# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Aaron Sunter

**Respondent:** Buildakit (UK) Ltd

**Heard at:** Manchester ET (by CVP) **On:** 6 & 7 October 2022

**Before:** Employment Judge Poynton (sitting alone)

**Representation**
Claimant: In person
Respondent: Mr W Richardson (Director)

# RESERVED JUDGMENT

1. The claimant's complaint of unfair constructive dismissal is not well-founded and is dismissed.

2. The claimant's complaint of unlawful deductions from wages is not well-founded and is dismissed.

# REASONS

**Introduction**

1. The Claimant was employed by the Respondent as a Trainee Site Manager from 1 May 2016 until he resigned with immediate effect on 31 October 2021.

2. ACAS was notified under the early conciliation procedure on 5 January 2022 and the certificate was issued on 14 January 2022. The Claimant's ET1 claim form was received by the Tribunal on 13 February 2022. The Respondent's response to the claim ET3 form was received by the Tribunal on 11 April 2022.

3. The Claimant claimed unfair dismissal because of what he says were several breaches to the implied term of trust and confidence causing him to resign.

4. The Respondent's position was that the claim is unfounded.

## Issues for the Tribunal to decide

5. The Claimant's claim for constructive dismissal was brought pursuant to section 95(1)(c) of the Employment Rights Act 1996. The Claimant claimed that there had been a series of events which cumulatively amounted to a fundamental breach of the implied term of trust and confidence causing him to resign.

6. The Claimant submitted a detailed ET1 Form and confirmed at the outset of the hearing that his claim for constructive unfair dismissal was based on the events referred to in his ET1 Form and witness statement as follows:

    a. In early April 2020, the Claimant shared some concerns that other colleagues had brought to his attention via a WhatsApp group. The Claimant spoke with Mr Richardson on behalf of the Respondent and felt that his concerns were not listened to and were not addressed. The Claimant received a letter from Mrs Richardson on behalf of the Respondent in relation to this incident and felt that he was not given opportunity to discuss this further.

    b. On 1 July 2020, the Claimant installed a sign during the course of his employment. It transpired that the sign had been installed incorrectly or in the wrong location. The Claimant believed that he had installed the sign according to the instructions given to him by Mr Richardson. The Claimant and Mr Richardson had an exchange when the Claimant arrived at work on 2 July 2020. The Claimant understood that Mr Richardson was requesting that he move the sign at the weekend. The Claimant considered this to be an unreasonable request and felt that the exchange was intimidating. He left the premises following the exchange.

    c. On 6 September 2021, the Claimant was injured at work. The Claimant attended hospital. The Claimant felt pressured to return to work and returned on 7 September 2021. The Claimant was absent from work on 8 September 2021 and returned to work on 9 September 2021. The Claimant felt that he was being pressured to return to work and carry out tasks that were not appropriate given the injuries he had sustained.

    d. On 24 September 2021, the Claimant had an operation and was off work from this date onwards. The Claimant's position is that there was an agreement between him and the Respondent that he would be paid 2 weeks' contractual pay during this period of absence. The Claimant was paid Statutory Sick Pay for the entire period of his absence.

e. On 31 October 2021, the Claimant resigned as he felt it was impossible for him to return to work.

7. The Respondent's position is that its treatment of the Claimant did not amount to a fundamental breach of the implied term of trust and confidence or, in the alternative, that any breach was waived by the Claimant.

8. It was also contended that the Respondent's conduct was not the reason for the Claimant's resignation. The Respondent disputes that there was any agreement to pay the Claimant his full contractual rate of pay for any period that the Claimant was off sick as stated by the Claimant. The Respondent's position is that the Claimant was planning to resign and timed his resignation so that the Respondent was unable to deduct monies owed by the Claimant in respect of training that had been paid for by the Respondent in accordance with the terms and conditions of the Claimant's employment.

9. The issues for the Tribunal to decide were as follows:

*Constructive unfair dismissal*

a) Whether there was a fundamental breach of contract, namely the implied duty of trust and confidence, by the Respondent based on the Grounds identified by the Claimant;

i. Whether there was reasonable/proper cause for the Respondent's conduct in respect of the Grounds;

ii. If not, when viewed objectively were the Grounds calculated or likely to seriously damage trust and confidence;

b) Whether the Claimant terminated the contract because of the Grounds;

and

c) Whether the Claimant lost the right to resign because he affirmed the contract of employment.

*Unlawful deduction from wages*

a) Did the Respondent make unauthorised deductions from the Claimant's wages and if so, how much was deducted, i.e. were the wages paid to the Claimant for the period from 24 September 2021 less than the wages properly payable based on any contractual entitlement to full contractual pay for a period of 2 weeks?

b) In this claim the fundamental issue in dispute was whether there was a contractual entitlement to full contractual pay for a period of 2 weeks from 24 September 2021.

## Procedure

10. The Claimant was a litigant in person.

11. At the outset of the Hearing the Tribunal spent some time clarifying the basis of the Claimant's claim and the Respondent's position in response.

12. The Respondent had provided the Tribunal with a bundle of documents comprising 326 pages including cover sheets and index.

13. The Claimant had also provided the Tribunal with a bundle of documents comprising 41 pages.

14. The parties agreed that the Respondent's bundle would be used for the purposes of the hearing but that any additional documents in the Claimant's bundle would be referred to as necessary.

15. The Respondent also provided some additional evidence at the start of the hearing which comprised:

    a. A letter dated 6 December 2018 from Accrington & Rossendale College to the Claimant regarding a HNC Construction Course;
    b. An email dated 3 April 2020 from Mrs Richardson to the Claimant responding to the Claimant's email of 3 April 2020.

16. It was agreed that these documents were relevant to the issues before the Tribunal and were therefore accepted as late evidence.

17. The Tribunal had written witness statements from the Claimant on his own behalf and from Mr William Richardson and Mrs Nicole Richardson on behalf of the Respondent.

18. The Tribunal heard oral evidence from the Claimant and from Mr Richardson on behalf of the Respondent.

19. I considered all the written and oral evidence notwithstanding whether it is addressed specifically in this decision.

## Findings of fact

20. It is not the Tribunal's purpose to resolve each and every last dispute of fact between the parties. My function is to make such findings of fact as are necessary to answer the issues in the claim and to put them in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

21. The Respondent is a business that has two elements: the first is the manufacture of timber frames panels for and the second is the installation of the timber frames on site for the construction of new homes. The Respondent employs 12 people. The Claimant commenced employment with the Respondent on 1 May 2016. The Claimant was initially employed as a bench joiner in the manufacturing arm of the business, assembling timber frame panels. The Claimant was promoted to the role of Trainee Site Manager in the construction arm of the business at some time in late 2019. The Claimant's annual salary at the time of his resignation was £30,000.

*Concerns raised by the Claimant in March / April 2020*

22. In late March 2020, some colleagues expressed their concerns to the Claimant about procedures in place at the Respondent's factory following the COVID-19 pandemic and resulting lockdown that commenced in March 2020. These concerns were expressed via a WhatsApp messaging group. The Claimant contacted Mr Richardson by telephone on or around 3 April 2020 about those concerns which primarily related to the lack of access to running water as the kitchen facilities were closed off. There were 3 employees working in the factory at that time and prior to their return to the workplace, Mr Richardson discussed with them the processes that were to be implemented.

23. I find that the concerns were discussed and that the call was terminated without a satisfactory resolution being reached from either party's perspective. I find that Mr Richardson felt that he had done everything he could to explain the processes and procedures that had been put into place in the factory following the onset of the COVID-19 pandemic to the Claimant. I find that the Claimant felt that the concerns he raised had not been listened to or addressed and that he was frustrated that the call had not gone as he would have wished.

24. Following the call, those working in the factory were gathered together by Mr Richardson to discuss any concerns. There was no evidence before me from any other employees as to what was discussed at that meeting. I find that no concerns were raised by anyone during the meeting.

25. Based on the evidence I heard from the Claimant and Mr Richardson, I have concluded that there was no reference to the Respondent's social media policy at that meeting. I accept Mr Richardson's evidence that this was due to him not being aware of who was a participant in the WhatsApp group.

26. The Claimant confirmed that he had been provided with a copy of the Respondent's policy on use of social media but accepted that he had not read this in full. I find that the Claimant was aware that there was a policy on the use of social media.

27. Following the call, on 3 April 2020, the Respondent wrote a letter to the Claimant expressing concern that the WhatsApp group was being used to voice negative comments and intended to damage the business and staff morale. The letter sought to remind the Claimant of the terms and conditions of his contract. The Claimant was the only member of staff to receive such a letter. I find that the Claimant felt that he was being singled out by being the only member of staff to receive such a letter.

28. Based on the evidence I heard from the Claimant and Mr Richardson, I find that there was no disciplinary action taken as a result of this incident. Mr Richardson sent this letter at a very difficult time for the business and that tensions were running high. I find that the letter of 3 April 2020 was a reminder about conduct and use of social media rather than a threat of disciplinary action.

29. I considered the evidence in the bundle of documents which included a significant number of text messages between the Claimant and Mr

Richardson, the Claimant and Mrs Richardson and also the Claimant and Chris Parker who was identified by Mr Richardson as a member of the design team. These messages were exchanged after this incident. I also considered the email exchange that was provided to the Tribunal as late evidence. I accept that the Claimant felt that this incident had affected his perception of Mr Richardson and Mrs Richardson. However, I find that Mr Richardson's and Mrs Richardson's approaches to the Claimant did not alter following the incident. I find that the Claimant did seek to discuss the matter with the Respondent but that no discussion took place due to the ongoing impact of the COVID-19 lockdowns on the Respondent's business. I find that the Respondent believed the matter was concluded as the Claimant did not raise the matter again.

*1 July 2020*

30. On 1 July 2020, the Claimant was instructed by Mr Richardson to instal a sign. The Claimant installed the sign in accordance with his understanding of the instructions that were provided by Mr Richardson. Following installation of the sign, the Claimant sent a picture to Mrs Richardson to show the location of the sign. Mrs Richardson then advised the Claimant by text message that the sign was not correctly located.

31. A discussion took place between the Claimant and Mr Richardson on 2 July 2020 about the location of the sign. The parties' recollection of the nature and content of those discussions differ. The Claimant's recollection is that Mr Richardson advised him that the sign would have to be moved and that this work would have to be carried out over the course of a weekend. Prior to this date, the Claimant had occasionally worked at the weekend. The Claimant says that he advised Mr Richardson that he was not able to do this at the weekend and that Mr Richardson's response was "*You don't have a fucking choice*". Mr Richardson refutes that this was his response. The Claimant was consistent in his evidence throughout the hearing that this was Mr Richardson's response and Mr Richardson was equally consistent that it was not. I find that there was a heated exchange between the Claimant and Mr Richardson and on the balance of probabilities, based on the consistency of the Claimant's evidence, I find that Mr Richardson swore at the Claimant.

32. The Claimant collected his belongings and left work immediately after this heated exchange and did not intend to return to work. Mr Richardson then called the Claimant to apologise for asking him to work on a Saturday and asked the Claimant to return to work. The Claimant returned to work the same day.

33. Both parties accepted in their oral evidence that there was a misunderstanding as to the nature of the instructions that Mr Richardson provided relating to the location of the sign. I find that there was a heated exchange between the Claimant and Mr Richardson and that nature of that exchange was such that the Claimant felt so upset that he left work and did not intend to return. I further find that after both the Claimant and Mr Richardson had had opportunity to calm down, the Claimant felt able to return to work.

*6 September 2021 – accident at work*

34. On 6 September 2021, the Claimant had an accident at work and injured his hand. He was taken to hospital by a colleague following the incident and his wounds were dressed. The Claimant returned to the Respondent's office later that afternoon for a brief period and left for the day at approximately 3.30pm.

35. The Claimant returned to work on 7 September 2021. The Claimant confirmed in his oral evidence that he was happy to return to work on 7 September 2021.

36. The Claimant texted the Respondent to advise that he would not be attending work on 8 September 2021. The Claimant was absent from work on 8 September 2021.

37. The Claimant felt that the way the Respondent treated him after the accident was unacceptable. The Claimant's evidence was that Mr Richardson was repeatedly calling him to find out when he would be returning to work. The Claimant's witness statement (paragraph 4.2) referred to a call from Mr Richardson on 8 September 2021 in which Mr Richardson queried whether he would be returning to work the following day. The Claimant's evidence is that he said that he would go in and see how he got on and that he made it clear to Mr Richardson that he would not be able to do any kind of lifting or loading and that Mr Richardson agreed, but that after a very short space of time he was trying to coax the Claimant into doing more. Mr Richardson referred me to a log of calls from his mobile phone [page 260 of the bundle] which records a call to the Claimant's number on 8 September 2021 which lasted 42 seconds. Mr Richardson stated that this was him leaving a voicemail message and that he did not speak with the Claimant. I accept Mr Richardson's evidence and I find that he did not speak with the Claimant on 8 September 2021.

38. The Claimant returned to work on 9 September 2021 and undertook light duties, he gave examples of bits of driving and picking things up from suppliers. The Claimant's was supervising other employees on site and he would help them out where they didn't understand.

39. The Claimant felt that more and more was put on him and that he was being asked to undertake work that he should not be doing given his injuries. Mr Richardson's evidence was that the Claimant undertook light duties. Mr Richardson's witness statement states that he spoke with the Claimant and the Claimant advised that he would be ok to go to work and supervise his co-workers. I find that the Respondent did not expect the Claimant to undertake anything other than light duties on his return to work.

*Agreement to pay 2 weeks' contractual pay in the event of the Claimant being off sick*

40. I heard evidence from both parties about discussions and negotiations that had taken place in relation to the Claimant's pay and other terms. Neither the Claimant nor Mr Richardson could be specific as to the dates of these discussions.

41. Both the Claimant and Mr Richardson accepted in their evidence that a discussion took place at the beginning of the day regarding whether the Claimant should remain on an annual salary or whether it would be better for him to revert to being paid on an hourly rate basis.

42. The Claimant initially agreed to be paid on an hourly rate basis following this discussion.

43. Following the Claimant agreeing to be paid on an hourly rate basis, on 6 August 2021 Mr Richardson emailed Mrs Richardson in the following terms:

    *"As discussed*

    *Aarons wage lifts to £15.00 / hr*
    *Travel 1 way unless living away or traveling more than 1 hr & 15 mins each way*
    *No time & half*
    *1 Holliday per year extra up to 25 days per year"*

44. I find that the discussion took place on 6 August 2021 and that the Respondent prepared a contemporaneous note of the matters discussed and agreed upon.

45. Having reflected on the matter, the Claimant sought clarification at the end of the day as to whether he would have to work a week in hand if he changed to being paid on an hourly rate basis. Mr Richardson confirmed that this was the case. The Claimant then changed his mind and advised Mr Richardson that he did not want his pay changing.

46. The parties' recollection of the other matters discussed during the initial discussion on 6 August 2021 differs. The Claimant says that he and Mr Richardson discussed an extra day's holiday and that the Claimant would be paid 2 weeks at his contractual rate of pay in the event that he was off sick. Mr Richardson refutes that there was any discussion about paying the Claimant at his contractual rate of pay for a period of 2 weeks. I find that the contemporaneous record of the discussion in the email of 6 August 2021 supports Mr Richardson's evidence that there was no agreement to pay the Claimant 2 weeks at his contractual rate of pay in the event that he was off sick. I therefore find that there was no agreement in those terms.

*Resignation*

47. On 31 October 2021, the Claimant resigned from his employment with the Respondent with immediate effect. His email of 31 October 2021 stated:

    > *"There are a number of reasons for this but ultimately I no longer feel happy working there."*

48. The Claimant did not give any other specific reasons for his resignation.

49. The Claimant did not raise any formal grievance in relation to any of his concerns at any point.

## The Law

*Constructive dismissal*

50. Section 95(1) (c) of the Employment Rights Act 1996 sets out that an employee will be dismissed by an employer if 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.

51. The employer must be guilty of conduct which is a significant breach going to the root of the contract (repudiatory breach) or which shows that the employer no longer intends to be bound by one or more of the essential terms, then the employee is entitled to treat himself as discharged from any further performance under the contract. If he does, then he terminates the contract by reason of the employer's conduct and is "constructively dismissed. (**Western Excavating Ltd v Sharp [1978] 1 All ER 713)**.

52. The trust and confidence term was set out in **Malik v Bank of Credit and Commerce International SA [1997] IRLR 462** as follows: "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".

53. More recent case law has clarified that it is not necessary for the employer to act in a way which is both calculated and likely to destroy the relationship of trust and confidence, instead either requirement need only be satisfied (**Baldwin v Brighton & Hove City Council [2007] IRLR 232)**.

54. Where there is a series of acts, the question for the Tribunal will be "does the cumulative series of acts taken together amount to a breach of the implied term?" (**Lewis v Motorworld Garages Ltd [1985] IRLR 465**, per Glidewell LJ).

55. In cases where a series of acts is relied upon the Tribunal must consider the "last straw" which caused the Claimant to resign. Guidance on "last straw" cases has been provided in the case of **London Borough of Waltham Forest v Omilaju [2005] ICR 481**). The Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, and nor must it constitute unreasonable or blameworthy conduct although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective. And while it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct that is perfectly reasonable and justifiable satisfies the last straw test.

56. Tying together the case law identified above the Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978** clarified the approach to be taken by the Tribunal as follows:

*In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*

*(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
*(2) Has he or she affirmed the contract since that act?*
*(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
*(4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term? (If it was, there is no need for any separate consideration of a possible previous affirmation….)*
*(5) Did the employee resign in response (or partly in response) to that breach?*

**Representations by the parties**

57. After the evidence had been concluded, both parties made submissions which addressed the issues in this case. I have set out the key points in the parties' submissions below. It is not necessary for me to set out those submissions in detail here. I fully considered all the submissions made and the parties can be assured that they were all taken into account in coming to my decision.

The Claimant

58. The Claimant submitted that the way in which he had been treated by the Respondent had led to him feeling that he was unable to continue with his employment. The Claimant submitted that there had been a series of acts or events that had led to a breakdown in his relationship with the Respondent. He submitted that the Respondent's failure to pay him his contractual rate of pay, in accordance with what the Claimant says was agreed, was the last straw which resulted in his resignation. The Claimant submitted that he was unfairly constructively dismissed.

The Respondent

59. The Respondent submitted that there had been no breakdown in the relationship with the Claimant. The Respondent submitted that the relationship with the Claimant had been a good one and that the Claimant was a highly regarded employee. The Respondent submitted that the incidents in March/April 2020 and July 2020 referred to by the Claimant were not breaches of his contract of employment and were isolated disagreements that did not amount to a fundamental breach going to the heart of the Claimant's contract of employment. The Respondent submitted that these incidents occurred during a period of significant difficulty due to the CVID-19 pandemic. The Respondent also submitted that the Claimant was not asked to undertake unreasonable duties following his accident. The Respondent further submitted that there had been no agreement to pay the Claimant his contractual rate of pay for a period of 2 weeks in the event of the Claimant being unable to work due to illness. The Respondent

submitted that there had been no repudiatory breach of the Claimant's contract of employment and that the Claimant was not entitled to treat himself as constructively dismissed. The Respondent submitted that the Claimant had resigned of his own volition.

## Conclusions

*Constructive unfair dismissal*

*Concerns raised by the Claimant in March/April 2020*

60. I have considered whether the Respondent's letter of 3 April 2020 to the Claimant amounted to a significant breach going to the root of the contract. I conclude that it does not. I have concluded that although the Claimant felt that he was singled out as no other employee received a letter in similar terms, this did not amount to a breach of contract. I accept Mr Richardson's evidence that the Claimant was the only employee to receive a letter as he was not aware which other employees were members of the WhatsApp group.

61. I have concluded that the Respondent was not aware of which other employees were members of the WhatsApp group. The Respondent could identify that the Claimant was a member of the WhatsApp group as the Claimant had advised Mr Richardson during the course of their discussion. I conclude that there was a reasonable and proper cause for the Respondent sending the letter and there is no fundamental breach of contract. In any event, I conclude that the Claimant felt able to continue working for the Respondent and in so doing, affirmed any breach of the contract. The evidence points to a working relationship that continued in a cordial and professional manner.

*1 July 2020*

62. I have considered whether this incident amounted to a significant breach going to the root of the contract. I have concluded that it is not. I conclude that there was a misunderstanding as to the nature of the instructions given to the Claimant on 1 July 2020. This led to a heated exchange taking place between the Claimant and Mr Richardson on 2 July 2020. I conclude that Mr Richardson did ask the Claimant to move the sign over the course of the weekend and that the Claimant refused. I have found that during the heated exchange on 2 July 2020, on the balance of probabilities, Mr Richardson swore at the Claimant. I conclude that this made the Claimant feel agitated and resulted in him walking out of work. However, the Claimant felt able to return to work the same day. I conclude that this was a heated exchange which resulted from Mr Richardson being frustrated about the sign having been installed in the wrong location. I conclude that Mr Richardson swearing at the Claimant happened in the heat of the moment. Mr Richardson called the Claimant to apologise for asking him to work at the weekend and the Claimant felt able to return to work after that call. I conclude that this exchange did not amount to a significant breach going to the root of the contract

63. I also considered whether Mr Richardson's behaviour can be said to be calculated or likely to destroy or seriously damage the trust and confidence

between the parties. Conduct such as swearing can undermine trust and confidence in an employment relationship. I concluded that this was an isolated incident and there was no evidence that could lead to a conclusion that the Claimant had to work in a regularly intimidating or hostile environment. In any event, I conclude that the Claimant felt able to return to work the same day and in so doing, affirmed any breach of the contract. The evidence points to a working relationship that continued in a cordial and professional manner.

*6 September 2021 – accident at work*

64. I have considered whether this incident and the manner in which the Respondent treated the Claimant after the accident amounted to a significant breach going to the root of the contract. I have concluded that it is not. I have concluded that the Respondent reasonably expected the Claimant to be able to carry out light duties. I have concluded that the Claimant may have assisted his colleagues with tasks which then resulted in his wounds re-opening but that this was not at the request of the Respondent.

65. I have concluded that by assigning the Claimant to light duties, the Respondent acted in a manner that would be expected from a reasonable employer in the circumstances where an employee has had an accident and returned to work.

*Agreement to pay 2 weeks' contractual pay in the event of the Claimant being off sick*

66. I considered whether the Respondent's failure to pay the Claimant 2 weeks' pay at his contractual rate of pay rather than Statutory Sick Pay during a period of absence due to having undergone an operation amounted to a significant breach going to the root of the contract.

67. Paragraph 11.2 of the Claimant's contract of employment specifically states:

> *"Subject to your satisfying the relevant requirements you shall receive Statutory Sick Pay (SSP). Your qualifying days for SSP purposes are Monday to Friday."*

68. There was no documentary evidence before me to support the Claimant's assertion that Mr Richardson, on behalf of the Respondent, had agreed to pay the Claimant for 2 weeks at his contractual rate of pay in the event of the Claimant being unable to work.

69. Having heard the oral evidence from the Claimant and Mr Richardson, I have concluded from all of the evidence before me that if there was an agreement to pay the Claimant for 2 weeks at his contractual rate of pay, this would have been included within Mr Richardson's email of 6 August 2021 to Mrs Richardson. This was not included within the email of 6 August 2021. It is significant that the Respondent had a contemporaneous record of the matters discussed on 6 August 2021 and the Claimant did not. I therefore conclude that there was no agreement by the Respondent to pay the Claimant his contractual rate of pay for a period of 2 weeks.

70. I have considered whether the Respondent paying the Claimant Statutory Sick Pay can be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties. Having concluded that there was no agreement to pay the Claimant at his contractual rate of pay for a 2-week period of absence, it follows that there is no breach. It also logically flows that this cannot be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties. The Claimant was paid in accordance with the terms and conditions of his employment and I conclude that there has been no breach.

*Last straw*

71. The Claimant relies on the "last straw" doctrine. I have therefore considered the following questions:

    a. What was the most recent act (or omission) on the part of the Respondent which the Claimant says caused, or triggered, his resignation? The Claimant says it is the Respondent's failure to pay contractual pay for 2 weeks for the period when he was absent from work after his operation on 24 September 2021 which caused him to resign.

    b. Has the Claimant affirmed the contract since that act or omission? The Claimant resigned promptly after his salary payment in October so has not delayed in resigning.

    c. If not, was the act (or omission) by itself a repudiatory breach of contract? I have found that there was no agreement by the Respondent to pay the Claimant his contractual rate of pay during the time he was absent from work following his operation. It therefore follows that there has been no 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 the implied term of trust and confidence. I have found that each incident that the Claimant has referred to does not of itself amount to a breach of contract and I therefore conclude that there has not been a series of acts or omissions which viewed cumulatively, amounted to a breach of the trust and confidence term.

    e. Did the Claimant resign in response (or partly in response) to that breach? The Claimant did not advise the Respondent that the reason for his resignation was that he thought he should have been paid for 2 weeks at his contractual rate of pay rather than Statutory Sick Pay. I accept the Claimant's oral evidence that he resigned due to the Claimant's failure to pay him at his contractual rate of pay. However, I have concluded that there was no agreement, therefore there was no breach.

*Unlawful deduction from wages*

72. Having concluded that there had been no agreement by the Respondent to pay the Claimant at his contractual rate of pay for a 2 week period of absence due to illness, it follows that there has been no unlawful deduction

from the Claimant's wages. The Claimant was paid Statutory Sick Pay for the period of absence after his operation in accordance with the terms and conditions of his employment.

73. I accept that the Claimant felt strongly about his claim and believed that he had been unfairly treated. However, that is not the issue that the Tribunal has to determine. The issue is whether there has been a repudiatory breach of contract on the part of the Respondent which would have entitled the Claimant to treat himself as constructively dismissed. I conclude that there was no repudiatory breach of contract on the part of the Respondent which would have entitled the Claimant to treat himself as constructively dismissed. I conclude that there was no breach of the implied term of trust and confidence. As a result, I find that the Claimant was not constructively dismissed and therefore his claim for unfair dismissal fails and is dismissed.

## Costs

74. At the conclusion of the hearing, the Respondent indicated that in the event that the Claimant's claim was unsuccessful, they would seek to request a costs order. Rule 76(1) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 provides that the Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that:

    a. a party (or party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
    b. any claim or response had no reasonable prospect of success; or
    c. a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

75. In the event that the Respondent wishes to proceed with an application for a costs order or preparation time order, they should make any such application in writing within 28 days of the date of this judgment being sent to the parties in accordance with Rule 77 of the 2013 Regulations setting out the basis on which they consider that the Claimant should be ordered to pay their costs and the extent of the costs they are seeking. Rule 77 of the 2013 Regulations provides that no such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

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Employment Judge Poynton

Date 29 November 2022

**Case No: 2400936/2022**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

30 November 2022

FOR EMPLOYMENT TRIBUNALS