EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107495/2023

Hearing Held on 18-20 March and 14 June 2024

Employment Judge Hendry
Members: V. Lockhart
N. Richardson.

Mr James Marshall — **Claimant**
In Person

McPherson Limited — **Respondent**
Represented by:
Ms J McLaughlan,
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Employment Tribunal is that the application for a finding of unfair dismissal not being well founded is dismissed.

REASONS

1. The claimant in his ET1 sought a finding that he had been unfairly "constructively" dismissed by the respondents. The respondent company denied that they had given the claimant cause to resign. They also argued the claimant's resignation was not in response to any alleged breach and that in any event any dismissal would be fair.

Issues

2. The legal issues for the Tribunal to determine were whether or not the claimant could demonstrate that the respondent had committed a material repudiatory breach of contract by their actions entitling him to resign. It was not dear from the ET1 whether the claimant was seeking to establish a breach of an express or implied term. The Tribunal also had to consider issues as to whether or not earlier incidents complained of had been affirmed or waived by the claimant or had been revived allowing the claimant to rely on them. These matters were commented upon by the claimant at the start of the hearing, His position was that the two earlier incidents that he had referred to in 2017 were only important in his view as they showed a pattern of the respondent not dealing properly with health and safety issues. This seemed to suggest that they were not breaches he was relying upon.

Evidence

3. The Tribunal had the benefit of a Joint Bundle. The claimant added, by agreement payslips to that Joint Bundle and also an aide memoir© which he used to assist in giving evidence. The Tribunal heard evidence from the claimant on his own behalf and from a work colleague John Strachan. The

Tribunal also heard evidence from Mr Michael Cooper, the respondent's Operation Manager and from Ms Fiona Braidwood, their HR Manager.

Facts

The Tribunal made the following findings in fact:

4. The respondent company is a large haulage company based in Aberlour. Much of their work is with local whisky distillers in Speyside. One of their tasks was to remove draff (spent grain) from the distilleries following the distilling process. This draff has traditionally been used as cattle feed and more recently it has been turned into biomethane in bio plants such as the plant at Grissan Riverside in Dufftown at which the claimant was contracted to work.

5. The claimant is an experienced HGV driver. He has worked for the respondent company for 3 separate periods of time. He joined them as an HGV driver and since the 5 May 2017 he worked under a Contract of Employment (JB p137-145). He worked 48 hours per week. On average he would receive £850 gross per week with a normal take home pay of £640.

6. The Grissan Riverside Mill was supplied by draff by the respondents drivers who would take it from surrounding nearby distilleries and unload (tip) it. They assigned a driver to the plant during the day (John Strachan) and one overnight (the claimant).

7. The driver's tasks were to take the draff from distilleries, take it to the plant and to tip it into the intake hopper of the plant. It had to be filled to allow draff to be continuously fed into the plant which ran on a 24 hour process. In addition other drivers would deliver trailers (boxes) full of the material for the plant driver on duty to tip in to the hopper. This occurred throughout the day and night. The drivers assigned to the plant were expected to unload the

boxes delivered during their shift and have the empty boxes ready for use by other drivers.

8. When the claimant first began work at the plant there were 2 intakes each with their own hopper. It was possible to fill up one of the hoppers and then tend to other duties such as driving to a distillery to collect a load of draff or take a break as it would take approximately 20 minutes for the largest hopper to empty before needing refilled.

9. In about May 2023 the owners of the Mill introduced a new faster intake to replace the 2 previous intakes. This meant there was only one hopper in use. This intake would deplete the hopper of draff in a shorter period of around 10 minutes. They also increased the capacity of the plant expecting approximately 500 tons of draff to be tipped daily rather than the previous target of 250 tons. The claimant felt under pressure from those running the Mil! to keep the hopper topped up and the process running, If the hopper emptied then the entire process would be halted.

10. The claimant found it was difficult to take breaks and carry out his duties. He was told he was entitled to a total break of 2 hours spread over his night shift of 12 hours. The day shift driver was entitled to 45 minutes breaks.

11. Because of the pressure of work it was often not possible for the claimant to "tip" (empty) all of the boxes by the end of his shift. This would cause difficulties for the respondent as these trailers would be needed during the day. In addition, there were often teething problems with the Mill which caused breakdowns and stoppages. This would lead to a build up of untipped draff.

12. The claimant would manipulate the tachographs on the lorries to record that he was actually taking breaks that he had not taken. He did not disclose this to his employers. He knew that if breaks were not recorded they would show up on the employers system for monitoring drivers hours and working time. He felt pressure to do this. On one occasion he telephoned "Trevor" his line manager who was part of the respondent's Traffic Dept and said he was

having difficulties taking breaks that night. He was told to do what he could and to "crack on" The matter was not recorded by Trevor as an issue for managers to consider when reviewing the logs.

13. The claimant was working the night shift between 6 and 7 November 2023. One of the respondents' Directors had instructed another driver to accompany the claimant during the night shift and report back. The claimant wasn't warned about this. He discovered from the driver that it was to check that the draff was being tipped properly. He understood that this was in response to criticism from the Mill operators. The claimant was annoyed at this. He worked hard. He was an experienced driver and had tipped loads for many years. He had never experienced any criticism of his abilities to tip draff.

14. At the end of the shift on the 7 November the claimant had had enough. He decided to leave his position.

15. He returned home and had some alcohol. The claimant described this as untypical and that he had been experiencing 'a bit of a breakdown'. As a consequence he sent several text messages to the respondent's traffic planners (JB p35-41). The traffic planners could not make any sense of the messages and brought them to the attention of Mr Michael Cooper, the Operations Manager. Mr Cooper brought the matter to the attention of Ms Fiona Braidwood, the HR Manager. He was concerned the claimant might be having a medical emergency having experienced a similar situation with an employee in his previous employment. He agreed with Ms Braidwood that he should telephone the claimant at home, which he did. On doing so he discovered that the claimant was drunk. He asked the claimant to attend a meeting on 13 November to discuss matters.

16. The claimant emailed Mr Cooper on 9 November (JB p42):

"*Dear Mike*

Following on from our conversation on Tuesday 7th November 2023, I would like to take this opportunity to provide some background to the events which led to this conversation.

I am sure it was clear from my demeanour how strongly these events have affected me. On leaving site that morning after my shift, I knew I could no longer work effectively as it stood I would not be able to return to the continuation of this intolerable situation.

I was very tired after my usual 12 HR shift, and did have a few drinks prior to making this contact. I was, and still am, very frustrated with this ongoing situation. I am aware I may have come across as abrupt and/or offensive. Should this be the case, please accept my apologies.

I feel unjustly targeted as a factor in the failure of Grissan Riverside Plant's obvious inability to cope with its ever increasing workload. I feel a frank and open discussion is necessary before I am able to return to work.

I am not, and have never been, workshy and strongly resent the implication that I am. In fact, I believe I go above and beyond, considering the fact that I worked through all legally required breaks. All I want is to be allowed to do my job to the best of my ability without feeling scrutinised and blamed for circumstances outwith my control.

In my opinion, recent events are equating to nothing more than a finger pointing witch hunt, something which I am unable to tolerate at my place of work.

I look forward to hearing from you. Unfortunately I feel I am unable to return to work until these issues are addressed."

17. Mr Cooper responded by email on 10 November asking the claimant to meet him at 11.30 pm the following Monday. He wrote *"Fiona and myself would be happy to go through any issues you have" (*JB 43).

18. The claimant met Mr Cooper and Ms Braidwood on 13 November. At the start of the meeting the claimant said he was not happy in the job. He said: "if you don't want me back you will have to pay me off". He then raised the difficulties he had in taking breaks. There then followed a discussion in relation to two incidents in 2017 that the claimant characterised as health and safety issues that the claimant had raised with the company and the

current difficulties working at the Grissan Riverside Plant including difficulties in taking breaks.

19. Mr Cooper emailed the claimant on 13 November following the meeting (JB45):

> *"Good afternoon Jim*
>
> *Following on from our meeting today, as discussed, we will allocate you to local driving to remove you from some of the points you raise surrounding your role tipping draught at Grissan Riverside.*
>
> *Please report to Riverside tomorrow and meet Tim Franklin, he will mentor you in the Potdale collection and delivery locations and equipment and once comfortable, we can look to expand your training into Chivas side of the operation. David Farquhar will still be you (your?) daily planning controller outwith any issues during shifts to be raised with our night shift controller.*
>
> *I have received your email correspondence and 4 emails relating to an incident at Glenlossie and the incident with the power lines all have been forwarded to Fiona.*
>
> *Please do not hesitate to contact me should you wish to discuss any of the above/*[1]

20. The claimant emailed on the 14 November (JB46):

> *"Good morning Mike*
>
> *At our meeting yesterday I feel I stated clearly I would be unable to return to work until the reasons for my absence have been fully addressed and resolved. I feel that to simply move me to another post is not a sign of my issues being addressed, or any way being taken seriously.*
>
> *Therefore it is with regret that I must decline, for the moment, your instruction to resume work this evening in the suggested alternative position.*
>
> *I am keen to avoid taking legal action as also discussed yesterday. This is now my second week of unpaid absence, and I am sure you will appreciate my need for these issues to be resolved in a timely manner.*

/ fee/ that if my complaints (both past and present) continue to be ignored, it will be clear that the company has no regard for the welfare of its employees.

I look forward to hearing from you.

Regards
Jim Marshall"

21. Mr Cooper responded (JB48):

"We have made reasonable adjustments to allow you to return to work whilst the company review the issues you raised during our meeting and to minimise your loss of earnings. At no point did you refuse any offer of returning to another role, when I informed you I would not be allocating you back to Grissan Riverside tipping work until the matter was resolved. The temporary position also took into account the medical issue you raised with your back, and your statement of being unable to drive long distances.

As you are refusing the temporary position, you will continue to remain unpaid.

On the subject of Legal action, we would never stop anyone seeking legal advice or pursuing legal action. If you would like to seek legal action, please direct any representation to Ms Fiona Braidwood, HR Manager based at our Aberlour office and also copied into this email."

22. Mr Marshall responded (JB50):

"Good afternoon Mike

You are correct in saying I expressed willingness to take on another role within the company. However, at our initial meeting I was clear in saying that I felt I could not return to work until satisfied that my concerns had been addressed and resolved fully. I have outlined a number of incidents over the years which I feel have had a detrimental effect on my wellbeing and confidence in the safety of operations within the company.

From my information, I would like to request specific details of the investigations you are carrying out with regards to my concerns/ absences. To be clear, what exactly are you investigating.

With regard to the caustic exposure incident, reported on 15/05/2017, I did not at any point receive a copy of the outcome of the investigation. To this end, I would like to receive it now. As the person who reported and was involved in this particular incident, I am sure I am entitled to this information, specifically by involvement. I was, and still am, very concerned about potential lung damage as a result of this incident.

My motivation for these requests is purely my concern for my safety and wellbeing at my workplace."

23. On 23 November 2023 the claimant contacted ACAS to start an early conciliation process. The early conciliation process concluded on 29 November 2023. The claimant registered for work with an employment agency on 27 November 2023 and began temporary work as an agency worker driver with Moray Council on 4 December 2023.

24. The claimant has remained working with the Council. His position is as a temporary relief driver over the winter but he hoped to remain in employment with them after April when the relief staff are usually dismissed. The claimant's wages with the Council are lower than they were with the respondent.

25. The claimant did not hear anything further in relation to the investigation following the correspondence with Mr Cooper. He was unaware that Mr Cooper had contacted the company's IT Manager to obtain copies of archived emails in relation to the two historic incidents. This took some time to carry out as the records were in storage. The two Managers mentioned by the claimant who had been involved in the 2017 incidents had left the company.

26. Mr Cooper had checked the logs that were kept of incidents including the night logs when the claimant would be on shift he noted no issue had been put on record by the Controllers in relation to the claimant's concerns. It was their duty to record any difficulties experienced by drivers to allow the matter to be reviewed by the Operations Manager. The respondent's managers

were unaware that the claimant had been falsifying his Tachograph card to show breaks until the claimant said that he was doing this at the meeting he had with Mr Cooper and Ms Braidwood. Had the respondent's managers been aware of this suggestion they would have treated the matter very seriously as it could have an impact on their Operator's Licence.

27. Mr Cooper met Jim Strachan, the day driver and spoke to him about the difficulties taking breaks. Mr Strachan indicated that he would fit in breaks either when getting a load at a client's premises i.e when the lorry was being loaded or when a load of draff was delivered to the Mill by another driver. He would ask the driver to tip the load into the hopper for him and this would allow him time for a break. He told Mr Cooper that the night shift driver would not have this same flexibility as he had in getting drivers to tip the loads.

28. Mr Marshall emailed on 20 December (JB53):

> *"Dear Mr Cooper*
>
> *I am writing to inform you of my official resignation as of today (20-12-23) from my position of HGV driver with McPherson Aberlour.*
>
> *You did state by email on 14th November 2023 that you were reviewing the issues raised as to why I felt I could no longer continue in my post. I did also ask for confirmation of the outcome of previous enquiries raised by me concerning my safety and wellbeing.*
>
> *I felt, and still feel that your solution; to move me to an alternative role within the company, did nothing to address the concerns which caused me to feel I could not continue in my role under such unworkable circumstances. I also felt such a move would do nothing to address the very real issues raised.*
>
> *I did make it quite clear at our meeting on 13th November 2023 that I would be willing to take on another role within the company, but only once the reasons why I felt I could not continue in my present role had been investigated and resolved, I have already officially reported my involvement in other potentially fatal incidents, with no satisfactory resolution. Prior to the continuously increased and impossible workload I was very content with my employment position.*

Over 6 weeks have now passed since you informed me that you would be making enquiries into my reasons for not returning to my position on site. I have asked specific questions, and to date have again heard nothing regarding my concerns.

Therefore, regrettably, I have no option but to consider this as constructive dismissal."

29. The claimant's termination of employment was processed.

2017 Incidents

30. The first incident related to his exposure to caustic steam at a Diageo Distillery ("caustic steam incident") and secondly an incident involving overhead power lines that had occurred at Allanbuie Farm by Keith ("Allanbuie incident").

Caustic Steam Incident

31. The claimant emailed Ritchie May, the respondents' Health and Safety Manager on the 15th of May 2017 and narrated that an incident had occurred at Glenlossie Distillery shortly before. He indicated at about 4am on a Sunday morning he pulled into bay 2 at Glenlossie to tip pot ale (a distilling byproduct). His cab window was open. He discovered that a "mist of steam like vapour" was present and that his eyes were burning and he was struggling for breath (JB58).

32. The claimant had gone to the Control Room in the Distillery to report the matter but there was no-one there. He believed that there was only one distillery employee on site at that time. Much of a modern distillation process is automated. He found the distillery employee and explained the problem. The employee accepted that he had left the caustic valve open by mistake after cleaning pipes. The claimant wrote:

> *"Don't want to make an issue of this but need this on record, my eyes were burning for some time after this and I did get a few lungfuls and spent the next few hours sneezing and coughing. It all seems okay, did have a bit of a sore throat last night but now seems fine. I had a look on the internet this morning regarding the stuff, potentially not particularly pleasant, think this was a very small dose would like this on record just in case."*

33. The respondent's QHSE Manager Mr May responded. He passed the email to senior managers at Diageo and looked for "feedback". He received a response and said that the matter would be investigated (JB61). The claimant chased the matter up on 1 June (JB62). Mr May contacted Diageo and asked for an update (JB63). The claimant heard nothing further. He arranged for a solicitor to write to the respondent in October. Mr May passed the solicitor's letter to Diageo (JB64) asking for a response. They responded on 30 October: *"I can confirm a review of our Accident Book confirms no incident reported by your employee..."* (JB66). The claimant was advised on 26 June that Diageo had investigated the matter and *"had not elaborated on their investigation"* (JB67). The claimant emailed Mr May on 17 June 2020 indicating that his solicitor had never received a formal response and asking who he had spoken to at Diageo. Mr May would not release this information because of data protection concerns and suggested the claimant contact the Risk Manager at Diageo.

34. The claimant let the matter drop.

Allanbuie Incident

35. The claimant including other drivers were given instructions in relation to the dangers of overhead power lines (JB74). They were told that it was important to check where they were tipping and to "Look out! Look up! Electricity can kill you." The advice also contained the following "your vehicle does not have to contact the lines for the current to flow, the HSE

recommend that vehicles should not approach closer than 9 metres distance from overhead power lines supported on wooden poles with 15 metres for those supported by metal towers and structures.

36. The power lines at Allanbuie were supported on wooden poles.

37. The claimant emailed Iain MacLeod, a Traffic Manager on 13 June (JB75):

> *"On Sunday night I was asked to tip draff at this farm. I had not previously visited this place. On arrival in darkness it was clear some loads had already been tipped and there was very little open space to the right of this bay sort of thing, I could not get far enough forward to tip the whole load. I decided to tip the remainder alongside existing draff.*
>
> *I began to raise box, fortunately just as daylight was breaking and then noticed the high voltage power line directly above just prior to contact with this. Photo attached.*
>
> *We really do need to be risk assessing these places prior to someone being killed! This photo was taken about half an hour later. The subject heading was "Allanbuie Farm. Off the record".*

38. The claimant emailed Mr MacLeod on 13 June:

> *"Iain*
>
> *The Company Handbook is very clear on this issue 2-11-1 not really interested in the high cost of repair bit.*
>
> *Why I am being asked to tip within 9m of risk (not possible in suggested area) in darkness?."*

39. Mr MacLeod indicated that the correspondence had been forwarded to the QHSE Manager. Mr May looked into the matter and visited the farm. The claimant was not told of any further action being taken by the company.

Tachographs and Break recording

40 The respondent company requires an Operator's Licence to carry out their business. They must ensure that their drivers operate a tacograph system which provides information on their driving and breaks which is checked by the company. This system allows the company to monitor the length of driving, breaks and whether there are any infringements of the rules. If an infringement is highlighted it is investigated. If minor the circumstances are recorded and if more serious the driver may be disciplined. It is important to the company that the tachograph records are correct. Drivers are responsible for ensuring that they have a Tachograph card in any vehicle they are operating and the system is recording driving and other work as well as breaks.

41. The claimant would take his card and put it in whatever lorry he was driving. As part of the investigation Mr Cooper obtained details of the claimant's inputted information (JB147/148). It showed that the claimant was recording appropriate periods for breaks on every shift. The system showed the total number of breaks taken and the longest break.

42. The claimant could tip loads, and this took a period of time, and as the vehicle was not being driven and the brakes engaged it would show on the system as a break from work, in fact on most occasions the claimant was actually still working monitoring the tipping process. Anyone examining the card or the downloaded data would not be able to tell that the claimant was actually working. The claimant did not like taking actual breaks while tipping as he thought it unsafe to leave the vehicle unsupervised when this process was engaged nevertheless he would not record this time as 'other work' and show it as a break.

43. Mr Cooper obtained all the necessary emails that were recoverable in relation to the historic incidents by late December/early January. He concluded that there was no basis for the claimant's complaints. He did not write a formal report but briefed the Directors on the outcome.

Witnesses

44. The Tribunal found the respondent's witnesses generally credible and reliable witnesses who gave their evidence in a straightforward manner. The one area of evidence we found unsatisfactory was we were concerned that the investigation into the breaks issue carried out by Mr Cooper seemed somewhat superficial given the seriousness of the situation as highlighted by Mrs Braidwood in her evidence. We were surprised that his investigation did not seem to generate a report for senior management or any written records or guidance such as guidance for drivers at the mill stressing the importance of breaks and putting in place an understanding that those delivering draff should be asked to tip their vehicles to allow the resident driver a break. Nor was the apparent pressure from the operators investigated but this was unknown to the claimant when he resigned.

45. The claimant's evidence was also generally credible and reliable in relation to his narrative of events and we accepted his evidence about the two incidents we write about.

Submissions

46. The claimant did not make any formal legal submissions but indicated that the Tribunal should accept his evidence about the background to his resignation. He said he had been repeatedly badgered to keep the Mill operating. It was impossible to carry out a 24 hour process and for a single driver to take breaks. He felt he had no option other than to disguise the fact he wasn't getting breaks. His position was that management must have known. He said he had raised the matter of the difficulty in taking breaks while working at the Mill with the Traffic Controllers. Mr Marshall believed he was in a Catch 22 situation. If he did not show breaks then there would be infringements shown against him but he was under pressure to keep the

hopper topped up and the system running. He was concerned that he would be disciplined. The claimant had a clean disciplinary record.

47. Ms McLaughlan acting for the respondent took the Tribunal through the factual position as the respondents saw it. In 2017 the incidents had all been addressed at the time. They were "historic". The matters were not live. In relation to the caustic steam incident the respondent's managers could have done nothing further given the position taken by Diageo. The incident had been recorded by the respondent but that is all they could do. In relation to the farm incident their understanding was that it was believed that the claimant had tipped his load in the wrong place (i.e. too close to the power lines and that in any event had an obligation to ensure that it was safe before he did so. This was drummed into drivers who were aware of the dangers caused by raising the back of the vehicle when tipping. Before being entitled to terminate the contract, she submitted that, the claimant has to demonstrate repudiatory conduct and this he had failed to do.

48. With reference to the claimant's own chronology it was quite clear that he intended to resign on the 7 November. He refused to return to work. There was no justifiable reason for him to do so *(Mostyn v. S and P Casuals Ltd* UKEAT/0158/17/JOJ). The respondent had put in place an investigation. They had taken his concerns seriously. He had never mentioned that he had falsified breaks until the Employment Tribunal hearing. He could not treat the investigation as a final straw. The delay in concluding the investigation was wholly reasonable given the circumstances. In her submission there was no last straw nor was there any repudiatory conduct. In relation to compensation even if the claimant was dismissed it would not be just and equitable for him to receive any compensation during the period up to his employment with Moray Council because he had been offered alternative work.

Discussion and Decision

49. The Tribunal first of all had regard to the terms of Section 95(1)(c) of The Employment Rights Act 1996 (hereinafter the 'Act') which is in the following terms?

"Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2). . . , only if) -

(9) .....
(b) .....

(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".

50. The section provides that when the employee terminates their contract (with or without notice) in circumstances in which they are entitled to do so because of the employer's conduct that will amount to a dismissal for the purposes of the Act. The focus is on the employer's actions not the employee's reaction to those actions and whether the employer, looked at objectively, has been guilty of a repudiatory breach of contract.

51. The Tribunal considered the guidance contained in the well known case of *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27 Court of Appeal which has laid down time honoured and helpful guidance on this matter. The nub of the matter is to be found in the judgment of the Master of the Rolls, Lord Denning, where he says at page 29, paragraph 15:-

"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."

52. We also considered whether the claimant's employers had by their actions, looked at cumulatively and over a period, had destroyed the implied term of trust and confidence that requires to exist, between employer and employee, in this regard we reminded ourselves of the case of *Malik v BCCI SA* [1997] 3 All ER and the dicta contained there: that a contract of employment contains an implied term to the effect that the employer: -

> *"would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".*

53. The Tribunal also considered the observations of the Employment Appeal Tribunal in the case of *BG Plc v. Mr P O'Brien* [2001] IRLR 496 in that in every case:-

> *"the question is whether, objectively speaking, the employer has conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. If the employer is found to be guilty of such conduct, that is something which goes to the root of the contract and amounts to a repudiatory breach, entitling the employee to resign and claim constructive dismissal. Whether there is such conduct in any cases will always be a matter for the Employment Tribunal to determine, and having heard the evidence and considered all the circumstances".*

54. In other words the implied obligation enforces the principle that the employee is entitled to be able to have trust and confidence in his or her employer. In this case the Tribunal had to consider the actions of the employer acting through their managers as they interacted with the claimant and to the background to those actions.

55. As has been noted the breach of the implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each individual incident may not do so. In particular in such a case the last act of the employer which leads to the employee leaving need not itself be a breach of

contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term (see Woods v. W *M Car Services* ***(Peterborough) Ltd*** *1981* ICR 666. This being reference to the classic "last straw" situation. As we discuss later it was not particularly dear that the claimant was relying on the 2017 incidents. It was clear however from his evidence that the 'final straw' for him was the length of time the investigation was taking coupled with the self imposed loss of earnings.

56. These matters have been canvassed on many occasions with the appropriate starting point being the case of ***Buckland v Bournemouth University*** [2010] EWCA Civ 121. It was suggested in that case that:-

> *"(1) In determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished* ***Mahmud*** *(Malik)test should be applied.*
>
> *(2) If, applying the* ***Sharp*** *principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed.*
>
> *(3) It is open to the employer to show that such dismissal was for a potentially fair reason.*
>
> *(4) If he does so, it will then be for the Employment Tribunal to decide whether dismissal for that reason, both substantively and procedurally (see* ***Sainsbury v*** *Hitt [2003] IRLR 23), fell within the range of reasonable responses and was fair."*

57. The Court of Appeal in England provided further guidance as to what conduct might amount to a 'last straw' in the case of *London Borough of Waltham Forrest v Omilaju* [20051 IRLR 35. Lord Justice Prophet stated:-

> *"I see no need to characterise the final straw as unreasonable' or blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor*

do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence."

2017 incidents

58. Although the claimant seemed to suggest he was not relying on the earlier 2017 incidents he spent some time giving evidence about them. It became clear that he felt they were relevant as highlighting what he regarded as an unsatisfactory response to health and safety matters which was then reflected in the delay in the investigation he had said was a necessary step in him returning to work. That seemed to us to be a difficult position to adopt as he was unaware at the time of the efforts being made by Mr Cooper to investigate his concerns and this was also against a background of him being offered work elsewhere in the interim period. In retrospect we were not convinced that the claimant was not seeking to resurrect these suggested earlier failings or that they played no part in his resignation.

59. The reasons for his resignation and the catalyst for refusing to return to the plant were matters that the Tribunal did not find particularly easy to identify and characterise but we return to that matter later. We had regards to the fact that the claimant is after all a party litigant. However, we decided to examine the 2017 incidents and ascertain if they were repudiatory breaches and whether they were revived by later events.

60. As a general observation we were conscious that the respondent company did not seem to have detailed records of the outcomes or investigations that had taken place in 2017. We suggested that was due to the fact that the managers involved had left and accordingly the respondent's evidence was incomplete and second-hand but we would have expected some written records other that email traffic.

61. The first incident related to the exposure to caustic steam. The claimant appears to have sustained no apparent lasting injury and in his first email to

his employers he said he did not want to make an issue of the matter but wanted it recorded. It was clearly a concerning matter for the claimant. The respondent company did not ignore the matter but raised it with Diageo ultimately being told there was no record of the incident. Some employers might have pressed Diageo to confirm whether they had identified and interviewed the person likely to have been on shift that evening but they did not. They passed the matter back to the claimant suggesting he write to the appropriate manager in Diageo. It seems that the claimant took the matter no further which was perhaps understandable given that no outward injury had been sustained. It was disappointing that they did not respond to the claimant's solicitors but passed that to Diageo. While the reasonableness of the employer's actions can be criticised there is insufficient to constitute a repudiatory breach of contract in our view.

62. In relation to the incident at Allanbuie the claimant accepts that he had a duty to inspect the area he was tipping at and says he did so. We accept his evidence about the incident. We were told that other drivers had tipped here without complaint and that the CQSE Manager inspected the site. From the evidence we considered it seems that there is a clear hazard in the area the tipping occurred. It is unfortunate that no written record seems to have been kept of the risk assessment that was said to have been made.

63. The claimant seems to have grounds for his complaint that even if he had seen the power lines much of the site is within 9 metres of them and the activity was potentially dangerous. On the one hand the complaint was apparently investigated by the appropriate person from the respondent company but again no report or records of this was produced nor is there any evidence that other drivers were alerted to the possible dangers posed by the power line.

64. We would comment that there is a duty on employers to identify and if possible reduce risks to employees and we can understand the claimant's dissatisfaction with the final outcome. It was surprising that he did not lodge

a grievance or report the matter to the HSE but for whatever reason he chose not to do so. He seems to have let the matter drop. Assessing the role of the employer here it does appear to us that the respondent should have done better and fell down in not identifying the possible risks the site posed (it was being used regularly) or then clarifying, recording and disclosing the results of the investigation. It was not clear that any action was taken as a consequence of this investigation.

65. We noted that the respondent's position was that the incident was wholly the claimant's fault for not checking the site properly. That does seem difficult to reconcile with the circumstances namely tipping the load in the dark or even with their own position that he tipped in the wrong area. If there was a danger then the need to avoid part of the concrete bay near the power lines and to take particular care especially in the dark was not emphasised to him or apparently others despite allegedly having been subject to a risk assessment. We concluded that this was a blameworthy incident and one which could possibly alone or with others breach the implied duty of trust and confidence.

Reasons for Resignation

Was there a final straw?

66. The immediate reasons for the claimant's resignation are not as clear as they might have been especially having regard to matters set out in his email to Mr Cooper following their meeting, his later resignation letter and the terms of the ET1. The matter has some significance as the respondent argued there was no final straw and the claimant intended to resign on the 6/7 as was evident from him refusing alternative work and asking to be paid off.

67. The claimant's position at the hearing was that he was now focusing on the respondent's failure as he saw it to investigate why he was not able to take

his breaks. We accept that it seemed as if the difficulties in taking breaks, had become more acute after the plant was altered some time earlier to have only one hopper which needed to be kept constantly filled. But it also seems to us that what brought matters to a head on the 6/7 November was the fact that someone had been sent to check how the system was working or as the claimant saw it how he was doing his job. In evidence in chief he said that he had "had enough" and that he was "done with the constant badgering". He did not say who was doing this.

68. We assumed that this situation had occurred because of concerns from the Mill Operators but we heard no evidence from the respondent company about this. The claimant took this badly. It was not clear where exactly that pressure was coming from but it seems to have been from the client running the Mill rather than the respondent's managers. The claimant was never disciplined for taking breaks (or not).

69. As we can see the claimant's case principally revolves around the issues at the Mill and the events of the evening of the 6/7 November. Let us start off by saying we were puzzled that there was no evidence about why another employee attended the nightshift or for what stated purpose or more generally what the background was to that instruction. Mr Cooper was apparently unaware of this matter namely that someone was asked to attend and report back to the Chairman. However, we bore in mind that as a principle an employer is entitled to check or supervise an employee's work and if the purpose was to be able to confirm that their employee was working properly then this seems unobjectionable although it could have been handled better as he was given no forewarning.

70. We accept that there is no need for there to be "proximity in time or nature" between a last straw and earlier repudiatory acts. The final straw need not be unreasonable or blameworthy conduct. If however it is not repudiatory in nature it will not revive earlier acts ***(Kaur v Leeds Teaching Hospitals NHS Trust*** [2019] ICR 1,CA). The employer's action in checking up on the

ciaimant was not itself a repudiatory act. It was not capable of reviving the Allanbuie incident which occurred in 2017.

71. We considered an alternative which was that the delay in concluding the investigation could be regarded as a final straw. This is certainly the prompt for the claimant to lodge his letter of resignation. We concluded that despite the relatively long time it was taking to conclude the investigation that this was justified in the circumstances as the claimant wanted the 2017 incident re-examined. Had we held that this was the true final straw that too was unable to revive the earlier incident as it was not repudiatory in character.

72. We then considered the ***Malik*** test and if the respondent company could be held to have acted in such manner as to have breached the implied duty of trust and confidence.

73. We bore in mind that these events also took place against a background of the respondent monitoring driving hours and breaks through software they use and seeing no issue with the claimant's records, issues such as a failure to take breaks would have been highlighted automatically and the claimant knew this. It appeared to the respondent's managers as if he was taking his breaks. The claimant's position in evidence was that he had falsified these records by for example setting the system on the vehicle to "break" whilst he was actually engaged in tipping work. The tipping work should have been recorded as work on the system. The respondent's managers were unaware that the claimant was doing this or that the breaks were being falsified.

74. The claimant's position was we think twofold. He argued that anyone who was aware of the "set up" of the work would know that he would struggle to take breaks. There was some force in this and we can understand that on a busy night if other drivers did not stay and tip their loads he would have difficulties getting a break. This falls down however because he falsified the paperwork that reassured them that things were all right.

75. We bear in mind that it is the employer's conduct that is at issue but it is significant that the claimant had not raised a grievance in relation to any supposed inability to take breaks, nor had he raised the matter formally with management. In his email dated 10 November he only mentioned breaks in passing (p43). He said that at some time in the past no doubt on a busy night he had said to "Trevor" his line manager who worked on the Traffic Department that he was finding it difficult to take his breaks. We considered his recollection of the conversation. He said that he was told to do his best. He did not contact Trevor again about this matter. It was not escalated to management and although we heard no evidence from the employee concerned there did not seem to be anything in the conversation to alert him that this was a continuing concern. Mr Cooper could find no record of this conversation having been noted down, which If it had been regarded as being a serious mater it should have been, for investigation by a manager. We accepted that the taking of breaks was something that the employers expected the drivers such as the claimant to do and that they should be taken as and when they can be.

76. We also noted that the claimant in his email dated 10 November 2023 wrote that: *"I am not, and have never been workshy and strongly resent the implication that I am. In fact, I believe that I go above and beyond, considering the fact that I work though all legally required breaks…"* The conclusion we reached was that the difficulties in taking breaks, which we concluded were real, was not the issue for the claimant that night This had been a pre-existing state of affairs for many months if not for many years. He had not only put up with this situation without complaint he had hidden any actual occasions where he had not taken breaks from his employers. In these circumstances we came to the view that the claimant had not demonstrated that the employers were in repudiatory breach of contract entitling him to resign and the claim must accordingly be dismissed.

77. We would record that although the respondent company has a system in place to monitor breaks there must be a temptation to ignore taking breaks in order to make sure that the hooper is filled, the trailers emptied for the

following day and there was no room to blame production problems on the driver or the company. The system only works if the correct information is inputted. We would have been more comfortable had there been some analysis of the workload and some clear guidance given around the importance of taking breaks for those working in this environment. There seemed to be no investigation into possible pressure from the mill owners. The practical day to day difficulties in taking breaks did not seem to have been fully considered. For example there seemed to be no requirement for visiting drivers to tip and allow the claimant or other resident drivers to take a break although they would often do so "as a favour". Loyalty to the company and the business might well naturally lead an employee to get into a routine of not taking the full breaks required especially if they feel under pressure to keep the plant operating and in the long term that is to no-one's advantage.

Employment Judge: J M Hendry
Date of Judgment: 24 June 2024
Entered in register: 25 June 2024
and copied to parties