



EMPLOYMENT TRIBUNALS

Claimant: Pio Ferri

Respondent: Altrad Employment Services Limited (1)
Altrad Babcock Limited (2)
Doosan Babcock Limited (3)

Heard at: Bristol ET (CVP)

On: 28,29 & 30 October 2024

Before: Employment Judge Oldroyd

Appearances

For the Claimant: Mr James
For the Respondent: Mr Warren-Jones

WRITTEN REASONS

Summary

1. The Claimant was employed by the Second Respondent at an industrial site owned by a third party. Following a disciplinary hearing, the Claimant was sanctioned by being redeployed to a new site and given a final written warning. The redeployment resulted in the Claimant's employment with the Second Respondent being transferred to the First Respondent, but seemingly on less favourable terms. The Claimant says the transfer was a dismissal or else he was constructively dismissed because the events that gave rise to the transfer also gave rise to breach of the implied term of trust and confidence that should exist between employers and their employees. The Claimant also says that, having been dismissed, he was not paid his full salary in lieu of notice and that this amounts to a breach of contract.
2. The Second Respondent denies that the Claimant was dismissed and maintains that the transfer to the First Respondent was necessary in order for the Claimant to be redeployed and to be paid. The Claimant denies breach of contract.



Documents and Evidence

3. The parties produced an agreed chronology and bundle. At the hearing, I was provided with the Claimant's final pay slip for September 2023.
4. The Claimant produced a witness statement and gave oral evidence.
5. Mr Davies, Mr Wood and Mr West produced witness statements on behalf of the Respondents and each gave oral evidence. Mr Davies is a senior manager of the Second Respondent. Mr Wood is a senior manager of the First Respondent, whilst Mr Wood is a HR Manager of the First Respondent.

Fact findings

6. The Claimant began his employment with the Second Respondent (**Altrad Babcock**) on 10 June 1996. The Claimant's written contract was not provided to the Tribunal.
7. Altrad Babcock was formerly known as Doosan Babcock Limited, the Third Respondent and they are the same legal entity.
8. Altrad Babcock provides services to industry. It is a very significant enterprise with a turnover that exceeds £200M and extensive HR resource.
9. Among the services that Altrad Babcock provided was the provision of tradesmen to third parties who were undertaking industrial projects. Those tradesmen attended various sites throughout the country as and when required. The Claimant was one such worker.
10. Altrad Babcock is part of the wider Altrad Group of companies. The First Respondent (**Altrad Employment Services**) is also part of that group but it is a wholly separate company and legal entity.
11. On about 1 October 2023, those workers that were managed by Altrad Babcock were transferred to Altrad Employment Services by way of TUPE. It is clear, as events below demonstrate, that even before the TUPE transfer the lines between Altrad Babcock and Altrad Employment Services were somewhat blurred and that the two companies operated, in certain respects, hand in glove as 'Altrad' rather than separate entities. Such is the blurring of lines that where I refer to 'Altrad', it is because it is unclear to me whether the entity that I am referring to is Altrad Babcock or Altrad Employment Services.
12. The Claimant had worked on well over 100 industrial projects across the country whilst employed by Altrad Babcock. The length of each project varied, but it was not uncommon for the Claimant to work a month or maybe two before being redeployed elsewhere. The Claimant accepts that his rate of pay would move up or down depending upon the site he was deployed too (with the reasons for this



being explained by Mr West in his evidence that pay rates were governed by a National Framework and Trade Union interests in different projects).

13. The Claimant's position, shortly before his employment ended, was an 'Advanced Craft Level Pipefitter'. The Claimant had been deployed to Hinkley Point C (**HPC**) since 4 May 2022, a site owned by EDF Nuclear Newbuild and managed by MEH Alliance.
14. On 5 July 2023, the Claimant was advised by MEH that a complaint had been made against him by a female employee of EDF. The EDF employee complained that the Claimant has approached her by "*crossing her personal space*" on 27 June 2023 and whispered to her:

"I am good genetic material to look at and reproduce with....Fact that I am a catholic makes me even more attractive".
15. The Claimant was advised by MEH on 5 July 2023 that he was being suspended on full pay and investigated for gross misconduct. The Claimant was also advised that the suspension would last for less than 7 days. Although MEH instigated the suspension, the Claimant was plainly being suspended by his employer, Altrad Babcock and the investigation was in some way outsourced to MEH. The Claimant makes no complaint about that.
16. The investigation and disciplinary procedures of Altrad Babcock were set out in a document called the Common Framework Agreement (**CFA**). The CFA did not appear in the bundle. Similarly, it is clear that employees of Altrad Babcock attending the HPC site were expected to abide by a Code of Conduct that required workers to demonstrate respect, positivity, solidarity, humility and clarity to each other. The Code did not appear in the bundle either, but I accept, based on the evidence of Mr Davies and Mr West, that Code expected employees to behave in the way I have described. The expectation is certainly not unreasonable.
17. It was not disputed that before this complaint was made, the Claimant had no prior disciplinary record, despite his long length of service. The Claimant was a good and valued employee.
18. The Claimant was invited to an investigatory meeting that took place on 13 July 2023 that was undertaken by MEH. The Claimant was accompanied by his union representative. At this meeting, the Claimant denied using the words attributed to him by the complainant. The Claimant accepted having a conversation with the complainant, but he simply recalled using the phrase "*good bloodstock*" on noting that the complainant was Polish and catholic (as the Claimant was). The Claimant's comments, he said, were not intended to be offensive but jocular or complimentary.
19. As at 17 July 2023, the Claimant was advised that he remained suspended and that the investigation remained ongoing.



20. During this period, MEH interviewed relevant witnesses, but not the complainant (who did not wish to be interviewed). The complainant had, though, set out her complaint and a summary of what had been said to her in writing to a manager in quite clear terms.
21. As to other witnesses, there were two but neither had heard the precise words used by the Claimant. The evidence of these witnesses was not significantly helpful either way.
22. MEH produced an investigation report that concluded:

“Whilst the version of the conversation between the two parties differs, there are confirmed comments and language that is against the Code of Conduct at HPC as well as the values (respect, positivity solidarity, humility and clarity). Therefore there is a case to answer at a disciplinary hearing.”
23. By letter dated 31 July 2023, the Claimant was duly invited by Altrad Babcock to a disciplinary hearing that was to take place on 2 August 2023. That letter was sent by Gavin Davies on behalf of Altrad Babcock. The Claimant was informed that the purpose of the hearing was to investigate *“inappropriate comments to a female member of staff”*, that the allegations were *“serious”* and that a potential outcome of the process included dismissal. I am satisfied that Claimant was fairly aware of the nature of the allegations that he was being asked to address and the implications if proven.
24. Mr Davies confirmed in his evidence that, before the disciplinary hearing, he had been provided with the investigation report and that he would have had regard to the CFA and the Code of Conduct. I have no reason to doubt that he did. I am also satisfied that the Claimant was well aware of that a basic requirement of that Code was to treat others with respect. To this end, the Claimant was a long serving employee and I accept the evidence of Mr West that a requirement to treat others with respect was the subject of inductions that the Claimant would have undergone when being assigned to HPC.
25. On 1 August 2023, Gavin Davis (not to be confused with Mr Davies), the Claimant’s then line manager, sent a text to the Claimant:

“Hi mate, hope everything is as well as it can be. Suspension was lifted, come back in when you are ready”
26. From this moment on the Claimant’s suspension was lifted, although this was communicated in an unusual fashion, namely informally by text. Having regard to the evidence as a whole, I am satisfied that the reasons for and the duration of the suspension were communicated fairly to the Claimant at all times and he understood the position.



27. In the event though, the Claimant was unable to return to work immediately because his pass to HPC had been revoked by EDF pending resolution of the disciplinary process. The Claimant therefore remained on paid leave. But he was not suspended as far as Altrad Babcock was concerned.
28. The disciplinary hearing took place on 10 August 2023. It had been delayed from 2 August 2023 at the request of the Claimant's union member.
29. There is a note of the disciplinary hearing. As well as the Claimant and Mr Davies attending that meeting, it was also attended by Mr West who produced the note.
30. Mr West's role in the meeting was to ostensibly only to take the note, and it was Mr Davies who was the sole decision maker. In spite of that, there are instances (in the bundle and in his witness statement) where Mr West suggests that he might have been a joint decision maker with Mr Davies, this being apparent by use of the pronoun "we". Mr Davies was clear in his oral evidence that, whilst Mr West was present at the hearing, the final decision was made by him alone. I have no reason to reject that evidence.
31. At the hearing, the Claimant again denied using the words attributed to him by the complainant. Mr Davies instead focused on words that the Claimant accepted he had used , which included words to the effect of that:
 - a. Being Polish meant that the complainant was of "*good bloodstock*".
 - b. The Claimant was catholic, like the complainant.
 - c. That town in which the complainant lived was "*like a car park*".
32. It was put to the Claimant that the use of these words might be offensive or disrespectful and that they could be gross misconduct due to "*potential sexual harassment*". The Claimant was again adamant that the comments were not intended to be offensive at all. The hearing concluded with Mr West stating:

"We will adjourn the meeting to consider an outcome ... I don't think that this will impact your employment with Altrad but we need to consider redeployment".
33. It is clear to me that the Claimant understood that he would be advised in due course whether he had been found to have committed an act of misconduct and, if so, the sanction to be imposed.
34. As to redeployment, although this does not feature in the note, it appears common ground that redeployment to a new project was discussed in very broad terms and the Claimant agreed that, whatever the outcome, it would be sensible. This was pragmatic on the Claimant's part rather than an admission of guilt or wrongdoing. In agreeing redeployment though, the fact that this might entail the Claimant being transferred from Altrad Babcock to Altrad Employment Services was not discussed. This was accepted by Mr West in evidence.



35. The outcome of the disciplinary process was set out in a letter sent by Mr Davies of Altrad Babcock on 17 August 2023. The conclusion was that:
- a. It could not be established that the Claimant used the words alleged but he still inappropriately commented on or referenced the complainant's 'bloodstock', her religion and her hometown.
 - b. It was confirmed that the Claimant did not mean to cause offence albeit that was its effect and thereby misconduct. The ultimate conclusion was that:

"The comments were misguided and in breach of the client values that underpin behavioral expectations on the project".
 - c. It was decided that the Claimant would to be provided with a final written warning.
 - d. It was confirmed that the Claimant would be redeployed to a new project, 'Valero' commencing on 7 September 2023. (Mr Davies confirmed the redeployment was part of the sanction albeit that was not Mr West's recollection). It was not revealed that redeployment might involve the Claimant's employment with Altrad Babcock ending and him being rehired by Altrad Employment Services. Indeed, Mr Davies was not aware of this possibility.
 - e. The letter did not say whether the suspension was lifted, but I have found that it already had been lifted and that this had been communicated to the Claimant.
36. It is not necessary for me to find whether the Claimant did or did not make the comments that were attributed to him. As noted, Mr Davies did not make such a finding.
37. I have considered, though, whether the finding of misconduct and the sanction imposed was a reasonable one in light of what the Claimant accepted he did say and in light of the requirement in the Code of Conduct to treat others with respect. Although I did not have sight of the CFA or the Code, it strikes me that the language that the Claimant admitted using was over familiar and at least capable of causing offence which it probably did and which led to a complaint. For that reason finding of misconduct was reasonable. The sanction imposed, whilst robust, does not seem to me to have been unreasonable response.
38. The Claimant says that the imposition of a written warning came as a complete shock to him. It is not an exaggeration to say that the Claimant was very angered by the imposition of a final written warning. The Claimant described, in evidence, that the imposition of a written warning would mean that he would be walking on a "razor blade" and that going forwards he risked dismissal for even a minor



transgression. The Claimant firmly believed that the imposition of a final written warning was wholly unjustified, given that there was no evidence that he had used the words attributed to him. This rather misses the point, though, that Mr Davies' decision was not based on the words attributed to the Claimant but words that he accepted that he had used.

39. The Claimant unsurprisingly, given the strength of his feelings, appealed the imposition of a final written warning (but not his redeployment to Valero) on 18 August 2023. The basis of the appeal, lodged by the Union representative, was that:

“... neither Pio or me were informed that a final written warning was being issued in the outcome meeting .. Furthermore owing to lack of evidence and discrepancies between the witness statements we believe a final warning is too harsh ...”.

40. The Claimant was advised by letter dated 31 August 2023 that the appeal hearing would be on 5 September 2023 before Mr Kevin Wood of Altrad Employment Services. Mr Wood explained that it was not unusual for Altrad Employment Services to assist Altrad Babcock in HR related matters. In this case, Mr Wood said it made good sense in that he had no personal relationship with the Claimant and yet was a senior manager of a company in the Altrad group who was based at HPC. This is an example of the lines between the two Altrad entities being blurred.

41. Like Mr Davies, Mr Wood said that he had regard to the CFA and the Code of Conduct when conducting the appeal. I have no reason to doubt that.

42. On 29 August 2023, the Claimant received a letter from 'Altrad' outlining a new contract relating to his redeployment to Valero. The terms of this new contract were materially different to his existing terms with Altrad Babcock in the following way:

- a. The Claimant was to be employed by Altrad Employment Services (not Altrad Babcock). It was not acknowledged that the Claimant's employment with Altrad Employment Services would continue on from his employment with Altrad Babcock.
- b. The Claimant's notice period was reduced to one week whereas as an employee of Altrad Babcock the Claimant was entitled to a statutory minimum period of 12 weeks' notice.
- c. The Claimant was described as being employed as a 'Pipefitter', which the Claimant perceived to be a demotion from his role as an 'Advanced Craft Level Pipefitter'.
- d. A new 4 week probationary period was introduced, during which the Claimant could be dismissed on two hours' notice.



- e. The contract was expressed to be for a fixed term, ending on completion of the Valero project with no commitment to procure a new project.
 - f. The Claimant's salary was reduced to £19.11 (from £25.41) an hour.
43. On 31 August 2023, the Claimant checked his 'pay slip portal' and he discovered two things.
- a. The Claimant had not in fact been paid his basic salary or employer's pension contribution since 17 August 2023 (though he had received holiday pay).
 - b. The Claimant had been issued with a P45 stating his employment with Altrad Babcock had ended on 16 August 2023 – hence, the Claimant concluded why he had not been paid from that date. The Claimant had not been notified that the P45 has been uploaded, as was the case with other pay slips, he just saw it by chance when searching for his latest pay slip.
44. The Claimant says that as from 31 August 2023 he believed that he had been dismissed as from 16 August 2023 because a P45 had been issued and because he had not been paid. The Claimant also said in evidence that his understanding that he had been dismissed tallied with the fact that a few colleagues had mentioned to him that he had resigned after seeing his name on an intranet site as a leaver. The Claimant said in evidence he was clear that he had been "*obliterated*" by Altrad Babcock.
45. The Claimant was asked why he did not contact his line manager, or Altrad generally to ask why he had been dismissed, if that was his belief. In evidence, the Claimant said that he thought he had tried to contact his line manager, but he may have been on holiday. Even so, it is very surprising that the Claimant did not make contact with any other person to query the position (such as his union representative).
46. In the meantime, the appeal hearing took place on 5 September 2023 before Mr West. There is a note of the meeting also. The Claimant was represented by his union representative once more.
47. At the hearing, the Claimant did not dispute his redeployment "*which was needed*". What was in dispute was the issuing of a final warning as "*this was too harsh*" and had not been foreshadowed at the disciplinary meeting.
48. What is noticeable from the note of the appeal hearing is that the Claimant did not reveal that he regarded himself as having been dismissed, or that he had been issued with a new less favourable contract in respect of the Valero redeployment. I do find this to be surprising. The Claimant did raise the fact that he had not been paid since 17 August 2023 and Mr West arranged for that to be investigated (which it was).



49. The Claimant was due to commence work at Valero on 5 September 2023 but in the event the Valero site no longer had need of the Claimant for legitimate operational reasons and so that redeployment did not come to fruition. Altrad made efforts to source a new project for the Claimant.
50. Also on 6 September 2023, the Claimant was advised that he was now being redeployed to a project known as Huntsman. Again the Claimant was issued with a contract by Altrad that was less favourable to him than his contract with Altrad Babcock (albeit his continuous employment was acknowledged). In terms of what was less favourable:
- a. The Claimant was again described as a 'Pipefitter'.
 - b. The Claimant's notice period was again reduced to one week.
 - c. The Claimant was again subject to a 4 week probationary period which allowed termination within 2 hours.
 - d. The Claimant's salary was reduced, again, to £19.11
51. The Claimant said in his oral evidence that this was a "*nail in the coffin*" as far as he was concerned. The Claimant said that it was clear to him that the imposition of less favourable contractual terms, allied to his perception that he had been dismissed, meant that he was no longer wanted by Altrad Babcock.
52. It is appropriate at this stage to make findings as to how the Claimant came to be issued with a P45 and also how he came to be issued with two contracts which, Altrad fully accepted, were less favourable to him. The reasons are not set out clearly in any of the documents in the bundle or in the witness evidence. The most helpful explanation was provided by Mr West in his oral evidence. Taking the evidence as a whole, I find as follows:
- a. At the relevant time, many employees of Altrad Babcock were in the process of having their employment formally transferred to Altrad Employment Services. A TUPE process was under way at the time. Hence, on 28 August 2023, Altrad Babcock advised many of its employees, including the Claimant, that they would be transferred to Altrad Employment on or about 1 October 2023 by way of TUPE.
 - b. Mr West explained in evidence that the broad purpose of the transfer was to bring a number of Altrad employees under a single roof from where they could be deployed to work for any part of the wider Altrad group of companies.
 - c. When it was agreed that the Claimant should be redeployed to the Valero site and then the Huntsman site, the TUPE process had not been



completed. (It had been delayed and it was ultimately completed on or about 1 October 2023).

- d. Both the Valero and Huntsman sites were already designated as sites that would be managed by Altrad Employment Services in the sense that workers would be deployed there by it. Therefore, in order to give effect to the redeployment and to allow the Claimant to be paid it was necessary to:
 - i. End the Claimant's employment with Altrad Babcock. This was done on 16 August 2023. Altrad Babcock's payroll system was updated by identifying the Claimant as having resigned on this date. This update automatically generated a P45 that was uploaded to the Claimant's pay slip portal.
 - ii. Register the Claimant on the pay roll of Altrad Employment Services. This had the effect automatically generating the new contracts with which the Claimant was issued. Because the Claimant had no prior working relationship with Altrad Employment Services, the relevant contracts assumed that the Claimant was a new starter, and hence included terms that were less favorable and not suitable to the Claimant (such as a reduced notice period and probationary period).

In evidence, Mr West made the point (which I accept) that had the Claimant not been redeployed when he was, but immediately after the TUPE transfer that was to take place on 1 October 2023, then he would not have been issued with a P45 or have received contracts that were inappropriate to his status. Mr West also said in evidence that there was no question of Altrad Employment Services not agreeing that the contracts issued to the Claimant were unsuitable and that he was entitled to be employed on materially the same terms as he was employed by Altrad Babcock. I accept Mr West's evidence on that point.

53. It appears that a Ms Abby Pryde of Altrad endeavored to speak with the Claimant to discuss his redeployment to the Huntsman on 7 September 2023. There is no note of that conversation but Ms Pryde's internal e mail of that date states:

"I have just tried to call Pio to discuss the Huntsman opportunity, he said we are not to contact him anymore and to go through his lawyer. He will not be attending Huntsman".

54. From a subsequent e mail that Ms Pryde sent to the Claimant on 7 September 2023, it is clear that some form of discussion took place relating to how a P45 came to be issued and why he had been issued with a new contract. The e mail does not explain the position with clarity though. It states:



"I am writing to clarify the paperwork you have received.

As you are aware the TUPE process which formalises the switch from Altrad Employment Services has been delayed due to technical issues which means that your move from HPC which is an Altrad Babcock contract to Huntsman which is Altrad [Employment] Services has required us to make some changes to the payroll system that provides you with your weekly payments.

I understand that having received a P45 is likely to have caused some confusion so I wanted to clarify that these documents are system generated when changes relating to your transfer have been processed.

You remain an Altrad employee. I understand the contract that you have received contains an error in that your length of service has not been process correctly. I confirm that this has been rectified and a refreshed document is attached.

I can also confirm that the payment promised to you whilst awaiting remobilisation has now been processed.

Please accept our apologies for the admin errors and our assurances that you remain a valued member of the Altrad team"

(The "refreshed document" was not in the bundle or referred to in evidence. The Claimant says he does not recall receiving anything).

55. What is noticeable from this e mail is that the Claimant was not told, in clear terms, that his contract with Altrad Babcock had been deliberately terminated so that he could begin a new contract with Altrad Employment Services albeit the intention was that the contractual terms should remain the same. This is another example of the lines between Altrad Babcock and Altrad Employment Services being blurred.
56. The Claimant was asked why, in light of this e mail, the Claimant still believed he had been dismissed. The Claimant said he just did not believe what was being said to him and that he had lost confidence in Altrad. I find that a plausible explanation, albeit it is still regretful that the Claimant did not speak with Altrad. Had he done so, it was still possible that the parties might have been able to consensually agree a transfer to Altrad Employment Services and then to the Huntsman site on agreed terms. But that did not happen owing to the Claimant's now deep mistrust of Altrad Babcock.
57. On 7 September 2023, the Claimant's legal advisers wrote to Altrad in the following terms:

"Please can you clarify why Pio is being asked to perform a more junior role ... The Company's actions and attitude over the past few weeks raises questions and is of great concern to my client has been left in limbo not knowing what is going on with his employment "



It is to be noted that this letter does not expressly assert that the Claimant regarded himself as having been dismissed at this time.

58. This correspondence was responded to by Mr West on 13 September 2023. Mr West again set out how the P45 and new contracts came to be issued but without acknowledging that the Claimant's employment with Altrad Babcock had been ended. Instead there was a euphemistic reference to a "*change in the payroll system*" having caused confusion. I say this was euphemistic as there was not merely a payroll amendment. Matters had gone further than that as the Claimant's employment with Altrad Babcock had been deliberately ended (albeit in the expectation he would agree to be re-hired by Altrad Employment Services).
59. On 14 September 2023, the Claimant's appeal against his final warning was dismissed by Kevin West of Altrad Employment Services. I have already found that the original sanction was reasonable and applying the same reasoning, I do not find that the outcome of the appeal was unreasonable. There was certainly no merit in the complaint that the final warning had not been trailed at the disciplinary hearing; it was made clear to the Claimant at the end of the hearing that the outcome and sanction remained a matter to be considered.
60. Also on 14 September 2023, the Claimant was advised that, having turned down the Huntsman project, he was to be redeployed to site known as Fawley in Southampton as from 18 September 2023. The Claimant was not provided with any contractual documents relating to this transfer and so I do not know on what terms the Claimant was to be engaged.
61. The Claimant says that turned down the Fawley project on 18 September 2023 stating that he had either already been summarily dismissed on 16 August 2023 or else because he had been constructively dismissed. The Claimant wrote:

"Please note I will not be reporting to work today as I believe I have been dismissed.

The reason I believe I have been dismissed is that I was issued with my P45 on 16 August 2023 without warning. I was not paid a salary from the Company until I was back paid last week, although I dispute that my back payments are correct
...

Further you have attempted to transfer me to another place of work and asked me to sign away my employment rights and be demoted and receive a significant reduction in my salary.

I also received my appeal outcome letter last week, which has raised concerns with me regarding the investigation process as some of the comments made in the letter are factually incorrect and misconceived.



In the event that you do not consider that I have been dismissed, please accept this as my resignation with immediate effect, on the basis that I have been constructively dismissed and the appeal outcome letter was the last straw”.

62. The Claimant accepts that his salary was paid in full up to 18 September 2023 save in one respect; the Claimant’s final pay slip dated 14 September 2023 reveals that he was not paid any pension contributions in the last month of his employment to which that pay slip relates. The Claimant had been paid those contributions in previous pay slips.
63. On 2 October 2023, the Claimant found alternative employment albeit he says on a lower wage and it is fixed term contract now due to end in November 2025. (The Claimant says he applied for the role after resigning).

The claims

64. The Claimant asserts that:
- a. He was unfairly dismissed on 16 August 2023 being the date his P45 was issued. In the alternative, the Claimant says he was constructively dismissed or else automatically unfairly dismissed pursuant to certain breaches of TUPE.
 - b. The Claimant says that in breach of contract and on the footing he was dismissed:
 - i. He did not receive 12 weeks’ notice pay being his statutory entitlement.
 - ii. He was not paid employer pension contributions in the period to which his final pay slip relates.

Issues

65. The parties each produced agreed list of issues. These issues were discussed at the outset of the hearing and agreed to be as follows.

Unfair dismissal

66. Was the Claimant summarily dismissed on 16 August 2023 (or 31 August 2023) as a result of the P45 being issued and seen by the Claimant.
67. If he was dismissed, the Respondents accept the dismissal was unfair.



Constructive dismissal

68. In the alternative, the Claimant claims that the Respondents acted in fundamental breach of the implied term of mutual trust and confidence that should exist between employees and employees. The following were identified as breaches:
- a. The Claimant was suspended without sufficient reasons being identified.
 - b. The Respondents attempted to dismiss the Claimant by issuing a P45.
 - c. The Respondents failed to pay the Claimant's salary and employer's pension contributions after 17 August 2023. (Only the pension contributions relating to the period of the Claimant's last pay slip are now outstanding).
 - d. There was an attempt to unilaterally vary the Claimant's contract in respect of his redeployment to Valero on 29 August 2023.
 - e. There was an attempt to unilaterally vary the Claimant's contract on in respect of his redeployment to Huntsman on 7 September 2023.
 - f. The Claimant failed to review the Claimant's suspension or lift it after the outcome of the disciplinary process.
 - g. There was an attempt to unilaterally vary the Claimant's contract in respect of his redeployment to Fawley on 14 September 2023.
 - h. The Respondents failed to properly investigate and then uphold the Claimant's appeal.

(The last of those breaches was said, in ET1, to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

69. The Tribunal must need to decide 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. The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

70. Did the Claimant resign because of the breach?

Automatic unfair dismissal

71. In the alternative, did the issuing of the Claimant's P45 and attempts to issue a new contract with Altrad Employment Services cause the Claimant to incur a substantial change in his working conditions that was detrimental to him contrary to Regulation 4(9) TUPE?



72. Was the Claimant entitled to treat his contract of employment as having been terminated by the Respondents?
73. Was the Claimant otherwise subjected to repudiatory breaches of contract in the form of contractual variations contrary to Regulation 4(11) TUPE?

Automatic constructive dismissal

74. In the alternative, was the Claimant automatically constructively dismissed pursuant to Regulation 7 TUPE?

Breach of contract

75. If the Claimant was dismissed and on the footing that the Claimant was entitled to 12 weeks' notice, was that paid to him in full?
76. Did the Respondents act in breach of contract by failing to pay the Claimant's pension contributions in the period to which his last pay slip relates and up until the end of his statutory notice period?

The Law

Unfair Dismissal

77. It is axiomatic that an employee who wishes to prove unfair dismissal must establish that they were actually dismissed; as opposed to, say, resigning.
78. The burden of proof is on an employee to prove dismissal. within the meaning of S.95 of the Employment Rights Act 1996 (**ERA**). S.95 states (in so far as is material) that an employee will be treated as dismissed if his or her contract of employment is terminated by the employer with or without notice
79. The general rule is that unambiguous words of dismissal or resignation may be taken at their face value without the need for any analysis of the surrounding circumstances. **Sothorn v Franks Charlesly and Co 1981 IRLR 278, CA**. There are qualifications to that so that a decision taken in the heat of the moment might not be capable of amounting to a dismissal.
80. The test as to whether ambiguous words amount to a dismissal or a resignation is an objective one. All the surrounding circumstances must be considered. If ambiguity remains, the Tribunal should ask itself how a reasonable employee would have understood them in light of those circumstances.
81. This objective test applies when the ambiguity occurs in correspondence between employer and employee. In **Chapman v Letheby and Christopher Ltd 1981 IRLR 440, EAT** an employee received an ambiguous letter. The EAT noted that its interpretation:



'... should not be a technical one but should reflect what an ordinary, reasonable employee... would understand by the words used'. It added that 'the letter must be construed in the light of the facts known to the employee at the date he receives the letter'.

82. In **Kirklees Metropolitan Council v Radecki 2009 ICR 1244, CA**, the Court of Appeal held that removing an employee from the payroll while he was suspended and negotiating a compromise agreement was a sufficiently unequivocal statement of the employer's intention to terminate employment.
83. In **Feltham Management Ltd and ors v Feltham and ors EAT 0201/16**, though, an employer's conduct in ceasing to pay an employee when she walked out after an argument was not conduct amounting to an unambiguous termination, and nor was a letter from the employer asserting that the employee had resigned. The EAT also considered that informing an employee that no salary will be payable, for good reason or bad, does not necessarily convey that the employer is terminating the contract: for example, pay may be withheld if the employee is ill.

Constructive dismissal

80. Constructive unfair dismissal arises under section 95(1)(c) of the ERA which deems a dismissal to have arisen in circumstances where:

"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".

81. In **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, CA**, the common law concept of a repudiatory breach of contract was imported into what is now section 95(1)(c). Lord Denning MR put it as follows:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

82. The component parts of a constructive dismissal which need to be considered are therefore as follows:
 - a. A repudiatory or fundamental breach of the contract of employment by the employer.
 - b. A termination of the contract by the employee because of that breach.



83. In terms of the alleged breach of contract, it may be breach an express term or an implied term.
84. As far as implied terms are concerned, the Claimant relies upon **Malik and Mahmud v BCCI [1997] ICR 606** in which was held that and employed is under a duty maintain the relationship of trust and confidence that should exist between employer and employee and that the employer shall not:

“Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

85. Something more that unreasonable conduct is required. In **Frenkel Topping Ltd v Ms G King: UKEAT/0106/15** the EAT confirmed that establishing a breach of the implied term is a “*demanding test*” and the employee must “*demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract*”.
86. A breach of such an implied term is repudiatory in nature **Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A.**
87. The question of whether there has been a breach is viewed objectively: **Buckland -v- Bournemouth University [2010] IRLR 445)**
88. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. In **Buckland** it was observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (**Hilton v Shiner Builders Merchants [2001] IRLR 727**). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach
89. In this case, the Claimant relies upon a number conduct events that I have set out as collectively amounting, objectively viewed, to a breach of the implied obligation.
90. In this regard, it is accepted that a breach of trust and confidence might arise not because of any single event but because of a series of events. In such a case a claimant can rely on a ‘last straw’ which does not itself have to be a repudiation of the contract but a contributing factor see **Waltham Forest v Omilaju [2005] IRLR 35**, and **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**. In **Kaur** it was also confirmed that an employee can rely upon earlier conduct by the employer even if they affirmed the contract after those earlier matters, as long as the last straw adds something new and effectively revives those earlier concerns.



91. Whether breach of an express or implied term, the fundamental breach of contract by the employer need not only be a single reason for the resignation of the claimant. It does not matter if there are other reasons: **Wright v North Ayrshire Council [2014] IRLR 4.**
92. Even if there is a fundamental breach, the contract may be affirmed if, after the breach, an employee behaves in a way which shows that they intend the contract to continue notably by reason of delay, but delay of itself is not sufficient. It all depends on the circumstances. Affirmation is not raised as an issue in this case.
93. If it is established that there has been a constructive dismissal, the next stage is for the Tribunal to consider whether the dismissal was nonetheless fair. The burden lies on the employer in this regard. In this case, it not suggested that if there was a dismissal it was fair.

Automatic unfair dismissal and TUPE

94. The TUPE regulations are designed to protect employees if the business by which they are employed transfers to new owners. A “*relevant transfer*” is defined in Regulation 3 as a transfer of a business or else a service provision change.
95. Regulation 4(9) TUPE provides:

“where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.
96. Regulation 7 TUPE provides:

“Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—

(a) the transfer itself; or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.”



Conclusions on the issues

Unfair dismissal

97. The only issue for me to consider on unfair dismissal is whether the Claimant has established, on the balance of probabilities, that there was a dismissal. This is because the Respondents accept that if there was a dismissal, it was unfair.
98. There are certainly some reasons to suppose that there was not a dismissal when all the circumstances are viewed objectively:
- a. The Claimant was advised in writing that the outcome of the disciplinary hearing was that he was not being dismissed, but redeployed.
 - b. The Claimant pursued his appeal against the outcome of the disciplinary hearing after believing he had been dismissed.
 - c. The Claimant made no mention of his dismissal at his appeal hearing and it was not referred to by his legal advisers in open correspondence either. That suggests the Claimant did not believe that he was dismissed. Whilst the Claimant's subjective belief is not critical, it informs the objective analysis of the position.
 - d. The suggestion of dismissal is at odds with the Claimant being issued with new contracts, even though they might have been with a new employer and on less favorable terms.
 - e. The Claimant was advised by Altrad that the issuing of the P45 was an error (and that the less favourable contracts were automatically generated) and that he remained a valued employee of Altrad.
99. In spite of this, I am satisfied that there was a dismissal on 16 August 2023. I reach that view because, viewed objectively, four particular factors confirm that the Claimant was dismissed by Altrad Babcock:
- a. First, I have regard to the fact that the Claimant was provided with a P45. The existence of such document is suggestive of the fact that the Claimant's employment with Altrad Babcock was at an end. For a period of time, the Claimant was not paid on time.
 - b. Second, it was accepted by the Mr West, very fairly, that the ending of the Claimant's employment with Altrad Babcock was deliberate so as to allow his employment to continue with a new entity, Altrad Employment Services.
 - c. Third, the Claimant not once but twice received a contract identifying a new employer, namely Altrad Employment Services suggesting that his employment with Altrad Babcock was at an end.



d. Fourth, those new contracts were, as was accepted, on far less favourable terms. Whilst this may have been an error, it was not unreasonable for Claimant to suppose that it was another indicator that his employment with Altrad Babcock had ended and that he was starting afresh, so to speak.

100. In reaching this conclusion, I acknowledge that what the Respondents were trying to achieve was to seamlessly transfer the Claimant's employment from Altrad Babcock to Altrad Employment Services. But, that does not alter the fact that this involved a dismissal that the Claimant had not consented to and it was a transfer that, as the Mr Warren Jones accepted, was not part of the impending TUPE transfer.
101. In light of this finding, I accept that the Claimant was unfairly dismissed by Altrad Babcock.

Constructive dismissal

102. Although I have found the Claimant was unfairly dismissed, I shall briefly set out what I would have found if my conclusion had been that the Claimant was not expressly dismissed.
103. The Claimant identified 8 matters that together he says had the likely effect of damaging the trust and confidence that should exist in the employer / employee relationship.
104. As will be apparent from my factual findings, many of his factors appear to me to have had no impact on the duty of trust confidence, viewed objectively and fairly. However, there are four concerning factors:
- a. The dismissal (or purported dismissal in this hypothetical scenario) on 17 August 2013.
 - b. The unilateral imposition of the transfer to Altrad Employment Services which, whilst well intended, was not agreed to by the Claimant.
 - c. The sending to the Claimant, not once but twice, contractual terms that were less favourable to him. I recognize that by these steps were probably undertaken by Altrad Employment Services but this was plainly with the agreement and encouragement of Altrad Babcock.
 - d. The non-payment of salary (which was remedied) though this was remedied so less significant.
105. I take on board that Altrad, by letter dated 7 September 2023 reassured that he the Claimant that he remained valued. But actions speak louder than words.



106. I am satisfied that taken together the 4 factors I have identified were likely to damage the trust and confidence of the employer- employee relationship and had that effect. Altrad Babcock was thus in repudiatory breach of contract.
107. It is still necessary for the Claimant to establish that he resigned because of the breach. In his resignation letter, the Claimant suggested that he resigned because of the unfavorable determination of his appeal (and I have found that to have been a reasonable outcome). I have little doubt that this was a reason for the resignation. But it was not the only reason. I am satisfied that the other factors that I have found amounted to a repudiatory breach were a significant contribution to the Claimant's decision to resign. Hence, in his resignation letter and in his oral evidence the Claimant did refer the other factors that I have found breached the implied term.
108. Thus, had I not found that the Claimant was expressly unfairly dismissed, then I would have found that he was constructively dismissed in any event by Altrad Babcock.

Automatic unfair dismissal

109. As I have found there has been unfair dismissal, I need not address the alternative claim for automatic unfair dismissal.

Breach of contract

110. On the footing that the Claimant was unfairly dismissed on 16 August 2023, he was entitled to 12 weeks statutory notice from date. It is not disputed that he was not paid 12 weeks' pay (continuing until 8 November 2023) and this is a breach of contract by Altrad Babcock.
111. On the basis that the Claimant was entitled to pension contributions as apparent from the only pay slip I have seen and as that pay slip does not suggest that the Claimant benefited from any such contributions in the period to which that pay slip relates an up until the conclusion of his statutory notice period, then I am satisfied that there has been a breach of contract in this regard also by Altrad Babcock.



Employment Judge Oldroyd

Dated: 31 October 2024

Sent to the parties on:
11 November 2024

Jade Lobb

For the Tribunal: