



EMPLOYMENT TRIBUNALS

Claimant: Mr G Napper

Respondent: Pentaco Construction Limited

Heard at: Watford Employment Tribunal by video (CVP)

On: 10 December 2024 and 11 December 2024

Before: Employment Judge Macey

Representation

Claimant: Mr Redpath, counsel

Respondent: Mr Chapman, solicitor

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of constructive unfair dismissal is not well-founded and is dismissed.
2. The complaint of failure to pay accrued but untaken holiday pay on termination is not well-founded and is dismissed.

RESERVED REASONS

CLAIMS AND ISSUES

1. The issues to be determined by the Tribunal were agreed with the parties at the start of the hearing on 10 December 2024 and were as follows:

Unfair dismissal

- 1.1 Was the claimant dismissed?

Constructive dismissal

- 1.1.1 Did the respondent do the following things:
 - 1.1.1.1 Tell the claimant at a meeting on 25 October 2023 that he was to be dismissed without any process or reason;
 - 1.1.1.2 Send the claimant home on 25 October 2023, professionally embarrassed the claimant and excluded him from company information and operations for which he was still responsible;
 - 1.1.1.3 Exclude the claimant from the business including IT systems and company information for approximately 8 weeks;
 - 1.1.1.4 Ignored the claimant's grievance, protected disclosures and information request raised on or around 15 November 2023 (including, but not limited to, the non-payment of the claimant's bonus);
 - 1.1.1.5 Subjected the claimant to a disciplinary process which was motivated by the respondent's wish to end the claimant's employment which was due to be heard by the very person that he had raised grievances about;
 - 1.1.1.6 Caused the claimant's mental health to be severely affected?
- 1.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:
 - 1.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
 - 1.1.2.2 whether it had reasonable and proper cause for doing so.
- 1.1.3 In the alternative, was there a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? The Tribunal will need to decide:
 - 1.1.3.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
 - 1.1.3.2 whether it had reasonable and proper cause for doing so.
- 1.1.4 Whether the alleged final straw act which the claimant alleges occurred on 7 December 2023 when Mr Hubbard confirmed in an email dated 7 December 2023 that he would still be conducting the disciplinary hearing on 8 December 2023 was the last in a series of acts or incidents that cumulatively amounted to a repudiation of contract by the employer.

- 1.1.5 Did the claimant resign on 7 December 2023 in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.
- 1.1.6 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.
- 1.2 If the claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract? The respondent says the reason for dismissal was the claimant's conduct.
- 1.3 Was it a potentially fair reason?
- 1.4 Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the claimant?
- 1.5 The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

Remedy for unfair dismissal

- 1.6 If there is a compensatory award, how much should it be? The Tribunal will decide:
 - 1.6.1 What financial losses has the dismissal caused the claimant?
 - 1.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - 1.6.3 If not, for what period of loss should the claimant be compensated?
 - 1.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - 1.6.5 If so, should the claimant's compensation be reduced? By how much?
 - 1.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - 1.6.7 Did the respondent or the claimant unreasonably fail to comply with it?
 - 1.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
 - 1.6.9 If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

- 1.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
- 1.6.11 Does the statutory cap of fifty-two weeks' pay or £105,707 apply?

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

Holiday Pay (Working Time Regulations 1998)

- 1.9 What was the claimant's leave year?
- 1.10 How much of the leave year had passed when the claimant's employment ended?
- 1.11 How much leave had accrued for the year by that date?
- 1.12 How much paid leave had the claimant taken in the year?
- 1.13 Were any days carried over from previous holiday years?
- 1.14 How many days remain unpaid?
- 1.15 What is the relevant daily rate of pay?

PROCEDURE, DOCUMENTS AND EVIDENCE HEARD

- 2. The form of this hearing was a remote video hearing by CVP. The claimant had technical issues at the start of the hearing but these were resolved by 11.15 am on 10 December 2024.
- 3. There was a Bundle of Documents of 391 pages ("Bundle"). Redacted pages for page numbers 282 to 284 inclusive were produced to replace those in the original Bundle. Numbers in square brackets throughout this Judgment refer to the pages in the Bundle
- 4. There were separate written witness statements. The claimant gave evidence for himself. Mr Wilson (a former employee of the respondent) and Mr Walsham (a former employee of the respondent) also gave evidence for the claimant. Mr Hubbard (a director of the respondent and a shareholder of Eastern Prospective Holdings Limited "EPH". EPH wholly owns the respondent) gave evidence for the respondent. The claimant also had a schedule of loss.

FACTS

- 5. The claimant was employed as managing director at the respondent, a construction company (wholly owned by EPH), from 26 May 2017 to 7 December 2023. The claimant had a service agreement with the respondent [97-122].

6. Clause 9 deals with holiday. In clause 9.2 it states the holiday year runs from 1 January each year to the following 31 December and that no holiday entitlement may be carried forward from one holiday year to the next.
7. The respondent accepts that the claimant had instituted a practice since the Covid pandemic of allowing employees to carry over up to three days' holiday into the next holiday year.
8. The claimant says that employees in practice were allowed to carry over more than three days' holiday into the next holiday year. The claimant says that in the holiday year 2023 Mr Grady had carried over 6 days holiday from 2022 and Ms Phillips had carried over 5.5 days from 2022. There is record of employee holiday entitlement as of 8 September 2023 [136]. This does list Mr Grady as having 36 days to take in 2023 and Ms Phillips as having 35.5 days to take in 2023.
9. The respondent has a Disciplinary policy [60-64] and an Anti-Corruption and Bribery policy [89-90].
10. The claimant was primarily responsible for the management, strategy and direction of the respondent and had a free hand to run the respondent as he saw fit.
11. The respondent says that starting in March 2022 Mr Hubbard (director of the respondent and a shareholder of EPH) and the other shareholders of EPH had concerns about the claimant's performance. Specifically, the claimant's attendance at the office, his work attire, the lack of marketing and failure to win business for the Cambridge unit of the respondent. The respondent says that Mr Hubbard and Mr Creegan spoke to the claimant about these concerns in March 2022, July 2022, September 2022, October 2022, November 2022, December 2022 and January 2023.
12. The claimant says that there were no issues with his performance and Mr Hubbard and Mr Creegan did not speak with him about these concerns on any occasion.
13. There are no notes of these discussions in the bundle and the grounds of resistance attached to the ET3 do not provide any detail about these discussions.
14. On cross-examination the claimant did comment that Mr Hubbard had a "bee in his bonnet" about working from home following the Covid pandemic.
15. I find it difficult to believe that there would be no supporting documentary evidence for these discussions if they had happened. I find that they did not happen.
16. I do find, however, that the claimant was aware that Mr Hubbard did not want working from home to be encouraged at the respondent following the Covid pandemic.

17. In September 2023 one of the sub-contractors (P-D) regularly used by the respondent attended the claimant's house to discuss works that the claimant wanted to be completed at his house. Mr G from P-D attended and discussed the claimant's requirements with him. No quote was provided for these works.
18. P-D were to provide samples to the claimant and these were provided in mid-October 2023 just before the claimant left to go on holiday.
19. Meanwhile, on 24 September 2023 the claimant emailed Mr Hubbard [232] regarding the 2022 Director Bonus. This email stated that "we" need to know what's happening with the Directors' bonuses for 2022 as an accrual will need to be made in 2023 for bonuses. The email proposed a figure and then asked Mr Hubbard to please advise so that "we" can make the necessary adjustments.
20. Mr Hubbard replied to the claimant on 26 September 2023 [232] saying that "we" have not considered it yet. Mr Hubbard also said that his own opinion was that current issues and losses on contracts will need to be brought into the conversation.
21. The claimant was on holiday from 11 October 2023 to 24 October 2023 inclusive.
22. While the claimant was away on holiday P-D attended his house for approximately three days to carry out the works which comprised forming steps, works to form a new driveway, cutting back bushes and filling in of a pond that had previously been removed. No invoice was provided by P-D in October 2023.
23. The claimant returned to work at the respondent on 25 October 2023 and attended his office at approximately 8 am.
24. At approximately 9 am the claimant received a telephone call from Mr Hubbard to come to a meeting with Mr Hubbard and two other shareholders of EPH (Mr Hubbard's brother and Mr Creegan) at St Matthews Road.
25. The claimant says that when he attended the meeting Mr Hubbard, who led the meeting, told him he was not needed any more by the respondent and that he should go home and would have an update within two weeks.
26. The respondent says the claimant was not told he was going to be dismissed and that Mr Hubbard offered the claimant the opportunity to return to work, or to take some paid time out of the business whilst they looked to agree a way forward for everyone. The respondent says the claimant elected of his own accord to take time away from the office to consider his options while he remained on full pay.
27. There are no notes of the meeting from either the respondent or claimant.
28. The only other documentary evidence is an email from the claimant to Mr

Hubbard dated 8 Nov 2023 at 21.15 [237]. Which states:

"I have been told to go home for two weeks and I've not heard anything"

"I'm continuing to wait at home and do as instructed...."

29. I find that the claimant was not told at this meeting that he was not needed anymore by the respondent nor was he dismissed at this meeting, but I find that the claimant was told to go home for two weeks by Mr Hubbard.
30. Further at this meeting Mr Hubbard told the claimant to keep his laptop and mobile phone, not to use his company credit card, that the claimant's Internet access would be restricted and that the claimant should not communicate with any of the respondent's employees and that they would be told the claimant is extended leave.
31. Mr Wilson recalls the claimant returned from holiday in October 2023 but that on his return he was not working and that matters should continue to go through Mr Grady, preconstruction director, (as they had been while the claimant was on holiday).
32. Following 25 October 2023 clients and consultants of the respondent received a bounce back message when they emailed the claimant. The message stated that the claimant's email address no longer existed. The claimant knew this because he received several calls from clients/consultants asking him what was happening.
33. On or around 3 November 2023 P-D attended the claimant's house again to redo some works to the step. No invoice was provided for the works at this time.
34. On 7 November 2023 Mr G of P-D telephoned Mr Grady. Mr Grady made notes of this conversation [235-236]. During this conversation Mr G alleged that P-D had been working at the claimant's house and that it had been done as a favour and that Mr G had been told to build it into Phase 10.
35. Phase 10 was part of a project the respondent was undertaking for a public sector client.
36. Mr Grady and Mr G had a further conversation on 8 November 2023 [235-236]. During that conversation Mr Grady told Mr G:

"... Unfortunately Gavin may be leaving the business..."

37. Mr G also told Mr Grady the following on 8 November 2023:

"Yeah, he was very nervous about you finding out, saying we couldn't use AKS Skips and if we get anything from GB Plant Hire you've got to pick it up as Andrew is very close to them and will find out."

38. Also, on 8 November 2023 the claimant emailed Mr Hubbard asking for an update because he had been at home for two weeks and had not heard anything [237].
39. Mr Hubbard and Mr Creegan had a meeting with Mr G of P-D on 14 November 2023. There are notes for this meeting [272-273]. In this meeting Mr G alleged that the claimant had agreed with Mr G that the cost of the works carried out at the claimant's house would be added to the costs for Phase 10 so that the claimant would not have to pay for it. Mr G also stated that the claimant did not ask for a quote and at no point did the claimant ask for any quote and had not asked for an invoice or anything to do with payment.
40. The respondent says it was a nightmare situation to be facing. The respondent predominantly sources work from public sector clients and if these clients were to suspect any potential wrongdoing in the respondent's management team they would be unlikely to award the respondent contracts. On cross-examination Mr Hubbard expressed that he really wanted the allegations not to be true and that he would be thrilled if they were not true. That the allegations were not good for the claimant nor for the business.
41. On 14 November 2023 Mr Hubbard emailed the claimant requesting that he attend a meeting on 15 November 2023. The claimant refused to attend because he already had a meeting arranged with his solicitors on 15 November 2023 which would take some time and informed Mr Hubbard of such on 14 November 2023 at 8.17 pm by email [238].
42. On 15 November 2023 at 10.18 am [242-243] Mr Hubbard emailed the claimant requesting that the claimant attend a meeting that day, or if not on that day, tomorrow (i.e. 16 November 2023).
43. The claimant's solicitors wrote to the respondent on 15 November 2023 raising a number of grievances on behalf of the claimant [245-254]. These included, amongst other things, the following:
- a. That the claimant had been effectively "ambushed" at the meeting on 25 October 2023, which he had been asked to attend with no warning, no right to be accompanied and no consideration given to the professional or personal impact such an action would have on him;
 - b. That material harm was being caused to the claimant's position in the respondent as both a statutory, senior employed and responsible person;
 - c. That since the meeting, the claimant had received several calls from various sub-contractors and clients/ consultants asking what was happening as they had tried to send him emails and they were getting bounce-backs saying his email address no longer existed. That this was embarrassing and extremely difficult to handle and his inability to respond was adversely affecting his reputation and

this was a great cause for concern as a statutory director of the company;

- d. That the claimant had become aware that the directors had openly informed other staff that the claimant was now leaving the business;
- e. That the claimant was getting numerous LinkedIn profile views because the industry was getting to know some of what was happening (in the absence of any even basic reputational management);
- f. That as the responsible person for health and safety the claimant was now being unlawfully excluded from critical safety activities, which in turn was a serious breach of the respondent's legal health and safety obligations, ultimately putting employees, the public and business at risk;
- g. That the claimant had effectively been excluded from the respondent's business, excluded from the respondent's IT systems and company information, that he had been materially undermined as the managing director, and unlawfully restricted from information in his capacity as a statutory director, a responsible person for health and safety, and as a senior employee;
- h. That the claimant had effectively been removed from post, with zero communication and a clear indication that he was no longer wanted as an employee or director;
- i. That these matters were having a materially adverse impact upon his hard-earned reputation in the industry, as well as his mental health;
- j. That the claimant had lost trust and confidence in the respondent given the surprising mistreatment of him;
- k. That there had also been a failure to pay the bonus that was payable at that point.

44. At 10 am on 16 November 2023 Mr Hubbard emailed the claimant [242]. He acknowledged receipt of the two letters from the claimant's solicitors overnight. He again invited the claimant to meet with Mr Hubbard on 16 November 2023 at St Matthews. No further information was provided in that email about what the meeting would be about.

45. The claimant replied to Mr Hubbard at 11.46 am by email [242] saying he would meet with Mr Hubbard on a one-to-one basis in a public location (Sprowston Manor in the main bar area) at 1.30 pm. The claimant also telephoned and messaged Mr Hubbard on 16 November 2023. The claimant attended the location that he had suggested at 1.30 pm on 16 November 2023 but Mr Hubbard did not attend.

46. Instead at 2.08 pm Mr Hubbard emailed the claimant [240 -241]. This states the following:

"Further to your email of 11.46am today, it is clear that you are not willing to come and meet us at our offices as instructed, despite the fact that you are currently on full pay and ought to be subject to our reasonable management instructions.

....
“... we acknowledge receipt of the letters from your solicitors and note the contents. Regarding the issue of the 2022 profit share, please note that whilst the accounts have been finalised recent financial forecasts suggest that the financial performance of some contracts made have been overstated and, as at this stage, we have yet to conclude determination of what exceptional items may need to be considered and what the final position on profit share will be. The bottom line is that the position remains to be confirmed and we are fully aware of and will recognise your contract position.

I mention the matter of the profit share because it is the only aspect of your solicitor’s letters that we intend to comment on currently. We are not going to respond to those letters, as matters at this stage are very much internal, between employee and employee (or indeed from director to director).”

...

“The allegations

... it was brought to our attention that you had circa 20K or so of building work done at your house between 8th September and end of October approx.

The allegation is that you have not paid for that work, and that the company who carried it out is a contractor of Pentaco or a prospective contractor. The allegation gets worse. It is also alleged that the reason you did not pay for the work on your house yourself was because you told the contractor they should do the work for you for free but could “lose” the cost of this work, circa £20k, in the work that they would then do for Pentaco, in a contract you would ensure they were awarded.

It seems to us that this allegation, if substantiated at its highest, is fraud and a criminal offence. At the very least, if true, it seems like it is a serious breach of our Bribery and Corruption Policy, dishonest and gross misconduct and an abuse of position and breach of fiduciary duties.

We appreciate you have the right to a fair hearing and a defence, and these are serious allegations, which could amount to criminal allegations. We had wanted to discuss them with you, man to man, today. We have wanted them to not be true and for your reaction to assure us of that. But it was not possible to meet with you.

You will know if these allegations are true, and if they are, we were intending to offer you today the opportunity to fall on your sword and resign with immediate effect and to allow you to focus on securing a new role elsewhere. If you no longer work for us, we are not realistically able to take our investigation into these allegations much further.

If these allegations are true, and you wish to contest them, then I am afraid they are serious enough on the face of it, given the information we have so far, that we will need to suspend you and commence a thorough investigation (into all related matters) and a formal disciplinary process. Suspension does not imply prejudgment of the allegations and is a neutral act, but it is necessary given the extremely serious nature of the allegations on the face of it.

Please let us know by close of business tomorrow whether you wish to contest the allegations: if you do, please consider yourself suspended on full pay from that point, although a more formal HR letter will then come out to you confirming the terms of your suspension and what the next steps in the disciplinary process will be.”

47. On cross-examination Mr Hubbard explained that the respondent wanted to deal with the allegations first, because they were serious, before considering the claimant’s grievance in full.
48. On 17 November 2023 the claimant sent a WhatsApp message to Mr G at P-D requesting P-D’s final account for the works done by P-D at the claimant’s house [257] and [307].
49. Also, on 17 November 2023 Mr Hubbard emailed the claimant [255] attaching a letter. This letter dated 17 November 2023 [256] formally confirmed the claimant’s suspension from work with immediate effect pending investigation into allegations of gross misconduct.
50. On 22 November 2023 the claimant emailed Mr Hubbard [261] referring to Mr Hubbard’s email dated 16 November 2023. The email stated:

“As a Director of the business, I am aware of my duties to be open and honest at all times and I write to fulfil these obligations. On the allegations, I can confirm as follows: -

- 1. ... did do some minor works on my drive and garden at home, these were finished a few weeks ago.*
- 2. It was and is always the case I was due to pay for them myself.*
- 3. I asked for the cost of the work in advance and I was told, “don’t worry, we will sort it”, and I did not demand a price as I trusted them not to overcharge me.*
- 4. I went on holiday and the work was done then. I have since asked for the bill for the works. I am declaring all this now to ensure that the business is clear that:*
 - a. All works were done for me.*
 - b. I am paying for those works.*
 - c. I have not and did not intend to link in any way these works with Pentaco and any suggestion that is the case is both wrong and/or at best misconstrued.*

7. My reason for using ... was simply that I knew of them, and, whilst I had not been personally involved in dealings with them on

Pentaco's behalf, was aware that their work was considered to be of good quality and fairly priced, hence it was logical for me to engage them.

So, to be clear, the minor works done in my garden are being paid for by me and have nothing to do with Pentaco.

I do accept with the benefit of hindsight that I should have declared these works to the company (no matter how minor they are) but I was very busy leading up to my leave, I then went on leave and then on the day I returned to work I was forced out of the business and have since been dealing with that."

51. On 29 November 2023 Mr Hubbard emailed the claimant a letter [263-266] inviting the claimant to attend a disciplinary meeting on 4 December 2023. That the meeting would be held by Mr Hubbard and Mr Creegan, acting on behalf of the board. The four allegations included:
- a. That the claimant requested, encouraged or at least allowed a sub-contractor to carry out works (with a value of circa £20K) at the claimant's residential address;
 - b. That the claimant encouraged the sub-contractor to carry out the works free of charge by representing to the sub-contractor that they would be awarded a contract with the respondent (Phase 10);
 - c. That the claimant instructed the sub-contractor to add the costs of the works to their quotations for the Phase 10 sub-contract; and
 - d. That the claimant to minimise the chances of the Board becoming aware of the works had instructed the sub-contractor not to use AKS Skips and GB Plant Hire because the owners of those sub-contractors were very close to Mr Grady.
52. The letter also noted that the claimant had set out his response to the allegations in the claimant's email dated 22 November 2023 and summarised the claimant's position.
53. The claimant was also informed that if substantiated the allegations would contravene clauses 15.1(b)(ii) and 15.1(b)(iii) of his service agreement and/ or the respondent's Anti-Corruption and Bribery policy and/ or Section 2 of the Bribery Act 2010.
54. The letter contained a number of enclosures [267-273].
55. On 1 December 2023 the claimant's solicitor emailed Mr Hubbard [274-275] requesting a postponement of the disciplinary hearing on 4 December 2023 due to the timescale being insufficient to prepare for the hearing. The letter further notified Mr Hubbard that the claimant had been signed off sick and enclosed a fit note [276].
56. The fit note [276] stated the claimant had stress and anxiety. It signed the claimant as being not fit for work from 30 November 2023 to 14 December 2023.

57. Mr Hubbard replied to the claimant's solicitor by email on 1 December 2023 [281] and rearranged the disciplinary meeting to take place on 8 December 2023.
58. On 5 December 2023 the claimant received an invoice from P-D [312] for £21,162.19 (including VAT) for contract works. The claimant paid the invoice on 6 December 2023.
59. Also, on 6 December 2023 the claimant's solicitor emailed Mr Hubbard [284] and requested that Mr Hubbard remove himself as a chair of the disciplinary hearing because, amongst other reasons, they alleged:
- a. that on 25 October 2023 Mr Hubbard had informed the claimant he would be dismissed without reason and that Mr Grady in comments to a witness had openly confirmed that the claimant will be leaving the business, and
 - b. that Mr Hubbard had failed to deal with complaints/ grievances together with protected disclosures raised by the claimant.
60. The claimant's solicitors requested in this email that an entirely independent chair hear the matter.
61. At 8.52 am on 7 December 2023 Mr Hubbard replied to the claimant's solicitors' email and informed them that he would not be removing himself from the disciplinary meeting on 8 December 2023 and that it would be chaired jointly with Mr Creegan [282-283].
62. At 7.41 pm on 7 December 2023 the claimant's solicitors emailed Mr Hubbard the claimant's representations on the allegations and indexed appendices [285-312].
63. At 8.10 pm on 7 December 2023 the claimant emailed Mr Hubbard [313-314] resigning from his position. This email states:
- "I have resigned as a consequence of the following events:-*
- 1. Being told I was to be dismissed without any process and no reasons;*
 - 2. Being sent home and professionally embarrassed and excluded from Company information and operations for which I am still responsible;*
 - 3. Being cut out of the business for weeks;*
 - 4. Being dragged through a disciplinary process based upon spurious and false allegations which were due to be heard by the very person I raised grievances to and about;*
 - 5. Having my grievances and protected disclosures and requests for information ignored;*
 - 6. Having my bonus payment withheld.*
- There are a number of other issues and breaches, these are the key points.*

My health has also been severely affected by all this and I have lost trust in the company.

I have lodged my replies to the allegations and I now resign my employment with immediate effect in response to the ongoing breaches on the part of the company.

64. The claimant says he concluded that the reality was, based on the respondent's conduct towards him over the previous six weeks or so, there was a clear risk, if the disciplinary was conducted by the same people, that the respondent would dismiss him (irrespective of the merits) for what it would call gross misconduct and the claimant felt that this was a risk that he could not take. The respondent says that the claimant chose to resign rather than attend the disciplinary hearing.
65. On cross-examination the claimant further commented he did not feel that he would have a fair hearing and that he was pushed into a corner.
66. After 7 December 2023 the respondent paid the claimant two and a half days accrued but untaken holiday pay. The calculation of the accrued but untaken holiday pay on termination took into account three days holiday that the claimant had carried over from previous leave years.
67. ACAS early conciliation commenced on 24 January 2024 and finished on 6 March 2024.
68. The claimant presented his claims for constructive unfair dismissal and failure to pay holiday pay on 16 April 2024.

LAW

Constructive unfair dismissal

69. Section 95(1) of the Employment Rights Act 1996 states the following are dismissals for the purposes of unfair dismissal:

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

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.”

70. The common law concept of a repudiatory breach of contract is imputed into section 95(1)(c) of the Employment Right Act 1996.
71. 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.
72. Firstly, a repudiatory or fundamental breach of the contract of employer by the employer is required.
73. If a claimant is relying on breach of implied term of mutual trust and confidence the definition of a breach of the implied term of mutual trust and confidence by the employer as follows:
“Without reasonable and proper cause, conducted itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee.”
74. This test is objective and all the circumstances must be considered.
75. If a claimant is relying on the last straw doctrine a breach of trust and confidence might arise because of a serious of events.
76. If the last straw is completely innocuous or trivial, and none of the preceding matters amount to a fundamental breach of contract, the claim will fail. The last straw doesn't need to be a fundamental breach of contract, but it must contribute, however slightly, to the breach of trust and confidence.
77. The tribunal should ask itself the following questions:
- a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
 - b. Has he or she affirmed the contract since that act?
 - c. If not, was that act (or omission) by itself a repudiatory breach of contract?
 - d. If not, was it nevertheless a part ... of a course of conduct comprising several acts and omissions which, viewed cumulatively, amount to a (repudiatory) breach of the implied term of mutual trust and confidence?
 - e. Did the employee resign in response (or partly) in response to that breach?

78. The employee must terminate the contract because of the fundamental breach. It need only be a reason for the resignation by the employee. It does not matter if there are other reasons.

79. It is open to a respondent to seek to persuade a Tribunal that a reason given in a letter of resignation, even though a sufficient reason for resigning in the sense of being a repudiatory breach, is not a genuine reason so as to give a right to claim constructive dismissal.

Failure to pay accrued but untaken holiday pay on termination

80. When calculating the amount of accrued but untaken holiday pay on termination a claimant can rely upon the terms of their contract of employment including implied terms.

81. Express terms can be varied by mutual agreement between the parties.

82. A term can be implied into the contract of employment where it is the normal custom and practice to include such a term in contracts of that kind. The custom must be “reasonable, notorious and certain”, and the parties must be shown to be applying the term because there is a sense of legal obligation to do so.

CONCLUSIONS

Constructive unfair dismissal

Did the respondent tell the claimant at a meeting on 25 October 2023 that he was to be dismissed without any process or reason – issue 1.1.1.1

83. My finding of fact above was that the claimant was not told on 25 October 2023 that he was not needed anymore by the respondent, nor was he dismissed at this meeting. I did find that the claimant was told to go home for two weeks by Mr Hubbard.

84. This allegation is not factually made out.

Did the respondent send the claimant home on 25 October 2023, professionally embarrass the claimant and exclude him from company information and operations for which he was still responsible – issue 1.1.1.2

85. The claimant was told to go home for two weeks by Mr Hubbard. Further the claimant was told to keep his laptop and mobile phone, but that he should not use his credit card and that his Internet access would be restricted. Also, the claimant was told not to communicate with any employee.

86. I conclude the claimant was, therefore, excluded from company information and operations for which he was still responsible being a director of the respondent.

87. Clients and consultants received a bounce back email message when they emailed the claimant saying that the claimant’s email address no longer

existed. I conclude that this did cause the claimant professional embarrassment.

88. Mr Wilson recalled the claimant returned from holiday in October 2023, but that the claimant was not working and that matters should continue to go through Mr Grady. As regards the employees of the respondent I conclude although they may have been questioning why the claimant was not present in the office this was not sufficient to cause the claimant professional embarrassment vis-à-vis the employees of the respondent.

Did the respondent exclude the claimant from the business including IT systems and company information for approximately 8 weeks – issue 1.1.1.3;

89. The claimant was told to go home on 25 October 2023 by Mr Hubbard. The claimant was then later suspended on 17 November 2023 pending the disciplinary hearing due to the serious allegations that had been made against him [256]. Given the serious nature of the allegations, I conclude it was appropriate for the respondent to suspend the claimant on 17 November 2023.

90. I conclude that the claimant was excluded from the respondent's business (including IT systems and company information) from 25 October 2023 to 17 November 2023 inclusive. This is a period of just over three weeks.

Did the respondent ignore the claimant's grievance, protected disclosures and information request raised on or around 15 November 2023 (including, but not limited to, the non-payment of the claimant's bonus) – issue 1.1.1.4

91. The claimant raised a grievance, protected disclosures and an information request (through his solicitors) on 15 November 2023 [245=254]. The only issue that the respondent responded to in writing on 16 November 2023 was about the bonus and the need to take into account exceptional items when calculating the profit share [240]. The respondent did not arrange a grievance meeting with the claimant either before the claimant's resignation.

92. I conclude that the respondent in the main did ignore the claimant's grievance, protected disclosures and information request raised on or around 15 November 2023 [245-254]. The response in respect of the bonus was perfunctory and no meeting was arranged with the claimant to discuss his grievance in full.

Did the respondent subject the claimant to a disciplinary process which was motivated by the respondent's wish to end the claimant's employment which was due to be heard by the very person that he had raised grievances about – issue 1.1.1.5

93. The claimant did have works carried out by P-D at his house. No quotation was provided in September 2023 or October 2023 prior to works starting. There was no invoice for the works until the claimant requested it on 17 November 2023 via WhatsApp [257 and 307]. I note that this was after he had been informed of the serious allegations by Mr Hubbard on 16 November 2023.

94. The allegations raised by Mr G with Mr Grady on 7 November 2023 were very serious allegations. They were very serious both for the claimant personally and for the respondent's business. Neither Mr G nor Mr Grady gave evidence to the Tribunal.
95. The claimant has alleged these allegations were motivated by the respondent's wish to end the claimant's employment with the respondent.
96. Mr Redpath submitted that on 8 November 2023 Mr Grady had told Mr G that Gavin (i.e. the claimant) will be leaving the business (i.e. the respondent). In fact, what Mr Grady told Mr G on 8 November 2023 was that "*Gavin may be leaving the business...*" [235-236]. A subtle but important difference in wording.
97. Mr Hubbard was also very clear in cross-examination that he really wanted the allegations to not be true and how serious they were for the business. Mr Chapman submitted that it beggared belief to suggest that the respondent concocted these allegations.
98. I conclude that it is just not credible to conclude that the respondent concocted these allegations. They are so potentially damaging to its business it would be a case of biting one's nose off to spite one's face to create these allegations.
99. I conclude they were not simply put forward as a motivation to end the claimant's employment with the respondent. A third party raised serious allegations, these allegations needed to be investigated and a suspension and disciplinary process was an appropriate response.
100. I conclude that the first part of the issue (did the respondent subject the claimant to a disciplinary process which was motivated by the respondent's wish to end the claimant's employment) is not made out factually.
101. In respect of the second part of the issue, i.e., that the disciplinary hearing was due to be heard by the very person (Mr Hubbard) that the claimant had complained about in his grievance, I conclude that the respondent did do this.
102. The claimant had raised grievances about Mr Hubbard's actions on 25 October 2023 [245-254] and then Mr Hubbard refused to step down from conducting the claimant's disciplinary hearing [282-283].

Did the respondent cause the claimant's mental health to be severely affected – issue 1.1.1.6?

103. There is not much evidence before the Tribunal on this issue. There is a fit note dated 30 November 2023 [276] which said that the claimant was unfit to work due to stress and anxiety. In cross-examination the claimant said that he was still on medication for anxiety and depression.
104. This is not sufficient evidence for me to be able to conclude that the claimant's mental health was severely affected and that the respondent caused this. This allegation is not made out factually.

Did those breach the implied term of trust and confidence? – issue 1.1.2

105. I need to decide whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and whether it had reasonable and proper cause for doing so.
106. I conclude that by instructing the claimant to go home for two weeks without further information, professionally embarrassing the client vis-à-vis the respondent's clients/ consultants and excluding him from company information and operations (for which he was responsible) for just over three weeks the respondent did behave in a way that was likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.
107. Nor did the respondent have a reasonable and proper cause for doing these actions. The actions in paragraph 106 above did breach the implied term of trust and confidence.
108. I conclude that by excluding the claimant from the business (including IT systems and company information) for just over three weeks the respondent did behave in a way that was likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. Nor did the respondent have a reasonable and proper cause for doing so.
109. The actions in paragraph 108 above did breach the implied term of trust and confidence.
110. I conclude that by ignoring in the main the claimant's grievance, protected disclosures and information request raised on or around 15 November 2023 (including, but not limited to, the non-payment of the claimant's bonus) the respondent did behave in a way that was likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.
111. Mr Hubbard explained that because the allegations made by Mr G at P-D were so serious they were more pressing than investigating the claimant's grievance. This is not a reasonable and proper cause for in the main ignoring the claimant's grievance etc. The grievance could have been heard in tandem with the disciplinary issues or should have been investigated prior to the disciplinary hearing.
112. I conclude that the respondent did not have a reasonable and proper cause for in the main ignoring the claimant's grievance etc. and that the respondent in the main ignoring the claimant's grievance etc. did breach the implied term of trust and confidence.
113. I conclude that choosing Mr Hubbard as one of the individuals conducting the disciplinary hearing was a poor choice by the respondent and was unreasonable because the claimant had raised a grievance against Mr Hubbard which had not been heard and responded to.

114. However, just because an action is a poor choice and/ or unreasonable does not automatically mean that there has been a breach of the implied term of trust and confidence. And Tribunals are warned to not set the bar too low.
115. Many employers engage third party consultants to conduct disciplinary hearings on their behalf and there are many businesses that provide this service. It was entirely possible for the respondent to find a suitably independent third-party consultant to conduct the hearing on the respondent's behalf. Although this would have been a better choice I conclude that it was not likely to destroy or seriously damage the trust and confidence between the claimant and the respondent to choose Mr Hubbard to conduct the disciplinary hearing.
116. I conclude that the decision to have Mr Hubbard conduct the disciplinary hearing was not a breach of the implied term of trust and confidence.

In the alternative, was there a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? – issue 1.1.3

117. Again, I need to decide whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and whether it had reasonable and proper cause for doing so.
118. If I am wrong that any one (or all) of the respondent's actions I have identified above in paragraphs 106, 108 and 110 breached the implied term of trust and confidence then viewed cumulatively the above actions in paragraphs 106, 108, 110 and 113 amounted to behaviour by the respondent which was calculated to destroy or seriously damage the trust and confidence between the claimant and the respondent and not the respondent did not have a reasonable and proper cause for doing these acts.

Whether the alleged final straw act which the claimant alleges occurred on 7 December 2023 when Mr Hubbard confirmed in an email dated 7 December 2023 that he would still be conducting the disciplinary hearing on 8 December 2023 was the last in a series of acts or incidents that cumulatively amounted to a repudiation of contract by the employer – issue 1.1.4

119. Mr Hubbard did confirm in an email dated 7 December 2023 [282-283] that he would not step down from conducting the disciplinary hearing with Mr Creegan on 8 December 2023. Given that the claimant had raised a grievance on 15 November 2023 about Mr Hubbard's actions towards the claimant on 25 October 2023 and afterwards this was not minor or trivial and was unreasonable. It was not an innocuous act.
120. I conclude that this refusal by Mr Hubbard on 7 December 2023 to remove himself from the disciplinary process was the last in a series of acts or incidents that cumulatively amounted to a repudiation of contract by the respondent.

Did the claimant resign on 7 December 2023 in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation – issue 1.1.5

121. In respect of the content of the claimant's resignation email dated 7 December 2023 [313-314] I have concluded above that the following were breaches of the implied term of trust and confidence between the claimant and the respondent on their own:

"I have resigned as a consequence of the following events:-

...

2. Being sent home and professionally embarrassed and excluded from Company information and operations for which I am still responsible;

3. Being cut out of the business for weeks;

...

5. Having my grievances and protected disclosures and requests for information ignored;

122. Further I concluded, in the alternative, that these actions in conjunction with the act of choosing Mr Hubbard to conduct the disciplinary hearing on 8 December 2023 cumulatively amounted to a breach of the implied term of trust and confidence between the claimant and the respondent.

123. The claimant said in evidence that he concluded that the reality was, based on the respondent's conduct towards him over the previous six weeks or so, there was a clear risk, if the disciplinary was conducted by the same people, that the respondent would dismiss him (irrespective of the merits) for what it would call gross misconduct and the claimant felt that this was a risk that he could not take.

124. On cross-examination the claimant further commented he did not feel that he would have a fair hearing and that he was pushed into a corner.

125. Even if an employee leaves for a whole host of reasons, he can still claim constructive dismissal if the repudiatory breach is one of the factors relied upon.

126. It is open to a respondent to seek to persuade a Tribunal that a reason given in a letter of resignation, even though a sufficient reason for resigning in the sense of being a repudiatory breach, is not a genuine reason so as to give a right to claim constructive dismissal.

127. Mr Redpath submitted that the claimant had no real alternative than to resign.

128. Mr Chapman submitted that the claimant resigned because he did not want to attend the disciplinary hearing. Mr Chapman submitted that

this may have been because the claimant genuinely believed that Mr Hubbard was part of a collusion with Mr G at P-D to concoct the allegations against the claimant or because the claimant thought that the decision was prejudged. Mr Chapman further submitted that that these beliefs were not reasonable.

129. I have already concluded above that Mr Hubbard did not concoct these allegations with Mr G of P-D.

130. In respect of prejudging the outcome of the disciplinary hearing the only evidence to support this is the comment made by Mr Grady to Mr G of P-D on 8 November 2023:

“... Unfortunately Gavin may be leaving the business...”

131. This is not sufficient for me to conclude that the respondent would have dismissed the claimant **irrespective of the merits** if Mr Hubbard had conducted the disciplinary hearing. I conclude that although it was unreasonable to have Mr Hubbard conducting the disciplinary hearing this did not mean that the decision itself was a foregone conclusion and prejudged.

132. I further note that the claimant only requested an invoice from Mr G at P-D on 17 November 2023 [257] and [307], this was the day after he was informed by Mr Hubbard about the allegations against him [240-241]. I also find it strange that a quotation was never provided to the claimant by P-D prior to the works commencing in October 2023.

133. I also note that the claimant raised his grievance [245-254] three weeks after 25 October 2023 (the day he was told to go home by Mr Hubbard). It seems strange that he did not raise a grievance about being excluded from the business prior to 15 November 2023.

134. It also seems strange that the claimant did not inform the respondent earlier than 6 December 2023 that he did not want Mr Hubbard to conduct the disciplinary hearing. The claimant was aware on 29 November 2023 that Mr Hubbard and Mr Creegan would be conducting the disciplinary hearing.

135. The claimant's solicitors emailed the respondent on 1 December 2023 requesting a postponement of the original date for the disciplinary hearing, but they did not request that Mr Hubbard be removed from the process until 6 December 2023, two days prior to the disciplinary hearing on 8 December 2023.

136. All these facts undermine the credibility of the claimant's submission that he was resigning in response to the repudiatory breach/ breaches of the respondent and/ or the "last straw" (the respondent's confirmation on 7 December 2023 that they would not remove Mr Hubbard as a chair of the disciplinary hearing).

137. I conclude that the claimant wanted to avoid attending the disciplinary hearing on 8 December 2023 at all costs and that was the reason for his resignation.
138. I conclude that the claimant was not constructively dismissed by the respondent.

Holiday Pay (Working Time Regulations 1998)

139. During the hearing the respondent confirmed that the number of holiday days in contention were 10 days of annual leave.
140. It was also agreed that these were days that had been carried over from previous leave years for which the claimant had received no payment. The respondent had paid the claimant for three days of annual leave that the claimant had carried over from previous leave years.
141. The question for me to decide was whether the claimant had a contractual right to carry over 13 days' annual leave from previous holiday years as opposed to just three days' annual leave.
142. The service agreement [97-122] states in clause 9.2 that no untaken holiday days can be carried over from previous leave years.
143. It is not entirely clear whether the claimant's case is that the service agreement had been mutually varied to allow the claimant to carry over 13 days' (or any amount of days) annual leave or whether the claimant's case is that it had become normal custom and practice at the respondent to include a term allowing employees to carry over untaken holiday from previous leave years in its contracts with its employees.
144. In respect of mutual variation of the claimant's service agreement there is no evidence that this happened.
145. I conclude that as the claimant reported to the Board of the respondent any mutual variation of his service agreement would have needed the agreement of the Board. This did not happen and the claimant could not unilaterally vary his own service agreement.
146. In respect of whether it had become custom and practice at the respondent, the evidence is that two employees (who reported to the claimant) had been allowed by the claimant to carry over more than three days untaken annual leave into the 2023 leave year.
147. This is insufficient evidence to demonstrate that the custom was "reasonable, notorious and certain". Nor does the evidence demonstrate that the claimant allowed these two employees to carry over the untaken holiday days (over and above three days) because there was a sense that the respondent had a legal obligation to do so.
148. I conclude that there was no implied term by custom and practice that allowed employees to carry over more than three days' untaken annual leave from previous leave years.

149. I conclude that the respondent has not failed to pay the claimant accrued but untaken holiday pay on termination.

Employment Judge Macey

Date: 7 January 2025

JUDGMENT SENT TO THE PARTIES ON

15 January 2025

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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