EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss Tatjana Pogiene	**v**	Debach Enterprises Limited

Heard at: Norwich

On: 12, 13 and 14 June 2023

Before: Employment Judge Postle

Members: Ms S Limerick and Mr B Lynch

Appearances
For the Claimants: Miss Kolentsova, Solicitor
For the Respondent: Miss Criddle, KC

Interpreter: Mrs Scholefield, Russian speaking

JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The Claimant's claim for constructive unfair dismissal is not well founded.

2. The Claimant's claims for unlawful deduction of wages and outstanding holiday pay are not well founded.

3. The Claimant is Ordered to pay the Respondent's Costs in the sum of £21,000 in respect of this three day Hearing.

REASONS

Background

1. At the outset of the Hearing, there was some further Case Management as at the Hearing on 17 January 2022 before Employment Judge Hyams at which two Deposit Orders were made; one in respect of the claim for unfair dismissal and one in respect of the claims for breaches of the Equality Act

2010 at £50 each on grounds each had little reasonable prospect of success.

2. It should be noted that the claims under the Equality Act 2010 were subsequently withdrawn by the Claimant, but the claim for constructive unfair dismissal remained. For the avoidance of doubt, the said increased Deposit Order made by Judge Cowen at the Hearing on 11 May 2023 was lawfully made and sent out to the parties, I have nevertheless revoked Employment Judge Cowen's Deposit Order on reconsideration. However, the original Order for the amounts of Deposit on the constructive unfair dismissal claim, remains, i.e. £50.

3. It was also before Employment Judge Hyams and again for the avoidance of doubt, that the Claimant's then legal representative, whether qualified or not (as a Solicitor), Ms Donaldson confirmed that the letter the Claimant sent headed 'Formal Grievance letter before action' dated 10 July 2020 (at page 553 of the Bundle for these proceedings) and actually received by the Respondents on 16 July 2020, was to be regarded as the Claimant's resignation with immediate effect. That resignation was in response to the manner in which the Claimant's Appeal against the decision to dismiss her was allowed.

4. Therefore, this case is not about an express dismissal, it is about the Claimant's constructive dismissal. For the avoidance of doubt, the Case Law on the effect of a successful Appeal against dismissal on the contract of employment is crystal clear. The act of allowing an Appeal against dismissal is that an employee is re-instated, the contract is revived and the previous dismissal vanishes. It is entirely irrelevant what the parties subjectively perceive to be the case. The dismissal vanishes whether the Right to Appeal is pursuant to a contractual process or not and whether the employee subjectively wants to be re-instated or not. The Authority for that proposition is Marganakis v Iceland Foods Ltd. [2023] ICR250, EAT(14-17).

5. The Tribunal also reminds itself in determining a case for constructive unfair dismissal, the Employment Tribunal must ask a series of questions posed in Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR1CA(55). A breach of the implied term of trust and confidence requires that the Respondent has without reasonable and proper cause, acted so as to destroy and seriously damage the relationship of trust and confidence between the parties. In respect of this case, it is actually difficult to determine how the Claimant's case is pursued. The Tribunal are assuming it is a breach of the implied term of trust and confidence. The Tribunal says that as the manner in which the case has been pursued appears to have been an attempt to revisit an express dismissal, which of course is entirely inappropriate.

6. The Claimant also has claims for alleged unpaid wages and holiday pay.

7. In this Tribunal we heard evidence from the Claimant through a prepared Witness Statement, with the aid of a Russian speaking Interpreter Mrs Scholefield.

8. For the Respondents we heard evidence from Mrs Davis who carried out the Investigation leading up to the Claimant's dismissal and Mrs Kemball the Managing Director of the Respondents, both giving their evidence through prepared Witness Statements. The Tribunal have had a mountain of documents totalling something in the region of 2,303 pages.

Credibility

9. The Tribunal found the Claimant was an evasive witness who frequently had to be warned by the Tribunal of the need to answer Counsel for the Respondent's questions. Quite extraordinary on one occasion, the Claimant's response to a question from the Respondent's Counsel was that she would neither deny or confirm. The Judge made it clear that she had to answer the question and furthermore, each time she evaded answering the question, the question would be put a total of three times and if she failed to answer the question then Counsel would be instructed to move on and the Tribunal would draw their own inferences from the Claimant's failure to answer such questions.

10. In respect of the Respondent's witnesses, it has been said that Mrs Davis deliberately manipulated data. The Tribunal do not accept that. There is, the Tribunal do accept and now Mrs Davis accepts, two documents dealing with the data which were duplicates and one was wrongly headed. The Tribunal accepts there was no malicious, underhand or deliberate attempt to mislead, it was quite genuinely a mistake. In any event, that would not have affected the decision to dismiss. The Dismissing Officer Mr Page acted on the information that was available to him, at the time from a third party namely Volvo.

11. In the case of Mrs Kemball, the Managing Director, the Tribunal found her to be a thoroughly honest, reliable, fair minded witness who, unusually in the work place these days, overturned the decision to dismiss and re-instated the Claimant with the appropriate assurances and apologies with no loss of income.

The Facts

12. Mrs Kemball in early 2020 was concerned about the rising costs against income that the Respondents were now seeing and effectively ordered an enquiry into the running of her business and the rising cost of fuel being used.

13. Investigation was then carried out by Mrs Davis into the Driver fuel usage. This is recorded by the Volvo's Telematic System which shows fuel recorded being pumped in and the fuel burned by the engine. As a result of the detailed investigation, it transpired that three drivers had

discrepancies between the fuel recorded having been pumped into their truck and the fuel burned by the engine of that truck. In a nut shell fuel was apparently being skimmed whilst those Drivers, one of which was the Claimant, was responsible for the vehicles.

14. As a result of Mrs Davis' concerns, she arranged a meeting and the Tribunal are in no doubt that such a meeting took place, with a Mr Jonathan Warby who is the Fuel Watch Manager at Volvo Trucks and Bus South and East, based at Ely. The purpose of the meeting was to verify the accuracy of the data as Mr Warby is an expert in Volvo fuel data. Mrs Davis and Mr Warby met on 4 March 2020. The sole purpose of Mr Warby reviewing Mrs Davis' findings on the fuel data was seeking clarification that what Mrs Davis was reading was accurate. Mrs Davis had generated Vehicle Tracking Reports and GPS satellite maps, following which Mr Warby viewed the data and confirmed the data was accurate within 1% to 2% tolerance and 10% tolerance had been built in to allow for any potential errors in the data; which effectively meant that any data used excluded anomalies under 10%.

15. Even with that variant, it became clear there were fuel discrepancies, namely the fuel that was going out of the tank was actually not being burned by the said vehicle, in other words, was missing / being skimmed.

16. As a result of the above, the Claimant was by letter of 15 April 2020 invited to attend a Disciplinary Hearing to answer allegations that:

    16.1 there were discrepancies between the fuel recorded as having been pumped into a work truck and the fuel burned by the engine of that truck; and

    16.2 the suggestion that there was a theft of company property, namely the fuel that had gone missing (pages 252 – 253).

17. The Disciplinary Hearing was ultimately re-scheduled by a week to allow the Claimant to discuss the documents with a Russian Interpreter to ensure that she had plenty of time to prepare for the Disciplinary Hearing.

18. The evidence used at the Disciplinary Hearing to support the allegations was that the data drawn from the trucks Telematic System which showed a drop in the level of the fuel in the tank of the Claimant's truck when the truck was not actually moving, (pages 258 – 262). Indeed, the Claimant herself conceded in evidence before the Tribunal,

    "If there is a shortage of fuel in the tank, that means theft, doesn't it?"

19. The issue the Respondents were considering was how this happened and whether it was the Claimant's fault.

20. At the Disciplinary Hearing the Claimant was given every opportunity to explain these discrepancies and having submitted no documents herself,

prior to the Disciplinary Hearing, she could not explain why fuel going into the tank was missing and not being burned off by the engine.

21. The Respondent's Manager conducting the Disciplinary Hearing, Mr Page, took the decision to dismiss for gross misconduct on the basis that there were fuel discrepancies which the Claimant could not explain and he concluded that fuel had been stolen. However, he specifically did not conclude that the Claimant had stolen the fuel, but the fuel for which the Claimant had been responsible for had been skimmed from the tank (pages 281 – 285). It is important to note at this stage, that the decision to dismiss was based on the Volvo expert Mr Warby confirming that the data he had been shown was accurate from the Telematic System.

22. Outside the time limit for the Appeal, the Claimant lodged an Appeal but not the grounds. After some further exchange of emails, once again the Respondents, Mrs Kemball who was to conduct the Appeal, granted the Claimant further time in which to lodge her Appeal (pages 482 – 513). The full grounds for Appeal seems to have arrived with the Respondents around 9 June 2020 and the Claimant was then invited by letter of 12 June 2020 to an Appeal meeting on 18 June 2020. The Respondents were to arrange for an independent translation company to provide a Russian Interpreter for that meeting. The Claimant was also advised of her right to be accompanied at the meeting by a fellow employee or Trades Union Representative.

23. The Appeal meeting went ahead on 18 June 2020. That was clearly an extensive meeting and the Claimant was given every opportunity, through her Russian Interpreter, to expand on her Appeal and set out her case. It should be noted at this stage, on the very last day for the Appeal, there were various documents the Claimant asserted she needed for the Appeal which she requested. Many of which were totally irrelevant for the purposes of an Appeal, particularly the Respondent's Stakeholder Pensions Scheme.

24. What is clear is that the Claimant, in Appealing, did not want her job back. She wanted compensation, she wanted Mrs Davis to be dismissed and the Claimant also raised at the Appeal that members of staff knew about her dismissal and claimed they had been told by HR. The Claimant was specifically requested to provide details about whom was spreading these rumours so they could be investigated, but the Claimant refused despite originally alleging that the names of these people and text messages were on a smart telephone which she had with her at the Appeal Hearing. Given the failure to provide any evidence, Mrs Kemball could do nothing. The Tribunal notes that the tenor of the Claimant's Appeal was compensation and she talked about injury to feelings. The Claimant's view was that the Respondent made a mistake in dismissing her and that she was not coming back because the Respondent would not meet her needs and those needs were in effect refusing to pay the Claimant substantial compensation for the Disciplinary process. At that stage the Claimant was

already threatening going to Court if she did not get substantial financial compensation.

25. Mrs Kemball, after the Appeal Hearing and before reaching her decision, went back to Volvo to ask specific confirmation as to the accuracy of the Telematic System. Originally she received a response from the Legal Director of Volvo which was woolly and non-committal as to the specific accuracy of the Telematic System. Mrs Kemball did not leave it there. She chased the Legal Director a number of times. Indeed, attempted to telephone him and he refused to take her calls.

26. Clearly the Respondents did not know at the time of the decision to dismiss that Volvo did not consider the data to be 100% reliable, in particular, Mr Warby from Volvo had represented to Mrs Davis that data was accurate and that in his view showed fuel skimming on the Claimant's vehicle. As a result of the Respondents not being able to rely on the data from the Telematic System following the rather woolly letter from the Legal Director, in effect Volvo changing its position after the Claimant was dismissed, Mrs Kemball rightly overturned the decision to dismiss and reinstated the Claimant offering to pay lost wages from the date of dismissal to the date of reinstatement.

27. The Outcome of the Appeal letter is dated 2 July 2020 and deals with every aspect of the Claimant's Appeal so far as was relevant to the issues. The letter ended,

> *"This issue has been complex and time consuming for all parties and though I have found all processes were conducted fairly and allowances were made to give you more time, I also believe we have all been potentially ill informed by the third party (Volvo) with international standing within the industry advising us to rely on the validity of their data which we reasonably then did, which they have now subsequently stated that there may be an explanation for the anomalies. Although we are still waiting for further information, if this was the case and had been known at the outset I do not believe a disciplinary process would have been started. I apologise for how this has made you feel, but I do not see how the Disciplining Manager could have acted in any other way given the information supplied at the time, other than follow our laid down procedures and make his decision based on the balance of probability and his reasonable belief. I also feel there is no proven reason for you not to accept the full re-instatement of your role as I have found no malicious gossip here at Debach, or locally in our business community regarding your reputation and you have not presented me with any evidence of it. I look forward to hearing your thoughts on my conclusions and offer of re-instatement, I should be grateful if you would come back to me once you have had the opportunity to consider this letter, discuss and return.*
>
> *Yours sincerely*
> *Mrs Kemball, Managing Director"*

28. That letter was dated 2 July 2020. Interestingly enough, the Claimant on 1 July 2020 had registered with ACAS. Furthermore, the Claimant resigned by letter of 10 July 2020 but this was only received by the Respondent on 16 July 2020 (pages 553 – 567). It appears consistent with the Claimant's pre-determined decision that she did not want her job back and just wanted compensation.

29. The Claimant was still maintaining the position after Appeal that if the Respondents paid her £50,000 and dismissed Mrs Davis, only then would she return to work for the Respondents. In the Claimant's letter of resignation and Grievance letter dated 10 July 2020, there was an allegation of falsification by Mrs Davis. This was investigated as part of the Claimant's Grievance (pages 645 – 652) and other members of staff within the Respondent. However, the Claimant resigned before that was considered and determined in any event.

The Law

30. Section 95(1)(c) of the Employment Rights Act 1996 states, if there is a dismissal where the employer terminates a 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. It is well trodden Law that in order to claim constructive dismissal, the employer must establish that:

- there was a fundamental breach of contract on the part of the employer;
- the employer's breach caused the employee to resign; and
- the employee did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal.

31. In effect, what an employee has to show is that her employer has without reasonable and proper cause acted so as to destroy or seriously damage the relationship of trust and confidence between the parties. To reiterate, the effect of allowing an Appeal against dismissal is that the employee is re-instated, the contract is revived and the previous dismissal vanishes as if it never took place.

Conclusions

32. It has perplexed the Tribunal during the course of the last three days, how the Claimant's claim for a breach of the implied term of trust and confidence is pursued. What is clear on the facts of this case, there was no fundamental breach of the implied term of trust and confidence on the part of the employer entitling the employee to resign. Far from it, the Respondents at virtually every stage accommodated the Claimant, extending the time as far as was relevant to prepare for the Disciplinary Hearing, multiple times allowing an extension in relation to the Appeal, providing numerous documents to the Claimant at the last moment prior to the Appeal, many of which simply had no relevance to the Appeal and

then overturning the decision to dismiss, offering the Claimant her job back, apologies and back pay for the period between dismissal and re-instatement.

33. By any objective assessment, the Tribunal could not conclude that the Respondents have in some way breached the implied term of trust and confidence such as to suggest the Respondent without reasonable and proper cause acted so as to destroy or seriously damage the relationship of trust and confidence between the parties. In any event the Claimant had been reinstated with no loss of income.

34. At the conclusion of the proceeding, Ms Criddle Counsel for the Respondent, made an Application for Costs in respect of the original Deposit Order of Employment Judge Hyams in which it was made on the basis that the constructive unfair dismissal claim had no reasonable prospect of success.

35. The Claimant was recalled to the Witness Box and reminded she remained on Oath. She originally indicated she had not been working since her dismissal but it transpired at various times that she had. She now had an offer of work for a German company starting next week. She said she had debts around £7,000 and it was likely in her new employment she would earn in the region of £40,000 - £50,000 per annum.

36. Once again, the Claimant was somewhat vague and evasive about what work, if any, she had done from the dismissal and only when she was pushed conceded the new job starting next week was as a Heavy Goods Vehicle Driver.

37. Ms Kolentsova, the Claimant's representative was given an opportunity to address the Tribunal. She said two things, it was not normal for the Tribunal to make awards for costs and it would cause the Claimant great financial hardship.

38. The power to award costs arises out of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

39. Under Rule 76, a Tribunal may make a Costs Order or Preparation Time Order and shall consider whether to do so where it considers that:

    a. …
    b. any claim or response had no reasonable prospect of success, or
    c. …

40. Rule 78 deals with the amount of the Costs Order.

41. Rule 84 deals with a party's ability to pay. In particular, in deciding whether to make a Costs Order, Preparation Time Order or Wasted Costs Order and if so in what amount, the Tribunal may have regard to the paying party's ability to pay.

42. It is of course trite Law that in the Employment Tribunals costs do not follow the event.

43. It is a two stage process,

    43.1 Did this case have no reasonable prospect of success?
    Certainly Employment Judge Hyams felt that when he made a Deposit Order and his reasoning for it is largely the same as the Judgment of the Tribunal at the Full Merits Hearing.

    43.2 Then the Tribunal has to decide whether to exercise its discretion to make a Costs Order and in doing so whether to consider the Claimant's means.

44. Clearly, this case had absolutely no reasonable prospect of success. It was doomed to fail from the outset and in those circumstances the first part of the equation takes place; clearly the claim had no reasonable prospects of success. The Tribunal, therefore, were unanimous in their view that they should exercise their discretion in awarding costs, having had regard to the Claimant's means and her future prospects of employment.

45. The amount of costs sought by the Respondent is for this three day Hearing, only the sum of £21,000 and the Tribunal therefore makes an Order for Costs in that sum, payable forthwith.

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Employment Judge Postle

Date: …21 August 2023…….

Sent to the parties on: 24 August 2023...

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For the Tribunal Office.