



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107495/2023

Held in Aberdeen on 19, 20 and 21 January 2026

Employment Judge J Shepherd
Tribunal Member A H Perriam
Tribunal Member A Atkinson

James Marshall

Claimant
Represented by:
Mr Cunningham
Counsel
Instructed by:
Messrs DJP
Solicitors

McPherson Limited

Respondent
Represented by:
Ms McLaughlin
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant was constructively unfairly dismissed. The respondent is ordered to pay to the claimant the total sum of **Thirty Two Thousand and Sixty Seven Pounds and Fifteen Pence (£32,067.15)**, consisting of:

- (1) A basic award in the sum of £5,787.00
- (2) A compensatory award in the sum of £26,280.15

REASONS

Introduction and issues

1. This claim came before the Tribunal having been remitted to a fresh Tribunal for rehearing by the Employment Appeal Tribunal in a judgment dated 9 July

2025 following a successful appeal by the claimant of an earlier judgment of the Aberdeen Employment Tribunal promulgated on 25 June 2024.

2. It was explained to the parties at the outset of the hearing that the Employment Judge had read the original Tribunal judgment and the judgment of the Employment Appeal Tribunal in order to understand the scope of the remittal, but that the members, Mr Perriam and Mr Atkinson, had not read those judgments. The parties therefore understood that this was an entirely fresh re-hearing of the case and that the parties must approach the evidence and submissions on that basis.
3. Although there had been a preliminary hearing following the remittal, there was no agreed list of issues. The parties were therefore given some time at the outset of the hearing to draft and agree a list of issues to be determined by the Tribunal. The Tribunal is grateful to both representatives for their cooperation in preparing this list.
4. The claim is one of constructive unfair dismissal. The agreed list of issues provided by the parties is as follows:
 1. *Was the claimant constructively dismissed (ss 94(1), 95(1)(c)ERA 1996)?*
 2. *Did the respondent commit a fundamental breach of contract, namely the implied term of trust and confidence? The claimant relies on the following breaches:*
 - a. *Exposure to caustic steam at Glenlossie on 15 May 2017;*
 - b. *The respondent's inadequate response to the incident at Glenlossie;*
 - c. *Exposure to the risk of tipping close to an overhead powerline at Allanbuie Farm on 12 June 2017;*
 - d. *The respondent's inadequate response to the incident at Allanbuie Farm;*
 - e. *The setting of unreasonable targets for the tipping of draff at Grissan Riverside from around July 2023, resulting in the claimant being unable to take his required rest breaks;*
 - f. *The respondent's inadequate response to the claimant's concerns, including sending a co-worker to check up on the claimant on 6/7 November 2023 and the respondent's failure to investigate the claimant's concerns.*
 3. *Did the claimant resign in response to a fundamental breach of contract?*
 4. *Did the claimant delay resigning and affirm the contract?*
 5. *What constitutes the fundamental breach or breaches of contract?*
 6. *Did the claimant affirm the contract?*

- a. *In delaying his resignation after the events at Glenlossie on 15 May 2017 (caustic steam)?*
 - b. *In delaying his resignation after the events at Allanbuie Farm on 12 June 2017 (overhead power lines)?*
 - c. *In delaying his resignation after the events at Grissan Riverside (working hours/ breaks/ work pressure) (2023)?*
 7. *Do the events at Grissan Riverside alone amount to a fundamental breach of contract, including the respondent's response?*
 8. *If the events at Grissan Riverside alone do not amount to a fundamental breach of contract, did they revive the earlier breaches so that cumulatively they amount to a fundamental breach of contract?*
 9. *Do the events at Allanbuie Farm, including the respondent's response, alone amount to a fundamental breach of contract? If not, do they amount to a fundamental breach of contract when taken together with the Grissan Riverside events?*
 10. *Do the events at Glenlossie, including the respondent's response, amount to a fundamental breach of contract? If not, do they amount to a fundamental breach of contract when taken together with the Grissan Riverside events and/or with the Grissan Riverside events and the Allanbuie Farm events?*
 11. *Is the claimant entitled to a basic award and a compensatory award and if so in what amount?*
 12. *Did the claimant take reasonable steps to mitigate his loss?*
5. The Tribunal had before it a joint agreed hearing bundle running to 171 pages.
 6. The Tribunal heard evidence from the claimant, Mr Marshall, on his own behalf. On behalf of the respondents the Tribunal heard evidence from Mr Michael Cooper, Operations Manager, and Mr Gary Musgraves, Health and Safety Manager.

Findings of Fact

7. The respondent is a haulage company based in Aberlour. It employs approximately 450 people. The respondent works with whisky distillers, transporting by-products known as draff (spent grain) and pot ale from distilleries. Draff was traditionally used as cattle feed but more recently is commonly used for the production of biomethane in bio plants.
8. The claimant is an HGV driver. He has worked for the respondent over a period of years with some breaks in his continuity of employment. His most recent period of employment with the respondent commenced on 5 May

2017. The claimant worked 48 hours per week on night shifts, carrying out 12 hour shifts from 6pm on a Sunday night until 6am on Thursday mornings.

The incident at Glenlossie - 14 May 2017

9. On 14 May 2017 the claimant was attending a client's site at Glenlossie, driving a tanker to deliver pot ale. He pulled into a bay to start tipping the pot ale, with the window of his cab open, and his eyes started burning and he started struggling for breath. The claimant got out of his cab and noticed a mist of steam like vapour and liquid spraying from the syrup pipe. The claimant immediately went to the control room to report it but found nobody there. There were lights flashing and alarms going off. The claimant went to search for someone on the site and found the operator loading woodchips. The claimant explained there was a problem with the syrup pipe. The operator quickly went to investigate. The claimant took some time to walk around in the fresh air and catch his breath. When he returned to his lorry he found the operator hosing down the area. The claimant asked what had happened and the operator explained he had been cleaning out the tanks with caustic steam and had left the valve open by mistake, resulting in caustic steam discharging from the tanks.
10. The claimant reported this incident to Richie May, the respondent's then health and safety manager, by email after his shift had finished on 15 May 2017. The claimant stated that he did not want to make an issue of it but needed it on record as his eyes were burning for some time and he spent the next few hours sneezing and coughing. He stated he had a sore throat the previous night but now seemed fine. He explained he had researched caustic steam on the internet, that it was potentially not particularly pleasant, that he thought this was a small dose but he would like it on record just in case.
11. Mr May forwarded the claimant's email to the client, Diageo, the same day and said he looked forward to their feedback on it. Diageo said they would investigate and revert.
12. On 1 June 2017 the claimant chased Mr May asking if he had received any response, noting that if he had not come in to the Glenlossie site at that time the next few drivers would inadvertently have been driving into a potentially hazardous situation. On 2 June 2017 Mr May chased Diageo for an update.
13. On 26 June 2017 Mr May emailed the claimant to say that the incident he had reported at Glenlossie had been investigated by Diageo and they had not elaborated on their investigation. Mr May thanked the claimant for reporting it. The claimant asked for a copy of Diageo's reply but was informed that it was given in a phone call. The claimant responded to say that he wouldn't mind reassurance that he was free of any potential future problems with this,

meaning his exposure to the caustic steam, and attached a 'Hazardous Substance Fact Sheet' relating to Sodium Hydroxide/Caustic Soda. He asked that this be passed to the person that had called from Diageo. The claimant then heard nothing further from either the respondent or Diageo about the incident.

14. On 4 October 2017 the claimant contacted his solicitors regarding this matter and asked them to write to Mr May and/or Diageo requesting further information. The claimant explained that this had been a very unpleasant experience and expressed concern about the exposure to caustic steam being detrimental to his future health.
15. On 17 October 2017 the claimant's solicitors wrote to the respondent asking Mr May to confirm what concentration of the chemical the claimant had been exposed to, whether Diageo had health and safety advice for those exposed to the chemical, what investigation had been carried out to minimise the risk of a repeat, and what entry had been logged in the Accident Book?
16. On 23 October 2017 Mr May forwarded the solicitor's letter to Diageo and requested a response. On 30 October 2017 Diageo responded and stated "*I can confirm a review of our accident book confirms no incident reported by your employee at Glenlossie Dark Grains Plant.*" Mr May did not respond to the claimant's solicitor or the claimant.
17. On 17 January 2020 the claimant emailed Mr May to say he had been speaking to his solicitor regarding other matters and it was noted that Mr May had never replied to the solicitor's letter of 17 October 2017. The claimant stated that his position had not changed, that he would like confirmation of this incident, and asked to know who was spoken to about this so that the claimant and his solicitor could contact them directly. Mr May declined to provide that information, citing "*the current General Data Protection regs*". He informed the claimant to ask his solicitor to contact Diageo directly and recommended the attention of the Risk Manager.
18. On 30 March 2021 the claimant wrote to Diageo asking for details of the investigation that was followed after the incident. He received no response to that letter.
19. The claimant was not asked to deliver to Glenlossie again after the incident on 14 May 2017. The respondent's other drivers continued to operate at the Glenlossie site.

The incident at Allanbuie Farm 12 June 2017

20. On 12 June 2017 the claimant was asked to tip draff at Allanbuie Farm. The claimant had not previously visited this site. The claimant arrived in darkness

and noted where loads of draff had already been tipped by other drivers earlier in the day. There was insufficient space to get far enough forward to tip the whole load with the existing tipped loads, so the claimant decided to tip the remainder alongside the existing draff.

21. The claimant began to raise his trailer to tip the load. Daylight was just breaking and a break in the cloud meant that he noticed there was a high voltage power line directly above. The claimant stopped tipping so as to avoid hitting the power line. He took a photograph of the power line. On return to the respondent's yard the claimant reported the incident verbally to Trevor Venard, the Night Shift Traffic Controller.
22. Early the next morning, on 13 June 2017, the claimant sent an email to Iain MacLeod, Transport Manager, headed "*Allanbuie Farm. Off the record*" in which he reported this incident. At the end of the email he stated "*We really do need to be risk assessing these places prior to somebody being killed!*" He sent a further email to Mr MacLeod a couple of hours later that stated "*Iain, The company handbook is very clear on this issue 2-11-1. Not really interested in the high cost of repair bit. Why am I being asked to tip within 9m of risk (not possible in suggested area) in darkness?*"
23. Mr MacLeod responded later that morning stating "*Jim I have forwarded your email correspondence to our QHSE Manager who will respond to your concerns.*" That manager was Mr May.
24. The claimant's reference to the company handbook was a reference to the section dealing with overhead power lines. The handbook warns that contact with live overhead lines kills people and causes serious injuries every year and that a high proportion, about one third, of inadvertent line contacts prove fatal. It notes that a vehicle does not have to contact the overhead power lines for the current to flow and that the HSE recommend that vehicles should not approach closer than 9 metres' distance from overhead power lines supported on wooden poles and 15 metres for those supported by metal towers and structures and notes that, unless a driver is absolutely sure that lines are dead, i.e. no power applied, or not carrying voltage, i.e. telephone wires, to not approach closer than that stated above.
25. The claimant heard nothing more from Mr May or anyone at the respondent in relation to this incident. The claimant was not asked to tip draff at Allanbuie Farm again, although the claimant was aware that drivers continued to tip draff there from the day after the incident onwards.

26. From around 2019 onwards the claimant started to work permanently on night shifts at Grissan Riverside which is a biodigester plant converting distillery by-products into green gas.
27. The claimant's role was to tip draff into the plant. He was the only respondent employee based at the site on the night shift. It was his role to collect loads of draff from different locations on the site and to take the loads to the intake point for tipping. Other drivers would deliver loads to the site but it was the claimant's job to tip them into the intake point. The claimant worked 12 hour night shifts and was required to take 2 hours of breaks within the 12 hour working period. The Grissan Riverside plant was manned by one operator, who was not an employee of the respondent. The claimant and the operator were the only people present on site through the whole of the night shift.
28. When the claimant first started working at the Grissan Riverside site there were two small hoppers into which the draff was tipped. The intake target was 350 tonnes per 24 hour period. At that level of intake the claimant had no difficulty with taking his required rest breaks during his shifts.
29. In or around July 2023 one of the two small hoppers was replaced with one large hopper that ran at twice the speed. From that point onwards Grissan Riverside started to increase the intake target and by the end of September or beginning of October 2023 the daily 24 hour intake target had increased from 350 to 500 tonnes. This increased target meant that the hopper had to be continually fed with draff with a consequent impact on the claimant's workload. He found that he was no longer able to take sufficient time away from his work to fulfil the requirement to take two hours of breaks within his 12 hour shift. As he felt pressure to ensure that he was tipping sufficient draff to keep the plant running, he stopped taking the required breaks but falsified his tachograph recorder to state that he had taken the required breaks.
30. In addition to the increased workload as a result of the increased intake target, there were also difficulties with the plant. The buffer tank would fill up because it couldn't process the product through the plant quickly enough, triggering shut downs of the plant throughout the night shift. This created further pressure on the claimant and meant that the target of 500 tonnes per 24 hours was not routinely being met. In particular the claimant felt he was being pressured by the Night Shift Traffic Controllers to ensure that all trailers were tipped during his shift as they were needed for the following day.
31. The claimant informed the Night Shift Traffic Controllers, Trevor Venard and Ian Cox, that the increased workload meant that he was not able to take his required breaks. He explained to them that although he was showing on his tachograph that he was taking breaks, he was not actually able to do so. The

claimant was told by the Night Shift Traffic Controllers to do what he could and that they would sort it out.

32. The claimant worked back to back with his colleague on the day shift, John Strachan. As a day shift driver Mr Strachan was only required to take 45 minutes of breaks in every 12 hour shift. Mr Strachan was able to take sufficient breaks by asking drivers delivering to the site during the day to tip his loads while he took a break. It was not possible for the claimant to fulfil all of his breaks in this way due to the number of drivers delivering during the night shift and the fact that he was required to take 2 hours of breaks.
33. The claimant explained his concerns to Mr Strachan who said he would take it up with the Transport Manager. The claimant was aware that Mr Strachan had contact with the management in the yard who worked from 9am to 5pm. The claimant never saw any of the respondent's management as they were never present during the night shift. The claimant believed that Mr Strachan had discussed the difficulties and the claimant's concerns with the respondent's Transport Manager.
34. At this time, unbeknownst to the claimant, the respondent was having regular conversations with their client at Grissan Riverside about the fact that the daily intake target of 500 tonnes was not being met. The respondent believed that this was because the night shift operators at Grissan Riverside had probably reduced the production speed because if the intake speed was too fast a high level probe would shut down the system when activated. The respondent believed that the night shift operator was therefore winding down the speed by 20% and that this was the reason why the daily target was not being met.
35. David McPherson, the Managing Director of the respondent, had met with the client and sought to explain to them that the plant could not cope with the volume of draff required to meet their targets and that the difficulties lay with the plant, not with the respondent or their employees.
36. A decision was taken by David McPherson to send another employee to accompany the claimant on the night shift to demonstrate to Grissan that it was the plant, rather than the respondent's employees, that were causing the difficulty with meeting the daily target. The respondent considered that they were taking this action to placate their client, not because they believed that the claimant was in any way to blame for the intake target not being reached. The claimant was not aware of these discussions between the respondent's management and Grissan.
37. On 6 November 2023 the claimant received a call from David Farquhar, the Traffic Planner on the day shift. Mr Farquhar told the claimant that someone

was coming up to Grissan Riverside to spend a shift with him to make sure the job was getting done. The claimant explained to Mr Farquhar that he had been saying for months that the difficulty was that product could not be tipped in any faster. The claimant believed that this employee was being sent to check up on him because the respondent thought he wasn't getting the job done. The claimant was very frustrated by this as he was working 12 hour shifts without adequate breaks.

38. As had been explained to the claimant, another driver from the respondent, Mr Franklin, attended for the night shift on 6 November 2023. As expected, this did not resolve the problems with inputting sufficient draff into the plant to meet the 500 tonne daily target because there were still issues with the plant and it was still not possible to input all of the draff required to meet the target. At 5am on 7 November 2023 the operator called the claimant to say the plant would have to shut down as the buffer tank was full. The claimant therefore lowered his boxes, prepared to go home, and waited for the shift changeover at 6am. He informed the day shift driver, Mr Strachan, that the plant was currently shut down and then went home.
39. The claimant was very upset about the fact that he believed that another employee had been sent by the respondent to check up on him. The claimant was also increasingly concerned that if the DVSA did a spot check and came to the Grissan Riverside site to check his tachograph showing that he was on a break whilst still operating a trailer he was at risk of losing his HGV licence. The claimant believed that the finger was being pointed at him by the respondent for the problems at the Grissan Riverside site and when he left shift that morning he decided that he would not come back to work until the situation was resolved.
40. Immediately after his shift had finished on 7 November 2023 the claimant started drinking and consumed a significant amount of alcohol. The claimant was in a distressed state and sent a number of text messages to the respondent that made little sense. The texts did indicate that the claimant would not be coming to work for the next 2 nights, and that he may not return to work at all.
41. The text messages were shown to Mr Cooper, the Operations Manager. He was worried that the claimant may have been having some kind of medical emergency because the messages made little sense. Mr Cooper contacted the claimant by telephone. By that time the claimant had not taken any rest after his 12 hour night shift and was drunk. Mr Cooper told the claimant to come in for a meeting when he had sobered up.
42. On 9 November 2023 the claimant sent an email to Mr Cooper explaining how strongly these events had affected him and that on leaving site after his shift

on 7 November he knew he could no longer work effectively as things stood and *“would not be able to return to the continuation of this intolerable situation”*. The claimant apologised if he had come across as abrupt or offensive but explained his frustration with the situation and that he felt unjustly targeted as a factor in the failure of Grissan Riverside plant’s inability to cope with the ever increasing workload. The email explained that the claimant believed that he was going above and beyond and referred to the fact that he was working through all legally required breaks. He referred to recent events *“equating to nothing more than a finger-pointing witchhunt”* and explained that he was unable to return to work until these issues were addressed.

43. Mr Cooper invited the claimant to a meeting with him and Fiona Braidwood, HR Manager, on 13 November 2023. In the meantime the claimant remained absent from work. At that meeting the claimant expressed his concerns about the current situation, but also referred to the incidents that had occurred at Glenlossie and Allanbuie Farm. The claimant considered that these incidents were connected in that they were all issues that had impacted upon him and that he believed had compromised his health and safety but that the respondent had failed to take any action about them. The claimant therefore asked for the incidents at Glenlossie and Allanbuie to be investigated and dealt with. The claimant forwarded the email chains from those incidents.
44. Following the meeting on 13 November the respondent stated that they would allocate the claimant to local road driving to *“remove you from some of the points you raised surrounding your role tipping draff at Grissan Riverside”*. On 14 November 2023 the claimant emailed Mr Cooper stating *“At our meeting yesterday I feel I stated clearly that I would be unable to return to work until the reasons for my absence have been fully addressed and resolved. I feel that simply to move me to another post is not a sign of my issues being addressed, or in any way being taken seriously...I feel that if my complaints (both past and present) continue to be ignored, it will be clear that the company has no regard for the welfare of its employees”*. The claimant declined to resume work to the alternative role suggested, noting that he was now on his second week of unpaid absence and asked for the matter to be resolved in a timely manner.
45. At this stage the claimant was still open to returning to work if the situation was resolved. He would have preferred the situation at Grissan to resolve and to return to his original position because he enjoyed the job, the hours suited him, and it was a role that also suited the difficulties he had with his back that meant he could not sit in the same position for long periods.

46. Mr Cooper responded to the claimant on 14 November to inform him that as he was refusing the temporary position offered the claimant would continue to remain unpaid during his absence.
47. On 15 November the claimant responded, referring to having outlined a number of incidents over the years that he felt had a detrimental effect on his wellbeing and confidence in the safety of operations within the company. The claimant requested specific details of the investigations that the respondent was carrying out with regard to his concerns.
48. The claimant received no reply from Mr Cooper or anyone else at the respondent to his email of 15 November, nor did he receive any further contact at all from the respondent about any investigations into the concerns the claimant had raised. Mr Cooper accepted under cross examination that it was not satisfactory not to respond to this email.
49. After the meeting of 13 November Mr Cooper asked the respondent's IT manager to download the emails relating to the previous incidents that the claimant had referred to. This was a time consuming process as the emails had been archived and placed on an external hard drive from where they had to be retrieved. Mr Cooper did not carry out any further investigations into the claimant's concerns about Grissan Riverside, Glenlossie or Allanbuie Farm. He did not check whether the incidents were logged or recorded in the respondent's accident book. Mr Cooper informed the Tribunal that he had tasked Mr Musgrave with looking into these matters but that evidence was contradicted by Mr Musgrave who said that he had not been asked to investigate these matters and therefore had not done so.
50. On 27 November 2023 the claimant registered for work with a recruitment agency and on 28 November 2023 that agency sent a request for a reference to the respondent.
51. On 4 December 2023 the claimant commenced carrying out temporary work as a driver for Moray Council.
52. On 20 December 2023, having heard nothing more from the respondent and still being absent from work and unpaid, the claimant wrote to Mr Cooper resigning from his position of HGV driver with the respondent with immediate effect. The claimant noted in his email that over six weeks had passed since Mr Cooper had informed the claimant that he would be making enquiries into the claimant's reasons for not returning to his position on site, that he had asked specific questions and to date had heard nothing regarding his concerns. He stated that regrettably therefore he had no option but to consider this as constructive dismissal.

Relevant law

53. The claim is one of unfair constructive dismissal made under s.94 of the Employment Rights Act 1996 ('the ERA').
54. It is for the claimant to prove that he has been dismissed. S.95 of the ERA provides for "constructive dismissal" where an employee resigns "*in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*" This means that there has been a fundamental breach of contract by the employer. This could be a breach of an express or implied term.
55. In **Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27** Denning MR said at paragraph 15: "*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 further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.*"
56. It is well-established that there is an implied term in every contract of employment of mutual trust and confidence between employer and employee. In **Malik v Bank of Credit and Commerce International SA [1997] IRLR 462**, the term was held to be, "*The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.*" In **Baldwin v Brighton and Hove City Council [2007] IRLR 232** it was held that the relevant test is satisfied if either of the requirements is met – so the correct formulation is whether the conduct is calculated *or* likely to destroy or seriously damage the relationship.
57. Whether there has been a breach of trust and confidence is a matter of fact for the Tribunal to determine – **Aberdeen City Council v McNeill [2015] ICR 27**.
58. An employee may lose the right to rely on the fundamental breach if he delays in terminating the contract and is considered to have affirmed the contract after the breach. This will depend on the circumstances.
59. A course of conduct can cumulatively amount to a fundamental breach of contract which would entitle an employee to resign and claim constructive dismissal following a "last straw" incident. The last straw must contribute to the breach but need not be of the same character as earlier acts nor need it be unreasonable or blameworthy conduct in itself. It may also revive earlier breaches in respect of which the claimant would otherwise be deemed to have affirmed the contract.

60. In **London Borough of Waltham Forrest v Omilaju [2005] IRLR 35**, Lord Justice Prophet stated: *“I see no need to characterise the final straw as ‘unreasonable’ or ‘blameworthy’ conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence.”*
61. In **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1** Underhill LJ, at paragraph 55, stated:
- “I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*
- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
 - (2) Has he or she affirmed the contract since that act?*
 - (3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
 - (4) If not, was it nevertheless a part (applying the approach explained in Omilaju [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reasons given at the end of para 45 above).*
 - (5) Did the employee resign in response (or partly in response) to that breach?*
- None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.”*
62. The claimant must prove that he resigned in response to the breach of contract but the repudiatory breach or breaches need not be the sole cause of the resignation provided they are an effective cause.
63. A constructive dismissal need not necessarily be unfair. It is for the respondent to establish a potentially fair reason for the conduct that constitutes the fundamental breach within the terms of s.98(2) of the ERA.

64. If the respondent establishes a potentially fair reason, the Tribunal must decide whether in the circumstances (including the size and administrative resources of the respondent) the respondent acted reasonably or unreasonably in treating that reason as sufficient reason for dismissal. That shall be determined in accordance with equity and the substantial merits of the case (s.98(4)).
65. It is well established that there may be more than one reasonable response to the particular circumstances. One employer acting reasonably might dismiss while another might not. The Tribunal, in making the assessment under s.98(4), must consider whether the decision to dismiss falls outside that 'range of reasonable responses'. It must not substitute its own view of what it would have done in the circumstances and conclude that if it would not have dismissed, then the dismissal is unfair.

The parties' submissions

66. Both parties helpfully provided detailed written submissions. They are not rehearsed in full here but have been taken fully into account by the Tribunal.
67. On behalf of the claimant Mr Cunningham submitted that the conduct of the respondent in relation to the Grissan Riverside events was sufficient in itself to amount to a repudiatory breach of contract entitling the claimant to resign his employment without notice and treat himself as constructively dismissed. Alternatively he asserts that the events relating to the respondent's response to the incident at Glenlossie, and the incident itself and the respondent's response to the incident at Allanbuie Farm, taken together with the Grissan Riverside events, amounted to a fundamental breach of contract and that the final straw was the respondent's inadequate response to the claimant's concerns, entitling the claimant to resign.
68. On behalf of the respondent Ms McLaughlin submitted that the claimant had resigned in response to the respondent's decision to send another employee to site on 6/7 November 2023. She asserts that this was not a breach of contract by the respondent. Ms McLaughlin submitted that the increase in workload created by the increased intake target at Grissan Riverside was entirely manageable and that the claimant had ample opportunity to take his breaks if he wished to, which he could have done by asking other drivers to tip their loads whilst he had a break. Ms McLaughlin asserted that Mr Cooper was actively investigating the claimant's concerns but that he did not want to go back to the claimant with 'dribs and drabs of information' as an explanation for why Mr Cooper had made no contact with the claimant for a period of six weeks after 15 November 2023. She submits that this was not a breach of the claimant's contract of employment. Ms McLaughlin asserted that the

incidents at Glenlossie and Allanbuie, and the respondent's responses to them, did not amount to breaches of contract and, even if they did, the claimant had by the time of his resignation affirmed any such breach. Ms McLaughlin asserts that the claimant resigned because he had another job and it would not have mattered what the respondent did in their investigation because as at 7 November the claimant had no intention of ever returning to work.

69. The Tribunal notes that the respondent's written submissions contained facts that had not been heard in the evidence by this Tribunal and appeared to be a reference to matters heard at the first liability hearing. The Tribunal have only had regard to the evidence and submissions relevant to this hearing.

Analysis and conclusions

What was the most recent act (or omission) on the part of the respondent employer which the claimant says caused, or triggered, his resignation?

70. The most recent act or omission relied upon by the claimant was the respondent's inadequate response to the claimant's concerns raised on 13 November 2023 in relation to Grissan Riverside, Glenlossie and Allanbuie Farm, including sending a co-worker to check up on the claimant on 6/7 November 2023, and the respondent's failure to investigate the claimant's concerns.
71. Although the events of 6 and 7 November 2023 prompted the claimant to decide not to return to the workplace until his concerns had been resolved, he had not at that time decided to resign his employment. He liked his job, it suited him well, and he wanted to give the respondent the opportunity to resolve his concerns so that he could continue in that role but whilst also being able to take adequate rest breaks.
72. The claimant gave the respondent a period of six weeks from first raising these concerns to investigate and to respond to him. It was only when the respondent failed to respond and failed to address those concerns in any way, against the background of having failed to previously act on the concerns he had raised about Glenlossie and Allanbuie Farm in 2017, that the claimant decided to resign his employment.

Had the claimant affirmed the contract since that act?

73. The claimant had not affirmed the contract since raising his concerns at the meeting on 13 November 2023. He made it clear that he was unable to return to work until his concerns had been addressed and resolved. The claimant

gave the respondent six weeks from the time of first raising the concerns with Mr Cooper to allow the respondent to address them. By 20 December 2023, when the claimant resigned, he had heard nothing from the respondent about his concerns and there was no indication that the respondent was carrying out any investigations.

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

74. The Tribunal finds that the respondent carried out very limited investigations into the claimant's concerns in the six week period between 7 November and the claimant's resignation on 20 December 2023. Other than Mr Cooper's initial meeting with the claimant on 13 November 2023 at which the claimant raised his concerns, the respondent made no efforts to discover from the claimant his version of events about the situation at Grissan Riverside, or about the incidents at Glenlossie or Allanbuie Farm. Mr Cooper's actions were limited to asking the IT manager to recover any emails in relation to the Glenlossie and Allanbuie Farm incidents but he carried out no other internal or other investigations at that time. He did not speak to the respondent's current health and safety manager to ask him to check the records for any mention of the previous incidents. He did not speak with the Night Shift Traffic Controllers about whether the claimant had raised the issue of being unable to take adequate breaks. He did not make any efforts to investigate why the claimant had not been able to take sufficient rest breaks at Grissan Riverside since the end of September/ beginning of October 2023.
75. These were serious matters that were being raised by the claimant. The requirement for the claimant to take 2 hours of breaks in every 12 hour shift is a legal requirement. That he was stating that he had been unable to take those breaks due to the workload caused by the increased intake target from 350 to 500 tonnes, and that he had therefore needed to falsify his tachograph, was a very serious matter indeed, both for the respondent and for the claimant who stood to potentially lose his HGV licence as a result.
76. The Tribunal find that the failure of the respondent to take any meaningful action to investigate or address the claimant's concerns, and to leave him on unpaid leave for an indefinite period whilst they should have been carrying out those investigations, was conduct that was likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the respondent.
77. As part of the claimant's assertion that the respondent's response to his concerns was inadequate, he also relied upon the respondent sending a co-worker to check up on him on 6/7 November.

78. When a second driver was sent by the respondent to work the night shift with the claimant at the Grissan Riverside site on 6 and 7 November 2023, this was not done to check up on the claimant in any way, or because the respondent had any suspicion that the claimant was not doing his job properly. The respondent sent that employee to seek to placate their client and to establish that it was not the respondent's fault that the 24 hour intake target was not being met, because the respondent's drivers could not put more draff into the hopper, or do so any more quickly than they were already doing. The respondent believed that the difficulty lay not with their drivers, but instead they suspected that due to the difficulties with the plant that had been experienced since the installation of the new hopper and the significant increase in the daily intake target, that the night shift operator at Grissan Riverside was reducing the speed of the intake to prevent the frequent shut downs of the plant, and it was this reduction in speed that was causing the target not to be reached.
79. However, none of this had been explained to the claimant and he had only been told that the additional employee was coming to ensure that the job got done. It was therefore reasonable for the claimant to believe that the employee was being sent to check up on him and that this implied that he was not doing his job properly. The Tribunal however is not satisfied that the sending of a co-worker on 6 and 7 November 2023 was in itself capable of amounting to conduct by the respondent that was calculated or likely to destroy or damage the trust and confidence between the claimant and the respondent.
80. The Tribunal are satisfied that the respondent's inadequate response to the claimant's concerns after 13 November 2023 was, by itself, a repudiatory breach of contract.

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 the implied term of trust and confidence?

81. Even if the respondent's inadequate response to the claimant's concerns after 13 November 2023 had not amounted to a repudiatory breach of contract, the Tribunal is satisfied that the respondent's conduct in that regard was part of a course of conduct comprising several acts and omissions in respect of the incidents at Glenlossie, Allanbuie Farm and Grissan Riverside which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence.

82. The claimant no longer asserts that his exposure to caustic steam at Glenlossie on 15 May 2017 amounted to a breach of the implied term of trust and confidence. He accepts that this was not the fault of the respondent. He does assert however that the response to that incident by the respondent was inadequate and that this did amount to a breach of the implied term.
83. After the claimant reported being exposed to caustic steam at Glenlossie the respondent made no investigations of its own into that incident. It handed the matter over to the client who owned the Glenlossie site, Diageo. The Tribunal have seen no evidence to suggest that Diageo carried out any investigations either. Neither the respondent nor Diageo appeared to have put any entry in their accident books about the incident. The respondent took no steps to make sure that its drivers were not at risk of being exposed to the same danger of being exposed to a hazardous substance in future. The only action the respondent took in relation to the claimant was to ensure that he was never sent to the Diageo site again. This did not allay the claimant's concerns about the potentially hazardous substance that he had been exposed to and, despite seeking assurances from the respondent over a three year period, including a letter from the claimant's solicitors, the respondent took no steps to provide any assurances or to investigate the incident at all.
84. The Tribunal were satisfied that this was conduct by the respondent that was likely to seriously damage the relationship of confidence and trust between employer and employee.

Allanbuie

85. The claimant asserts that both the exposure to the risk of tipping close to an overhead power line at Allanbuie Farm on 12 June 2017, and the respondent's inadequate response to him reporting that incident, were breaches of the implied term of trust and confidence.
86. The consequences of the claimant being sent to tip at a farm location that he had never to before, in the dark, and tipping draff in an area where there was an overhead power line, could potentially have been fatal.
87. The Tribunal were provided with a copy of a site assessment for Allanbuie Farm. This document only assessed the area where pot ale was to be delivered which was in a different location to where draff was to be tipped. It appeared that no assessment at all had been made as to where draff was to be tipped and whether that represented a hazard to drivers delivering there due to the overhead power lines.
88. Before the Tribunal, the respondent sought to suggest that the hazard was caused by the claimant tipping draff in the wrong location. This assertion was

made despite the fact that the respondent had made no assessment of that part of the site, none of the respondent's witnesses had visited that site, and no investigations into that incident had been carried out by the respondent. The Tribunal accepted the evidence of the claimant that he was tipping the draff in the correct area, as close as possible to the existing draff that had been tipped by other drivers earlier that day, and that this incident did not occur as a result of any error on the claimant's part. The Tribunal find that the inadequate site assessment of the relevant area of Allanbuie Farm and the resultant exposure of the claimant to the risk of tipping, in the dark, in an area where there were overhead power lines, was likely to destroy or seriously damage the relationship of trust and confidence between the claimant and his employer. The claimant rightly considered that he had been exposed to a very serious risk to his health and safety.

89. The Tribunal also find that the respondent's response to the claimant reporting this incident was wholly inadequate. No steps at all were taken to investigate the incident and the promised response from the QHSE Officer, Mr May, did not materialise. The respondent provided no evidence that any follow up site assessment was made and the claimant received no response to his email reporting the matter. There was no evidence that the incident had been logged in any way, whether in an accident book or otherwise. The only step taken by the respondent was to not ask the claimant to deliver to Allanbuie or any other farm site again. It did continue to ask its other drivers to deliver to that site without apparently making any changes or any further assessment. The claimant was entitled to take the view that this demonstrated that the respondent had a lack of regard for the health and safety of its drivers, including the claimant.
90. The Tribunal was therefore satisfied that the respondent's response to the Allanbuie Farm incident was also conduct that was likely to destroy or seriously damage the relationship of trust and confidence between the claimant and his employer.

Grissan Riverside

91. The Tribunal accepted the claimant's evidence that, from around the end of September/ beginning of October 2023, the workload at the Grissan Riverside site was such, due to the increase in the 24 hour intake target from 350 to 500 tonnes, that the claimant was unable to take adequate breaks in his 12 hour night shifts. This was because there needed to be an almost continual supply of draff into the hopper such that the claimant needed to be continually tipping draff.

92. In his evidence Mr Cooper told the Tribunal that he considered that it was the driver's responsibility to ensure that they took adequate breaks throughout their shift. The respondent appeared to have given no thought at all to how its night shift drivers would be able to manage the increased workload as a result of the increase in the 24 hour intake target whilst at the same time taking 2 hours of breaks in a 12 hour period.
93. Mr Cooper accepted under cross examination that the claimant was being truthful when the claimant reported that he had been unable to take adequate breaks. Mr Cooper's evidence was that, if the claimant was sitting in his truck and had raised his tipper with the draff going into the hopper, there was nothing more for the claimant to do so that he could sit with a cup of tea and that this would amount to a rest break. Mr Cooper's suggestion was that the claimant was not working during that time, even though his trailer was discharging draff into the hopper. The Tribunal do not accept that the claimant would not be working whilst in control of an HGV tipping a load of draff into machinery, or that drinking a cup of tea or eating a sandwich whilst operating his tipper, as the claimant explained he was often required to do, amounted to the claimant taking an adequate rest break.
94. The Tribunal also did not accept Mr Cooper's evidence that it would have been appropriate for the claimant to ask the Grissan night shift operator to watch his tipper whilst it was discharging draff into the hopper in order to be able to take a rest break. This suggestion was not put to the claimant under cross examination, but the Tribunal observes that this appeared to be a most unsatisfactory suggestion given that the operator would not be a qualified HGV driver with the required experience to operate the vehicle if there were to be any difficulty with the tipping process, and that it would not have been appropriate for the claimant to have left his vehicle alone whilst in the middle of tipping draff into the hopper.
95. Mr Cooper also suggested that the claimant could have waited until another of the respondent's drivers came to deliver draff during the night shift, as there would be at least two drivers doing so during that shift, and to ask them to tip their own load whilst he took a break. This was also not put to the claimant under cross examination as a possible solution to the claimant's difficulties with taking rest breaks. The Tribunal was also not persuaded that this was a satisfactory approach by the respondent to facilitating the claimant taking his breaks, as the claimant would be reliant on waiting for another driver to arrive. The respondent simply did not concern itself with how the claimant's breaks would be facilitated, even after the claimant had reported to the Night Shift Traffic Controllers that he was unable to take his breaks. The Tribunal are satisfied that the claimant genuinely could not find an appropriate opportunity to take breaks and that he was concerned about the potential risk to him in

being unable to do so, particularly as this was necessitating him falsifying breaks in his tachograph which had the potential to jeopardise his HGV licence and therefore his livelihood.

96. As a consequence of the Tribunal's findings that the final act or omission relied upon by the claimant as causing his resignation was on its own a fundamental breach of contract, and was also a part 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, there is no need for any separate consideration of whether the claimant affirmed the breaches in respect of the Glenlossie and Allanbuie Farm incidents.

Did the employee resign in response (or partly in response) to the respondent's inadequate response to the claimant's concerns?

97. The Tribunal finds that the claimant did resign in response to the respondent's failure to adequately address the claimant's concerns that he raised in the meeting with Mr Cooper on 13 November 2023.
98. The respondent sought to suggest that the claimant had in fact already decided to leave the respondent's employment by the time he had left work on 7 November 2023 and by the time he had raised his concerns with Mr Cooper on 13 November 2023. The respondent asserted that this was the reason that the claimant sought alternative employment, because he had already made his mind up that he was going to resign, and that the securing of alternative employment was the reason why the claimant decided to resign when he did.
99. The Tribunal was satisfied that the claimant accepted temporary work at the beginning of December 2023 as a result of the amount of time he had been unpaid by the respondent whilst waiting for the respondent to investigate and address his concerns. The fact that he was able to secure temporary work was not the effective cause of his resignation. At that time the claimant was still hopeful that the respondent would take action to deal with his concerns and to address the problems at Grissan Riverside to allow him to return to his job there.
100. The claimant only decided to finally resign when it became apparent to him by 20 December 2023 that the respondent did not intend to take action to address and resolve his concerns.
101. The Tribunal is satisfied that the effective cause of the resignation was the respondent's breach of contract in failing to investigate and address the claimant's concerns raised on 13 November 2023. That was also part of a

wider course of conduct by the respondent comprising the acts and omissions set out above which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence.

Was the dismissal unfair?

102. Neither party made any submissions on the question of whether the constructive dismissal was potentially fair but, for the avoidance of doubt, the Tribunal does not consider that a potentially fair reason for the respondent's conduct has been established.
103. In conclusion, the Tribunal therefore finds that the claimant was unfairly dismissed.

Remedy

104. The claimant provided a schedule of loss. The parties helpfully indicated that there was no disagreement between them as to the figures contained in the schedule of loss, save that the respondent asserted that there had been a failure by the claimant to mitigate his loss.
105. The claimant was paid £850 per week gross by the respondent and took home around £640 net.
106. His claim for loss of earnings spanned the period from his resignation on 20 December 2023 to 10 December 2024 when he secured permanent alternative employment which fully mitigated his ongoing loss. In that period the claimant had carried out some temporary work and he had accounted for the earnings from that work in his schedule of loss.
107. The respondent asserted however that the claimant had not adequately mitigated his loss.
108. The burden of establishing that there has been a failure to adequately mitigate loss lies with the respondent. The respondent has not met that burden. They point simply to the fact that the claimant had not produced emails or other evidence relating to his job applications.
109. In her written submissions Ms McLaughlin also asserted that the claimant had not provided evidence of any benefits the claimant had applied for or why he did not apply for any benefits and that the only explanation for this could be that the claimant had periods of undisclosed earnings. This was not put to the claimant in cross examination and the Tribunal therefore rejects that submission. There is no evidence before the Tribunal to suggest that the claimant has failed to disclose his full earnings in the relevant period.

110. The Tribunal accepts the claimant's evidence as to the efforts he made to mitigate his loss. As a consequence of a back complaint he is limited in the HGV driving roles he can undertake as he needs to intersperse periods of driving with periods of walking and standing. The claimant accepted appropriate temporary work after resigning his employment with the respondent and was also out of work for periods of time whilst searching for a suitable position.
111. The claimant is now employed with a fuel distribution company, delivering fuel. His current role suits him as the driving is interspersed with periods of walking and standing.

Basic award

112. The parties agree that the correct sum to be awarded in respect of the basic award is £5,787.00.

Compensatory award

113. The claimant's loss of wages for the period of 20 December 2023 to 10 December 2024 was £33,489.04. The claimant makes no claim for any loss of earnings after 10 December 2024 as that was the date he secured his current employment which has fully mitigated his ongoing losses.
114. In the period between 20 December 2023 and 10 December 2024 the claimant earned net pay of £4,788.39 in his work with Moray Council from December 2023 to 17 March 2024. He also earned net pay of £2,920.50 in his work with Marr Haulage Contractors from September to October 2024. The total loss of earnings claim therefore amounts to £25,780.15. The parties also agree that the claimant is entitled to £500 in respect of loss of statutory rights, resulting in a total compensatory award of £26,280.15.
115. The total amount payable by the respondent to the claimant in respect of basic and compensatory awards is **£32,067.15**.

Date sent to parties: 26 March 2026