



# EMPLOYMENT TRIBUNALS

**Claimant:** Ismail Ismail

**Respondent:** Asda Stores Limited

**Heard at:** Watford

**On:** 5 January 2023 (video hearing), 9 January 2023 (Respondent's written submissions), 13 January 2023 (Claimant's written submissions)

**Before:** Employment Judge Din

## REPRESENTATION:

**Claimant:** In person

**Respondent:** A. MacMillan, counsel (instructed by Addleshaw Goddard LLP)

# RESERVED JUDGMENT

The judgment of the Tribunal is that the complaint of constructive unfair dismissal fails and is dismissed.

# REASONS

## Introduction

1. The Claimant is Mr. Ismail Ismail (**Claimant**).
2. The Respondent is Asda Stores Limited (**Respondent**), a supermarket chain. The Respondent was represented by Mr A. MacMillan of counsel.

## Claims and issues

3. The Claimant claims that he was constructively dismissed and his dismissal was unfair under the Employment Rights Act 1996 (**ERA 1996**). The

Respondent contests the claim. If his claim is successful, the Claimant seeks a remedy.

4. The outstanding issues are as follows.

- a. Was the Claimant dismissed?
  - i. Did the Respondent do the following things:
    1. Deny the Claimant a fair and equal opportunity to be appointed as Night Shift Manager;
    2. Through one of its employees, verbally abuse, belittle and bully the Claimant;
  - ii. Did that breach the implied term of trust and confidence? The Tribunal will need to decide:
    1. Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and
    2. Whether the Respondent had reasonable and proper cause for doing so.
  - iii. Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.
  - iv. Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.
- b. If the Claimant was dismissed:
  - i. What was the reason or principal reason for the dismissal – i.e., what was the reason for the breach of contract?
  - ii. Was it a potentially fair reason?
  - iii. Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

#### **Procedure, documents and evidence heard**

5. The Claimant's claim form (ET1) was received by the Employment Tribunals Service in Watford on 25 February 2022.
6. The Respondent's response form (ET3) and Grounds of Resistance were provided on 13 April 2022.
7. A 247-page hearing bundle of documents (including index) was provided in advance of the hearing. This contained: Employment Tribunal documents, policies and contracts of employment, general documents and mitigation documents.
8. In addition to the materials in the bundle, the following was put before the Tribunal:
  - a. A statement from David Pierce (undated).
  - b. A statement from Elton Farukku (undated).
  - c. A statement from Jignesh Patel (undated).
  - d. A statement from the Claimant (undated).

- e. A witness statement from Alexandra Louise Pownall (undated).
  - f. A witness statement from Adrian Baxter (undated).
  - g. A witness statement from David William Preston (undated).
9. The statements from Mr Pierce, Mr Farukku, Mr Patel and the Claimant are undated, do not contain statements of truth and appear unsigned. The Claimant and Mr Farukku attended the hearing. Mr Pierce and Mr Patel were unable to attend. The statements of Ms Pownall, Mr Baxter and Mr Preston are undated and appear unsigned. Ms Pownall, Mr Baxter and Mr Preston all attended the hearing. I accept all statements and oral evidence (as appropriate) in evidence, giving appropriate weight to them in light of the above factors.
10. In the Claimant's ET1, there was an indication that the Claimant may make a claim of discrimination. The Claimant agreed that this would not be pursued.
11. At the hearing, the Tribunal heard from the Claimant and Mr Farukku for the Claimant and from Mr Preston, Mr Baxter and Ms Pownall for the Respondent.
12. While the factual evidence was completed at the hearing on 5 January 2023, I ordered sequential written closing submissions, with the Respondent's submissions to be served first to allow the Claimant's consideration of them. The Respondent was ordered to serve their submissions by 5pm on 6 January 2023, and the Claimant was ordered to serve his submissions on 13 January 2023.
13. The Respondent served their submissions on 9 January 2023. I accept these submissions notwithstanding the slight delay in receiving them. The Claimant served his submissions in accordance with the order on 13 January 2023.

## **Facts**

14. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point.

### The Claimant's employment

15. The Claimant was employed by the Respondent from 23 June 2003 at the Respondent's Brackmills Distribution Centre (**Brackmills depot**). The Claimant resigned on 8 November 2021 and his employment was terminated on 3 December 2021. At the time of his resignation, the Claimant was a Warehouse Department Manager for the Brackmills depot's DotCom early shift.
16. Mr Preston was, at the relevant time, the Operations Manager at the Brackmills depot, with responsibility for over 500 employees. He had previously been the Claimant's manager for one year, and was, at the time of the Claimant's resignation, two levels above him. They had worked together for around 15 years.

### Claimant's grievance

17. On 8 November 2021, the Claimant sent a letter to Mr Baxter, the General Manager at the Brackmills depot (copied to Ms Emma Cotterell, a Human Resources Business Partner at the Respondent), raising a grievance on the

basis that he had been denied opportunities to progress in the business, most recently in relation to his internal application for the Night Shift Manager role.

18. The Claimant said that he had not received any communication stating whether or not the Respondent was progressing his application. Instead, he had seen others being interviewed. As a result, he felt that there was an “agenda” behind what was happening as a consequence of the involvement of Mr Preston, who was the recruiting manager for the role. He then referred to the history of their relationship.
19. The Claimant went on to say that he had “not enjoyed a decent professional relationship” with Mr Preston, even though the Claimant did not directly report to him. The Claimant stated that, although he and Mr Preston had, at times, had an “ok” working relationship, there had been occasions when Mr Preston had crossed the line. The Claimant referred to Mr Preston’s use of foul language.
20. The Claimant set out two specific incidents where Mr Preston has behaved inappropriately. The Claimant said that since those he has tried to avoid Mr Preston and to enhance his skills in the hope that further shift manager opportunities would come up.
21. The Claimant was successful in being offered a department manager role in another location, but could not agree terms and conditions. He had not been successful in other shift manager roles, including as a Stocks and Systems Shift Manager. He then referred to his (failed) application to become Night Shift Manager.
22. The facts around the above points are described in more detail below.
23. The Claimant concluded by saying that his position at the Brackmills depot has become untenable and that his resignation would be forthcoming.

#### Mr Preston’s conduct

24. The Claimant’s grievance letter of 8 November 2021 refers to an alleged interaction with Mr Preston in, it is thought, 2019. The Claimant and Mr Jignesh Patel, who has worked at the Brackmills depot since 2004, were in a room with two operations managers, one of which was Mr Preston. Mr Preston shouted and swore. Ms Natalie Hersey, the then Human Resources Business Partner, was in the next room and heard what happened. As part of her interview in the Claimant’s grievance process, Ms Hersey states that she spoke to Mr Preston about the incident at the time, advising him that shouting was not an appropriate way to manage the team. Mr Preston told her that he was angry about an issue (which Ms Hersey believes concerned falsifying figures), but on reflection he should have maintained control. Mr Preston now states that he cannot recall the incident.
25. On the basis of the evidence I have seen, the incident in in or around 2019 did occur and Mr Preston did shout and swear.
26. Ms Hersey recalls she explained the options that were available to the Claimant at the time, including raising a grievance. The Claimant decided not to take the matter further.

27. The second specific incident regarding Mr Preston that the Claimant refers to in his 8 November 2021 grievance letter concerns an interaction with Mr Preston in 2020. The Claimant was covering as a shift manager and as a department manager. The Claimant alerted a duty senior manager that there was underperformance occurring and this would require further investigation. As the investigation had not (justifiably, according to the Claimant) been completed, Mr Preston swore at the Claimant and told him that he had to do his "fucking job". The Claimant asked Mr Preston to stop. Mr Preston apologised immediately. The Claimant did not accept the apology, as he did not think that Mr Preston meant it.
28. Mr Preston broadly accepts the Claimant's recollection. He states that he recalls saying "I expect managers to do their fucking job" to a group of managers (rather than just to the Claimant). He further recalls the Claimant raising the matter, Mr Preston apologising and the Claimant not accepting the apology. However, Mr Preston states that it was a genuine apology.
29. I find that this incident occurred. Although it is unclear whether Mr Preston's comment was directed solely at the Claimant or to a group including the Claimant, I find that Mr Preston did make that comment and the Claimant was one of the key people it was directed at. This is because the Claimant can explain why the comment was made and the Claimant would have been one of those in the firing line as a result. Having heard from Mr Preston, I also find that the apology was meant as genuine – although the Claimant's perception was that it was not genuine.
30. Mr Preston further states that he had chosen the Claimant to be one of his direct team at that time, when he could have chosen one of another 31 people. Mr Preston wanted to give the Claimant the opportunity.
31. The above incidents were not the subject of any previous grievances raised by the Claimant. However, the Claimant states that he raised the 2020 incident with Mr Baxter informally and nothing was done.
32. The Claimant refers to a number of other occasions where Mr Preston has been abusive. He does not give any further specific examples beyond those stated above.
33. There is evidence from Mr David Pierce (who remains at the Respondent and has worked at the Brackmills depot since 2000) that Mr Preston created a "do it or else" atmosphere. He also references Mr Preston having "screaming fits" at him, where he was called "A fucking idiot, who can fuck off" in an open plan office in front of others.
34. Mr Elton Farukku (also an employee at the Respondent) comments on Mr Preston's behaviour stating that Mr Preston had come down to the shop floor several times "shouting, screaming and making threats". Mr Farruku states that matters became unbearable such that he left his position as a manager to become a HGV driver (with a different manager). He concludes by describing Mr Preston as a "BULLY with power". In live evidence, Mr Farruku stated that he had numerous arguments with Mr Preston, although he did not have dates and times. He added that he was in a similar situation to the Claimant in that he wanted to progress but he found all doors shut. Mr Farruku stated that

unless he became part of Mr Preston's circle he would continue to have no chance of progression.

35. A further current employee at the Respondent, Mr Patel, describes his experience with Mr Preston as "very toxic". Mr Preston was said to be rude and constantly verbally abusing Mr Patel and other managers. Mr Patel comments that Mr Preston has now moved to a different depot and things have improved at the Brackmills depot as a result.
36. Mr Preston denies allegations of bullying and harassment, and states that he is not aware of receiving any formal concerns, complaints or issues. He adds that there are many examples of managers on the site who he has supported and developed, including the Claimant.
37. Mr Preston emphasises his record of improving the teams that he has had responsibility for and his high expectations. He states that his actions, including frustration, came out of his desire to do better. Mr Baxter agrees that Mr Preston was on a drive to improve. Mr Baxter acknowledges that the way in which Mr Preston did this could be improved – hence Mr Baxter had provided coaching to Mr Preston in this regard.
38. In cross-examination, Mr Preston stated that he could recall being coached by Mr Baxter on four occasions over seven years – for example, where Mr Preston had been presenting and Mr Baxter had told Mr Preston that he could do something differently. In re-examination Mr Preston stated examples were where Mr Preston had raised his voice or sworn.
39. Mr Preston commented that he had supported the Claimant through a number of development opportunities, including a 12 month manager course. The Claimant disputes the extent to which Mr Preston was involved. However, it is accepted that Mr Preston had to sign-off on the Claimant being part of the course. Mr Preston further stated that there would have been a number of years where the Claimant would not have worked closely enough with Mr Preston to make any judgement about his behaviour. However, the Claimant would nonetheless approach Mr Preston for feedback and support.
40. In support of this final point, the Respondent put forward documentary evidence that the Claimant sought feedback from Mr Preston in July 2021. Mr Preston provided feedback on 7 July 2021 stating that the Claimant was "...a really good manager and could be a great manager". As well as matters that Mr Preston liked about the way the Claimant worked, he set out concerns about the way the Claimant worked and suggestions to help the Claimant improve the way he worked. He concluded by saying that he was available to talk about his feedback in more detail if the Claimant needed clarity. The Claimant did not pursue this.
41. In October 2021, Mr Preston praised the Claimant over email for some work the Claimant had done with respect to mental health related absence and bad back related absence. The Claimant states that Mr Preston would do that but then be abusive.
42. In addition, in November 2021, the Claimant asked to speak to Mr Preston. This was to talk about the Claimant's growth, perceptions of him and the Claimant moving forward.

Promotion opportunities in 2021

43. On 24 September 2021, the Claimant applied for a role as Stock and Systems Shift Manager. The application was supported by his manager, Mr Yousef Ibrahim. The Claimant was interviewed on 9 October 2021 but was ultimately unsuccessful in his application.
44. Shortly after, following Mr Ibrahim alerting the Claimant to the job opportunity over WhatsApp, the Claimant made an application on 18 October 2021 for the role of Night Shift Manager. Mr Ibrahim, as the Claimant's manager, did not support the application and the Claimant's application was not progressed to the interview stage. There is some confusion as to the circumstances around this. On the basis of the evidence, it appears that the Claimant did not ask for Mr Ibrahim's support, but if he had, the Mr Ibrahim would have had concerns about it and would want to speak to the Claimant about it. Nonetheless, Mr Ibrahim did indicate to Ms Pownall as part of the appeal process (see below) that he would have supported the Claimant's application after such a discussion.
45. Mr Preston stated that it would only be where a manager had supported an individual applicant's application that the applicant could progress to the interview stage. Part of Mr Preston's role as recruiting manager for the Night Shift Manager role was to progress or reject applications. It was not Mr Preston's role to provide support (or otherwise) for the Claimant's application or to provide feedback to the Claimant about it. That was the reason why he asked Mr Ibrahim to provide feedback to the Claimant on his application in light of Mr Ibrahim not supporting the Claimant's application.
46. The Claimant believed that due to Mr Ibrahim supporting his previous application for the Stock and Systems Shift Manager role and alerting the Claimant to the new Night Shift Manager opportunity, the Claimant would have Mr Ibrahim's support for his application.
47. Mr Baxter explains that the Stock and Systems Shift Manager and Night Shift Manager roles were different. The Stock and Systems Shift Manager would be supported by a day shift team. There was no such support for the Night Shift Manager and their team of 60. Mr Baxter was of the view that they required different skills.
48. A further factor was a "Your Voice" survey undertaken by the business to ascertain levels of engagement between employees and their managers. The Claimant had received the worst score in his team and the second worst score in the Brackmills depot. According to Mr Baxter, the results of this survey came out after Mr Ibrahim's support for the Stock and Systems Shift Manager role but before the Claimant's interview for it. The Claimant disputes the time. However, it is clear that the "Your Voice" scores were in circulation at the time of the Claimant's Night Shift Manager application.
49. Mr Preston further says that the overall DotCom early shift score had seen the greatest fall in performance, with the Retail early shift (the team the Claimant had moved from) having the most improved score. It must be stated that there is no direct evidence that these changes were down to the Claimant.

50. In his grievance letter dated 8 November 2021, the Claimant states that these scores reflected six months with the DotCom team and the main driver of those results was the four weeks he spent managing colleagues' underperformance.
51. As stated above, Mr Preston had asked Mr Ibrahim to provide feedback to the Claimant regarding his application. This did not take place, as evidenced by an email from Mr Preston to Mr Ibrahim of 10 January 2022 pointing this out. It is unclear when the Claimant did find out that Mr Ibrahim had not supported his application and appears to have been only after the Claimant resigned.
52. The Claimant states, however, that during a discussion with Mr Ibrahim on 2 November 2021, his application for the Night Shift Manager role was mentioned. The Claimant's manager said that the Claimant should not have applied for that role as Mr Ibrahim stated he had a negative perception of the work done by the Claimant. Further, the Claimant states Mr Preston had a negative perception of the work done by the Claimant. In addition, the Claimant felt that he was disadvantaged because he had disclosed that he had been offered a job by another employer and also because he had not covered for Mr Ibrahim when he was on holiday.
53. There were two internal applicants, other than the Claimant, for the Night Shift Manager role. The Respondent states that one of those was not progressed because they did not receive support from their manager. The other was, according to the Respondent progressed as they did have that support. I have not seen evidence to the contrary.

#### Claimant's resignation

54. On 8 November 2021, the same date as lodging his grievance, the Claimant submitted his resignation, stating that he feels that he has been left with no choice but to step down. He stated that he would be submitting a complaint of unfair treatment in respect of his application to become Night Shift Manager. He further stated that he believed that this unfair treatment was "...maliciously motivated by recruiting manager and operational manager David Preston".
55. The Claimant asked to serve his four weeks' notice and to be free to leave no later than 3 December 2021.
56. On 9 November 2021, Ms Cotterell wrote to the Claimant offering him some time to reconsider his decision.
57. The Claimant states that he worked his entire notice period out of respect for the Respondent and Mr Baxter. The Respondent processed the Claimant's resignation with effect from 3 December 2021. The Claimant moved to another employer, the same employer that had offered the Claimant a position while still at the Respondent.

#### Grievance process

58. The Claimant agrees that the Respondent offered him a full grievance and appeal process in line with the Respondent's grievance procedures. However, the Claimant takes issue with Mr Baxter being appointed to deal with his grievance.



59. The Respondent's grievance policy from September 2021 states that "Any manager more senior than the colleague who raised the grievance and who's had the appropriate training can hear the grievance, as long as they're not implicated or connected to the allegations in any way. The Manager should (where possible) be from a different store/depot/region/department".
60. Mr Baxter was appointed to deal with the grievance. Mr Baxter was more senior than the Claimant and had received the appropriate training. He was, however, not from a different "store/depot/region/department" and was Mr Preston's manager. Further, he was part of the overall recruitment process for the Night Shift Manager role.
61. Mr Baxter has stated that he believes that he was sufficiently independent and denies any suggestion that the grievance process was a sham in order to protect Mr Preston. Further, he states there was the clear opportunity for an appeal as a backstop.
62. Mr Baxter states he was aware that the Claimant had applied for the Night Shift Manager role and that the application had not progressed. Mr Baxter further states he was aware from Mr Preston that the reason for this was that the Claimant's application had not been supported by the Claimant's manager, Mr Ibrahim.
63. In a letter to the Claimant dated 16 November 2021, the Claimant was invited to a meeting. The meeting took place on 24 November 2021, which was attended by Mr Baxter, the Claimant, Mr Pierce (who accompanied the Claimant) and a note taker. The Claimant stated that he considered it was inappropriate for Mr Baxter to hear the grievance due to Mr Preston reporting to Mr Baxter.
64. Following the 24 November 2021 meeting, Mr Baxter interviewed people who had been referred to by the Claimant at that meeting, including Mr Ibrahim, Ms Hersey and Mr Patel.
65. Mr Baxter did not interview Mr Preston as part of this process. This was because, according to Mr Baxter, he was focused on the reason why the Claimant's application had not been supported. It was Mr Ibrahim who was the Claimant's direct line manager who did not support the Claimant's application, and Mr Baxter interviewed him.
66. Mr Baxter concluded that the Claimant's internal application had not progressed broadly because of the "Your Voice" survey. Mr Baxter also stated that an endorsed application form was never provided to Mr Preston. Further, Mr Baxter was of the view that the other internal candidate whose application had not been supported by their manager was also not considered for interview and, therefore, that the Claimant had not been singled out.
67. Mr Baxter went onto conclude, with respect to the Claimant's relationship with Mr Preston, that Mr Preston had made mistakes and needed to learn from them. Mr Baxter did not accept that Mr Preston had been unreasonable in the way in which he challenged managers. Mr Baxter recalled occasions when Mr Preston had provided the Claimant with support. Mr Baxter did not consider that the Claimant's relationship with Mr Preston had any bearing on why the Claimant's application was not progressed.

68. In light of the above, Mr Baxter did not uphold the Claimant's grievance. This was confirmed in writing to the Claimant on 10 December 2021. The letter referenced the Claimant's right to appeal.

### Appeal

69. The Claimant sent a letter dated 20 December 2021 appealing Mr Baxter's decision. His key grounds of appeal concerned:

- a. Mr Baxter's choices in interviewing witnesses;
- b. Mr Baxter's position as general manager of the Brackmills depot, with a notetaker who used to report to Mr Preston;
- c. The unfair use of the "Your Voice" scores;
- d. The overall failures in the recruitment process and in management at the Brackmills depot.

70. Ms Alexandra Pownall, the General Manager at the Respondent's Erith Chilled Distribution Centre, was appointed to consider the appeal. Following an initial hearing on 3 February 2022, she conducted various interviews as part of the process, including interviews with Mr Preston, Mr Farruku, Ms Cotterell and Mr Baxter. The appeal was heard on 17 March 2022. She sent her findings to the Claimant in a letter dated 31 March 2022.

71. There appears to be no dispute that the appeal process was run independently and fairly.

72. Ms Pownall upheld part of one of the Claimant's grounds of appeal. This was that, while Ms Pownall did not believe that Mr Baxter's involvement in the recruitment process hindered the Claimant's application or affected the outcome of his grievance, she did believe that the Claimant's request that Mr Baxter should be replaced as grievance hearing manager, was fair and reasonable and that the Claimant may not have felt that Mr Baxter was impartial. The other grounds of appeal raised by the Claimant were dismissed.

### **Law**

73. Section 94 of the ERA 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111 ERA 1996. The employee must show that he was dismissed by the Respondent under section 95.

### Dismissal

74. In this case, the Claimant claims that he was dismissed by the Respondent under section 95(1)(c) of ERA 1996, namely under the provision that states that, for these purposes, an employee is dismissed by his 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".

75. The burden is on the claimant to show that there was a dismissal.

76. In *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221, CA, the common law concept of a repudiatory breach of contract was imported into what is now section 95(1)(c) ERA 1996. Lord Denning MR stated:

“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”.

77. The component parts of a constructive dismissal which need to be considered are as follows:

- a. A repudiatory or fundamental breach of the contract of employment by the employer;
- b. A termination of the contract by the employee because of that breach;
- c. The employee must not have lost the right to resign by affirming the contract after the breach, typically by delay.

78. There needs to be clarity about the contractual term which the claimant says has been breached. There may be express terms relating to pay or other provisions. Claimants may also rely on implied terms.

79. A key implied term in this regard is the term as to trust and confidence (see *Malik and Mahmud v BCCI* [1997] ICR 606) as being an obligation that the employer shall not: “Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”. The test is an objective one and all the circumstances must be considered. Acting in an unreasonable manner is not sufficient (see *Frenkel Topping Limited v King* UKEAT/0106/15/LA). The implied term is only breached if the employer demonstrates objectively by its behaviour that it is abandoning and altogether refusing to perform the contract.

80. In effect, therefore, the Tribunal should consider:

- a. What is the conduct or failure to act on the part of the employer which is said to breach the implied term?
- b. Was there reasonable and proper cause for that conduct or inaction?
- c. If not, when viewed objectively was that conduct which was calculated or likely to destroy or seriously damage trust and confidence?

81. A breach of trust and confidence might arise, not because of any single event, but because of a series of events. Claimants can state that individual matters amounted to a breach of trust and confidence, but in the alternative to say that the whole sequence of events met the test even if none of its individual components did so.

82. In the latter kind of case the Claimant can rely on a “last straw” which does not itself have to be a repudiation of the contract (see *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35 and *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978). If the last straw is entirely innocuous or trivial, and none of the preceding matters amount to a fundamental breach of contract, the claim of constructive dismissal will fail.

83. Further, *Kaur* also confirms that an employee can rely on earlier conduct by the employer even if he affirmed the contract after those earlier matters - as long as the last straw adds something new and revives those earlier concerns.
84. The fundamental breach of contract by the employer need only be a reason for the resignation of the claimant. It does not matter if there are other reasons: *Wright v North Ayrshire Council* [2014] IRLR 4.
85. A breach by any supervisory employee will bind the employer provided that supervisory employee is acting in the course of their employment (*Hilton International Hotels (UK) Ltd v Protopapa* [1990] IRLR 316). Further it is no defence to a claim for constructive dismissal for the employer to argue that the employee failed to raise a grievance in response to the employer's conduct (*Tolson v Governing Body of Mixenden Community School* [2003] IRLR 842) or that the employee had another job to go to (*Healy v Slough Borough Council* UKEAT/0125/19 (11 October 2019, unreported)).
86. Unacceptable abuse may constitute a breach of the term not to undermine trust and confidence (*Palmanor v Cedron* [1978] IRLR). The conduct does have to be repudiatory in nature for such a breach to occur.
87. If it is admitted or established that there has been a dismissal, the next stage is for the Tribunal to consider the reason for the dismissal and if appropriate the question of fairness.

### Fairness

88. Section 98 of ERA 1996 deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2) ERA 1996. Second, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.
89. Section 98(4) ERA 1996 then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.
90. The exercise required depends on what the employer reasonably believes, on the basis of what it reasonably knows, about the relevant matters. It requires a broad assessment of all the relevant circumstances. The correct approach is for the Tribunal to consider whether dismissal was an option that a reasonable employer could have adopted in the circumstances. The Tribunal cannot substitute its own opinion for that of the employer as to whether certain conduct is reasonable or not. See: *British Home Stores Ltd v Burchell* [1978] IRLR 379 and *Tayeh v Barchester Healthcare Ltd* [2013] EWCA Civ 29.

## Conclusions

91. The initial question in this matter is whether the Claimant was constructively dismissed.

### Night Shift Manager

92. In respect of the Claimant's application for the Night Shift Manager role, I do not consider that the matters in question are sufficient to amount to a repudiatory or fundamental breach of the Claimant's contract of employment, whether as a breach of the implied term of trust and confidence or otherwise.

93. The Claimant's application for the role of Night Shift Manager was not progressed because that application was not supported by the Claimant's manager, Mr Ibrahim. The Claimant contends that this was not a requirement for his previous application for the Stock and Systems Shift Manager role. However, in respect of the Night Shift Manager role, this approach was stated to be a requirement and was consistently applied to the other two internal candidates for that role, with one of those candidates progressing to the interview stage following support from their manager and the other not progressing because they failed to get that support.

94. There may have been some confusion as to the circumstances around Mr Ibrahim's lack of support. However, it was a requirement for there to be support for the application and this did not occur.

95. More broadly, the Claimant's application for the Night Shift Manager role was impacted by the Claimant's poor scores from a "Your Voice" survey undertaken by the business to ascertain levels of engagement between employees and their managers. This would have impacted the Claimant's application and appears (according to the findings of the grievance process) to have influenced the Respondent's position once it had been identified that Mr Ibrahim had not provided support for the Claimant's application.

96. The Claimant alleges that Mr Ibrahim's actions may have been influenced by the Claimant not covering for Mr Ibrahim while Mr Ibrahim was on holiday. Further, the Claimant alleges that Mr Preston improperly influenced Mr Ibrahim in relation to the Claimant's application for the Night Shift Manager role.

97. I have not heard convincing evidence that Mr Ibrahim's lack of support was improper, nor that it was improperly influenced by other parties such as Mr Preston. Mr Preston was the recruiting manager, but the decision whether to support (or not support) the Claimant's application was with Mr Ibrahim. Further, although the Claimant makes criticisms of the use of the "Your Voice" scores, I have not heard persuasive evidence that the Respondent was wrong to consider them in the context of the Claimant's application for the Night Shift Manager role. The Claimant is correct to say that such scores needed to be looked at in the context of his relatively new role within the DotCom team and his previous good appraisals, however that does not mean that it was

unreasonable for the Respondent to have regard to the, very recent, “Your Voice” scores.

98. The Claimant states that Mr Ibrahim acted inconsistently because he had supported an application by the Claimant for another role, Stock and Systems Shift Manager, only a matter of weeks previously. Mr Ibrahim did not provide support for the Night Shift Manager role because he was not asked by the Claimant for such support. This is in contrast with the support provided for the Stock and Systems Shift Manager role. Beyond that, the “Your Voice” scores came out after Mr Ibrahim provided his support for the Claimant’s Stock and Systems Shift Manager role application, but before consideration was given to the Claimant’s Night Shift Manager role application. As such, it is clear that they were two distinct applications with distinct processes that should be treated separately. This is supported by the Respondent’s contention that the Stock and Systems Shift Manager and Night Shift Manager roles are different and, as a consequence, different recruitment criteria would apply.

99. I do not consider the fact that Mr Ibrahim alerted the Claimant to the Night Shift Manager role over WhatsApp as suggesting that Mr Ibrahim would necessarily formally support the Claimant’s application. On the basis of the evidence that I have seen, it was an encouragement to apply rather than any kind of endorsement of a future application.

100. There were flaws and issues in the recruitment process, most notably the confusion around support for the Claimant’s Night Shift Manager application, Mr Ibrahim subsequently failing to inform the Claimant of him not supporting the Claimant’s application promptly or at all, and then Mr Ibrahim not providing feedback on the application in a timely manner.

101. I do not consider that these overcome the overall conclusion. Accordingly, I find that the failure of the Claimant to move to the interview stage of his application for Night Shift Manager and connected matters did not provide a basis for the constructive dismissal of the Claimant.

#### Mr Preston’s conduct

102. I have seen and heard credible evidence from the Claimant and others, especially Mr Farruku, about Mr Preston’s conduct. In particular, I have heard and seen that Mr Preston shouted and swore at employees on more than one occasion. Although this may, as Mr Preston asserts, be as a result of his high expectations, it is not – as has been pointed out to him by a member of the Respondent’s Human Resources team – an appropriate way to manage a team.

103. Notwithstanding this, I must look at the matter from the perspective of the Claimant and his claim. The Claimant has identified two specific alleged instances (in or around 2019 and 2020) of Mr Preston’s improper behaviour. Although the Claimant and other witnesses do refer to other occasions where the Claimant may have been impacted, there is no specificity or direct evidence around them. Further, the fact that the Claimant works two levels below Mr

Preston would suggest that, in the absence of specific evidence, the Claimant did not have as much direct contact with Mr Preston as he had in the past.

104. Taking the two incidents in or around 2019 and 2020, I have found that both occurred and, although there may be some disagreement as to the details, the key elements are not disputed. Unacceptable abuse may constitute a breach of the term not to undermine trust and confidence (*Palmanor v Cedron* [1978] IRLR). Further, it is no defence to a claim for constructive dismissal for the Respondent to argue that the employee failed to raise a grievance in response to the employer's conduct (*Tolson v Governing Body of Mixenden Community School* [2003] IRLR 842) or that the Claimant had another job to go to (*Healy v Slough Borough Council* UKEAT/0125/19 (11 October 2019, unreported)).
105. In light of this, it is, on the face of it, possible that the two incidents either in isolation or together could amount to a repudiatory or fundamental breach of the Claimant's conduct of employment.
106. However, after both instances the Claimant continued to work for the Respondent, including continuing to seek development and promotion opportunities. This continued for a considerable period. It was only after he failed to progress in his application for the Night Shift Manager role that the Claimant resigned. As such, the Claimant lost the right to resign by affirming the contract after any breach that may have occurred as a result of the incidents in or around 2019 and 2020.

#### Series of events

107. A breach of trust and confidence might arise, not because of a single event, but because of a series of events. The Claimant can rely on a "last straw" which does not itself amount to a repudiation of contract. As stated in the case of *Kaur*, the only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence.
108. As stated above, the Claimant's resignation followed his application for the role of Night Shift Manager not progressing. This was some time after the two incidents of alleged misconduct by Mr Preston (in or around 2019 and 2020) that the Claimant refers to. The Claimant's application for the Night Shift Manager role did not progress because the Claimant did not have the support of his manager, Mr Ibrahim, for that application. It was also in the context of recent, low "Your Voice" scores in respect of the Claimant. In these circumstances, and Mr Preston's lack of involvement in this aspect of the decision, I do not consider it to be part of the series of events which cumulatively amount to a repudiation of the contract by the Respondent.
109. The overall, and ongoing, atmosphere created by Mr Preston, as set out in the evidence of the Claimant, Mr Pierce, Mr Farruku and Mr Patel, has been evidenced. However, in terms of the Claimant, the Claimant had opportunities to progress and had continued to apply for opportunities within the Respondent. Further, I did not hear specific evidence of improper conduct by Mr Preston

directed against the Claimant more recently than the incidents in or around 2019 and 2020.

110. Accordingly, taking the events as a whole, there was not a previously affirmed repudiatory or fundamental breach of contract that had been revived by further events.

111. Finally, I will deal with the grievance as heard by Mr Baxter. There can be criticisms made of the process. In particular, Mr Baxter's failure to interview Mr Preston and Mr Baxter not exploring the circumstances around the lack of support for the Claimant's application for Night Shift Manager further with Mr Ibrahim. Further, I agree with the findings of the appeal that the Claimant's request to have his grievance heard by a more independent party was a reasonable one and should have been actioned. They occurred post-resignation and, to a large extent, were cured by the appeal process conducted by an independent party within the Respondent. As such, they do not impact my conclusion as stated above.

### Claim

112. In light of the points set out above, the Claimant has not demonstrated that he was the subject of a constructive dismissal, and so his claim for unfair constructive dismissal does not succeed.

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Employment Judge Din

Date: 10 February 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

1<sup>st</sup> March 2023

GDJ  
FOR EMPLOYMENT TRIBUNALS