EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100572/2025

Held in Glasgow on 17 April 2025

Employment Judge P O'Donnell

Mr A Donald	**Claimant** **Represented by:** **Mr B Dawes -** **Trade Union** **Representative**
EMG Scotland Limited	**Respondent** **Represented by:** **Ms F Farral -** **Representative**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's application for interim relief is refused.

REASONS

1. The hearing was held in order to determine the claimant's application for interim relief under s161 of the Trade Union and Labour Relations (Consolidation) Act 1992 arising from his claim for unfair dismissal under s152 of that Act.

2. There was also reference, during the course of the hearing, to the interim relief application being made under s128 of the Employment Rights Act 1996. However, that statutory provision was not relevant because it is not engaged by a claim of unfair dismissal under s152 of the 1992 Act. This makes no practical difference to the decision below as the similar principles apply to applications made under the different statutory provisions.

3. Both agents produced written submissions and supplemented these orally. For the sake of brevity, the Tribunal does not intend to set out the submissions in detail. These have been noted and the Tribunal will refer to any point raised that requires to be specifically addressed in its decision below.

Relevant Law

4. Section 161 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides as follows:-

(1) An employee who presents a complaint of unfair dismissal alleging that the dismissal is unfair by virtue of section 152 may apply to the tribunal for interim relief.

…

5. Section 152 of the 1992 Act provides that:-

(1) For purposes of [Part X of the Employment Rights Act 1996] (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—

(a) was, or proposed to become, a member of an independent trade union, . . .

(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, . . .

[(ba) had made use, or proposed to make use, of trade union services at an appropriate time,

…

(2) In subsection [(1)] "an appropriate time" means—

(a) a time outside the employee's working hours, or

(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it

is permissible for him to take part in the activities of a trade union [or (as the case may be) make use of trade union services];

and for this purpose "working hours", in relation to an employee, means any time when, in accordance with his contract of employment, he is required to be at work.

[(2A) In this section—

(a) "trade union services" means services made available to the employee by an independent trade union by virtue of his membership of the union, and

(b) references to an employee's "making use" of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

…

6. In order to succeed in an application for interim relief, the claimant must show that it is "likely" that the complaint of unfair dismissal will succeed. The question of what is meant by "likely" has been addressed by a number of authorities which have said that it means "a pretty good chance of success" which means more than just the balance of probabilities (*Taplin v C Shippam Ltd* [1978] IRLR 450) and that it involves a "significantly higher degree of likelihood" than more likely than not (*Ministry of Justice v Sarfraz* [2011] IRLR 562).

7. The Tribunal needs to take account of all matters that would require to be determined at the final hearing of the unfair dismissal claim although it does not require to conclusively resolve those matters before deciding on the application for interim relief (*Hancock v Ter-Berg* [2020] IRLR 97).

8. Section 95(1) of the 1996 Act states that dismissal can arise where:-

"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."

9. The circumstances in which an employee is entitled to terminate their contract by reason of the employer's conduct is set out in the case of *Western Excavating v Sharp* [1978] ICR 221. The Court of Appeal held that there required to be more than simply unreasonable conduct by the employer and that had to be a repudiation of the contract by the employer. They laid down a three stage test:

    a. There must be a fundamental breach of contract by the employer

    b. The employer's breach caused the employee to resign

    c. The employee did not delay too long before resigning thus affirming the contract

10. A breach of contract can arise from an express term of the contract or an implied term. For the purposes of this case, the relevant term was the implied term of mutual trust and confidence.

11. The test for a breach of the duty of trust and confidence has been set in a number of cases but the authoritative definition was given by the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462 that an employer would not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

12. The "last straw" principle has been set out in a range cases with perhaps the leading case being *Lewis v Motorworld Garages Ltd [1985]* IRLR 465. The principle is that the conduct which is said to breach trust and confidence may consist of a series of acts or incidents, even if those individual incidents are quite trivial, which taken together amount to a repudiatory breach of the implied term of trust and confidence.

13. The “last straw” itself had to contribute something to the breach even if that is relatively minor or insignificant (*Kaur v Leeds Teaching Hospitals NHS Trust [2018]* IRLR 833).

14. In a constructive dismissal case, the reason for dismissal is the reason for the breach of contract by the employer (*Berriman v Delabole Slate Ltd [1985]* ICR 546, CA).

15. The question of how the Tribunal should approach the burden of proof in relation to the reason for dismissal in cases involving claims of automatically unfair dismissal was addressed in *Kuzel v Roche Products Ltd [2008]* IRLR 530 by Mummery, LJ:

“As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced led by the employee on the basis of an automatically unfair dismissal on the basis of a different reason."

Decision

16. As noted above, the Tribunal needs to be satisfied that the claimant’s case for unfair dismissal is likely to succeed and this includes all issues that would require to be determined at the final hearing. In the present case, this means that the Tribunal not only needs to be satisfied that the reason for the claimant’s dismissal was one which falls within the scope of s152 of the 1992 Act but, also, that the claimant was dismissed as defined in s95(1)(c) of the 1996 Act.

17. Dealing with the question of dismissal first, the claimant argues that there was a breach of the implied duty of trust and confidence relying on the conduct of the respondent over a period of time starting in October 2024 and continuing until March 2025.

18. Looking at the alleged conduct relied upon, the Tribunal is not persuaded that the claimant is "likely" to succeed in satisfying the *Malik* test set out above.

19. The Tribunal notes that, before the matters on which the claimant relies as amounting to a fundamental breach of contract had occurred, there had been issues between the claimant and respondent. For example, there was a proposal to close the office at which the claimant worked and have him work from the Glasgow office which caused the claimant concerns about increased travel. Further, the other person who had worked at the same office as the claimant had been dismissed and the claimant expressed concerns about the impact of this on his workload.

20. At the hearing, the Tribunal was referred to a number of emails from October 2024 but without any real context as to the circumstances and reasons why they were sent. The email correspondence in October 2024 is, on the face, correspondence from a manager raising issues with the claimant about work that had been done. An employer is entitled to raise such issues with their employees and ask questions of them. In doing so, they are not necessarily acting in a manner that is calculated, or likely, to destroy or seriously damage the employment relationship and, if they have issues they wish to discuss, may well have reasonable and proper cause for any such correspondence.

21. Whilst the claimant may well have taken exception to these emails, the Tribunal does not consider that the content and tone of these are such that it can be said that they would cause, or contribute to, any loss of trust and confidence in terms of the *Malik* test.

22. Mr Daws made the submission that these emails were being sent after the claimant had disclosed his disability to the respondent and were, in some way, a form of discrimination or harassment in relation to disability. The Tribunal found this to be a puzzling submission for two reasons.

23. First, there is no claim of disability discrimination under the Equality Act 2010 pled in the ET1 and so any final hearing will not determine whether there was any unlawful discrimination against the claimant under the 2010 Act.

24. Second, if it is the claimant's case that some of the conduct by the respondent which led to him losing trust and confidence was motivated by the fact that he was disabled then this undermines (or dilutes) the claimant's argument that the main or principal reason for his dismissal was one which fell within s152 of the 1992 Act.

25. The later alleged conduct by the respondent relates to the involvement of the trade union and the assertion by the claimant that the respondent was seeking to penalise him for seeking the union's assistance or deterring him from doing so.

26. The conduct complained of by the claimant is correspondence from the respondent indicating that they will not engage in correspondence with the claimant's trade union representative and will only correspond directly with the claimant. This culminates in a threat of legal action against the trade union representative when he, in the respondent's view, persists in seeking to communicate with them despite the requests not to do so.

27. There is no legal obligation on an employer to communicate with a trade union representative rather than the employee. An employer is entitled to communicate with their employees about matters in the workplace and will not be in breach of contract in doing so unless those communications meet the test set out in *Malik.*

28. Similarly, an employer is not legally obliged to allow a trade union representative to attend meetings between the employer and the employee unless the meeting is one which falls within the scope of the statutory right to be accompanied. None of the meetings which were proposed by the respondent in this case fell within the scope of that right as they were not disciplinary or grievance meetings. Again, an employer who does not permit a trade union representative to attend a meeting to which the right to be accompanied applies is not acting in breach of contract unless the *Malik* test is met.

29. The Tribunal does not consider that the respondent's refusal to communicate directly with the claimant's trade union representative or being unwilling to

allow that representative to attend the proposed meetings (which were welfare and not disciplinary meetings) is likely to meet the *Malik* test or contribute to that test being met.

30. Reference was made in the claimant's submissions that the respondent's refusal to engage directly with the claimant's trade union representative amounted to a breach of s146 of the 1992 Act because the claimant was being subject to a detriment with the sole or main purpose being to penalise him for, or deter him from, making use of trade union services. This submission potentially conflates the conduct said to give rise to a fundamental breach of contract with the reason for such conduct. It also confuses s146 with s152 of the 1992 Act with the latter being the relevant provision for the purposes of the interim relief application.

31. However, with that being said, the Tribunal is not persuaded that the claimant is likely to show that the respondent's refusal to communicate directly with his trade union representative was a detriment to him or that it was done with the sole or main purpose of penalising the claimant or deterring him from using the services of his trade union. The claimant was being treated no differently from any other employee of the respondent who would be expected to communicate directly with their employer. Similarly, there was nothing in what was being said by the respondent that had the purpose of deterring him from using the services of his trade union; the only thing that was being said was that the respondent would not communicate directly with the trade union and it is difficult to see how this would deter the claimant from using the union's service. The claimant could (and, indeed, did) continue to seek advice from the union.

32. The Tribunal does consider that the threat of legal action by the respondent was not a wise course by the respondent given that it was likely to inflame matters. However, this threat was not directed at the claimant and was only made after the trade union representative persisted in contacting the respondent after they had made it clear that they would not communicate with him. On the face of it, this threat was not prompted by the claimant making

use of the services of his trade union but, rather, the conduct of the trade union representative.

33. The claimant's representative made submissions about certain correspondence being wrongly marked as "without prejudice" asking the Tribunal to draw an adverse inference from this as well as the contents of that correspondence as compared to the contents of "open" correspondence. The assertion being made was that the respondent was presenting two different impressions of itself in the belief that the "without prejudice" correspondence would not be seen by the Tribunal.

34. In the Tribunal's experience, the "without prejudice" label is routinely used by parties (and some lawyers) in circumstances where the correspondence in question is not "without prejudice" correspondence and it draws no conclusions from the fact that it may have been used wrongly in the present case. In any event, the "without prejudice" principle exists to allow parties to a legal dispute to have open and frank discussions intended to resolve a dispute and so there is nothing inherently wrong in a party seeking to rely on that principle (even if they were wrong about its application to the specific correspondence).

35. Looking at these circumstances as a whole, and bearing in mind that the burden of proving that there was a constructive dismissal is on the claimant, the Tribunal is not satisfied that the claimant is likely to prove he was dismissed. In particular, the Tribunal does not consider that this is a case where the claimant has presented enough information that demonstrates that he is likely to show that the *Malik* test has been met.

36. Rather, the picture that emerges from the available information is one of an employee who is unhappy with issues in the workplace but that, in itself, is not sufficient to give rise to a constructive dismissal. The issues in question arise from matters which occurred before the events said to give rise to his constructive dismissal as well as those later events which occurred over October 2024 to March 2025. However, on the face of it and for the reasons

set out above, these issues are not such that, when taken alone or as a whole, the claimant is likely to satisfy the *Malik* test.

37. Although the Tribunal's decision on the issue of dismissal is sufficient to dispose of the interim relief application, the Tribunal will, for the sake of completeness, address the question of whether the claimant, if he was able to prove that he had been dismissed, would be likely to show that the reason for his dismissal fell within s152 of the 1992 Act.

38. As noted above, there was significant reference to s146 of the Act in the submissions but this is not the relevant statutory provision. The relevant provision is s152 and this is important because the test is different; s146 speaks of the sole or main purpose of any detriment being penalising an employee for, or deterring them from, making use of trade union services; s152 provides that a dismissal is unfair if the reason (or principal reason) is that the employee made use of trade union services. This distinction is important.

39. The very nature of a "last straw" constructive dismissal case is that there has been multiple acts by an employer which on their own do not amount to a fundamental breach of contract. It is the conduct as a whole which is said to amount to a fundamental breach and so it would be the reason for the whole of that conduct which would be the "reason" for any constructive dismissal.

40. It is quite clear from the claimant's own case that there is no one reason for the whole of the respondent's alleged conduct. As set out above, the claimant's own submissions allege that the earlier correspondence in October 2024 was motivated by the claimant disclosing his disability to the respondent. Further, these events occurred before the claimant made use of trade union services.

41. In these circumstances, it cannot be said that the claimant will be likely to show that the reason (in the sense of a sole reason) was the fact that he had made use of trade union services.

42. It is correct that, by the time he resigned, the claimant had made use of his trade union's services and that the later conduct relied on by the claimant was, at the very least, related to this fact (that is, it was the respondent's refusal to engage directly with the claimant's trade union representative). It is this which is said to be the "last straw".

43. However, the fact that something was the "last straw" does not mean that this is the sole or principal reason for any constructive dismissal. As noted above, the very nature of a "last straw" case is that it is the conduct as a whole (and not simply the "last straw") which gives rise to any fundamental breach and, therefore, to there being a dismissal in law.

44. In the present case, the claimant relies on a range of conduct by the respondent as giving rise to his dismissal and, as noted above, he alleges different reasons for different elements of the respondent's conduct. In these circumstances, the Tribunal does not consider that the claimant is likely to show that the principal reason for any dismissal was because he made use of trade union services.

45. For all these reasons, the Tribunal considers that the claimant's application for interim relief is not well-founded and it is hereby dismissed.

Date sent to parties **25 April 2025**