EMPLOYMENT TRIBUNALS

Claimant: Mr R Cowper

Respondent: AJ Building (Hull) Ltd

Heard at: Hull **On:** 25 and 26 August 2020, 27 August 2020 (in chambers)

Before: Employment Judge D N Jones

REPRESENTATION:

Claimant: In person, Mrs T Cowper, support
Respondent: Mr K Blake, Managing Director, Mr J Tandey, operations manager

JUDGMENT

1. The respondent did not commit a fundamental breach of the contract of employment of the respondent. His resignation did not amount to a constructive dismissal.

2. The claims for unfair dismissal are dismissed.

3. The claim for wrongful dismissal is dismissed.

REASONS

Introduction and issues

1. This a complaint for unfair dismissal under general principles and contrary to section 100 of the Employment Rights Act 1996 (ERA) on health and safety grounds and for wrongful dismissal. The claimant resigned. It was agreed at the preliminary hearing that if the claimant established that he had been constructively dismissed, the respondent would not argue the dismissal was for an otherwise fair reason.

2. The issues are:

    2.1 Did the respondent act in a way which was calculated or likely to destroy or seriously undermine trust and confidence?

    2.2 If so, did it act without reasonable and proper cause?

    2.3 Further or alternatively did the respondent fail to provide the claimant with a safe place of work?

    2.4 Did the claimant resign as a consequence of either of the above implied contractual terms?

    2.5 If so, did the claimant otherwise affirm the contract by delaying his resignation between the last act which constituted a breach and evincing an intention to keep the contract in existence?

    2.6 Were the reasons for any breach because the claimant brought to the respondent's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health, that he left his place of work in circumstances of danger which he reasonably believed to be imminent and dangerous and which he could not reasonably have been expected to avert or because he took appropriate steps to protect himself from danger, in circumstances of danger which he reasonably believed to be serious and imminent?

    2.7 If the claimant resigned as a consequence of a repudiatory breach of contract of the respondent, what balance of notice pay would be due had the contract been lawfully terminated by the respondent?

Evidence

3 The Tribunal heard evidence from the claimant, from Mrs Janet Temple, office administrator, Mr Neil Ford, foreman, Mr Joe Tandey, operations manager and Mr Kris Blake, managing director and owner of the respondent.

4 The respondent had submitted a statement from Mr Jack Hatfield, who had been working on the particular job which was at the heart of the dispute and he might

have been able to provide significant evidence because he was the only other person present than the claimant and Mr Ford at the critical time. The statement had been taken shortly after the event in question on 17 June 2019. I was informed by Mr Blake that the respondent had not had contact with Mr Hatfield for some time and so the respondent would not be calling him. The claimant indicated he would wish to call Mr Hatfield in those circumstances. He would have needed to challenge the contents of Mr Hatfield's statement which contradicted his version of events and the Tribunal explained that he would not be allowed to do so by cross examination. Under the rules of evidence and procedure which apply in the courts and tribunals that is not permissible. In the event he was not able to contact Mr Hatfield in time for him to attend on the second day of the hearing and no adjournment was sought. The witness statement of Mr Hatfield was considered, but carried limited weight, or value, because it was not tested by questioning in contrast to the other witnesses who attended.

Strike out

5 On the second day of the hearing Mr Blake asked the Tribunal to strike out the claim because of the conduct of the claimant the previous day. The Tribunal may strike out a claim or response under rule 37 if the manner in which a party has conducted the proceedings is scandalous, unreasonable, disruptive or vexatious.

6 The conduct of the claimant met that threshold. When giving evidence the claimant became aggressive, verbally and by his demeanour. Instead of answering many of the questions put to him he made disparaging, offensive and profane remarks about his former employers, often with finger pointing to add emphasis to the invective. He left the witness table on more than one occasion to produce items he had brought with him and placed at the back of the Tribunal. These had not been disclosed. One was a large drawing of the work, but the other was a heavy piece of metal piping. It was about 2 feet in length. It was presented with a view to demonstrating the strength of the material. The end of the material had twisted under the force applied to drive it into the ground. The claimant explained, shamelessly, that he had stolen it from his employers when he left their premises on the last day of his employment, because he had foreseen there would have been the need to make this clear. When not giving evidence the claimant could not contain himself from making sarcastic and snide asides. Although he apologised several times and agreed not to point and to try to control his emotional outbursts, he failed to do so.

7 This conduct was disruptive and unreasonable. It deflected from the objective of the hearing and was, at times, menacing. It was scandalous, in that the claimant used the proceedings as a means to express his disobliging opinions of his former employers, rather than to address the legal complaint.

8 The application to strike out the claim was rejected notwithstanding, because the Tribunal was satisfied a fair hearing of the claim remained possible and achievable, with adjustments. Part of the questioning of witnesses was taken over by the claimant's wife, who behaved in a civil and proper manner and repeatedly reproached the claimant for his outbursts. The Tribunal was able to

put the claimant's case to the witnesses. At one point the claimant chose to sit outside when Mr Ford concluded his evidence and his wife was able to conduct the proceedings at that point in time. There was no doubt that the claimant had become consumed with feelings of anger and bitterness at the ill treatment he perceived his employers to have subjected him to and this had led to him becoming unwell. He had been prescribed anti-depressants. This did not justify his behaviour in the proceedings but went some way to placing in context the departure of it from acceptable norms.

9 The Tribunal was not oblivious to the stress and upset caused to Mr Blake by the actions of the claimant. The claimant's behaviour added significantly to the difficulties in presenting a case when not represented. However, to prevent a case from being considered on its merits is a draconian step and it was possible to achieve a hearing which allowed all relevant evidence and arguments to be made.

Background/Facts

10 The respondent is a company which specialises in domestic and commercial refurbishments and repairs and much of its work is undertaken on instructions of insurance companies. It is one of two companies in the UK which provides a specific form of helical micro pulldown piling. Mr Blake purchased the company from his grandparents in 2012 when he became its managing director. He had been a director of the company for two years prior to that. The respondent employs 17 staff, but this fluctuates.

11 The claimant was employed by the respondent from 8 April 2013 until 25 June 2019 as a labourer and mechanic. He and Mr Blake had known each other for some years prior to the commencement of the claimant's employment because of a long friendship with his stepson.

12 On 6 June 2019 the claimant, Mr Ford and Mr Hatfield attended at a property in Doncaster to undertake repair works underneath a rear extension to a dwelling house. The work involved underpinning the rear and left elevation walls to the extension. A trench was dug to the foundation of these walls. Five piles were to be driven below the foot of the walls and each secured to the base of the wall with a metal bracket. The means of driving the pile underground was to be by use of a portable hydraulic motor which is operated manually. Because of the limited access at the rear of the property in the small yard/garden use of a more substantial, mechanical machine was not viable. A pile head on the device is attached to one end of the pile and operates as a screwdriver, by driving the pile into the ground in a clockwise direction. In order safely to secure the machine and ensure there is sufficient torque to drive the pile into the ground, a bracing (or torque) arm is attached to the pile head and fixed against a nearby stable and immovable object. The immovable object takes the pressure, in the opposite, anticlockwise direction of the pile as it is screwed into the ground. If the bracing arm were not securely placed against an immovable object, the pressure created from the pile driver could cause it to break free and move at force in an anti-clockwise direction. Serious damage or injury would arise if anything or anyone were caught in its free-wheeling path.

13 On 12 June 2019 a serious dispute arose between Mr Ford, who was the supervisor and manager of the particular works, and the claimant, about where the bracing arm was to be placed in respect of the fourth pile which was to be driven underground in the middle of the rear extension wall. The claimant and Mr Hatfield had arrived at the site shortly after 10 o'clock, having delivered a dehumidifier elsewhere. The claimant was about to move a washing machine/dryer which was in a small cabinet next to a garden party wall to the adjoining property. This was so that the bracing arm could rest against this wall when driving the fourth pile into the ground. Mr Ford told the claimant not to move the washing machine because the bracing arm was to be restrained by the "mud". The claimant asked Mr Ford if he was joking, saying that the mud would not last a minute, why would they brace off the mud when there was a suitable wall. He left to have a cigarette and returned five minutes later. He asked Mr Ford if he should move the washer/dryer. Mr Ford said no because they were to use the mud. The claimant said this would lead to injury or death and after an angry exchange in which both swore at each other he returned to the respondent's offices in Hull. Before he left the claimant asked Mr Hatfield if he was leaving too, but he declined and remained at the property. The account of this conversation had been recorded by the claimant on a home calendar. He had written it down shortly after the events in question and prepared a handwritten chronology from the calendar and text messages in a document he provided to the Tribunal. Mr Ford largely agreed with the description of the conversation when it was put to him by the Tribunal. (Ordinarily, this account would have been put in cross examination by the claimant, but he had concluded his cross examination of Mr Ford before reaching these events, because he had become angry and exasperated with Mr Ford's answers to earlier questions. It was therefore necessary for the Tribunal to put the essential parts of the claimant's case to Mr Ford).

14 Mr Ford and Mr Hatfield completed the installation of the last two piles. Both involved leaning or attaching the bracing arm to the inside of the trench. One side of the trench comprised of the rear elevation wall from ground level to foundation level. The opposite side comprised a vertical wall of earth beneath ground level. At its top was a thin layer of concrete which had formed the surface of the ground in the back yard. Above the concrete, to the left side of the trench, was a substantial pile of 'spoil', which was the material which had been excavated when digging the trench. To drive in the fourth and fifth pile Mr Ford had run the bracing arm along the earth side of the trench. Mr Ford and Mr Hatfield returned to the office later that day, having completed the works.

15 The claimant had arrived back at the respondent's premises by mid-morning. He spoke to Mrs Temple and said he had concerns about the way the job in Doncaster was being done and that it created health and safety issues. He produced photographs on his phone and said that because Mr Ford would not listen to him he had left the site. Mrs Temple said she would ring Mr Tandey and Mr Blake but both were out of the office at that time. The claimant went to the staff rest room, but left after 20 minutes to go home.

16 Mrs Temple made phone calls to Mr Blake and Mr Tandey. She was able to contact Mr Tandey and explained to him what the claimant had said.

17 Mr Tandey telephoned the claimant at 3:12pm. The claimant set out his version of events and Mr Tandey agreed that if Mr Ford had intended to use the pile of rubble, or spoil, which had been excavated from the trench as the immovable object to take the pressure of the bracing arm it would be dangerous. The claimant said he was considering contacting the health and safety executive, but Mr Tandey suggested he left it with him to investigate.

18 Mr Tandey spoke to Mr Ford and Mr Hatfield later that afternoon when they returned from the job. They explained to him that the bracing arm had been secured inside the trench and not against the spoil. Mr Tandey spoke to Mr Blake later that day to discuss work generally and informed him about the disagreement between Mr Ford and the claimant and that he would keep him informed.

19 Mr Tandey had expected the claimant to attend work on Thursday, 13 June and Friday, 14 June 2019, but he stayed at home. On 13 June 2019 Mr Tandey undertook some research. He considered the detailed instruction manual in respect of the pile driver.

20 On 14 June 2019 the claimant telephoned the office at 5:15pm. Mr Tandey could not take the call as he was working at a business event that evening. He sent the claimant a text when he came free, at 20:52 hours. He said he would call the claimant the following morning and the claimant asked him to ensure it was late morning because he was attending the doctors.

21 Mr Tandey telephoned the claimant at about 11 o'clock on Saturday, 15 June 2019. He informed him that he had made enquiries and that he considered that Mr Ford had operated the bracing arm correctly and safely. He explained the different version of events given by Mr Ford to that described by the claimant. The claimant said that Mr Tandey did not have sufficient experience of piling and that he intended to take the matter up with Mr Blake. There was a discussion about the claimant's visit to the doctor. The claimant informed Mr Tandey that he had been certified as not fit to work for a week because of his back. Mr Tandey wished him a speedy recovery. Mr Tandey later spoke to Mr Blake, on 16 June 2019, and informed him of what had happened and that the claimant was off sick with a bad back.

22 On 19 June 2019 the claimant telephoned Mr Blake and left a message shortly after noon. Mr Blake was working remotely, in the Yorkshire Dales. He had limited access to mobile and data reception. He telephoned the claimant on Thursday, 20 June 2019 at 3:20 in the afternoon and explained he had been busy. There was a 20 minute discussion about what had happened on 12 June 2019. Mr Blake explained that he had been briefed on what had happened and that he agreed with Mr Ford, that the safest way to have installed the pile was to brace the torque arm inside the trench. He also expressed the view that the suggestion of the claimant to use the garden wall would have been less safe because it was a less stable structure. The claimant said that it was not just about the pile installation but that there were other aspects of Mr Ford's work which caused concern and that it was always, "Neal's way or the highway". The claimant said that he had photographs which would establish that Mr Ford was bodging the installation of the piles and he referred to problems with the brick

spread footings. Mr Ford said that he needed to know of any matters of concern. He suggested visiting the claimant to take a statement of events in respect of the new matters which he had raised but that he would need a further meeting with Mr Ford first. The claimant sent a number of photographs he had taken, via WhatsApp, to Mr Blake

23 Mr Blake spoke with Mr Ford on Friday, 21 June 2019. He rejected the criticisms which the claimant had made. Mr Blake looked at the file for the project which contained a number of photographs of the work which had been undertaken as the work was in progress. He considered they supported Mr Ford's account of his work and that it had been to a high standard.

24 Mr Blake telephoned the claimant on the evening of Sunday, 23 June 2019. He apologised for not having been able to visit him at his home as he had been busy with personal matters. He informed the claimant that he had had a meeting with Mr Ford on the Friday and investigated the new claims, including reviewing the site photographs. He said they showed more clearly the work from start to finish and, having regard to the problems that were encountered in the tricky installation, he was satisfied the job had been done correctly. There is a dispute between the claimant and Mr Blake as to who then suggested a meeting of Mr Ford, Mr Hatfield, Mr Tandey, Mr Blake and the claimant. I am satisfied that Mr Blake had asked the claimant how he would wish to see the matter resolved , that a meeting was suggested by the claimant and Mr Blake agreed. In the claimant's calendar note, he stated, "*Lastly I said look we want a meeting of all five involved me Jack Neal Blakey Joe. I proposed 10am Tues knowing Monday was no good this time on a Sunday nite"*. It is clear that at the conclusion of that telephone call both the claimant and Mr Blake were in agreement that a meeting would assist move matters forward. It would allow all parties to explain their position and point of view.

25 On the evening of Monday 24 June 2019, Mr Blake learned that he had to attend a meeting at his son's school the following morning and that Mr Tandey was to attend an urgent meeting with a client. He therefore rearranged the meeting with the claimant and others for later in the day. He communicated with the claimant by text at 18:17 on Monday, 24 June 2019 and the claimant replied, "*4 it is*".

26 The claimant had a sleepless night. He came to the conclusion that enough was enough and he wished to resign. He sent a text to Mr Hatfield at 7:26 on the morning of 25 June 2019. The claimant asked if Mr Blake had been given his version of events. Mr Hatfield replied to say no-one had mentioned anything since he had left, not even Joe. The claimant said in evidence that he had decided to resign regardless of this information.

27 The claimant telephoned the office shortly after 8 o'clock to communicate his intention to leave. Mrs Temple said that she did not receive the call, but I am satisfied nothing turns upon this. The claimant may have spoken to someone else in the office, because she did not usually arrive until 8:30am. He sent a text to Mr Ford to inform him he was quitting and that message was relayed later to Mr Tandey and Mr Blake. On any view he resigned that day.

28 The claimant attended at the premises of the respondent to collect his belongings. The others had assembled for the meeting. Mr Blake saw the claimant was in the stores and went to speak to him. He invited him to discuss matters but the claimant said he had been advised not to discuss anything. The claimant went to his car. Mr Blake followed him and opened the passenger door. He asked the claimant to come upstairs to explain why he was quitting. The claimant said he would hear from his solicitors and that he had had his chance. Mr Blake said he could not believe he would not talk about it after all the years they have known each other. The claimant said, "*well doesn't that make you a bigger cunt then*". Mr Blake replied, "*I'm a cunt*?", which the claimant said, "*Yeah, you're a cunt*". The claimant then criticised Mr Blake for not doing anything about his complaints of poor work practice on site, there were some further heated words and the claimant informed Mr Blake he would be hearing from his solicitors, left the driving seat of his vehicle and walked round the side of the car to slam shut the passenger door.

The Law

29 By section 94 of the ERA an employee has the right not to be unfairly dismissed.

30 A dismissal is defined by section 95 of the ERA and includes the employee terminating 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, section 95(1)(c). This is known as a constructive dismissal.

31 In order for there to be a constructive dismissal, the employee must have resigned because his employer has committed a fundamental breach of contract and he must not have otherwise affirmed the contract, for example by delaying his resignation and thereby evincing an intention to continue to be bound by the terms of the contract, see ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*** and ***Buckland v Bournemouth University [2010] IRLR 445***. The term is not to be equated to a duty to act reasonably. In respect of what is required in the nature of the breach, it is whether the employer, in breaching the contract, showed an intention, objectively judged, to abandon and altogether to refuse to perform the contract, see ***Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420*** and ***Leeds Dental Team Ltd v Rose [2014] IRLR 8***.

32 There is an implied term in a contract of employment that the employer will take reasonable steps to ensure the employee is safe, see ***Johnstone v Bloomsbury Health Authority [1991] ICR 269***.

33 There is an implied term in a contract of employment that neither party shall, without reasonable and proper cause, act in a way which is calculated or likely to destroy or seriously undermine the relationship of trust and confidence between the parties, see ***Malik v BCCI SA (in liquidation) [1998] AC 20***.

34 Such a breach may be because of one act of conduct or a series of acts or incidents, some of them may be trivial, which cumulatively amount to a repudiatory breach, see ***Lewis v Motorworld Garages Ltd [1986] ICR 157***. If a

series of acts, the last event must add something to the series in some way although, of itself, it may be reasonable, see ***Omilaju v London Borough of Waltham Forest [2004] ICR 157*** and ***Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1***.

35 By section 100 (1) of the ERA, an employee shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

> (c) being an employee at a place where—
>
> (i) there was no [health and safety] representative or safety committee, or
>
> (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
>
> he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
>
> (d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or
>
> (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.
>
> (2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.
>
> (3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

Discussion and Conclusions

36 The first issue to be determined is whether the circumstances on 12 June 2019 created a breach of either of the implied terms. Was Mr Ford intending to embark upon a dangerous and unsafe working practice of installing the fourth pile by securing the bracing arm against a pile of spoil?

37 I agree with the conclusion of Mr Tandey, that the claimant had misinterpreted Mr Ford in the heated conversation which had taken place when he and Mr Hatfield arrived at the site. In his evidence the claimant made it plain that he was frustrated that he had not had a break after having delivered a humidifier elsewhere and that Mr Ford was not going to allow him to have one. ("*Kissed goodbye to tea break because of his mood*"). I consider it probable that there was a frosty atmosphere when the discussion took place about where the bracing arm was to be placed.

38 I think it highly unlikely that Mr Ford intended to brace the torque arm against the pile of spoil. It would have been obvious that this would not have been an immovable object which could have safely held the bracing arm in position, it comprising of earth and other building debris. Its value in stabilising the bracing arm was limited to the weight, which was significant, which the spoil brought to bear on the ground at one end of the trench. Mr Ford had installed hundreds of piles and had been taught by Mr Blake how safely to secure the bracing arm. I find it implausible, in these circumstances, that he would ever have intended such a risky enterprise as the claimant said, not least because other options were available. There is no doubt that Mr Ford and Mr Hatfield did complete the job that afternoon by securing the bracing arm in the trench. I consider it unlikely Mr Ford had a change of heart after the claimant left, in respect of where to place the bracing arm. It is far more likely the claimant misunderstood what Mr Ford meant. In fairness to the claimant, there may have been a lack of clarity in Mr Ford's expression by his brief use of the term "mud".

39 Had the claimant remained at the site, it would have become apparent that by referring to mud, Mr Ford had meant the side of the trench opposite the elevation wall which comprised of earth, which rested below the spoil above. This state of confusion might have been clarified had either Mr Ford or the claimant been in a better frame of mind, but Mr Ford was frustrated with the claimant's confrontational attitude and there was no goodwill to allow a proper discussion. Rather, the situation descended into the trading of abusive remarks and the claimant storming off site. I am satisfied however that before he left it is likely Mr Hatfield had intervened to seek clarification of what Mr Ford meant. When Mr Ford and Mr Hatfield returned to the office on 12 June 2019, they reported to Mr Tandey that Mr Hatfield had said, during the heated exchange, "he doesn't mean the mud, he means the trench". I accepted Mr Ford's evidence that this was said. I suspect the claimant was not listening by this stage, because he had fixed in his own mind the idea that Mr Ford was talking about using the spoil. The claimant repeated this comment of Mr Hatfield, in his written reply to the response of the respondent to the claim, but he retracted it at the commencement of his evidence, to, "*why didn't Jack Hatfield say 'Rob maybe he means the trench*?'".

40 Mr Ford was the senior employee on site and had the responsibility to implement a safe system of work on behalf of the respondent. Did he fail to do so, or fail

properly to communicate his intentions with the claimant? If the claimant reasonably anticipated that there was to be a dangerous procedure, he would not have to hang around to watch it play out. At common law that could amount to what is known as an anticipatory breach; if his employer had declared that an unsafe system of work was going to be adopted, there would be an anticipatory breach of the implied term to take reasonable steps to make a person's work safe.

41 I have no doubt that the system of work Mr Ford operated was safe. Whilst I can understand that the claimant believed that the system which was going to be adopted was to be highly dangerous, that was a mistaken belief. Unhappily, the claimant allowed his temper to get the better of him. This was, in all likelihood, no different to a number of the outbursts witnessed in the Tribunal and to the unpleasant volley of abuse directed at Mr Blake when he tried to persuade the claimant to discuss matters in the yard on 25 June 2019. It was not reasonable of him to leave the site at that time. The bracing arm had not been put in the position the claimant believed would be dangerous. The responsible action would have been to call Mr Tandey from the site to explain the serious danger the claimant believed Mr Ford was placing the workers in. Mr Tandey had the principal responsibility for safety. The claimant said he did not do this because he had not responded to a call he had made on a previous occasion. I did not regard this as realistic. The claimant must have known that this would be considered by Mr Tandey when he returned to the office. To delay putting him on urgent notice was pointless. Having considered his evidence I have no doubt Mr Tandey would have immediately attended the site and instructed Mr Ford to cease all work in the meantime, had he received a call from the claimant. The danger the claimant was raising could have given rise to fatal injury and criminal prosecutions. It is inconceivable that Mr Tandey would have ignored it.

42 I am quite satisfied that in leaving the site, the claimant was consumed with anger following the argument he had with the foreman which is why he made no call to Mr Tandey, the HSE or Mr Blake. Had the claimant behaved calmly, in the same manner as Mr Hatfield, he would have discussed the matter further with Mr Ford and learnt that the operation Mr Ford had proposed was, in fact, safer than using the boundary, party wall which the claimant had intended. The claimant jumped to a premature and mistaken conclusion about how the work was to be undertaken, because he was not prepared to have a proper discussion, being frustrated that he had not had a break, annoyed that Mr Ford seemed in a mood and because Mr Ford had rejected the claimant's proposed choice of secure object.

43 In these circumstances, there was no breach of the implied term to make the place of work safe, anticipatory or otherwise. There was much discussion in the hearing about how the first three piles had been installed and what measures had been taken to secure the bracing arm ealrier. There was disagreement about whether the same party garden wall had been used as the immovable object for the first pile and the extent to which the trench on the left elevation wall had been used for another pile. I did not consider this debate was of any real assistance in resolving the issues in this case, which were about what had happened on 12 June 2019 and not the previous days. The disagreement about the security of

the party garden wall and whether it had been used for the first pile was only of any real significance if it was to be compared to the strength of the trench wall. As that was not why the claimant left the site, nor why he believed the operation to be dangerous, it had only tangential relevance to credibility. On that, Mr Ford was a more reliable witness than the claimant. The claimant's accuracy as a historian was skewed by his sense of grievance. One example was a statement he made that the full length of the bracing arm had rested against the left extension wall. That was said during the evidence of Mr Ford because the claimant felt it undermined what Mr Ford had explained. The Tribunal pointed out that was not borne out by the claimant's own diagram which displayed the end of the bracing arm extending beyond the end of the wall. The tailoring of his case in this way reflected poorly on his reliability.

41. The events of the 12 June 2019 did not establish any basis for a breach of the implied term of trust and confidence. A criticism could be made of Mr Ford that he had not expressed himself clearly. However, that had to be seen in the context of him being drawn into a heated and aggressive confrontation with the claimant. I do not find any actions of Mr Ford constituted the quality of conduct necessary to destroy or seriously undermined trust and confidence.

42. The other aspect to the complaint concerns the events of the following 12 days. The claimant says his employer did not take his complaint seriously and left him waiting for long periods without addressing his seriousmatter. A breach of the implied term can arise by acts which are not of themselves sufficiently serious to destroy or seriously undermine trust and confidence, but when taken together may do so.

43. I reject that complaint as well. The sequence of events showed that both Mr Tandey and Mr Blake made investigations and called the claimant to discuss their findings. Within 3 days, the claimant was informed by Mr Tandey that he had concluded the system of work had been safe and he explained why. The claimant had not reported at work for duty on either the Thursday or the Friday, where the matter could have been discussed face to face. Mr Tandey contacted the claimant on a non-working day, on the Saturday morning.

44. Mr Blake had not ignored the concerns either. It was for Mr Tandey, as the operations manager, to deal with the complaint in the first instance. I do not regard his handling of the matter, after it had been escalated to him by the claimant, as falling short, let alone to the standard of destroying or seriously undermining trust and confidence. The claimant had been off work sick for the week commencing 17 June 2019. By then Mr Blake was working away from the office and had considered that the claimant may need some rest from work. After the claimant contacted him, within two days he had spoken to him and agreed to speak again to Mr Ford about new concerns he had raised. He contacted the claimant at the weekend, on Sunday evening and it was agreed that a meeting with all concerned would be a way forward. That was to take place within two days. None of this, objectively, is indicative of an employer which is demonstrating an intention to abandon the contract of employment. Mr Blake had many demands on his time and responded within a reasonable timeframe. The claimant had not presented a written grievance under the respondent's

policies, but this did not prevent Mr Tandey and Mr Blake from investigating and responding to the complaints. The claimant's expectations for a swifter response were quite unrealistic. The actions from 12 June 2019 to 25 June 2019 did not cumulatively destroy not undermine trust and confidence.

45. I recognise that the text form Mr Hatfield in the early morning of Tuesday 25 June 2019 would have caused the claimant concern. If correct, it meant that, contrary to the assertions of Mr Tandey and Mr Blake, his version of events about the 12 June 2019 had not been asked for. Because Mr Hatfield did not give evidence, it was not possible to understand precisely what he meant or why he sent this message. Mr Tandey speculated that he might not have wanted to lead the claimant to think he had taken sides. I am unable to resolve that question. I am satisfied, however, that Mr Hatfield had not only given his account of what had happened when he returned to the office on 12 June, but that he also signed a written statement at the request of Mr Tandey on Monday 17 June 2019. That was the witness statement the respondent had served in this case. The Tribunal asked Mr Tandey about the circumstances in which he took the statement. He said that Mr Blake had requested that he took statements about the incident and so he duly obtained this one. I regarded Mr Tandey as an impressive and reliable witness in this case. I reject the suggestion that this statement had been falsely created and that he has lied about speaking to Mr Hatfield during his enquiries.

46. Even had I found there to have been a fundamental breach of contract on 12 June 2019, I would have held that the clamant had affirmed the contract by raising the matter with Mr Blake and agreeing to a meeting to resolve matters. This was the clearest of indications that the claimant wished to remain and move forward in his employment after a meeting to clear the air. The text from Mr Hatfield may have changed his mind, but that was not an action of the claimant's employer and was, in any event not reflective of what had occurred. It is the employer's behaviour which must damage trust and confidence and by this stage the respondent was evincing a clear desire for the claimant to remain in employment; one which the claimant accepted by agreeing to attend a meeting on 25 June.

47. There was no fundamental breach of contract by the employer and it was the claimant who chose to bring the contract to an end by walking out on 25 June 2019 and not giving notice. He had provided a sick note until 4 July 2019. He was paid sick pay until then. He did not report to work to serve his notice. There was no entitlement to notice pay in those circumstances.

Employment Judge D N Jones

Date: 28 August 2020