



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4100007/2023

Hearing held at Dundee on 11 and 12 December 2023

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Employment Judge McFatridge

Mr Alasdair Fleming

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**Claimant
In person**

Perth and Kinross Council

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**Respondent
Represented by:
Ms M McLaren,
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant was not unfairly constructively
25 dismissed by the respondent. The claim is dismissed.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he
had been unfairly constructively dismissed by the respondent. The
30 respondent submitted a response in which they denied the claim. It was
their position that the claimant had resigned his employment. A
preliminary hearing took place on 27 April 2023 following which various
case management orders were made with a view to progressing the claim.
The respondent's representative applied for a strike out of the claim under
35 Rule 37 on the basis that the claimant had failed to comply with these
orders. The application for strike out was not granted and in the course of
this judgment the Employment Judge dealing with the matter made
E.T. Z4 (WR)

various further case management orders. The final hearing took place on 11 and 12 December 2023. The claimant gave evidence on his own behalf and also led evidence from Mr J Miller a former colleague. Evidence was led on behalf of the respondent from Paul Garden, Assistant Operations Manager with the respondent and from Adam Harazim, Crieff Depot Foreman with the respondent. A joint bundle of productions was lodged and is referred to in the judgment below by page number. On the basis of the evidence and the productions I found the following essential facts relevant to the claim to be proved or agreed.

10 **Findings in fact**

2. The respondent is Perth and Kinross Council. The claimant commenced his employment with the respondent on or about 3 December 2018. He was employed as a Street Sweeping Operative. Part of the week he would clean the streets using a traditional barrow. For the rest of the week he would drive an Arco street sweeping machine. The claimant holds a driving licence and also carried out various other duties. The claimant worked out of the Crieff depot. From the commencement of his employment he would require to report to the depot every morning so that work could be allocated by the foreman. He would then be transported into the centre of town or wherever it was that he was required to carry out further duties. The claimant would then require to return to the depot once his shift was finished. The claimant did not at any time object to these arrangements. The vast majority of other workers at the Crieff depot also required to attend the depot at the beginning and end of their shift. There were two exceptions who were employed solely as traditional street sweeping barrowmen. One of them lived in Auchterarder and it was agreed that he could start his shift from the centre of Auchterarder. His work did not vary. He did not carry out the range of tasks carried out by the claimant. The other operative had a similar position in Crieff. These arrangements were longstanding having been requested by these individuals and having been specifically approved by the respondent.

3. During the course of his employment the claimant was prone to outbursts where he appeared to have little control of his temper. The claimant received an informal counselling letter on or about 9 February 2022 for

swearing and the use of inappropriate language in response to a management instruction. This was lodged (page 41).

4. At some stage the claimant became one of the two trade union shop stewards within the Crieff depot. As a shop steward he became involved in representing employees at various meetings with management.
5. In or about April 2022 the respondent organised a facilitated discussion to address perceived issues that had arisen between the claimant and the depot supervisor Gair McCrostie. The personal difficulties between the claimant and Mr McCrostie appear to have commenced some time previously when the claimant complained that Mr McCrostie had spoken inappropriately to him at the funeral of a colleague who had unfortunately died of Covid. Mr McCrostie had understood that the claimant and other employees had been told by their foreman that they should stand at a certain point in the cemetery where the family had requested they pay their respects. This information had not been passed on and Mr McCrostie had remonstrated with the claimant regarding this. It appears that subsequently the relationship between the claimant and Mr McCrostie was poor. The claimant's position was that since Mr McCrostie had sworn at him he was entitled to swear at Mr McCrostie. Following the facilitated discussion both Mr McCrostie and the claimant agreed that they would seek to treat each other with more respect in future. Following the meeting Mr Paul Garden who had facilitated the discussion between the parties sent a letter summarising his understanding of each party's position and the agreement they had made as to how they were to treat each other going forwards. Both the claimant and Mr McCrostie confirmed they were happy with this outcome. The correspondence was lodged (pages 43-44).
6. On 1 July 2022 an incident took place between the claimant and the depot foreman Mr Harazim. The day before, a fellow employee (D) had asked the claimant if the claimant would accompany him as trade union representative to a meeting which was to take place on the morning of 1 July. The claimant had agreed to this. The next morning Mr Harazim discovered that one of the HGV drivers was unavailable and that in accordance with the usual practice Mr Harazim would require to drive the vehicle himself. This meant that he would not be available for the meeting

and he would not be in a position to make his office available for the meeting to take place over Teams with HR as had been intended. Mr Harazim advised D of this and said that he could either have the meeting reconvened the following week or that he could do it that afternoon at 2.30 once Mr Harazim returned to the depot. D was aware that the claimant finished at 2 o'clock on a Friday. At this point the other trade union shop steward at the yard happened to be there and D said that he wanted to get things over with and asked if the meeting could go ahead at 2.30 with the other trade union shop steward representing him. Mr Harazim confirmed his agreement.

7. The claimant arrived in the yard a few minutes later at around 7.25 ready to start work at 7.30. Immediately he became very angry when he heard that the meeting had been postponed and he formed the belief that in some way Mr Harazim was interfering with his prerogatives as a shop steward by arranging for the meeting to be rescheduled and for another shop steward to accompany D. At the Tribunal hearing the claimant accepted that he was angry and that he was shouting at Mr Harazim. At any event following this encounter Mr Harazim made a formal complaint against the claimant. A few days later once he knew that Mr Harazim had lodged a formal complaint about him the claimant lodged a formal complaint about Mr Harazim. The respondent's commissioned two investigations. They first of all investigated the claimant's complaints. Their investigation report was lodged (pages 45-52). The claimant was interviewed and the investigation was carried out by Nigel Taylor, Direct Services Manager. He summarised the claimant's three complaints on page 45. He did not find any evidence to uphold these complaints. During the course of this he also interviewed the claimant's colleagues who had witnessed the incident. A statement of SF occurs on page 48. He said that he became aware of someone shouting and screaming outside in the yard and then saw the claimant pacing around the yard ranting. He recalled the rant went along the line of "*am no having any manager cunt telling me what I can say and what I canny fucking do and say with my staff*". He also shouted about getting Adam out of the yard. A statement was also taken from SM. This was lodged at page 49. He said that the claimant was standing on his tiptoes right in Adam's face, pointing in his

5 face and screaming about “*my fucking staff my boys*” and that “*he’d get him out the yard quicker than he came in*”. A statement from CC was lodged (page 50). He reported the claimant and Adam together in the middle of the yard right up close, face to face, with Ally screaming aggressive “*who the fuck are you, I don’t take any fucking orders from managers about my fucking staff*”. He also confirmed that the claimant moved away after a few seconds but kept roaring on about his staff and getting Adam out. A statement was taken from AB which was lodged at page 51. This confirmed what the others had said. A statement was taken from D (page 52). He confirmed that he had spoken to Adam at around 7.15 about the Teams meeting and that it had been moved from 8.30 to 14.30 as Adam had to drive. He confirmed that he had spoken to the other trade union shop steward JB who had agreed to accompany him if AF was unavailable. He also confirmed that having heard raised voices he heard the claimant shouting and bawling.

8. A statement was taken from the claimant on 21 July 2022 which was lodged (page 66-69). His position was that his behaviour that day was appropriate and in line with the respondent’s Code of Conduct because as a union rep he needed to represent his members. A statement from Adam Harazim was taken (page 64-65). He stated that the claimant had come towards him till he was toe to toe, nose to nose and barged him backwards with his body, pointing in his face and screaming and shouting “*No fucking manager will tell me what to do with my fucking staff who the fuck do you think you are ... I’ll get you booted out this fucking depot*”. Mr Harazim’s statement also noted the effect which the incident had had on his confidence and general wellbeing.

9. The claimant was off work for a period shortly after the incident. No sick line was lodged but the claimant indicated that the reason for his absence was stress.

30 10. Having decided not to uphold the complaint made by the claimant against Mr Harazim the respondent decided to proceed with a disciplinary investigation in respect of Mr Harazim’s allegation against the claimant. The statements taken from the various witnesses were typed up and signed by the witnesses during July and August. These were lodged

(pages 72-76). It was also discovered that the incident had been recorded on a vehicle's CCTV camera.

11. The respondent have various CCTV cameras used in various aspects of their work. There are fixed CCTV cameras in the depot. These cameras are not particularly reliable and are rarely, if ever consulted. The Assistant Operations Manager Mr Garden is the responsible officer who has the sole authority to download images from these cameras. During the course of his lengthy time with the council he has not actually downloaded any video footage from the cameras at the Crieff depot. The respondent also use bodycams however again it is extremely rare if not unheard of for this video ever to be viewed.
12. More pertinently the respondent has CCTV cameras on their fleet of vehicles. The CCTV on these vehicles is consulted on a routine basis and the foreman Mr Harazim has authority to do this. The way it works is he has a log in on his phone. This is his personal phone which has been specifically authorised and has the appropriate encryption and IT safeguards in place to enable him to log in and view CCTV footage. This is most commonly used where there has been a road traffic incident. Incidents unfortunately take place on a fairly regular basis where motorists become frustrated at being delayed behind a bin lorry and accidents take place. The cameras are also used where an allegation comes in from a member of the public that a bin has not been emptied or that the staff have behaved in some way inappropriately. The cameras operate when the ignition is switched on in a vehicle and it was a matter of chance that the altercation between the claimant and Mr Harazim on 1 July was viewed by the camera on one of the vehicles. The CCTV footage was shown to the claimant twice during his interview on 21 July. It was the claimant's view that the CCTV showed him shouting and bawling at Mr Harazim but did not show any physical contact as having taken place. Still photos from the CCTV were lodged. Neither party had asked for or made arrangements for the CCTV to be played at the Tribunal. In any event I considered it would not have been relevant. For what it is worth it appears that from the angle the vehicle CCTV footage was taken from it would simply not have been possible to ascertain whether there had been no physical contact as

the claimant maintained or whether the claimant had barged Mr Harazim with his chest as maintained by Mr Harazim and others.

5 13. There was a fixed CCTV camera which is shown in some of the vehicle CCTV photos and which the claimant believed might show matters more clearly. This is a camera which is situated near the entrance to the depot. Although the camera is capable of looking down at the area where the altercation took place, as a matter of practice this camera is always pointing at the public skips area which is adjacent. The investigating officer, following the claimant's request investigated the issue and was
10 satisfied that there was no CCTV footage from this camera which would assist in determining what had happened. This was mentioned in the investigation report (p71)

14. On 5 August 2022 Mr Harazim had cause to make another file note in relation to the claimant. This was lodged (page 53). At the claimant's
15 urging the respondent had previously agreed to put the claimant through training for an HGV licence. This is not something the respondent do lightly and Mr Harazim had been active in trying to persuade senior management that the claimant should be given this opportunity which cost the respondent several thousand pounds in training fees. Having
20 successfully completed the test the claimant required to obtain a further CPC certificate before he would be in a position to drive HGVs for the respondent. As part of this process the claimant's driving licence had to be photographed. On or about 6 August, Gareth the depot's supervisor spoke to the claimant about this. The claimant provided a photograph to
25 Gareth but it was not clear. The claimant was reluctant to allow Gareth to take a photo of his licence on his own phone for data protection reasons. He discussed with Gareth that he would send a copy in and that he would not have his licence with him the following day as this was being used for other purposes. The following day Mr Harazim asked him for the licence
30 so that he could photocopy it and get the cpc process underway. The claimant explained that he did not have it with him. Mr Harazim was happy for the photographing of the licence to be delayed but he was concerned as he knew it was the respondent's standard practice that all employees driving council vehicles ought to have their licence with them at the time

they were driving them. He knew the claimant was due to be out driving a council vehicle that day. He told the claimant that he would require to check with his supervisor (Gareth) whether it would be okay for the claimant to drive that day even although he did not have his physical driving licence in his possession. Following this discussion the claimant decided to drive home and get his licence himself. Mr Harazim was surprised the claimant did this since he had not told him to and he felt that the matter was to be recorded in a file note which was lodged (page 53).

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15. A further informal counselling letter was issued to the claimant on 6 September 2022 (page 100-101). This followed a discussion between the claimant and Gareth Dimmock on 6 September 2022. It related to an incident on Tuesday 6 September where Mr Dimmock had tried to contact the claimant as he was unsure whether he was at work or not. When he did it transpired that rather than report to the depot in the morning the claimant had gone straight to the centre of Crieff. Mr Dimmock noted there had been no instruction or permission from the respondent to do this. He also noted that on the Monday the claimant had driven back to the depot during the day and driven back out in his own car without any instruction or permission. The letter noted that no further formal action would be taken. It also noted that the claimant had assured Mr Dimmock that it would not happen again.

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16. On 5 September 2022 the respondent's Mr Garden wrote to the claimant inviting him to a disciplinary hearing which was to take place on Tuesday 13 September 2022. The letter was lodged (pages 54-55). The letter referred to two allegations, they were

- (i) On 1 July 2022 you verbally assaulted an employee of Perth and Kinross Council.
- (ii) On 1 July 2022 you physically assaulted an employee of Perth and Kinross Council.

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17. The claimant was due to attend work on 9 September but did not do so, telephoning to say that he was sick. The claimant lodged a fit note confirming that he was not fit for work from 9 September to 23 September 2022. It gave the reason for his illness as being "stress at home". The

claimant did not contact the respondent about the hearing nor did he appear at the time fixed. On 16 September Mr Garden wrote to the claimant stating that he had asked Occupational Health to call him regarding his current absence. This email was lodged (page 110).

5 18. On 21 September the claimant sent an email to the respondent at 20:42 resigning his position. His letter of resignation was lodged (pages 112-113). He referred to bullying. His letter was acknowledged by Nigel Taylor on 23 September 2022 (page 112). He confirmed to the claimant that since he had resigned he would no longer have an employee and would
10 have no continuing recourse to the council's procedures. The claimant wrote again on 25 September confirming his position and on 26 September Mr Taylor confirmed that his termination paperwork would be processed (page 111).

15 19. During the period of his employment with the respondent the claimant kept his taxi driver licence. He had previously worked as a taxi driver for many years. Around 10 days after his resignation he recommenced driving taxis. His earnings from taxi driving were roughly similar to his earnings from the respondent albeit they were not pensionable.

Matters arising from the evidence

20 20. The claimant's ET1 was extremely brief simply stating "*Bullying and harassment I received from the management and the unfair treatment.*" During the case management process the Employment Judge attempted to flesh this out and the matters which were understood to constitute the claimant's claim were summarised in paragraph 6 of the hearing note
25 dated 27 April 2023.

21. During the course of the hearing the claimant made only passing reference to certain of these issues and did not mention at all the issue about IT help being promised contained in paragraph 6(iv). The claimant's evidence was vague and unstructured and I required to press him at various points
30 in order to try to work out precisely what it was that he claimed had caused him to resign. He continually referred to bullying and to a "toxic" atmosphere but seemed reluctant or unable to provide specifics. During his evidence the claimant wanted to talk a great deal about CCTV logs.

This was entirely irrelevant and appeared to be an issue which had arisen after the claimant's resignation. It was his position that he had made a data subject access request of the respondent for the log of who had accessed CCTV of the incident. No log was produced. The respondent had produced for the tribunal a log from the depot CCTV system which did show that the vehicle CCTV had been accessed in connection with the incident by the investigating officer. The claimant disputed that this document was accurate. During the course of the hearing it became clear that the claimant's view was that there was a fixed camera in the yard which would have shown the incident. It was also clear from the evidence of the other witnesses and the documentary evidence of the investigation that this was simply incorrect.

22. The claimant also failed to appreciate the difference between the way the respondent dealt with CCTV from the fixed cameras (which was practically never accessed) and the vehicle cameras which were accessed by the foreman on a regular basis. During his evidence the claimant would make various assertions that certain policies and procedures were illegal or incorrect without having any basis whatsoever for doing so. With regard to the incident on 1 July he did eventually accept during cross examination that his behaviour had not been appropriate but he said he was entitled to behave this way because Mr. Harazim had no right to decide which union rep should represent which employee. . During this questioning the claimant became extremely aggressive and several times reiterated his view that he was perfectly entitled to behave aggressively towards Mr Harazim because Mr Harazim did not have the right to tell an employee who the trade union official should be accompanying him to a meeting. I was entirely satisfied on the evidence that matters proceeded as set out above and that there was absolutely no question of Mr Harazim trying to usurp the claimant's position in this way. It appeared to me that the respondent's submission that the claimant was someone who had serious difficulty in controlling his temper and became aggressive when things were not going his own way was well-founded. The claimant raised several incidents which were not foreshadowed in the pleadings. I have not made findings in fact relating to them since it would not be appropriate for me to do so but even on the claimant's own version of these events it

appeared that he was clearly some-one who had difficulty in accepting authority and would ignore management instructions if he felt he knew better.

23. With regard to the issue of whether the claimant was being singled out by
5 being required to attend the Crieff Depot every morning so that work could
be allocated the claimant accepted that this was something he did in
common with most others in the depot. He initially said many others were
permitted to start off at the place where they would be working but
eventually accepted that he knew only of the two who the respondent
10 accepted were given this particular dispensation. In relation to the incident
on 6 September it eventually became clear that the claimant had
understood from what he had been told the previous day that he would be
working in Crieff town centre. For reasons known only to him he had
decided that he would not attend the depot first thing in the morning but
15 would go straight to the town centre. He made no request to do this and
did not tell his manager's what he planned to do. It was only after they
phoned him to see where he was that he raised the issue. The informal
warning clearly states that when he met with Mr Dimmock the claimant
acknowledged that he was in the wrong and that his action would not be
20 repeated. In evidence the claimant confirmed that he had in fact said that
at the meeting with Mr. Dimmock.

24. At the end of the day there was nothing said by the claimant in his own
evidence which came even close to amounting to a breach of contract far
less a repudiatory breach of contract. Indeed once one drilled down into
25 the claimant's evidence all that one could discern was a sense on his part
that he felt bullied in some way every time the respondent sought to
exercise normal management functions. Apart from the matters
mentioned there was absolutely no specificity in his evidence. I did not
consider him to be an accurate historian and found his evidence to be
30 neither credible nor reliable.

25. The claimant also led evidence from Mr Miller who had been a refuse
vehicle driver for a period of many years before he had retired in April
2023. His evidence was completely inspecific and he was not asked about
any specific instances. He was invited by the claimant to agree with the

claimant that management had spoken to him inappropriately and he confirmed that in his view” the management bullied everybody but more so the claimant”. He had apparently witnessed the incident on 1 July but his evidence relating to this was inspecific. What he said was “*It started off as handbags and then escalated.*” He also said that the claimant had not been really raising his voice. Given that the claimant himself admitted he was shouting as did Mr Harazim and given that all of the written statements also confirmed this I found this statement did not enhance Mr Miller’s credibility. At the end of the day there was really nothing in his evidence other than that he felt the management were continually pulling people up. His evidence was so inconsequential that the respondent’s representative did not seek to cross examine him.

26. Both of the respondent’s witnesses gave evidence in a clear and patently honest fashion. They made appropriate concessions. I preferred Mr Harazim’s account of what had taken place on 1 July to that of the claimant. He did not seek to overegg the pudding. He accepted that the claimant had only touched him momentarily with his belly but it was clear from his evidence that Mr Harazim had felt undermined and intimidated by the claimant’s aggression.

27. Mr Garden’s evidence was that the respondent had been proceeding entirely appropriately with a disciplinary process in relation to the claimant. He considered it extremely likely that the outcome would have been that the claimant would have been dismissed had the matter proceeded to a disciplinary hearing. He confirmed that he himself had viewed the CCTV footage. His position was that the CCTV footage was simply inconclusive because of the angle from which it was being filmed. He did not agree with the claimant that the footage clearly showed that no physical contact had taken place. Given the apparent angle the camera was looking at from the stills it appeared to me that Mr Garden’s version was much more likely to be the truth. I considered both of the respondent’s witnesses credible and reliable.

Issues

28. The sole issue before the Tribunal was whether or not the claimant had been unfairly constructively dismissed by the respondent. If I had found in favour of the claimant the claimant was seeking compensation.

Submissions

5 29. Both parties made submissions. The claimant's submission initially dealt entirely with his concern that there was something untoward in the way that the respondent logged their access to CCTV footage. This was entirely irrelevant to the matter before me and in any event it appeared to me that the claimant's position was based on a misapprehension as to the
10 factual and legal position. The respondent's representative made her principal submission in writing. She referred to the law on the subject and in general terms I agreed with her summary therefore I will not repeat her submissions at length but refer to them where appropriate below.

Discussion and Decision

15 30. Section 95(1)(c) of the Employment Rights Act 1996 states

“(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—

....

20 (c) 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.”

31. This concept is known as constructive dismissal. One of the very early
25 authorities in relation to this matter is the case of ***Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27***. This case made it clear that the test set out in section 95(1)(c) was a contractual one. The test for constructive dismissal is whether the employer's actions could be viewed as conduct amounting to a repudiatory breach of the contract of employment. The legal theory is that if the employer carries out a repudiatory breach of
30 contract then if the employee resigns in response to that repudiatory breach they may be taken to be dismissed rather than simply to have resigned. It therefore follows from this that not all conduct by the employer of which an employee disapproves or which an employee dislikes will

entitle an employee to resign and claim they were constructively dismissed. The conduct by the employer must be sufficiently serious as to amount to a repudiatory breach of contract.

32. In this case, the claimant stated that the respondent had breached the implied term of trust and confidence. This was confirmed to Employment Judge Kemp. This term was discussed in the case of **Malik v Bank of Credit and Commerce International SA [1997] IRLR 462**. This case confirmed that every contract of employment contains an implied term 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. Because the relationship of confidence and trust is so important any breach of the implied term will amount to a repudiatory breach. The case of **Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347 EAT** confirmed that for there to be a breach of the implied term then what was required was conduct which was calculated or likely to seriously damage or destroy the relationship. In this case I was absolutely satisfied that there was absolutely nothing the respondent had done which came even close to meeting this standard. The case of **Omilaju v Waltham Forest London Borough Council [2005] ICR 481** makes it clear that the test is an objective one. In this case the claimant said at various times in response to questioning that he had felt stressed at the time. He complained of lack of sleep and indicated he had consulted his doctor. His suggestion that his stress was related to his employment was somewhat undermined by the medical certificate which he provided which said that he was signed off due to stress at home. That having been said, I was prepared to accept that the claimant had genuinely felt stressed about the upcoming disciplinary hearing. The question however of whether there has been a breach of the implied term requires to be looked at objectively. In this case the respondent was more than entitled to decide that they should fix a disciplinary hearing to deal with the allegation made against the claimant. The witness statements they had showed an extremely serious act of aggression carried out on their foreman and that this had been done in front of other members of staff. This was the respondent exercising their rights in terms of the contract of employment,

it was not something which would undermine the contract. I was also referred by the respondent to the case of ***Claridge v Daler Rowney Ltd [2008] IRLR 672*** which once again confirmed that for the constructive dismissal to be established the employer must have behaved so badly that the employee could not be expected to stay in his employment. This case stated that conduct by the respondent must be outside the range of reasonable responses. Once again there was absolutely nothing in even what was alleged by the claimant which came close to establishing this.

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33. It was also the respondent's position that the claimant had not established that he resigned in response to any of these breaches. It appears that whatever particular incidents he was founding upon his view was that he had been bullied over a period. I considered it far more likely that as a trade union official he would know well that the outcome of the disciplinary hearing was very likely to be his dismissal. I considered it more than likely that this was the true reason why he resigned when he did.

34. At the end of the day I have no hesitation in finding that the claimant was not constructively dismissed by the respondent. He resigned. The claim is therefore dismissed.

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Employment Judge: I McFatridge
Date of Judgment: 19 December 2023
Date sent to parties: 21 December 2023