which discussed his sickness absences reached a 'trigger point' and which could give rise to disciplinary action. Mr Letchford suggested the absences were because of his increased workload arising from his colleagues being absent, but Ms Stone noted that apart from a few very short absences, these colleagues were not absent for an extended period of time prior to Mr Letchford commencing his absence in April 2019. Moreover, even if they were absent, she noted that the core cutting machines could only cut at a single speed.

24. From 19 November 2018, Mr Letchford was offered a full-time contract on the slitting machines but informed that he would undergo a period of training with Mark Hartley. However, following a number of disagreements, he moved onto C shift in March 2019. At this stage, he had not on completed his training and Mr Shipstone who was the C shift manager, confirmed that he initially joined as a core cutter and that shortly after the move had taken place, Mr Letchford began to complain that he was being made to do the previous shift's work and was working 24 or 36 hours work in a 12-hour shift. Mr Shipstone gave the same convincing evidence as that given by his managerial colleagues, that this was not possible due to the way the 24/7 production cycle worked and the fixed speed of the core cutting machines.

25. From 25 April 2019, Mr Letchford began a period of sickness absence which his fit note attributed to *'work related stress'.* This continued for some time, and he was invited to a meeting on 3 July 2019 by Ms Bain. Once again, Mr Letchford asserted that he had been made to do 24 hours work in a 12-hour shift and Ms Bain's record of the meeting noted *'this has been discussed before'.* Her letter of 8 July 2019 explained to Mr Letchford that *'…within any 12 hour Shift, you could only cut a finite amount of Cores and provided that you are able to take the breaks to which you are entitled, whether the amount of cores you have cut is more or less than is required for your Shift and or any subsequent shifts is a matter for the Shift and Production Managers.'* She developed a return-to-work plan with these concerns in mind and a phased return was explained in the letter and which made it clear the typical number of cores to be cut each hour and the breaks that he should take.

26. Mr Letchford returned to work on 15 July 2019, and he appeared to work without difficulty until he resumed working a 12 hour shift patter which appeared to be from week 3 of his phased return to work and he again believed that he was being expected to do the work of two people. On 14 August 2019, Mr Shipstone recorded that Mr Letchford walked out of work claiming *'…he is doing 24hrs work in 12 hours again and this has happened because Chris Stone was asked to do other duties and he has been left to do all the work again'.* He was again signed off work by his doctor and the fit notes described this being because of *'stress at work'.* This absence continued and on 3 October 2019 he was referred to Acorn Occupation Health Limited who were the external company who provided occupational health ('OH') support to Saica. An OH meeting was arranged for 15 October 2019 with Wendy Elton, the OH nurse. The meeting did not go as planned and Mr Letchford walked out having accused Ms Elton of writing incorrect notes and

Ms Elton reminding him that he needed to discuss matters that were relevant to his sickness absence. This was supported by notes produced by Debbie Harrison and Mr Greasley and Mr Letchford emailed Acorn to say that *'The behaviour of your operative is abhorrent. She seems totally uninterested in any answers she is given which do not fall within the remit of what she wants.'* Mr Greasley recorded that he tried to reassure Mr Letchford that there *was no "conspiracy" between the three parties, but he did not want to listen, he continued his comments on the collusion and then left the building'.* Mr Letchford also sent an email to Mr Greasley on 15 October 2019 which was somewhat ill tempered and made a number of accusations regarding Saica's management and his union Unite. He stated in this lengthy email that '*Saica has turned an obsessive-compulsive workaholic into a total shambles through mockery and an excessive workload!'* However, taking into account the contents of the email, the Tribunal felt that its primary purpose was to inform Mr Greasley that he was about to present a claim form to the Tribunal.

27. Ms Elton's OH report dated 15 October 2019 was short and stated, *'Unfortunately, I am unable to enclose a report from the occupational health management referral because Mr Letchford was clearly too unwell to continue with the assessment. The assessment was terminated because of his mental agitation'.* Mr Greasley wrote to Mr Letchford on 24 October 2019 and summarised the events which had taken place since 3 July 2019 when he met with Ms Bain. He explained that he had treated Mr Letchford's email to him of 15 October 2019 as a grievance and invited him to a grievance hearing on 1 November 2019. The Tribunal found that this was a sensible step to take, especially considering the potential mental health issues which Ms Elton and the fit notes suggested. He also explained that he was concerned that it may be some time before Mr Letchford would be fit enough to return to work and he offered him the support of Saica's Employee Assistance Programme. Mr Letchford emailed on 4 November 2019 to say that he remained ill and asked that the grievance meeting take place in his absence. Mr Greasley replied that he would speak with Ms Bain about the grievance. However, on 15 November 2019, Mr Letchford sent a further email giving notice of his resignation with one month's notice. He referred to the Tribunal claim and that he had commenced early conciliation, although by 15 October 2019, he had presented a claim form to the Tribunal.

28. Despite giving notice, Mr Letchford did not seek a further fit note from his GP and instead returned to work to complete his notice period. A letter was sent to him by Mr Greasley on 28 November 2019 acknowledging his resignation and confirming his date of termination as being 15 December 2019. He had 218.5 hours untaken holiday entitlement, and this was to be paid into his final salary payment.

29. Mr Letchford's grievance was dealt with following the receipt of his email of 4 November 2021 in his absence and Mr Grealsey confirmed the outcome in his letter of 4 December 2021. He dealt with the complaints which he could identify from the email of 15 October 2021 which he treated as Mr Letchford's grievance. Each one was found not be substantiated and with relevance to this claim he stated that he could find no evidence of unreasonable expectation being made concerning workload, taunts from colleagues and he

enclosed a copy of his training records which confirmed that he had been trained to undertake those activities which he was responsible for. Mr Letchford confirmed that he did not appeal the grievance.

30. In considering its findings of fact, the Tribunal had to consider carefully the conflicting evidence of Mr Letchford and the respondent's witnesses. A particular difficulty during the hearing related to Mr Letchford continually seeking to raise matters which were not relevant to the list of issues before the Tribunal, both when giving evidence and cross examining the respondent's witnesses. It was necessary for Employment Judge Johnson to remind Mr Letchford to focus upon what was relevant on a number of occasions, although some allowances were made in accordance with the overriding objective because of his unrepresented status in the proceedings. However, despite many reminders made of Mr Letchford to focus upon the list of issues, he continually failed to address those issues relating to the alleged age discrimination and the Tribunal was not able to consider this matter. He did vaguely refer to a request made by a 70-year-old colleague whom he said was refused part time hours and that all people employed by Saica after he joined the company were younger than him, but Mr Letchford provided no explanation as to why this was relevant to his claim of age discrimination. The Tribunal noted that several of the respondent's witnesses were asked about the complaint and were unable to provide any evidence of this issue being raised.

31. A number of documents were included within the bundle which were entitled Core Operator Time sheets and were introduced in 2019 because of Mr Letchford's assertion that his workload was disproportionate. Each core operator was asked to complete a time sheet for each shift worked. It contained 4 columns with a section for 'D numbers' which the Tribunal understood to be the job numbers, 'Numbers of cores cut', 'Pallets Wrapped' and 'Machine breaks covered'. The final two columns recognised that core cutters did not usually spend the entirety of their shift cutting cores, but also might do other tasks and sometimes other miscellaneous activities were included in those two columns, such as cleaning and restacking pallets.

32. Mr Letchford along with his colleagues completed these forms following his return to work from sickness absence in late July and until he walked out from work in mid-August 2019. The Tribunal considered these sheets and found that by assuming the machine can only cut 70 to 100 cores per hour as described by Mr Grindey to Ms Bain (in July 2019), then theoretically a maximum of 825 to 1100 cores could be cut in any 12 hours shift, (once an hour for breaks was taken into account). According to the time sheets between 1 and 8 August 2019, Mr Letchford worked 3 shifts and he produced 944, 1004 and 1295 cores. During this time, he was also recorded as carrying out wrapping and moving pallets which were part of his duties. However, if Mr Letchford's arguments were correct, he would have been expected to produce up to 3300 cores (i.e. 3 x 1100 cores) in a single shift. This was clearly not the case. He was producing more cores at this time than his colleagues, and while operators were no doubt expected to be productive during their shift, there was no indication from the time sheets that Mr Letchford was working (or was expected to work), disproportionately.

33. Mr Letchford also argued that the way in which the shifts and his workplace were managed, gave rise to serious health and safety concerns. He paid particular attention to an incident where a stack of pallets collapsed. Although Saica did not record the incident as a near miss, Mr Shipstone did acknowledge with hindsight that *'probably a better investigation could have taken place'.* Mr Holden, who was a Unite trade union representative was found to be a credible and reliable witness and when asked whether Mr Letchford raised any health and safety concerns with him, he said no. This evidence is accepted by the Tribunal as being correct.

34. Saica had a health and safety officer working at its Buxton site and he was Tony Bartlett, who provided a health and safety presentation to all new starters including Mr Letchford. While Mr Letchford argued that Mr Bartlett always seemed busy when he walked through the production floor, he did not provide convincing evidence that he ever tried to approach him with a view to raising and addressing health and safety concerns. Moreover, Mr Bartlett's evidence was that he had put in place in a T card system which enabled employees to raise health and safety concerns if he was unavailable at a particular time. The Tribunal found his evidence to be credible and accepted that Mr Letchford would have been aware of this system from Andy Richards, who was the health and safety champion for C shift and from posters across the workplace which provided Mr Bartlett's details to employees. The Tribunal heard consistent and reliable evidence from the respondent's witnesses with management and supervisory responsibility for health and safety including union representatives and it does not accept that Mr Letchford was raising health and safety concerns at the relevant time to them. While he may have had raised issues concerning his workload, he never addressed them as a health and safety concerns, (or in such a way that a reasonable employer would have concluded them to relate to health and safety), and this appears to be something that Mr Letchford had sought to argue after he resigned and once he commenced proceedings.

The Law

<u>Unfair dismissal (s100 Employment Rights Act 1996 ('ERA'))</u>

35. Section 100 ERA relates to unfair dismissal in health and safety cases.

36. Section 100(1) provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or principal reason for the dismissal is that (in the case of the employee):

    i) Where there was no health and safety representative or it was not reasonably practicable to raise the relevant matter with them, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful to health and safety, (s.100(c));
    ii) In circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger

persisted) refused to return to his place of work or any dangerous part of his place of work, (s.100(d)); and,

iii) In circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger, (s.100(e)).

37. Section 100(2) ERA provides that for the purposes of s.100(e) whether the employee took (or proposed to take) appropriate steps is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

38. Section 108 provides that complaints of automatic unfair dismissal such as this one, do not require the employee to have completed 2 years of uninterrupted continuous employment at the effective date of termination.

When resignation can amount to constructive unfair dismissal

39. It should also be noted that in section X of the ERA which relates to unfair dismissal, s.95(1)(c) provides that an employee should be regarded as dismissed where they terminate their contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct.

40. In ***Western Excavating (ECC) Ltd v Sharp*** **1978 ICR 221** it was held that in order to claim constructive dismissal an employee must establish:

(i) that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach);

(ii) that the breach caused the employee to resign – or the last in a series of events which was the last straw; (an employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to plead constructive unfair dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract; and

(iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

41. Ms Kaye referred to the case of ***Malik v Bank of Credit and Commerce International SA*** **[1997] IRLR 462** which provides that all contracts of employment contain an implied term that an 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.

42. In relation to the question of *'last straw',* Ms Kaye referred to ***Kaur v Leeds Teaching Hospitals NHS Trust*** **[2018] IRLR 833**

Direct age discrimination

43. Section 39 of the Equality Act 2010 ('EQA') provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting him to a detriment.

44. Section 13(1) EQA, sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (age in this case), A treats B less favourably than A treats or would treat others.

45. Section 13(2) EQA applies specifically to age, and adds that (A) does not discriminate against (B) if A can show A's treatment of B to be a proprotioante means of achieving a legitimate aim.

46. For the purposes of direct discrimination, section 23 EQA provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual.

47. Section 136 EQA sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

48. Ms Kaye referred to the case of ***Ayodele v Citylink Limited*** **[2018] IRLR 114** which provided considered the question of burden of proof and how to approach, having first discussed its treatment in earlier caselaw.

49. She also referred to ***Burrett v West Birmingham Health Authority*** **[1994] IRLR 7 EAT** which found in an unlawful sex discrimination case, (in dealing with a comparator), the question was not the difference of treatment, but whether it was *'less favourable treatment'.* The EAT found that this question was one of fact for the Tribunal hearing the case and does not depend upon the subjective belief of the claimant.

Discussion

Preliminary issue – was there a dismissal?

50. Mr Letchford asserts that his notice of resignation which he gave on 15 November 2019, amounted to a dismissal for the purpose of this claim.

51. He says that the respondent fundamentally breached the implied term of trust and confidence by overloading him with work during his shifts and/or giving him more work when he complained about it.

52. For the reasons given in the findings of fact above, the Tribunal is unable to accept that Mr Letchford was overloaded with work or indeed, once he complained about that work, he was given even more work. It was clear that Mr Letchford raised his concerns about being expected to do double or treble the amount of work normally expected of a core cutter during a 12-hour shift. However, the Tribunal has found that not only was there no evidence that such a practice was taking place, but that it was not possible to work anywhere near that level with the core cutting machinery available. The way in which the 24/7 production cycle worked meant that Mr Letchford did a 12-hour shift like his colleagues and worked according to the production plan, with work rolling onto the next shift if it could not be completed. Additionally, core cutters would often do other tasks that arose during the shift, so inevitably it was unlikely that each core cutter would work identically from shift to shift, and the time sheets confirmed this.

53. There was no evidence that Saica sought to victimise Mr Letchford once he made his complaints and although they were unable to agree that he was overloaded, they nonetheless investigated his concerns on each occasion and even went so far as to remind him of the need to take breaks and created the core cutting time sheets so they could see whether he was working at a disproportionate level to that of his colleagues. This was clearly not the case, however.

54. Although Mr Letchford's resignation email referred to a number of issues, he primarily relied upon his belief that he was overloaded with work and Saica had ignored his complaints and allowed this practice to continue. While he may genuinely have believed this to be the case and it was the main reason for his resignation, the Tribunal does not accept that the alleged actions took place and they did not amount to a fundamental breach.

55. The Tribunal accepts that Mr Letchford believed that the overloading of work continued until he began his period of sickness absence on 14 August 2019. Understandably, although we did not have medical evidence from this date, the fit notes produced by his GP referred to work related stress and it appears that due to his mental health at the time, he was unable to effectively attend an OH appointment on 15 October 2019. For this reason, the Tribunal does not believe that Mr Letchford unduly delayed giving notice of resignation, although this is of no consequence, given that his belief was not an accurate representation of his workload at Saica.

56. For these reasons the Tribunal must conclude that the resignation did not amount to a dismissal by the respondent.

<u>Jurisdictional matters</u>

57. Finally, the Tribunal also noted that Mr Letchford commenced and concluded early conciliation on 10 October 2019 and presented his claim form to the Tribunal on 15 October 2019. He was still working his notice until his effective date of termination which 15 December 2019 and he was therefore still employed at the date he presented his claim form when he indicated that he wished to bring an unfair dismissal. As his employment had not terminated at

the date the claim was brought, the Tribunal would be able to hear the complaint even if the case had been well founded.

58. Although the claimant had not worked the usual qualifying period of employment of 2 years continuous employment at the effective date of termination required by s.108 ERA, this provision does not apply to a complaint brought under s.100 ERA.

Unfair dismissal

59. Given that Mr Letchford was considered by the Tribunal to have not been dismissed, he is unable to demonstrate that his complaint of automatic unfair dismissal for health and safety contrary to section 100 ERA.

60. However, had he been able to persuade the Tribunal that a dismissal had taken place as a result of his resignation, did he satisfy the test required by subsection 100(1)(c) ERA?

61. The Tribunal acknowledged that Saica's Buxton site was a workplace where a health and safety representative was present. Each shift appeared to have a health and safety champion and on Mr Letchford's shift, this was Andy Richards. There were also other Unite representatives available and Tony Bartlett was the health and safety manager. The Tribunal noted that the respondent's witnesses gave convincing evidence about the means by which health and safety concerns could be raised by employees and even if an representative was not immediately available, the T card system enabled written health and safety issues to be raised. There was no suggestion that it was not reasonably practicable for Mr Latchford to raise health and safety concerns with the representatives in place.

62. However, even if this was not the case, Mr Letchford only raised issues concerning excessive workload and did not assert that it was a health and safety issues. The Tribunal accepts that excessive workload can potentially be a health and safety matter, especially if it is disproportionate or prolonged, but Mr Letchford did not articulate his concerns as being health and safety matters while employed by Saica and accordingly those complaints which he raised with managers, would not have been recognised as complaints of that nature. This was especially important given that the complaint made by Mr Letchford did not appear to make sense to managers based upon their understanding of the production cycle and these complaints did not give the impression that he reasonably believed that the circumstances in question were harmful or potentially harmful to health and safety.

63. Accordingly, the complaint of automatic unfair dismissal on health and safety grounds is not well founded and must fail.

Age discrimination

64. The Tribunal accepts that Mr Letchford fell within an age group at the material time that his claim relates to of 35-year-old and over.

65. Although the Tribunal did not hear specific evidence relating to the alleged younger age (25 years or younger), for the 3 comparators identified in the list of issues, the respondent did not dispute their ages and the Tribunal accepts that they fell within this age group.

66. Accordingly, Mr Letchford as a person of 35 years or more, is comparing himself with comparators doing like work of 25 years of less.

67. The treatment that he refers to in this complaint is that he was required to cut cores for two or even three shifts during his own shift and/or that he was dismissed.

68. The Tribunal does not accept that this treatment occurred for the reasons given above in the preliminary issues discussion and the findings of fact. Accordingly, he cannot have been treated less favourably than his younger comparators and he has not provided convincing evidence that direct discriminatory treatment on grounds of age was taking place. A complaint of discrimination should have featured strongly in Mr Letchford's evidence and in his cross examination of the respondent witnesses. What was particularly noticeable in this case, was how little he referred to this particular complaint and for these reasons the Tribunal cannot accept that it is well founded.

69. Accordingly, it is not necessary for the Tribunal to consider whether the respondent had pursued the alleged treatment as part of legitimate aim in a proportionate way.

Conclusion

70. The claimant's resignation did not constitute a dismissal contrary to s.95(1)(c) ERA and he is unable to bring a complaint of constructive unfair dismissal.

71. The claimant presented his claim form bringing a complaint of constructive automatic unfair dismissal contrary to s.100 ERA while still employed and it does not have jurisdiction to hear this complaint.

72. Even if the claimant was dismissed and the Tribunal did have jurisdiction to hear the complaint of constructive automatic unfair dismissal contrary to s.100 ERA, it is not well founded and should be dismissed.

73. The complaint of direct discrimination on grounds of age contrary to s.13 ERA is not well founded and should be dismissed.

74. This means that all of the claimant's complaints are unsuccessful.

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Employment Judge Johnson

Date 12 May 2022

JUDGMENT SENT TO THE PARTIES ON
13 May 2022

FOR THE TRIBUNAL OFFICE