



EMPLOYMENT TRIBUNALS

Claimant: Mr Jonathan Corner

Respondent: Triton Risk Management Limited

Heard at: Employment Tribunal at Newcastle upon Tyne (remotely by CVP)

On: 16 May and 27 June 2023

Before: Employment Judge Heather

Representation

Claimant: Mr Jones, Counsel

Respondent: Mr Ryan, Counsel

JUDGMENT ON LIABILITY

1. The claim for unfair dismissal is well founded. The Claimant was unfairly dismissed by the respondent.

REASONS

Preliminary matters

Format of the hearing

1. The hearing was conducted by video over 2 days. On the first day matters proceeded without any technical difficulties. On the second day of the hearing my internet connection was interrupted part way through the day. I needed to use a mobile phone hotspot to connect to CVP and to turn off my video in order to preserve bandwidth and sound quality. The parties and their representatives maintained their videos and I was able to observe what was happening at all times. Each party's counsel confirmed that they were content with those arrangements.

Time estimate

2. The hearing was listed with a time estimate of one day. Given the nature of the claim, number of issues to determine and volume of evidence, that time estimate was a significant underestimate. The matter went part heard on 16 May 2023 and was listed for a second day on 27 June 2023. The matter was still not concluded at the end of the second day as witness evidence did not finish until after 5pm. Rather than listing for a third day both parties (through their respective Counsel) gave written closing submissions.

Split hearing

3. The Tribunal agreed to a split hearing on the first day; liability first and then remedy.

Bundle

4. The original hearing bundle ran to 320 pages plus 3 witness statements and an agreed list of "acts and omissions". On the second day of the hearing an additional 19 pages of evidence were introduced by the respondent to which the claimant did not object.

Application to strike out

5. During Mr Foxcroft's evidence on the second day of the hearing he admitted (in response to a direct question from the Claimant's counsel) that the bundle in front of him was marked up with post it notes and page references. An application was made by the Claimant to strike out the Response. Having received a scanned copy of the bundle which Mr Foxcroft had been using and hearing submissions from both Counsel I gave oral reasons for refusing that application during the hearing and do not repeat them here.
6. The hearing continued with Mr Foxcroft using a clean copy of the bundle for the remainder of the time that he was giving evidence.

The claim

7. The Claimant's claim was issued on 12 January 2023. The Claimant relied upon his employment with Cleveland Fire Brigade Risk Management Community Interest Company and subsequently with the Respondent as a Mines Rescue Captain (by a transfer of undertakings). The continuous employment was said to have started on 1 August 2018. The Claimant resigned, with immediate effect, on 27 October 2022.
8. The Claimant's grounds of complaint as set out in the particulars of claim annexed to the ET1 were that the respondent breached the implied term of trust and confidence by:
 - a. dismissing him for gross misconduct;
 - b. failing to carry out any adequate investigation;
 - c. changing the decision (to dismiss) to a final written warning while accepting that the evidence that the decision was based upon was unreliable and therefore not giving any evidence to support the decision to give him a final written warning.
9. By the time of the hearing there was an agreed list of "acts and omissions alleged by the Claimant", which were as follows:
 - a. Inadequate investigation of alleged misconduct including lack of witness statements, inadequate ANPR information and lack of CCTV evidence.
 - b. Refusal to allow the Claimant additional time after returning from his holiday before proceeding with the disciplinary hearing and his dismissal on 19th August 2022.
 - c. The dismissal of the Claimant for an alleged breach of a policy to be aware of the location of all Mines Rescue Team staff when no policy was in place before 19th August 2022.
 - d. Dismissal of the Claimant for the alleged misconduct of a colleague.
 - e. Informing the Claimant by email from Katharine Coutts, HR Manager, on 12th October 2022 that his appeal had been successful and apologising for the stress

caused leading the Claimant to believe he would return to work.

- f. Graham Foxcroft, the Appeal Manager, accepting that the Respondent's investigation and evidence was inadequate but giving a final written warning for alleged negligent conduct confirmed by letter of 21st October 2022.
- g. Referring to the refusal of Anglo American to allow the Claimant to work on Site without providing any evidence of this.
- h. Providing no evidence that the Respondent had made any attempt to persuade Anglo American to review this decision in light of the lack of evidence in support of misconduct by the Claimant.
- i. Unsuitable offers of employment by the Respondent.
- j. The last straw was being given a final written warning.

The response

10. The Respondent's response was dated 21 February 2023. The details of the Claimant's employment were agreed. R provides safety, security and emergency response services to companies operating in high hazard environments. C was employed by R to work on a site which was run by one of the companies to which R provides services.
11. The Respondent denied that it had acted in any manner that gave rise to a repudiatory breach of contract; that if it was in breach of contract it was not fundamental; that if it was in breach of contract the Claimant did not resign in response to that breach and that the Claimant had waived any such breach through his actions.
12. The Respondent also asserted that if it was found to be in breach of contract that the dismissal was for a potentially fair reason, namely some other substantial reason (section 98 (2) Employment Rights Act 1996). The Respondent set out that the decision to terminate the Claimant's contract for some other substantial reason was fair in all the circumstances because:
 - a. The Respondent followed a fair procedure;
 - b. The Respondent took reasonable steps to seek reinstatement of the Claimant to the site;
 - c. The decision to terminate was within the band of reasonable response.

The evidence

13. The Tribunal heard evidence from the claimant and from Mr Graham Foxcroft, CEO on behalf of the respondent.
14. Both witnesses relied upon witness statements, which were taken as read. Mr Foxcroft introduced some additional evidence by way of examination in chief. Both witnesses were subject to cross-examination, the Tribunal's questions and re-examination.
15. The Claimant had filed a witness statement from Mr Robert Stenhouse but did not call him as a witness.
16. The Tribunal was referred selectively to a hearing bundle of relevant documentary

evidence (including the supplementary evidence which was admitted on the second day of the hearing).

Assessment of the evidence

17. The Tribunal is satisfied that both of the witnesses gave their evidence honestly and to the best of their knowledge and belief. It is not necessary to reject a witness' evidence, in whole or in part, by regarding the witness as unreliable or as not telling the truth. The Tribunal naturally looks for the witness evidence to be internally consistent and consistent with the documentary evidence. Is the evidence credible? Is it corroborated by other witness evidence and/or by the contemporaneous records or documents? How does the evidence withstand cross-examination? How reliable is a witness's recollection? Is a witness speculating rather than testifying? What is the witness's motive for their account? How does the witness compare to other witnesses?
18. The Tribunal found the claimant to be a consistent and compelling witness, whose account was detailed and plausible, with an impressive recollection of events that were of considerable significance to him, and in keeping with the documentary record. The Tribunal guards against the possibility that his evidence illustrates how "the wish can be father to the thought", but any suggestion of that is overtaken by the consistent account given by the text messages and the email evidence.
19. In contrast, the evidence of Mr Foxcroft was in many places vague and less well-informed. Mr Foxcroft was somewhat remote from some of the events in question, and frequently referred to what he had been told by Mr Jonathan Davies rather than from his own knowledge or experience.
20. The Tribunal preferred the evidence of the claimant where there were matters of dispute or contest for the above reasons.

Findings of fact

21. C was employed by Cleveland Fire Brigade Risk Management CIC (CFBR) on 1 August 2018.
22. On 1 August 2020 C's employment was transferred to R.
23. The site where C worked (the Wilton site) is operated by Anglo American (AA).
24. R is contracted by AA to provide services on the Wilton site.
25. R is not the only company contracted to provide services to AA at the Wilton site.
26. Personnel working at the Wilton site include AA employees, R's employees and employees of other organisations.
27. C's contract of employment with CFBR describes his role as "Site Protection Officer" (page 39).
28. C's role at the date of termination of his employment (and at all relevant times for the purpose of this claim) was Mines Rescue Captain.
29. C was responsible for leading a team of 5 Mines Rescuers.
30. C's contract of employment states that: "*The disciplinary rules and procedures*

applicable are in accordance with the company Terms and Conditions and respective policies and procedures.” (page 40 – 41).

31. C was not provided with the Terms and Conditions, policies or procedures referred to in his contract.
32. C’s contract lists a number of duties / expectations of him as Mines Rescue Captain, which included:
 - a. Implement arrangements to account for all people on-site and identify missing persons;
 - b. Confirm all persons are accounted for; or their last known location and condition.
33. It is common ground between the parties that subsequent to the incident that led to C’s disciplinary hearing R has implemented a policy which sets out the specific arrangements for Rescue Captains to check in with their staff every 2 hours.
34. It was common practice amongst personnel working on the Wilton site to attend the Visitor Centre car park to collect take away food delivered there.
35. On 12-13 July 2022 C was working night shift. During the night C gave permission for one of his team (Sarah Linaker (SL)) to attend the Visitor Centre (on a different part of the site) to give some keys to her partner. C told SL to take her radio with her.
36. At around 03:30 – 04:00 on 13 July 2022 C was asked by Rob Seaman (a Superintendent with AA) to muster his team back to the site office.
37. C mustered his team and they were all at the site office within 5 minutes (including SL).
38. R received an email on 5 August 2022 from Jeff Hawman (Deputy Mine Manager, AA) as follows (page 60):

“Hi Jonny / Rich

It has been highlighted that we may have had an insufficient number of MRT personnel available at Wilton on at least seven occasions in the last two months due to unauthorised absence. I don’t need to stress how serious this could be when you consider the pain that we all felt after the improvement notices earlier this year.

Please instigate a through [sic] investigation of potential MRT number deficiencies immediately.

I have attached some evidence which has been gathered regarding vehicle movements off the Wilton site. If you need any assistance with your investigation then please ask.

I’ll put a meeting in for Monday morning to have a catch up with you, Stu H, Paddy and I.

*Best regards
Jeff Hawman”*

39. Further ANPR data was sent to R by AA on 7 August 2022.
40. R commenced an investigation on 9 August 2022.

41. On 9 August 2022 SL was interviewed by Richard Fisher (RF) (Security Manager) as part of R's investigation. SL told RF that she kept her phone and radio with her when she left the site. She stated (page 75):

"I have just heard that there was talk of using CCTV. I cannot believe that I was away off site for so long. We always have checks to do. I have delivered training and I have photographs to prove it".

42. On 9 August 2022 C was interviewed by RF as part of R's investigation. C was unequivocal in his responses. He said that he was unaware that SL had left the site on four occasions for 6 – 7 hours each time. He stated (page 77):

I had everyone in on the 27th June and told them not to leave the site. I'm confused. The only one I know about was in July. The night in question. So, the only one I know about where Sarah went off was the 26th of July where she went to deliver keys to her boyfriend. I cannot believe she took so much time off site. I would have been aware of it. There is security patrols to do. Training to do."

43. C was suspended on 9 August. The suspension checklist dated 10 August 2022 details the following reasons:

- C could not offer any explanation as to why a member of his team was allowed to leave site without authorization and without him noticing.
- C's actions caused R to fall out of contractual compliance with the client and strained the trust / relationship with the client.
- There would be a risk to safety of staff, service users, property, finance or information if C remained at work.
- Not appropriate for C to remain in site until the matter has been fully investigated.
- No alternative roles that C is qualified to fulfill.

44. As part of his investigation RF considered, and took into account, the ANPR data which was appended to the email from AA on 5 August 2022 and the additional information which was sent on 7 August 2022.

45. RF made the following recommendation in an email dated 11 August 2022 (page 83):

- Progress to disciplinary hearing for gross misconduct for the following charges:
 - Bringing the organisation into disrepute;
 - Repeated or serious failure to obey instructions (accounting for and maintaining the welfare of his team);
 - Serious and repeated breaches of health and safety rules.

46. Gus Murphy (GM) (HSE Advisor, AA) provided a witness statement to R which is dated 12 August 2022. That witness statement sets out that:

- At around 22:30 – 23:00 on 12 July 2022 GM attended the Wilton site. He noticed that the Triton Rescue vehicle was not parked on site and also that an Audi motor

vehicle belonging to one of the Triton team was not on site.

- GM assumed that the Triton team was out on patrol.
 - Between 03:30 – 04:00 on 13 July 2022, the AA Superintendent asked GM the whereabouts of the Triton Team as he (the Superintendent) was unable to locate anyone.
 - GM and his colleague went to the Triton office. There was nobody there.
 - There was nobody at the security hut.
 - GM and his colleague returned to the Triton office and GM's colleague informed GM that the medical room door was locked from the inside and in darkness.
 - GM and his colleague tried to contact the Captain (C) by radio.
 - They did not get a response for about 5 – 10 minutes when C appeared saying that he was conducting BA4 inspections.
 - GM and his colleague challenged C about doing inspections in the dark and challenged him as to the whereabouts of his team.
 - C was requested to muster his team and to confirm they were accountable and on-site.
 - GM was informed by his colleague at 05:00 – 05:30 that the Triton team were in the Triton office and that the Triton Rescue vehicle had returned to the site.
47. C was notified of the decision to proceed to a disciplinary hearing in a telephone conversation on 17 August 2022 with Callam Brown (CB) (Emergency Preparedness and Response Manager).
48. During the call between C and CB on 17 August 2022 and subsequently in a call between them on 18 August 2022, C requested that the disciplinary hearing be postponed. On both occasions CB refused C's request to postpone the disciplinary hearing.
49. Following the telephone call between C and CB a letter inviting C to the disciplinary meeting on 19 August 2022 was sent to C by email on 17 August 2022 (pages 87 – 88). That letter sets out that the allegations to be considered were:
- a. Gross negligence – serious neglect of duties, bringing the organisation into disrepute and failure to carry out fundamental duties as Rescue Captain. This allegation related specifically to:
 - i. Failing (on multiple occasions) to notice a member of his team left the site without authorisation (and for significant periods of time) on seven separate occasions for periods between 31 minutes and 7 hours 16 minutes.
 - ii. Staffing levels, consequent on i above, falling below minimum contractually required on the site thus risking the health and safety of all on site as well as jeopardising R's relationship with the client.
 - iii. Not providing appropriate support to a member of staff after they disclosed they

were experiencing personal problems which amounts to a failure in duty of care to staff.

- b. Sleeping on duty and breach of fundamental duties as Rescue Captain.
50. The disciplinary hearing took place on 19 August 2022 and was chaired by CB.
51. At the disciplinary hearing C, again, requested a postponement. CB refused that request.
52. C was told verbally at the conclusion of the meeting that he was to be dismissed immediately due to gross negligence. The reasons were stated to be:
- a. Breach of trust with company;
 - b. Breach of contractual obligation as Mines Rescue Captain;
 - c. Breach of contractual obligation with client – been multiple times for multiple hours – if it was one occurrence the outcome may have been different.
53. An allegation of being asleep on duty was not upheld due to insufficient evidence.
54. The allegation of not supporting his staff member was withdrawn as the evidence showed that C was not aware of the personal problem until after the incident. R's notes of the disciplinary hearing are not very clear in relation to this point but the subsequent letter and the evidence of C and R's case is that this allegation was not upheld.
55. The outcome of the disciplinary hearing was confirmed in writing by way of letter from the disciplinary officer to C dated 23 August 2022 (pages 105 – 107):
- a. The allegation of gross negligence, bringing the organisation into disrepute and failure to carry out basic duties as Rescue Captain were upheld on the basis that:
 - i. the disciplinary officer found that C had not noticed that a member of his team had left the site on multiple occasions, for extended periods (of up to 7 hours 16 minutes) over a 2 month period;
 - ii. the disciplinary officer found that C's position that he maintained radio contact with his team was contradicted by the fact that a member of his team took several unauthorised absences from the site;
 - iii. the disciplinary officer concluded that C had not done enough to ensure the whereabouts of his team;
 - iv. the disciplinary officer concluded that C had not checked in with his team regularly enough;
 - v. the disciplinary officer discounted one occasion when a member of C's team was alleged to have left the site unauthorised as the disciplinary officer accepted that C was not on duty at the time;
 - vi. the disciplinary officer concluded that C's negligence had led R to breach its contractual minimum staffing levels;
 - vii. the disciplinary officer concluded that C's failure to notice an unauthorised

absence from his team member resulted in R not having a fully functioning mines rescue service and that in the event of an emergency the health and safety of all individuals on site would be severely compromised.

- b. C was given the benefit of the doubt in relation to when he had information available to him to enable him to provide support to his team member regarding her personal circumstances and no further action was to be taken regarding that allegation.
 - c. C was given the benefit of the doubt in relation to the allegation of sleeping on duty and no further action was to be taken in regard to that allegation.
56. The overall conclusion of the disciplinary officer was that C's actions (in failing to notice the unauthorised absence of a member of his team) amounted to breaches of R's procedures for Mines Rescue Captains, C's contract of employment and his fundamental duties as a Rescue Captain and that they were such serious breaches of C's obligations that dismissal without notice was appropriate.
57. C appealed against his dismissal by letter dated 7 September 2022 (pages 113 – 119). The appeal raised (amongst other things) the question of the reliability of the ANPR data which had been relied upon at the disciplinary to substantiate SL being absent from site.
58. R undertook further investigation in light of C's appeal against the outcome of the disciplinary hearing and it was at that point that R concluded that the ANPR data was not as reliable as it had previously been thought to be. R had confidence in the ANPR data at the time of the investigation, disciplinary hearing and decision to dismiss.
59. The appeal hearing took place on 23 September 2022 and was chaired by Graham Foxcroft (GF). At the end of the meeting C was told by GF that GF would need to take time to investigate matters further. C was asked what outcome he wanted from the appeal. He did not give an explicit answer. C said, "I'm not sure", "..if the decision gets overturned then I would decide whether I would want to return", "Yeah, I think so", and said that he would like to be able to return to work. C explained that he was planning to be away for a month and when asked what he would do if he was re-instated, he said that he would seek to take unpaid leave.
60. On 10 October 2022 Katharine Coutts (HR Manager, Triton) sent an email to C, as follows (page 237):
- "Good morning Jack*
- I hope you are keeping well.*
- Thank you for your patience whilst Graham has been investigating your appeal. Following his investigation, we would like to have an opportunity to discuss the outcome of these findings and a resolution with you. I am aware that you may be abroad at this time – is that still the case? If not, please could you let us know when is convenient for you to have a further meeting with us. If you are still abroad, would you be comfortable / able to have the meeting via telephone / Microsoft Teams / Zoom. Please let me know your thoughts.*
- Best wishes*
- Katharine Coutts".*
61. KC sent a further email to C on 11 October:

“Good morning Jack! [sic]

I hope you are well.

Following on from my last email (below), have you had an opportunity to consider when you will be available for a further discussion with us re your appeal? Please let me know your thoughts and I will get a meeting organized.

Best wishes

Katharine Coutts”

62. C replied to KC later in the day on 11 October:

“Hi Katharine

I am still on holiday until Friday the 21st.

Having thought about it I would prefer to wait until I am back in the uk due to the stress of it all.

Regards

Jonathan Corner”

63. On 12 October 2022 (page 235) KC sent an email to C, as follows:

“Dear Jack

*Thank you for your reply. We appreciate that this has been a difficult time and you are currently abroad, however, we would like to confirm with you that Graham has made the decision to uphold your appeal and overturn the original decision. An outcome letter will be sent to you over the next few days outlining Graham’s decision in further detail, your reinstatement (should you wish to return. Would you indicate whether or not this would be an option, as in the Appeal hearing you intimated that you would want to think about it,) and other matters relating to this. If you let me know of a date after 21/10/2022 or sooner, we can get a meeting arranged. We apologise for any stress caused during this time, but we must consider all allegations and evidence available before any decision can be made. I hope by receiving this outcome, this has relieved some of your stress. If you have any questions, please let me know.
Looking forward to hearing from you.*

Best wishes

Katharine Coutts”

64. On 18 October 2022 C sent an email to KC setting out that he was travelling home and requested a copy of the outcome letter so that he could make an appointment on his return.

65. C subsequently received a letter dated 21 October 2022 (page 240 – 245) which detailed the outcome of the appeal and which set out the following:

- a. The dismissal was to be substituted with a final written warning;
- b. The appeal officer (Mr Foxcroft) accepted that the ANPR data had been shown to be unreliable (albeit he stated that the information regarding the unreliability of the ANPR was not known at the time of the decision to dismiss);
- c. C had failed to check that his colleague had returned to site after authorising a period of absence on 13 July 2022, which Mr Foxcroft considered to be negligent;

- d. C admitted that he should have checked in with his staff more often;
 - e. C's actions could have had a serious impact on the business;
 - f. R could have done more to support C (with management training and to ensure that C knew what was expected of him);
 - g. Nevertheless, given the nature and demands of the role common sense should have told C that he should be checking in with his team;
 - h. It was fair and reasonable to investigate the allegation of being asleep on duty even if that allegation was not subsequently upheld;
 - i. Allegations of similar conduct by other staff will be investigated but have no bearing on the disciplinary action against C;
 - j. C had said in the appeal that he did not feel the need to monitor his team as they were all experienced and he didn't think that they would go off site but Mr Foxcroft considered this irrelevant to C's obligation to check in with his team;
 - k. Dismissed C's allegation regarding his request for the disciplinary hearing to be adjourned;
 - l. Mr Foxcroft's conclusion that C had a negligent attitude to his teams attendance and that his actions had caused R to breach its contractual minimum staffing levels with its client;
 - m. In the event of an emergency the health and safety of all individuals on site would have been compromised;
 - n. C was not being punished for the actions of others;
 - o. The delay between the incident that led to the initial investigation and the commencement of the investigation was down to when R was notified of it by its client;
 - p. C's complaint that the notes of the disciplinary hearing were not accurate was not upheld as the notes do not need to be verbatim and Mr Foxcroft concluded that they were a proper record of that hearing;
 - q. C's position is reinstated with immediate effect;
 - r. The client has enacted 3rd party removal and do not wish C to return to site;
 - s. Details of a meeting were set to discuss the 3rd party removal (on 26.10.2022).
66. There was no direct evidence nor any witness evidence from AA regarding the third party removal process. The relevant email exchanges were as follows:
- R sent an email to AA on 29 September 2022 *"can I confirm that you as the client, do not wish Mr Corner to return to the [] project"*.
 - On 30 September 2022 an internal email was sent from Jonathan Davies to GF stating, *"Following receipt of our email request to [] I spoke to the mine manager."*

They are requesting more detail of the case and evidence”.

- There was an email exchange between Jonathan Davies (an employee of R) and Jeff Hawman (mine manager, employed by R’s client) on 27 October 2022 and 28 October 2022, as follows:

“Good afternoon Jeff,

Following the recent investigation and subsequent dismissal of Mr Corner as Mines Rescue Captain it has become clear that some of the supporting ANPR and Site Access Card evidence from Wilton international controlled via Sembcorp is unreliable. Following lengthy discussions with our HR and legal team, the unreliability of some of the evidence will lead to all of the evidence being brought into question. With this in mind, we have no option than to reinstate Mr Corner. We have informed Mr Corner that the client [] does not wish him to return to work on any of the Woodsmith Project sites. Can I request confirmation of this position so we can take the case forward to conclusion”.

“Hi Jonny

Please could you put your HR and Legal Representatives in touch with @Dolby, Rachel and @Campbell, Richard to provide them with some more information on this to enable further discussion”.

- On 28 October 2022 Jonathan Davies emailed GF that:

“Spoke to Jeff the mine manager 5 mins ago.

[] are up for the email confirming that they don’t want him on site. There [sic] legal.guys [sic] want some more info. I’ll push this first thing Monday. Am I giving them Katherine’s details?”.

- On 31 October 2022 Katharine Coutts (HR manager at R) emailed Rachel Dolby and Richard Campbell as follows:

“Good afternoon Rachel and Richard

I hope you are both well.

I have been asked to contact you by Jeff Hawman on behalf of Triton Risk Management in relation to one of our members of staff, Mr Corner. Following the investigation and subsequent dismissal of Mr Corner as Mines Rescue Team Captain it has become clear that some of the supporting ANPR and Site Access Card evidence from Wilton International controlled via Sembcorp is unreliable. As a result of this, we have made the decision to overturn the original decision and reinstate Mr Corner. However, we have been informed that the client AA does not wish for Mr Corner to return to work in any capacity on any of the Woodsmith Project sites. Can I request confirmation of this position so we can take the case forward to conclusion”.

67. The meeting to discuss the next steps was on 26 October 2022 (Wednesday). During the meeting GF told C that R had been *“fighting on your behalf”, “we are fighting back”, “we are not happy with it”, “we don’t want to lose you”, “I will try one more time with Anglo, just in case they are willing to reconsider”, “We would love to just offer you another mines rescue role, but we just don’t have anything outside of Anglo”.* KC said, *“We are sorry, because it’s not fair on you”.*

68. The email exchanges regarding the third party removal process were instigated by R. The assertions made by GF in the meeting on 26 October 2022 are in direct conflict with the emails that R sent to AA. My finding is that it was R that instigated the removal of C from the site and R then presented a false account of that to C.
69. In the course of the meeting on 26 October 2022 R identified potential alternate roles for C as follows:
- a. Retail Security Office, Newcastle.
 - b. Gatehouse Security Office, Hartlepool.
 - c. Controller, night shifts.
 - d. Contract Manager.
 - e. Accounts assistant.
70. In the meeting C enquired about a role that he was aware of at Port of Blyth. He was told that the only vacancy was a zero hour contract and required a SIA license.
71. C expressed in the meeting that he wanted to go back to his existing role or another mines rescue role. He expressed concerns that the roles identified were not suitable for various reasons such as the requirement for an SIA license (which he did not have), the distance of the job locations from his home or that he had no relevant experience (accounts).
72. C said that he would not make any immediate decisions and that he would like to speak to his family and solicitor before making a decision.
73. GF and KC explained to C that if he agreed to return to work then he would receive back pay from the date of his dismissal but that a separate decision may be made to dismiss him for "some other substantial reason" if an alternate role could not be agreed and AA would not change its decision that he was not allowed to work on their site(s).
74. There was some discussion during the meeting as to the timing of when C needed to make a decision. Initially, GF wanted C to decide immediately but subsequently agreed that he would give C "until Tuesday" (1 November 2022).
75. C resigned on 27 October 2022, by letter. The reason that C gave for the resignation was a breach of the implied term of trust and confidence and he highlights the following:
- Dismissing him for gross misconduct;
 - Failing to carry out any adequate investigation;
 - Changing the decision to a final written warning while accepting that the evidence the decision was based on was "unreliable in the circumstances" therefore it did not provide any evidence to support the decision to give a final written warning;
 - The email from KC on 12 October 2022 was misleading because it did not mention the final written warning, it said that C could return to work and did not mention that C would be unable to work on any AA site;

- R had not provided any evidence of who made the decision at AA;
- R had not provided any evidence of the effort to avoid AA's decision to refuse to allow C back on site;
- All the offers of alternate employment were unsuitable either because C did not have the relevant experience or they were too far from his home;
- C would be at significant risk of dismissal when in a new role of which he had no experience whilst he was subject to a final written warning.

76. C's letter explicitly set out that he intended to claim constructive dismissal.

Claimant's submissions

77. The claimant's written submissions were 19 pages (65 paragraphs). The Tribunal will not attempt to summarise those submissions but incorporates them by reference.

Respondent's submissions

78. The respondent's written submissions were 21 pages (67 paragraphs). The Tribunal will not attempt to summarise those submissions but incorporates them by reference.

Relevant law

Constructive dismissal

79. As the claimant resigned his employment and relies upon a constructive dismissal, he must establish that he terminated the contract under which he was employed (with or without notice), in circumstances in which he was entitled to terminate it without notice by reason of the respondent employer's conduct (section 95 (1) (c) Employment Rights Act 1996).

80. Section 98 of the Employment Rights Act 1996 provides that:

“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

*(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) A reason falls within this subsection if it -

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

81. It is enough that the employee resigned in response at least in part, to fundamental breaches of contract by the employer. The fact that the employee also objected to other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the circumstances of the repudiation: Meikle v Nottinghamshire County Council [2005] ICR, CA. It follows that once a repudiatory breach is established, if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon: Wright v North Ayrshire Council UKEATS 0017/13 (27 June 2013); Abbey Cars West Horndon Limited v Ford UKEAT 0472/07.

Breach of trust and confidence

82. The relevant principles are found in Western Excavating (EEC) Ltd v Sharp [1978] ICR 221. The test of a constructive dismissal is a three-stage one:
- i. was there a fundamental breach of the employment contract by the employer?
 - ii. did the employer’s breach cause the employee to resign?
 - iii. did the employee resign without delaying too long and thereby affirming the contract and losing the right to claim constructive dismissal?

83. The Tribunal reminds itself that for a Claimant to establish that the respondent has behaved in such a way as to amount a breach of the implied term of trust and confidence is a high hurdle. In Malik v Bank of Credit and Commerce International SA 1997 IRLR 462 The House of Lords confirmed that:

“the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

84. The Court of Appeal in Omilaju v Waltham Forest London Borough Council 2005 ICR 481 confirmed that, the test is an objective one. The Court also concluded that the act constituting the last straw must contribute to the breach of the implied term of trust and confidence.

Some other substantial reason

85. In Scott Packing & Warehousing Co Ltd v Paterson [1978] IRLR 166, the Scottish EAT confirmed that third-party pressure to dismiss could constitute “some other substantial

reason” with Lord McDonald saying:

“In our view an employer cannot be held to have acted unreasonably if he bows to the demands of his best customer in a situation such as this even if the customer’s motive for seeking the removal of the employee was suspect”.

86. The UKEAT said in *Henderson v Connect (South Tyneside) Ltd [2010] UKEAT/0209/09/SM* (Lord Underhill at paragraphs 13 and 18):

“13...It must follow from the language of s. 98 (4) that if the employer has done everything that he reasonably can to avoid or mitigate the injustice brought about by the stance of the client – most obviously, by trying to get the client to change his mind and, if that is impossible, by trying to find alternative work for the employee – but has failed, any eventual dismissal will be fair: the outcome may remain unjust, but that is not the result of any unreasonableness on the part of the employer.

*“18...however much the employer “takes into account” the injustice to the employee caused by the third party’s stance, he may still reasonably decide to dismiss – see in particular Sir John Donaldson’s recognition in *Dobie* (at p 817 C-D) that the factors to which he draws attention cannot be decisive. As we understand it, the effect of *Dobie* is that in a case whether the client’s stance appears to be liable to cause injustice, the tribunal must consider with special care whether the employer had indeed done all that he could to avoid or mitigate that injustice: in a case of patent injustice it may be necessary for the employer to “pull out all the stops”.*”

Effect of dismissal being overturned on appeal

87. It is clear from the cases of *Roberts v West Coast Trains Ltd [2004] IRLR 788* and *Patel v Folkestone Nursing Home Ltd [2018] EWCA Civ 1689* that the effect of an employer upholding an appeal against a dismissal is that the employment contract is revived and treated as though the employee / employer relationship had never ended.

Burden of proof

88. The R has the burden of showing what the reason for dismissal was and whether this was a potentially fair reason for dismissal. In a constructive dismissal claim, if the Tribunal has determined that there has been conduct by R which amounts to a repudiatory breach of contract and that C has been constructively dismissed, it is then for R to show the reason for that dismissal (essentially, the reason for the repudiatory breach) and that it was a potentially fair reason for the dismissal. If so, the Tribunal must then consider whether R acted reasonably in all the circumstances in treating the conduct as a sufficient reason (section 98 (4) ERA), the burden here being neutral.

Discussion and conclusions

89. I will deal with the issues in dispute applying the relevant legal principles to the facts as I have found them to be.

What was the act that caused or triggered the resignation?

90. I am satisfied that C’s resignation was triggered by the combination of (i) C’s perception of the flawed investigation and disciplinary procedure, (ii) R sending a misleading email to C on 12 October 2022 which led C to believe that his appeal against dismissal had been entirely successful and that he had the choice to return to work (in his existing role) when in fact his appeal had only been partially successful, he was not going to be able to return to his existing role and R intended to either redeploy C into an alternate role or to dismiss him for “some other substantial reason”.

Did the above alleged acts (as set out in paragraph 90) breach the implied term of trust and confidence or did the respondent act with reasonable and proper cause at all material times?

91. Reminding itself of the facts found above, the Tribunal concludes that although:

- a. R acted properly when it instigated an investigation into allegations against C which were referred to R by AA;
- b. R had a proper basis for pursuing a disciplinary hearing against C;
- c. R conducted the appeal hearing fairly and properly,
nevertheless
- d. The aftermath of the appeal hearing was not conducted fairly or properly;
- e. R's email to C of 12 October 2022 was fundamentally flawed and knowingly conveyed an entirely false impression to C that his appeal had been successful and that he could return to work. In fact, C's appeal had been only partially successful. The majority of the findings of the disciplinary officer had been upheld but the appeal officer had decided to impose a lesser sanction of a final written warning (rather than dismissal) because the disciplinary officer concluded that some of the evidence at the disciplinary hearing was not reliable. In addition, the detailed letter confirming the dismissal set out that AA had invoked a procedure which the parties referred to as 3rd party removal which meant that AA would not permit C to work on its sites. Because of that procedure invoked by AA, R had no intention of allowing C to return to his role as Mines Rescue Captain and intended to attempt to redeploy him to another role or to dismiss him for "some other substantial reason".
- f. R's position in relation to its client's 3rd party removal is not creditable because:
 - i. there is no documentary evidence to corroborate the assertions made by GF on behalf of R that R's client had invoked 3rd party removal in respect of C;
 - ii. the evidence is that R sought confirmation from its client that C would not be allowed back in the client site;
 - iii. there is no evidence that R sought to persuade its client to allow C back on site or to "fight his corner".
- g. The background to the 3rd party removal is that R says that AA said that it would not permit C to return to working at the Wilton site or any other site. R did not provide any written or oral evidence from R on this point. No contractual documentation was produced as to whether AA had any contractual right to approve or veto personnel of the Wilton site or any other sites.
- h. GF said in evidence that a £7 million contract was at risk but again there is no corroborating evidence or documentation to support this.
- i. R did make efforts to identify alternate roles for C and explained that dismissal could be a potential outcome if a suitable role was not identified and agreed between the parties.

92. The authorities refer to the need for an employer to do all that it could be reasonably

expected to do to assist C and to prevent him from losing his job (Henderson and Dobie). I am not satisfied that R attempted to “*pull out all the stops*” to assist C. On the contrary, quite the opposite happened. R was seeking to get AA to commit to writing that C could not return to work on its sites. There are no persuasive emails from R to AA or attempts to placate AA. The only oral evidence on the point was hearsay evidence from GF that other members of staff at R had attempted to speak with AA but had been told not to press the matter any further and that R was concerned that its contracts with AA (worth £7 million across various sites) were at risk.

93. I am satisfied that, viewed objectively, conduct such as R’s misleading email of 12 October 2022, the subsequent, very different, letter confirming the details of the outcome of C’s appeal, R’s attempts to get AA to commit that C could not return to work and the implementation of the procedure in relation to redeployment would seriously damage or destroy the relationship of trust and confidence between an employer and employee. In this case that behavior did, in fact have that effect on C (though of course that subjective effect is not the test that I am applying). destroyed or seriously damaged the trust and confidence between C and R.
94. I am not satisfied that R acted with reasonable and proper cause at all times because R sent a seriously misleading email to C on 12 October 2022 and it was, as I have found, R that instigated the removal of C rather than AA and R presented a false account of the position both to C in October 2022 and in these proceedings.

Did the claimant waive or affirm any of the alleged breaches of the implied term of trust and confidence?

95. It was entirely reasonable for C to have considered R’s email of 12 October 2022 to have been a positive outcome for him in respect of his appeal against the outcome of his disciplinary hearing. Accordingly, nothing turns on the fact that C did not resign at that stage.
96. C’s resignation was triggered by R instigating a further procedure (which could have led to C’s dismissal) in light of the supposed 3rd party removal by its client. C’s resignation came only six days after the letter of 21 October 2022 and was the day following the meeting regarding alternate roles on 26 October 2022. In those circumstances C cannot be said to have waived the breach or to have affirmed the contract.

Did the claimant resign in response to the alleged breaches of the implied term?

97. R’s misleading email of 12 October 2022 and R’s actions in relation to the alleged 3rd party removal procedure were the effective cause of C’s resignation.

If there is a constructive dismissal, did the respondent have a fair reason for it and did it follow a reasonable procedure in relation to it?

98. R has not suggested that there was any fair reason for the misleading email of 12 October 2022.
99. R asserts that it was acting on the instruction of AA in relation to the third party removal process and that the process would have arisen irrespective of the outcome of the disciplinary proceedings against C. R says that this is a potentially fair reason for dismissal as it amounts to “some other substantial reason” (section 98 (1) (b) ERA).
100. There is a woeful lack of evidence to substantiate or corroborate AA’s position and whether a third party removal procedure was invoked. The evidence provided that R sought written confirmation from AA (which never materialised) that it did not want C to return completely undermines R’s assertion that it sought to persuade AA to take C back

and that R fought his corner.

101. Whilst a third party removal can, and will in many cases, be a fair reason for dismissal that is not the position here and I have concluded that R did not have a fair reason for the dismissal.

Decision

102. The claimant's resignation amounted to a constructive dismissal within the meaning of section 95 (1) (c) of the Employment Rights Act 1996. The claimant was unfairly dismissed by the respondent.

Remedy

103. The parties should now seek to agree the compensation to be paid from R to C in light of the decision of the Tribunal. If the parties cannot agree the remedy between them then either party may apply within 4 weeks of the date that this judgement and reasons are sent to the parties for the matter to be dealt with at a resumed hearing. Should a resumed hearing be necessary then further directions will be given for filing and serving of evidence.

Employment Judge Heather

Date: 26 January 2024