



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Matthew Chapman  
**Respondent:** Ice Pig Limited (trading as Skuna Boats)  
**Heard at:** East London Hearing Centre (by CVP)  
**On:** 29 February 2024  
**Before:** Employment Judge C H O'Rourke

## Representation

**Claimant:** In person  
**Respondent:** Mr I Wheaton - counsel

# JUDGMENT

The Claimant's claim of constructive unfair dismissal is, subject to Rule 37(1)(a) of the Tribunal's Rules of Procedure 2013, struck out, as having no reasonable prospects of success.

# REASONS

(Written reasons having been requested at the Hearing, in accordance with Rule 62(3) of the Employment Tribunal's Rules of Procedure 2013, the following reasons are provided:)

## **Background and Issues**

1. The Claimant was employed as a general manager, from October 2018, until his resignation, with immediate effect, on 6 July 2023. As a consequence, he brings a claim of constructive unfair dismissal.
2. The Respondent company is a leisure boating business, offering boating experiences at its two London sites. The Claimant worked at its Canary Wharf site and his line manager was Mr Stuart Thomson, the founder and a director of the Company. It seasonally employs up to twenty staff, with some, including the Claimant being year-round permanent staff. It was agreed that the 'season' ran from Spring to the end of September.

3. The issues in respect of this claim were agreed at the outset of this Hearing to be as follows:

a. The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breaches were as follows;

- (i) Being bullied and harassed by Mr Thomson at a meeting on 27 April 2023;
- (ii) Being again bullied and harassed by Mr Thomson in a discussion on 13 May 2023;
- (iii) The Respondent failing to deal sufficiently promptly with his subsequent grievance.

(The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

b. The Tribunal will need to decide:

- (i) Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and
- (ii) Whether the Respondent had reasonable and proper cause for doing so?

c. Did the Claimant resign because of the breach? The Respondent states that the Claimant had long planned to terminate his employment by the end of September, due to his plans to travel and that his resignation was prompted by his remuneration demands not being met.

d. Did the Claimant delay before resigning and therefore affirm the contract? The Respondent states that he did, as the events in question had occurred two months previously.

e. In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98(4) of the Act? The Respondent asserts that it was, due to conduct and capability concerns it had with the Claimant.

f. If the dismissal was found to be unfair, the Respondent would rely on breach of the ACAS Code by the Claimant, contributory fault on his part and **Polkey**.

#### The Law

4. I reminded myself, firstly that the burden of proof is on the Claimant in such cases and also of the following well-known authorities:

- a. The case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 EWCA**, which sets out the test for constructive unfair dismissal and which has been itemised already by me, in my explanation above of the issues.

- b. The case of **Mahmud v BCCI International** [1997] UKHL ICR 606, which stated (as subsequently clarified) that:

*“The employer should 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.”*

5. Respondent’s Application. This Hearing was listed as a final hearing of the claim, for two days, on 29 February and 1 March 2024. Following preliminary discussions and clarification of the issues (as set out above), on 29 February, I heard the Claimant’s evidence, from approximately 11am until 1.15pm (to include a fifteen-minute break). He provided a witness statement and the parties had agreed a joint bundle, to which I shall refer by PDF numbering.
6. Following return from the lunch break and before proceeding to hear the evidence of the two Respondent witnesses, Mr Wheaton applied, subject to Rule 37(1)(a), for the claim to be struck out, as having no reasonable prospects of success. Essentially, he submitted that, on the Claimant’s own oral evidence, the reason for resignation given by him in his claim form and witness statement (the two alleged fundamental breaches of contract by Mr Thomson and, as a ‘last straw’, the alleged delay in dealing with his grievance) was not true, but that the real reason was that the Claimant mistakenly believed that he had to resign by 6 July 2023, due to him considering that the three-month statutory time limit commenced running from the date of an incident prior to the first alleged breach of contract, on 7 April 2023 and that he had, therefore, to resign no more than three months later. (I deal with this matter in greater detail below.)
7. Following a thirty-minute adjournment, I heard submissions from the Claimant, which, again, I will deal with in more detail below.

### The Facts

8. Chronology. By way of chronology and background to this matter, I set out the following, generally uncontentious matters:
- a. The Appellant had an appraisal in October 2022 [68] which identified some weaknesses in his performance. Discussions were had as to the payment of a bonus, a pay rise and the possibility of a share scheme.
- b. 7 February 2023 (all dates hereafter 2023) – the Claimant wrote stating ‘... *I’m going travelling at the end of the year (September) until the foreseeable future*’ [73].
- c. An undated and partially completed appraisal form (only by the Claimant) stated [60] that ‘*moving into my final season with Skuna after 4.5 years I want to make sure that I can enjoy my final months ....*’. Based on the Claimant’s start date of employment, that places that statement in or about March and there was an appraisal on 5 April [127].
- d. On 7 April (and as referred to in an email of 11 April [92]), the Claimant said that he had informed Mr Thomson of a mental health breakdown,

but which Mr Thomson had wanted '*to sweep under the radar*' and not deal with until the following week, still requiring the Claimant to work over a busy weekend.

- e. The Claimant self-certified a week's sick leave, from 10 to 17 April, completing a return-to-work form on his return [86], in which he referred to '*anxiety, stress, burnout*' and listing his requirements for support at work [89].
- f. 27 April – the Claimant and Mr Thomson had a '1-2-1' meeting, but with a Ms Preddie (an Executive Assistant and HR representative for the Company) also in attendance. The Claimant said that Mr Thomson effectively hectoring him about his requests for further support from management and said, in a '*completely antagonising tone*' to him that he should '*grow up*'. The Claimant (who was aged 28 at the time) considered this statement to be belittling and embarrassing and, he said, worsened his mental health. Mr Thomson admitted that he had told the Claimant that '*he needed to grow up*', which he meant as requiring the Claimant to show more maturity and which word he wished he had used at the time [158].
- g. 4 May – the Claimant was subject to disciplinary proceedings following information having been provided to management by a departing employee, as to an incident some months before in which an intoxicated fellow-employee had fallen into the water and had to be rescued. The Claimant was aware of the incident at the time, but did not record in the accident book, or report it to management, as he didn't wish to put the employee's job at risk. He accepted, both at the time and in this Hearing that that had been a bad '*judgment call*' and that he '*held his hands up*'. He was issued a final written warning, which he did not appeal against.
- h. 13 May – the Claimant said in his statement (paragraph 41 onwards) that due to a problem with his hot water boiler at home, he spent time trying to fix it and on realising he would be late for work, he called Mr Thomson to let him know. He said that Mr Thomson shouted down the phone, stating '*for fuck's sake, that's not an excuse*'. On arrival on site, he said that he requested of Mr Thomson that he not speak to him in that manner, to which Mr Thomson replied, '*I don't fucking care*'. Mr Thomson said that 13 May was the busiest day for the business in eight months and that he himself was under some personal pressure, due to the very recent birth of his and his wife's baby. He said that the Claimant said that he couldn't come to work as he could not have a hot shower, to which he replied, '*are you fucking serious?*' and that later when the Claimant got to work, he stated that '*not having a hot shower ... was not a fucking excuse to be late*'. He said that he immediately regretted using such language and understands that it is not acceptable. He said that he did apologise to the Claimant at the time, and which was accepted by him. The Claimant said that this apology was offered on 18 May, but that he didn't accept it (47).

- i. 19 May – there had been ongoing discussions about the Claimant’s remuneration and Ms Preddie emailed him making an offer, to which the Claimant requested more time to respond [132-3].
  - j. 24 May – the Claimant brought a grievance, referring to the 27 April and 13 May incidents and also raising a challenge as to his holiday pay entitlement [134]. He said that *‘trust and confidence has been undermined’*. He also said in the conclusion to the grievance that *‘I would prefer to remain on amicable terms as I have tried to during this whole process. I am looking to have a realistic conversation about where we can go from here to come to a reasonable outcome.’* and that his concerns made *‘it almost impossible to continue working in such a toxic environment.’*
  - k. Mr Thomson was removed as the Claimant’s line manager and replaced by another manager, pending the outcome of the grievance.
  - l. 1 June – the Claimant went on sick leave and did not return to work.
  - m. 2 June – an external investigator was appointed by the Respondent to deal with the grievance and his conclusion, on 21 June, was that the Claimant’s allegations of bullying and harassment were rejected [163]. He was offered the opportunity to appeal.
  - n. 23 June – the Claimant appealed [180].
  - o. 26 June – the Claimant was signed off sick for a further month.
  - p. 5 July – the Claimant wrote, resigning on six weeks’ notice [186]. He stated that *‘... I am resigning in response to a repudiatory breach of contract by my employer and I therefore consider myself constructively dismissed. I am still awaiting a final verdict from the grievance raised 24/05/23 and subsequent appeal 23/06/23 which sets out the basis on which I believe you have seriously breached my contract. As the company has failed to reach a verdict on my grievance in a sufficient time frame, I now consider that my position at Skuna Boats is untenable and my working conditions intolerable, adding to which my mental health has suffered greatly. This leaves me no option but to resign in response to your breach.’*
  - q. 6 July – the next day he wrote again, stating that *‘it has come to light in order to be able to raise this effectively with ACAS for constructive dismissal and to take the next appropriate steps ... I am left no choice but to resign from my role with immediate effect as of today (06/07/23).’*
9. Claimant’s Evidence in Cross-Examination. As relevant to the matters I need to consider, I summarise that evidence as follows:
- a. The Claimant agreed that he had first announced his intention of leaving the business, at the end of the 2023 season, in October 2022, wishing to give the Respondent as much advance warning as possible. When it was suggested to him that what he said in the March/April draft

appraisal [60] was *'unequivocal'*, he said that *'that was the plan 100%'*. He agreed that he had never indicated any change of mind on that plan.

- b. He was challenged as to why, in the follow up to an appraisal meeting of 5 April, when he had already, he said, been subjected to bullying and harassment by Mr Thomson, he made no mention of that in the meeting, and he said that *'it took a while to process'* [127]. It was suggested to him that by May, his primary concern was to build up enough money to fund his planned travelling, as reflected in his ongoing negotiations with the Respondent and he said *'that was part of it, yes'*. He denied that when such money was not forthcoming from the Respondent, he decided to obtain it another way, via this claim.
- c. He agreed that he had had, over time, considerable advance payments of salary from the Respondent [66], which he further agreed was *'very generous and was treating him well.'*
- d. He agreed that despite complaining in the 1:2:1 meeting on 27 April that he lacked appropriate training for his role [116], when he needed training, it was provided to him. He agreed that there were issues with his performance but attributed these to lack of support from management and to his poor mental health and he stated that he *'was in over my head'*.
- e. In relation to Mr Thomson swearing at him, the Claimant agreed that *'language could be robust'* in the Company, on occasion and that phrases like *'what the fuck'* or *'for fuck's sake'* might be used by him and others, but that that was *'out of context'*, as Mr Thomson's comments were *'very personal and directed at me'*. He went on to say that *'it was not the norm to swear and was quite unusual'*.
- f. It was put to him that his complaint, at the highest, was that he raised a grievance, but did not, at the time resign, which with he disagreed. He agreed that his grievance was processed and that he had been told that it would *'take weeks rather than days'* to complete [140].
- g. He agreed that, in his grievance, he did not say that Mr Thomson's behaviour was a fundamental breach of contract and nor did he resign [134], simply moving on, in the same document, to his complaint about holiday entitlement. He denied that his reference to *'remain(ing) on amicable terms'* and to *'a reasonable outcome'* meant payment to him of money, following which he would leave. He said that Mr Thomson's behaviour was *'the tip of the iceberg in a toxic environment.'*
- h. When it was put to him that Mr Thomson's behaviour was not *'calculated or likely to destroy or seriously damage trust and confidence'* and that he himself had accepted this by referring to *'damaged or undermined'*, he said that that was not the case initially, but became so. It was then suggested that therefore, if those two incidents were not enough in themselves to be repudiatory breaches, leading to his resignation, then that it must have been the alleged delay in processing his grievance that led him to resign. He said in response that he'd been *'reflecting on the*

*grievance and also had heard about discussions Mr Thomson had had with others about me*. He was asked where he had referred to such matters in his resignation letter and he referenced his phrase as to his working conditions being *'intolerable'*. When it was suggested that nothing had changed since his grievance to merit his escalation of his stated concerns and that he was *'back-filling'*, he denied that.

- i. He was challenged that as the 27 April and 13 May incidents had not led to his resignation, that by that point that it must, therefore, have been the alleged delay in processing his grievance that was the *'last straw'*, prompting him to resign. In response, he said that in fact, it had been his (misconceived) concern that if he did not resign by 5/6 July, he would not have been able to bring this claim, not any apparent delay by the Respondent in processing his grievance that prompted him to resign. He agreed that the complaint about the processing of the grievance was not, in fact, a real *'issue'*. He further agreed, therefore that the only *'real'* issues were the events of 27 April and 13 May.
  - j. When it was suggested to him that even after his grievance, he continued to negotiate with the Respondent, because he was *'still looking for cash'* he said that *'I wanted to stay with the Company'*. When it was therefore further put to him that such a statement supported the contention that the two incidents were not, in fact, fundamental breaches of contract, he said that he *'wanted to push through and see the end of the season and wanted to benefit both parties'*. He denied that he had brought the grievance five days after his refusal of the pay offer, in order to pressurise the Respondent into offering more, but that instead he *'was standing up to a bully'*.
  - k. In answer to a question from the Tribunal, he said that if he had known the correct application of the three-month time limit, he wouldn't have resigned on 6 July, but *'might have'* at some later point.
10. No Reasonable Prospect of Success. I find that the Claimant's claim of constructive unfair dismissal has no reasonable prospects of success, for the following reasons:
- a. On his own evidence, his claimed *'last straw'* that obliged him to resign, namely the alleged delay in processing his grievance, was a fabrication, when, in fact, the true reason was his misconceived view that he had to resign by 5/6 July, in order to be permitted to bring a claim to this Tribunal. That rationale was entirely one of his own manufacture, and nothing to do with any fundamental, or otherwise, breach of contract by the Respondent.
  - b. It being the case, therefore that there is no (legitimate) *'last straw'*, then the only two alleged fundamental breaches that the Claimant can rely on (and which he accepted to be the only *'real'* issues) are the incidents of 27 April and 13 May. There is no real dispute as to the Claimant's complaints in respect of those incidents. Both parties accept that in the first incident he was told by Mr Thomson to *'grow up'* and in the second incident that Mr Thomson had angrily sworn at him for being late for

work. The Respondent contends that these incidents do not meet the **Mahmud v BCCI** test, as to being conduct calculated or likely, without due cause, to have destroyed or seriously damaged the relationship of trust and confidence between the Claimant and them, with which the Claimant clearly disagrees.

- c. Despite the Claimant's assertions in that respect (and as reiterated in his closing submissions) however, I don't accept that, in fact, that conduct did destroy that relationship and I find this for the following reasons:
- i. He did not resign either at, or shortly after these incidents, instead bringing a grievance and when he did resign, it was not due to any legitimate 'last straw' incident that could be linked to those incidents, but one of his own manufacture, unrelated to any actions of the Respondent.
  - ii. On his own evidence, he clearly did not regard Mr Thomson's conduct as constituting repudiatory breaches of contract, wishing, in his grievance, to remain on '*amicable terms*' and seeking a '*reasonable outcome*' (which, I find, in view of his intended departure at the end of September, to 'go travelling', can only have been financially driven). He also said in evidence, in answer to an assertion that he had not regarded the incidents as destroying or seriously damaging the relationship, that '*that was not the case initially, but became so.*' Such aspirations and evidence, on his part, are clearly the antithesis of what would be expected in response to repudiatory breaches of contract. Again, on his own evidence, he said that he '*wanted to push through and see the end of the season and wanted to benefit both parties*', indicating to me, beyond all doubt that he did not consider that there had been repudiatory breaches of contract, instead viewing the incidents as merely valuable 'bargaining chips' in the ongoing negotiations as to his salary and final bonus.
  - iii. The Claimant's admission that had he known the correct application of the three-month time limit, he wouldn't have resigned on 6 July, but '*might have*' at some later point, further indicates the calculated or strategic nature of his considerations on this matter, in order to secure, for him, the best possible outcome. Such behaviour is not that of a person who has been the genuine victim of two repudiatory breaches of contract.
  - iv. Even if I were wrong in those conclusions and there had been fundamental breaches of contract, the Claimant did not resign in response to them, but due to his misconception as to the three-month time limit.
- d. I am conscious of the guidance given in authorities such as **A v B [2011]** ICR D9 EWCA, **Mbuisa v Cygnet Healthcare Ltd EAT 0019/18** and **Cox v Adecco Group UK and Ireland [2021] ICR 1307 EAT**, as to the exceptional nature of such strike-out orders and the considerations that



should apply in those circumstances, but nonetheless find that a strike-out order is appropriate in this case, for the following reasons:

- i. Even taking the Claimant's case '*at its highest*', there is no dispute as to the relevant factual matrix. The circumstances of the two incidents are not in dispute; the contents of the contemporaneous documents are accepted by both parties and the Claimant's own evidence, in respect of matters of which only he can testify, as to his thought processes at the time of resignation, is clear.
- ii. I heard the Claimant's evidence, in full, over two hours and read all documents to which I was referred, and I did not consider that he had discharged the burden of proof upon him.
- iii. While the decision to grant the application for strike-out meant that I did not hear the evidence of the two Respondent witnesses, it would, I find, have been merely '*a fanciful prospect*' that such evidence would have assisted the Claimant in discharging the burden of proof. Mr Thomson's only relevant evidence was in relation to the two incidents, the facts of which, as I have said, were not in dispute. Following the bringing of the grievance, Mr Thomson was removed from line management of the Claimant and even on the Claimant's evidence, had no significant interaction with him, thereafter, particularly bearing in mind that the Claimant went on sick leave a week after bringing his grievance and did not return thereafter. The Claimant's only interaction with the Respondent Company during the bulk of this period was in the processing of his grievance by the external investigator, his bringing of an appeal and his resignation, none of which involved Mr Thomson. Ms Preddie's involvement was even more marginal. She attended the 27 April meeting and attested to the '*grow up*' comment. She was involved in the undisputed negotiations with the Claimant as to his pay and bonus. She acknowledged receipt of his grievance, before handing it over the external investigator. Again, on the Claimant's own evidence, as contained in his witness statement, there is no indication of any alleged involvement by Ms Preddie, between the bringing of his grievance and his resignation and that therefore she would have had any relevant evidence to give in respect of his decision to resign. Finally, any crucially, the only person who could give evidence as to the Claimant's actions, communications and thought processes (and upon which I based my decision to strike out his claim) was the Claimant himself and I heard that evidence in full.
- iv. This is not a case of an ill-educated, or non-English literate litigant-in-person, seeking to rely on poorly drafted pleadings, but of a straightforward chain of events, in respect of which the Claimant's evidence was the core factor. Based on the content and quality of his written communications and his comprehension of questions in cross-examination and his ability to cogently answer such questions, the Claimant is clearly an intelligent and articulate man.

The issues in the claim were fully canvassed at the outset of the Hearing and agreed by both parties and which I am confident were understood by the Claimant.

11. Conclusion. For these reasons, therefore, the Claimant's claim of constructive unfair dismissal is struck out, as having no reasonable prospects of success.

**Employment Judge O'Rourke**  
**Dated: 1 March 2024**