EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000041/2025

Held in Glasgow via Cloud Video Platform (CVP) on 22 April 2025

Employment Judge R King

Mr T Stewart	**Claimant** **In Person**
ICTS (UK) Ltd	**Respondent** **Represented by:** **Mr M Ramsbottom - Senior Litigation Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's claim is dismissed.

REASONS

Introduction

1. The claimant has presented a claim of unfair constructive dismissal. Although he does not have two years qualifying service, his position is that he was automatically unfairly constructively dismissed in circumstances where he had asserted a statutory right and therefore there is no qualifying period of service. The statutory right he relies on is the right not to suffer an unauthorised deduction from his wages in terms of section 13 of the Employment Rights Act 1996. His claim therefore falls to be decided in terms of section 104(1)(b) of the Employment Rights Act 1996, in which case the burden of proving the reason for dismissal falls on him.

2. In advance of the hearing the parties had agreed a joint bundle of documents. It should be noted that while the claimant had that bundle in his possession, he was unable to access it during the hearing as he was joining the CVP

platform on his mobile telephone. On several occasions, the Tribunal ensured that he was content to proceed even though he was unable to view the documents. The documents about which evidence was led were all documents whose terms were not in dispute and that he was either the author or recipient of and he was fully aware of their contents. Care was taken at all times to ensure that when any document was referred to, the entire relevant section of that document was read out. The claimant confirmed he was content with that approach.

Relevant law

Constructive dismissal

3. The relevant law is contained in the Employment Rights Act 1996. Section 94 (1) of this act provides an employee with the right not to be unfairly dismissed by his employer.

4. Section 95 (1)(c) provides that an employee is to be regarded as dismissed if –

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

5. The leading case relating to constructive unfair dismissal is ***Western Excavating (ECC) Limited v Sharp [1978] ICR 221*** in which Lord Denning held that:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

6. Unlike the statutory test for unfair dismissal, there is no band of reasonable responses test. It is an objective test for the Tribunal to assess whether, from

the perspective of a reasonable person, in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and to refuse to perform the contract. (***Tullet Prebon plc v BGC Brokers LP 2011 IRLR 420***).

7. In ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*** the Court of Appeal stated that 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 ***Waltham Forest v Omilaju [2004] EWCA Civ 1493***) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a previous affirmation, because the effect of the final act is to revive the right to resign).

(5) Did the employee resign in response (or partly in response) to that breach?

8. There is no rule of law that a constructive dismissal is necessarily unfair. If it finds there has been a constructive dismissal a Tribunal must also consider whether that dismissal was fair or unfair having regard to section 98(4) of the Employment Rights Act 1996, which provides –

"(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case"

9. In that case the Tribunal must therefore consider whether the respondent had a potentially fair reason for the breach (***Berriman v Delabole Slate 1985 ICR 546***) and whether it was within the range of reasonable responses for an employer to breach the contract for that reason in the circumstances. When making this assessment, the Tribunal must not substitute its own view of what it would have done but consider whether a reasonable employer would have done so, recognising that in many cases there is more than one reasonable response.

Assertion of a statutory right

10. The relevant statutory provision is as follows:

104 - Assertion of statutory right.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

11. In *Mennell v Newell & Wright (Transport Contractors) Ltd [1997] EWCA Civ 2082,* the Court of Appeal pointed out that all that was required was for the employee to allege that his employer has infringed his statutory right and that the making of the allegation was the reason for his dismissal. The Court of Appeal held that the allegation need not be correct, either as to the entitlement to the right or as to its infringement, provided that the claim was made in good faith.

Issues

12. The issues for the Tribunal were therefore:

(1) Did the claimant allege in good faith that the respondent had infringed a right of his, which is a relevant statutory right, namely his right not to suffer an unauthorised deduction from his wages?

(2) Did the respondent breach his contract of employment because he had asserted that statutory right?

(3) If so, was such breach (or breaches) sufficiently important to justify the claimant tendering his notice?

(4) Did the claimant resign in response to such breach?

(5) Did the claimant waive or affirm any such breach?

Witnesses

13. The claimant gave evidence on his own behalf. For the respondent, Michelle McLaughlin, station manager, and Raymond Bell, security team manager, gave evidence.

14. A joint bundle of documents was lodged and both parties provided helpful submissions at the conclusion of the hearing.

Findings in fact

15. Having heard evidence, the Tribunal makes the following findings in fact. Where there was a disputed issue, the Tribunal reached a conclusion on the balance of probabilities. It is not the Tribunal's intention to recite or make findings in fact in relation to every piece of evidence that it heard, since that would include facts that were ultimately irrelevant to its conclusions on the disputed issues to be determined.

Background

16. The respondent provides security services across various sectors within the UK and Ireland. It employed the claimant as a security officer between 24 February 2023 and 2 January 2025. His place of work was Glasgow Airport where his duties were to protect the security of passengers, including ensuring that passengers did not take unauthorised or dangerous objects through the airport onto flights.

17. In addition to his security duties, he also carried out *"in flight"* tasks which involve checking food coming into the airport for any unauthorised or dangerous objects.

18. Prior to the termination of his employment, his hourly rate was £13.42 per hour plus a shift allowance of 75p per hour. Although he was only contracted to work for 20 hours a week, he regularly worked more than 40 hours per week and overtime was generally readily available.

The importance of DNXCT

19. It is an essential annual requirement of the role of security officers that they complete a Digital National X-Ray Competency Test (DNXCT) in order to demonstrate their ability to operate the X-ray equipment used in the airport screening security process.

20. All certification of x-ray screeners in the UK is undertaken by aviation security instructors and test managers on behalf of the Civil Aviation Authority. It is a strict condition that each security officer is given only three attempts to pass.

21. Although the claimant passed his initial DNXCT assessment on his induction, his continued employment as a security officer was conditional on his passing the screening process during his second year in the role. Unfortunately for him he subsequently failed the test on four occasions, namely on 18 January 2024, 19 January 2024, 4 June 2024, and 16 September 2024.

Discussion of alternative employment as a baggage support officer

22. On 22 November 2024, the respondent wrote to the claimant informing him that because he had failed his first three attempts, it was considering termination of his employment unless it could provide him with alternative work.

23. At a meeting on 28 November 2024 the respondent's then compliance and training manager Michelle McLaughlin informed the claimant that there was no option for him to attempt the test again and that he could no longer be employed as a security officer, as he had not met an essential performance requirement of that role.

24. However, she also informed him of the possibility of his moving to a different position as a baggage support officer if he was interested in redeployment. When the claimant asked Miss McLaughlin about the rate of pay she explained that the baggage support officer position had a different pay structure to the security officer role. As she did not have the pay details to hand she promised to forward them to the claimant after the meeting.

25. Further to this meeting, Miss McLaughlin e-mailed the claimant on 29 November with a copy of the Baggage Support Officer job description and asked if it was of interest to him.

26. On 1 December the claimant e-mailed Miss McLaughlin to say that he was interested in the position, which he understood –

"would be on the same contract which is 20 hours plus overtime with the same pay structure, I am happy with this."

27. On 2 December 2024, Miss McLaughlin e-mailed the claimant to explain that he would remain on 20 hours per week. In relation to pay, she referred him to the attached job description, which stated that the rate of pay for that position was £13.05 per hour.

28. Although the claimant accepted that he had received the respondent's e-mail confirming the baggage support officer's rate of pay of £13.05 per hour, he mistakenly assumed that this was inaccurate. His mistake was that he understood the respondent had previously advertised positions at lower pay rates than their actual pay rate. He believed that they had made that same mistake in respect of the information provided about the pay rate for a baggage support officer and that his pay rate would remain the same as when he was a security officer.

29. However, he did not clarify that with Miss Mclaughlin in response to her 2 December e-mail and she therefore reasonably believed that the claimant was willing to redeploy to the baggage support officer role at the hourly rate of £13.05 per hour.

The events of 2 January 2025

30. On the morning of 2 January 2025, the claimant attended work to begin his new role. On his arrival, the security team manager Raymond Bell handed him a document dated 29 December 2024 entitled ''AMENDMENT TO TERMS AND CONDITIONS OF EMPLOYMENT'', which confirmed that his new role, effective from 5 January 2025, would be Baggage Support Officer in the Aviation and Hold Baggage Team and his rate of pay would be £13.05 per hour. Otherwise, his terms and conditions would remain unchanged. He asked the claimant to sign this document to acknowledge the change to his terms and conditions.

31. When he read the document, the claimant told Mr Bell that he was unhappy because he had expected his pay to remain the same as it was when he was a security officer. He therefore told Mr Bell that he would not accept the role. In response, Mr Bell told the claimant not to be hasty and that the baggage support officer role was a good job to have in a good department. However,

the claimant said that he had no option but to resign, handed Mr Bell his pass and walked out. Although Mr Bell tried to stop him leaving, the claimant was adamant that he was leaving there and then. After the claimant left the premises, Mr Bell telephoned Miss McLaughlin to inform her about the events that had just taken place and that the claimant had resigned.

Miss McLaughlin's acknowledgment of the claimant's resignation

32. On 2 January 2025 Miss McLaughlin sent an email to the claimant in the following terms –

"I write to acknowledge receipt of your verbal resignation, with immediate effect, to Raymond Bell, security Team Manager, dated Thursday 2nd January 2025 and to confirm your resignation is hereby accepted.

By mutual agreement, your employment ended on Thursday 2nd January 2025.

…

Your pass has already been surrendered during your shift on the 2nd January 2025. Please return your uniform to the landside offices in Arran court as soon as possible."

33. The claimant did not respond to Miss McLaughlin's e-mail until 21 January 2025, when he e-mailed her in the following terms -

"Hello Michelle

I have thought about it the last few weeks and I would like to withdraw my resignation.

I had accepted the option of moving downstairs (BSO) but was not happy with getting my hourly rate cut and losing my shift allowance. I hope you understand my feeling on this matter.

I am now prepared to work the BSO role, do the training and accept the £13.05 per hour that goes with this new position. I can also help out with IFS.

I hope you can still use a worker like me and I look forward to your response."

34. By this time, the previously vacant baggage support officer position that had been offered to the claimant within the team had already been filled and the respondent was therefore unable to agree to the claimant withdrawing his resignation.

Submissions

Claimant's submissions

35. In his submission, the claimant explained that on 2 January 2025, he had been frustrated and upset. He had genuinely thought that when he took on the new role as a baggage support officer, everything would be the same but when he was handed the written terms and conditions, he discovered that it was not.

36. He felt he was worth more than that and that he had been treated unfairly. He believed that he had been told twice that he would be on the same contract. When he found out his new rate of pay would be different, he felt he was worth more than that due to his performance in other areas of his workplace, even recognising his deficiency in relation to the x-ray machine. In the circumstances, he believed that he was entitled to the same contractual rate of pay and that reducing his pay had been a breach of that contract.

Respondent's submissions

37. On behalf of the respondent, Mr Ramsbottom submitted that the respondent's understanding was that the right asserted was the right not to have his contract breached by having his pay reduced without his consent. In his submission however, the claimant had misunderstood the situation.

38. The events of 2 January 2025 had taken place because of the claimant's failings on the x-ray machine, which meant he could no longer carry out a security officer role, and because the respondent had been keen to find him an alternative suitable role to keep him in employment.

39. Mr Ramsbottom acknowledged that the claimant had generally been considered a good worker who was held in high regard. However, because of his failings on the X-ray machine the respondent had to consider an alternative position for the claimant, or he would lose his job.

40. Miss McLaughlin had therefore gone through the process of identifying a new suitable alternative position for the claimant as a baggage support officer. She had discussed the terms and conditions of that role with the claimant. She had sent him a copy of the job description, which confirmed that the rate of pay was £13.05 per hour. The claimant had been entitled to turn it down, but he had not.

41. In Mr Ramsbottom's submission, it was only on 2 January 2025 that it eventually dawned on the claimant that the baggage support officer role was actually paid a lower hourly rate than he was being paid previously. The claimant had only acknowledged that when Mr Bell had handed him the paperwork, in response to which he had resigned and handed in his pass.

42. Unfortunately, by the time the claimant asked for his job back on 23 January 2025, the previously vacant position had been filled.

43. In Mr Ramsbottom's submission, there had been no breach of contract by the respondent and no dismissal, constructive or otherwise. In all the circumstances, he submitted the claimant's claim should fail.

Discussion and decision

44. In the first place the Tribunal had to determine whether the claimant had asserted a statutory right not to suffer unauthorised deductions from wages. It was clear that he had refused to agree to a contract variation involving a reduction in pay and had instead resigned because he believed he was contractually entitled to his previous rate of pay.

45. It was clear that his belief was mistaken. However, it was also clear that his belief was genuine and honest. In those circumstances the Tribunal concluded that when he refused to sign the contract amendment handed to

him on 2 January by Raymond Bell he had made an assertion, in good faith, that his right not to suffer unlawful deductions had been infringed.

46. The next question for the Tribunal therefore was whether the respondent had breached his contract of employment because he had asserted that statutory right and he had resigned in response. To answer that question, the Tribunal considered the entire chain of events leading up to his resignation on 2 January 2025.

47. In the first place, the Tribunal concluded that the respondent acted reasonably when it offered the claimant an alternative position as a baggage handling officer in circumstances where it could no longer employ him in his previous role as a security officer because of his failure to demonstrate competence on the X-ray equipment. While the respondent could not continue to employ the claimant as a security officer it recognised that in other respects he was a valuable and hard-working employee whom it was keen to retain.

48. In relation to the salary of the baggage handling officer role discussed with him, Miss McLaughlin provided the claimant with details of the £13.05 hourly rate in the job description attachment to her e-mail of 2 December 2024. The claimant admitted he had received that e-mail and attachment, but he had understood it to have been inaccurate in relation to the hourly rate. Unfortunately for him he had misunderstood the position, and he only realised that £13.05 was the true hourly rate when Mr Bell provided him with the contract amendment on 2 January 2025.

49. The Tribunal finds that the claimant resigned because of a mistaken belief that the hourly pay rate of the baggage handling officer role was the same as that of the security officer and that the respondent was therefore seeking to reduce his pay without his consent. However, he held that mistaken belief through no fault whatsoever on the part of the respondent, who had been completely fair and transparent with him at all times and had provided him with accurate information. Even after he resigned Mr Bell had urged him to reconsider his position, but he had not been willing to do so.

50. In all the circumstances, there was no breach of contract by the respondent in response to the claimant's assertion of a statutory right. Indeed, there was no breach of contract by the respondent at all. The claimant did not resign in response to a breach of contract by the respondent entitling him to terminate the contract without notice. His claim is therefore dismissed.

Date sent to parties **13th May 2025**