EMPLOYMENT TRIBUNALS

Claimant: Mr J Wilks

Respondent: Warrington Fabrication Company Limited

Heard at: Liverpool ET (via CVP) **On**: 4 and 5 July 2024 and 13 December 2024 (sitting in chambers)

Before: Employment Judge McCarthy

Representation

Claimant: In Person
Respondent: Miss S Ackroyd

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal under Part X Employment Rights Act 1996 is well-founded. The claimant was unfairly dismissed. The respondent is ordered to pay the claimant the following:

(a) A basic award in the sum of £1020. No compensatory award is ordered.

(b) Note that these are actual the sums payable to the claimant after any deductions or uplifts have been applied.

(c) The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply, as this is a case where the claimant has not received any state benefits in relation to the termination of his employment.

2. The complaint of wrongful constructive dismissal is well-founded. The respondent is ordered to pay the claimant the sum of £801.20 as damages for breach of contract. This figure has been calculated using gross pay to reflect the likelihood that the claimant will be taxed upon it as Post Employment Notice

3. The complaint for holiday pay is dismissed upon its withdrawal by the claimant at the outset of the hearing on 4 July 2024.

4. The complaint of unauthorised deduction from wages relating to the alleged "docking of wages" for arriving home earlier than his "contractual" finish time is dismissed upon its withdrawal by the claimant at the preliminary hearing on 23 April 2024.

5. The complaint of breach in relation to of contract (theft of tools) is not well founded and is dismissed.

6. The complaint of unauthorised deduction from wages is well founded. But no award as been made given the deduction has already been awarded in relation to the complaint of wrongful constructive dismissal.

7.

REASONS

Introduction

1. By a claim form presented on 6 November 2023 (having entered early conciliation on 27 October 2023 and received a certificate against the respondent dated 30 October 2023, the claimant raised the following complaints:

   1.1 Unfair constructive dismissal, contrary to section 94 of the Employment Rights Act 1996 ("ERA"), within the definition in section 95(1)(c) of ERA and alleged to be unfair within the meaning of section 98 of ERA;

   1.2. A claim for damages for breach of contract (wrongful constructive dismissal);

   1.3 Unauthorised deduction from wages (one week's full pay);

   1.4 Failure to pay for accrued annual leave on termination of employment, contrary to regulation 14 of the Working Time Regulations 1998 ("WTR") and/or contrary to section 13 of ERA; and
   1.5 A claim for damages for breach of contract (failing to prevent the theft of his tools.

   The claimant relies on a breach of the implied term of trust and confidence in relation to his constructive and wrongful dismissal claims.

2. By a response form (including grounds of resistance) dated 20 December 2023 the respondent resisted the complaints. It denied that there had been any fundamental breach of contract which had entitled the claimant to resign. There had been no dismissal and the reason the claimant had resigned was to take up a new role at another company. They also contended that no further payments were due to the claimant.

3. As the parties are aware from previous correspondence, the determination of the claimant's claim, has unfortunately been delayed due to an ongoing serious health issue which has meant that I have been unable to sit. I apologise for the unfortunate and unavoidable delay and thank the parties for their patience.

Complaints and Issues

4. At the outset of the hearing, the claims and issues were discussed and agreed with the parties. There was some refinement to the List of Issues previously discussed at the Preliminary Hearing on 23 April 2024 (the “List of Issues”).

   4.1 The claimant confirmed his constructive unfair dismissal complaint was as set out in paragraphs 19 to 21.6 of the Preliminary Hearing Record dated 23 April 2024. He says that the respondent breached the term of his contract known as “the implied term of trust and confidence”. He confirmed he was not alleging any breach of an express term of his contract. The complete list of the conduct that allegedly undermined the trust and confidence relationship is:

   (a) The respondent based him increasingly at the workshop from November 2022 onwards, depriving him of the opportunity of working longer hours and a site bonus;
   (b) The respondent gradually reduced his working hours from 50 hours to 40 hours per week;
   (c) The respondent suspended him for no good reason;
   (d) The respondent’s managing director told the claimant shortly after his suspension that another company was recruiting, implying that the claimant should go and work for another employer;
   (e) The respondent failed to provide him with a reason for his suspension, and when the claimant did discover the reason for his suspension it was not through an appropriate management channel, was not sufficiently clear and was not confirmed in writing until one week later; and
   (f) The respondent left his tools in an insecure place outside his house, knowing that he was not at home, resulting in his tools being stolen.

   4.2 The claimant said that he accepted that he had been paid his accrued but untaken holiday pay in full and so was withdrawing his holiday pay complaint. With consent, I dismissed the claimant’s holiday pay claim upon his withdrawal of this part of his claim.

   4.3 The respondent confirmed that it the claimant was found not to have been constructively dismissed, it was not disputing the claimant’s unauthorised deduction of wages claim for an underpayment of one week and accepted he is due the difference in pay between one week’s full pay of 40 hours.

   4.4 In relation to his breach of contract claim – theft of tools, the claimant clarified that he was only relying on the arguments set out in paragraphs 40.1 and 40.2 in the List of Issues and he was no longer pursuing the complaint in paragraph 40.3 of the List of Issues. The complaint at paragraph 40.3 of the List of Issues is dismissed upon the claimant’s withdrawal.

5. The complaint of unfair dismissal stands or falls with the question of whether or not the claimant was constructively dismissed. If he was, the dismissal was unfair as the respondent confirmed it did not seek to advance a potentially fair reason for dismissal.

List of Issues (adopting the original paragraph numbers)

6. The issues are:

Unfair constructive dismissal

27.1. Did the respondent do what the claimant says it did?

27.2. Was the conduct calculated or likely to destroy or seriously damage

the relationship of trust and confidence?

27.3. Did the respondent have reasonable and proper cause?

27.4. Did the breach of contract materially contribute to the claimant's

decision to resign?

27.5. Did the claimant affirm the contract?

Wrongful constructive dismissal

28. Same as unfair constructive dismissal.

29. There does not appear to be any issue about what the claimant's damages should be if he was constructively dismissed. The claimant gave one months' notice, which is all he was required to give, and which was more than the respondent would have been required to give him had the respondent chosen to dismiss him with notice. Had the respondent given him notice, however, the respondent would have been required under section 88 of the ERA [Employment Rights Act 1996] to pay the claimant his full pay during the notice period, rather than just his sick pay.

Deduction from wages

30. No issue to be determined given respondent's concession.

Breach of contract- theft of tools

39. The claimant does not suggest that there was any express term in his written contract or employment that required the respondent to look after his tools.

40. Based on the claimants account of what happened, I take the claimant to be arguing.

40.1 That there was an implied term in his contract for employment

40.2 That to leave his tools outside his house was, by itself, a breach of the implied term of trust and confidence.

41. The issues are:

41.1 Did the alleged term exist?

41.2 Was the term breached?

41.3 If so, did the breach cause the claimants tools to be stolen?

41.4 If it did, what was the value of the tools that were stolen?

Preliminary Issues

7. Notwithstanding the case management orders of Employment Judge Horne, discussed and ordered at the preliminary hearing on 23 April 2024, the claimant had not provided the respondent with a copy of his witness statement. The claimant still did not have a witness statement with him at the final hearing. We discussed how to proceed, and I was mindful of the overriding objective and that the final hearing had already been postponed due to the parties not appearing to be ready for it. It was agreed by all parties that the following documents (which the respondent had already seen) would be used to form the claimant's witness statement upon which he could be cross examined so that the final hearing could proceed. The respondent chose not to pursue its strike out application: -

   (i) The claimant claim form, (ii) His email of 6 March 2024 to the Tribunal clarifying his unfair constructive dismissal claim, and (3) paragraphs 19-21.6 in the Preliminary Hearing Record of 23 April 2024 (which he said was an accurate record of his complaints).

8. I gave the respondent some extra time to re-consider these documents and pull together any questions she wished to ask in cross examination. Given the respondent had seen these documents well in advance of the hearing I was satisfied that it was fair and in accordance with the overriding objective to proceed with the hearing having given the respondent's representative a reasonable time period to re-consider such documents and prepare questions.

Procedure/Documents and evidence heard

9. This was a hearing where all parties participated via CVP.

10. I considered documents in an electronic bundle notionally ending at page 226. I heard oral evidence from the claimant on his own behalf. For the respondent, I heard oral evidence from Mr Mathew Hand, Mr Gordon Viles, Mr Andrew and Miss Susan Ackroyd. I considered the written witness statements provided for all four of the respondent's witnesses and considered the documents that, it had been agreed (see above) made up the claimant's witness statement.

11. At the conclusion of the evidence each party made oral submissions.

Relevant facts

12. The relevant facts are as follows. Where I have had to resolve any conflict of evidence I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents.

13. The claimant, Mr Wilks, was employed by the Respondent, Warrington Fabrication Company Limited as a Welder Fabricator from July 2021 until 2 November 2023. At the start of his employment the claimant signed a contract entitled "Conditions of Service"- Workshop (39-43) (the "Contract"). According to the Contract the claimant was employed as a Welder Fabricator and for 40 hours per week (his basic working week). It also stated that "further hours worked above the basic 40 hours are at the discretion of the company" and there was no contractual right to overtime. (39). His work location is recorded in his Contract as the respondent's Atherton Quay premises, subject to the respondent's right to require him to work overtime and at additional locations. The claimant accepted in evidence that the Atherton Quay premises was his normal place of work between client contracts,

but it was rare. I find that his place of work was Atherton Quay but, when required by the respondent, he worked at client sites and was working at a client site when he was suspended. There was no contractual right to be deployed at a client site or to an increase in his working hours beyond the contractual 40 hours a week.

14. Whilst on site the claimant said he would earn more as workshop hours were cut and he earned a travel time radius bonus. However, the claimant also accepted in evidence that his contractual hours were 40 hours per week and that his hours had never been reduced below 40 hours. Mr Hand, the claimant's line manager, gave evidence (which I accepted) that basic hours (40) were the same regardless of location and when the claimant was on site his hours and pay could vary depending on where the client site was located in relation to the claimant's home. For example, when the claimant was suspended, the client site he was working at was located very close to this home, so his travel time was very short. The Respondent provided copies of the claimant's pay slips (60-90) and it is clear that in the weeks leading to his suspension (when not on holiday) he was paid more than his basic contractual pay so was still receiving overtime and/or site allowances/bonuses. It was agreed that the claimant's basic rate of pay was £12.75 per hour (having increased from its original rate in the Contract). The claimant was paid on a weekly basis and a full weeks' basic pay was £510. The claimant was on a period of sick leave from 31 August 2023 until 2 November 2023 and received sick pay of £109.40 (gross) per week (84-90) during his period of sickness. As the respondent's Sickness and Absence Policy sets out (208) the respondent only paid employees statutory sick pay ("SSP") (subject to the individual employee's entitlement to SSP) during periods of sickness absence.

15. The Contract states that after two years of service the respondent would give "two weeks 'notice to terminate [the claimant's employment] and the claimant was "required to give four weeks' notice" to terminate his employment. When he resigned the claimant gave one months' notice (more than he was contractually required to give) and remained on sick leave during this notice period. The respondent paid the claimant sick pay of £109.40 (gross) per week during his notice period (84-90).

16. The respondent has a defined Disciplinary Policy and Procedure (107). The policy includes a right to suspend employees. *"The Company shall have the right to suspend you from your duties on such terms and conditions as the Company shall determine for the purpose of carrying out an investigation into any allegation of misconduct or negligence or an allegation of bullying or harassment or discrimination against you and pending any disciplinary hearing. Such suspension is not seen as an indication of your guilt. If no further action is taken, the suspension will be lifted (110).*

17. The claimant had the use of one of the respondent's vans and the respondent provided him with all equipment he needed for his role, including power tools. However, like some other tradesmen, the claimant had a bag of his own hand tools which he chose (but was not required by the respondent) to use whilst undertaking his role. The respondent's vans were provided with additional locks, such as a steering lock and pedal lock which Ms Ackroyd said drivers were expected to use. Ms Ackroyd explained that spot checks were conducted on the respondent's vehicles to ensure they were secure.

18. Ms Ackroyd, who explained that she undertook payroll and assisted with Human Resources for the Respondent. On Friday, 21 July 2023, she said she was informed by the respondent's Managing Director, Mr Martin Simcock that a spot check had been conducted on the respondent's van which was being used by the claimant. Mr Simcock told her that the claimant had parked the van out of sight of

his home and had failed to use the additional locks and so he had suspended the claimant to investigate allegations of "*misconduct and insubordination.*" Mr Simcock told Ms Ackroyd that was dealing with the suspension himself. Ms Ackroyd gave evidence (as did Mr Hand) that Mr Simcock made no mention of gross misconduct and she had recorded what he said was the reason for suspension in her suspension letter.

19. Mr Simcock did not give evidence to the Tribunal. But having considered the suspension letter, Ms Ackroyd's investigation report (and her evidence, which I accepted), I find that Mr Simcock made the decision to suspend the claimant and the reason for the claimant's suspension was to investigate allegations of "misconduct and insubordination" (rather than gross misconduct) namely failing to comply with instructions in relation to securing a company vehicle with the security devices provided. The claimant accepted in evidence that he made an assumption, in advance of receiving the suspension letter that it was alleged he had committed gross misconduct. He understood that what was being alleged was that he had failed to comply with an instruction to secure the respondent's van with the security devices as can be seen in his email to the respondent of 22 July 2023.

20. Ms Ackroyd said that Mr Simcock had told her that he was suspending the claimant in the interests of the company and to protect company property. Ms Ackroyd gave evidence that she was notified of the suspension after the claimant had been picked up from the site and taken home and that he did not have a discussion with her about it – it was his decision. I find Mr Simcock did not consult with or take Human Resources advice from Ms Ackroyd before making the decision to suspend the claimant and starting the process. Mr Hand, the claimant's line manager also gave evidence that he was told by Mr Simcock that he would be dealing with the suspension and that Mr Hand was to refer the claimant to himself, if the claimant called. Mr Hand was not aware of the suspension until after the decision had been made. He was visiting clients on 21 July 2023 and was suddenly called back to the respondent's office and told by Mr Simcock that the claimant was being suspended for misconduct and insubordination.

21. In the absence of any oral or documentary evidence to the contrary, I find that Mr Simcock did not consider alternatives to suspension or undertake any further investigations after the spot check before suspending the claimant, such as meeting with the claimant to discuss the allegations, removing his access to a respondent's van only, investigating whether there was any written procedure/policy regarding the use of security locks or written evidence of a direct instruction to use the locks. I was struck by the lack of any documentation in the bundle recording how Mr Simcock had decided suspension was a reasonable way of dealing with the situation, what further investigations he had undertaken before coming to that decision and any alternatives to suspension he had considered and why he had discounted them. Ms Ackroyd said she was not aware of any other avenue being explored instead of suspension and said that she was not aware of any other avenues that could have been taken. It is clear that no investigations into whether the claimant had actually been formally instructed to use the security locks and/or whether there was a policy or procedure that detailed such instructions were conducted in advance of the decision to suspend as the disciplinary investigation undertaken by Ms Ackroyd, whilst the claimant was suspended quickly concluded that there was "no written procedural evidence" to support those instructions had been given and that "no written procedures or instructions could be established as being provided to John Wilks" (57).

22. The claimant was not provided with a suspension letter on the day of his suspension. This was prepared and sent to the claimant on the following Monday by Ms Ackroyd. On the day of his suspension, the claimant was working at a client's

site. Around 1pm on the 21 July 2023, he was told by the site manager to get his tools and equipment off site and that his van was being picked up by the respondent and he was going to be dropped off at home. The claimant was not told the reason for this but told to call his line manager, Mr Hand. Mr Hand told the claimant he needed to contact Mr Simcock saying " *this isn't anything to do with me*". It was only when the claimant called Mr Simcock that he was told that he had been "suspended on pay until investigation" (92). Mr Hand texted the claimant in response "ok mate, BGEN are looking for men at the minute". The claimant responded to Mr Hand "okay what are you saying Matt is that it or what." Mr Hand does not respond to this text message. Mr Hand said in evidence that he had spoken to the claimant to check on him and that, during that phone call, the claimant had asked whether he was aware of any companies taking on welders. Mr Hand said his text about BGEN was in response to the claimant's verbal request and that he passed this information on in the capacity of a friend not a manager.

23. It is not clear who told the claimant about the allegations that were being investigated but it is clear that the claimant was aware that it related to the use of security locks as he requested from Mr Hand any documents, such as written procedures, which stated that the respondent's vans must be secured using security locks (92 and 101-102). In the absence of a suspension letter, the claimant asked Mr Hand for information, including confirmation of the allegations on 22 July 2023 (101-102).

24. Ms Ackroyd produced a suspension letter on the Monday following his suspension (24 July 2023) and this was emailed to him the same day (44). The letter informed the claimant that he was suspended from work "following allegations of misconduct and insubordination" and that "an investigation into these allegations, which are continued failure to follow out direct instructions, will commence as soon as reasonably practicable." The letter stated that the "action was precautionary to allow a fair and impartial investigation to take place" and that the respondent "did not consider suspension a presumption of guilt nor disciplinary action and during this time his basic pay would remain unaltered" and he would receive his pay.

25. This letter was not provided to the claimant until a couple of days after the suspension so the Claimant was left unsure of the allegations and without all the information throughout the week. The claimant had just bought a house and, due to his previous attendance on an ACAS course on disciplinaries, assumed that he was being accused of gross misconduct (as he believed this would be the only circumstances where suspension was considered) and thought he was at risk of being dismissed. He gave evidence that he was worried all weekend and that before receiving the suspension letter, he obtained some legal advice and sent the respondent an email on 22 July saying that "As I knew I've been advised that this is good grounds for constructive dismissal." (101-102). He set out how he had never formally been told that it was a requirement to use the security devices or part of his duties and so he was "being placed suspended from work for not fitting the security devices even though [he didn't] have an instruction to do so in a formal letter stating this instruction as part of the contract of the issue of a work vehicle."

26. Whilst the claimant was suspended Ms Ackroyd undertook a disciplinary investigation into the allegations and determined that the allegations were unsubstantiated, and no further action taken. Ms Ackroyd recorded in her investigation report that she had found "no written procedural evidence to support the instructions given for the usage of security devices". She also found that "whilst the vehicle was not secured correctly it can also be argued no written procedures or instructions could be established as being provided to [the claimant]" (52-57).

27. On 28 July 2023 the claimant was informed by letter that the allegations were not substantiated and that his suspension had now ended and that he should return

to work on 31 July 2023 (58). In the meantime, Mr Viles and Mr Stokes, dropped the claimant's tools off at his home. During the claimant's suspension, the respondent had taken the opportunity to complete a full maintenance check on the van used by the respondent. Some tools belonging to the claimant were found in the van and Mr Viles was asked by Mr Simcock to deliver these tools back to the claimant on 31 July 2023 as the suspension period was over and the claimant was returning to work. I found Mr Viles a credible and straightforward witness, he gave balanced evidence, supporting the claimant's case at times. As photographs provided by the respondent showed, Mr Viles first tried to deliver the tools to the gated entrance at the back of the claimant's property but found it locked. He then moved to the front of the claimant's property and before unloading, knocked on the claimant's door. When there was no answer he spoke to the next door neighbor to establish whether anyone was in at the claimant's property and they told him that they thought "someone was rattling around in the property" and said that if the claimant's cars were parked at the back of the property they were "definitely home". Mr Viles had spotted the cars and so the neighbour told him that "Yes, they should be home then." It was not in dispute that Mr Viles also spoke on the phone with the claimant who said he was not home. When Mr Viles said he needed to drop off the tools, they discussed where the tools should be left and the claimant said that his friend would come over and take them into the house as he was at an appointment with his daughter. The claimant did not return to the property until after 5 O'clock.

28. It is common ground that the tools were placed in the front garden (which is gated and was surrounded by a wall). The claimant's house is on a main road. Mr Viles and Mr Stokes placed the tools in a place which was out of sight of the pavement and road in a space hidden by a wheelie bin and not in full view of the gate entrance. Mr Viles took photos of the items. These are in the bundle and I can see that attempts had been made to conceal the tools. Mr Viles did not provide anyone with copies of these photographs until after the claimant had contacted the respondent for the first time on 9 August 2023 to say the tools had been stolen (125). Mr Viles confirmed that he had not made a list of what had been dropped off but that the claimant's list of what tools he thought were missing matched the tools in his photos. The claimant was requested to provide receipts for the tools he said had been stolen. The bundle does not contain any receipts addressed to the claimant; the only receipts provided for some of the tools have the details of one of the claimant's former employers on them –not the claimant. The claimant sent an updated missing tool list at page 169 in which he said the total value of his lost tools was £2578.96. The claimant said he was very upset by the loss of his tools as he had built his tools up over the years and some were from when he was had started and were irreplaceable.

29. The claimant did not return to work on 31 July 2023. Instead, he went on sick leave due to a shoulder injury and subsequently provided a fit notes from his GP which covered the period from 31 July 2023 until the end of his employment. He was paid statutory sick pay during this time (SSP). During this time that claimant corresponded with the respondent on a number of occasions, about his sickness leave and when he may be able to return to work, his holiday entitlement and about the tools which had been dropped off at his home on 31 July 2023 (119-.148) The claimant made requests for the respondent to reimburse him for the tools that he said had been stolen and said the police had valued them at over £2500. The respondent asked the claimant for proof that he had reported the theft to the police and for the CCTV footage that he said he had provided to the police and was dissatisfied with the claimant's responses. The claimant did not provide the CCTV footage or a full crime reference number. Ms Ackroyd confirmed to the claimant that the respondent had no responsibility for his personal property and referred him to his contract. On 19 September, the claimant sent an email to the respondent asking what was to be done to replace his tools

as “this would hinder my hopeful return to work when my sick not expires.”

30. The claimant’s Contract (41) under the heading “Office and Departmental Security” states “Although the Company makes every effort to ensure that your property is secure it cannot be held responsible for any loss or damage that may occur. You should make your own arrangements if you wish to insure your personal property”.

31. The claimant resigned from his employment by email on 2 October 2023 with one months’ notice (149). He was only required to provide 4 weeks notice. In his resignation email, the claimant stated that “ after some thought and legal advice” he was resigning from his position. He said that “For the following reasons, I feel my employment has been made difficult. My accident had a long term effect on me and long lasting injury prohibiting me from working. My suspension and the way the suspension was conducted and the theft of my tools after they were delivered without clear notice as per the emails in discussion. My notice is covered by my fit note”. He ended his email by saying “I wish the company well and thank you for the opportunity.”

32. The claimant continued to supply fit notes and was paid sick pay but not full pay during his notice period. His employment with the respondent ended on 2 November 2023 on the expiry of his notice. It is common ground that the claimant immediately started a better paid job (commencing his new job on 3 November 2023). The pay slip for his new role showed a basic hourly rate of £16 at his new employer (213-221). At the respondent the claimant’s basic hourly rate was £12.75.

34. I find that the material reasons for the claimant’s resignation was his suspension and the way it was conducted, and the delivery of his tools to the front garden of his home which were later stolen. These are the reasons that are contained within his resignation letter and the claimant contended he had grounds for constructive unfair dismissal the day after his suspension. There is no reference in the resignation letter to being based increasingly in the workshop, from November 2022 onwards, depriving him of the opportunity of working longer hours and a site bonus, or the how respondent gradually reduced his working hours from 50 hours to 40 hours per week. I do not find that his resignation was in response to such matters particularly as it is clear from the claimant’s payslips that there was never a reduction in his contractual hours and he was working at a client’s site at the time of his suspension. I find that the date of the last straw was 28 July 2023.

Relevant law

35. Section 95 of the Employment Rights Act 1996 (“ERA”) relevantly provides:

    95 Circumstances in which an employee is dismissed

    (1) For the purposes of this Part an employee is dismissed by his employer if (and… only if)—

    … (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. …

36. In “Harvey on Industrial Relations and Employment Law” at paragraph DI [403]: “*In order for the employee to be able to claim constructive dismissal, four conditions must be met:*

*(**1**) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.*

(2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law.

(3) He must leave in response to the breach and not for some other, unconnected reason.

(4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract."

37. If the employee leaves in circumstances where these conditions are not met, he will be held to have resigned and there will be no dismissal within the meaning of the legislation at all.

38. The Tribunal's starting point was the test set out by the Court of Appeal in **Western Excavating (ECC) Ltd v. Sharp [1978] IRLR 27**. An employee seeking to establish that he has been constructively dismissed must prove:

  a. that the employer fundamentally breached the contract of employment; and

  b. that he terminated the contract by resigning?

  c. that he resigned in response to the breach.

39. The term of the contract upon which the claimant relies in this case was the implied term of trust and confidence. It is an implied term of any contract of employment 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: **Malik v Bank of Credit and Commerce International SA [1997] ICR 606**, as clarified in **Baldwin v Brighton & Hove City Council [2007] IRLR 232.**

40. The test of whether there has been a breach of the implied term of trust and confidence is an objective one in which the subjective perception of the employee can be relevant but is not determinative. As Lord Nicholls said at page 611A of **Malik** in relation to the conduct relied on as constituting the breach:-

> ***"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. This requires one to look at all the circumstances."***

41. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

42. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT (Langstaff J) in **Frenkel Topping Limited v King UKEAT/0106/15/LA** (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is**

> **"seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
>
> > **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.**
>
> **15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."**

43. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per **Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] IRLR 347*, 350***

44. In some cases, the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal affirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.**

45. The last straw doctrine is relevant only to cases where the repudiation relied on by the employee takes the form of a cumulative breach.

46. The law relating to the reason for a resignation after a repudiatory breach was reviewed by the EAT (Langstaff P presiding) in **Wright v North Ayrshire Council [2014] IRLR 4.** If an employee has mixed reasons for resigning it is enough if the repudiatory breach played a part in that decision. It need not be the sole, predominant or effective cause. That is particularly clear from the decision of the Court of Appeal in **Nottingham County Council v Meikle [2005] ICR 1**. At paragraph 20 of **Wright** Langstaff P summarised it by saying

> "**Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause."**

If, however, there is an underlying or ulterior reason for the employer's conduct, then there has not been a constructive dismissal.

47. An employee may lose the right to treat himself as constructively dismissed if he affirms the contract before resigning.

48. An employee is entitled to a reasonable period of time in which to resign before being taken to have affirmed the contract: **Air Canada v. Lee [1978] ICR 1202, EAT**. The length of that period is not fixed. Relevant factors include the consequences to the employee of losing their job and their prospects of finding alternative work: **Chindove v. William Morrison Supermarkets EAT/0201/13.**

49. An employee who remains in employment whilst attempting to persuade the employer to remedy the breach of contract will not necessarily be taken to have affirmed the contract. All depends on the circumstances of the particular case: **W E Cox Toner (International) Ltd v Crook *[1981] IRLR 443*,**

50. The Court of Appeal commented in *Crawford and anor v Suffolk Mental Health Partnership NHS Trust 2012 IRLR 402, CA*, that even where there is evidence supporting the employer's investigation, suspension 'should not be a knee-jerk reaction, and it will be a breach of the duty of trust and confidence towards the employee if it is'.

51. The Acas Code of Practice on Disciplinary and Grievance Procedures ('the Acas Code') It is intended to provide the standard of reasonable behaviour in most instances and, although not in itself legally binding, it is admissible as evidence before a tribunal. In particular, a tribunal must take its provisions into account where they are relevant to the case in question, and a failure to follow the Code can result in an adjustment in compensation of up to 25 per cent in a subsequent employment tribunal claim — Ss.207 and 207A Trade Union and Labour Relations (Consolidation) Act 1992.

Conclusions

52. The definition of a dismissal for these purposes is found in section 95(1)(c) of the Employment Rights Act 1996 which is where an employee terminates the contract in circumstances where he is entitled to terminate it because of a fundamental breach of contract by the employer.

53. I have had to decide whether the claimant's resignation should be construed as a dismissal. In order for the employee to be able to claim constructive dismissal there must first be a fundamental breach of contract by the respondent. This is a case where the claimant alleged that a series of actions on the part of the respondent cumulatively amounted to a breach of the implied term of trust and confidence.

54. I had the benefit of a significant amount of factual evidence, both written and oral. Not all of it proved to be relevant. I took account of all relevant points made in submissions, even if not expressly addressed below.

55. The first issue I had to determine was whether the respondent did what the claimant said it did. On the basis of my finding of fact I concluded that the respondent did not base him increasingly at the workshop depriving of. The claimant's contract states his normal place of work as the wokshop and I accepted Mr Hand's evidence that he worked the same basic hours on both on site and workshop. Whilst on site the claimant may be paid additional travel time, the amount would depend on where the site was located. At the time of the claimant's suspension he was on a site but it was only 10 minutes down the road from the claimant house. I also did not conclude that the respondent had gradually reduced the claimant's hours. His contractual hours were 40 hours per week and he accepted that he had never been given less than this. There was no contractual right to overtime in his contract.

56. On the basis of my finding of fact I did conclude that the "claimant had been suspended for no good reason". I did not consider that there was reasonable and proper cause for the suspension in the specific circumstances of this case. The respondents did not consider the claimant's conduct to be of the most serious nature -gross misconduct, it had not proceeded with caution and undertaken further investigations to establish whether the claimant had been provided with any written procedures or instructions with regard to the use of security locks before deciding to suspend the claimant. There had been no consideration of alternatives to suspension such as removing the van from the claimant's possession during the investigation. A reasonable employer would have checked first whether there had been any written instruction or policy to use the security lock first and taken steps to consider what steps short of suspension could have safeguarded the companies property and interests. On the basis of my finding of fact I concluded that this was a "knee jerk reaction" to the spot check . Both the claimant's line manger and Human Resources adviser were unaware of the matter until the suspension was already in process. There was no documentation evidencing a careful consideration of whether suspension was appropriate, no advice taken from the person who provided Human Reources advice in advance of the suspension (Ms Ackroyd) or a suspension letter prepare in advance so the claimant did not have to chace or ring around for information." (52-57). The claimant was expelled from a client site, taken home by one of his colleagues and had to ring round to find out what was happening before he was told he was suspended. I concluded that his line manager had suggested an alternative employer and that the claimant had understood this to mean that his manager was suggested he was going to be dismissed. Even if Mr Hand did not mean to imply this, he did not correct the claimant when he questioned on the messages what Mr Hand meant and he was the claimant's line manager.

57. On the basis of my findings of fact I concluded that the respondent did leave the claimant's tools in his front garden when the respondent knew he was not in. However, the respondent made a number of efforts to get hold of the claimant and inform him they were at his home, they discussed with him where to leave the tools and understood that there was either someone in the claimant' house or that the claimant was making arrangements for his friend to take the tools in. The respondents made efforts to place the tools in the most secure place and to conceal them but it was in a front garden so was insecure. They went to the back gate and even spoke to neighbours to check whether the claimant was in his house before unloading.

56. Applying the test derived from **Malik** I had to determine whether the respondent without reasonable or proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. There were two strands to that test:

(1) Was there reasonable and proper cause for the employer's actions?

(2) If not, were those actions serious enough to be likely, when viewed objectively, to destroy or seriously damage the relationship?

57. I reminded myself that the courts have emphasised that this is a test which is not to be applied too lightly. It is a stringent test for a claimant to meet as emphasised in **Frenkel Topping Limited v King UKEAT/0106/15/LA** (paragraphs 12-15) It was said in the **Tullett Prebon** case that the employer must have demonstrated objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. Those are words which indicate the strength of the implied term.

58. As for the last straw, it is possible for a last straw to constitute a repudiatory breach even if in itself it does not breach trust and confidence, and even if in isolation none of what has gone before has breached trust and confidence.

59. The Court of Appeal in **Kaur** (referred to above) offered guidance to tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed: -

    59.1 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? I concluded the answer to this was the leaving of tools in the claimant's front garden.

    59.2 Has he or she affirmed the contract since that act? I concluded the answer to this was no. The claimant resigned on 2 October 2023. I took into account Ms Ackroyd's submissions about the claimant not resigning shortly after his suspension and the delivery of tools to his home on 28 July 2023. Relevant factors I took into consideration was the claimant was on sick leave from 31 July 2023 until his resignation (and during his notice period). He was in correspondence with the respondent during this period regarding his stolen tools and seeking to establish what the respondent was going to do about reimbursing him. He resigned shortly after the respondent made clear that it was not taking responsibility for his tools and were not going to reimburse him.

    59.3 If not, was that act (or omission) by itself a repudiatory breach of contract? On the basis of my findings of fact, I concluded that it was not by itself a repudiatory breach of contract. Whilst it may have been more reasonable to take the tools away and return when the claimant was in, this was a working day and the claimant was still suspended so the respondent not unreasonably expected him to be at home. On the basis of my finding of facts and as detailed above, the respondent took a number of steps to secure the claimant's property despite it being in the front garden, spoke with the claimant at the time so he was aware they were at the house at 1pm. On his own evidence the claimant did not return until after 5pm that night knowing the tools had been delivered and where they were. I did not consider this omission to be serious enough to destroy trust and confidence. I concluded that the conduct was not serious enough when viewed objectively to be calculated or likely to destroy or seriously damage trust and confidence. It was not something which showed any intention to abandon and altogether not to perform the contract of employment; it was not something with which an employee could not be expected to put up. In isolation, I concluded that last straw relied upon by the claimant was not a breach of trust and confidence. It did not breach the **Malik** test.

    59.4 If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence. I concluded that it was.

60. Having concluded that the last straw was not a repudiatory breach in itself I next considered whether the cumulative series of acts relied upon by the claimant taken together amounted to a breach of the applied term. Whilst the last straw was in itself insufficient to justify the claimant treating his resignation as a constructive dismissal, I had to consider whether when viewed against a background of such incidents it was sufficient to warrant him treating his resignation as a constructive dismissal.

61. I concluded that the last straw was part of a course of conduct comprising a series

of acts and omissions which, viewed cumulatively, amounted to a breach of trust and confidence. The last straw relied upon did constitute a breach of the implied term of trust and confidence when added to what had gone before.

Suspension

62. Looking at all the circumstances, I was satisfied that the claimant's suspension and the process followed did meet the high threshold of the Malik test in isolation. In isolation or when added to what went afterwards, the conduct was serious enough when viewed objectively to be calculated or likely to destroy or seriously damage trust and confidence. It was something which showed an intention to abandon and altogether not to perform the contract of employment; it was something with which an employee could not be expected to put up.

63. I concluded that the claimant was constructively dismissed. Turning secondly to the question whether the dismissal was fair or unfair, the respondent did not seek to advance a potentially fair reason for dismissal and so I concluded that the dismissal was unfair and the claim of unfair constructive dismissal therefore succeeds.

64. Turning to the question of compensation, compensation for unfair dismissal is in two parts The first is the basic award which is calculated according to a formula in the Employment Rights Act 1996 based on age, length of service and gross weekly pay. As at the date of his employment ending the claimant had 2 completed years of service and in each of these years he was aged between 22 and 41 years. He is therefore entitled to a total multiplier of 2. It was agreed that his gross weekly pay was £510 a week. Multiplied by 2 that figure gives a basic award of £1020 and I order the respondent to pay that basic award to the claimant.

65. Turning to the compensatory award, section 123(1) of the Employment Rights Act 16 requires me to award such compensation as is just and equitable to compensate the claimant for losses resulting from unfair dismissal. The claimant immediately started a better paid job after his dismissal and so the dismissal did not cause the claimant to lose earnings. I therefore make no compensatory award for lost earnings.

66. As this is a case where the claimant received no state benefits following his resignation the recoupment regulations do not apply.

Wrongful Constructive Dismissal: Notice

67. The issues for determination here are the same as the complaint of unfair dismissal. For the same reasons as for the complaint of unfair dismissal I concluded that the claimant's complaint of wrongful constructive dismissal was well founded. The claimant gave one months notice but was paid only statutory sick pay. The respondent was required under the claimant's contract to pay him two weeks notice. Section 88 of the Employment Rights Act 1996 requires the respondent to pay him full pay during his notice period and as the claimant was constructively dismissed he should have been paid £1020 (2 weeks of £510 per week). Instead he received £109.40 per week (£218.80) and so is entitled to the difference of £801.20 gross and I order the respondent to pay this. The award is gross to reflect the likelihood that the claimant will be taxed upon it as Post Employment Notice Pay.

Unauthorised deduction from wages

68. The claimant gave one months notice but was paid only statutory sick pay. The respondent was required under the claimant's contract to pay him two weeks notice. Section 88 of the Employment Rights Act requires the respondent to pay him full pay during his notice period and as the claimant was constructively dismissed he should have been paid £1020 (2 weeks of £510 per week). Instead he received £109.40 per week (£218.80) and so there was a deduction and he was entitled to the difference of £801.20 gross. However, as this difference in notice pay has already been awarded in relation to the Wrongful constructive dismissal complaint I make not order for any payment by the respondents as that would amount to double recovery.

Breach of Contract – theft of tools

69. I concluded that the claimant's breach of contract claim was not well founded. On the basis of my finding of facts, I concluded that leaving the tools outside the claimant's home was not a breach of trust and confidence for the reasons I have set out in the constructive unfair dismissal complaint conclusions, which are repeated here. I also concluded that there was no implied term in his contract of employment that the respondent take reasonable care of his tools whilst they were in the respondent's possession. The claimant's contract of employment contained the following express term under the heading "Office and Departmental Security" "Although the Company makes every effort to ensure that your property is secure it cannot be held responsible for any loss or damage that may occur. You should make your own arrangements if you wish to insure your personal property". (41). I therefore concluded that there was no basis (such as necessity) to imply a term of the sort contended for by the claimant. The proposed implied term was not one that arose from the common law principles of implication of contractual terms. I concluded that the was no breach of the claimant's contract, he was not entitled to any damages as the respondent was expressly not responsible for any loss of personal property and so his complaint fails and is dismissed.

____

Employment Judge McCarthy

Date: 17 February 2025

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
18 February 2025

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **2411629/2023**

Name of case: **Mr J Wilks** v **Warrington Fabrication Company Limited**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 18 February 2025

the calculation day in this case is: 19 February 2025

the stipulated rate of interest is: **8% per annum**.

Paul Guilfoyle
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note:
   www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.