EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113534/2021

Held in Wick on 17, 18 and 19 May 2022

Employment Judge Brewer

Mr C Durrand	**Claimant** **In person**
Reid and Fraser Limited	**Respondent** **Represented by** **Mr G Lindhorst, Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is:

1. The claim for unauthorised deductions from pay in relation to holiday pay is dismissed on withdrawal.
2. The claim for constructive unfair dismissal fails and is dismissed.

REASONS

E.T. Z4 (WR)

Introduction

1. The claimant brings claims of constructive unfair dismissal and for unpaid holiday pay (unauthorised deductions from wages).

2. Given that the claimant was a litigant in person and not legally qualified, before the hearing of evidence commenced, I set out and explained the procedure we would be following during the hearing. I explained to the claimant the nature and purpose of both cross-examination and submissions and encouraged him to ask any questions about the procedure or for clarification of anything which was unclear.

3. The claimant went first, and during the hearing of his evidence on day 1 the facts indicated that the claimant had in fact taken all his accrued holiday during his employment. In the circumstances U asked the claimant to consider overnight whether he wished to continue to pursue that claim. On the morning of day 2 of the hearing the claimant confirmed that he wished to withdraw the claim for holiday pay, and I confirmed to the claimant that the claim would therefore be dismissed.

4. The claimant represented himself and gave evidence on his own behalf. The respondent was represented by Mr G Lindhorst, Advocate. He called Mr Stuart Walker, Director, Ms Carole Leslie, Consultant and Mr Steven Macgregor, Director.

5. I had an agreed bundle of productions. During the hearing several further productions were admitted as evidence from the respondent without any objection from the claimant.

6. We heard the evidence and submissions on the first day and the morning of the second day. I deliberated and delivered an oral judgment on the morning of the third day. Immediately following the judgment, but before the formal conclusion of the proceedings, the claimant walked out of the hearing. He was not therefore present to hear the respondent ask for written reasons. He

was also not present to hear that the respondent reserved its position on costs pending receipt of those written reasons which I now set out below.

7. I would make one further point in relation to the hearing which is that despite my clear indication of the purpose of cross-examination, the claimant did not cross examine any of the respondent's witnesses and thus all of the respondent's evidence was unchallenged, nor did he make any submissions.

Issues

8. The claim is for constructive unfair dismissal.

9. The claimant confirmed that he resigned in response to the following:

    a. Lack of sufficient notice of the sale of the shares in the respondent, and

    b. Failure by the respondent to give the claimant a promised pay rise.

10. The issues were agreed at the outset of the hearing as follows:

    a. Was the alleged failure to give the claimant sufficient notice of the sale of the shares in the respondent breach of an express or implied term of his employment contract to the effect that he should be given sufficient notice of the sale of the shares in the respondent, if not

    b. Was that alleged failure a breach of the implied term of trust and confidence,

    c. Was the alleged failure by the respondent to give the claimant a promised pay rise breach of an express or implied term of his employment contract to the effect that he was to be given a particular pay rise, if not

d. Was that alleged failure a breach of the implied term of trust and confidence,

e. In the alternative if the above allegations were not separately a fundamental breach of contract, were they cumulatively a fundamental breach of contract?

11. If there was a fundamental breach of contract, was it the operative cause of the claimant's resignation?

12. Did the claimant affirm the contract?

Relevant law

13. The relevant law is as follows.

14. The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in **Malik v BCCI; Mahmud v BCCI** 1997 1 IRLR 462 where Lord Steyn said 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."*

15. The burden of proving the absence of reasonable and proper cause lies on the party seeking to rely on such absence — **RDF Media Group plc and anor v Clements** 2008 IRLR 207, QBD. As in that case, this will usually be the employee.

16. In **Hilton v Shiner Ltd — Builders Merchants** 2001 IRLR 727, EAT, for example, Mr Recorder Langstaff QC stated in connection with a submission by counsel as to the proper legal test for establishing a breach of the implied term in the context of a case where the employer was alleging that the employee's misconduct had destroyed trust and confidence:

> *"When Mr Prichard identified the formulation of the trust and confidence term upon which he relied, he described it as being an obligation to avoid conduct which was likely seriously to damage or destroy a mutual trust and confidence between employer and employee. So to formulate it, however, omits the vital words with which Lord Steyn in his speech in Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) (above) qualified the test. The employer must not act without reasonable and proper cause… To take an example, any employer who proposes to suspend or discipline an employee for lack of capability or misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence between employer and employee, whatever the result of the disciplinary process. Yet it could never be argued that an employer was in breach of the term of trust and confidence if he had reasonable and proper cause for the suspension, or for taking the disciplinary action."*

17. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. That is commonly called constructive dismissal.

18. In the leading case in this area, **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, CA, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it:

> *'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed'*

19. In order to successfully claim constructive dismissal, the employee must establish that:

a. there was a fundamental breach of contract on the part of the employer;

b. the employer's breach caused the employee to resign;

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

20. I note that a constructive dismissal is not necessarily an unfair one — **Savoia v Chiltern Herb Farms Ltd 1982** IRLR 166, CA.

21. In terms of causation, that is the reason for the resignation, a tribunal must determine whether the employer's repudiatory breach was 'an' effective cause of the resignation. However, the breach need not be 'the' effective cause — **Wright v North Ayrshire Council** 2014 ICR 77, EAT. As Mr Justice Elias, then President of the EAT, stated in **Abbycars (West Horndon) Ltd v Ford** EAT 0472/07,

> *"the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon"*

22. Where an employee has mixed reasons for resigning their resignation will constitute a constructive dismissal provided that the repudiatory breach relied on was at least a substantial part of those reasons (see **Meikle v Nottinghamshire County Council** [2004] EWCA Civ 859, [2005] ICR 1).

23. Thus, where an employee leaves a job as a result of a number of actions by the employer, not all of which amounted to a breach of contract, they can nevertheless claim constructive dismissal provided the resignation is partly in response to a fundamental breach.

24. If the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract resulting in the loss of the right to claim constructive dismissal. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, CA, the employee.

> *"must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged"*

25. This was emphasised again by the Court of Appeal in **Bournemouth University Higher Education Corporation v Buckland** 2010 ICR 908, CA, although Lord Justice Jacob did point out that, given the pressure on the employee in these circumstances, the law looks very carefully at the facts before deciding whether there really has been an affirmation. An employee's absence from work during the time he or she was alleged to have affirmed the contract may be a pointer against a genuine affirmation.

26. In relation to whether the contract has been affirmed, or the breach waived by the claimant, the Court of Appeal in **Kaur** (above) offered guidance to tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:

    a. what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

    b. has he or she affirmed the contract since that act?

    c. if not, was that act (or omission) by itself a repudiatory breach of contract?

    d. if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

e. did the employee resign in response (or partly in response) to that breach?

27. Given the way the case was put it seemed to me to be at least arguable that the claimant was contending that he was impliedly entitled to a pay rise and that he was impliedly entitled to reasonable or sufficient notice of the sale of the shares of the respondent.

28. The courts will not imply a term simply because it is a reasonable one. Nor will they imply a term because the agreement would be unreasonable or unfair without it. A term can only be implied if the court can presume that it would have been the intention of the parties to include it in the agreement at the time the contract was made. In order to make such a presumption, the court must be satisfied that:

a. the term is necessary in order to give the contract business efficacy,

b. it is the normal custom and practice to include such a term in contracts of that particular kind,

c. an intention to include the term is demonstrated by the way in which the contract has been performed, or

d. the term is so obvious that the parties must have intended it (the officious bystander test).

29. In this case, given the evidence, we are concerned only with the business efficacy test and/or the officious bystander test.

30. The business efficacy test is whether the term is *necessary*, not simply reasonable or desirable. In **Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and anor** 2016 AC 742, SC, the Supreme Court pointed out that the test is not one of ‘absolute necessity’,

and suggested that it might be more helpful to say that a term can only be implied if, without the term, the contract would lack 'commercial or practical coherence'.

31. In relation to the 'officious bystander' test. The term derives from the case of **Shirlaw v Southern Foundries (1926) Ltd 1939** 2 KB 206, CA, where the Court of Appeal (in a decision subsequently affirmed by the House of Lords (**Southern Foundries 1926 Ltd v Shirlaw 1940** AC 701, HL)), held that a term could be implied in a situation where *'if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "oh, of course"'*. In practice, this means that a term will be implied if it can be said that it is so obvious that it goes without saying.

Findings in fact

32. I make the following findings in fact (references are to pages in the agreed bundle).

33. The respondent is a firm of accountants with offices in Wick and Thurso. It employs around 17 staff.

34. The shareholders at the material times were Mr and Mrs Walker. Mr Walker was also the sole director of the respondent and Mrs Walker was employed in the administration of the respondent.

35. The claimant was employed as an accounts assistant from 7 September 1998. His employment was governed by a contract of employment [32 – 39].

36. The claimant originally worked in the Thurso office, but he asked to be allowed to work from Wick, which was agreed, although for the last 2 years or so he has worked from home.

37. In relation to the pay rise question, the claimant had an appraisal meeting in September 2016. Notes of that are at [66 – 68]. As part of that meeting the

claimant said he was looking for a pay rise to £17.00 per hour. At the time his hourly rate was £11.75. The claimant's claim form says that he was not given the salary increase at the time but that one was "promised…in a year's time if I had another solid year" [7].

38. After the appraisal meeting the claimant was afforded a pay rise and his pay was increased by 6.4%.

39. The claimant had two further pay increases of around 4%. The first was in April 2018 and the second was in April 2021.

40. Between September 2016 and October 2021, the claimant did not raise the matter of any, or any particular pay rise with the respondent.

41. During 2020, Mr Walker decided that he wished to begin to decrease the amount of time he spent working in the respondent and turned his mind to the future of the respondent and the question of succession planning. They clearly had choices as to how to exit the business including whether to sell it as a going concern, to sell the shares and if so, how and to whom.

42. Mr Walker was concerned that if he sold to a competitor firm they would take the client base, close the offices and service the clients from say Inverness or perhaps Aberdeen. However, Mr Walker was committed to keeping the respondent local and maintaining the Wick and Thurso offices, and he established that the best means of achieving this would be to sell the shares to an employee ownership trust (EOT) as the best vehicle to achieve that.

43. In short, an EOT is a trust that enables a company to become owned by its employees and can be set up by a company's existing owners often as part of their exit or succession planning strategy. It was created by the **Finance Act 2014**, to encourage more companies to become employee owned.

44. Mr Walker enlisted the assistance of a consultancy run by Carole Leslie to facilitate the sale and purchase of the shares. Ms Leslie has assisted in the creation of between 60 and 80 EOTs.

45. The essentials of the proposal were as follows – a company was created called Reid & Fraser EOT Trustees Limited ("the EOT"). Mr Walker leant the company the capital with which the shares were purchased and on completion, the EOT would own the shares and hold them in trust for the employees of the respondent as the beneficiaries. The company would then repay the loan, essentially the purchase price of the shares, to Mr and Mrs Walker over time. Once that loan was cleared any future profit could be used to, for example give the staff bonuses. Every EOT requires HMRC approval because of the favourable tax treatment of capital gains in relation to the value of the shares being sold.

46. In preparation for the transaction, and as part of the succession plan, Mr Macgregor and Ms Linda Cameron, both senior managers in the respondent, were to become directors of the respondent and so were made aware of the proposal when it was at a relatively formative stage. One employee who was to join the board of the EOT (because the legislation governing employee ownership trusts requires an 'employee director') was also aware of the proposal at a relatively early stage as was one very long serving employee who was to remain, and remains, manager of the Wick office. All other staff were advised of the deal on the same day, 13 October 2021. The Wick staff were told at a lunch at the Norseman Hotel (the Norseman meeting). This was some 9 days before the deal was to complete.

47. The position of the employees of the respondent remained the same after the share sale. The change in the owner of the shares in the respondent was just that. It had no negative impact on the employees. Their terms and conditions remained the same, their work did not change, they had no personal liability for the loan repayment to Mr Walker. The only thing which

altered was that respondent's employees automatically became beneficiaries of the trust embodied in the EOT.

48. At the Norseman meeting staff were given a detailed note about the sale of the shares [69 – 73]. The claimant's evidence was that he fully understood the document, but he did have some queries.

49. Following the Norseman meeting, the claimant exchanged a number of emails with Carole Leslie between 13 October 2021 and 28 October 2021 [57 – 61]. In those emails the claimant expressed concern about the sale of the shares although these concerns seemed to centre around the fact that he had no choice whether to participate. Ms Leslie did her best to assure him that, for example, his employment contract was not going to change, and he was not going to be personally liable for loan repayments.

50. For reasons which remain unclear the claimant continues to express his opposition to the sale of the shares to the EOT.

51. On 28 October 2021 the claimant sent an email to Ms Leslie in which he says

> *"I have quit as a direct result of the imposition of the EOT, seemingly without the option to refuse. I did refuse but I was ignored"*

52. From 28 October 2021 the claimant exchanged a number of emails with Mr Walker [51 – 56]. Mr Walker was surprised that the claimant had resigned.

53. On 29 October 2021 the claimant sent an email to Mr Walker [51] in which, among other things, he says the following:

> *"Also, I'll come back on Monday if you offer the following:*
> *£15 per hour*
> *4 day working week*
> *36 Hours per week…"*

54. No such offer was made by the respondent.

55. The claimant commenced early conciliation on 2 November 2021. He received his early conciliation certificate on 29 November 2021.

56. The claimant presented his claim on 30 November 2021.

57. Those are the essential findings of fact. I turn now to my decision.

Observations on the evidence

58. In general, all of the witness evidence was credible. Although I have found against the claimant, I accept that he firmly believed what he said in evidence. None of the respondent's evidence was challenged by the claimant and in the case of the very limited disputes of evidence around precisely what was discussed at the appraisal meeting in 2016, I have accepted the evidence of Mr Walker and Mr Macgregor.

Respondent's submissions

59. Mr Lindhorst's submissions were commendably short. He argued that the evidence entirely supported the respondent's case, that the claimant had not made out his case either in relation to the alleged agreement as to a pay rise or to any breach of a term of his employment in respect of the share sale and he invited me to dismiss the claim.

Claimant's submissions

60. The claimant declined to make any submissions.

Decision

The pay rise issue

61. Prior to the final hearing of this matter, the claimant seemed to be asserting that at his appraisal meeting held in September 2016 by Mr Walker and Mr Macgregor, he was made an enforceable promise that he would be given the pay rise he sought if he had what is referred to as a solid year in 2017. The precise amount of the pay rise sought does not seem to have been mentioned at the appraisal but prior discussions indicated that the claimant thought he should be receiving an hourly rate of around £17.00.

62. In fact, on closer inspection of the evidence the claimant's case is much less substantial than that suggested above. In oral evidence the claimant confirmed that at the 2016 appraisal meeting, the respondent had simply agreed to "*look at it again next year*", that is that they had agreed to look at the question of a significant pay rise in 2017 if the claimant had a 'solid' performance in the following year. This is in fact confirmed by the claimant in his own email of 28 October 2021 [54]. The claimant confirms as follows:

> *"I had a meeting with you several years ago about my salary. I left that meeting still unhappy. You made a promise to look at it again if I had another solid year…."*

63. The claimant complains that "*it*", i.e., his pay, was not looked at for the next 5 years. But that is simply factually incorrect. In the 5 years following the discussion in 2016 at his appraisal meeting, the claimant had three pay rises of 6.4%, 4% and 4%, so self-evidently the respondent did do what was promised, it looked again at the claimant's pay. The claimant has in my judgment sought to argue that by agreeing to "*look at it again if I had another solid year….",* the respondent was agreeing to give him the pay rise he sought of some £17.00 per hour, only on the condition that he had another 'solid year'. But on his own written and oral evidence, that was clearly not the case. No such promise was ever made by the respondent.

64. The claimant accepted in evidence that his written contract gave him no right to any or any particular level of pay increase. There is no evidence on which to imply such a clause in his contract and as I have found there was no express or implied agreement from 2016 to give the claimant any or any particular level of pay rise. Taken at its very highest, it may be argued that in September 2016 the respondent agreed to look at whether or not to give the claimant subsequent pay rises, which they clearly did and so cannot be in breach of such a promise.

65. In short, the respondent did not breach any express or implied term of the claimant's contract of employment related to pay reviews and/or pay increases.

Share sale issue

66. Turning to the sale of the shares, it seems to me that this is legally problematic for the claimant. How can the respondent, a limited company, have done or failed to do anything which did or could amount to a breach of the claimant's contract of employment by dint of the fact that the shareholders in the respondent agreed a sale of the shares?

67. There are a number of salient points to make about this claim.

68. First, there is no legal obligation on the respondent as a limited company to advise employees that shares in it are being sold by one or more shareholder to a purchaser. I see no basis for implying such a term because to do so would be give an employee an implied right to know about the private financial transactions of shareholders and there is no basis in law for so doing.

69. Second, the sale of the shares is a private matter between the owners and purchasers of the shares. There may be all sorts of reasons why the parties may not wish the sale to be known about at about time, or known about in advance of the sale, including not least commercial sensitivity.

70. Third, even though in this case the sale was to the EOT, the reality was simply that the employees at the time became beneficiaries of the Trust created by the particular scheme, nothing changed for the employees in relation to their employment status or the terms on which they were employed. They were affected only in that they were soon to take on the capacity of trust beneficiaries but were not affected in their roles as employees and so it is difficult to see how in that circumstance any such employee could claim breach of an express or implied term of their employment contract.

71. It is in fact clear from both the documentary and oral evidence that the claimant's only complaint about the EOT proposal was that he was only given 6 working days' notice of the sale, but as he in fact had no right to be told of the sale of the shares, it is again difficult to understand how he says not being told something earlier than was the case in circumstances where he had no right to know at all, could be a breach of trust and confidence. I of course accept that in the present situation it was inevitable that staff would be told of the deal given that they would become beneficiaries of the EOT, but that did not require any particular period of notice in my view.

72. As I have indicated above, in my judgment there is no basis for implying a term into the claimant's contract of employment to the effect that he was to be given any or alternatively to be given reasonable notice of the sale of the shares in the respondent. Neither business efficacy nor the the officious bystander test require the implication of such a term.

73. As to the issue of trust and confidence, I remind myself that the implied term of trust and confidence is expressed thus:

> *"The employer shall not without proper and reasonable cause conduct itself in a manner calculated or likely to seriously damage or destroy the relationship of trust and confidence between employer and employee"*

74. I am entirely satisfied that the timing of the announcement of the sale of the shares and the creation of the EOT was a matter between Mr and Mrs Walker as shareholders of the shares and the EOT, it was not the decision of the respondent, thus the respondent cannot have acted in breach of the implied term of trust and confidence simply because the respondent had not acted in the sale. At its very highest it could, I suppose, be argued that after the purchase given that the respondent had taken on a debt it had to repay, and that therefore employees had a right to know about this. Again, I see no basis to find this to be the case. Even though the respondent was taking on a debt, this did not create any obligation on the respondent to inform employees

about that. It was a business decision, and the respondent has no obligation to discuss and seek employee agreement about that any more than it had an obligation to, for example, discuss taking on a business loan, mortgaging a property or undertaking any other business transaction save where the law imposes obligations of consultation as would be the case in a business sale under the Transfer of Undertakings (Protection of Employment) Regulations 2006.

75. Furthermore, and in any event, the employees were in fact informed about the deal as soon as was reasonable after the deal became certain and thus insofar as Mr Walker was acting as the respondent, if at all, he acted with proper and reasonable cause even if as a result of the deal the respondent took on liability for a loan repayment.

76. I should add that in any event, the claimant's claim that he resigned because of a breach of trust and confidence by the respondent is fundamentally and fatally undermined by his email to Mr Walker of 29 October 2021 in which he says he would return to work if the respondent offered him:

> *" £15 per hour*
> *4 day working week*
> *36 Hours per week…"*

77. Quite clearly the claimant's willingness to return to work for the respondent just a few days after he had resigned with what would have been the same amount of pay for just 4 hours a week less working time indicates that the claimant's position had not been intolerable, as he put it in one email, he had not reached the stage where he could no longer work with Mr Walker specifically or the respondent in general and in fact trust and confidence had not been destroyed or seriously damaged as the claimant alleged.

78. For all of those reasons the claimant's claim of constructive unfair dismissal fails and is dismissed.

Employment Judge Brewer

Date of Judgement 23rd May 2022

Date Sent to Parties 23rd May 2022