EMPLOYMENT TRIBUNALS

Claimant: **Mr A Karunaratne**

Respondent: **Aldi Stores Limited**

Heard at: **London South (Croydon via CVP)** **On: 10/12/2024 - 12/12/2024**

Before: **Employment Judge Wright**

Representation:
Claimant: **In person**

Respondent: **Mr J Bromige – counsel**

REQUEST FOR WRITTEN REASONS

Oral judgment having been given on the 12/12/2024 and further to the claimant's request for written reasons on the 31/12/2024, these written reasons are provided.

WRITTEN REASONS

It was the Judgment of the Tribunal that the claimant's claim of constructive dismissal contrary to the Employment Rights Act 1996 (ERA) was not well founded; it therefore fails and was dismissed.

1. The claimant presented a claim form on 26/5/2023 following a period of early conciliation which started on 16/3/2023 and ended on 27/4/2023. The claimant's employment with the respondent ended when he resigned without notice on 21/12/2022 (page 138). He stated the respondent had committed a repudiatory breach of contract and he relied upon a breach of the term of mutual trust and confidence.

2. There was a preliminary hearing on the 7/3/2024 at which the issues were recorded as (page 40):

> *The Complaints*
>
> *42. The Claimant is now only making the following complaint:*
>
> *42.1 Constructive unfair dismissal.*
>
> *The Issues*
>
> *43. The issues the Tribunal will decide are set out below.*
>
> *1. Unfair dismissal*
>
> *1.1 Was the Claimant dismissed?*
>
> *1.1.1 Did the Respondent do the following things:*
>
> *1.1.1.1 Write to the Claimant on 3rd October 2022 and make allegations about the Claimant's conduct;*
>
> *1.1.1.2 following a disciplinary Hearing on 4th November 2022, finding the Claimant guilty of 10 counts of fraud; and*
>
> *1.1.1.3 issuing the Claimant with a final written warning on 9th November 2022.*
>
> *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 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

1.1.4 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

1.1.5 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 What was the reason for the breach of contract? The Respondent says conduct.

3. The claimant did not rely upon the alleged breaches as cumulative resulting in a 'final straw'. The alleged breaches were relied upon individually.

4. The respondent's disciplinary procedure is contractual. The claimant however did not advance his case as a breach of a contractual term; he relied upon the implied term of mutual trust and confidence.

5. It should be noted that the Order of 7/3/2024 contained the standard paragraph (6 on page 33) that if the list of issues was incorrect, the parties had seven days to say so.

6. At the preliminary hearing on the 7/3/2024 the claimant was Ordered to pay a deposit as a condition of being permitted to continue with his claim (page 43). The claimant subsequently paid the deposit and so he was able to pursue his claim. He did appeal against that Order, however the Employment Appeal Tribunal found there were no reasonable grounds for bringing the appeal on the 24/7/2024.

7. The Tribunal heard evidence from the claimant and for the respondent from: Mr Callam Cosford (Area Manager); Mr David Murray (Store Manager); and Ms Emily Pine-Coffin (Area Manager).

8. There was a 258-page electronic bundle. There was also an additional bundle of 88-pages of 'disputed documents'. This bundle contained in the main without prejudice correspondence and County Court claims. The claimant was not permitted to refer to the pages he identified in that bundle as

they were either without prejudice, related to the County Court claims, pre or post-dated the issues which this Tribunal has to determine or were a first instance decision of another Employment Tribunal.

9. Oral submissions were made by both parties and Mr Bromige provided a written skeleton argument and some authorities. All submissions made were considered.

10. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered all of the evidence given by the witnesses during the hearing. It included the documents referred to by the witnesses and took into account the Tribunal's assessment of the evidence.

11. Only relevant findings of fact pertaining to the issues and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced in the witness statements/evidence.

Findings of fact

12. The respondent is a well-known discount retailer with stores across the UK. The claimant worked at the respondent's New Malden store as a Store Assistant. On the 25/8/2022 the Area Manager carried out a cash audit and that resulted in transactions being flagged on the respondent's system as unusual till activity.

13. The transactions were identified as being processed by the claimant and they consisted of five separate refunds of carrier bags on separate occasions in July 2022. The Area Manager had reviewed the CCTV footage and that showed that no customer was present when this activity was carried out.

14. It was the respondent's procedure that a refund can only be processed when a customer is present; as there is no need to provide a refund if the customer is not there.

15. Mr Murray as Store Manager investigated the matter and he also viewed the CCTV footage. He spoke to the claimant in August 2022 accompanied by a colleague; according to the chronology. There is however no record of this conversation. This resulted in a report to the Area Manager on the 20/9/2022 (page 77).

16. Mr Murray's report recorded that the claimant had admitted to avoiding the need to call a manager over to his till with a key, to authorise a void transaction. He recorded:

> 'I asked for his version as to why he had completed refunds without a customer present. He told me that when he needs to void a transaction he would delete all of the items and put through a cheap product (such as a carrier bag) so that the transaction total wasn't at zero value, he would then press Total so that he could continue with the next transaction. He would then remember how many of these 'voids' he had done and refunded them at the end of his shift. By him doing this, it bypasses the need for a Manager to authorise the void.
>
> He was remorseful and told me he did it several times in order to help store efficiency. I made it clear to him that this is manipulating ALDI procedures and we have these procedures in place for a reason. This is in violation of Page 29 of the Employee Handbook:
>
> "All voids must be approved by the duty manager following the established procedures"'

17. The claimant was invited to a disciplinary hearing by letter dated 3/10/2022 (page 84). The meeting was scheduled for 4/11/2022, due to a period of annual leave the claimant was due to commence on the 4/10/2022 for four-weeks. The allegations were ten instances of 'fraudulent cash refunds' contrary to the Employee Handbook.

18. This letter is one of the alleged breaches by the respondent (issue 1.1.1.1).

19. The claimant made an issue of the Employee Handbook referred to. Certainly, the disciplinary invitation letter referred to the '[02/18]' version and in particular to page 20. The claimant signed for receipt of the Handbook and confirmed he understood the contents of it on the 15/2/2018 (page 83). He took issue that the extracts from the Handbook which appeared in the bundle were from the '07/22' version, which he did not have. He did however accept in cross-examination that he was sure it said the same thing (the 2022 version as the 2018 version) as it was pretty standard.

20. This is one example of the claimant over-complicating matters. He is pedantic. Another example is the claimant taking issue with the reference in the Handbook to a 'duty manager' approving refunds. He said the respondent now qualified this by saying refunds must be approved by a manager. The Tribunal finds that a duty manager is the manager on duty at the relevant time, who has the key needed to provide a refund; and there is nothing untoward about this statement.

21. The claimant also complains (although he does not rely upon this as a breach of contract) that he had the forthcoming disciplinary meeting hanging over him during his period of leave. This is a fair point. The claimant could have however requested that the meeting be brought forward. The respondent's position was that it did not arrange meetings during periods of annual leave as the claimant in this case could have been unavailable or out of the country.

The claimant could have made a request to the respondent, rather than again pedantically referring to the fact the letter referred to 'if you cannot attend'. Ms Pine-Coffin, did say, quite reasonably, if the suggestion had been made to bring the meeting forward, he may well have complained about that too. This is hindsight on the claimant's part.

22. The claimant did not return to work once his period of leave ended as he was unfit for work.

23. The Tribunal finds both Ms Dow as the Area Manager originally and Mr Murray had concerns about the claimant's till refunds when no customer was present. They both viewed the CCTV footage and Mr Murray did not receive a satisfactory explanation from the claimant when he investigated the matter.

24. It was rational for the respondent to invite the claimant to a disciplinary meeting and it was acceptable for it to set out in that invitation letter the allegations which the claimant was to answer. The claimant criticised the respondent for not following the Acas Code, however it would have been a breach of the Code for the respondent not to set out the allegations.

25. It was permissible for the respondent to put the allegations to the claimant in the disciplinary meeting and to invite him to explain himself, to answer them or to offer mitigation. The claimant did not deny the allegations in the meeting.

26. After the disciplinary hearing took place on the 4/11/2022, the written outcome was sent to the claimant dated 9/11/2022 (page 103) (these two matters are the remaining two alleged breaches of contract 1.1.1.2 and 1.1.1.3).

27. The outcome was a final written warning to last for 12 months. The claimant was offered a right of appeal and he exercised that right.

28. To complete the chronology, the appeal hearing took place on 11/12/2022 and it was heard by Mr Cosford. The outcome was communicated by an undated letter (page 133) (the claimant acknowledged receiving the email attaching the letter just before midnight on the 19/12/2022 (page 138)). Mr Cosford upheld the decision of Ms Dow to give the claimant a final written warning. Mr Cosford did allow the appeal to the extent the use of the words 'fraud', 'fraudulent' and 'fraudulently' had been improperly used. He substituted the nature of the allegation as that of manipulation of the respondent's procedures.

29. The claimant resigned without notice on 21/12/2022 (page 149). He gave as the reason for his resignation as responding to a repudiatory breach of contract as a result of a breach of the term of mutual trust and confidence. He said the respondent had caused irreparable damage to his reputation, caused him three months of stress and he referred to delay and to the rejection of the

appeal. He said his position was now untenable and his working conditions were intolerable.

30. The claimant however did not rely upon the appeal outcome as a breach of contract leading to his resignation.

31. The respondent treated the claimant's resignation letter as a grievance and in due course, a grievance meeting and appeal meeting were held. Those matters post-dated the claimant's resignation and are not relevant to the issues the Tribunal had to decide.

32. The claimant accepted he had manipulated the respondent's till processes. He agreed he processed cash refunds when there was no cash to refund. The claimant's motivation may have been benign, in that he believed he would be able to serve customers more quickly and as such, assist the respondent. He also seemed to believe that it would save time not to have to call a Manager over to his till with the key to authorise the transaction. He did not appear to have appreciated however, that the respondent's processes are in place for a reason. To prevent fraud and to also protect staff.

33. In view of that, the Tribunal finds it was objectively acceptable for the respondent to consider the allegations at the disciplinary hearing. The same reasoning applied to the outcome which was to give the claimant a final written warning.

34. Mr Murray agreed in evidence that he did not believe the claimant was dishonest at the time, or at the time of this hearing. His evidence-in-chief was that at no time did he think the claimant was dishonest or trying to harm the respondent. Mr Murray thought the claimant was seeking to make the store more efficient; however, his efforts in attempting to do so were in breach of procedures.

The Law

35. S.95 ERA provides:

> **Circumstances in which an employee is dismissed.**
>
> (1) For the purposes of this Part [Part X Unfair Dismissal] 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.
>
> (2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—
>
> (a) the employer gives notice to the employee to terminate his contract of employment, and
>
> (b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;
>
> and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

36. In Malik v Bank of Credit and Commerce International SA [1997] ICR 606 it was held that:

> 'The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'

37. The conduct needs to be repudiatory in nature in order for there to be a breach of the implied term of trust and confidence (Morrow v Safeway Stores Ltd [2002] IRLR 9).

38. In order to establish that they have been constructively dismissed, a claimant must show the respondent committed a breach of contract. That breach must be sufficiently important to justify the claimant resigning, or else it must be the last in a series of incidents which justify leaving.

39. The claimant must leave in response to the breach and not for some other unconnected reason.

40. The claimant must not have waived the breach (also known as 'affirming' the contract) by for instance waiting too long to terminate the contract.

41. Mr Bromige set out the law in his skeleton argument:

> *Constructive Dismissal*
>
> *3. The Claimant has a right not to be unfairly dismissed (section 94 ERA 1996) and constructive dismissal is capable of being a dismissal (s95(1)(c) ERA 1996) within the meaning of Part X ERA 1996.*

4. The Claimant is only "entitled" to terminate the contract as per s95(1)(c) when the Respondent has committed a repudiatory breach of the contract as per Western Excavating Ltd v Sharp [1978] ICR 221.

…
8. The conduct of the Respondent must be viewed objectively and assessed in accordance with the term of implied trust and confidence as affirmed by the House of Lords in Malik v BCCI [1997] IRLR 462.

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

9. The Tribunal must be careful not conflate the Claimant's perception of his treatment by the Respondent at the material time with how the Respondent should have reacted and treated the Claimant in light of that perception. The latter is pertinent to the issues to be decided applying Malik. The former is not.

The Disciplinary Procedure

10. The disciplinary and grievance policy, contained in the Employee Handbook is expressly referred to in the Claimant's contract of employment at Clause 12 (pg. 54). The Respondent confirms that the disciplinary policy is contractual (see §11, pg. 27), and the Claimant did not dispute this in cross examination.

11. Whilst the disciplinary policy is contractual, naturally and logically, the decision of the disciplinary officer as to whether to take disciplinary action, and if so, which of the 4 sanctions (pgs. 60-61) should be imposed, is a discretionary exercise.

12. Because Ms Dow was therefore exercising a contractual discretion, when assessing her actions, it and it is not for the Tribunal to substitute their own view as to how the Respondent should have acted, per Lord Hodge in Braganza v BP Shipping Limited [2015] IRLR 487 at para [52]. The principle in Braganza, which related to an express contractual provision was also held by the Court of Appeal in IBM United Kingdom Holdings Limited v Dalgleish [2018] IRLR 4 to apply to the implied term of trust and confidence (see in particular para [226] and [232]).

> *[226] Accordingly, as we read the judge's judgment, he failed to apply the Wednesbury test in relation either to Holdings as regards the Imperial Duty or to UKL as regards the contractual duty. It seems to us that, in referring to the reasonable employer test, as he often did, he may have incurred the risk identified by Baroness Hale DSPC in Braganza v BP Shipping Ltd [2015] ICR 449, para 29, quoted at para 38 above, that "concentrating on the outcome runs the risk that the court will substitute its own decision for that of the primary decision maker". In particular, reference to the reasonable employer may lead to the application, even if unconsciously, of a test diluted and distorted from the true test of irrationality, as enunciated, for example, by Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] ICR 14:*
>
> *"By 'irrationality', I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'… it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"*
>
> *[232] In so deciding, the Judge erred in law. The correct approach is to apply a*

rationality test equivalent to that in Wednesbury (see paras 45 and 46 above) in order
to decide whether a decision by a decision maker such as Holdings, as principal employer under a pension scheme, or UKL as employer, is valid and lawful having regard to the Imperial duty and the contractual duty of trust and confidence. Both limbs of the test can apply, but it was not argued in the present case that any irrelevant matter had been taken into account, or any relevant matter left out of account. Therefore the question was whether the decision taken was one which no rational decision-maker could have reached. Although the judge directed himself that the test to be applied was one of capriciousness, perversity or arbitrariness, which is close to the rationality test, he accorded an overriding substantive significance to the reasonable expectations such that they could only lawfully be disappointed in a case of necessity, which is not compatible with the correct approach. Members' expectations, even if they satisfy the judge's criteria for a reasonable expectation, do not constitute more than a relevant factor which the decision-maker can, and where appropriate should, take into account in the course of its decision-making process

…

Claimant's motivation for, and timing of, resignation

29. If a fundamental breach has occurred, then the motive for the Claimant's resignation need only be in part caused by the breach. As per Keane LJ in Nottinghamshire County Council v Meikle [2004] IRLR 703:

The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the
repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by [the Respondent].

…

32. As for affirmation, following the Court of Appeal decision in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, the correct analysis that the Tribunal must undertake is (as per Underhill LJ at [55]):

In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) 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?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a

> *course of conduct comprising several acts and omissions which, viewed cumulatively,*
> *amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for*
> *any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)*
>
> *(5) Did the employee resign in response (or partly in response) to that breach?*
>
> *…*
>
> *35. Further, he is unable to "resurrect" the previous breach given the lack of any further breaches post 9th November 2022. As per Underhill LJ at [45] in Kaur:*
>
> > *If the tribunal considers the employer's conduct as a whole to have been repudiatory*
> > *and the final act to have been part of that conduct (applying the Omilaju test), it should not normally matter whether it had crossed the Malik threshold at some earlier stage: even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so.*
>
> *36. There is no so called "final act" in this case.*

Conclusions

42. The claimant is an articulate and intelligent man. He was passionate about his job; however that passion may have verged into obsession. He said several times that he would start to serve the next customer, before he had finished serving the previous one. He was especially proud of his scanning speed (serving one customer every 90 seconds) and he also said several times that he would work a 12-hour shift, standing at his till, without taking a comfort break.

43. The Tribunal concluded the claimant was, in a peculiar manner, acting with the best intentions. He was seeking to make the store more efficient.

44. The respondent did write to the claimant on the 3/10/2022 (breach 1.1.1.1). It was justified in doing so. There were issues with the claimant's refund processes and it was correct to put him on notice of that and to send him the relevant evidence. The respondent's own procedure provided for this and it is in accordance with the Acas Code, which the claimant quoted (page 60).

45. Following a disciplinary hearing on the 4/11/2022 the respondent did find the claimant's conduct to have been 'very unsatisfactory' (page 103). The letter of the 4/11/2022 did not use the term 'guilty', although the invitation to a disciplinary hearing did refer to 'determine whether you are guilty of misconduct' (page 84). It was the claimant who adopted the term 'guilty' and then used it in correspondence and job applications. The respondent did find the misconduct alleged proven following the hearing on the 4/11/2022. To that extent, the respondent did make that finding (breach 1.1.1.2).

46. The respondent did issue the claimant with a final written warning on the 9/11/2022 (breach 1.1.1.3).

47. The respondent was justified in reaching that conclusion. The extract of the respondent's disciplinary policy which was provided (page 60) did not specifically provide that the outcome will be put in writing; however it is nonsensical to suggest that the respondent was not obliged to do so. The Acas Code provides that an employee should be informed of the outcome in writing.

48. The question therefore is whether the three actions the respondent performed breached the implied term of trust and confidence? Considering issues 1.1.2 and the sub-issues: whether the respondent behaved in such a way that was likely to destroy or seriously damage the trust and confidence between it and the claimant; and whether it had reasonable and proper cause for doing so.

49. In respect of the latter, the Tribunal concluded the respondent did have reasonable and proper cause for taking the action which it did. It had legitimate concerns about the claimant's refund practises. It investigated them and it decided there was potential misconduct.

50. Although of course the respondent's action was unwelcomed by the claimant, it was not irrational or unreasonable. The respondent followed its own disciplinary process and it followed the procedure set out on page 60.

51. It is not a breach of the implied term of mutual trust and confidence for a respondent to take legitimate disciplinary action in good faith. That is notwithstanding the claimant feeling the steps the respondent took were unwarranted.

52. The respondent behaved correctly and appropriately. It did not behave in such a way as to undermine or damage the implied term the claimant relies upon.

53. There was no breach of mutual trust and confidence and certainly no fundamental breach.

54. The claimant resigned in part due to embarrassment and he felt that his reputation had been damaged. He also resigned as he stated he had been discriminated against; although he was never able to articulate that allegation and he did not pursue it as part of this case. The claimant did refer to 'finding me guilty of ten counts of fraud' as a reason for his resignation (page 146). It is therefore fair to conclude that the issue of a final written warning did have a material influence upon his decision to resign.

55. The respondent advanced submissions on whether the claimant affirmed the contract (meaning he chose to continue with the contract after the steps the respondent took which he said were fundamental breaches). The third step was to inform the claimant of the final written warning on the 9/11/2022. The claimant did not resign until the 21/12/2022. In the meantime, he pursued an appeal. His substantive appeal was unsuccessful (albeit the respondent changed the terminology from 'fraud' to 'manipulation). The claimant did not however rely upon the appeal outcome as a breach of contract. In view of the finding there was no breach of contract by the respondent, it is not necessary to reach conclusions on this issue.

56. The reason for the dismissal was the claimant's resignation. It was not constructively unfair.

57. For those reasons, the claimant's claim is not well-founded and is dismissed.

9/1/2025

Approved by

Employment Judge Wright