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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107272/2023

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Held in person on 18 and 19 March 2024

Employment Judge S Neilson

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Mr Ian David Black

**Claimant
Represented by
Mrs Black**

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**Bellrock Property & Facilities Management Limited
Represented by**

**Respondent

Dr Hamilton**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Employment Tribunal is that the claimant was not constructively dismissed and his claim for unfair dismissal is accordingly dismissed.

REASONS

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1. The case was heard in person over two days. The Claimant was represented by his wife, Mrs Black and the Respondent was represented by Dr Hamilton of the respondent. Both parties provided a bundle of productions to which the witnesses referred.

2. The claimant gave evidence on her own behalf. Claire Wilson, Deputy Contract Manager and John Hattie, Supervisor, gave evidence on behalf of the respondent.
3. At the outset the Tribunal clarified the issues in dispute (as noted below). The claimant confirmed that although reference was made to redundancy in the ET1 this was a claim for constructive unfair dismissal only. The Tribunal also clarified that it did not have any remit to deal with the loss of the claimant's personal possessions. The claimant confirmed that he was only seeking a basic award for unfair dismissal. He was not seeking a compensatory award as he had commenced employment with a new employer on 11 September 2023.

Issues

4. The issues to be determined in the case were as follows.
5. Did the respondent commit a fundamental breach of the claimant's contract?
6. Did the claimant resign in response to that fundamental breach of contract?
7. Did the claimant delay before resigning and affirm the contract and lose the right to claim constructive dismissal?
8. If the claimant was constructively unfairly dismissed what compensation should be awarded to the claimant?

Findings in Fact

9. The respondent is a large facilities management company employing approximately 1,600 employees across the UK. They have responsibility for managing a number of buildings throughout the UK on behalf of clients. In particular, the respondent had a contract to provide facilities management services to office buildings in Scotland and in Newcastle on behalf of HMRC. One of these buildings was the tax offices of the HMRC at Queensway House in East Kilbride (that location will be referred to as "EK"). EK was a large

building consisting of four distinct blocks, A, B, C and D. When full it would house approximately 2,200 people.

10. The respondent's contract with HMRC was to deliver hard facilities management services for HMRC's buildings in Scotland and Newcastle. Hard facilities management services consist of physical maintenance works to the buildings and the plant in the buildings. The respondent took over responsibility for that contract on 1 April 2021. Under the contract the respondent was responsible for carrying out a number of maintenance tasks on the HMRC properties, including EK. The work had to be carried out to an internationally recognised standard, SFG20, for building maintenance. The maintenance works could be broken down into Statutory; Non-Statutory; Reactive and Quoted Works. The contract between the respondent and HMRC set out the standards to be maintained in providing the services. Failure to meet those standards would result in financial penalties being imposed upon the respondent.
11. The claimant was at the material times employed by the respondent as an electrical technician. The claimant worked exclusively at EK carrying out facilities management work.
12. The claimant had been employed at EK for 28 years. During that period he had worked for various companies and he had been transferred on a number of occasions under the Transfer of Undertakings (Protection of Employment) Regulations ("TUPE"). He was transferred on 1 April 2021 under TUPE to the respondent.
13. In the period from April 2021 through to August 2023 the claimant worked at EK alongside his colleague, Mr Ronnie Greenan ("Mr Greenan"). They both reported into a Supervisor. From October 2021 that Supervisor was Mr John Hattie ("Mr Hattie").
14. The claimant and Mr Greenan were responsible for carrying out both planned and reactive maintenance works to the building at EK.

15. The claimant, Mr Greenan and Mr Hattie would participate in a weekly virtual Teams meeting with other colleagues who carried out similar roles for the respondent's other properties in Scotland and in Newcastle. There were a total of 9 properties. These meetings were chaired by the Regional Manager, Mr Steven Pollock ("Mr Pollock").
16. Under his terms and conditions of employment the claimant was not required to do overtime and the respondent was not obliged to offer any overtime. From time to time the claimant would be offered overtime and he could elect to do it or not.
17. The respondents have a formal grievance policy which provides for grievances to be dealt with informally in the first instance through discussion, which failing for a formal grievance process to be followed by the employee lodging a written grievance.
18. The respondent operated an IT system known as "Concerto". All maintenance jobs at EK would be logged on Concerto. The claimant and Mr Greenan had access to Concerto through tablets issued to them for their use. The respondent and the client also had access to Concerto.
19. The maintenance works at EK would be carried out by the claimant and Mr Greenan. However, from time to time the respondent would outsource certain works to third parties to carry out, where, for example, particular skills were required that the claimant and Mr Greenan might not possess.
20. The tasks that the claimant and Mr Greenan required to complete each day were posted to the Concerto IT system. For Reactive Maintenance works HMRC would contact the head office of the respondent in Leicester to outline the problem. The respondent would then log the work required on the Concerto system for the claimant and Mr Greenan to pick up.
21. Mr Hattie started work as the EK site supervisor for the respondent in October 2021.

22. There were a number of changes in the way that the respondents managed the workload with HMRC once they took over the contract. Work that had previously been scheduled to be done outside of office hours was now scheduled to be done during office hours – thus reducing the need for overtime. Work that might have been previously done by two people would often just be given to one person to do. Mr Hattie played a part in changing these ways of working. He wanted to ensure a higher level of compliance with the terms of the contract.
23. During the period that the claimant and Mr Greenan worked for Mr Hattie their communications, on the whole, were restricted to matters relating to work issues.
24. Mr Hattie required the claimant and Mr Greenan to report to his office every day at 3.45 p.m. to discuss the days work and the plan for work the following day.
25. 1 February 2023 was the claimants 60th birthday. It was not acknowledged by Mr Hattie.
26. The amount of overtime that the claimant did decreased once the respondent took over the contract with HMRC.
27. There was an annual shut down of electrical systems on an annual basis to allow an outside contractor to check the electrical system. This work was done over a weekend. Typically, it might provide an opportunity for overtime working for the claimant. The claimant was involved in this work at the end of 2021. In 2022 the respondent's sub-contractor was unable to do the work and at the last minute the respondent engaged a new sub-contractor to do the work on 17/18 December 2022. The claimant was offered an opportunity to do overtime in connection with that shut down but declined due to the lack of notice.
28. Mr Hattie did move his office during the period he was supervising the claimant and Mr Greenan. The move was 10 metres down the hallway. The move would have been known to the claimant.

29. Mr Hattie would from time to time be absent from EK without notifying the claimant. Holidays would be recorded both with Human Resources and on a wall chart in the respondents office at EK.

5 30. On 1 February 2023 Mr Greenan had been assigned a task of putting in floor boxes in Block C of EK. Mr Hattie attended at the location but could not find Mr Greenan. The claimant was at the opposite end of the floor and Mr Hattie asked the claimant where Mr Greenan was. The claimant informed Mr Hattie that he did not know where Mr Greenan was but thought he might be at the toilet. The claimant left and when Mr Greenan returned to the area where the
10 work was to be carried out in Block C Mr Hattie spoke to him to ask where he had been. Mr Greenan was unhappy about this and said that Mr Hattie was watching him and that “we are watching your comings and goings”. Mr Hattie was unsettled by this and left to speak to the claimant who at this time was in Block B. The claimant was up a step ladder in block B fixing a fire exit sign.
15 Mr Hattie approached the claimant and, in a brief conversation, said to him words to the effect of “I have just had a conversation with Mr Greenan and he informed me that you are both watching my coming and goings”. The claimant responded to say he did not know anything about this. Mr Hattie then said he would notify Mr Pollock and organise a site meeting. In addressing the
20 claimant Mr Hattie spoke with a raised voice and was agitated.

31. Mr Hattie notified Mr Pollock about the incident on 1 February 2023 and Mr Pollock convened a meeting for 3 February 2023 with the claimant, Mr Greenan, Mr Hattie and himself. Ms Cunningham, the administrator was in attendance to take notes. The purpose of the meeting was to provide an
25 opportunity to clear the air between Mr Greenan, the claimant and Mr Hattie, to get out any issues and to resolve those issues. During that meeting there was a general discussion about some of the issues on the EK site. In particular, the issue of management of the claimant and Mr Greenan and a reduction in overtime was raised by the claimant. Mr Hattie and Mr Pollock explained that the respondent does have a different approach to Mr
30 Greenan’s and the claimant’s previous employer, Salisbury. The claimant asked for a formal meeting with Mr Pollock to discuss the issues that he and

Mr Greenan had with the way they were being managed. Mr Hattie offered to and did leave the meeting at that point to allow that conversation to take place. The meeting then continued with the claimant, Mr Greenan, Mr Pollock and Ms Cunningham in attendance. The claimant and Mr Greenan highlighted to Mr Pollock the difficulties they were experiencing with Mr Hattie, particularly with regard to the lack of communication.

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32. The claimant sent an e mail on 10 February 2023 to Mr Pollock Stating "*Hi Steven, Both Ronnie and I understand work for everyone is busy and everything needs planned, can you give us an update in plans to move forward from our meeting last week 3rd February Ronnie and I are keen to move forward We look forward to hearing from you*"

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33. The claimant sent a further e-mail on Tuesday 14th March 2023 to Mr Pollock requesting an update on the meeting and stating that "*the site issues remain unchanged*". Mr Pollock responded to that e mail by an e mail on the same day stating "*Hi Ian thanks for your e-mail. The update as it stands is I have taken on board both sides of the discussion that was had and listened to all points. It remains that both sides have valid points and arguments and I will seek to resolve as much as I can from a site relationship point of view. Regards the minutes I will get these to you once I'm back at my laptop. Regarding another meeting I think it will be best to hold separate meetings on this as there are separate issues to discuss. I will be in touch to advise of times for the meetings.*" The claimant responded by e-mail on the same date "*Hi Steven Thanks for your quick response All Ronnie and I are asking is to make a meeting a priority as continuing to work in a stressful environment with unresolved issues is hard and waiting six weeks plus is a long time cheers*".

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34. On 21st March 2023 Mr Pollock sent a copy of the minutes of the meeting of 3rd February 2023 to the claimant and Mr Greenan and apologised for the delay in getting these to them. In a further e mail to the claimant at 3:02 p.m. on 21 March 2023 Mr Pollock stated "*Hi Ian, just tried to ring you, I'm in Ian Prosser's office just now if you want to have that follow up chat. If you are*

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available [short notice I know] head down I'll be here for another hour or so just you though I'll speak to Ronnie separately. If not I will rearrange.. Thanks"

The claimant was unable to attend a meeting as he was busy working. He responded by e mail that day to say *"Hi Steven Sorry been a bit busy would prefer to rearrange meeting also with both Ronnie and myself present as it affects both of us cheers"*. To which Mr Pollock responded *"Hi Ian, no problem but I won't be doing a joint meeting I want to establish any individual issues. I will be in touch."*

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35. Mr Greenan was the subject of a disciplinary investigation meeting carried out by the respondent on 12 April 2023. By letter of 7 June 2023 Mr Greenan was invited to a disciplinary hearing. In July 2023 Mr Greenan resigned from his employment with the respondent.

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36. The claimant was absent from work on the grounds of ill health in the period from 11 July 2023 through to 8 September 2023. The claimants first Statement of Fitness to Work dated 14 July 2023 stated the condition as "Asthma flare". The claimants second Statement of Fitness to Work dated 7 August 2023 stated the condition as "asthma flare, stress".

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37. By letter of 14 August 2023 the claimant resigned from his employment with the respondent. The claimant gave 4 weeks' notice with his employment to terminate on 8 September 2023. In the resignation letter the claimant stated *"In the past fourteen months, my Line Manager John Hattie, has made it clear that I am not welcome as part of 4 staff members at Queensway House. Lack of communication, controlling remarks, instigating isolation have over time, resulted in a stressful and toxic place of work. Raising concerns with Regional Management Steven Pollock in August 22 - resulted in no assistance, no meeting, no improvement and again in Feb 23 (this time locally documented but no procedure followed up when asked several times - I was simply ignored), it was again made clear that Bellrock did not want to improve the working relationship. The Bellrock, bullying, toxic working environment at Queensway house, has solely led me to give you the required four weeks' notice to terminate my employment after 28 years."*

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38. The respondents replied by letter of 15 August 2023 accepting the claimant's resignation.
39. The claimant's employment terminated on 8 September 2023.
40. The claimant secured alternative employment with Arnold Clark Automobiles commencing on 11 September 2023. The claimant secured this new role through his son who works for Arnold Clark Automobiles. He secured that role shortly before starting with them on 11 September 2023.

The Law

41. Section 94 of the Employment Rights Act 1996 ("ERA") gives an employee a right not to be unfairly dismissed. Under Section 111 of the ERA an employee has a right to present a claim for unfair dismissal to an employment tribunal.
42. Section 95(1)(c) of the ERA provides "*For the purposes of this Part an employee is dismissed by his employer if ... (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.*"
43. As established in *Western Excavating -v- Sharp* 1978 IRLR 27 there are three essential elements to a claim for constructive unfair dismissal:- (1) there must be an actual or anticipatory breach of contract by the employer which is a fundamental or repudiatory breach, ie one that goes to the root of the contract so as to be sufficiently serious to justify the employee's resignation; (2) the employee must resign in response to that breach, rather than for some other reason; and (3) the employee must not delay too long in terminating the contract in response to the employer's breach, otherwise the employee may be regarded as having elected to affirm the contract and the right to accept the employer's breach would be lost.
44. In all contracts of employment there is an implied term of trust and confidence. In the context of constructive unfair dismissal the employee must show that the employer has, without reasonable and proper cause, conducted itself in

a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them.

45. In the context of a constructive unfair dismissal claim the Tribunal may have to have regard to the last straw doctrine. This might arise in three different ways. Firstly, where earlier acts or omissions do not by themselves amount to a fundamental breach but the last act or omission (“the last straw”) adds sufficient weight that the cumulative total does repudiate the contract (*Waltham Forrest -v- Omilaju 2005 IRLR 35*). Secondly where earlier acts or omissions do amount to a fundamental breach but the employee carries on working thus affirming the contract and there is then a last straw event – the employee can rely upon the entire series of events as repudiating the contract (*Kaur -v- Leeds Teaching Hospitals NHS Trust 2018 IRLR 833*). Thirdly where the earlier acts/omissions do amount to a fundamental breach and the employee has not affirmed the contract then an innocuous final straw will allow the employee to go back and rely upon the earlier breaches provided they materially contributed to the decision to resign (*Williams -v- Alderman Davies Church in Wales Primary School 2020 IRLR 589*).
46. The burden of proof to establish that there has been a fundamental breach of contract lies with the employee.

20 **Discussion & Decision**

47. The primary issue in this case is whether there has been a fundamental breach of contract by the respondent such as to entitle the claimant to resign and claim constructive dismissal. The onus on establishing that sits with the claimant. Ultimately it is an objective test and it is for the Tribunal to satisfy itself that it is more likely than not that there has been such a breach.
48. The claimant relies upon a breach of the implied duty of trust and confidence. His case is based upon two broad factors. Firstly, his treatment by his Supervisor, Mr Hattie. Secondly the failure of the respondent to address the concerns that he raised about his treatment by Mr Hattie – specifically following on from a meeting on 3 February 2023.

49. Mrs Black on behalf of the claimant put forward a number of grounds which she claims establish a breach of the implied duty of trust and confidence. These essentially relate to the relationship with Mr Hattie. The grounds can be summarised as (a) lack of communication; (b) lack of team conversation; 5 (c) the requirement to get permission for the claimant and Mr Greenan to work together; (d) the lack of communication over the electrical annual shut down; (e) Mr Hattie “watching” the claimant and his colleague; (f) the requirement to report to Mr Hattie at 3:45 p.m. each day; (g) work being done during office hours instead of outside office hours and being done as overtime; (h) Mr 10 Hattie moving office without telling the claimant; (i) Mr Hattie leaving site or taking annual leave and not notifying the claimant.

50. Dealing firstly with the communication issue. The evidence did establish that the claimant and Mr Hattie did not have what might be termed a “friendly” relationship. There was very little in the way of small talk or conversation of 15 matters outside the working relationship. This was an issue for the claimant. For example, the failure of Mr Hattie to acknowledge the claimant’s 60th birthday on 1 February 2023. Allied to that there was clearly a change in working style when Mr Hattie became the Supervisor. There were new ways of working. However, the Tribunal is not satisfied that there was any evidence 20 of a lack of communication in relation to work matters. Communication of work instructions was through the Concerto IT system allied to the daily meetings at 3.45 p.m. with Mr Hattie and the weekly Team’s meetings. Whilst there may well have been a lack of “team conversation” on matters outside of the workplace it is not a requirement of the employment relationship that 25 employees need to socialise. They do need to treat each other with civility and respect but the fact that a supervisor does not wish to engage in conversation about non-work matters would not be grounds for a breach of the implied duty. The Tribunal has also considered whether the events of 1 February 2023 were sufficient to show grounds for breach of the implied duty 30 of trust and confidence. There was an altercation between the claimant and Mr Hattie. However, both parties confirmed that there was no swearing and that it was a short exchange where Mr Hattie raised his voice and was

agitated. The Tribunal did not consider that incident by itself to be sufficient to establish a breach of the implied duty.

51. The new ways of working may well have led to concerns (c) and (g). There were jobs that the respondent considered were not two-man jobs. It is not
5 unreasonable to require that the claimant and Mr Greenan work individually on matters. This was no doubt a change for both of them and may have jarred but it is not an unreasonable position for the respondent to adopt. Similarly, the change to work being done outside of office hours to being done during office hours is a reasonable position if that avoids overtime and saves cost.
10 In relation to overtime there was no contractual entitlement to overtime and the claimant in giving his evidence confirmed that not getting overtime was not a material issue for him.

52. On issue (d) Mr Hattie explained that the issue with the annual shut down for 2022 arose at the last minute and the claimant was notified, albeit late in the
15 day, but declined due to the late notice.

53. On issue (e) the claimant did not provide any specific examples. No doubt the change in the ways of working may have led to a higher degree of “supervision” than the claimant and Mr Greenan might have been used to – but there was no evidence that this was in any way inappropriate.

20 54. On issue (f) the claimant objected to having to meet at 3:45 p.m. each day. In the view of the Tribunal this was not an unreasonable management request. Mr Hattie was concerned to stay on top of the work and plan future work. He considered this to be an important meeting in the context of how he ensured compliance with the client’s requirements. In the view of the Tribunal
25 the requirement for such a meeting alongside the other new ways of working instigated by the respondent were reasonable management decisions to meet the requirements of the service being provided to the client. This would have represented a change to the claimant, but it cannot be said that it represented any change in his terms and conditions or was unreasonable in
30 the context of the role the claimant was carrying out.

55. On issue (h) whilst Mr Hattie may not have formally notified the claimant of his office move in advance the Tribunal do not see this as a material issue. It would have been obvious there was a move and it would have occasioned the claimant very little inconvenience.
- 5 56. Finally in relation to leaving site and annual leave. There was a calendar on the wall in the office showing holidays. Whilst there may well have been occasions when Mr Hattie did not fully disclose when he was leaving site or when he was going to be absent the Tribunal does not consider that to be a material issue.
- 10 57. Whilst the Tribunal can understand that the claimant must have found the transition to the new ways of working brought in by the respondent challenging, particularly after very long and loyal service, taking the evidence as a whole the Employment Tribunal is not satisfied that there is evidence that supports the claimant's case that his treatment by Mr Hattie amounts to
15 a breach of the implied duty of trust and confidence.
58. The claimant in his evidence for his reasons for leaving also referenced the treatment of Mr Greenan. The Tribunal did not hear any evidence with regard to the circumstances surrounding Mr Greenan being put through an investigation and disciplinary process. Accordingly, it cannot say whether Mr
20 Greenan's treatment gives any grounds for the claimant to allege that this is a basis for a breach of the implied duty owed to him.
59. The other issue that the claimant raised related to the failure by the respondent to deal with his concerns. The only evidence the Tribunal heard on this related to February/March 2023. Specifically, there was evidence that
25 that the claimant raised his concerns at a meeting with Mr Pollock on 3 February 2023.
60. The failure by an employer to properly deal with a grievance raised by an employee can by itself be a breach of the duty of trust and confidence (see *Blackburn -v- Aldi Stores 2013 IRLR 846*).

61. It was Mr Hattie who instigated the meeting with Mr Pollock that took place on 3 February 2023. At that meeting the minutes confirm that the claimant stated "*I personally don't want to talk about this I would rather have a formal meeting with yourself Steven regarding mine and Ronnie's issue.*" Thereafter
5 Mr Hattie leaves to allow the conversation to take place and there is a meeting where the claimant outlines his concerns regarding the relationship with Mr Hattie. The meeting concludes and it would appear to be the understanding of the claimant that Mr Pollock will follow up with him and Mr Greenan. The claimant chases Mr Pollock on 10 February 2023 and again on 14 March
10 2023. Mr Pollock responds on 14 March 2023 proposing a separate meeting with the claimant. On 21 March 2023 Mr Pollock offers a meeting to the claimant. The claimant is unable to attend as the proposed meeting was offered with very little notice. The claimant responds to say his preference is to meet with Mr Greenan also in attendance as the issues concern them both.
15 Mr Pollock responds to say he will not be doing a joint meeting as he wants to establish individual issues. He states he will be in touch. There is no follow up meeting after that date. Mr Pollock does not get back in touch. The claimant does not follow up further and in his evidence in response to a question about why he did not lodge a formal grievance or take the matter
20 further he stated, "he had just hoped things would improve."

62. Dr Hamilton for the respondent submitted that by this point there was an impasse. He submitted that Mr Pollock had offered to meet on three occasions, but the claimant refused to meet without Mr Greenan also being present. It was open to the claimant to raise a formal written grievance. Mrs
25 Black for the claimant submitted there was a failure to effectively try and resolve a staff issue.

63. In deciding whether or not there was a breach of the implied duty by the respondent failing to deal with a grievance the Tribunal is satisfied that the original meeting with Mr Pollock was initiated by Mr Hattie; a grievance was
30 raised by the claimant in that meeting; there was an attempt to deal with that informally by discussions with Mr Pollock; there was an impasse on meeting with or without Mr Greenan (although the Tribunal notes that at any formal

stage the claimant would have had the right to be accompanied by Mr Greenan as a fellow employee); Mr Pollock ultimately undertook to get back to the claimant but failed to do so and the claimant did not pursue the matter further. In the circumstances the Tribunal is not satisfied that there was a breach of the implied duty of trust and confidence in these circumstances. It was open to the claimant to pursue the matter further and he took a conscious decision to proceed on the grounds that things might improve. In his view he stated, when giving evidence, that Mr Hattie was a Jekyll and Hyde character, so he clearly entertained the hope that things might improve.

64. In any event it is clear to the Tribunal that even if there was a breach of the duty of trust and confidence by Mr Pollock failing to deal further with the grievance then by delaying before resigning the claimant affirmed the contract. The claimant resigned on 14 August 2024, nearly 5 months after the exchanges relating to the grievance (although he was off ill for the last month of that period). The claimant continued working in the hope that things would improve. There was no evidence of any further issues or problems in that period. In giving evidence in chief in response to a question on how he was feeling at the point of resignation he stated “I am angry at what they did to Ronnie – I feel they will do the same thing to me. They did not want us on site – too old, too slow. Mr Hattie took a dislike to us – half the things they tried to give Ronnie Greenan on disciplinary were dismissed”. The treatment of Mr Greenan was not something there was evidence before the Tribunal about and accordingly it cannot be said that that amounted to a “last straw”. In the absence of any evidence of other issues that might have amounted to a “last straw” it is not possible for the claimant to rely upon any earlier breach that has been affirmed by the claimant continuing to work.

65. Finally, the Employment Tribunal notes that whilst we heard evidence regarding what happened to personal belongings of the claimant after he had resigned the Tribunal did not consider this evidence relevant to the issue of constructive dismissal since it related to events after the claimant resigned.

66. For the reasons set out above the Tribunal dismisses the claim.

Employment Judge: S Neilson
Date of Judgment: 13 May 2024
Entered in register: 13 May 2024
and copied to parties