



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

5

**Case No: 4106922/2023**

**Hearing Held on 12 and 13 February 2024**

10

**Employment Judge Hendry**

15

**Mr C McGregor**

**Claimant  
In Person**

20

**D Steven & Son Ltd**

**Respondent  
Represented by:  
Ms A O'Donnell**

25

30

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

35

The claim for unfair dismissal succeeds and the Tribunal awards the claimant the sum of Four Thousand Five Hundred and Sixty-Nine Pounds sterling (£4569) made up of a basic award of Three Thousand, Nine Hundred and Sixty-Nine Pounds (£3969) and an award for loss of statutory rights amounting to Six Hundred Pounds (£600).

40

## REASONS

1. The claimant in his ET1 sought a finding that he had been unfairly “constructively dismissed” from his employment as a LGV Driver with the respondent, a large haulage company. The respondent company denied that they had given the claimant cause to resign or in the alternative that any breach was minor and that if there had been a dismissal it was fair.

### Issues

2. Unfortunately, there was no Preliminary Hearing in this case to identify issues. The claimant set out his position very briefly in his ET1 and had not given much background but further information was contained in his grievance which he had referred to in his ET1. The respondent’s lawyers had not sought further particularisation of the claim.
3. The principal legal issue was whether or not the respondent had given the claimant sufficient cause to resign. It was apparent that an accumulation of events had undermined the claimant’s trust and confidence in the respondent leading him to resign.
4. During the period leading up to the claimant’s leaving work through illness he had been unhappy that his allocated lorry (truck) had been sold and a replacement truck although ordered, had not yet arrived. After an objection from the respondent’s solicitors was upheld I ruled that this matter was not one that the claimant had given notice of in his ET1. It was, however, background.
5. The main factual circumstance that caused the claimant to resign was that he was forced to carry out yard work rather than drive on his return from sick leave. Because of the way the respondent company pay drivers such as the claimant this meant a substantial cut in his wages of about 30 to 40%. He disputed that there was any good reason for this suggesting that it

was a deliberate way of making him leave following the difficulties he had experienced with Mr Chris Steven. The respondent contended that they had cause to suspend him from driving because he could not drive with because of his hypertension condition.

5

6. The final events before the claimant resigned revolved around a grievance he had lodged on 16 October. In that he raised a number of issues including why had he been restricted to yard duties. He had asked for an acknowledgement within 10 working days i.e. by 26 October. He received an acknowledgment within this period but heard nothing further either about the progress of the grievance or arrangements to meet him and discuss it. He continued to be allocated only yard work and resigned on 27 October. The issues arose as to whether there had been a “final straw” or if indeed he needed one in the circumstances.

15

### **Evidence**

7. The Tribunal had the benefit of a Bundle of Documents prepared by parties. This was added to by agreement. The claimant also produced copies of a series of WhatsApp (text messages) which he wanted to lodge. I noted that the Order that had been sent to the claimant when the hearing had been arranged did not specify that he had to intimate documents in advance or lodge them prior to the hearing. I, therefore, allowed these documents to be lodged and arranged for the Clerk to copy and number them (C1 to C33).

20

25

### **Witnesses**

8. The Tribunal heard evidence from the claimant on his own behalf and from Mr Steven Junior, a Director of the Company and his father David Steven Senior (Managing Director) and Christopher Steven, a Director.

30

I made the following Findings in Fact:

## Background

- 5 9. The claimant qualified as an HGV Driver shortly after leaving the Army in 2009. He joined the respondent company on 10 October 2016. He was hardworking and competent.
- 10 10. The respondent company is a haulage company. The main site of its operations are in Scrabster in Caithness. They have depots in Aberdeen and at Bellshill near Glasgow. They employ between 50 and 55 staff with between 25 and 30 full time drivers. They have a substantial turnover. They have no dedicated HR function but have an administrative office at their premises in Scrabster. The Office Manager deals with payroll and in liaison with the Directors he deals with any HR matters that arise. The company is family owned and run.
- 15 11. One of the Directors, Chris Steven is in charge of the Traffic Department. That department allocates drivers to jobs. Although the company have a number of large clients a substantial amount of work is ad hoc and allocated to drivers at short notice. Mobile telephone messages are used to keep in contact with drivers as is email and direct telephone communication. Throughout his employment the claimant was in regular daily contact with Chris Steven or when he was not available with others in the Traffic Department based in Scrabster.
- 20
- 25

## Entitlement to Salary

- 30 12. The claimant was given a Contract of Employment (JBp26-33) and a Job Description (JB 35-26). The respondent company reserved the right to ask the claimant to perform such other duties as may reasonably required. The

Job Description was for a LGV Driver. H gave the claimant's duties as general driving and collection of goods.

- 5
13. Under the heading "Salary" the contract said "Your Pay Grade will be: LGV Driver Grade 1-Trip based.
- 10
14. The contract under the heading Hours of Work specified "Your normal hours will be in accordance with EU Regulations and Directives on Driver's Hours NSD Working Time..." It provided that the claimant might be asked to work additional hours "as and when required" There was no reference to a working week of 35 hours per week or to core or basic hours.
- 15
15. The claimant's wage slips (JB p186) broke down the claimant's monthly earnings into salary and what was described as "Non Tax N/Out (expenses) and Overtime". The point at which "overtime" began was not stated. It appears that it was not truly overtime despite being described as such. The sum put under this heading was a sum calculated on the basis of a payment given for each mile driven. The claimant was not provided with a calculation of how this sum was worked out. He did not have "core hours" to which overtime could be added. The weekly wage was based on a fixed component (described as salary) and a sum calculated on mileage. The claimant was expected to drive for as long as the applicable regulations would allow mostly between 40 and 50 hours per week.
- 20
- 25

### **Claimant's Illness**

- 30
16. The claimant lived in Perth. He worked out of the Bellshill depot near Glasgow and would generally pick up his truck there. On occasion he would sleep in his car or in a truck at Bellshill to ensure that he was ready for work early the next morning.

17. The claimant had his own truck until it was sold in early summer 2023.

18. By the middle of 2023 the claimant felt under a stress. He had complained about a lack of communication from Mr Steven and not knowing what work he was to be allocated until the last minute. For example, the claimant made reference to events on 1 June 2023 (C1) in the various texts he had sent to Mr Chris Steven throughout the day:

“-Stayed in car last night as nobody has said what’s going on”

“-Am away home if you can let me know what’s happening with work thanks”

“- What’s the plan for me on Monday”

“-Have I still a job with D Steven.”

19. There had also been friction between the claimant and Mr Chris Steven about the claimant’s reluctance to work weekends. He would not do so when he got access to his son.

20. In June 2023 the claimant had been feeling unwell for some time. He arranged to see his GP on Friday 7 July. He had been in contact with Mr Steven about feeling unwell and about the fact he had arranged a doctor’s appointment. He had told Mr Steven that he had a urinary tract infection. Mr Steven wanted him to cancel the doctor’s appointment and keep working. Initially the claimant agreed to do so. Mr Steven told the claimant that he could get antibiotics “over the phone”. Mr Steven had suggested he change over with another driver at Perth but the arrangement broke down. The claimant later decided that he felt too unwell and had to keep the appointment. A dispute arose between the claimant and Mr Steven who was unhappy that the claimant was keeping the appointment. The claimant had the following text exchange with Mr Steven. (p160).

C- “And I said I had the doctors”

CS- “And you said you would cancel it”

C- "Well I didn't as u didn't answer nd am sore"

C- "I'm peeing and it's going up like a balloon"

C- "I can see what's going on here now"

CS- Shoot in by the depot...

5 C- Your actually trying to bully me nd force me out"

CS- "work to be done Trucks no good to me sat parked up".

C- "I don't have a truck".

CS- "I do so work it."

io C- "it's not my fault I need to see a doctor the mora I was more than willing to change over."

C- "And u wouldn't say so I didn't am not arguing with you

Chris you have been off with me for weeks."

CS- "just want the work done and you know that."

15 C- "I do the work you are constantly on my back over little things it's getting hellish."

CS - "4 days."

C- "This is a medical thing no a sore finger nd I was going to do changeover u sent me home."

CS- "Things change here all the time."

20 C- "did you call your changeover man tonight?".

C- "you didn't tell me who I was changing with then I got a message from Alan saying he wasn't changing with me any more."

On the 7 July the claimant texted:

25 C- "Was taken to hospital last night have a bad kidney infection been advised to rest for the week."

CS- "that's no so good will you be okay Monday. Light duties And a pick up in Inverness (crying tears emoji)".

C- "Iv been signed off for 2 weeks am not well atoll am afraid."

CS- "oh no pop me the sick note I will forward it up to upstairs for you."

30

21. When the claimant was examined in the hospital it was found that in addition to the infection he had unusually high blood pressure. He submitted a Statement of Fitness for Work (Fit Note) (JB p37) that he had been signed off work for 2 weeks. The reason given was "essential hypertension." The

claimant submitted a further Fit Note after being assessed on 20 July 2023. It was for 21 days. The reason given "essential hypertension". The claimant submitted a third Fit Note after being assessed on 10 August 2023 for 21 days. The same condition was noted. The claimant's final Fit Note (JB p40) was submitted after he was assessed on 31 August 2023 for a further 21 days for essential hypertension. During this period the claimant was prescribed medication for high blood pressure and it came under control. By the end of the period he was feeling much better. He arranged to see his GP and was confident that he would be returning to work.

10

22. If the truck the claimant was to use during the week ended up in Scrabster, the respondent's main base, at the weekend he would often get a lift from the Bellshill Depot from another driver on Monday to Scrabster to pick up a truck there and then be allocated loads to deliver for the rest of the week.

15

23. During the claimant's period of absence he had no contact at all with the company. They did not ask when he was likely to return.

20

24. The claimant's Fit Notes were sent to Scrabster and given to the Payroll Manager. The claimant's absence and reason for absence was on occasion mentioned at weekly management meetings which the Directors attended. Sometime before the claimant had left on sickness absence a new truck had been ordered to replace his old truck. The new truck arrived during his absence and the respondent company gave it to one of the new drivers they had employed.

25

25. On 18 September the claimant texted Mr Steven (C33) "*Hopefully I'll be back on Monday*". He received no response.

30

26. On the 22 September following his doctor's appointment he texted "*Good to go for Monday*". He received no response.

27. The claimant texted Mr Steven on 24 September (C31) "*What's on tomorrow?*". He received no response.

35

28. The claimant decided to wait at home on Monday 25 September till he knew where he was to pick up a truck or what work he would get.

29. He texted *"what's the plan for today"*. Mr Steven responded at 8.49  
5 *"unknown no in office yet"* (C32).

30. The claimant texted Mr David Steven Senior at 9.57 am (p179):

(0) *"not sure what's going on with work as Chris won't speak to me I'm being ignored. I was due to return yesterday but nobody is letting me know what I'm meant to do if you could let me know Craig"*.

31. Later the claimant was told to get a lift to Scrabster. On Tuesday 26 September he got a lift to Scrabster and picked up a truck. He was told that  
15 a new truck was ordered and that meantime he would have to use whatever truck was available. He worked the rest of the week.

32. He texted Mr Chris Steven on Friday 29 September:

20 *"what's the plans for me next week"* and there was no response. He texted later that day *"am getting treated different which isn't good I'm full time and you have ..."*(JB179).

33. The claimant was told to attend the Bellshill Depot on Monday 1 October.  
25 When he arrived the Depot Manager told the claimant that he had received an email from David Steven Junior, which he showed the claimant (JB p58) It stated that:

30 *"Understand there's a bit of confusion in regards to Craig McGregor. Due to low volumes with the fish and general at the moment please keep Craig on yard duties with no more than 35 hours per week until further notice. Don't ask him to do anything he's not trained to do. Hopefully things will pick up shortly and normality will resume"*.

35 34. The claimant was concerned at this turn of events. He could not understand why he was being asked to do yard duties or where the 35 hour limit on his hours came from. This led to his income almost halving. This had never

occurred in the past. Being asked to work in Bellshill meant that he would also have to travel from his home every day to work and this would be costly. Normally once he had picked up his truck he would drive for the rest of the week. He thought that the reasons given in the email were false and that the real reason he was being made to do yard duties was because he had fallen out with Chris Steven. He suspected the company wanted rid of him.

35. The claimant was unaware of the exact formula used to calculate his wages but knew that if he was not driving his income would decrease by almost a half. He became aware that in his absence new drivers had been recruited.

36. The claimant contacted ACAS and after taking advice texted Mr David Steven Senior the Managing Director on 3 October 2023. Mr Steven Senior was at that point about to go on annual leave. The claimant texted *7 would like to raise a formal grievance*". There was no response.

37. The claimant prepared a written grievance and sent it to the respondent on 16 October. The grievance raised a number of matters including what the claimant said was a lack of communication with him. He also wrote about what he described as the recent unfair treatment and changes to working conditions in the following terms:

*7 would also like to express my concern regarding the unfair treatment I have been receiving since my return from sick leave. I now have no dedicated vehicle which is a big change from my working conditions prior to being on sick leave. I have been told to work restricted hours (35 per week) in the yard which I am not contracted to do whilst other people that are less experienced and have less time with the company than me are given driving roles and I feel I should be given a higher priority as described within my contract as an HGV Driver. No communication has been given to me directly except orders passed on from the Yard Manager that I am only allowed to work in the Glasgow yard for a maximum of 35 hours per week. This is work that I am neither contracted to do or have received any training*

for. On several occasions I have been asked to overnight in various vehicles and due to the amount of drivers using them it's impossible to clean. Some vehicles are already unhygienic ... due to these and a number of other concerns I feel that I am no longer being treated fairly or respectfully which has created a degraded work environment for me. In light of the above concerns I kindly request the following actions be taken: (1) improve and confirm communication methods to ensure that adequate notifications within a reasonable time period are given to ensure timely action and understanding of relevant information (2) provide assurance that a return to the working conditions I had in place prior to my sick leave and as per the agreed contract I started employment with i.e. confirm a designated vehicle for me to drive and return to my agreed working hours of Monday to Friday as an HGV Driver.

I would appreciate a written acknowledgement of this grievance letter **within 10 working days**. Further to an acknowledgment I would like to have my formal grievance heard in person and a plan put in place to improve the working conditions I am currently forced to carry out. Additionally I kindly request that an investigation be conducted into the matters raised and appropriate actions be taken to resolve them."

David Steven responded (JB53):

"It's of great concern that I acknowledge your grievance dated the 16<sup>th</sup> of October 2023. I have today initiated a full investigation into the issues you have raised in your letter. As soon as this has been completed, I will be in contact with you. In the meantime, we understand how important your mental health is and would encourage you to speak to a health care professional about this. If time off is required for any appointment, please let your Glasgow line manager know and D Steven & Son will accommodate this."

38. Beyond this acknowledgement the claimant received no contact from the company. No steps were taken to arrange a meeting with him or to discuss

his concerns. He was not told why he was being made to work on yard duties or why his hours were only 35 hours per week. He was not made aware what investigations were being carried out or envisaged. He remained at the Bellshill Depot on yard duties and on a reduced income.

5

39. The respondent's managers were aware that the claimant was unhappy about not driving. They were aware of the impact this would have on his earnings. They did not tell him that his new truck was about to arrive or explain how he could return to driving duty despite there being work for him to do.

10

40. The claimant texted Mr Steven senior on 27 October as follows:

*"No response from my grievance letter so I'm taking it to the next step".*

15

41. Mr David Steven responded:

*"Hi Craig hope you are well. There was a letter posted Friday 20<sup>th</sup> October explaining the matters raised were under investigation. Unfortunately the investigation has not yet been concluded. Upon the conclusion of the investigation we will be in contact. In the meantime if you have any problems or doubts over your health or mental health please arrange to see your GP or medical consultant. D Steven & Son will fully support any appointment that may be required."*

20

25 42. The claimant could not understand why any investigation would be lengthy. It would amount to Mr Chris Stevens responding to the points raised and explaining why he was on yard duties and when he was due to return to driving. The respondent's Directors did not carry out an investigation other than to ask those in the Traffic Department what was wrong with the claimant.

30

43. The claimant responded: *"10 days I gave to have the matter sorted whole lot nothing has been dealt with at all".*

The claimant sent the text at 14:11. There was no response.

44. At 16:13 he texted:

5

*"How much notice do I need to give to resign?". Mr Steven responded at 21:26 "Hi Craig the notice period in your contract of employment is one week (5 working days). I would stress again if you feel you require medical attention please make an appointment with your GP or medical consultant at first opportunity". The claimant responded "Don't know why you keep going on about medical things David not what this is about if you read the grievance letter properly".*

10

The claimant heard nothing further.

15

45. On 1 November he resigned at 12:04 (p JB55):

*"Dear David I find the position you have put me in after almost 3 years is untenable. I therefore feel I have to resign. Regards Craig McGregor."*

20

46. The claimant's last day of work was the 8 November.

### **Witnesses**

25

47. I found the claimant to be a credible and reliable witness. He gave his evidence in a straightforward manner which was consistent with the contemporaneous evidence such as the WhatsApp messages. I regret that I did not form the same impression of the respondent's witnesses. I found that they lacked candour and I found some of their evidence unreliable and impossible to accept. There was clearly no investigation and the txt responses to the claimant reminding him to take care of his mental health but not telling him why was on yard duties and not driving were somewhat

30

bizarre. If there evidence, which was that the claimant had to be put in yard duties because he had not notified DVLA of his hypertension, was true then it is extraordinary that they did not write telling him that and explaining how he could return to driving. Despite what they claimed there was clearly no genuine appetite to engage with the claimant over any of the issues raised and get him back working as a driver despite insisting that there was work for him to do and knowing he was considering resignation. They must have been well aware of the likely impact their actions would have.

## 10 Submissions

48. The claimant indicated that he wanted to get on with his job and drive but he believed that the employers had decided to get rid of him some time earlier. He had been lied to over the reason he was not driving. His income virtually halved. He had no option except to resign. Nothing had happened after the lodging of his grievance to suggest there was any investigation or it was being treated seriously. He had not been asked to a meeting or asked for more detail. If it was a question of signing a form for DVLA he would have done it. The lack of income for four weeks was very serious for him.

49. The respondent's solicitor asked the Tribunal to prefer the evidence of her witnesses. The claimant had no good reason to resign. He had been told that he could not drive until his condition had been notified to DSVLA. He lodged a grievance which was acknowledged within the time period he asked. The respondents had to investigate the grievance and steps were being taken to do so. The failure to deal with the grievance could not be regarded as a final straw. If the claimant was dismissed then the dismissal was fair as he could not legally drive without notifying DVLA.

50. The claimant was unemployed for a period of 2 days. He suffered no ongoing loss.

### **Discussion and Decision**

51. Section 95(1)(c) of The Employment Rights Act 1996 (hereinafter the 'Act') is in the following terms:-

5 **“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) -*

(a) .....

(b) .....

10 (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”.*

15 52. 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. in the present case the claimant resigned with seven days' notice. 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.

20 53. The Tribunal considered the guidance contained in 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:-

25  
30 *“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.”*

35 54. The claimant was that his employers had by their actions, looked at cumulatively and over a period, destroyed the implied term of trust and confidence that requires to exist between employer and employee. He also

argued that putting him on yard duties was “something he was not contracted to do”. I had regard to case of **Malik v BCCI SA** [1997] 3 AHER and the dicta contained there: that a contract of employment contains an implied term to the effect that an employer: -

5

*“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”.*

10 55. 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:-

15

*<sup>11</sup>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”.*

20

56. 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.

25

57. 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.

30

35

58. These matters were canvassed more recently in the case of **Buckland v Bournemouth University** [2010] EWCA Civ 121. It was suggested in that case that:-

5

“(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.*

io

(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.*

15

(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.”*

59. 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** [2005] IRLR 35, Lord Justice Prophet stated:-

20

*7 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.”*

25

30

60. It is also worthwhile considering the discussion of the last straw principle that took place in the case of **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] ICR 1, C.A. The leading judgment was given by Underhill LJ. At paragraphs 41 to 46 in which Underhill LJ refers to the case of **Omilaju** he makes the following observations at paragraphs 45 and 46:

35

*“45. ... even when correctly used in the context of a cumulative breach, there are two theoretically distinct legal effects to which the 'last straw' label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the Malik threshold: in such a case the breaking of the camel's back consists in the*

40

5 *repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's*  
10 *decision to accept, the legal significance of the last straw being that it revives his or her right to do so. ... 46. Fourthly, the 'last straw'<sup>1</sup> image may in some cases not be wholly apt. At the risk of labouring the obvious, the point made by the proverb is that the additional weight that renders the load too heavy may be quite small in itself. Although that point is valuable in the legal context, and is the particular point discussed in Omilaju, it will not arise in every cumulative breach case. There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect)."*

61. In the present case the claimant makes no reference to the last straw  
20 principle as such. He was coming to the end of his tether as it were because of the impact the cut in his wages was having and would probably have resigned anyway but the catalyst for his resignation was the lack of any meaningful response from the respondent. I am not sure this is needed given the ongoing failure to return him to driving duties with the concomitant  
25 cut in his wages or tell him how he could return to driving duties. But if the case was analysed in this way I concluded that he would have still succeeded.

62. The respondent's Directors deliberately took a very narrow view of how to  
30 respond to the grievance and did so simply with an acknowledgement. They knew perfectly well that the decision to restrict the claimant to yard duties would be financially crippling. Despite being able to respond immediately explaining why he had truly been put on yard duties they acknowledged the grievance and left this matter unaddressed while purporting to undertake an  
35 investigation. The lack of any meaningful response and the continuing loss of wages proved too much for him and he resigned.

63. The respondent's solicitor suggested that the simple acknowledgement of the grievance within the time requested was enough. This is too narrow a

view to take as they could, had they wished, dealt with the principal complaint, not being allowed to drive, immediately by explaining why this action had been taken. They also took no steps to progress the grievance such as asking the claimant for further details or setting up an urgent meeting with him. In the words borrowed from **Omilaju**:

*“The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence.”*

- 5
64. The main issue for the claimant was being put on yard duties with the consequent loss of wages through not driving. This was the principal reason for his resignation. His position was that he was never told why this had occurred. His suspicion was that he was being forced out. He was employed as a driver and the reference “other duties” in his contract seems incidental to the role he has which was as a HGV driver. There was no provision in the contract that would, for example, allow him to be asked to do yard work indefinitely or to justify a reduction in his normal hours to 35.
- 10
- 15
65. Although the wage slips mention a salary component of his wages there is no reference in the contract (p27) to a salary element or reference to him working 38 hours per week. Salary seems to be used in clause 4.1 as his total weekly pay. It seemed clear that he almost invariably worked the maximum hours he could as a driver and was expected to do so. In the month of June leading up to his period of illness he did not earn less than £659. This reduced to around £326 when on yard duty. This took place against a background of the respondent claiming that there was no shortage of work for him.
- 20
- 25
66. The reason given by the respondent company for not returning the claimant to work as a HGV driver revolves around his hypertension condition. It was accepted that the ET3 was wrong in placing this discussion on the Wednesday of the claimant’s return. They say that Mr David Steven Senior spoke to the claimant when they met by chance in the cafeteria on the Friday of his first week back. This was apparently overheard by Chris Steven. Mr David Steven says he told the claimant about notifying DVLA. He gave
- 30

evidence that he knew that the claimant's diagnosis of high blood pressure meant that he could not drive at all. He said that he had noticed the diagnosis on some of the Fit Notes when the claimant's absences were mentioned at routine Monday morning "catch up" meetings at which the Payroll Manager and the other Directors attended. If this was true it seems extraordinary that no steps were taken when the claimant was absent through ill health and prior to any return to contact him and indeed DVLA to check this understanding. It would have meant the end of his employment at least as a driver.

10

67. It seems tolerably clear from the published advice (p188) that the only requirement for a driver with hypertension, as opposed to malignant hypertension, is for them to notify DVLA and they can then immediately drive. At no point did the respondent seek advice either from an Occupational Health provider or the claimant's GP to confirm that his condition was of the less serious type nor to explore how well controlled through medication it now was. This makes little sense, if as they claim, they had work for the claimant to do and wanted him back driving.

15

68. If this was truly senior management's understanding, and the claimant's condition had been recognised as requiring DVLA's notification before he drove then it is also puzzling that he was allowed to drive on the Tuesday, Wednesday, Thursday and Friday of that week. To suggest otherwise would mean that the company was complicit in a breach of the DVLA rules. This leads to the strong suspicion that the issue of hypertension and its impact on the claimant's ability to drive was recognised at some later some date. It supports the claimant's contention that no such discussion ever took place. I accepted his evidence that if he had known about the need to notify DVLA he would have simply done this rather than suffer a cut in his income.

25

30

69. The Directors accepted that they had not texted or written to the claimant explaining their position or instructing him to complete the appropriate notification at the time or later when he lodged his grievance or when he threatened resignation. Their position was that the claimant would be on yard

duties potentially for the foreseeable future as it was his sole responsibility to inform DVLA. They did not see it as their duty either then or later to explain to him why he on yard duties and how he could resume driving, if what they say was true then it would be apparent that the claimant was labouring under some misunderstanding when he lodged the grievance. But they did not clarify the position to him. These do not appear to be the actions of an employer seeking to maintain the implied duty of trust and confidence and it would be clear to any employer such actions would be likely to undermine such trust.

10

70. Their position also did not sit comfortably with the email sent to the depot in Bellshill advising that the claimant was on yard duties because of a lack of work. It was accepted that this was untrue. The justification given by Mr David Steven Junior was that the alternative would be telling the yard manager about the claimant's condition and this would be a breach of his confidentiality. It is not immediately clear why any explanation needed to be given. When asked why some more anodyne reason wasn't given such as operational reasons/lack of a truck or whatever he suggested that the depot manager would see through these excuses as if he would not recognise an alleged fall off in work, when this was not occurring, as anything other than an excuse. In response to a suggestion that the notification for to DVLA could have been sent to the claimant perhaps via the depot manager explaining that the claimant should sign it and "get back on the road" the response was that it was solely his responsibility. He seemed unconcerned that the email was in fact an untruth or the possible impact on the claimant who suspected it to be untrue.

15

20

25

30

71. Considering the evidence and in particular the failure of the employers to write or text the claimant reminding him of his obligation to contact DVLA following his diagnosis or to engage meaningfully with his grievance I take the view that on the balance of probabilities no such discussion took place and the claimant's evidence on this matter must be preferred.

72. The claimant in his grievance raised the question of yard duties writing:

*"I have been told to work restricted hours (35 per week) in the yard which I am not contracted to do whilst other people that are less experienced and have less time with the company than me are given driving roles that I feel that I should be given higher priority for as described within my contract as an HGV Driver. No communication has been given to me directly except orders passed on from the Yard Manager that I am only allowed to work in the Glasgow Yard for a maximum of 35 hours per week."*

5  
10 73. One of the odd features of the case, as mentioned earlier, was that it seems apparent from the grievance that whatever the respondent's managers thought the claimant knew the grievance makes clear that he seemed to think that he was restricted to yard duties because the work that the company had was going to other drivers and he was not driving because of  
15 a slow down in work as the email said. Any employer reading the grievance might well have had to take time to investigate the other allegations but the answer to the claimant's grievance on this important point, and on a matter which had led to a substantial cut in his wages, could have been responded to immediately. They could have reassured him that as soon as the  
20 notification was sent he could return to driving. This was the second outcome he sought in the grievance namely to return to driving work. His employers must have been aware of the crippling effect on his income being taken off driving duties would have had. By this point (16 October) he had spent two weeks on yard duties. The response from the respondent's  
25 Directors giving evidence in essence was that had got what he had asked for namely an acknowledgement within the ten days requested and the company were entitled to investigate the matter in a time scale that suited them despite the pressing situation that had developed.

30 74. The evidence seemed to suggest that no meaningful investigation had taken place or was intended. It is difficult to see how issues such as a lack of communication could be investigated without further information, examples and so forth, from the claimant. The claimant was not asked to a meeting to discuss the grievance or asked for further information. Even when the

claimant was clearly considering resignation there was no response to any of the substantive issues made by the employers (p54 onwards) despite being in a position to.

5 75. The focus for the Tribunal is to look at the situation objectively and determine the conduct that is complained of. I remind myself that the implied duty of trust and confidence is a mutual duty of both employer and employee.

10 76. First of all what are the breaches that the claimant had demonstrated?. The employee here was put on yard duties although he was employed as an HGV driver. The first question is whether or not there was a reasonable and proper cause for that conduct. Even if the claimant had been instructed to carry out only these duties because of his failure to notify DVLA it would be  
15 a breach of the implied term to retain him on such duties, with the consequences this would have on his wages, without telling him clearly why this had to be done and explaining how he could regain those driving duties. Misleading him as to the reason for his removal from driving work as the email did was also capable in itself as being a material breach on it's own. It  
20 certainly adds to the earlier and continuing one. Finally failing to respond to the claimant's grievance in any meaningful manner and explaining why he was confined to yard duties and telling him how this could be quickly overcome would in my view also amount to a material breach in its own right and also even if I am wrong in this characterisation it is capable of forming a  
25 final straw entitling him to resign.

77. Taken together and separately these matters are all conduct that, judged objectively, is calculated or likely to destroy or seriously damage trust and confidence. It is not necessary to show that repudiation was intended or that  
30 the company acted with malice as the claimant suggested. It could be that the respondent's managers were 'caught on the hop' and came up with the plan to leave the claimant on yard duties until he was needed such as when his new truck arrived but the manner in which he was treated, after seven

years of employment, at the very least show little or no regard for him as a loyal employee,

78. The claimant obtained employment quickly. He had no continuing loss. He is entitled to a basic award. I will award the sum of £600 for loss of statutory rights. The statutory cap on gross pay which was £643 but the claimant earned generally above this until his period on yard duties. Parties accepted the Pay Slips that had been lodged were copies of the originals. I have taken out the sums shown which appear to relate to expenses when looking at the gross pay. I have also left out of account the last Pay Slip at page pl 95 as I assume it contained accrued holiday pay given that the claimant's employment ended a week earlier on the 8 November. Leaving aside the period when the claimant was sick the final 12 weeks of his wages shown in the wage slips from the 15 June (p187) show gross earnings of £6808 giving a gross average weeks wage of £567. His basic award is calculated with reference to his seven full years of service giving seven weeks and his age (he was 41 on the last year of service) and this amounts to £3969 (7x £567).

**Employment Judge: J M Hendry**  
**Date of Judgment: 22 March 2024**  
**Entered in register: 22 March 2024**  
**and copied to parties**