EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113682/2021

Held via Cloud Video Platform (CVP) on 25, 26, 27 and 28 April 2022

Employment Judge J Hendry

Mr Alan McDowall	**Claimant** **Represented by:** **Ms A Buchanan - Solicitor**
Class One Traffic Management Ltd	**Respondent** **Represented by:** **Mr P Wilson - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's application for a finding that he was unfairly constructively dismissed by the respondent company not being well founded is dismissed.

REASONS

1. The clamant seeks findings that he was unfairly (constructively) dismissed from his employment as a senior contracts manager. He worked with the company for 18 years from 18 November 2002 until the expiry of his notice 11 August 2021.

2. The respondent company is involved in designing and providing traffic management systems for clients in relation to planned and emergency road repairs.

Issues

3. The issues for the Tribunal were whether the respondent company has acted in such a way as to entitle the claimant to resign in terms of Section 95(1)(c)

of the Employment rights Act 1996 (''ERA'') through breach or breaches of the implied duty of trust and confidence culminating in a ''final straw''.

Evidence

4. The Tribunal had the benefit of a Joint Bundle of Productions. It heard evidence from the claimant on his own behalf and from a former employee of the respondent company Matthew McGarrity. The company led evidence from Michael Healey, Managing Director, Mrs Catherine Tulloch, Managing Director and former Company Secretary and William Murdoch Contracts Director.

Facts

5. When the claimant started worked with the respondent company in 2002, he was provided the statement of main terms of employment (JB47-48). As part of his remuneration he was entitled to a company car and fuel card for both business and private mileage.

6. The claimant supervised contract managers in his team. He designed and oversaw the design of traffic management systems, pricing and tendering. He was particularly knowledgeable and skilled in what was known as ''high speed'' traffic management namely the management of traffic on motorways, duel carriageways and main trunk roads. He was on good personal terms with the respondent's owners and Directors, Mr Michael Healey and Ms Catherine Tulloch who he had known for many years. He was regarded as hardworking and loyal.

7. The respondent as a provider of temporary traffic management systems act on behalf of various organisations such as local authorities, utility providers such as Scottish Water, and road contractors such as Amey and Bear Scotland.

8. The claimant was allowed considerable autonomy in his day to day work. As he dealt with high speed work and the bulk of Mr Murdoch's work was for utilities and emergency repairs they worked separately although they shared an open plan office with other contract managers and staff. Mr Murdoch was,

however, in charge of the over allocation of work and responsible for the performance of the business.

9. In October 2019, the respondent's business was purchased by Chevron Traffic Management. There was a period of due diligence lasting a year put in place which meant that the purchaser's accountant checked the finances and financial operating systems of the company over this period.

10. Following the change of ownership, the respondent set new targets for revenue. They used historic data. The claimant was unhappy that he had not been consulted about this matter. He believed that the opportunity for growth in high speed contracts was unrealistic given the shortage of funds in general for roadworks and the effect of the pandemic on road building activity. He was aware that many of the potential customers carried out traffic management themselves or had a preferred contractor accordingly had little to no surplus work. He did not raise his concerns. In the event the targets were met by the company (JBp160)

11. More generally the claimant felt excluded from the takeover process. He was not asked to attend senior management meetings with Chevron management. He felt that he should be involved in these meetings and could contribute to making any changes work more efficiently. He felt that the respondent's communications with staff around this time was poor and there were concerns that there might be redundancies which had not been addressed. The Directors were both very busy during this period and focussed on the successful sale of the company. They did not deliberately exclude the claimant from any meetings but did not see a need for him to attend any of them.

Historic Difficulties

12. The claimant had worked many years with the respondent when in 2015, William Murdoch was appointed Operations Director. The claimant felt that he had been unfairly passed over for the appointment. He had a meeting with Mr Healey in about April 2018 to discuss his concerns. He set out his concerns in writing before the meeting (JB99-100).

"For the last two years, I have been continually struggling with the fact that you have appointed Wullie above myself and the business. I have never really understood why both yourself and Catherine could think he was more entitled to a promoted position before me. I can only assume that you do not really understand what I do and I am continually doing for the business or you do not respect what I am doing. I am certainly not loud and brash with an almost bully like approach in management. But I am certainly professional, technically strong and have a strong quiet demeanour that Clients warm to and respect.

I really feel I have come to a crossroad in my career where I need to know where my future lies for the next 10-12 years. I am unable to accept Wullie as my boss, so if that cannot be resolved, I feel there is nothing more for me at Class One and I will actively be seeking to move to either a rival TM company, set myself as a consultant or look as prospects south or abroad.

I must emphasise that I do not wish to leave Class One as it has been a huge part of my life. In general, I do enjoy working with the people there and know I have their respect. Wullie and I can and do work well together when at the same level. Our current positions in the company will only create problems at some point as I will not accept him as my line manager."

13. The claimant also raised a question of his bonus scheme.

14. Mr Healey met the claimant. He was keen to keep the claimant in the company. He reassured the claimant that he was respected and trusted. Mr Healey made notes at the time that reflected his thoughts and what he said at the meeting. He wrote:

"Whilst Wullie is in a more senior position, Alan is at a level where he is not directed by anyone let alone Wullie and you are given the latitude to do this work without any of us scrutinising any aspect of your work, this is because we know you are doing your job to the best of your ability and we trust you."

15. Following the discussions with Mr Healey, Mrs Catherine Tulloch, wrote to the claimant on 23 April (JB105) agreeing changes to the claimant's current

annual salary, bonus and pension contributions. Following this, on 1 May, the claimant would be paid £80,000 per annum and the employers would pay 5% pension contributions as opposed to 3%. In return, the claimant signed a restrictive covenant agreement preventing him from working for or canvassing the respondent's clients for a period of six months (JB106-109).

Lockdown

16. The effect of lockdown in late March/April 2020 had a significant effect on the respondent's business. The only work that continued was emergency work mostly coming from utility companies. As a consequence, the respondent decided to utilise the government furlough scheme and put the bulk of their workforce on furlough.

17. The company arranged for employees to pick up their ''jobpacks'' showing the equipment to be used and the design and location of the work from a shed or bothy outside the main office. This was to allow social distancing and to prevent employees having to enter the main office and interact directly with staff there.

18. The claimant met Mr Healey, the Managing Director and Catherine Tulloch a Director in about late March early April. He was advised that he was going to be put on furlough as of the 1 April.

19. The maximum furlough payment was £2,500 and the respondent's Directors understood that this was a substantial reduction in the claimant's wages. The claimant did not want to be put on furlough. The claimant along with other staff received a letter on or about 30 March indicating that they would be furloughed (JB111-112).

20. On 29 May, someone using the computer terminal account for Ally McVicar, the depot manager, who was on furlough, sent the claimant login details for "Zephyr SRL" which would allow the claimant to change digital road signs from home. He was emailed by Craig McCann from C Spratt Multi Utility on 27 June 2020 about a closure and diversion (JB116-117). He had previously emailed Mr McCann on 24 June (JB118-119).

21. The claimant purchased snacks from the respondent's office vending machine on the 8/16 April and 6/29 May (JBp193-194). He also purchased lunch meals from a nearby Tesco shown on his current accounts on 7/9/17/ April and 23 June (JBp164-184).

22. In order to top up his salary in the first month, the claimant asked to use accrued holidays and he was paid five days holiday pay. After the first month of lockdown, Ms Tulloch looked at the company income and came to the view that it was more robust than she expected it to be. She was conscious that the claimant had taken a large drop in salary and agreed with Mr Healey to make up his salary to 80% of his pre-furlough salary. This meant that the company ''topped up'' his salary.

23. The claimant returned from furlough on 13 July 2020 to full time work.

Entitlement to Company Car

24. The claimant enjoyed the benefit of a fully ''expensed'' company car and fuel card.

25. The claimant drove a Jaguar F-PACE vehicle but in late 2020, due to a problem with the vehicle's fuel pump, it was decided that it was not economic to repair the vehicle. In any event, it was due to be changed.

26. The claimant entered into discussions with Mr Healey about a new vehicle. The claimant had been paying a large amount of tax for the benefit of having this car and fuel. He had come to the view that a hybrid electric vehicle would save him both tax and fuel costs. He believed that it would also be efficient for the company. He identified a Mercedes vehicle and put this proposal to Mr Healey that it should be purchased for him.

27. Mr Healey contacted Chevron to obtain their views on the matter although ultimately at that point it was still a decision for the respondent's management to make. Adrian Smith, the Chevron Transformation Director, who was in charge of liaising with the respondent, emailed on 22 December with his views. Mr Smith pointed out that the motor vehicle the claimant wanted had a list price of around £67,000. The Jaguar F-PACE had a list price of around

£44,000. (JBp125-126). He provided calculations that the claimant would save money using the Chevron approach either if he leased or bought a vehicle. The email was passed to the claimant.

28. Mr Healey concluded that the proposed purchase of the Mercedes was too expensive an option and not commensurate with the claimant's position in the company hierarchy. Negotiations between them went on over a couple of months. Mr Healey believed that the claimant had finally decided to purchase a Tesla electric motor vehicle. In the interim the claimant had the benefit of a hire vehicle, a Nissan Qasquai, which was provided by the respondent. He then asked to use a van in order to allow himself an opportunity to save up enough money for the deposit on a new vehicle. Mr Healey indicated that if he purchased an electric vehicle, he would allow the vehicle to be charged at the company premises at no charge. The replacement of the F PACE was not agreed by the time the claimant resigned.

Out of Hours Helpline

29. The respondent operates an out of office emergency helpline for their clients. Because the operations manager had recently left the company, the claimant offered his assistance with the rota. The burden of operating the rota fell on a small number of people particularly on the Operations Director, William Murdoch.

30. A new operations manager was appointed through an internal appointment. The successful candidate did not have sufficient experience to deal with the sort of emergency calls that the helpline was used for and was not at that point put on the rota. It was decided to continue with the current participants until the new operations manager gained more experience. The claimant, without consulting Mr Murdoch, decided that as a new operations manager had been appointed, he would now step down from the rota. He delayed telling Mr Murdoch. He knew that Mr Murdoch would not be happy about this.

31. On or about Friday 19 March 2021 (JBp158), just before the claimant was due to take over the helpline, he told another person in the office that he was stepping down. This then came to the attention of Mr Murdoch relatively late

that day. Mr Murdoch waited until staff had left and then spoke to the claimant privately. He was angry that the claimant had stepped down at very short notice. The claimant did not give an explanation as to why he was doing this or had left it so late. Mr Murdoch accused the claimant of not being a team player and acting like a petulant child.

32. The following day, Mr Murdoch apologised to the claimant for his behaviour. The claimant also apologised for the late notice removing himself for the rota. The claimant did offer to assist Mr Murdoch if someone on the rota needed a situation escalated to a more senior manager, but Mr Murdoch declined the offer.

Incident 9 July

33. In July, a family member of the claimant tested positive for COVID. The claimant had to work from home for ten days. He worked using his laptop. This did not have the same functionality as his computer at work. It made the completion of work more difficult and time consuming.

34. The claimant's manager Mr Murdoch expected the claimant to use some of his time at home chasing up ''bring ups''. These were a regular and important feature of the claimant and Mr Murdoch's duties. The company computer system (CRM) would highlight tenders that had not been responded to. It was important to contact the potential client to find out how the respondent's tender had faired and whether the job was given to some other competitor and why or if it had simply been delayed. There had historically been a backlog of ''bring ups''. Sometimes more urgent work would take priority to chasing ''bring ups''. Mr Murdoch believed that as the claimant was working at home, he would not be subject to the same interruptions and pressures that he would face at work. He believed that doing this work would be an efficient use of time. He did not discuss his views with the claimant or tell him his expectations.

35. Mr Murdoch emailed the claimant on 9 July at 17:26.

"Please see attached bring up sheet. I have highlighted the 21 customers completed in yellow today.

Can you send me your completed list."

36. The claimant did not respond. On Monday 12 July, Mr Murdoch emailed the claimant at 08:45 (JB137).

"Alan,

Can you send me your updated bring ups from Friday."

37. The claimant responded at 08:55 (JB136):

"Wullie,

Sorry thought I had sent this.

Workload Friday did not allow anytime to do BU's.

Never got chance to do any of my own and only managed to email Gillian and Hayley at Luddon for update on 20 no. that have been priced.

Try and free up some time this morning to pursue but not looking good so far.

I take it Amber is in operations today as quite a few drawings have come in on Friday that need addressed. Euan doing some but struggling with time.

I will also help him when I can."

38. Mr Murdoch responded (JB136) in an email sent at 14:29:

"Alan,

Can you detail what your work load was on Friday that did not allow for bring ups to be completed.

Can you list the quotes and drawings completed and any other items that prevented you from tackling the bring ups.

Can you get this to me before the end of the day."

39. Mr Murdoch needed the information requested namely who the claimant had contacted because he was also chasing ‘‘bring ups’’. He did not want to duplicate the claimant’s efforts and contact the same clients again.

40. When the claimant said he had insufficient time to do any ‘‘bring ups’’ Mr Murdoch checked the computer system and could find no numbers being issued for new jobs which would indicate tenders were being prepared or any new drawings logged in the system by the claimant. This was the sort of work that could take priority over ‘‘bring ups’’. He was unsure as to what the claimant had actually been doing on the Friday.

41. On receipt of the last email the claimant tried to call his line manager but got no reply. The claimant then telephoned the Managing Director, Mr Healey, to express his concerns about being questioned in his way.

42. The claimant appeared angry and upset on the telephone call. Mr Healey tried to pacify the claimant and said he would look into it.

43. After this call, the claimant then made contact with Mr Murdoch by telephone. It was clear to the claimant that Mr Murdoch was querying what he had been doing at home on 9 July. The claimant was outraged that he could not be trusted to manage his own work and time. He would not tell Mr Murdoch what work he had been doing. He indicated that he was not prepared to be questioned by Mr Murdoch. He indicated that he would not accept Mr Murdoch as his line manager or that he had any right to ask him these questions. The discussion became heated and in the course the discussion, Mr Murdoch said that if he would not tell him what work he had been doing on 9 July, he would be “marked absent”. This suggestion infuriated the claimant. He took the comment both as a suggestion that he had not been working at home on 9 July and also that he would be marked absent and his wages might be docked. He telephoned Mr Healey and resigned. He was adamant that he was resigning. He told Mr Healey not to talk him out of his resignation. The call was overheard by Mrs Catherine Tulloch as it came through her hands-free motor car system when Mr Healey took the call. The Directors discussed the matter and decided to accept the claimant’s resignation.

44. The claimant attended the office on 14 July when was given a letter from the Managing Director accepting his verbal resignation.

45. The respondent as a goodwill gesture paid four weeks' notice in addition.

46. The claimant wrote to Mr Healey on 14 July in relation to his resignation (JB p141-142). He wrote:

"It is with deep regret that I write this resignation. Please accept this letter as notice of my resignation from the position of Senior Contracts Manager at Class One Traffic Management Limited.

I haven't made this decision lightly however the conversation I had with Wullie Murdoch on Monday has driven me to suspect I am not part of the future within this company as I am being micromanaged for no apparent reason. I have been professional throughout my career with Class One and I know I am well respected within the industry therefore I feel I have no alternative but to pursue my career elsewhere due to an accumulation of events I have noted below.

1. *Company Car – Changing of rule to suit. No longer allowed a Company car relative to what I have been driving for 18 years and to be told that Chevron do not do company cars and personal mileage i.e. to/from work would have to now be paid for by the individual. To then see a Contracts Manager who was possibly leaving be given a company car of his choice and a fuel card with no objection. By this time, I had no choice but to run about in a company van to try and save enough money for an upfront deposit and insurance for a car. In addition, Wullie Murdoch being given a company van to try and save enough money for an upfront deposit and insurance for a car. In addition, Wullie Murdoch being given a company car well in excess of his previous vehicle also made the situation extremely unfair and indicated to me I was not worthy of a vehicle.*

2. *As a Senior Manager I have felt more and more left out of the overall running of the company and the interface with Chevron Senior Staff being left to another.*

3. *The general uncertainty that is hanging over the office staff and workforce with a feeling of disengagement with Senior Staff.*

4. *No pay rise in last 3 years, even though the Company has made money and I am working more hours now than I have ever done.*

5. *The relationship between Wullie Murdoch and myself have been deteriorating over the last year with the latest email asking me to justify what work I have been doing on Fri 9th July as I have not managed to update bring ups that were his to do. There was a strong inference that I had not been doing my job. I was then told that he would mark me absent from work on that day when I refused to divulge that information. I did work all day and that last email sent was at 18:49. For a long-term Senior Manager to be challenged on this is both degrading and disrespectful. There have been other managers off due to COVID for longer periods who were never questioned of what they were doing on a day-to-day basis. This act could be construed as a bullying tactic for not conforming.*

6. *Standby – this is a real bone of contention with the office staff creating distain and a feeling of almost being bullied/tricked into going on standby with no reward/recompense for the inconvenience it causes at home and social life. This is something I have always maintained should not be carried out by any Senior Manager. I did offer to help out when John Whitelaw was dismissed as Wullie Murdoch was obviously struggling but did intimate that once Operations wee back to full strength I would step down. Wullie Murdoch then removed himself from the rota and happily allowed myself to continue without consulting me. When Claire took the Operations Managers position, I stepped down when Wullie Murdoch verbally attacked me citing me as not a team player and acting like a petulant child. I did offer to share the escalation, but he refused. He did apologise the next day, but damage was already done. There are also 6 other technicians/contracts managers who could and should be on the rota before any Senior Staff.*

7. *Having to be put on furlough for four months when still working and forfeiting holidays when there was still plenty work to progress. The Company still made a profit over that period. This has later impacted my ability to borrow further funds to purchase a car as I had been furloughed on a lesser wage. In addition, I also know this was not consistent across the office."*

47. The claimant obtained records of his petrol purchases from March 2020 until October 2020 (JB189-191-102). He also obtained records showing that he had bought snacks at the office on the

Submissions

Claimant's Submissions

48. Ms Buchanan took the Tribunal through the evidence. The claimant occupied a senior position as Operations Manager. He was given considerable independence. He had special skills in high speed work.

49. The notes of Mr Healey taken at the meeting in 2018 supported the claimant's position and contradicted Mr Healey's evidence about the claimant's subordinate role. It was accepted by the company that Mr Healey would not interfere with the claimant's work. The claimant's evidence in relation to furlough should be preferred to that of the respondent's witnesses. The company was facing potential financial crisis because of coronavirus. It made sense to keep the claimant who had special skills working in some capacity though the lockdown period.

50. There was other evidence she submitted that supported the claimant's position that he was working. The purchase and consumption of fuel indicated that the claimant was likely to be at work and he used of the vending machine. Mr McGarrity's evidence was in her view persuasive. The respondent's position overall is not credible. If the claimant was on furlough and not expected to work, there would be no need for him to obtain the login details to change the digital signs. The evidence given by Mr Murdoch about how other terminals were used occasionally explained why emails went out in the

name of someone on furlough was confused. There was no reason she submitted why they wouldn't put out emails or letters if their own name but acknowledge that it was being sent on behalf of the employee concerned. The claimant had tried to recover emails but was told that the company had not retained copies.

51. She then turned to the issue of the car benefits. It was clear that the company was trying to align their car policy with that of Chevron. It was clear that the claimant was not going to get the car of his choice and there was no reference to the F PACE vehicle being replaced with a similar vehicle. In relation to the standby incident, the claimant had fully accepted that his timing was poor but he had no obligation to carry out the standby work. The Tribunal should accept his position that he had offered to share the escalation to work with Mr Murdoch.

52. The solicitor then took the Tribunal through the detail of the final incidents starting with 9 July. The emails from Mr Murdoch were a significant escalation of matters. He wanted a response by the end of the day and the claimant only had a few hours to respond. The claimant was trying to comply with Mr Murdoch's request and had not ignored his emails. Ms Buchanan took the Tribunal to the legal position as she saw it starting with the cases of ***Western Excavating*** and the questions posed in ***Kaur*** that the Tribunal should consider.

53. The "final straw" here was the behaviour of Mr Murdoch escalating matters in the way he did. Although it is not pled in this way, her position was that this incident was in itself a breach of trust and confidence.

Respondent's Submissions

54. Mr Wilson reminded the Tribunal of the terms of the ***Malik*** test. His primary submission was that there was no evidence that the respondent had breached the implied duty of trust and confidence. He accepted, given the authority of the case of ***Omilaju v Waltham Forest***, the Tribunal was likely to hold that the interaction between the claimant and Mr Murdoch on the day of his resignation was probably sufficient to constitute a final straw. However, he

asked that the incident should be examined carefully. The claimant had in his view reverted to the sort of position he had taken back in 2018 namely he was simply not prepared to recognise Mr Murdoch as his boss. There was evidence from both Mr Murdoch and Mr Healey that the claimant used words to the effect that he would not recognise Mr Murdoch as his boss. Mr Wilson then took me through the same incidents that Ms Buchanan had.

55. He suggested that the most serious allegation the claimant made was that he was forced to work during furlough. This would be an extraordinary situation. It would be a clear fraud in which the claimant had participated. The indications in the evidence that he did not want to be put on furlough and that he thought there was sufficient work for him to do. The claimant said it was clumsy draftsmanship but puts matters in paragraph 7 thus: *"having to be put on furlough for four months when still working and forfeiting holidays when there was still plenty of work to progress."* There was nothing in the allegation that he was forced to forfeit holidays. He took holidays to top up his salary. It was only after the first month that the respondents as a gesture of good will because he was losing the most by being on furlough increased his wage to 80%.

56. Counsel then spent some time looking at the evidence in relation to the claimant working on furlough. In his view, Mr McGarrity could not be relied on. He was clearly a disgruntled employee. The claimant's petrol receipts did not assist. Mrs Tulloch had indicated that the claimant and his wife ran a number of vehicles. Nothing could be deduced from him purchasing petrol in this way. The figures might simply be explained as reflecting a way of budgeting during a difficult financial period.

57. In the Excel spreadsheet showing the purchase of snacks, there were remarkably few transactions if the claimant had been at work during all of this period. It was interesting he suggested that Mr Murdoch unprompted had mentioned that jobpacks were picked up from the ''Bothy'' outside the office to prevent employees having to enter the office during lockdown. If Mr McGarrity had a clear recollection of this period, as he claimed, then he would have undoubtably mentioned this. Why would the company in the course of

disclosure of being purchased act in this way. The whole idea is unlikely. There is a suitable explanation given in relation to the names on these emails. It was explained by Mr Murdoch in his evidence.

58. Turning to targets, there was no suggestion this was a material breach of contract. The respondent's Directors were entitled to take a view in relation to the targets. They used historical data and in fact met the targets. The claimant's allegation that he was being set up to fail had no foundation whatsoever. Setting targets was the sort of thing that the respondent was perfectly entitled to do.

59. Turning to the car issue, nothing was taken away from the claimant. He was still entitled to a car and a fuel card. What happened was that he opened up various alternatives in order to save himself tax and these alternatives were being discussed with Chevron who were taking over the company. The company baulked at paying £67,000 for a new vehicle. There was no suggestion that if he had asked for a replacement F-PACE he wouldn't have got it. He did not however want this because of the tax implications. The matter was still under negotiation when he resigned with Mr Healey thinking that the claimant was going to purchase an electric car under the Chevron scheme.

60. The helpline issue does not cast the claimant in a good light. The claimant accepts that it was very late in the day indeed that he withdrew from the rota. He had left Mr Murdoch in the lurch. It was understandable that Mr Murdoch was annoyed. They both discussed the matter the following morning, cleared the air and moved on. Objectively, there was no breach of contract.

61. Turning to the final incidents, the Tribunal has to bear in mind that part of the test in ***Malik*** is that the respondent would have to act without reasonable and proper cause. He submitted that throughout their actions, they had reasonable and proper cause for doing what they did. Mr Murdoch explained that he needed the information in relation to bring-ups in order to ensure there was no duplication. He also thought Mr McDowall was naturally turn to do this work as he away from the hurly-burly of the office. He also needed to

know if contacts were coming in and the state of the work because his job was to pass work out between the various contract managers and as he put it, keep an equilibrium. The claimant was not told he would have his wages docked. He was told that he would be marked as absent. It was clear from Mr Healey's evidence which Mr Wilson asked the Tribunal to prefer that the claimant reverted once more to the line that Mr Murdoch was not his manager and would not be recognised as his manager. Mr Murdoch's comments were ill advised and would not assist matters. They had to be seen in context.

62. Finally, in relation to the Schedule of Loss the only issue taken by the respondent was that account should be taken off the four week's pay which was made as an *ex gratia* sum. Otherwise Mr Wilson had no comments to make in relation to a failure to mitigate or the figures used in the calculations.

Discussion and Decision

Legal Principles

63. An employee can, in certain circumstances terminate, the employment contract and claim what is referred to as 'constructive' dismissal.

The statutory basis for this is set out in Section 95 of the Employment Rights Act 1996 9 (ERA) as follows:

"***95 Circumstances in which an employee is dismissed.***

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

(a)…

(b) …

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

64. In cases concerning constructive dismissal it is clear that the focus should be on the employer's actions and the reasons for those actions rather than the

employee's response to what has happened. A finding of constructive dismissal is not inconsistent with a finding that the employee has by their own conduct, contributed to that dismissal.

65. In the case of **Garner v Grange Furnishing Ltd.** [1977] IRLR 206, the EAT observed:

"… the conduct of both parties has to be looked at when assessing whether or not the employer's conduct was such that the employee is entitled to … say that he was forced to go... In our judgment, in which, once the [employment] tribunal reasonably and properly concludes that the relative conduct of both, and particularly of course the conduct of the employer, is such that there was a constructive dismissal, the choice of time, or the choice of incident, may be either completely or largely irrelevant when it comes to the degree of compensation. Put another way, once the very difficult assessment is arrived at in favour of the employee arising out of some trivial incident, or the last straw, it seems to us logical that one is forced back then, so far as the contribution is concerned, to look at the conduct of the employee, not with reference to the triviality of the final incident, but over the whole period. Just as the employer may be found liable in a constructive dismissal situation as a result of conduct over a period of time, so it seems to us that the more normal and perhaps more sensible way of assessing contribution should be to pay very little attention to the finality of the situation, but to look at it much more broadly, over the whole period of time."

66. A constructive dismissal case is determined by applying the law of contract. That was determined in the well-known case of **Western Excavating (ECC) Ltd v Sharp** [1978] IRLR 27. It has recently been re-asserted in the case **Bournemouth University Higher Education Corporation v Buckland** [2010] IRLR 445. What causes there to be a constructive dismissal is not conduct of the employee but conduct of the employer which amounts to the employer abandoning the contract (the modern test or expression of 'fundamental breach'). That is conduct which is, centrally, that of the employer. Where the conduct said to be a fundamental breach in that sense is a breach of the implied term of trust and confidence, then not only will it be

repudiatory, but by definition there will be no reasonable or proper cause for the employer's behaviour. That is because the accepted formulation of the test for that which amounts to the implied term is that an employer must not conduct itself in such a way as is calculated or likely to destroy or damage the relationship of trust and confidence between employer and employee without reasonable or proper cause (applying the test in **Mahmud v BCCI** 1998 AC 20). Those last words are important in this case as the employers argue that the had reasonable grounds and authority to challenge the claimant about what work he had been doing.

67. The present case was pled as a final straw case. Mrs Buchanan referred the Tribunal to the case of **Kaur v Leeds Teaching Hospitals NHS Trust** (2018) EWCA Civ 978 CA. That case is authority for the proposition that a final straw can revive repudiatory acts that would otherwise have been said to have been waived by the employee. The 'final straw' itself may be relatively insignificant and may not always be unreasonable or 'blameworthy'. However, the last incident cannot be utterly trivial or innocuous, and it must contribute something to the breach. Where an employee 'soldiers on' when the employer's behaviour is capable of amounting to a repudiatory breach then employee will have affirmed the contract. But the Court of Appeal confirmed that in a case where cumulative breaches are relied upon, further contributory acts allow an employee to rely on the whole series of acts, notwithstanding any earlier affirmation.

Discussion

68. The background in this case is instructive. The claimant has never really got over Mr Murdoch being appointed Operations Director and being his superior. There was a face-saving solution that he was left mostly to get on with his work but ultimately Mr Murdoch was his senior and in charge of all the operations. When he finally ended up in a situation where he came to exert some authority over the claimant the claimant did not react well. The evidence suggested that the claimant was very sensitive and conscious about his status or perceived status in the company. This was no doubt exacerbated by the sale of the company and the realisation that things were bound to change,

and he would no longer necessarily have the sort of relationship with the new owners that he did with the old.

Company Car

69. An appropriate starting point is the claimant's letter of resignation (JBp141-142). The claimant first of all complains that his entitlement to a company car and other benefits is being denied or eroded. He had found himself in a difficult position while still enjoying a fully 'expensed' car there was a significant tax penalty and he was due a change of vehicle. The proposal he made had some advantages to the company in that a fully electric vehicle would have been cheaper to run but it was considerably more expensive than the F PACE Jaguar he had been given. Even taking into account possible discounts the difference was substantial. The claimant was piqued when his proposal was rejected, and Chevron's views canvassed. I accepted that at this point the decision was one for Mr Healey to make but it was understandable that the claimant must have been looking over his shoulder as it were to what might happen when Chevron fully took control and possible implemented their company car policy.

70. The claimant's allegation that the company was taking away the benefits he had previously enjoyed, and contractually entitled to, to are not reflected in the evidence or in the emails. It was clear that there was a negotiation between the claimant and Mr Healey about a suitable replacement vehicle and that the claimant's first proposal which would have led to him being given a much more expensive prestige vehicle was rejected. There was no evidence that the claimant had asked for a replacement F-PACE and I accept the evidence of Mr Healey that if he had wanted a similar replacement then he would have agreed to this.

71. Matters were left unfortunately unresolved with Mr Healey believing that the claimant was keen, for tax purposes, on an electric car. The claimant had in fact concluded that a hybrid vehicle would be the best choice overall. As a stop gap the claimant was provided with a hire car and then a van. That seems to have been the claimant's choice so he could save up a deposit and buy the

electric vehicle of his choice. Mr Healey had indicated that the company would allow it to be charged at the company premises. The claimant may have been annoyed at not getting his way over the replacement but there was no breach of any express term and if he had wanted a like for like replacement one would have been provided. The matter in any event never came to a head with the claimant either insisting on a similar prestige petrol car to be supplied or an equivalent hybrid or electric car.

Exclusion for Meetings/ Uncertainty

72. The next matter the claimant referred to in his resignation was being excluded, as he saw it, from meetings with Chevron about the takeover. There was little in this. The claimant couldn't point to any particular meetings or how his exclusion undermined him. In essence his position came down to the assertion that it would have been a good idea if he had attended. That is perhaps not unreasonable from his point of view especially given the uncertainty the sale of the company might engender but it was a decision made by the Directors that the claimant was not needed. The one meeting not involving the Directors seemed to be between the IT manager of the respondent and IT staff from Chevron and it is really self-evident why such a meeting would take place to harmonise or at least understand the two IT systems.

73. The second matter raised was related to the first. The claimant puts is thus: ''*The general uncertainty that is hanging over the office staff and workforce with a feeling of disengagement with Senior Staff".* He did not provide any evidence of how in practical terms this impacted on his job. This issue was not really explored in evidence, but it was clear that the focus of the two owners/Directors was on the sale of the business and the period of due diligence and then on the impact of lockdown. There may very well have been uncertainty but that is almost inevitable and the focus of senior managers on the sale but neither amounts to a breach of trust and confidence in these circumstances.

Pay Rise

74. This matter was only briefly touched upon. The fact that the claimant had not received a pay rise might have galling for him but there was no contractual obligation to review his salary.

Relationship with Willie Murdoch

75. The claimant states that his relationship with Mr Murdoch had been deteriorating over the previous year. He did not in evidence specify what led him to this conclusion. It was interesting to note that there were no complaints or grievances made about the relationship nor , as one might expect, did the claimant approach Mr Healey directly about any alleged difficulties. Indeed the evidence was that the working relationship, although not cordial, was professional up until the claimant removed himself from the standby rota.

76. The principal incidents relied upon were firstly Mr Murdoch telling him that his actions in removing himself from the rota were not those of s team player and that he was acting like a petulant child or words to that effect. This was said in the heat of the moment and there was some basis for the comments and justification for Mr Murdoch's anger. At very short notice he would have had to replace the claimant on the standby rota. The claimant accepted that he had been in the wrong not to give Mr Murdoch good notice of his position and that he should not have learned through a third party so late in the day that he was removing himself from the rota. It was accepted that the claimant had no legal obligation to help with the rota but his reason for removing himself namely that there was now a newly appointed manager in place to deal with the rota seems a poor reason given that he accepted that the new manager was inexperienced for this task. In any event Mr Murdoch apologised for his use of these terms the following day and the claimant also apologised for his behaviour. The mutual apologies appear to have been genuine and accepted by both.

77. A certain robustness of language is not something that is unusual in the workplace and the context of what is said and the circumstances are important. There was no history of the claimant being verbally abused or

insulted by Mr Murdoch. This was not a public dressing down in front of junior staff such as occurred (twice) in the case of **Morrow v Safeway Stores** (2002) IRLR 9 EAT Plc. In this case I struggled to accept that what had occurred amounted to a repudiatory breach.

78. The second and final incident with Mr Murdoch and the one that was the catalyst for the resignation began with the exchange of emails. There was some dispute as to the exact order that telephone calls took place on the afternoon of the 9 July nothing turns on that. The claimant's position as set out by him was a complaint to Mr Healey in the following terms: ''*the latest email asking me to justify what work I have been doing on Fri 9th July as I have not managed to update bring ups that were his to do. There was a strong inference that I had not been doing my job. I was then told that he would mark me absent from work on that day when I refused to divulge that information. I did work all day and that last email sent was at 18:49. For a long-term Senior Manager to be challenged on this is both degrading and disrespectful. There have been other managers off due to COVID for longer periods who were never questioned of what they were doing on a day-to-day basis. This act could be construed as a bullying tactic for not conforming''*

79. Mr Murdoch explained in evidence that he was also doing 'bring ups' and he needed to know what the claimant had done so as not to duplicate the effort and possibly annoy clients. This appears to be a perfectly reasonable basis for his initial request. When told that the claimant had been too busy he was surprised and checked the computer system which would show if new tenders had been created or plans revised by the claimant. It was not clear to him what the claimant had been doing. He challenged the claimant about the matter and the claimant reacted badly. He did not seek to explain what he had done but reverted to a position that had Mr Murdoch had no right to challenge him. This has echoes of the claimant's position taken when Mr Murdoch was appointed that he would not be managed by him.

80. Mr Murdoch had good grounds to ask the claimant what bring ups he had done and to query what other work he had been doing instead. Whether the claimant recognised it or not he was in a position of authority being

responsible for the operations department. The use of the phrase to ‘‘mark him absent’’ was unwise. The phrase has unfortunate connotations and is commonly to be marked absent without leave. This often carries the additional implication of not getting paid. He did not go on to suggest that as a consequence the claimant’s pay would be docked. However, it was a response to the claimant refusing to say what he had done. The words used by the claimant in his email were: *‘‘ I was then told that he would mark me absent from work on that day when I refused to divulge that information.’’* (my emphasis).

81. The claimant was patently unhappy at being challenged and did not accept Mr Murdoch’s authority. Mr Murdoch in the circumstances here had a reasonable basis for his actions and the overreaction of the claimant suggest he had touched a nerve. I agree with Mr Wilson’s submission that on its own this incident was insufficient to stand as a repudiatory breach. It would have been sufficient to constitute a ‘final straw’ following the guidance in ***Omilaju*** as it clearly not ‘utterly trivial’’ as the Court of Appeal put it. This is indeed the way the matter was pled in the ET1 although Ms Buchanan argued that it was enough on its own. My conclusion was that this cannot amount to an act that either on its own the implied duty of trust and confidence.

Standby/Rota

82. The claimant agreed to assist with the standby rota. It was a burden and one for which he and other staff were not paid extra for but it was not envisaged as permanent. He came off the rota and there were no consequences for him doing so. The respondent accepted that they had no right to insist he stayed. It was not particularly clear in evidence how long the arrangement lasted or at least how long the claimant was on the rota, perhaps a few months, but this cannot amount to an act that either on its own or with others could breach the implied duty.

Furlough

83. This was by far the most serious allegation namely that the claimant had expected to work during furlough while being paid through the Government

furlough scheme (Coronavirus Job Retention Scheme) put in place during lockdown. There were adminicles of evidence that suggested he was still attending work such evidence that he was filling up his car regularly with petrol. There were some transactions that showed he had bought snacks at a vending machine at the company premises. There was the fact that he had been given passwords that would allow him to change the messages on digital motorway signs and an email.

84. It was surprising that the claimant did not seek to lead evidence from his wife or family to confirm he left for work during lockdown, nor did he call (other than Mr McGarrity) contract staff he was working with or or customers he was dealing with. For someone who was attending work every day and busy there was very little material to substantiate this. In stating this I take on board that the company too did not call any more junior staff who remained at work to speak to the claimant's absence.

85. The submission by Mr Watson that the petrol receipts show no more than someone budgeting their fuel purchasing and that there were others in his household such as his wife who might need to drive was not wholly persuasive. The fact that the claimant had bought snacks at the premises was indicative of his presence on those dates but had to be considered with the evidence of Mr Healey that the claimant often ''popped in'' to catch up with staff and generally keep in contact. The odd thing is that if the claimant was working at the office full time (and there appears to have been little or no high-speed work for him to do) what was he doing? He could not produce emails showing the work he was doing (the respondent had not kept emails for this period) but did not give evidence of particular contracts or clients or incidents he had worked on. As Mr Wilson noted the relatively small number of snacks or lunches is surprising if it was his habit to do this and seems to suggest only a periodic attendance at the office. Of course, the purchase of meals from Tesco, even one near the office, might be unrelated to work. I do not think that these matters greatly assist the claimant and probably undermine his claim to be working every day during lockdown. The other matters such as

the passwords or email do not assist him either as they which appear minor, routine and discrete.

86. The principal corroborative evidence that the claimant attended work came from him and from Mr McGarrity. I did not believe that Mr McGarrity was a dishonest witness although he was despite his objections to the term a disgruntled former employee. To put it another way he was no friend of the respondent company. It was surprising that spoke of getting work packs from the claimant from the office when a system had been put in place to have them collected from a bothy outside and thus getting round the need for them to enter the office. This later evidence coming unprompted from Mr Murdoch. My conclusion was that Mr McGarrity, who was a little vague about dates in his evidence, looking back to lockdown must have confused when he had received those job packs from the claimant in the office for a slightly later period during the pandemic when the claimant had returned to work but when restrictions were still in force.

87. The evidence of Mrs Tulloch was convincing that the Directors accepted that the impact of furlough and the salary cap was most acutely felt by the claimant. It rings true, particularly because of their long friendly relationship, that when after the first month when she found that the finances could bear it that his salary was topped up and unlike the first month of furlough he didn't have to 'cash in' holidays to maintain his income.

88. Not only would the respondent company and the Directors have committed criminal offences having the claimant working during furlough they would possibly have imperilled the sale of the company as they were still having the purchasers carrying out 'due diligence'. The risk to the Directors would have been considerable and far outweighed any potential benefit. If there had been high speed work such as the claimant specialised in, and the evidence was that there was little roadbuilding or repair activity, they would have asked the claimant to return.

89. Looking at the evidence in the round I am not convinced that the claimant's evidence is true that he worked full time during lockdown. I do not wholly

discount the fact that he may have carried out the occasional task but probably not at the insistence of the respondent's managers. If he did any work then it was likely to be minor, on his own initiative and took place on the relatively few occasions he had chosen to visit the office.

90. The final straw takes on considerable significance in this case as many of the earlier alleged breaches are of some vintage and without it the claimant would be held to have waived his right to resign. Prior to the alleged final straw, the main matters relied on seems to be the incident over the rota which took place on the 19 March 2021, the issues around the company car in December 2020 and the furlough issues in July the previous year. However, I need not consider the issue of waiver as the conclusion I that I have reached is that there were no acts ether single acts or cumulative that would have amounted to a repudiatory breach entitling the claimant to resign. The claim is accordingly dismissed.

Employment Judge: James Hendry
Date of Judgment: 06 June 2022
Entered in register: 06 June 2022
and copied to parties