EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr N Nicholaou	**v**	**Cambria Automobiles (South East) Ltd**

Heard at: Watford **On**: 4 & 5 February 2019

Before: Employment Judge Clarke QC

Appearances

For the Claimant: Mr Khalilov, Solicitor
For the Respondent: Mr R Wayman, Counsel

JUDGMENT

1. The claims for constructive unfair dismissal, unpaid overtime payments and arrears of holiday pay fail and are dismissed.

REASONS

Background and witnesses

1. On 7 March 2018 the claimant made a claim to the employment tribunal alleging constructive unfair dismissal and seeking payments in respect of unpaid overtime and untaken holidays. I was not addressed on either the overtime or holiday pay claims.

2. The claim form alleged that the respondent was in repudiatory breach of contract in three broad ways:

   2.1 Giving the claimant an excessive workload and doing nothing to alleviate it;

   2.2 Unreasonably requiring the claimant to attend an investigatory meeting without giving him details of what was to be investigated;

   2.3 Unreasonably calling the claimant to a disciplinary hearing.

3. In submissions those three broad allegations were further broken down to become ten allegations of conduct said to amount (individually or cumulatively) to a breach of the implied term as to trust and confidence. These are identified below.

4. Mr Khalilov (for the claimant) made much of what he said was the stark difference in quality between the claimant's oral evidence and that of the respondent's three witnesses. He went so far as to suggest that two of those witnesses, Mr Hill (the claimant's manager) and Ms Smith (who replaced the claimant) were deliberately lying, so as to enable the respondent to advance a case that they knew to be false.

5. Hence, I record my impressions of the four witnesses from whom I heard:

   5.1 The claimant. I considered the claimant to be a truthful witness seeking to deal with the questions put to him, but one who struggled to explain why it was that he had great difficulty in doing his work in the allotted time. He was disarmingly frank in stating that the workload itself was not excessive and that the problems which he experienced stemmed from errors which others were making in the paperwork presented to him to work from. He was unable to explain why if (as he accepted) he had been instructed simply to log any error in that paperwork and return it to the author and that he was doing this, save in the case of the simplest errors, these errors substantially increased his workload.

   5.2 Mr Hill. I found Mr Hill to be an honest witness doing his best to assist the tribunal. He sought carefully and clearly to answer questions relating to the claimant's volume of work. Any confusion in his answers seemed to me to stem from the fact that various measures of work volume were available (the number of claims, the number of job cards, the work hours undertaken by technicians, the number of files, the number of invoices and others) and the questions posed to him (and Mr Khalilov's understanding of the answer) often confused one measure with another. Mr Hill and the claimant's representative frequently disagreed, this was most often in relation to volumes of work which the claimant had himself said were not excessive, but which Mr Khalilov repeatedly suggested to Mr Hill to have been or to have become excessive.

   5.3 Ms Smith. She was persistently attacked in cross-examination on the basis that she was inventing her evidence and that much of it was inaccurate and deliberately so. So far as the claimant's representative was concerned, her claim to be able to do the claimant's old job in some six hours a day without assistance was fanciful. I found her evidence to be given carefully and where repeatedly pressed for additional detail she was able to provide it. I accept the comment that much of the detail was not in her witness statement, but I do not regard that as a criticism of her (or those who helped produce that statement). As is often appropriate, the cross-

examiner sought to see whether she could explain her evidence and provide further detail to substantiate that explanation. She both could and did.

5.4 Mr Tomlinson. He I found to be a straightforward witness, taking great care with his answers, prepared to say when he lacked detailed (or any) recall and prepared to accept the limitations of his knowledge. I note that this was particularly so in respect of warranty work and how it was conducted in parts of the group for which he had no responsibility. He left the respondent's employ very shortly after the events in question and readily accepted that this also hampered his recall to an extent. He had put his time with the respondent behind him when he moved on to work for a business rival, learning its particular practices and procedures and he was careful to point out where this was (or could be) hampering his recall of the detail of the respondent's practices.

Findings of fact

6. The claimant was employed by the respondent as a warranty administrator at its Barnet showroom. He had been employed in that role since August 2005, but became the respondent's employee only following a TUPE transfer to the respondent in July 2014.

7. The claimant worked on Jaguar and Land Rover warranty claims. The respondent employed persons to do the same work in Swindon (where the work was initially spread across two geographically distant sites and where one full-time and one part-time member of staff did the work) and at Welwyn Garden City and, dealing with vehicles from other manufacturers, at other sites.

8. In his claim form the claimant appeared to complain that before the transfer to the respondent, three people were employed to do his job, that two of them left before the transfer (and were not replaced) and that he raised the need for additional staff but this was ignored. I am satisfied that the claimant was not doing the work of three people. He was doing a job which others at other locations did alone and, as he said in evidence, he was coping well with it until January 2017, subject to problems occasioned by inaccurate records (see below). His evidence was clear that workload was not a problem for him, but the fact that paperwork coming to him contained errors did cause difficulties.

9. In 2016 the claimant had seemed to his manager, Mr Hill, to be struggling a little with missing job cards and/or inaccurate or incomplete records given to him. He was provided with them to enable him to prepare entries on the appropriate computer software. Hence, in mid-2016 Mr Hill changed the system to address this and to help the claimant. The change involved the claimant ceasing to be responsible for dealing with errors in paperwork passed to him for processing. Invoices were, from that time, to be generated by those doing the work and passed to the claimant so that he could extract the relevant material to make the warranty claim. He was

instructed to pass back for correction by those producing the documentation any which contained errors, alerting Mr Hill to this by a daily schedule. Save for obvious minor errors, which he could quickly self-correct, this is what the claimant did thereafter. This reduced the scope of his work and ought to have given him extra time to do what remained of it. It was never contended that identifying errors was other than straightforward and not time consuming.

10. From mid-2016 onwards, the claimant's job involved his logging on to the computer software used by the manufacturers in question to process warranty claims and to put in the chassis number of the vehicle in question and details of the work. From August 2017 onwards the software system used was known as WASP.

11. The claimant's hours of work were 8am to 6pm with an unpaid hour for lunch. In fact, he regularly came in much later than 8am and stayed out for longer than his one hour for lunch, often making up time in the evening. His manager, Mr Hill, was aware of this and did not discourage the practice, nor did he monitor the claimant to ensure that he was working his contracted number of hours, albeit at non-contractual times.

12. It is the claimant's case that, at least from January 2017 onwards, he worked every day to about 9pm and still had a backlog of work. This backlog he linked, in a way he was never able satisfactorily to explain, to the errors in the paperwork presented to him. He accepted that, from this time, he usually started work at or after 9am.

13. Having heard from Mr Hill and Ms Smith and having seen the evidence of log-on and log-off times from WASP, I am satisfied that:

    13.1 In the period August to November 2017 the claimant worked after 8pm on only 6 occasions.

    13.2 He worked before 10am on only 17 occasions.

    13.3 Those figures have to be considered in the context of the number of working days in the period in question. The period from August to November 2017 encompassed 18 weeks. In some of those the claimant was only working 4 days, having booked the Friday in order to use up holidays. If one assumes that he was absent on holiday on every Friday, that would still mean that there were 72 relevant working days.

    13.4 In the circumstances, I find that the claimant habitually started work at about 10am and finished somewhat before 8pm and took longer than one hour for lunch, but that Mr Hill did not complain.

14. In January 2017 the claimant got into difficulties in keeping his work up to date after returning from holiday. He was faced with a backlog of work which he appeared to be unable to clear. After discussion with Mr Hill, he was given the services of another member of staff to help him for some

three hours a day. He was then able to get on top of the work by March 2017. However, a backlog again developed when he was away for a week in July 2017 and he never caught up. Mr Hill discussed with him the possibility of again providing assistance, but the claimant resigned before this was implemented.

15. The claimant ought to have been able to do his work within his contracted hours. I so find having regard to the following:

    15.1 The evidence of what other warranty administrators managed, particularly the single warranty administrator covering Welwyn Garden City who had to deal with the same combination of vehicle manufacturers and approximately the same volume of work.

    15.2 The fact that the jobs of other warranty administrators were more extensive than his as they had to chase up and resolve paperwork errors.

    15.3 The discussion of timings between the claimant and Mr Tomlinson at an investigatory meeting in November 2017 as noted in the minutes.

    15.4 The fact that the part-time person who replaced the claimant (Ms Smith) does the work in approximately six hours a day without assistance. I note that she worked for only four hours a day to begin with, rising to five hours a day. However, during those periods she did have some assistance, both to learn the job and to help do the work.

    15.5 As already noted, the claimant's own evidence was that volume of work was not the problem. He attributed the problem to the errors in paperwork, but he was not responsible for dealing with those. An examination of the daily schedules of errors sent by him to Mr Hill shows that where there was an error he made a brief entry in the schedule and the paperwork was returned. That entry appeared in each daily record until the paperwork was returned to the claimant in an acceptable form, when the claimant would make the appropriate entries on the system. There was no significant build-up of a backlog of unresolved errors. In any event, even if there had been, this would not explain the claimant's inability to do his work within his contractual hours.

    15.6 In the light of the evidence of Ms Smith (and what I heard about the work of other warranty administrators) I am satisfied that the claimant's job could be done in six hours a day. Some days would be less busy, some more busy and sometimes (following a particularly busy day or period, or following holidays) it might be that work from one day would spill over to the next. However, the overall volume of work was such that any backlog should have been dealt with rapidly.

16. By November 2017 the respondent had some £220,000 arrears of warranty work which had been done, but for which it had not received payment from

the manufacturers within 30 days of the completion of the work. Moreover, that arrears figure had significantly escalated since the previous monthly report. Hence, the respondent's financial controller raised the matter with senior operational managers and this led to an investigatory meeting conducted by Mr Tomlinson with the claimant and, subsequently, a meeting with Mr Hill. I am satisfied that the notes of the meeting with the claimant on 16 November 2017 provide an accurate account of what was discussed, albeit that they are not verbatim. It is clear that the claimant accepted that the payment of warranty monies was very substantially in arrears and that those monies ought already to have been received from the manufacturers had the system been operated correctly.

17. Mr Tomlinson was seeking to understand why the arrears figure had escalated to such an extent. In the course of the meeting the claimant was reminded that the warranty administrators on other sites were able to cope and that they were responsible for chasing and resolving the queries, concerns and inaccuracies arising from the paperwork submitted to them, whereas the claimant simply returned incomplete or inadequate paperwork in all but the very simplest of cases.

18. The claimant's explanation for the arrears was that the records from the technicians supplied to him were poor and incomplete. Mr Tomlinson probed this, because (as he explained in evidence and as I have summarised above) it made no sense to him as an explanation, given that the inaccurate documents were returned, the mistakes corrected and an appropriate claim should then have been made. He noted that the daily sheets submitted to Mr Hill by the claimant (which the claimant produced copies of) showed that at any one time the highest value of the claims currently not made because of inaccuracies in paperwork never exceeded £20,000 and that at the relevant time, with arrears of £220,000, there were only two items on the daily schedule.

19. The claimant asserted to Mr Tomlinson that he was doing his best, that he was tired, that the amount of warranty work had increased and that the technicians, particularly new technicians, did not deal properly with paperwork. Understandably, for the reasons set out above, these explanations did not appear to Mr Tomlinson satisfactorily to answer the questions that he was raising. He noted to the claimant that, looking at the deficit, the claimant did not appear to be doing his job properly.

20. There was some mention in the meeting of the claimant's failing to adhere to his contractual working hours. As the main thrust of the claimant's explanation for the backlog was that it stemmed from the fault of others, the working hours were discussed only in the context of the claimant's assertion that he was doing his best, but nevertheless the backlog of unprocessed claims had developed. Mr Tomlinson (understandably) did not accept the claimant's explanation that the problem was the fault of others. However, he was concerned that significant blame might attach to Mr Hill (as well as the claimant) for failing adequately to address the performance problems generally and, in particular, the problems concerned with errors in

paperwork. Hence, he interviewed Mr Hill and, subsequently, decided that there should be a disciplinary hearing both as regards the claimant and Mr Hill.

21. A number of criticisms were made of Mr Tomlinson's approach to and conduct of this investigation. It is said that he failed to prepare properly by searching out all relevant records, failed to devise an interview plan, referred to other warranty administrators when he was unaware of the situation at Swindon (which he did not manage), became accusatory and adversarial in his questioning and failed to produce witness statements for those he interviewed or an interview report.

22. This matter was, as it began life, one which appeared to Mr Tomlinson to be likely to be a relatively simple matter to investigate. Mr Tomlinson knew that the debt had quickly escalated to unacceptable levels. The purpose of his interviews was to try to establish why. That did not require any elaborate preparation, he understandably wished to hear what the claimant and his manager thought was the reason for this and how it was being addressed. He did refer to other warranty administrators coping with similar jobs. He had in mind the sites he managed, including Welwyn Garden City, which it is not disputed was directly comparable with Barnet. He was, at the time, unaware of the situation at Swindon, as was the claimant. In fact, comparison with Swindon was not straightforward. It comprised two geographically distant sites, but when it merged to a single site a single warranty administrator did the job. The questions asked by Mr Tomlinson at the meeting followed from the explanations given by the claimant. They were fair questions, in the circumstances designed to probe the explanation given by the claimant. No witness statements were produced, but detailed notes of the interviews were prepared. There was no investigation report, but the claimant was clear (then and in evidence) that the £220,000 arrears raised questions as to his and his manager's capability which, having heard what he had to say, the respondent reasonably wished to address in the disciplinary hearing. He was clear that the respondent's concern was how that could have arisen if both he and Mr Hill were doing their jobs properly. I am satisfied that he so understood at the time and he confirmed that that was his understanding when giving evidence.

23. The claimant's evidence was that when he received the letter telling him to attend a disciplinary hearing he understood the warranty debt problem referred to in it was the problem which he had discussed some few days earlier with Mr Tomlinson. He agreed that the escalating level of warranty debt was a legitimate matter of concern for the respondent and it had needed investigation. He agreed that it was his job to process claims so as to keep that level of arrears to a manageable level. He agreed that, in those circumstances, it was legitimate for the claimant to consider, at a disciplinary hearing, whether the escalation of the arrears to unacceptable levels demonstrated a lack of capability on his part.

24. Before considering further to his reaction to the letter, I need to consider the case repeatedly put to the respondent's witnesses that the warranty work

had increased in volume to such an extent that the claimant reasonably could not cope. I begin by again noting that this was not the claimant's contention when cross-examined.

25. I accept that there was a significant year on year increase in warranty work at all of the respondent's sites. In particular, this was so at the comparable site of Welwyn Garden City. The major increase in 2017 came in the middle of the year, so far as Barnet was concerned. Extra technicians were engaged when the Barnet operation moved premises and that coincided with the claimant's holiday absence for five days. I accept that on his return he faced a backlog of work made less easy by the need to complete the relocation of physical files to the new premises. However, that is a backlog that he ought to have been able to cope with in his contractual hours, if he was both working them and working efficiently and competently.

26. It follows from my findings (and the claimant's own evidence as recorded above) that in all the circumstances it was reasonable for the respondent to investigate the difficulties in warranty processing at Barnet and, having done so and received no sensible rational explanation, to instigate a disciplinary procedure. The claimant's explanations for how the arrears rose did not make sense; he relied upon the errors of others (which he was not responsible for and their correction of which would not increase his workload or cause the arrears to develop). The problems caused to him which were associated with inaccurate or incomplete paperwork had been addressed in mid-2016 by the change in the system noted above.

27. I consider that it is unnecessary for me to consider whether the claimant's problems stemmed from his working too few hours, or from a lack of competence, or both. However, as I was addressed on the issue, I will set out my findings. It seems to me, on balance, that a lack of competence led to his falling further and further behind and faced with an escalating backlog, with which he could not cope, the claimant worked less efficiently and for fewer than his contracted hours. That he ought to have been properly monitored and was not led to Mr Hill receiving a written warning.

28. I consider that it is enough that I conclude, as I do, that a reasonable employer could (indeed, almost inevitably would) have behaved as this employer did, in seeking to understand the situation by interviewing the claimant and Mr Hill and, having considered what they both said, to instigate a disciplinary procedure.

29. On receipt of the disciplinary letter the claimant approached Mr Tomlinson and orally resigned. He was repeatedly clear in cross-examination that it was the receipt of the letter which caused him to resign and not the workload that he was required to undertake. He was told that if he wished to resign he needed to do so in writing. He did so. His resignation letter did not assert that he was resigning in response to any unfair or improper conduct by the respondent. As a result, the disciplinary hearing did not proceed and the claimant was paid wages in lieu of notice.

The law

30. The claimant relies upon a breach of the implied term as to trust and confidence. Such a term is found in all contracts of employment and a breach of it would be a repudiatory breach, the acceptance of which would bring the contract to an end.

31. A claimant must identify the conduct said to be repudiatory. That is the conduct said to amount to a breach of the implied term as to trust and confidence. That may be a single instance of an act or failure to act on the part of the respondent, or may be found in the cumulative impact of a series of acts or failures to act and it is not necessary that the last act in that sequence should amount, of itself, to a breach of contract (whether repudiatory of itself or not).

32. I have not set out above the law in respect of unlawful deductions from wages, or for breach of contract, invoking the extended jurisdiction of the tribunal. The claim form suggested claims for unpaid overtime and untaken holiday. Neither was the subject of any submissions and the only evidence (found in the claimant's witness statement) neither suggests a contractual basis for claiming overtime payments, nor sets out any basis for quantifying such a claim. Hence, it is inevitable that any claim in respect of unpaid overtime or untaken holidays must fail and such claims are dismissed.

Application of the law to the facts

33. I then turn to the claim for constructive unfair dismissal. In this case the claimant relies upon 10 alleged breaches of contract. They are relied upon cumulatively and the last is said to represent the "last straw".

34. I will deal with each of those 10 alleged breaches of contract in turn, each is said to amount to a breach of the implied term as to trust and confidence.

    34.1 The failure to put in place a safe system of work for the claimant so that he could cope with his job. A safe system of work was in place. When the claimant appeared to be in difficulty in inputting records due to missing or defective data, Mr Hill changed the system so that others were to produce invoices and that any defective invoice (or other item of paperwork) was to be sent back. Done with reasonable efficiency, the claimant's work could be done within his contractual hours. Others at other sites managed this, even though the scope of their jobs was larger. Furthermore, Ms Smith does the work in six hours a day. I also note, again, that the claimant was adamant that his workload was not excessive and that the problems he experienced were the result of poor performance on the part of others.

    34.2 The failure to provide the claimant with adequate assistance. This appears to me closely related to the first alleged breach. The factual

basis for it is not made out. When the claimant appeared to be in difficulties he was given assistance, albeit that working efficiently and for his full contractual hours he should not have needed that help.

34.3 The failure to deal with the claimant's requests for help. Again, this allegation is closely linked to those dealt with above. When the claimant appeared to be struggling in mid-2016, the system was changed to assist him. When he appeared to be struggling in early 2017 he was provided with help. When he appeared to be struggling later in 2017 the possibility of additional assistance was discussed. Again, I note that had the claimant been working his full contractual hours and working efficiently he should not have needed any assistance.

34.4 The failure to carry out a reasonable, fair and impartial investigation in November 2017. I am satisfied that the investigation carried out by Mr Tomlinson was reasonable, fair and impartial. Mr Tomlinson readily accepted that he was unfamiliar with the ACAS Code on conducting workplace investigations, but I am satisfied that he operated a fair procedure in the circumstances. The particular criticisms made of him in this regard are dealt with in the findings of fact.

34.5 The putting of accusatory questions to the claimant. The claimant was, indeed, asked to answer questions as to why he had done or not done certain things. I accept that Mr Tomlinson's questioning was probing. Mr Tomlinson needed to probe the explanation given by the claimant, because (for good reason) it did not appear to him to make sense. The claimant did little more than repeat that explanation. I am satisfied that Mr Tomlinson acted fairly and reasonably in pressing him further and, in so doing, giving the claimant the fullest possible opportunity to explain the matters which troubled Mr Tomlinson.

34.6 The failure to provide notes of the interviews to the claimant in the context of the disciplinary process. The notes of the meetings were intended to be attached to the disciplinary letter. The claimant says they were not. I accept that. I also accept that this was an oversight which would soon have been realised and remedied had the disciplinary hearing proceeded. I further note that the claimant did not at any stage point out that whilst the letter indicated that it had enclosures, there were none.

34.7 The failure to produce an investigation report. In this case an investigation report would have been no more than a record of what the claimant and Mr Hill said. That is contained in the notes of their respective interviews. It was plain to the claimant (as it would have been to any reasonable person) that Mr Tomlinson did not consider the responses given by him to explain adequately the arrears of unpaid warranty invoices and the claimant's competence in carrying out his job was called into question.

34.8 Failing to arrive at a fair decision after the investigatory meeting. Mr Tomlinson acted fairly in deciding that the explanations given by the claimant did not satisfy him and in considering that the lack of an appropriate and credible explanation called the claimant's capability into question. In this context, I note that having heard from the claimant, Mr Tomlinson did consider that there could well be fault on the part of Mr Hill as the claimant's immediate manager. He also was summoned to a disciplinary hearing.

34.9 The failure to carry out a fair disciplinary process. The principal complaint here is that the claimant was given insufficient notice of the disciplinary hearing. It is right that the letter was handed to him some two days before the hearing was to take place. However, I consider the period allowed was sufficient to enable the claimant to prepare for what was, in effect, a re-examination of the explanations which he had already given at the investigatory interview. I also note that the claimant did not complain of the lack of notice or seek further time to prepare for the disciplinary hearing.

35. I have looked at each of those alleged breaches of contract individually and I have also considered them cumulatively. I do not consider that these matters establish that the respondent had acted in a manner calculated or likely to destroy or to seriously damage the necessary trust and confidence between it as employer and the claimant as employee. Indeed, as set out above, in most instances the factually allegations said to amount to the breach are simply not made out. Furthermore, the claimant was clear in evidence that he had resigned in response to the receipt of the letter inviting him to attend a disciplinary hearing. He considered it unfair to blame him for a problem (the arrears) which, he maintained, stemmed from the failures of others. In fact, he was not being blamed at that stage, rather he was being given a further opportunity (in a disciplinary context) to explain why the arrears were not his fault (but the fault of others) when, as he accepted in evidence, the respondent was entitled in the circumstances to investigate whether the fault was his.

36. In all of the circumstances this claim for constructive unfair dismissal cannot succeed and is dismissed.

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Employment Judge Andrew Clarke QC

Date: 7 March 2019

Sent to the parties on: 15 March 2019

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For the Tribunal Office