EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001700/2024

Held in Glasgow on 17, 18 and 19 March 2025

Employment Judge E Mannion

Mr J Flannagan	**Claimant** **Represented by:** **Mrs Flanagan,** **Lay representative**
McPherson Ltd	**Respondent** **Represented by:** **Ms McLaughlin** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant

(i) was not constructively unfairly dismissed and his claims against the respondent are dismissed; and

(ii) is not owed notice pay by the respondent and his claim in respect of this is dismissed.

REASONS

Introduction

1. This is a claim for constructive unfair dismissal and notice pay. The respondent asserted that the claimant's employment terminated fairly by way of resignation. As he resigned with immediate effect, no notice pay was due to him.

2. I heard from the following witnesses in the following order:

   (i) The claimant;

   (ii) Mr Michael Cooper (witness for the respondent); and

   (iii) Mrs Fiona Broadwood (witness for the respondent).

3. A joint bundle of documents was agreed in advance of the hearing.

Relevant law

4. **Section 95(1)(c) of the Employment Rights Act 1996 ("the ERA")** provides that an employee is dismissed, when "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".

5. The leading case on this area of law is **Western Excavating (EEC) Ltd v Sharp 1978 ICR 221 CA** where the Court of Appeal confirmed that for an employer's conduct to give rise to a claim of constructive dismissal, there must be a repudiatory breach of contract. As per Lord Denning MR:

> "*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 30 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. An employee must therefore establish the following for a successful constructive dismissal claim:

   (i) There was a fundamental breach of contract on the part of the employer;

   (ii) This breach caused the employee to resign;

   (iii) The employee did not delay too long in resigning.

7. The fundamental breach may refer to the implied duty of trust and confidence as between employer and employee. This duty is set out in **Malik v BCCI [1997] IRLR 462** which states that an employer must not without reasonable cause act in a way that is calculated to or likely to seriously damage or destroy the trust and confidence on which the employment relationship is founded. The Court of Appeal in **Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA** confirmed that the question of reasonable cause should be subject to an objective test.

8. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal even where the last straw itself does not amount to a breach of contract as per **Lewis v Motorworld Garages Ltd 1968 ICR 157, CA**. The last straw doctrine was also discussed by the Court of Appeal in **Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA** who confirmed that the final straw does not need to have the same character as previous acts, nor does it need to be unreasonable or blameworthy conduct. It must, however, contribute, if even slightly, to the breach of contract. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as destructive of his trust and confidence in the employer.

9. Where the course of conduct occurs over a period of time, an employee is entitled to rely on the totality of the employer's acts, provided that the last straw forms part of the series of breaches. This was confirmed by the Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1 CA** and is the

case even if the employee affirmed an earlier breach. As per Langstaff J in **Lochuack v London Borough of Sutton EAT 0197/14**:

"A failure to elect to treat a contract as repudiated does not waive such breaches… If a later incident then occurs which adds something to the totality of what has gone before, and in effect resuscitates the past, then the tribunal may assess, having regard to all that has happened in the meantime — both favourable to the employer and unfavourable to him — whether there is or has been a repudiatory breach which the employee is now entitled to accept. If so, and if the employee resigns at least partly for that reason, it will find in that case that there has been a constructive dismissal."

10. The intention of the employer is not a factor in assessing whether there has been a fundamental breach of contract.

Observations on the evidence

11. I considered that the claimant gave his evidence honestly and truly believed that the respondent treated him so badly that he was entitled to resign as a result. There were areas of dispute in the evidence but for the most part, these disputes arose due to the differing perspectives and perception of what happened. It was clear that the claimant viewed the relationship as irretrievably broken and that he no longer trusted the respondent. At the outset of his evidence when asked why he was at the Tribunal, he answered that he was here because the respondent lied to him. This perception, that the respondent was entirely in the wrong, coloured his view of the respondent's actions. A clear example of this is the phonecall which took place between the claimant and Mrs Braidwood on 4 June, a recording of which was played in full during the hearing. The claimant's evidence was that Mrs Braidwood lied on the call and could not answer questions he asked her, specifically she could not tell him who in Diageo decided he could not come back on the Blackgrange site. Mrs Braidwood's answer to that question on the call was "I don't know, I don't have any to do with that, I don't have contact with the customers." The difficulty for the claimant is that Mrs Braidwood answered this question, but did not have the answer the claimant was looking

for. She did not know who in Diageo made that decision and so could not share this detail with the claimant. The claimant viewed this as Mrs Braidwood avoiding the question, refusing to provide information and lying. In fact, Mrs Braidwood did not avoid the question – she answered it but did not know who made that decision. There was nothing in evidence to suggest Mrs Braidwood as HR manager would have that detail or would have been involved in the discussions with Diageo around the claimant's removal from site. Rather than a HR manager avoiding questions and refusing to provide information to the claimant, the recording of the phonecall evidenced a HR manager attempting to support and help the claimant, going so far as to say she felt terrible about what had happened and attempting to get the claimant to move on from what could not be changed, the decision from Diageo to remove the claimant but retain Mr Corcoran on site, and to focus on his health and returning to work. As such while I accept the claimant genuinely believed what he said in evidence to be true, this evidence is coloured by his perception of what occurred.

12. I considered the respondent witnesses gave their evidence honestly to the best of their recollection. Their evidence was consistent with contemporaneous documents.

Findings in fact

13. The Tribunal makes the following findings in fact on the balance of probabilities

14. The claimant was employed by the respondent from 20 January 2004 until 8 June 2024 when his employment came to an end due to his resignation.

15. The claimant was employed as a HGV Driver. For the last 20 years of his employment, the claimant worked primarily as a shunter on the site at Blackgrange Bond, Blackgrange, Alloa, FK10 2PH ("Blackgrange") operated by Diageo, a client of the respondent. As a shunter, the claimant drove a HGV, albeit onsite only. The Blackgrange site has a road system, roundabouts and speed limits. The claimant was particularly experienced in reversing a HGV. He had not driven a HGV truck on the open road for 20 years.

16. The Blackgrange site is a large site which sits alongside another site, Cambus. There is a security barrier between the two sites.

17. The respondent is a road haulage business operating on a number of sites across Scotland. These sites are run by other companies who are clients of the respondent and to whom the respondent provides haulage services.

18. The claimant normally worked alongside another shunter, Kevin Corcoran, also employed by the respondent.

19. On 5 April 2024, an altercation took place between the claimant and Mr Corcoran. Mr Corcoran was instructed to empty a trailer on the Cambus site. The claimant went to the Cambus site to see what Mr Corcoran was doing and the two engaged in a verbal altercation. During this altercation, the claimant called Mr Corcoran a liar and said to him “hit me” a number of times. The altercation did not get physical.

20. The claimant telephoned Scott Walker, Traffic Planner at approximately 9.15am to inform him what had happened. He was told to “get on with it” or words to that effect. The claimant continued his work until his normal clock out time at lunchtime.

21. The altercation was witnessed by a Diageo employee, Stuart Holden who informed his employer of what had occurred. Jonathon Cuthbert-Imrie, business leader at Diageo telephoned Mr Walker of the respondent and informed him that Diageo wanted the claimant off the site because of this altercation. This call happened approximately 2 hours after the claimant reported the incident to Mr Walker. It was followed by an email at 13.28 from Mr Cuthbert-Imrie stating that the claimant was suspended from site until an investigation was carried out.

22. Michael Cooper manages the Blackgrange/Cambus contract for the respondent. He was on annual leave on 5 April travelling to England. Mr Walker telephoned him to inform him of what had occurred and Diageo’s response. Mr Cooper instructed him to suspend both the claimant and Mr Corcoran and to instigate an investigation into what had occurred.

23. At approximately 1.40pm Mr Walker telephoned the claimant to inform him of his suspension. He was informed that this was due to the incident at Cambus involving the claimant and Mr Corcoran. Mr Corcoran was also suspended that day.

24. On 8 April, Mr Cooper telephoned the claimant and advised him to get a digital tachograph card. If a HGV driver is driving on a public road, they are required to take specific rest breaks and drive at certain speeds. This is recorded on the digital tachograph. Mr Corcoran was also advised to get a digital tachograph.

25. On either Friday 5 or Monday 8 April, Neil Wilson of the respondent was instructed to investigate the incident. This was not a disciplinary investigation under the respondent disciplinary process and instead was an investigation into the incident, rather than either of the two employees involved. The Acas Code of Practice on Discipline and Grievance did not apply to this investigation.

26. Mr Wilson telephoned the claimant on the 8 April and asked him to come to the Blackgrange site to give a statement about the incident on Friday. He did so. This statement contained at pages 82 – 85 of the bundle was on the respondent headed paper and recorded both the questions asked and the answer provided by the claimant. In this statement he confirmed Mr Corcoran was angry and asked him to get out of the cab of the truck. The claimant did so and said to “him hit me because if you do you lose your job.” He also confirmed that he called Mr Corcoran a liar a number of times. He stated that he viewed Mr Corcoran asking him to get out of his cab as something more threatening than calling Mr Corcoran a liar.

27. Mr Wilson spoke to Mr Corcoran. Mr Corcoran’s statement was at page 81 of the bundle. It was not on headed paper and did not follow the same format as the claimant’s in that it did not record the questions asked by Mr Wilson. This statement confirmed that the claimant called him a liar and said “hit me” to Mr Corcoran.

28. Mr Holden from Diageo also provided a statement of the incident. This statement was attached to the email from Mr Cuthbert-Imrie at 13.28 on Friday 5 April stating that the claimant was suspended from site.

29. Mr Corcoran and Mr Holden's statements established the claimant as the aggressor and both stated that the claimant said "hit me" to Mr Corcoran.

30. The respondent informed Diageo that they had investigated the incident and were not going to take formal disciplinary action against either employee. Irrespective of this, Diageo did not want the claimant to return to their site and informed the respondent of this.

31. On 13 April the claimant was advised by Mr Cooper that his suspension was lifted. He was informed that he would not be returning to the Blackgrange site as Diageo did not want him on site. Instead, a temporary shunting job had been found for him at a site at Glenturner covering a four week annual leave period. Mr Corcoran's suspension was also lifted but he was returning to the Blackgrange site as Diageo did not have any difficulty with this.

32. The claimant worked at the Glenturner site for approximately three weeks at which point the operator of the site informed Mr Cooper that they did not want the claimant on site any longer, alleging that the claimant was not doing sufficient work and "hiding" when at his place of work. These allegations were not investigated by the respondent, who accepted what their client reported to them.

33. On 14 April the claimant emailed Mr Cooper raising a grievance against Mr Corcoran and Mr Holden, stating that both had lied about the incident on 5 April. The grievance raised an issue with the fact that only the claimant was removed from Blackgrange permanently. It asked why Mr Walker did not take the claimant's notification seriously and why it was only investigated once Diageo complained. It asked why Mr Corcoran did not report the incident if he felt threatened, what was involved in the investigation, what the allegation was and the evidence to back this up.

The grievance also requested “all the material that relates to this incident that directly involves my name”.

34. Fiona Braidwood, HR Manager, acknowledged the grievance on 15 April and confirmed that it would be investigated. The email confirming this also stated that while the grievance was being investigated, the disciplinary investigation would be paused. This was an error as the completion of the investigation allowed the lifting of the suspension on 13 April.

35. Phil Leuty, Fleet Engineering Manager was appointed to investigate the grievance and a grievance meeting took place on 23 April. At this meeting Mr Leuty confirmed that the respondent could not look into a grievance against Mr Holden, who was not employed by the respondent. Mr Leuty ultimately found that the grievance was not upheld and informed the claimant of this in writing, by letter dated 30 April. This letter confirmed that there was no evidence that Mr Corcoran was lying; that the claimant agreed calling Mr Corcoran was a liar was challenging behaviour; and that the claimant had options to de-escalate the situation but chose not to. It also confirmed that suspension was not a disciplinary sanction and that the customer requested the claimant be removed from their site. The claimant was advised of his right of appeal.

36. The claimant and Mr Cooper had a meeting at the respondent premises at Aberlour. During this meeting Mr Cooper explained that as Diageo did not want the claimant to return to the Blackgrange site, the only alternative work was HGV driving. It was agreed that the claimant would take some annual leave and when he returned, he would shadow another HGV driver, Billy Stevenson for a number of days to get him comfortable with being on the road again after a protracted absence. The respondent also had a training school to train employees as HGV drivers. The respondent intended that the claimant would learn a particular route with Mr Steveson, would drive this route to the driving school where he would be given a trailer to drive back. Ultimately the claimant did not attend the driving school as he began a period of sickleave before this

occurred. The offer of further training was made to the claimant by Mrs Braidwood on 4 June during a call to discuss his sickness absence.

37. This change in duties and responsibilities from shunter to HGV driver did not have an impact on terms of pay but it meant a change in work schedule. Instead of beginning work at 6am with an early finish on a Friday, the claimant's workday would begin at 4am. It also meant he would be out on the road travelling rather than working from a singular place of work. The claimant agreed to these changes.

38. The claimant began shadowing Mr Stevenson on Tuesday 7 May. Mr Stevenson informed the claimant that he was not a trainer driver. The claimant did not do any driving on the Tuesday or Wednesday. On Thursday 9 May, the claimant shadowed Stevie Waters, another HGV driver. Again the claimant was a passenger and did not drive the HGV. There was an expectation from the respondent that when shadowing other drivers, the claimant would undertake some driving duties to become more comfortable behind the wheel of the HGV.

39. On or around 9 May, the claimant was asked by text message to pick up a HGV truck in Perth and drive it to Aberlour. The claimant responded to say he had not been trained on the digital tachograph and was told that this could be sorted out when he arrived at Aberlour. The claimant believed that driving without digital tachograph training was a criminal offence and could result in him losing his licence if stopped by the police. He did not explicitly inform the respondent of this. In any event, the claimant did not drive the HGV truck to Aberlour and the respondent did not insist on this.

40. On 2 May, the claimant emailed Mr Cooper asking him if the investigation into the incident on 4 April was closed. He received no reply. He emailed Mrs Braidwood on 6 May asking the same question, advising that he was "stressed to the max". A second email was sent to Mrs Braidwood on 7 May asking the same question. There was no response to either email.

41. The respondent wrote a letter to the claimant dated 8 May. This was signed by Fiona Braidwood and entitled Letter of Concern. In it Mrs Braidwood confirmed that the claimant engaged in unacceptable behaviour by "engaging in confrontational behaviour" with another employee which resulted in the client, Diageo unwilling to allow the claimant onsite as a shunter. It also stated that when placed on an alternative site, a second client asked that he be removed from their site. It went on to say "We have now arranged training and support for you to work as a road driver. This is the final option we have as given your behaviour, it is difficult to find a site that you can be placed at. For the avoidance of doubt and in the interest of clarity any further misconduct will result in more formal disciplinary action being taken which could ultimately result in you losing your employment with us."

42. The letter was not a disciplinary sanction. The claimant attempted to appeal the letter of concern but was informed that he could not do so.

43. The claimant began a period of sickness absence on 13 May due to work-related stress. He remained absent until his employment terminated. The respondent did not make contact with the claimant about his absence until 23 May when Mrs Braidwood emailed to attempt to arrange a call. This call ultimately took place on 4 June. It is the respondent's normal practice where an employee is absent for work-related stress to give them some time before contacting them. On this occasion, the respondent made contact 10 days after the absence began.

44. During the call on 4 June Mrs Braidwood repeatedly advised that it was Diageo's decision to remove the claimant from Blackgrange and that the respondent's hands were tied. The claimant asked specifically who made the decision and Mrs Braidwood responded that she did not know as she has had no contact with the client. She acknowledged that it was human nature for the claimant to be annoyed about this and that she felt terrible about the way in which things had gone on. When speaking about the road driving role, Mrs Braidwood accepted that the claimant was undertaking a different role and that he would get additional training and support to help him. The claimant stated

that the “work side” of things was not the stressor, but the fact that Mr Corcoran remained on site at Blackgrange. He stated that Mr Corcoran “got away with it, he was the aggressor and I am the one who suffered for it.” Mrs Braidwood ended the call by informing the claimant that once he had his health back, the opportunity was there to get the additional training he felt he needed for the road driving role.

45. Following this call, the claimant emailed Adrian Cai, Site Director at Diageo outlining briefly that he had been “aggressively attacked” by Mr Corcoran on 5 April, that he had been suspended and no disciplinary action taken against him but that Diageo have not allowed him back on site. He asked why this decision was taken, why Mr Corcoran was still on site and what time the incident was reported to Diageo. Mr Cai responded on 6 June advising briefly that an investigation was carried out by the respondent and that “any decisions thereafter as a result of that investigation were made by McPhersons in relation to the investigation outcome.” Mr Cai as Site Director has responsibility for Diageo Global and underneath him has a Senior Site Manager and Business Leader, Mr Cuthbert-Imrie. Mr Cai does not have day to day management of the site or the contract between Blackgrange and the respondent. Mr Cuthbert-Imrie undertakes this latter role.

46. The claimant believed that this response from Mr Cai was proof that the respondent had made the decision that he not be allowed back on site at Blackgrange. He believed that Mr Cooper and Mrs Braidwood had lied to him when they told him the decision to remove him from site was a Diageo decision. The claimant did not bring the contents of this email to the attention of the respondent. This email is not evidence the respondent made the decision to remove the claimant from Blackgrange permanently. It does not address or answer the specific questions as set out by the claimant in his email. It does not state that Diageo were happy for the claimant to return to Blackgrange but that the respondent decided to remove him permanently from site.

47. On 8 June the claimant emailed Mrs Braidwood resigning from his post. The letter set out a number of reasons which the claimant was relying on as the reason for his resignation. These included that:

    (i) Significant changes to his job without consultation or notice;

    (ii) That the respondent had acted in a calculated way which damaged his reputation both inside and outside of the workplace;

    (iii) That the respondent failed in their duty of care to prevent harassment against him in the workplace;

    (iv) That the decision to remove him from the Blackgrange site was the respondent's decision rather than the client's;

    (v) That the investigation undertaken by the respondent did not comply with the Acas Code of Practice.

48. Mrs Braidwood emailed the claimant on 14 June asking him to reconsider his resignation, reiterating that his removal from the Blackgrange site was a client decision and once he was fit enough to return to work, the respondent was willing to put in place whatever training and support he felt he needed.

49. The claimant sent a further email to Mrs Braidwood on 15 June rejecting the offer to reconsider his resignation. He stated that the respondent "has willfully breached the implied term of mutual trust and confidence by intentionally, knowingly and purposely without justifiable excuse fabricated the fact that I was not allowed on site at Blackgrange as a shunter." He noted that he viewed himself as being constructively dismissed.

50. The claimant's employment terminated on 8 June as per his letter of resignation.

51. **Submissions**

Both parties made submissions at the conclusion of the evidence. For brevity I have not included these here but full consideration was given to those submissions in reaching the decision.

Decision

52. The issues to determine:

(i) Was there a fundamental breach of contract?

(ii) Did the claimant resign in response to that breach?

(iii) If so, what remedy is available?

(iv) Is the claimant entitled to notice pay?

Was there a fundamental breach of contract?

53. The claimant is relying on the implied term of trust and confidence. If it is found that this term has been breached, this breach is said to be fundamental.

54. Whether a breach of contract is sufficient or fundamental is a question of law and fact. As above, an employer *"will not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee".* This is an objective test. The subjective perception of the employee can be relevant but is not determinative. The is a demanding test, with "damage" qualified by the word "seriously". It requires striking a balance between the employer's interests in managing his business as he sees fit and the employee's interest in not being unfairly or improperly exploited. The conduct at the heart of the alleged breach must be such that an employee cannot be expected to put up with it. The employer demonstrates by its behaviour that it is abandoning altogether the performance of the employment contract. It is not a test that the employer has to behave reasonably towards employees. Acting unreasonably is insufficient.

55. The claimant is not relying on a single act but a series of events from 5 April until his resignation on 8 June. He confirmed that the final straw was receipt of the email from Adrian Cai of Diageo which stated that the decision to remove the claimant from the Blackgrange site was the respondent's decision.

56. The breaches to the implied term of trust and confidence can be grouped as follows:

(i) How the respondent dealt with the altercation between the claimant and Mr Corcoran

(ii) The decision that the claimant be permanently removed from the Blackgrange site

(iii) The change in the claimant's role from shunting to road driving

(iv) The final straw email from Mr Cai

How the respondent dealt with the altercation between the claimant and Mr Corcoran

57. I accepted the respondent's evidence that it is not uncommon for drivers to fall out, which was not challenged by the claimant, and that it was not apparent to the respondent that the altercation between the claimant and Mr Corcoran might require investigation until Diageo requested the claimant's suspension from site until the matter was investigated. I considered that while the claimant informed Mr Walker what had occurred, when he was told to "get on with it" or words to that effect, he did not push back on this or inform Mr Walker that this was a serious matter that required to be dealt with by management. He did not attempt to raise the matter with another manager or with HR and continued with his work until the end of his shift without objection or complaint. I heard no evidence that he spoke to anyone else in the respondent organisation that day, concerned about what had happened or Mr Walker's lack of action in response.

58. Irrespective of who or what instigated the investigation, Mr Wilson was identified as investigator on the day of the incident and he met with the claimant on the next working day, Monday 8 April. The investigation was not

a disciplinary investigation with either the claimant or Mr Corcoran as subjects. Rather it was an investigation into the incident. As the claimant was not subjected to the disciplinary process, the Acas requirements do not apply. The claimant met with Mr Wilson and was given an opportunity to explain his side of the story. The claimant in evidence and in the course of the internal process itself was concerned with why Mr Corcoran did not raise a complaint if he felt threatened and why it took Diageo until around lunchtime to inform the respondent of the issue. The timing of Diageo's actions cannot amount to a breach of contract by the respondent. Neither can Mr Corcan's decision not to report the incident. The claimant also raised concerns about the differing format of his statement and Mr Corcoran's. I considered that these aspects do not amount to breaches to the implied term of trust and confidence as they are insufficiently serious enough to indicate the respondent wished to destroy the employment relationship.

59. I considered that given the three statements available to the respondent, that of the claimant, Mr Corcoran and Mr Holden there was reasonable and proper cause for the respondent to consider the claimant as the aggressor on 5 April, taking into account his admissions he called Mr Corcoran a liar and said "hit me". An employer preferring one employee's side over the other does not amount to a breach of the implied term of trust and confidence. An employer is entitled to consider the information before them and make a determination as to what has occurred. This is what happened here.

60. The claimant was issued with a letter of concern on 8 May. This was described by Mrs Braidwood as 'a warning shot across the bow' to note that the behaviour is not acceptable. She confirmed that the respondent does not use a letter of concern in a totting up exercise in any subsequent disciplinary matters. Mrs Braidwood's evidence in this regard was challenged, in particular the use of the phrase "more formal disciplinary action". It was put to her that this meant further disciplinary action, suggesting the investigation to date also amounted to disciplinary action. She disagreed and explained that it meant formal disciplinary action rather than informal action. I accepted this explanation. While the wording of this letter could have been clearer to avoid

misunderstanding, I considered that this letter was not a disciplinary sanction. It is reasonable for an employer to deal with incidents in the workplace in an informal manner. Not every incident merits formal disciplinary action and arguably formalising the process and making the claimant the subject of the disciplinary process when it was not warranted could itself have breached the implied term of trust and confidence. Deciding to deal with the incident informally is not a breach of the implied term of trust and confidence.

61. Taking these matters as a whole, I consider that the respondent had reasonable and proper cause for investigating the incident in an informal manner once they received the complaint from Diageo, in finding the claimant was the aggressor given the claimant's own admissions, and in informing him in writing that the matter had concluded but that should he display similar behaviours again, the matter would be dealt with by way of formal disciplinary action. Even if it were the case that there was no reasonable or proper cause to the respondent's actions in dealing with this altercation, I do not find that the respondent's behaviour was calculated or likely to destroy or seriously damage the trust and confidence between employer and employee. While the claimant subjectively believed this to be the case, the claimant's view is not determinative. It is accepted that this was a difficult and stressful time for the claimant and that ultimately he does not accept that the respondent believed Mr Corcorran over him. On an objective view, the respondent's actions in respect of the altercation are not such that an employee cannot be expected to put up with it. Unreasonable conduct is not enough for a fundamental breach, the conduct must be such that it seriously damages the employment relationship. This did not occur here.

The decision that the claimant be permanently removed from the Blackgrange site

62. The thrust of evidence from both respondent witnesses was that this was entirely out of their hands, that it was a Diageo decision and while they could try and persuade Diageo to let the claimant back on site, ultimately if they did not change their mind, the respondent could not force their hand. The claimant did not appear to accept this position and instead argued that it was really the

respondent's decision rather than Diageo's. The claimant was relying on the email from Mr Cai, site director. I accepted the respondent's unchallenged evidence that Mr Cai as site director has oversight of Digaeo globally and has both a senior site manager and business leader below him. It was the business leader, Mr Cuthbert-Imrie who has day to day interaction with the respondent about the services the respondent provides to them. It was also Mr Cuthbert-Imrie who informed the respondent on 5 April that they required the suspension of the claimant while an investigation took place. Mr Cooper's unchallenged evidence was that he attempted to fight the claimant's corner with Mr Cuthbert-Imrie but ultimately if a client doe not want an employee on site, there is not much the respondent can do on this.

63. As such, I determined that the respondent had reasonable and proper cause in removing him from the Blackgrange site permanently, as this was a client request.

The change in the claimant's role from shunting to road driving

64. The claimant gave evidence that while he is a HGV driver as per his contract of employment and drives HGVs as part of his shunting role, he had not undertaken the HGV driver role on public roads for some 20 years. This was understood by the respondent who put in place a period of training for the claimant, initially shadowing another driver and offering the opportunity to attend the respondent's driving school. He would be taught a specific run, then dropped off at the respondent's driving school, someone would load his trailer and he would drive back. While there was much made in the evidence about whether the driver the claimant was shadowing was a trainer driver or a mentor, it is not in dispute that the respondent was unaware of any concerns the claimant had about the quality or quantity of training he was receiving. Any concerns the claimant may have had were not communicated to the respondent at any time prior to his resignation. There was also much made of the fact that the claimant was not trained on how to use a digital tachograph. The claimant did not dispute that he had training on rest breaks and maximum driving hours which the tachograph records but maintained that he had not

been trained on how to use the digital tachograph itself. I accepted that the claimant was not shown how to use the digital tachograph as there was no evidence this had occurred, but understood from the evidence that such training would have been short as it is a straightforward machine, with only three modes. The lack of digital tachograph training came up when the claimant was asked to bring a HGV to Aberlouer. He informed the respondent he did not have the training and they responded that this could be done once he got to Aberlouer. Ultimately, the claimant was not required to undertake this task. The claimant's training lasted for 4 days before he began a period of sickness absence. He remained absent until his resignation on 8 June.

65. It was also accepted by the respondent that the change in duties from shunter to road driver resulted in a change of hours for the claimant and a change from a single work location. Mr Cooper met with the claimant to discuss the fact that there were no shunting roles available and that the only option was a road driving role. The claimant agreed to these changes. Having been placed in the difficult position where the client did not want the claimant onsite any more, there were limited options open to the respondent. The respondent could have considered dismissing the claimant for some other substantial reason but instead looked at other available work. There were no other permanent shunting jobs in a reasonable geographical area to the claimant's home address and so HGV driving was the only option. This was not disputed by the claimant. This was discussed with the claimant and he agreed to the change. In evidence the claimant stated that the change in hours was difficult for him as he was caring for his 84 year old mother. This was not something he made the respondent aware of when discussing the road driving job or at all. It was suggested that the respondent should have considered whether the claimant had caring or other responsibilities and asked him about this. I do not accept that position. In the absence of information to the contrary, an employer cannot suppose or surmise that an employee will require altered hours of work. The claimant had an opportunity to raise any concerns he had with the hours of work in his meeting with Mr Copper but he did not do so.

66. I considered that on the whole, the respondent's actions in placing the claimant in a road driving role and training him in that role do not amount to a breach of the implied term of trust and confidence. In the first instance, the respondent had reasonable and proper cause for the change in role. Even if there was no such reasonable and proper cause, the respondent's actions did not demonstrate a calculated effort to damage or destroy the employment relationship but rather an attempt to ensure the continuation of that relationship in light of the demand from a client that the claimant no longer work at the site he spent the last 20 or so years on.

Final straw email from Mr Cai

67. The claimant confirmed in evidence that the final straw was the email sent by Mr Cai on 6 June. In his view, this email confirmed that the respondent took the decision to remove him from Blackgrange permanently. Mr Cai is not an employee of the respondent. As such this email is not something done by the respondent and so cannot be a breach of the implied term of trust and confidence by the respondent. A breach must be by the employer to be relied upon.

68. In considering the content of the email itself, and the claimant's interpretation that it evidences a lie on the part of the respondent, I determined that the respondent did not lie to the claimant about who decided to permanently remove him from the Blackgrange site. While it is appreciated that this is the claimant's perception and belief of what happened, it does not hold up to scrutiny. Why would the respondent lie? The claimant did not offer any motivation for the respondent's alleged lie, either on the part of Mr Cooper or Mrs Braidwood. If the respondent wanted the claimant removed from Blackgrange permanently, they had the opportunity to do so at the conclusion of Mr Wilson's investigation. They did not need to use Diageo as a smokescreen for this. Given they concluded that the claimant was the aggressor in the altercation, it was open to them to move the issue into the formal disciplinary process where removal from site could have been a disciplinary sanction. If we consider this further, removing the claimant from

Blackgrange created difficulty for the respondent. They needed to fill his role on Blackgrange and find him alternative work. They were unable to avail of his skills and experience gained over 20 years in a shunting role. Re-training him as a HGV driver would take time and resources, which they were happy to provide but it meant the claimant would not undertake a full workload of a HGV driver until fully trained and after that would take some time before he was fully comfortable in the role. There was also the management time needed to make the various arrangements and support the claimant. Taking this into account, I considered that the email from Mr Cai does not evidence that the respondent lied and as such is not a final straw which can be relied upon to resign.

69. In conclusion, I considered that the respondent's actions do not amount to a fundamental breach of contract allowing the claimant to resign in response. His resignation does not lead to an unfair dismissal under Section 95(1) of the ERA and his claim fails.

Notice Pay

70. The claimant resigned with immediate effect on 8 June 2024. He therefore did not work or give his contractual or statutory notice. As his resignation does not fall within a dismissal under Section 95(1) of the ERA, there is no obligation on the respondent to pay notice pay when an employee resigns with immediate effect.

Date sent to parties **29 May 2025**