



EMPLOYMENT TRIBUNALS

Claimant: Mr Harris-Greyson
Respondent: Serco Limited
Heard at: London South Employment Tribunal (by video-hearing)
On: 22 - 24.01.2024
Before: Employment Judge Dyal
Representation:
Claimant: Ms Nicholas, Lay Representative
Respondent: Mr Moss, Lay Representative (Employee Relations Partner)

JUDGMENT

1. The claims fail and are dismissed.

Upon written reasons being requested at the hearing they are provided as follows:

REASONS

Introduction

1. This case came before the tribunal for its final hearing. As is standard for a case of this kind, it did so without the benefit of any preliminary hearing for case management. This unfortunately meant that the claims and issues were not identified in advance.
2. There was a lengthy discussion at the outset of the hearing of what the head of claim and details of them were. It was ultimately agreed that the claim form raised the following heads of claim:

- 2.1. Constructive unfair dismissal;
 - 2.2. Breach of the statutory right to be accompanied;
 - 2.3. A claim for a financial remedy pursuant to s.38 Employment Act 2002 for failure to provide written particulars of employment.
3. The discussion was complicated by the following matters:
- 3.1. In his claim form the Claimant ticked the box at 8.1 for '*other payments*'. 'Other' in this context means a claim for payments that is not a claim for notice pay, holiday pay or arrears of pay. However, the claim form/grounds of claim did not actually then make any complaint of failure to make some 'other' payment.
 - 3.2. There is a reference to harassment in the claim form. However, harassment as such is not a complaint that is within the tribunal's jurisdiction. There is a cause of action by that name in the civil courts pursuant to the Protection from Harassment Act 1997 but the tribunal has no jurisdiction in respect of it. The tribunal does have jurisdiction to hear complaints of harassment related to a protected characteristic i.e., a s.27 Equality Act 2010 claim. However, the claim form did not on a fair reading raise such a claim. The Claimant did say in passing in the grounds of claim that he had "*asked myself*" if the harassment could be down to his "*extensive experience or my racial identity*" but he did not actually allege it had. Nor on a fair reading of the claim form is that implied. For instance, none of the discrimination boxes at section 8.1 of the claim form are checked.
 - 3.3. Reference was also made to '*wrongful accusations*' in section 8.1. However, as I explained, there is no such cause of action.
 - 3.4. In his schedule of loss the Claimant alluded to various complaints not raised in the claim form such as age discrimination; public interest disclosure detriment, failure to pay holiday pay. Likewise in a commentary he produced on the Grounds of Resistance there is a reference to race discrimination.
4. I explained to the Claimant and Ms Nicholas that the claim form was an important document and that the only claims the Claimant could pursue were those identified in the claim form originally or by amendment. I explained the tribunal's power to allow amendments to the claim form.
5. In the course of this discussion Mr Moss identified a time limit point in respect of the unfair dismissal claim. Essentially the effective date of termination appeared to be 07.12.2022, early conciliation was not commenced until 07.03.2023, i.e., a day after the primary limitation period had expired. The claim was not then presented until 21 April 2023. It seemed to me that there was a real issue about this and that it should be added to the list of issues.
6. I granted an adjournment of about 45 minutes for the Claimant and Ms Nicholas to consider whether the Claimant wanted to make any application to amend and to consider the limitation point.
7. After the adjournment Ms Nicholas indicated that the Claimant would seek an extension of time for the unfair dismissal claim and that he applied to amend to include a claim for notice pay (wrongful dismissal).

8. I allowed the application to amend to add a claim for notice pay, for reasons given orally at the time. I indicated time limits for unfair dismissal would be dealt with together with the other issues in the claim rather than as a preliminary issue.

The issues

Constructive unfair dismissal

9. Was the unfair constructive dismissal claim presented within the primary limitation period?
- 9.1. If not was it reasonably practicable to present the claim in time;
9.2. If not was it presented within such further period as was reasonable.
10. It was agreed that the constructive dismissal claim gave rise to the following issues:
- 10.1. Was the Claimant dismissed and if so how and when?
- 10.1.1. The Claimant's case is that the Respondent was in repudiatory breach of the implied term of trust and confidence as follows:
- 10.1.1.1. Being told by Mr Taylor-Webb that he was getting paid more than supervisors;
- 10.1.1.2. Being questioned about his knowledge of stolen diesel and whispers suggesting that he was involved in stealing it.
- 10.1.1.3. Inviting the Claimant to an investigation meeting while he was on sick leave, and without any referral to Occupational Health;
- 10.1.1.4. Refusing the Claimant's request to be accompanied at the investigation meeting;
- 10.1.1.5. Being invited to a disciplinary hearing on 12 December 2022
- 10.1.1.6. The letter of dismissal of 15 December 2022.
- 10.1.2. Did the Claimant resign in response to the breach and if so did he do so without delay or waiver.
11. If the Claimant was dismissed what was the reason or principal reason for the dismissal?
12. If there was a potentially fair reason for the dismissal was the dismissal fair in all the circumstances?
13. If the dismissal was unfair:
- 13.1. should there be any reduction for contributory conduct?
13.2. should there be a *Polkey* reduction?

Wrongful dismissal:

14. Was the Claimant dismissed?

15. If so was the dismissal in breach of contract?

16. Was the Claimant paid for such period of notice as he was entitled to?

Right to be accompanied

17. Was there a breach of the right to be accompanied?

17.1. Did the statutory right to be accompanied at s.10(1) Employment Relations Act 1996, apply to the investigation meeting to which the Claimant was invited?

17.2. If so was there a breach of that right?

Uplift for failure to provide written particulars of employment

18. Did the Respondent fail to provide the Claimant with written particulars of employment contrary to s.1 Employment Rights Act 1996?

19. If so is the Claimant entitled to any award pursuant to s.38 Employment Act 2002?

The hearing

20. *Documents before the tribunal:*

20.1. Bundle – 196 pages

20.2. Photo of hand-held vacuum cleaner sent by claimant;

20.3. Witness statement of witnesses identified below

21. *Witnesses the tribunal heard from:*

21.1. The Claimant

21.2. Mr Simon Dear

21.3. Mr Steve Haywood

22. The hearing was listed for 2 days commencing on 21 January 2024. Owing to an administrative error it was put in Judge Dyal's list as a two hour hearing in the afternoon of 21 January 2024. At the outset of the hearing it was agreed that Judge Dyal would use the afternoon to read the documents in the case and that the case would then continue on 22 and 23 January 2024.

23. The Claimant was represented by Ms Nicholas who presented his case in a tenacious and determined way. The Respondent was represented by Mr Moss who I infer, from the way he presented the case, is an experienced litigator.

24. All of the witnesses identified above gave oral evidence and were cross-examined at some length. The representatives made oral closing submissions on the morning of 24 January 2024.

Findings of fact

25. The tribunal made the following findings of fact on the balance of probabilities.
26. The Claimant's continuous employment began in September 2010 when he was employed by Veolia. After an apprenticeship he became an HGV mechanic. He was assigned to the Lambeth Council Environmental Services Contract and was primarily based at a depot on Milkwood Road. The Claimant's employment transferred under TUPE to the Respondent in October 2021. The Claimant's reporting line was to a supervisor and above his supervisor to Mr Daniel Taylor-Webb, National Workshop Manager.
27. The Claimant was employed on relatively favourable terms and conditions, which included a premium for Sunday working. I accept the Claimant's evidence that Mr Taylor-Webb told him a few times that he was paid more than supervisors. In my view conveyed a minor sense of disapproval in Mr Taylor-Webb's part. The Claimant was, however, more generally, well regarded by Mr Taylor-Webb and was offered a supervisor post, which he declined. The Claimant and Mr Taylor-Webb had a good working relationship.
28. In the depot, among other things, there was a workshop with several bays for working on vehicles. In July 2022, an HGV driver reported that diesel was missing from his vehicle after it had been in the workshop. This prompted an initial investigation, the provisional conclusion of which was that it was suspected that fuel was being stolen from vehicles at the workshop on a substantial scale.
29. As a result, covert cameras were installed in the workshop for a period of one week between 25 September 2022 and 3 October 2022.
30. In the meantime, the Claimant had asked for and had been granted an extended period leave. On 4 September 2022, the Claimant travelled to Jamaica for annual leave. He returned to the UK on 30 September 2022 and returned to work on 2 October 2022.

2 October 2022

31. This was a Sunday so the workplace was very quiet. The only people at the workshop were the Claimant and his supervisor.
32. The Claimant was supposed to be working and was supposed to be wearing PPE in the form of work overalls. However, on his own account the Claimant was not carrying out his work duties and was not wearing PPE, but rather was working on and cleaning his own private van.
33. I have not seen the CCTV footage itself, but I have seen several pages of still images captured from it. I have also heard Mr Dear's and Mr Heywood's evidence about what the footage shows, likewise I have heard the Claimant's account of that day.

34. Based on that body of evidence I find that:

- 34.1. The Claimant's supervisor was siphoning fuel out of vehicles in the workshop. He had stored quite large plastic containers in wheelie bins that he siphoned the fuel into.
- 34.2. He used the wheelie bins to take the full containers to another vehicle that I infer was used to take the fuel off site.
- 34.3. Although there are some circumstances in which fuel can legitimately be siphoned from vehicles – for instance if it is contaminated or if the tank is leaking – there was no legitimate reason on this occasion. The fuel was simply being stolen.
- 34.4. The supervisor was doing this openly in the workshop;
- 34.5. The Claimant was in the workshop and it is not very big;
- 34.6. At times the supervisor was speaking to the Claimant while he (the supervisor) was siphoning fuel;
- 34.7. At one stage the footage shows the Claimant holding an object in his hand. It is not clear what the object is. It could be a siphon or it could be something else of a similar size and shape.

35. Based on the CCTV footage that had been gathered a number of employees were suspended. The Claimant was not one of them.

36. I accept the Claimant's evidence that in the weeks that followed 2 October 2023, Mr Taylor-Webb asked him three times whether he knew anything about stolen fuel. He said he did not.

37. I also accept the Claimant's evidence that he heard rumours in the workplace, or whispers as he called them, that he was going to be sacked for stealing fuel.

38. I further accept the Claimant's evidence that on around 6 November 2022, Mr Taylor-Webb told the Claimant that he was going to be invited to a formal investigation meeting. The Claimant asked him if he could be accompanied at the meeting and Mr Taylor-Webb said no.

39. The Respondent's disciplinary policy said this:

An employee has the right be accompanied at the disciplinary, appeal or dismissal meeting by a representative. This may be a representative of a trade union or a friend/ colleague from work. A representative may not be a close family member (even if they are employed by Serco), a solicitor, or anyone (apart from a Trade Union Official) who does not work for the Company. A Trade Union

Representative, who is not an employed official, must have been certified by their union as being competent to accompany an employee.

At an investigation meeting there is no statutory right for the employee to be accompanied, but any requests will be considered as long as it does not delay the process.

40. The disciplinary investigation guidance to managers said this:

There is no statutory right for an employee to be accompanied at an investigation meeting but where there are appropriate circumstances the investigation manager can agree to this, providing it does not delay the investigation beyond a reasonable time period. For example, where English is not the employee's first language or disability related reasons etc. If you require guidance on this matter, please contact MyHR. The statutory right only applies to a disciplinary hearing which could result in a formal warning or some other action being taken or confirmed against an employee.

41. On 8 November 2022, the Claimant commenced a period of sickness absence. He called in sick at 06.11 am and indicated that he expected to be on sick leave until 14 November 2022.

42. On 8 November 2022, the Claimant sent Mr Taylor-Webb a letter of resignation. He said:

I regret to inform that I would like to tender my resignation as HGV Mechanic effective from 8th November 2022. I hereby give one month notice of my intentions to leave your Company Serco. My last day will be 7th December, 2022. I wish you and your company continued success.

43. Mr Taylor-Webb responded the same day stating that he reluctantly accepted the claimant's resignation.

44. The Claimant was invited to an investigation meeting on 9 November 2022 to take place on 15 November 2022.

45. The letter set out what was being investigated;

- 1. Alleged theft and removal of diesel fuel from vehicles under the management and control of Serco Ltd (Company).*
- 2. Alleged facilitation of others in the theft and removal of fuel from vehicles under the management and control of the Company.*
- 3. Alleged removal of fuel from the Bulk Fuel Facility at Shakespeare Road using illicit means.*
- 4. Potentially bringing the Company into disrepute due the above actions.*
- 5. Potential breaches of Health and Safety at Work Act. Including, but not limited to, incorrect handling of fuel whilst on Company property that may lead to serious injury to others and/or to property.*
- 6. Potential breach of Carriage of Dangerous Goods by Road Regulations (ADR).*
- 7. A potential breach of mutual trust and confidence.*

46. The letter also stated this:

I would like to highlight that the investigation meeting is not a disciplinary hearing; the aim of the meeting is to discuss the allegations that have been raised about your conduct and to allow you an opportunity to provide a response to the allegations before a decision about how to proceed is made. I confirm that no decisions about the allegations have been made at this stage.

47. The letter stated that it was understood to be a worrying time for the Claimant. He was given details of the employee assistance programme which was said to offer a huge variety of support services. He was also given details of the Respondent's "NHS approved Thrive App" which was designed to assist with managing stress and anxiety.

48. The Claimant did not attend the investigation meeting. He says that he thought "potshots" would be taken at him and it was not what he needed. It proceeded in his absence.

49. Mr Dear produced an investigation report dated 16 November 2022 into the fuel theft issues generally as well as specifically into the Claimant's case. It reflected unfavourably on the Claimant.

50. On 20 November 2022, the Claimant submitted a fitnote dated 8 November 2022 signing him off for the period 8 November 2022 to 22 November 2022.

51. On 23 November 2022, the Claimant submitted a further sick note signing him off from that date to 8 December 2022.

52. Both notes indicated that he had a stress related problem.

53. On 7 December 2022, the Claimant's employment came to end pursuant to his resignation. This was the effective date of termination.

54. I find, based upon the payslip evidence in the bundle, that the Claimant was paid for the notice period between 8 November 2022 and 7 December 2022.

55. At some point after the Claimant's employment came to an end but before the disciplinary hearing referred to below, several of his former colleagues told him that he should come back. He told them that Mr Taylor-Webb should contact him if he wanted to. I infer that Mr Taylor-Webb understood this to mean that the Claimant wanted to come back. He spoke to Mr Dear about it and they agreed that the Claimant could come back but only if he would cooperate with the disciplinary process. Mr Taylor-Webb spoke to the Claimant and said that he could come back, but that it would be on standard Serco terms as this would be new employment and then only if he would cooperate with the disciplinary process. The Claimant declined this offer.

56. Through an internal mix-up the disciplinary process continued despite the termination of the Claimant's employment. He was invited to a disciplinary

hearing by letter of 12 December 2022 to take place on 15 December 2022. The Claimant did not attend the hearing.

57. On 15 December 2022, Mr Marston wrote to the Claimant purporting to summarily dismiss him. The letter states that he will not be paid notice pay but it is premised on the false assumption that the Claimant's employment was ongoing as at the date of the letter. The reference to notice was to any period after the 15 December 2022.
58. It is only fair to record that the Claimant denies that he was involved in the theft of fuel. He agrees that the evidence in this case that he has now seen suggests his supervisor was stealing fuel, however he denies any knowledge of this at the time. He says that the item seen in his hand in the CCTV footage was a hand held vacuum cleaner. On day 2 of the hearing, he submitted a picture of what I agree is a hand held vacuum cleaner, as part of his evidence. This vacuum cleaner has a similar shape to a siphon pump and it could be what was in the Claimant's hand in the still image captured by the CCTV footage.
59. There is simply no need for me to decide whether the Claimant was involved in stealing fuel or not in order to resolve this case, so I refrain from doing so.

Law

Constructive dismissal

60. The essential elements of constructive dismissal were identified in ***Western Excavating v Sharp*** [1978] IRLR 27 as follows:

"There must be a breach of contract by the employer. The breach must be sufficiently important to justify the employee resigning. The employee must resign in response to the breach. The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach in terms to vary the contract".

61. It is an implied term of the contract of employment 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"* (***Malik v BCCI*** [1997] IRLR 462).
62. A breach of the implied term of trust and confidence is inevitably a repudiatory breach of contract. Whether conduct is sufficiently serious to amount to a breach of the implied term is a matter for the employment tribunal to determine having heard all the evidence and considered all the circumstances: ***Morrow v Safeway Stores*** [2002] IRLR 9.
63. In ***Gogay v Hertfordshire County Council*** [2000] IRLR 703 upon the analysis of Hale LJ (as she was):

63.1. The test for a breach of the implied term is a severe one [55].

- 63.2. Even if the employer acts in a way that is calculated or likely to undermine trust and confidence there is no breach of the implied term if the employer has reasonable and proper cause for what is done [53].
64. The implied term can be breached by a single act by the employer or by the combination of two or more acts: **Lewis v Motorworld Garages Ltd** [1985] IRLR 465.
65. Breach of the implied term must be judged objectively not subjectively. The question is not whether, from either party's subjective point of view, trust and confidence has been destroyed or seriously undermined, but whether objectively it has been. See e.g. **Leeds Dental Team v Rose** [2014] IRLR [25] and the authorities cited therein.
66. The employee must resign in response to the breach. Where there are multiple reasons for the resignation the breach must play a part in the resignation. It is not necessary for it to be 'the effective cause'. See e.g. **Wright v North Ayrshire Council** [2014] ICR 77 [18].

Unfair dismissal

67. By s.94 Employment Rights Act 1996 there is a right not to be unfairly dismissed. That includes a right not to be unfairly constructively dismissed (s. 95(1)(c) ERA).
68. In a constructive dismissal case, the reason for dismissal in such a case is the reason that the employer did whatever it did that repudiated the contract and entitled the employee to resign. See **Beriman v Delabole** [1985] IRLR 305 [12 – 13].
69. There is a limited range of fair reasons for dismissal, see s.98 Employment Rights Act 1996. Where there is a potentially fair reason for dismissal fairness must be decided by applying the test at s.98(4), which the tribunal reminds itself of. When applying that test, the tribunal must not substitute its own judgment for that of the employer but ask whether the employer's decision to dismiss was within the band of reasonable responses.

Right to be accompanied

70. There is a statutory right to be accompanied at disciplinary and grievance hearings. Section 10 of the Employment Relations Act 1999 provides as follows:

10 Right to be accompanied.

(1) This section applies where a worker—

(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and

(b) reasonably requests to be accompanied at the hearing.

(2A) Where this section applies, the employer must permit the worker to be accompanied at the hearing by one companion who—

(a) is chosen by the worker; and

(b) is within subsection (3).

[...]

71. 'Disciplinary hearing' is defined in s.13(4):

(4) For the purposes of section 10 a disciplinary hearing is a hearing which could result in—

(a) the administration of a formal warning to a worker by his employer,

(b) the taking of some other action in respect of a worker by his employer, or

(c) the confirmation of a warning issued or some other action taken.

72. In **Heathmill Multimedia ASP v Jones** [2003] IRLR 856, the EAT held that 'some other action' must be construed as meaning some other disciplinary action.

Written particulars of employment

73. There is a right to written particulars of employment at s.1 Employment Rights Act 1996.

74. By s.38 Employment Act 2002, the tribunal has a power to make financial award where there is a breach of s.1 ERA, but only if a claim of a sort identified in schedule 5 of the 2002 Act (e.g. unfair dismissal) succeeds.

Submissions

75. Ms Nicholas submissions were quite wide ranging. They included:

75.1. The Respondent's managers were at fault for not spotting the fuel thefts at the depot more swiftly than they did;

75.2. The Claimant had not been involved in stealing fuel and the evidence did not support the conclusion that he had;

75.3. There had been a breach of a moral duty owed to the Claimant to take care of him. He should have been referred to OH or otherwise supported;

75.4. There had been a lack of independence with all of the managers knowing each other;

75.5. The disciplinary process had been pre-determined. The Respondent made up its mind to dismiss the Claimant because of his level of pay.

75.6. An extension of time should be given.

76. Mr Moss submitted that the unfair dismissal claim was out of time, that time should not be extended, that the Claimant had not been dismissed so the unfair and wrongful dismissal claims failed, that if he had been dismissed the dismissal was fair, and that there should be no extension of time. He ultimately accepted that the Claimant had not been given written particulars of employment that wholly complied with s.1 ERA at the start of his employment with the Respondent.

Discussion and conclusions

Was the Claimant dismissed and if so how and when?

77. The first issue is whether the Respondent was in breach of the implied term as alleged.

Claimant being told he was getting paid more than supervisors

78. I accept the Claimant's evidence that Mr Taylor-Webb told him a few times that he was getting paid more than supervisors and gave the impression that he looked on this unfavourably.

79. I can accept that this was not entirely appropriate, and in my view fell short of good practice. However, I do not accept that it was calculated or likely to destroy or seriously damage the relationship of trust and confidence. Quite simply it was a pretty minor matter and was objectively, wholly incapable of doing any significant damage to the employment relationship. It needs to be set in context also of the fact that Mr Taylor-Webb and the Claimant had generally a good working relationship.

Claimant being questioned about his knowledge of stolen diesel and whispers suggesting that he was involved in stealing it

80. I accept the Claimant's evidence that he was asked three times by Mr Taylor-Webb about whether or not he knew anything about the theft of diesel over the course of a few weeks after 2 October 2022.

81. In the circumstances I do not accept that this was calculated or likely to undermine trust and confidence, judged objectively. It was a perfectly sensible inquiry to make. It was not an accusation that the Claimant had himself been involved in stealing.

82. In any event, there was undoubtedly reasonable and proper cause to ask the Claimant. He had been at work on one of the days on which fuel had been stolen and indeed was one of only two people in workshop at the time. It was perfectly logical to ask him if he knew anything about it.

83. I do not think asking the Claimant three times rather than just once makes a significant difference. Someone in the Claimant's position may have had an obvious reluctance to say what they knew since it might, depending on what they knew, impugn a colleague (or indeed, depending on what they had done, impugn themselves). Thus asking more than once was perfectly sensible and rational. This was exactly the kind of thing where someone may initially refuse to give any information but later be willing to do so. Asking three times in a few weeks was perfectly proportionate. It did not begin to amount to harassment (as the Claimant alleges) in any remotely plausible understanding of that word. There was reasonable and proper cause for asking and for asking three times.

84. I also accept that the Claimant heard rumours/whispers that he was going to be dismissed for fuel theft. I accept that this must have been unpleasant and stressful. However, I do not accept that this was calculated or likely to destroy or seriously damage trust and confidence. That is because the information was nothing more than what the Claimant describes: rumours and whispers. It was obvious that there would be a formal investigation and disciplinary process to actually establish whether the Claimant had done anything wrong and if so what should become of his employment if any issue about fuel theft were pursued with him. It was also notable that the Claimant had not, unlike other colleagues, been suspended and that was a clear indicator that the Respondent was looking at cases individually and not simply lumping everyone together.

Inviting the Claimant to an investigation meeting while he was on sick leave without OH input and refusing Claimant's request to be accompanied at the investigation meeting

85. Some care is needed in delineating the material events here.

86. I accept that on 6 November 2022, the Claimant was told by Mr Taylor-Webb that he would be invited to a formal investigation meeting. He was not on sick-leave at this time and there was, simply, no reason to involve OH.

87. There undoubtedly was reasonable and proper cause to invite the Claimant to a meeting to discuss and answer allegations regarding fuel theft, the transportation of fuel (it apparently being driven off in plastic containers) not wearing PPE. This came from what was seen on the CCTV footage of 2 October 2022. Of course it did not necessarily establish an unanswerable case against the Claimant but it did establish a very strong case to answer:

87.1. he was one of two people in the workshop while fuel was being siphoned;

87.2. his supervisor was siphoning fuel making no effort to hide what he was doing;

87.3. he was talking to the Claimant at times while he did it;

87.4. there was an image of the Claimant holding something that may or may not have been a siphon;

87.5. the Claimant was not wearing his PPE overalls;

87.6. the Claimant was supposed to be working but he was not.

88. I also see Mr Taylor-Webb giving the Claimant a heads up that an invitation to such a meeting was coming as an utterly innocuous detail. It is polite to give notice that something like an invitation to a formal meeting is coming. Doing it orally prepares the ground and, though not strictly necessary, is a helpful courtesy where as here there was decent working relationship between manager and employee.

89. I also accept that the Claimant asked if he could be accompanied at the meeting and that Mr Taylor-Webb told him that he could not. I do not accept that this matter was calculated or likely, objectively, to destroy or seriously damage trust and confidence:

- 89.1. This was just an investigation meeting, it was not a disciplinary meeting;
- 89.2. There was no statutory right to be accompanied at this meeting;
- 89.3. The Respondent's internal policy provided for requests to be accompanied to be considered, but the guidance to managers was to allow it only where there were appropriate circumstances, such as where the employee's first language was not English or there were disability related reasons. There were no language issues or disability related issues in the Claimant's case and indeed at the time of the conversation he was not even on sick-leave. As at 6 November 2022 the Claimant did not have any particular vulnerability or need that meant there was any particular need to represented/ accompanied beyond the serious nature of the allegations. I acknowledge that the allegations that were to be considered at the investigation meeting were serious, and I can accept that it would have been better practice to give more careful thought to whether or not the Claimant should be accompanied.
90. However, I do not accept that falling short of best practice in this way came anywhere near being a breach of the implied term. The allegations against the Claimant were serious but they were not very complicated. The purpose of the meeting was to discuss the allegations and give the Claimant an opportunity to respond to them. He was very capable of doing those things without being accompanied.
91. The Claimant resigned on notice and went on sick leave on 8 November 2022.
92. The invitation to the formal investigation hearing was dated 9 November 2022. It post-dated the Claimant's resignation; he did not resign in response to it.
93. In any event, there plainly was reasonable and proper cause to invite the Claimant to this meeting as above.
94. The Claimant was now on sick leave, but the meeting was scheduled for 15 November 2022, the day after the Claimant had indicated he was likely to return. The letter also set out clearly two avenues for support including with stress or mental health problems.
95. I accept that no reference was made to OH health prior to sending this letter, but I do not accept that there was any indication to do so. The Claimant had only been on sick leave for a week. There was an obvious stressor for it. There is no requirement to contact OH every time an employee goes off sick. The letter itself said, that if for any reason the Claimant was unable to attend the meeting he should let Mr Taylor-Webb know as soon as possible. It is always open to an employee to ask to postpone a meeting whether for health reasons or otherwise. There was, simply, no breach of the implied term in inviting the Claimant to this meeting. In any event it post-dated the decision to resign.

*Invitation to disciplinary hearing on 12 December 2022 and 15 December 2022
purported dismissal*

96. On 12 December 2022 the Claimant was invited to a disciplinary hearing to take place on 15 December 2022. On 15 December 2022 a letter was sent to him purporting to notify him of dismissal.

97. While these matters did occur, they are of no materiality to the question of whether or not the Claimant was dismissed. That is because the Claimant's employment had already terminated, through his resignation on notice, on 7 December 2022.

98. Although the letter of 15 December 2022, purports to summarily dismiss the Claimant, it did not as a matter of fact or law have that effect. The Claimant's contract of employment had already terminated. There was, thus no contract to terminate summarily or otherwise.

Cumulative effect

99. I have stepped back and considered whether or not cumulatively the above matters amounted to a breach of the implied term of trust and confidence. They did not.

100. There were a few pieces of conduct that the Respondent did not have reasonable and proper cause for that that fell short of best practice as identified above. None of it was calculated to destroy or seriously harm trust and confidence. Even in combination it was not objectively likely to, nor seriousness enough, to destroy or seriously harm trust and confidence. Even in combination they were relatively minor matters that fell well short of the threshold needed to breach the implied term.

Conclusion on dismissal

101. The Claimant was not dismissed. His contract terminated pursuant to his resignation in circumstances in which the Respondent was not in repudiatory breach of contract. The contract had already terminated prior to the purported express dismissal which therefore was of no effect.

Unfair dismissal

102. The claim for unfair dismissal must fail – since the Claimant was not dismissed.

Wrongful dismissal / notice pay

103. The Claimant was not wrongfully dismissed – he was not dismissed at all.

104. The claim for notice pay is not well founded. The Claimant was required to give 4 weeks notice if he chose to terminate the contract. He gave a month's notice and was paid for that notice period. He had no further entitlement beyond that.

105. The claim for notice pay is based on a misunderstanding. The letter of 15 December 2022 purporting to dismiss the Claimant states that he will not be paid for his notice period and that was essentially the basis on which the claim was advanced. That letter proceeds on a false assumption that the Claimant's employment was ongoing on 15 December 2022 intends that the Claimant not be paid for any period subsequent to the letter. However, the Claimant had no entitlement to any further pay because his employment had already ended pursuant to his resignation 7 December 2022 and he was paid up until that date.

Right to be accompanied

106. The meeting in issue (that of 15 November 2022) was not a disciplinary hearing within the meaning of s.10 Employment Relations Act. It was not a meeting at which any sanction or other action (which means disciplinary act) was a possible outcome. It was just an investigation hearing.

107. The Claimant was offered the right to be accompanied and would have been permitted to be accompanied, at the disciplinary hearing of 15 December 2022. However, he chose not to attend and indeed his employment had in any event already terminated pursuant to his resignation.

Failure to provide written particulars of employment

108. It appears that there was a failure to provide the Claimant with a document that complied in respects with s.1 ERA upon transferring to the Respondent. The document in the bundle that Mr Moss relied upon in closing submissions setting out his terms omits his job title and level of pay. However, the claim for an award fails. A remedy can only be given pursuant s.38 EA 2002 if a claim listed in schedule 5 of 2002 act succeeds and no such claim has succeeded.

Time limits

109. Since the claims fail substantively there is no need to consider time-limits.

Employment Judge Dyal

Date **24.01.2024**

SENT TO THE PARTIES ON
12.02.24

FOR EMPLOYMENT TRIBUNALS

