EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103312/2023

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Held in Glasgow via Cloud Video Platform (CVP) on 10 October 2023

Employment Judge Smith

Mr D Jeffrey	**Claimant** **In Person**
RJ Blasting (Scotland) Ltd	**Respondent** **Represented by:** **Mr T Hainey -** **Manager**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Claimant's claim of constructive unfair dismissal is well-founded and succeeds.

REASONS

Introduction

25 1. By way of an ET1 claim form presented to the Glasgow office on 11 June 2023 the Claimant presented a single claim to the Employment Tribunal, namely one of (constructive) unfair dismissal. The Respondent filed an ET3 on 7 July 2023 indicating that it wished to defend the Claimant's claim in its entirety.

30 **The issues**

2. Neither party was legally represented at the hearing. The Claimant, Mr Jeffrey, represented himself and Mr Thomas Hainey (one of the Respondent's managers) represented the Respondent. Therefore, at the commencement of the hearing it was necessary to set out what the issues were that I had to

decide in the claim. It was explained to the parties that it was for Mr Jeffrey to prove that he had been constructively dismissed, and the questions relevant to that matter were explained to the parties and ultimately agreed. Insofar as the matter of liability was concerned, those agreed issues are set out as follows:

2.1. Did the Respondent breach the Claimant's contract of employment? Mr Jeffrey relied solely on the implied term of mutual trust and confidence as having been breached by the Respondent.

2.2. If so, was that breach a fundamental breach, in the sense that it was something the Respondent did, without reasonable and proper cause, which was calculated or likely to seriously damage or destroy the relationship of trust and confidence between it and Mr Jeffrey? It was explained to the parties that a breach of the mutual trust and confidence term is always deemed a fundamental breach of contract.

2.3. If so, did the Claimant resign in response to that fundamental breach of contract? It was explained to the parties that the breach need not be the only reason for resigning so long as it was part of the reason Mr Jeffrey resigned.

2.4. If so, did the Claimant nevertheless affirm the contract or waive the breach, meaning he would lose the right to contend he was constructively dismissed? This could be by Mr Jeffrey delaying too long or otherwise doing or saying something inconsistent with him treating the contract of employment as being at an end.

2.5. If the Claimant satisfied the Tribunal as to issues 1 to 4 above, he would have been constructively dismissed. In those circumstances the question then is whether the Respondent had a potentially fair reason for (constructively) dismissing Mr Jeffrey. Mr Hainey contended that it did have a potentially fair reason which, in summary, he contended was that the Respondent had sound business reasons for doing what it did. In essence, the Respondent was contending that its reason for constructively dismissing Mr Jeffrey fell into the category of Some

Other Substantial Reason ("SOSR") of a kind that may justify the dismissal an employee.

2.6. If I found the Claimant's constructive dismissal to have been potentially fair for the SOSR reason put forward by the Respondent, I must then decide whether his dismissal was actually fair, i.e. whether in the circumstances the Respondent acted reasonably or unreasonably in treating that reason as sufficient reason for dismissing Mr Jeffrey, taking into account the size and administrative resources of the employer, equity and the substantial merits of the case.

The hearing

3. I was presented with a productions file amounting to 63 pages and during the course of the hearing my attention was drawn by the respective parties to some of the documents contained within that file. I was also shown some additional documents by the Claimant, namely a set of payslips.

4. The Claimant gave evidence in support of his case. Mr Hainey gave evidence on behalf of the Respondent. I heard submissions from both sides after the evidence had concluded.

5. Regrettably, there was not enough time to deal with remedy issues within the hearing day. I therefore listed the case for a provisional remedy hearing, which would go ahead in the event that the Claimant succeeded in his claim.

6. I found Mr Jeffrey to be a straightforward, honest witness who was able to recall with admirable clarity the material events in the case, sometimes with great attention to detail. In a similar vein, I found Mr Hainey to be an honest witness but one who from time to time lacked precision about certain details, particularly in relation to the circumstances in which travel time came to be payable to employees such as the Claimant. I found both witnesses to be equally credible but that in areas of doubt, Mr Jeffrey was to be preferred as the more reliable witness of the two. Nevertheless, I concluded that both Mr Jeffrey and Mr Hainey had done their best to tell the truth as they understood it, and to assist the Tribunal in its evidential task.

Findings of fact

7. All of the findings set out below have been made on the basis of the evidence presented to me and according to the applicable standard: the balance of probabilities. The page numbers referred to are those within the productions file.

8. Mr Jeffrey commenced his employment with the Respondent on 18 February 1999. He was employed as a shotfirer and driller throughout. He was at all material times in possession of the necessary accreditation to carry out shotfiring work by the Mineral Products Qualification Council (MPQC), which is mandatory before someone can be permitted to carry out such work. He was at no stage within his employment provided with a statement of employment particulars.

9. The Respondent is headquartered in Kilmarnock, although its operations extend across Scotland and northern England. It employs 22 people.

10. For the great majority of the employment Mr Jeffrey carried out his role for the Respondent at opencast coal mines where the Respondent was contracted to carry out works. That changed in or around 2018 when a governmental decision resulted in the cessation of many opencast mining operations. From that point onwards, Mr Jeffrey was largely assigned to carry out his role at quarries. As the witness best placed to comment, I accepted Mr Jeffrey's evidence that around 50% of this time was spent shotfiring and the other 50%, drilling.

11. The Claimant was paid on a weekly basis. Whilst the set of payslips the Claimant provided to the Tribunal was not a complete set, from those payslips that were available and the productions file my findings are that in 2020 the Claimant's hourly rate of basic pay was £8.48. With effect from 6 April 2021 this increased to £9.81 per hour (p.21). By January 2023 his hourly rate of basic pay had risen to £10.10 (p.52).

12. My finding, based on the same evidential sources, is that the Claimant's basic hours were 39 per week, and that if he worked beyond those hours he would

be entitled to overtime payable at the rate of time-and-a-half or double-time. It was not explained to me the circumstances in which either overtime rate would become payable, but it is not necessary for me to make a finding on that matter.

13. The sites the Claimant typically worked at extended from Kelso, Peebles and Duns in the Borders (and thus relatively near his home in Berwick-upon-Tweed) down to Leyburn (North Yorkshire), Penrith (Cumbria), Bolton (Lancashire) and very occasionally in Wales. It was an agreed fact that the Claimant had an entitlement to be paid by the Respondent for his time spent travelling from home to site and, where necessary, for travelling between sites. From the Claimant's payslips in 2020 I find that the travel time allowance was calculated according to the Claimant's usual basic hourly rate, with the amount payable determined by the Claimant's time spent travelling.

14. From the payslips provided I find that the amount of travelling the Claimant did varied week-on-week, from three hours in the week of 30 March 2020 (resulting in a payment to the Claimant of £25.44) to 22½ hours in the week of 17 August 2020 (resulting in a payment to the Claimant of £190.80). It was evident from the overall collection of payslips, and I find, that the Claimant more often than not spent more than ten hours travelling for work each week, and thus more often than not received weekly travel allowance payments in excess of £100.

15. Whilst some of Mr Jeffrey's colleagues also had the essential MPQC shotfiring accreditation, not all of the Respondent's site-based employees did. At some sites where the Respondent operated there would be a dedicated explosives supervisor. However, as an accredited shotfirer it was agreed, and I therefore found, that throughout his employment Mr Jeffrey was always paid a shotfiring bonus payment. For each day that Mr Jeffrey fired shot, he would be paid to a flat-rate bonus payment of £35 per day. This had always paid throughout the course of his 20-year employment, as well as to others who were eligible.

16. Beyond shotfiring, part of Mr Jeffrey's work involved drilling. It was also agreed, and I therefore found, that throughout his employment, for every day which Mr Jeffrey performed some drilling, he would be paid a bonus of £40

per day. It did not matter precisely how much drilling Mr Jeffrey performed on any one day: so long as some drilling was done, the bonus would become payable to him by the Respondent. It was evident from the payslips, and I find, that in almost every week Mr Jeffrey was paid a weekly bonus of £200, suggesting that he did some drilling every day in those weeks.

17. Whilst Mr Hainey contended that these bonuses were non-contractual or at the Respondent's discretion, I rejected these contentions. By 2020 the schemes had been in place for a very long time. They were well known amongst the Respondent's employees, and expected by them to be paid. Mr Hainey could not conceive of circumstances in which the Respondent would not have paid the bonuses, so long as an eligible employee met the criteria for payment, and he confirmed that there was not a single occasion when an otherwise eligible employee actually had their bonus withheld. The criteria used by the schemes were straightforward and the amounts payable were fixed and uncomplicated. In these circumstances it was obvious to me, and I find, that these bonus schemes really amounted to entitlements for the Respondent's employees (and specifically, an entitlement for the Claimant).

18. As the Covid pandemic hit these islands in early 2020, the Respondent availed itself of the UK Government's Coronavirus Job Retention Scheme (CJRS) and furloughed the Claimant from time to time. The Claimant was furloughed between 6 April and 18 May 2020, again between 20 July to 3 August 2020, and for the final time between 25 January and 8 February 2021.

19. Unfortunately, in 2020 Mr Jeffrey's young daughter became seriously ill and on 23 December 2020 the seriousness of her condition was confirmed, as leukaemia. On that day Mr Jeffrey notified Mr Hainey of the situation via email (p.20) and shortly afterwards Mr Hainey replied, in a considerate and sympathetic way (p.19). The situation of Mr Jeffrey's daughter necessitated her having to spend long periods of time in hospital at the Royal Victoria Infirmary (RVI) in Newcastle, which was some 60 miles from their home. Mr Jeffrey's daughter spent months in hospital from 23 December 2020 onwards, which necessitated him travelling down to Newcastle every day in a rotation between himself and her mother. I had no hesitation in accepting Mr Jeffrey's

unchallenged evidence that this was an extremely challenging time for him and his family, and that it continued to be so throughout 2021 as his daughter's treatment continued.

20. The impact of his daughter's illness was such that Mr Jeffrey was himself signed off from work as being unwell, owing to the stress of the situation. He was unfit for work and absent for this reason, between 3 February and 16 August 2021.

21. On 8 April 2021 – during Mr Jeffrey's absence from work, as detailed above – the Respondent unilaterally modified the drilling bonus scheme (p.21). Having hitherto promised a flat rate of £40 payable in respect of each day of drilling work carried out (no matter how much), the scheme was changed to one dependent upon the amount of drilling carried out. For 50 to 100m of drilling, a £15 bonus would be payable. For 100 to 150m, £20 would be payable. For 150 to 200m, £25 would be payable. For 200 to 250m, £30 would be payable. Finally, for drilling done in excess of 250m, £40 would be payable.

22. Whilst he accepted the fact that the drilling bonus scheme was changed, it was not clear to me exactly when Mr Jeffrey was notified of the decision as it appeared on what looked to be an internal company memo rather than something addressed to Mr Jeffrey directly. However, what was clear is that this change was implemented by the Respondent without any consultation or indeed any attempt at engagement with those employees who had been eligible for the drilling bonus up to that time. No agreement from the workforce was sought. That group would necessarily have included the Claimant.

23. Around the same time as the drilling bonus scheme was changed, the Respondent decided to remove the travel time allowance that had hitherto been in force. This was removed because, Mr Hainey contended, the affected employees had been given a pay rise (to £9.81 per hour) and that their holiday pay would thenceforth be calculated based on a 12-week reference period. I accepted Mr Hainey's evidence that these were the reasons why the travel time allowance was removed. As a regular traveller, Mr Jeffrey would certainly have been affected by this removal and once again, it was a decision taken

without any discussion or engagement with the affected employees. No agreement from the individual employees was sought.

24. Following his return to work on 16 August 2021 Mr Jeffrey resumed the work he had previously done, in the same way. It was evident from p.61 that the work he was assigned included having to travel to Bolton on occasions in late August 2021. Bolton is around 200 miles' travel, by road, from Berwick-upon-Tweed. Mr Jeffrey noticed that the amount of shotfiring work he was required to do upon his return had reduced.

25. On 22 September 2021 the Claimant wrote to Mr Hainey (p.22) complaining about the remuneration he was receiving. Whilst he mentioned continuing to receive the shotfiring bonus (on one occasion) he mentioned that being on the drilling bonus scheme – which by that time had been changed, as detailed above – it was "hitting me in the pocket". Mr Jeffrey requested that he be put on a salary in place of his present remuneration, presumably as that would be more financially advantageous to him. Considering this email in the round, in my judgment it amounted to an act of protest by the Claimant concerning the situation he was facing at that time by virtue of the changes the Respondent had unilaterally imposed. Mr Hainey replied to that email on the same day but did not agree to the Claimant's proposals, stating that Mr Jeffrey in fact earned more than the other shotfirers, who enjoyed a salary. No specific figures were contained within that email and none were provided to me, but no further action was taken by Mr Hainey in respect of Mr Jeffrey's clearly articulated complaint.

26. From the payslips available my finding is that from his return to work in August 2021 onwards the Claimant never received a weekly drilling bonus payment of £200. Such bonuses as he did receive were variable and normally between £70 and £115. They never went higher than £170. Nothing replaced the travel allowance payments he had previously received.

27. Throughout the years 2021 and 2022 the Claimant's daughter remained very ill and although the frequency of trips to the RVI reduced gradually as her treatment continued, her illness and the need for her to regularly travel to

hospital never ceased. I again accepted Mr Jeffrey's evidence that the ongoing situation continued to be extremely challenging for him and his family.

28. On 25 April 2022 the Claimant was emailed by Hazel Malcolmson, the Respondent's office manager, stating that "as of today" the Respondent would no longer pay a shotfiring bonus (p.23). This removal was, in typical fashion, implemented unilaterally and with no attempt to engage in even a discussion with the workforce. No agreement by the individual employees was ever sought.

29. The frequency of the shotfiring work the Claimant was required to do actually increased. As 2022 progressed the Claimant continued working alongside his regular journeys to the RVI in relation to his daughter. Shotfiring became more frequent to the point that come 2023, he was usually firing three shots a week. By this stage, the bonus he previously enjoyed was no longer being paid to him.

30. In late 2022 the Claimant's requirement to travel also increased (p.61), with regular trips to Bolton, Penrith and Catterick Garrison (North Yorkshire) occurring in the final quarter of the year. Those trips continued to increase in quantity and frequency into 2023 as that year began. From the payslips it was clear that nothing was paid to the Claimant in respect of this quite considerable travel time.

31. Mr Hainey was right to assert that beyond his email of 22 September 2021, the Claimant did not at any time thereafter protest the measures taken by the Respondent in respect of reducing his remuneration, in writing. However, Mr Jeffrey said in evidence that he frequently mentioned the disadvantageous situation regarding his pay to his line managers, who did nothing to assist him. There was no documentary evidence that corroborated that assertion, but I nevertheless accepted it on the basis that I found the Claimant to be a cogent and truthful witness generally.

32. Given the combination of circumstances faced by the Claimant during the course of 2021 and 2022 (eight months' sickness absence in 2021, the ongoing emotional turmoil caused by his daughter's ill-health throughout those two years, and the increasing frequency of having to travel long

distances for work in the later part of 2022) it was abundantly clear to me that the Mr Jeffrey was a man under extreme pressure throughout that period. As one major problem slowly began to resolve, another major problem would arise. Set against the background constant of his daughter's serious illness and the fact that his life priorities would inevitably have been changed within that period, it was unsurprising to me that Mr Jeffrey did not raise a grievance or take formal steps to follow up on his oral complaints to his line managers.

33. By the earliest weeks of 2023 Mr Jeffrey became of the opinion that he was being taken advantage of by the Respondent. Around the same time, he became aware of a job vacancy at Allan Brothers Limited, a company based near Berwick and thus much closer to his home. He became aware of it through word of mouth and because his brother also works there.

34. On 12 March 2023 Mr Jeffrey emailed Mr Hainey (p.24) attaching a letter (p.25). Within the letter the Claimant asked to be considered for voluntary redundancy and said that he felt he had no alternative to leave the Respondent's employment to preserve his own wellbeing. Within that letter he mentioned how he considered himself to be worse off because of the change to the drilling bonus scheme and the removal of the shotfirers' bonus scheme, but principally because of the removal of the travel time allowance. Invoking his discontent regarding the Respondent's requirement that he must travel considerable distances to and from work, Mr Jeffrey expressly stated that, *"I am now expected in some instances to leave home at 4am to reach a site 3 hours away to start drilling at 7am. I receive nothing for this time & this also applies to travelling back home".* He stated that he considered himself to have been constructively dismissed on the basis that the terms of his employment had been *"ignored and changed without consultation or agreement"*, and that his final day of employment would be 17 March 2023.

35. Mr Jeffrey was offered a job by Allan Brothers on or around 13 March 2023. I accepted the Claimant's evidence that the job offered was on a lesser remuneration package than he had enjoyed with the Respondent, supported as that evidence was by the payslips he subsequently received from Allan Brothers that were available in the productions file.

36. Mr Hainey suggested to the Claimant in cross-examination that the reason he resigned was so he could take up employment with Allan Brothers, and not because of anything the Respondent had done. Mr Jeffrey disagreed. Consistent as it was with what had actually happened over the course of the previous two or so years of his employment, I accepted Mr Jeffrey's evidence that the reasons he set out in his resignation letter were the most significant part of his reasoning for resigning. I did accept, however, that the prospect that Allan Brothers might imminently offer him local employment, without the same need to travel, was also naturally part of his thinking at the time. Given his personal circumstances, I found that that additional consideration was both logical and natural and, moreover, that it in no way took the conduct of the Respondent out of the picture.

37. By an undated letter apparently sent before 17 March 2023 (p.26) Mr Hainey wrote to the Claimant refusing his request for voluntary redundancy on the basis that Mr Jeffrey's role was not redundant. In the same letter he accepted the Claimant's resignation and wished him well for the future.

38. On 20 March 2023 Mr Jeffrey commenced his employment with Allan Brothers.

The law

Constructive unfair dismissal

39. An employee who terminates the contract of employment may nevertheless claim to have been dismissed by the employer if the circumstances are such that he is entitled to terminate it by reason of the employer's conduct. This concept is known as a constructive dismissal. The entitlement to terminate must be a contractual entitlement. The leading case on whether there has been a constructive dismissal is *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27* (England and Wales Court of Appeal), and there are four tests to be satisfied in this regard. Those are:

    39.1. Did the employer breach the employee's contract of employment?

    39.2. If so, was that breach fundamental?

39.3. If so, did the employee resign in response to that breach or for some other reason?

39.4. If so, did the employee nevertheless affirm or waive the breach through his words or his conduct?

40. In this case the Claimant contends that he was constructively dismissed because he resigned in response to a breach of the implied term of mutual trust and confidence. The definition of that term was set out by the House of Lords in the case *of Malik & another v BCCI* [1997] IRLR 462, which I shared with the parties during the hearing. It is an implied term of every contract of employment that *"the employer shall not, without reasonable and proper cause, conduct itself in a way which is calculated or likely to seriously damage or destroy the relationship of mutual trust and confidence with the employee".*

41. A breach of the implied term is always fundamental, automatically satisfying the first and second of the *Western Excavating* tests: *Morrow v Safeway Stores plc [2002] IRLR 9* (Employment Appeal Tribunal).

42. In the context of the implied term of mutual trust and confidence, no employer can have reasonable and proper cause for breaching that term where the breach consists of the unilateral imposition of a significant pay cut on the employee*: Mostyn v S & P Casuals Ltd UKEAT/0158/17* (22 February 2018, unreported).

43. In relation to the reason for resignation, the mere fact that an employee has a new job to go to does not afford a defence to an employer facing an assertion of constructive dismissal by its former employee: *Healy v Slough Borough Council UKEAT/0125/19* (11 October 2019, unreported). The fundamental breach of contract by the employer must be an effective cause for resignation, even if it is not the sole cause: *Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493* (EAT).

44. In relation to waiver/affirmation, the Tribunal must decide whether waiver or affirmation has occurred by reference to the various factors in play, including those pointing towards or against the employee having insisted that the contract should continue (*W E Cox Toner (International) Ltd v Crook [1981]*

IRLR 443, EAT). One common factor pointing towards affirmation is the delay in resigning, but there is not – as a matter of law – any particular period of time by which an employee must resign in response to the fundamental breach lest he or she lose the right to assert that they have been constructively dismissed. It is always a matter of degree in each particular case, governed by the facts. Delay of itself does not generally amount to affirmation of itself but can be (and usually is) an important factor in determining whether affirmation has occurred *(Chindove v Wm Morrison Supermarkets Ltd UKEAT/0201/13*, 26 June 2014, unreported). Other factors may also be relevant to this question, not least the employee's length of service (*G W Stephens & Son v Fish [1989] ICR 324*, EAT), the employee's protests regarding the employer's conduct (such as the raising of a grievance or complaints), and the personal circumstances of the employee. This is not, however, intended as an exhaustive list as *W E Cox Toner* reminds Tribunals that this must involve a multifactorial analysis.

45. **Section 95(1)(c)** of the **Employment Rights Act 1996** deems a termination by the employee in the circumstances described above as amounting to a dismissal by the employer. In this case it is not in dispute that the Claimant has sufficient qualifying service so as to enjoy the right not to be unfairly dismissed (under **s.94**). If the Claimant establishes that he was constructively dismissed it is for the Respondent to prove (under **s.98(1)**) that the principal reason for the dismissal was a potentially fair one.

46. In this case the Respondent has advanced a case that it had a potentially fair reason for constructively dismissing the Claimant, namely that it had a sound business reason for doing what it did. I must therefore decide whether the Respondent has proved that that was the reason, and if it has done so, go on to determine the fairness of that dismissal according to the provisions of **s.98(4).** It is not for me to substitute my own view for what the employer actually did: at all times I must objectively assess fairness according to the test in **s.98(4)** and according to the yardstick of whether the employer acted as a reasonable employer could have acted in the circumstances.

Analysis and conclusions

47. I have not set out the parties' submissions in full, but I have borne them in mind at all times and where necessary I will refer to them in the paragraphs that follow.

(1) and (2): Fundamental breach of contract

5 48. Following *Morrow*, it makes sense to take the first two of the Western Excavating tests together as one question given that a breach of the implied term of mutual trust and confidence is always fundamental.

49. In my judgment, and with particular regard to *Mostyn*, the Respondent conducted itself in a way that was likely to seriously damage or destroy the
10 relationship of mutual trust and confidence in that it had, starting in April 2021, sliced off significant portions of the Claimant's overall remuneration package. It could not be said that these were small components of the Claimant's remuneration. For clarity, I have excluded overtime from my analysis as it was not suggested there was any change in the pay arrangements in respect of
15 overtime.

50. As I have found, Mr Jeffrey's basic hours were 39 per week and in the run-up to the change to the drilling bonus scheme his basic weekly wage was £330.72. The flat rate drilling bonus to which he had been entitled normally guaranteed him a weekly bonus payment of £200 on top of this. The travel
20 allowance which he was entitled to also normally saw him paid around £100 each week, taking into account natural fluctuations. The shotfiring bonus to which he was also entitled would add to the overall remuneration package by £35 for each day upon which a shot was fired. In essence, Mr Jeffrey would typically expect to be paid £650 each week, plus whatever shotfiring bonus
25 was payable.

51. Upon the change to the drilling bonus scheme and removal of the travel allowance payment with effect from April 2021, whilst Mr Jeffrey's basic weekly wage increased modestly to £382.59 (an increase of just over £50 a week) the flat-rate drilling bonus which had normally constituted a guaranteed
30 £200 on top of his basic wage each week was removed. The travel allowance – again normally worth around £100 per week to Mr Jeffrey – was also

removed. Again as per my finding, the change to the graduated drilling bonus scheme only resulted in his basic weekly wage being supplemented to the tune of between £70 and £115. After April 2021 the value of Mr Jeffrey's overall pay packet had dropped to (at the typical upper end) £497.59. The result was that in terms of his normal pay packet Mr Jeffrey was around 23% financially worse off each week, on account of the Respondent's unilateral action in changing the drilling bonus scheme and removing the travel allowance.

52. In my judgment, given the job Mr Jeffrey was employed to do and the two decades' worth of service he had provided to the Respondent, I consider that the Respondent making such changes to a long-established order in relation to this bonus and allowance was something of sufficient seriousness so as to inevitably, and seriously, damage the relationship of mutual trust and confidence. However, confirmatory of my judgment is the fact that it went about making these changes without even the smallest gesture towards seeking the consent of the employees. It was, in short, an imposition and nothing more than a diktat on each occasion.

53. The Respondent claimed to have reasonable and proper cause - "good business reasons" - for making these changes. Whilst Mr Hainey pointed to a slight increase as to the basic wage and the use of a pay reference period for holiday pay purposes, there was simply no evidence setting out what good business reason there was for making these changes at all. I could not, therefore, accept the Respondent's submission. However, even if there had been evidence to support a good business reason for making the changes I would still not have accepted that submission because it had no reasonable or proper cause for simply dictating to the employees (and specifically the Claimant) that this was happening, without any notice, consultation or attempt to seek agreement with the employees.

54. I turn now to the removal of the shotfirers' bonus scheme. This was removed on 25 April 2022. For reasons in the same vein as those relating to the Respondent's changes to the drilling bonus scheme and the removal of the travel allowance, in my judgment this also amounted to a fundamental breach of the implied term of mutual trust and confidence. Mr Jeffrey was employed,

in the proportion of about half of his role, as a shotfirer. That role carries with it the need for specific accreditation and for the utmost considerations of safety. The bonus scheme in relation to shotfiring had also been a long-standing entitlement of the Claimant and inherent to the work he performed as a shotfirer. It was also worth an additional £35 in his pay packet for each shot fired, and given the frequency with which he carried out shotfiring that additional payment was by any standards significant. In addition, the removal of the shotfiring bonus was embarked upon by the Respondent in the same egregious way as the other changes had been carried out in 2021: there was no notice, no consultation and no agreement was even tentatively sought. There was, in my judgment and on the evidence, no reasonable and proper cause for the Respondent to do what it did, nor in the way that it did it.

55. For these reasons, I consider that this case falls squarely into the Mostyn category of case. In relation to the change to the drilling bonus scheme and the removals of both the travel allowance and the shotfiring bonus scheme, Mr Jeffrey has satisfied me that the Respondent fundamentally breached his contract of employment.

(3) Reason for resignation

56. On this question my analysis follows the facts found. It is evident from my findings at paragraphs 33, 34 and 36, above, that the fundamental breaches of contract established in this case were a significant part of the reason why Mr Jeffrey resigned. Accordingly, Mr Jeffrey has satisfied me that the third element of the Western Excavating test is made out.

(4) Waiver/affirmation

57. Legally, the concepts of waiver of the breach and affirming the contract are distinct. However, the critical question for me is whether through his words or conduct (which can include inaction or delay) from the time of the fundamental breach onwards, the Claimant lost the right to treat himself as having been dismissed by the Respondent. That is the essence of *W E Cox Toner* and the authorities I have cited above.

58. Mr Hainey is correct to submit that the time between the fundamental breaches (April 2021 and April 2022) and the Claimant's resignation (March 2023) is significant. He is also right to submit that in some – possibly many – cases a delay in resigning to that extent would put paid to a Claimant succeeding on this fourth element of the Western Excavating test. However, whilst delay is one consideration the answer to the question of whether the Claimant lost his right to treat himself as having been constructively dismissed is multi-factorial and must be one that is firmly rooted in the facts of the case.

59. When considering the legal impact of delay it is therefore imperative to take into account the relevant context. The first fundamental breach occurred on 8 April 2021 but in my judgment it would not be appropriate to find that the Claimant affirmed the contract within the first four or so months following that breach, as he was absent from work through sickness during that time and it was a time when his daughter was particularly ill. The mere fact that he continued to receive sick pay in that time was not, in my judgment, indicative that Mr Jeffrey was content to go along with the removal of the travel allowance and the changes to the drilling bonus scheme.

60. Upon Mr Jeffrey's return to work it was clear to me that he protested the changes that had occurred to his overall remuneration package almost straightaway. The email to Mr Hainey of 22 September 2021 made his position relatively clear, and as I have further found, Mr Jeffrey made repeated complaints on the same subject matter orally to his line managers from that point onwards, none of which were ever acted upon by the line managers. In my judgment, this was not a case where Mr Jeffrey should be taken as having affirmed the contract simply by working on from August 2021 onwards, because despite working on he was plain with his employer that he was not content with the changes to his remuneration they had unilaterally imposed.

61. The facts that during the period 2021 to 2022 Mr Jeffrey had been an employee of more than 20 years' standing, and whose personal circumstances from December 2020 onwards one would struggle to conceive of as being more difficult, also weighed heavily in my determination of the affirmation issue. As unsatisfied as he obviously was with what the Respondent had done in both April 2021 and then in April 2022, it was entirely

unsurprising to me that a man in Mr Jeffrey's position would hold off in resigning until he was convinced resignation was viable.

62. Ultimately, the decisions that the Respondent unilaterally made in April 2021 and April 2022 were made at times when the Claimant was personally very vulnerable and only began to be significantly felt by him later, as 2022 drifted into 2023. As I have found (at paragraph 30), the amount of travelling the Respondent required the Claimant to undertake in that time was of significantly higher frequency and distance. The travel allowance that previously would have compensated him for hours spent on the road was not paid and at that stage resulted in a significant real-terms pay cut. Also, with the shotfiring bonus having been removed in April 2022, the increase in shotfiring work the Claimant was required to undertake come 2023 (up to three shots fired per week: see paragraph 29) resulted in him experiencing – at the same time as the loss of the travel allowance – another significant real-terms pay cut.

63. Whilst I agree with Mr Hainey that in a case where there has been a significant delay in resigning, that delay might be a factor of such significance that it outweighs all others and the employee should therefore be taken as having affirmed the contract. However, on the facts of this case, in my judgment the Claimant should not be taken as having affirmed the contract simply because there was such a delay in resigning. In the period after the Respondent's fundamental breaches the Claimant was initially absent through sickness and when he did work on, he did so under protest throughout, in a period where he was under extreme pressure in his personal life. When the financial impact of the fundamental breaches hit home in late 2022 and early 2023, he did not wait an unreasonable amount of time before resigning when he did. Therefore, in my judgment, answering this question firmly in the factual context of this case, the Claimant neither affirmed the contract nor waived the Respondent's fundamental breaches of contract.

64. It follows that in my judgment, the Respondent constructively dismissed the Claimant.

(5) Reason for the dismissal

65. Given my decision in relation to the Claimant's constructive dismissal, the burden is then upon the Respondent to prove a potentially fair reason for dismissing him. The potentially fair reason advanced by the Respondent is Some Other Substantial Reason, namely that it had sound business reasons for doing what it did.

66. The question of what the reason for dismissal was is a distinct question from whether the employer had "reasonable and proper cause" for conducting itself in a way that was calculated or likely to seriously damage or destroy the relationship of mutual trust and confidence (the Malik term). The two matters are not the same.

67. In my judgment, the Respondent has fallen well short of discharging the burden of proving the principal reason. The contended-for reason ("sound business reasons") is completely vague and no specifics were outlined by Mr Hainey at the hearing at all. Equally, in evidence it was not suggested by Mr Hainey to Mr Jeffrey that the Respondent had any particular reason for removing the travel allowance and shofiring bonus or for changing the drilling bonus. Such documents as communicated the respective decisions to Mr Jeffrey included no particulars as to the Respondent's rationale behind the decisions. The decisions themselves were made a year apart and what may have explained the April 2021 decisions may or may not have explained the April 2022 decision. It is not the role of the Tribunal to speculate or to fill in the gaps: it was incumbent upon the Respondent to prove the principal reason it constructively dismissed the Claimant and it has failed to do so.

68. It follows that in circumstances where the Respondent has failed to prove a potentially fair reason for dismissing him, the Claimant's claim of unfair dismissal is well-founded and therefore succeeds.

(6) Fairness

69. Given my decision in relation to the Respondent having failed to establish a potentially fair reason for the Claimant's dismissal, it is not necessary for me to go on to consider questions of fairness under **section 98(4).** The Claimant was unfairly dismissed.

Remedy

70. There not having been sufficient time within the hearing to deal with remedy issues, the case was listed for a provisional remedy hearing via video link on 18 December 2023. However, owing to the unavailability of the Employment Judge on that date that remedy hearing is vacated and the matter will be listed for an alternative date. The parties are required to supply their dates of unavailability for January and February 2024 within 7 days of receipt of this judgment.

Employment Judge:	**P Smith**
Date of Judgment:	**20 November 2023**
Entered in register: and copied to parties	**22 November 2023**