



EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video)
On: 4 & 14 March 2024
Claimant: Ivan Dixon
Respondent: Eric Patrick Care Ltd
Before: Employment Judge O'Neill
Representation:
Claimant Ms Lanehin, counsel
Respondent Ms Bayliss, counsel

JUDGMENT

1. The claimant's claim of unfair dismissal is not well founded and fails because the claimant was not dismissed.

REASONS

INTRODUCTION

2. The respondent is a company that provides support in the form of accommodation, care, 24-hour supervision and support to vulnerable young adults under 16 to 25 years of age who are already in the care and jurisdiction of Local Authorities. The respondent employs circa 23 people across three sites.
3. The claimant worked for the respondent as a support worker from April 2013 until 2023 when he claims that he was unfairly dismissed from his role.

PROCEDURE AND EVIDENCE

4. The hearing was held by CVP and was recorded.

5. I dealt with a preliminary issue regarding a query regarding a potential second claimant, Gary Lewis. It was confirmed by all parties, including the tribunal that there was no claim from Gary Lewis.
6. The scope of the claimant's claim was ambiguous, and the claimant requested that the claim should be clarified to include unfair constructive dismissal. The respondent argued that this was prejudicial, and it should be restricted to an (express) unfair dismissal claim. I agreed that the claim was not clearly made out on the ET1 and that it could be read either way. I considered the relevant facts with particular regard to the following:
 - a. Although the claimant was represented today, he had not been represented when he had started his claim.
 - b. Although the legal tests were different, they would turn on the same set of facts and witness statements had been exchanged on 19 February 2023.
 - c. Both parties were represented and therefore an adaptation of the legal tests should be possible.
7. I concluded that on balance it would be in the interests of justice, without undue prejudice to the respondent, to allow the claimant to plead constructive dismissal in the alternative.
8. The List of Issues was amended orally during the hearing therefore to include relevant issues for constructive dismissal.
9. On the first day of the hearing, both parties wished to introduce new evidence, having heard the arguments from parties I felt that it was, on balance, in the interests of justice and did not cause undue prejudice to allow all the requests for additional evidence. On the second day of the hearing, the respondent wished to introduce updated witness statements, these had not been exchanged with the claimant prior to the hearing and had not been received by the Tribunal. Having already gone part-heard and mindful of further delay and the claimant's concerns I decided that on balance it would not be in the interests of justice to allow the application and it was refused.
10. I heard evidence from the claimant and Mr E McIntosh, Mr E Patrick, and Ms S Monroe.
11. There was also a bundle of 157 pages, exhibits to the claimant's witness statement and the evidence that was introduced at the hearing.
12. Unfortunately it took some time to deal with preliminary matters; there was a large volume of witness evidence and the cross examination of the claimant took longer than anticipated; and there was a fire alarm and evacuation from

the tribunal building, so the hearing went part-heard. The hearing was adjourned after the claimant's evidence and resumed on 14 March when the respondent's witnesses gave evidence.

LIST OF ISSUES

13. How and when did the claimant's contract end?
 - a. Did the claimant resign or was he dismissed on 11 April 2023?
 - b. If neither, did the claimant resign or was he dismissed on 4 May 2023?
 - c. If neither, when did the claimant's contract end and how?
14. Constructive dismissal
 - a. Was there a repudiatory breach?
 - a. What was that breach?
 - i. The claimant claimed a series of acts starting with a scarcity of shifts in response to needing an operation, followed by an unfair disciplinary procedure.
 - b. Was there reliance on that breach?
 - c. Did the claimant affirm the breach?
 - d. What was the effective date of termination?
15. If the claimant was dismissed, can the respondent show that the reason or principal reason for the dismissal was for a potentially fair reason. The respondent will say it was gross misconduct/misconduct.
 - a. Where the respondent can show a fair reason for dismissal, the tribunal will go on to consider whether the dismissal was substantively fair, which.
 - b. 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
 - c. shall be determined in accordance with equity and the substantial merits of the case.'
 - d. The tribunal will have regard to British Home Stores Ltd v Burchell [1980] ICR 303 EAT.
 - i. Did the respondent believe the claimant had committed misconduct?

- ii. Did the respondent carry out as much investigation as was reasonable in the circumstances?
- iii. Did the respondent have in its mind the reasonable grounds, based on the investigation for holding that belief?

16. Remedy

a. Basic award

- i. What basic award is payable to the claimant, if any?
- ii. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before dismissal? If so, to what extent?

b. Compensatory award

- i. Would the claimant have been dismissed anyway, if so at what point?
- ii. Did the claimant cause or contribute to his dismissal? If so, to what extent?
- iii. What financial losses has the dismissal caused the claimant? The Tribunal will need to consider the claimant's health as it is understood he has been too ill to work since April 2023
- iv. Has the claimant taken reasonable steps to mitigate his losses?
- v. If not, for what period of loss should the claimant be compensated?
- vi. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- vii. Did the respondent or claimant unreasonably fail to comply with it?
- viii. If so, should any award be increased/decreased by up to 25%?

FINDINGS OF FACT

17. Having carefully considered the evidence and material, I make the following findings of fact. I have not made findings on every factual matter but have focused on the key factual matters necessary to reach a conclusion on the issues in the claim.

The claimant's employment pattern

18. It is not disputed that the claimant commenced working for the respondent in April 2013 and that he was an employee within the meaning of s230(1) ERA1996.
19. It is not disputed that the claimant worked on a zero hours basis and that his work was done in shifts.
20. The claimant's contract:
 - a. Clause 6 of the claimant's contract says "*It is a condition of your employment that you work flexibly in accordance with the working arrangements operated by the company. Your hours of work will vary according to the workload of the company and will be notified to you in accordance with clause 5 above*".
 - b. Clause 5.1 provides that "*You acknowledge that although the company will endeavour to allocate you suitable work when it is available, the company is under no obligation to provide you with any work, or to provide any minimum number of hours or work in any day, week or year*".
 - c. Clause 5.2 "*We will normally prepare and circulate in advance a full week timetable to notify you of the days and hours you will be required to work in that period. The timetable may be varied at any time by the company, either in advance of the four-week timetabled weeks, or during the four timetabled weeks*".
21. Witness evidence confirmed that the process outlined in the contract reflected what happened in practice. Shifts would be scheduled a month in advance. The claimant said in evidence that he "*never had a regular slot*". His hours were variable from month to month. Evidence showed that over the previous year his hours ranged from as little as 61 to as much as 217 hours per month.
22. The documentary evidence shows that his shifts could be allocated in anything from one to four shifts blocks and on any day of the week. Despite the claimant's claims in witness evidence that he was usually given a 'full' weekend (Friday to Monday shifts) there is no corroborating evidence of any fixed pattern to his shift allocation at all.

Events leading up to 19 March 2023

23. The claimant was scheduled to work on Saturday 25, Sunday 26 and Monday 27 February 2023. The claimant believed that he was not working following a whatsapp from Ms Munroe, his manager, which said "*Hiya Ivan, your not working this weekend*". The claimant, assuming that he was not needed on the Monday didn't turn up for work, despite Ms Munroe expecting him to be on shift.

24. Ms Munroe and a colleague called the claimant repeatedly on the Monday in question but the claimant did not respond.
25. It is understandable how the claimant misinterpreted Ms Munroe's message and why the claimant might have believed his full shift to be cancelled, even though he should have clarified whether "this weekend" included his Monday shift. However, I find the situation was without malice from either party and was an unfortunate misunderstanding.
26. On Friday 3 March the claimant emailed his employer to ask why he has not been allocated any shifts for March. Two days later Mr Patrick told the claimant that he was told that the claimant had failed to turn up for his shift on Monday 27 February and that he didn't answer any calls from colleagues that day. Ms Munroe confirmed in witness evidence that she did not schedule shifts for the coming month without first being informed of staff availability. She said that the claimant had not turned up for work on the 27th, had not responded to calls explaining his absence nor had he provided his availability for the coming month, so he was not scheduled for any shift in March. The claimant was unable to demonstrate that he had provided his availability to Ms Munroe.
27. Despite not being scheduled to work in March, the claimant attended online training on 17 March. Ms Munroe also texted the claimant on Friday 17 March to ask him to be on standby to work from Saturday 18 March, starting in the morning. This shift was then confirmed in a phone call later that day and presumably the start time was changed as the claimant started work in the evening of 17 March at the Eldon Park site.

19 March 2023

28. The claimant was on duty and working at Eldon Park, when at approximately 9:45am on Sunday 19 March, his colleague Mr Ayesoro arrived to relieve him of his shift. The claimant was surprised and upset, as he understood that he was working through to the next day (Monday 20 March).
29. I find that the claimant genuinely thought that he had been asked by Ms Munroe to work through the Sunday shift. This is explained by his strong reaction to being relieved from his shift by Mr Ayesoro and his willingness to work the day at an alternate site. I also found his evidence that he needed a lift to and from the site as he didn't drive to be credible, and that he had not arranged to be picked up on Sunday morning.
30. Not long after Mr Ayesoro arrived, at approximately 10am, the claimant made a telephone call Ms Munroe to ask why he was being relieved of his shift. I have no reason to doubt that this call was confrontational and explosive, as by all

accounts (his own, Mr Ayesoro's and Ms Munroe's) he was agitated and angry on this call.

31. Although the claimant in his witness evidence was initially adamant that he didn't swear at Ms Munroe, he conceded that he couldn't really remember what he said because he was angry. He admitted to calling Ms Munroe a liar and said that he "*may have sworn out of frustration*" when pressed. He said that he might have sworn, but that he wasn't swearing *at* Ms Munroe, and he repeated that it was "*just frustration*".
32. The claimant admitted that he hung up on Ms Munroe.
33. The claimant remained in the Eldon site and phoned Mr Patrick shortly afterwards. As with his call with Ms Munroe, the claimant was unable to recall the conversation with Mr Patrick in any degree of detail but he admitted that he was still angry. He conceded that he may have told Mr Patrick that Ms Munroe was a "*fucking liar*".
34. When asked if he recalled Mr Patrick telling him that his behaviour was inappropriate, the claimant said that he didn't care and that he was very angry.
35. Mr Patrick offered him alternative work at the Church Street site, which the claimant agreed to work.
36. During his witness evidence, the claimant didn't believe that his actions (shouting, swearing, hanging up) may have been upsetting for others or inappropriate in a place of work that was designed to protect vulnerable young people.
37. It was also evident that the claimant's emotional state at the time has negatively affected his ability to recall what had happened.

20 March

38. The claimant worked at the Church Street site until 10am, Monday 20 March, when his shift finished.
39. I find that the claimant did have contact with Mr Patrick on Monday 20 March although the claimant flatly denied that there had been a meeting. Mr Patrick's evidence was that there was a meeting between the two at the Church Street site. Mr Patrick said in his evidence that the site (Church Street) was unmanned at the time and therefore he needed to be physically present at the site to relieve the claimant from his shift and lock the building afterwards. The claimant said that there was only a telephone call with Mr Patrick and that "*he's made the whole thing up*". However as stated in paragraph 38 above, the claimant was unable to recall much of substance from the period. Therefore, I find that Mr Patrick's recall was more detailed and confident so on balance it is more likely

than not that there was a physical meeting between the two at the Church Street site.

40. The claimant denied seeing Ms Munroe's written report of the incident. The claimant also disputes seeing the contemporaneous email from Mr Ayesoro to Mr Patrick describing the events of the morning at the Eldon site, he said that he had never seen it until it appeared in the hearing bundle. When challenged, the claimant conceded that on 4 May he saw Mr Ayesoro and confronted him about the statement. The claimant said that he was aware of the statement as other members of staff had told him about it, but he hadn't seen it. The claimant also asserted that as he had not signed and dated Mr Ayesoro's email or Ms Munroe's report then he had not seen them. Mr Patrick's witness evidence was that he asked the claimant for his own written account of what had happened the previous day.
41. I find that the claimant's evidence is inconsistent and unreliable in respect of the meeting on 20 March. I find that during that meeting on 20 March, the claimant was provided with the contemporaneous written evidence of Mr Ayesoro (email sent 19 March 18:39) and an incident report filed by Ms Munroe and informed that there would be a disciplinary investigation about the incident on the morning of 19 March 2023.

21 March – 10 April 2023

42. The following morning, 21 March 2023, Mr Patrick emailed the claimant to say "*Good morning Ivan, This is to acknowledge receipt of your complain which I will look into and get back to you as soon as possible.*" The claimant's complaint was that Ms Munroe had lied to him regarding the shift on Sunday 19 March. The claimant had made the complaint by email on Sunday 19 March.
43. On 4 April 2023, Ms Munroe wrote to the claimant at his personal email address to invite him to a disciplinary hearing on 11 April at 2pm.
44. In the evening of 8 April 2023 Mr Patrick emailed the claimant on his work email to say that he was unable to reach the claimant to explain the outcome of "*your complaint*". Mr Patrick wrote that following his investigation his conclusions were that:
 - a. there had been a "*misunderstanding / miscommunication between yourself and [Ms Munroe] during your telecom on 17th March 2023, which led you both of you having different understandings regarding who was to work on 19th of March*";
 - b. "*I have also spoken to you and [Ms Munroe] and insisted that all shifts must be communicated and confirmed in writing to avoid any repeat of this situation, which you have both acknowledged*";

- c. the claimant's behaviour on the morning of the 19th *"is a matter that is being dealt with separate from your complaint"*; and
 - d. concluded with *"If you feel that your complaint has not been investigated properly or you wish to provide significant new information then you may complain to the next stage of the complaint procedure. For your complaint to be considered you will need to contact me explaining clearly why you feel your complaint has not been investigated properly or provide details of any new significant information or evidence that may alter the decision made."*
45. On 10 April, the claimant emailed the respondent to say that he will not be attending the disciplinary meeting the next day. He stated that he did not understand that nature of the complaint, or who had made it. He also requested that it be investigated by *"management level from another team"*.
46. I find that the claimant refused to go to the disciplinary because he didn't want to attend it and didn't want to be accused of misconduct/gross misconduct.
- a. I do not find it credible that he was unaware of the nature of the disciplinary or why it was being brought. It had been discussed with him on 20 March and that it was clear in the email regarding the claimant's complaint about Ms Munroe that his behaviour would be considered separately.
 - b. The claimant felt that he didn't have enough time to prepare but had a full week to prepare for the disciplinary from written notice and had been made aware at the meeting on 20 March that his behaviour would need to be considered.
 - c. The claimant had seen the statements made by Mr Ayesoro and Ms Munroe;
 - d. In witness evidence, the claimant explained that he felt that Mr Patrick was biased against him because he is friends with Ms Munroe. However, the claimant said that he was a long standing employee and was also friends with Mr Patrick. Mr Patrick had dealt with the claimant's complaint about Ms Munroe in a neutral and fair way and I find that there was no reason for the claimant to feel that he would not get a fair hearing.
 - e. The claimant felt that a disciplinary should be heard by another team but acknowledged that there was no one else in the respondent who could hear it. He felt that his disciplinary should have been outsourced to an independent HR company, despite it being a small company of less than two dozen employees operating in the public sector.

11 April 2023

47. The claimant had a hospital appointment, then received a telephone call from Mr Patrick at around 1:30pm.
- a. Mr Patrick had not received the email that the claimant had sent him the previous evening and was not aware that the claimant had issues about attending the meeting.
 - b. Mr Patrick said that during the call, the claimant didn't ask for more time or to postpone the hearing or say that he thought the process wasn't fair. The claimant was only focussed on stopping the disciplinary action and Mr Patrick had to explain why he couldn't just abandon the process. I have no reason to disbelieve Mr Patrick's account.
 - c. The claimant reiterated his concerns about the disciplinary and said that his complaint about Ms Munroe had not been investigated. He felt that Ms Munroe should be "*held accountable for her actions*".
 - d. The claimant denied he formally resigned during that call, but did confirm that "*I told Eric I could not work for him unless he stopped the disciplinary*". The claimant also felt that as he had not been on the rota for approximately seven weeks (notwithstanding he worked on the weekend of 17-19 March) he felt that he "*had no reason to say I had resigned as I had not worked anyway*".
48. At 2:49pm, after the phone call with Mr Patrick, the claimant emailed him a copy of a Fit Note issued on 3 April 2023.
49. At 3:36pm Mr Patrick responded to the claimant's email and recorded his impression of the call earlier that day. In this email Mr Patrick said
- "Despite me taking time to explain the procedure, you then stated that you were not happy to continue to work for EP Care unless I withdrew the disciplinary hearing. I explained to you that I could not withdraw the hearing as you need to held accountable for your actions and behaviour towards another member of staff. It was at that point that you began swearing and raising your voice, at which point I reminded you that I was speaking to you politely and that I expected the same level of courtesy to be shown to me. You then reiterated that you had no intention of not attending any disciplinary hearing regarding the incident on 19th March 2023, and that you would not be returning to work unless the disciplinary hearing was withdrawn. Once again I told you that I would not be withdrawing the disciplinary hearing at which point you stated that you no longer wish to work for EP Care before ending the call."*

50. The claimant did not respond to that email. In his witness evidence when questioned about this, the claimant simply said "*I didn't leave, Eric knows I didn't leave*" but offered no explanation as to why he did not rebut Mr Patrick's email which clearly stated what Mr Patrick understood to have happened.

Events following 11 April 2023

51. On 4 May, the claimant collected his belongings from the Church Street site. The claimant said in evidence that this was not because his employment was terminated but because Mr Patrick had thrown away his clothes in the past, so he just wanted to collect his tracksuit.
52. The claimant contacted another longstanding colleague Mr McIntosh to tell him he intended to come to the Church Street site. Mr McIntosh agreed to gather the claimant's belongings and meet him downstairs.
53. Mr McIntosh informed Mr Patrick that the claimant would be attending the respondent's site. Mr Patrick told Mr McIntosh that he was happy for the claimant to be on the premises and later when the claimant was on site he called Mr McIntosh and asked to speak to the claimant. The claimant declined to talk to Mr Patrick and said to Mr McIntosh that "*he was no longer happy working for Eric Patrick Care as he felt [Ms Munroe] and he had lied to him, and he did not want to work for liars*".
54. When asked if he accepted Mr McIntosh's account and that there was no reason for him to make it up the claimant responded by saying that he did not accept it and that Mr McIntosh was interested in getting his wages from Mr Patrick.
55. The claimant confirmed in evidence that at that time, he had not spoken to Mr Patrick since 11 April.
56. On 17 May, the claimant had heart surgery and Mr Patrick contacted him on 20 May to see how was. Neither party mentioned work and both said that it was a positive call.
57. On 1 June, £750 was deposited in the claimant's bank account from Eric Patrick Care with the ref PAYE. The nature of this payment is disputed.
- a. The claimant called Mr Patrick to ask "*whether he would be willing to pay me sick pay*". The claimant says that Mr Patrick "*told me not to worry and he would look after me*". The claimant said that Mr Patrick "*would put me back on his 'books'. He would speak to his accountant the following day to ensure I was put back onto the 'books'*". I note the claimant in this instance acknowledges that he was not on the books and that this position contradicts the rest of his claim that he never resigned.

- b. Mr Patrick says that during the call after his operation, the claimant had mentioned that he was struggling financially and so he agreed to lend him money. He said that he did so from the company account by accident and submitted evidence of his emails with the company accountant alerting him to the error and asking how to rectify the mistake these emails were dated 1 June.
58. I find that, on the balance of probabilities, Mr Patrick did not agree to put the claimant 'back on the books' but provided the £750 in a personal capacity as supported by the contemporaneous email correspondence between Mr Patrick and the accountant.
59. 17 June 2023 email from the claimant to Mr Patrick where the claimant denies having resigned. He said, "*I did not resign because if I had resigned I wouldn't have sent you a fit note letting you know I was off sick from dated 25th March 20.23 to 16th March 20.23 or are you saying you didn't receive this also.*"
60. 18 June 2023 Mr Patrick responded to the claimant saying "*I refer you to our telephone conversation on 11th April 2023 and my follow-up email to you on the said date. Where you told me you no longer wished to work for us, and also reiterated the same to other staff members before coming to collect your belongings. Your resignation has been accepted, and as far as I am concerned you no longer work for EP Care and haven't done for months.*"
61. P45 provided on 13 July 2023 with leaving date as 11 April 2023.

Fit Notes

62. The bundle included the claimant's Fit Notes for the following periods:
- a. 25/03/2023 – 16/04/2023 – sent to the respondent on 11/4/2023
 - b. 17/04/2023 – 26/04/2023
 - c. 29/04/2023 – 17/05/2023
 - d. 15/05/2023 – Record of admission to hospital
 - e. 17/05/2023 – 23/08/2023
 - f. 22/08/2023 – 21/09/2023
63. The letter from the DWP dated 26 August 2023 said, "*you no longer need to send us statement of fitness for work (also known as doctor's notes or fit notes) from your doctor, unless you condition changes*" and the DWP had a record of his prior year's pay.
64. I noted the claimant's repeated claims that the respondent knew he was ill but I do not find this to be supported by the documentary and witness evidence. I

find that given the longstanding nature of the personal and professional relationship between the claimant and Mr Patrick, there is no reason to believe that the respondent would not have paid the claimant statutory sick pay (SSP). Mr Patrick voluntarily contacted the claimant after his operation and offered to help the claimant financially.

65. There is no evidence to demonstrate that the claimant had clearly explained the nature of his illness and submitted a formal claim for SSP prior to the issue with his shifts on 27 February/beginning March. The first fit note obtained by the claimant on 25 March was not submitted to the respondent until after the call on 11 April 2023. The subsequent fit notes obtained by the claimant do not conclusively indicate an ongoing expectation of continuing employment and SSP as they were also required by the DWP in support of the claimant's Universal Credit.

RELEVANT LAW

Employment status

66. An "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. s.230(1) Employment Rights Act 1996 (ERA96)

Dismissal

67. An employee has the right not to be unfairly dismissed by their employer. (s.94(1) ERA96).
68. S.95 ERA96 provides that a dismissal occurs when
- "(1) An employee is dismissed by his employer if (and, subject to s95(2) only if)
- (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
 - ... or
 - (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
69. S.97(1) ERA96 states that the effective date of termination is
- (a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.

(2) Where—

(a) the contract of employment is terminated by the employer, and

(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),

for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(3) In subsection (2)(b) “the material date” means—

(a) the date when notice of termination was given by the employer, or

(b) where no notice was given, the date when the contract of employment was terminated by the employer.

(4) Where—

(a) the contract of employment is terminated by the employee,

(b) the material date does not fall during a period of notice given by the employer to terminate that contract, and

(c) had the contract been terminated not by the employee but by notice given on the material date by the employer, that notice would have been required by section 86 to expire on a date later than the effective date of termination (as defined by subsection (1)),

for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(5) In subsection (4) “the material date” means—

(a) the date when notice of termination was given by the employee, or

(b) where no notice was given, the date when the contract of employment was terminated by the employee.

70. A ‘heat of the moment’ resignation must be “seriously meant” or “conscious and rational”. This means that the speaker of the words genuinely intended to resign (or dismiss) and that they were “in their right mind” when doing so. The tribunal

must determine this objectively, i.e. would have appeared to a reasonable employer in all the circumstances that the claimant "really intended" to resign. Omar V Epping Forest District Citizen Advice [2023] EAT

Constructive dismissal

71. "The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct." S95(1)(c) ERA96
72. Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 provides the tribunal must consider
 - a. what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, their resignation? Where an employee has mixed reasons for resigning then their resignation will constitute a constructive dismissal provided that the repudiatory breach relied on was at least a substantial part of those reasons Meikle v Nottinghamshire County Council [2004] EWCA Civ 859, [2005] ICR 1.
 - b. Has the employee affirmed the contract since that act?
 - c. If not, was that act (or omission) by itself a repudiatory breach of contract? This does not mean that the employer intended to end the relationship but that the employer demonstrated an intention to no longer comply with a term (or terms) of the contract that was so fundamental that it went to the heart of the contract Singh v Metroline West Ltd [2022] EAT 80.
 - d. If not, was it nevertheless a part (of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?
73. There was a breach of the implied term of trust and confidence where "*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 and Mahmud v BCCI International SA (1997) ICR 606
74. The burden of proving the absence of reasonable and proper cause lies on the party seeking to rely on such absence. This will usually be the employee. RDF Media Group plc and anor v Clements [2008] IRLR 207 QBD.
75. The question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal instead the test is objective Western Excavating ECC Ltd v Sharp (1978) IRLR 27. The question is whether a reasonable employee

would interpret the employer's actions as amounting to a termination Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA.

Was the dismissal unfair?

76. A constructive dismissal is not necessarily an unfair one Savoia v Chiltern Herb Farms Ltd (1982) IRLR 166 CA.

Remedy

77. In unfair dismissal complaints there is a standard element known as a "basic award".
78. There is also a compensatory award which is defined as such amount as is "*just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.*"²
79. The claimant has a duty to mitigate their loss, that means to make reasonable efforts to find another job. If the employer believes that they have not made enough effort, the burden is on the employer to prove that.

APPLICATION OF LAW TO FACTS

80. I find that the claimant was an employee within the meaning of s230 ERA96 with the relevant period of service and is therefore entitled to bring a claim for unfair dismissal.

Burden of Proof

81. The claimant must show that on the balance of probabilities he was dismissed by the respondent, either expressly or constructively.
82. If the claimant has established that there was a dismissal, the burden of proof passes to the respondent who must establish, (i) on the basis of the facts known to it at the time, the reason for the dismissal and (ii) that, on balance of probabilities is a potentially fair reason for dismissal.

Was there a dismissal?

83. The claimant's primary argument is based on the allegation that there was a scheme formed by Mr Patrick and Ms Munroe to exclude him from shifts from the end of February so that Mr Patrick would not have to pay him sick pay.
84. I do not find this theory credible as:

- a. the claimant did not clearly tell them of his health issues and make a claim for sick pay prior to 27 February, in fact the claimant didn't provide a fit note or explain his health issues until 11 April;
 - b. the claimant did not respond to calls from the respondent on 27 February after missing his shift;
 - c. the claimant failed to provide the respondent with his availability for work in March;
 - d. the claimant had been included on the employee training on Friday 17 March;
 - e. the claimant was provided with work in March on short notice;
 - f. the respondent had provided the claimant with an alternate shift on Sunday 19 March;
 - g. Mr Patrick dealt with the claimant's complaint about Ms Munroe fairly and reasonably;
 - h. The claimant did not obtain a fit note from the doctor until six days after the incident on 19 March;
 - i. the claimant did not submit that doctor's fit note about his illness until after the phone call on 11 April; and
 - j. Mr Patrick remained concerned about the claimant's welfare after the employment relationship terminated and provided him with financial support.
85. From the respondent's perspective, the claimant had missed work on 27 February, refused to respond to calls for days, had not provided availability for work, then on 19 March had been abusive and inappropriate on the premises where young people may have overheard him, and that abuse had been directed towards his line manager and Mr Patrick. The respondent had tried to deal with the matter calmly by offering alternate employment on 19 March, had fairly considered the situation and how to ensure the misunderstanding would not arise again but wanted to ensure that the claimant's behavior was appropriately addressed.
86. Although the claimant may have later regretted saying it and now denies it, I find that, on the balance of probabilities, he resigned during the phone call with Mr Patrick on April 11 2023.
- a. The email from Mr Patrick two hours after their telephone call clearly set out his understanding of what had happened;

- b. the claimant made no effort to contact him that day to clarify the situation and rebut Mr Patrick's interpretation of the events meant that he had resigned;
 - c. the claimant failed to clarify the situation over the following few weeks and confirmed it again on the site visit on 4 May when he refused to speak to Mr Patrick and told Mr McIntosh that he didn't want to work for Mr Patrick; and
 - d. the claimant did not contact the respondent after 11 April (paragraph 56) and the first contact was initiated by Mr Patrick nearly six weeks later on 20 May.
87. Considering the series of events prior 11 April; starting from the time that the claimant did not turn up for shifts; his confrontation with his line manager; his refusal to engage in the disciplinary process; his resignation on 11 April; and then his subsequent refusal to engage with the respondent; I find that a reasonable employer, in the same position, with the information known to the respondent at the time would have believed that the claimant "seriously meant" his resignation during the call.
88. A reasonable employer would have appreciated that the claimant was perhaps not "conscious and rational" during the call. The respondent followed up their meeting with a clear email and gave the claimant a chance to clarify his words, and the claimant refused to engage further with the respondent. I therefore find that the claimant resigned with immediate effect on 11 April 2023.
89. For these reasons I find that there was no dismissal by the respondent within the meaning of s95(1)(a). Therefore, the claimant's claim for unfair dismissal fails.

Constructive dismissal

90. The claimant argued, in the alternative, that he was constructively dismissed and his resignation fell within s95(c) of ERA96.
91. The claimant argued that the combination of withholding shifts in response to his poor health and an unfair disciplinary procedure had breached the implied term of trust and confidence and the employer's actions were so fundamental that it left him no choice but to terminate his employment without notice.
92. The respondent was not contractually obliged to provide shifts nor was there an established pattern of shift work that could have given rise to an expectation of regular shift allocation.
93. The respondent was unaware of the claimant's health and the implications on SSP. The respondent did not provide the claimant with shifts because the

claimant failed to turn up for work on 27 February and to provide his availability for work in March.

94. The disciplinary procedure was flawed as it did not strictly follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, but the question is whether those flaws were so serious as to be a breach of the implied term of trust and confidence. The claimant has failed to prove that the process was so fundamentally unfair that it breached the implied term of trust and confidence. In reaching my decision I took into account the following:

The respondent:

- a. diffused the situation on the day of the incident by providing the claimant with alternate work;
- b. promptly investigated the claimant's grievance about Ms Munroe and suggested a new clearer process that would be followed by Ms Munroe;
- c. explained to the claimant what it understood had happened on 19 March, showing the claimant the relevant statements provided by the other staff members;
- d. gave the claimant the opportunity to provide his own statement;
- e. explained why the disciplinary process was important and couldn't just be abandoned;
- f. the disciplinary couldn't be carried out by a separate team but the process was being handled by Mr Patrick who was not the claimant's line manager and was not involved in the incident at Eldon Street on 19 March;
- g. provided the claimant with sufficient notice in advance as he was told verbally in the meeting on 20 March and again in writing on 4 April;

The claimant:

- h. did not address the disciplinary procedure until the night before;
 - i. didn't wait for the outcome of the respondent's investigation; and
 - j. did not wish to go through the process and resigned before the employer had properly investigated and reached any conclusions.
95. For these reasons I find that neither the respondent's failure to schedule shifts nor the disciplinary procedure were a breach of the implied term of trust and confidence.
96. I have also carefully considered whether all of the respondent's actions from the end of February to 11 April could have constituted a course of action by the

respondent (with the disciplinary investigation being the last straw) which breached the implied term of trust and confidence, but I am not persuaded that they do. I considered the employer's actions and my conclusions in paragraphs 83 and 84 above in light of constructive dismissal and I am of the view that the employer's actions (not timetabling shifts and the disciplinary process) were a predictable consequence of the actions of the claimant in the employment relationship and so, taking an objective view in all the circumstances, I do not consider that a reasonable employee would interpret the employer's actions as a repudiatory breach.

97. The claimant's claim for constructive unfair dismissal also fails.

Employment Judge O'Neill
Date **12 April 2024**

JUDGMENT & REASONS
SENT TO THE PARTIES ON
16 May 2024

.....
FOR THE TRIBUNAL OFFICE