



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4109662/2021

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Held in person at Dundee on Tuesday 24 May and by CVP on
25 and 26 May 2022

Employment Judge McFatridge

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Mr B Adamson

**Claimant
Represented by:
Mr Lawson,
Solicitor**

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DPD Group UK Limited

**Respondent
Represented by:
Ms Stobart,
Advocate
Instructed by:
Messrs Freeths LLP
Solicitors**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant was not unfairly constructively dismissed by the respondent. The claim is dismissed.

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REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unfairly constructively dismissed by the respondent. He also initially made a claim based on public interest disclosure however this was later withdrawn and dismissed. The respondent submitted a response in
E.T. Z4 (WR)

which they denied that the claimant had been dismissed, it was their position that he had resigned. In any event they denied that the dismissal was unfair. The hearing was initially set down as a hybrid hearing with the claimant and parties' representatives attending in person with the claimant and some of the witnesses giving evidence in person and some giving evidence online using the Tribunal's CVP system. As it happens it became clear to the parties on the first day of the hearing that there would be difficulties in hearing the evidence of the remote witnesses in the Tribunal room using the equipment available and the parties agreed that the remaining days of the hearing would take place online using CVP. The claimant gave evidence on his own behalf which was given in person. The respondent's witnesses all gave their evidence over CVP. Witnesses all gave their evidence in chief using witness statements albeit, with the consent of the Tribunal, the respondent's representative asked some additional questions of two of her witnesses in order to deal with matters which had arisen during the claimant's evidence. A joint bundle of productions was lodged by the parties which is referred to below using page numbers. In addition, with the consent of the Tribunal, the respondent lodged an additional document (supplementary 1) on the second day of the hearing which comprised an occupational health report which had been referred to by the claimant in his evidence. On the basis of the evidence and the productions I found the following essential facts relating to the claim to be proved or agreed.

Findings in fact

2. The respondent is a parcel delivery business which provides services to customers in over 30 countries. The claimant commenced employment with the respondent on or about 9 January 2017. The claimant was initially employed as a PM Shift Manager at the respondent's depot in Dundee. Because of the nature of the respondent's business they operate round the clock and managers are to work either am or pm. In the Dundee depot there were five Shift Managers (of which the claimant was one), one Depot Quality Manager and two Administrators. The depot also had approximately 44 employees and 65 owner/driver franchisees (OFDs). In

addition to his role as a PM Shift Manager the claimant took over the role of Health and Safety Representative for the depot during 2018.

3. The claimant reported to Mr David Lamont who was the Depot Manager. The claimant had a good relationship with Mr Lamont.

5 4. As part of the management process within the respondent a manager is expected to carry out what are called "formula 1" meetings with those who report to them. Mr Lamont held two formula 1 meetings with the claimant, one on 8 January 2019 and one on 18 September 2019. The meetings were designed to discuss how the manager felt they were doing, what their career aspirations were and detail any training or developmental needs. Meetings were also attended by an HR representative. Following each meeting the parties attending would agree a report which took the form of a populated spreadsheet where various boxes were completed. The content of each box was agreed by the manager attending the meeting and his line manager and HR. In the claimant's case the spreadsheet containing the outcome of the two meetings was lodged (page 95). For
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15 the January 2019 meeting the first box completed by Mr Adamson stated

20 "I feel that I can provide and capable of doing more than what I am doing in my current position. I am a team player and have gained the trust and support of my PM team. The introduction of Voice is pleasing on that we have achieved 100 per cent within 24 hours of introducing this. This allows me to monitor overall performance of my team. It further provides information that is going to allow us to manage the shift better and provide excellent customer service I
25 further discussed my key strengths, numeracy and analysis, communication, presentation and training skills."

With regard to career aspirations the document notes

"Not at local depot however would consider the opportunity of national ops support/would like to know more about DOM."

30 Under General Comments it stated

“Over the last six months I feel now that I am part of the team all well functional team. Communications has greatly improved and we are all there to support each other.”

5 The claimant did not raise any issues at the meeting in January with Mr Lamont in relation to any issues of bullying or management style within the organisation.

5. At some point in or about 2018 whilst the claimant was working at Dundee he attended a video presentation which showed the then CEO presenting a video about corporate branding. It took place at a local cinema. The claimant was concerned that during the presentation he understood the CEO to show a video clip taken by the CEO himself taken by using a mobile phone. The claimant believed that the CEO had been guilty of a health and safety breach by using his mobile phone to video a company vehicle whilst the CEO was himself driving. The claimant did not raise this issue at the time with any of his managers or with anyone in the company. He did not raise it at the formula 1 meeting in January 2019.

6. The claimant attended his second formula 1 meeting in September 2019. Again this took place with Mr Lamont and the outcome of this is also noted in the spreadsheet at page 95. The period immediately up to September 2019 had been a difficult period within the Dundee depot where there had recently been some change within the management at the depot. There had been challenges for the managers at the depot to maintain service levels and motivate their teams. The claimant is noted at the relevant boxes as stating

25 “There has been some significant instability in the team this year due to a couple of underperforming individuals one of which we still need to deal with. Other than that I believe that the team has gelled well and is performing well. Especially given the increase in workload they have faced and (particularly in recent weeks) the later and later arrivals of collections which further impacts their operations. The culture within DPD and the situation within which I find myself after another year are at odds with my principles, values and aims which I find it hard to envisage there being any

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meaningful way to improve this given the incompatibility of the opposing views.”

5 Mr Lamont understood the claimant’s assertions to be in the context of the difficult period mentioned. The claimant provided no further detail about the culture and how this was at odds with his own principles, values and aims and did not dwell on the point. Mr Lamont believed that the claimant was simply reflecting on a difficult period within the business and indeed noted that the management team was now working well together. At this meeting the claimant indicated that he was interested in a position within the National Operations Team as a national trainer.

7. The claimant again did not raise the issue of what he considered to be the inappropriate breach of health and safety by the Chief Executive Officer in relation to filming a company vehicle from his own car.

8. The respondent have a number of policies. A document entitled ‘employee’s summary of disciplinary and grievance procedures’ was lodged (pages 60-63). The grievance procedure is set out in section 6 starting on page 62. The policy states

20 “The DPD Group UK grievance procedure comprise four stages. Stage one is designed to be informal with stages 2, 3 and 4 being formal parts of the procedure.

25 Stage 1 – It is anticipated that the majority of grievances will be resolved at this stage. The employee does not have to lodge their grievance in writing and does not need to refer to their complaint as a grievance. However it is conducive to the process if the employee is clear about the nature of their complaint and also specific about the resolution they are seeking. Within five working days of the complaint the employee’s line manager should discuss the grievance with the employee. The employee is entitled to representation in any meeting to discuss the grievance and the line manager should confirm the outcome in writing.

30 If the employee is not satisfied with the outcome or does not believe that the procedure has been followed they may take their grievance to stage 2.”

Stage 2 goes on to state that the employee should formalise the substance of their grievance in writing to their designated manager. A timetable is provided for the manager to deal with this. If the manager does not deal with this there is then a stage 3 right of appeal to a more senior manager and the stage 4 right of appeal to the Director of HR and Training.

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9. The claimant has extensive experience as a manager in various other businesses and organisations before commencing employment with the respondent. He was well aware of the use of grievance procedures and the possibility of raising a grievance should there be any issues which concerned him. The claimant was also well aware of the respondent's own grievance process. He dealt with a number of grievances at the Dundee depot whilst a manager. The claimant was also aware that the grievance process was used very extensively within the respondent and indeed his own evidence was that grievances were 'thrown about like confetti.' The claimant at no stage raised a formal grievance with the respondent. Mr Lamont as his line manager did not understand that the comments made by the claimant at the formula 1 meeting in September 2019 were intended to be in some way an informal grievance under stage 1. In any event if the claimant was dissatisfied the claimant did not invoke stage 2 of the process as he ought to have done.

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10. Following the expression of his interest in the job of National Trainer Mr Lamont met the claimant for a coffee and discussed the role with him. The claimant applied for and was successfully appointed to the National Operations Department of the respondent in the role of National Trainer in or about February 2020.

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11. The letter formally offering the claimant this post was lodged (page 96). Although the claimant was to be based within the National Operations Department at DPD Dundee Depot his role involved having responsibility for training throughout the whole of Scotland and Carlisle in the north of England. The claimant was essentially to train what the respondent described as "on the job trainers" (OTJ). He would train them in how to induct new starts and also give the on the job trainers their induction training. On various occasions when required he would also give new

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training to drivers. This role involved the claimant travelling to various local depots. The claimant's line manager was initially Neil Andrew.

12. As is well known the Covid pandemic broke out in late March 2020. On 17 March 2020 the UK Chancellor announced a substantial package of emergency state support for businesses who were going to be affected by the pandemic. On 23 March the Prime Minister announced that people should only go outside to buy food, to exercise once a day or to go to work if they absolutely could not work from home.
13. At or around the beginning of April the claimant contacted Mr Andrew and booked two days' annual leave on 8 and 9 April. The claimant was aware that due to the Easter holidays he would then be off on 10 and 13 April before returning to work on 14 April.
14. He advised Mr Andrew that he wished to take 8 April off as that was the first anniversary of his father's death and he wished to be available to provide support to his mother on that date.
15. On 8 April 2020 Mr Andrew wished to contact the claimant. It had been determined that the claimant and the rest of the training team should be furloughed because it was unclear at that point what level of capacity the respondent would be working to. A significant proportion of the respondent's work had paused when organisations began sending their employees to work from home. A conference call had therefore been arranged to tell the training team that they were to be furloughed. Mr Andrew would not normally interrupt a period of annual leave by telephoning an employee but in this case he was keen to contact the claimant since he felt the information would be important to the claimant and he did not want the claimant finding out this information from another source before he had been officially told by the company.
16. The claimant had a work mobile phone which was normally used for contact with the respondent. It was the claimant's invariable practice to turn off his mobile phone when he was on leave or otherwise not working. Mr Andrew was also aware that the claimant lived in an area with fairly poor broadband access and in the past had found it difficult to pick up emails. Because of this Mr Andrew decided to phone the claimant on the

claimant's own personal mobile. Mr Andrew had the claimant's personal mobile number because it was on the application form which the claimant had completed in order to apply for the job as National Training Officer.

5 17. The call between the claimant and Mr Andrew was fairly brief. Mr Andrew told the claimant there was a meeting and that he would be welcome to participate in this if he wished to dial in. The claimant advised Mr Andrew that he was on annual leave and would not be dialling in. It was clear to Mr Andrew that the claimant had been annoyed and upset by the call. He made it very clear to Mr Andrew that he felt that the request to attend the meeting during a day when he would be on leave was out of order. 10 Mr Andrew sought to explain that he was only attempting to contact the claimant because of the exceptional circumstances. The claimant became defensive and said he shouldn't be trying to contact him when he was on annual leave at all. Mr Andrew confirmed that if the claimant did not wish to join the call then that was fine and said that he would speak to the claimant on his return to work. At no time did Mr Andrew seek to pressurise the claimant to dial in to the call nor was he in any way aggressive or show an inappropriate attitude. 15

20 18. The claimant did not dial in to the conference call. The claimant did not raise Mr Andrew's behaviour with anyone else within the organisation at that time.

25 19. Following the call Mr Andrew wished to meet with the claimant in order to confirm the claimant's furlough period and also seek to clear the air following the comments which had been made by the claimant during the call on 8 April. He wished to explain to the claimant why he had called the claimant in the way he did. He also wanted to bottom out if there were any residual issues.

30 20. Mr Andrew scheduled a meeting using the respondent's internal calendar system. At that time this defaulted to all meetings being online. A notification of the meeting was lodged (pages 117-118). After scheduling it he changed the venue of the meeting from being online to the Edinburgh depot. He had always intended it to be in person. He included a note to the claimant timed at 10.54 stating

“Brian I will meet with you in Edinburgh depot tomorrow to review the plans etc. I have confirmed with Dennis that we will have the first office available to us.”

21. Shortly thereafter the claimant emailed Mr Andrew stating

5 “I can see that this webinar has been changed to a physical meeting in Edinburgh – as is clear from my calendar. I am planning to be in Dundee tomorrow to support the new shift manager there, not Edinburgh.

10 Dennis (Edinburgh Manager) has also been to see me about this and is very unhappy about it seeing it is absolutely inappropriate in the current circumstances with which I am inclined to agree. He is running the depot with the minimum of support staff to minimise risk and does not see this as essential. As someone with an ‘at risk’ member of his family he has good reason to be concerned.

15 With regard to the schedule for the region you will see that it is complete with all depots having agreed to the dates in my calendar and the relevant people invited to attend. On that basis the programme could be complete next Thursday 23rd.

20 I would suggest that anything else needs to be discussed can be completed in a webinar that does not involve you driving 300 miles unnecessarily which would obviously also increase the risks to you and yours. Happy to discuss.”

25 Dennis the manager of the Edinburgh depot had not in fact contacted Mr Andrew but in any event Mr Andrew agreed to move the meeting to an alternative location. Mr Andrew’s position was that he wanted the meeting to be in person. As noted above he wanted to “clear the air”. Although the manager of the Edinburgh depot had not contacted him Mr Andrew decided that he would be happy to change the meeting to another venue namely the respondent’s Eurocentral depot which is situated in Holytown, Motherwell. This involved Mr Andrew travelling approximately 200 miles
30 each way and the claimant travelling 100 miles each way. At the meeting Mr Andrew advised the claimant that he would be placed on furlough leave from 4 May for an initial three week period. Nothing untoward occurred at the meeting. Mr Andrew was particularly keen to keep the claimant onside

as national trainers are extremely difficult to find and he had already formed the view that the claimant was an extremely good National Trainer. He felt that not only did the claimant have the required specific skills he also had the right character and attitude in order to generate the level of engagement and passion required. The meeting was socially distanced and followed the relevant health and safety procedures in place at the time.

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22. As it happens the respondent discovered that rather than the pandemic lockdown affecting their business negatively parcel volumes increased considerably and they found themselves in the position where they required to take on more drivers. They very quickly decided to reverse the decision to furlough the national training staff. A number of the training team who had already been furloughed returned to work on 27 April and because the claimant was not due to commence his furlough period until 4 May he did not actually ever go on furlough. The claimant was advised of this decision by letter dated 28 April 2020 (page 125).

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23. In or about May 2020 the claimant's line manager changed from Mr Andrew to Mr Nelson for reasons which were entirely unconnected with the meeting on 15 April. It was due to a general reorganisation within the respondent's business.

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24. The respondent's position with regard to home working and the National Training Team was that the role was depot based and required training to be conducted in person rather than remotely. There are a number of reasons for this. One is that it is felt in general terms that it ensures better engagement from the individual being trained. The second is that the sites often have site specific rules and processes which are much better explained on site. Some of these relate to rules which are required to be different because of the physical characteristics of the particular depot. Other rules and processes are different because of specifics regarding certain equipment which is onsite at some depots and not at others.

25. The respondent were aware that certain parts of the role could be undertaken at home. The position of Mr Andrew and the claimant's subsequent line manager Mr Nelson was that if an employee considered

that the tasks for a particular day could be carried out at home then they were free to ask their manager for permission to work from home for that date. At no time prior to December 2020 did the claimant ask to work from home.

5 26. Various of the claimant's colleagues asked Mr Nelson whether they could work from home during this period. In each case he granted the request having first checked that the work which they had in mind to do could readily be carried out from home.

10 27. As noted above Mr Nelson became the claimant's line manager as from 4 May 2020.

15 28. In general terms following the onset of the pandemic the respondent classed their employees as either essential or non-essential. The claimant was classed as essential. Certain employees who carried out roles which were deemed essential but who required to isolate because either they were extremely clinically vulnerable or had difficulties with childcare as a result of school closures were permitted to work from home. Those undertaking non-essential roles were not required to attend depots and worked from home.

20 29. At no time did the claimant challenge the categorisation of his work as essential. As noted above, at no time prior to the incident in December 2020 described below did the claimant ask to work from home. In conversations with Mr Nelson the claimant generally expressed scepticism about the Covid pandemic and the government's approach.

25 30. Generally speaking, Mr Nelson required those he managed to have their calendars updated one week in advance. Mr Nelson had access to their calendars and so could tell where they were going to be at any particular time. If anyone wanted to work from home they required to call Mr Nelson.

30 31. Despite the fact that the claimant did not raise the issue with his employers the claimant decided in or about 20 November 2020 to write to the Scottish Government Outbreak Management Team regarding the issues. His email was lodged (pages 134-135).

32. He stated

“I would like you to clarify a particular situation and the travel I am being asked to undertake as part of my job please.

I work in a training capacity for a major parcel delivery company with responsibility for the whole of Scotland. I live in the north east of Scotland in an area currently under Level 2 restrictions. Much of the work that I am currently doing can be done from my any company location or even my home, but I have been repeatedly told throughout this ‘crisis’ (during which I have been working the entire time) that I am not a home worker and must attend work all over the country (and into northern England at times).

Already this week I have been ‘required’ by my employer to travel into areas designated Level 4 and Level 3 which would seem to be at odds with both their public stance of ‘following’ Covid restrictions and with your advice.

Given that said organisation has a very strong bullying culture and is very authoritarian, I am concerned that I am being put in to an impossible position which could prejudice me legally.

Whilst I am recognised as a key worker by the organisation I do not believe my travel to be absolutely necessary but am being pushed to carry on as normal and to travel daily to other areas (predominantly Glasgow but also Edinburgh).

Please can you advise how the advice and the law treats my situation and what response I should offer my employer regarding their continued insistence of my national travel.” (page 135)

33. The claimant received a response on 7 December which was lodged (page 134). This stated

“Thank you for your email enquiry and I am very sorry there has been a delay in responding to you. As you may imagine we have been receiving a significant amount of correspondence at this time. Current regulations and guidance on travel state that travel for work in to Level 3 or 4 areas is permitted **where that cannot be done from your home** [link to guidance]

If you have concerns of what any businesses who appear to not be operating in a safe manner (in compliance with health and safety

requirements) this should in the first instance be reported directly to local authority environmental health services the contact details for which should be available on your local authority website.

Thank you for your email and I hope the above information helps to address your query.”

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34. It should be noted that the Tribunal heard no evidence whatsoever about the claimant being “repeatedly told he was not a home worker and must attend work”. The claimant accepted that in fact he had at no time ever asked his line manager to work from home prior to this date.

10 35. Despite what was stated in the email from the Outbreak Management Team the claimant did not contact his local authority relating to this matter.

36. The claimant was absent between 12 and 16 October 2020. The reason given by him at the time was stomach/hiatus hernia. The claimant explained that the claimant had experienced this condition for a number of years and had had surgery. The claimant advised Mr Nelson that he was awaiting corrective surgery having had a consultation with a specialist in December of 2019. The claimant had had a previous episode of absence due to the same cause in April 2020. During the discussion it was agreed that the claimant be referred to occupational health. One reason for this was that the respondent’s sickness absence policy works on something called a Bradford score whereby individuals are scored for the number and frequency of their absences and once the score reaches a certain level a reference to occupational health is suggested. Another reason was that the claimant and Mr Nelson felt that the existence of an occupational health report might well be of assistance in bringing forward the date for his corrective surgery. The report dated 29 October 2020 was lodged (supplementary 1). The report set out the history of the matter and noted that the claimant was managing his working role without any significant difficulty. In box 3 it stated

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“There is no risk to Mr Adamson or colleagues at work due to his reported symptoms. His capacity for work is unlikely to be affected and presently he is tolerating his symptoms and has access to appropriate treatment.

5 Based on the assessment today it is my opinion that Mr Adamson is fit for his working role. No specific workplace adjustments or restrictions are recommended for Mr Adamson. Management are advised that stress is a known trigger for potentially exacerbating Mr Adamson's reported symptoms. Where operationally feasible it is recommended that stress and pressure at work is kept minimal. Further surgery is planned to resolve Mr Adamson's symptoms and this will involve a period of absence from work. Mr Adamson should keep management updated on this when the surgeon has confirmed the type of the surgery required"

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The report went on to note that the writer considered it unlikely that the claimant's condition would be considered a disability.

37. In early November 2020 the claimant and Mr Nelson had a discussion regarding the forthcoming peak. This is what the respondent refers to as the extremely busy time which occurs after Black Friday/Cyber Monday when there are a large number of parcels to be delivered. The Edinburgh depot had gone through a number of changes and there was a suggestion that the claimant solely assist the Edinburgh depot and manage their PM operations. Neither the claimant nor Mr Nelson were keen on this. Mr Nelson's view was that the claimant had a number of other duties which required to be done. It was agreed between the claimant and Mr Nelson that the claimant would support Edinburgh two days per week. There was nothing untoward about this exchange. At around this time there was an exchange of emails between the claimant and Mr Nelson in relation to the matter which was lodged (pages 302-303).

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38. On November 30 and 1 December 2020 the claimant attended the Edinburgh depot. The claimant was there to support depot management during the peak period.

39. The respondent's generic Site Safety Rules Policy was lodged (pages 290-298) as was the Site Specific Safety Rules Policy for the Edinburgh depot (page 299). Both of these policies provide that all employees and visitors must wear high visibility PPE when in the warehouse/yard area at all times. The generic site safety rules confirm that high visibility workwear

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is mandatory at all locations and must be worn in all work situations outside the office.

5 40. Arriving at the Edinburgh depot the claimant was surprised to note that employees and others within the warehouse area were not wearing their high-vis vests. He was advised that the BBC were to be filming in the depot that day and that a decision had been made by senior management that staff were to remove their vests so that their branded DPD workwear would be visible. The claimant was advised by the Depot Manager that this decision had come from the respondent's Chief Executive. The claimant considered that this was a serious breach of health and safety rules. He mentioned this to the Operations Manager at Edinburgh and the Deputy Quality Manager who he understood to be responsible for compliance with company policies. The claimant did not raise the matter with anyone else and in particular did not raise the matter with Mr Nelson. 10 The claimant did not raise a formal grievance about the issue. 15

20 41. Mr Nelson was aware in general terms that the respondent's Chief Executive had on occasion requested that high-vis jackets be removed from photographs where the media were being taken. In Mr Nelson's opinion this did not create any kind of health and safety risk. His understanding was that the pictures were usually taken in offices or in the warehouse areas where there was no risks from moving vehicles. His understanding was that high-vis jackets would be replaced as soon as the photograph video had been taken or recorded. It was also his understanding that depot manager or other manager in charge of a depot where filming was taking place would as part of the general health and safety responsibilities make a risk assessment before taking a decision to instruct employees that they may remove their high-vis vests in areas where they would normally be worn. 25

30 42. The claimant did not raise any formal grievance or take the issue further at any point prior to his resignation.

43. On 24 December 2020 the claimant was due to attend work at the Dundee depot. He had been in Aberdeen over the previous few days. He received a phone call from the Dundee depot asking him not to attend as several

of the managers in Aberdeen had been diagnosed with Covid. The claimant understood the manager of the Dundee depot had family who were vulnerable and was therefore not keen that the claimant attend the depot because of his exposure to the Aberdeen managers. The claimant had a text message exchange with Mr Nelson which was lodged. The claimant stated

“Morning Dave, have had a message from Dundee asking me not to come in today as I was in Aberdeen yesterday and they apparently have three positive cases amongst managers – guess we should talk when you get a chance!”

Mr Nelson responded stating

“Morning, on calls just now if they don’t want you in then we need to be guided by that I’ll give him a call. Don’t go back to Aberdeen either so work from home today please.”

The claimant responded

“No problem – thanks for the quick reply.”

The claimant worked from home on 24, 29, 30, 31 December 2020.

44. On 5 January 2021 the claimant was due to attend work at one of the respondent’s depots. He left to get in his car at approximately 6.00 am but unfortunately slipped on ice hitting his left arm, shoulder and the side of his head on the ground and sustaining severe bruising. He was then off work until the end of that week.

45. On or about 11 January the claimant attended a return to work meeting with Mr Nelson in Glasgow as per the company’s absence management policy. During this meeting a return to work interview form was completed by the claimant and Mr Nelson. This was lodged (page 141). It was noted that again due to the claimant’s Bradford score a further reference to occupational health would be required. This was completed by Mr Nelson and signed by the claimant and Mr Nelson (page 143-144).

46. During the course of the meeting Mr Nelson noticed that the claimant was not wearing a face mask. Face mask use had become mandatory in Scotland as from 19 October 2020 subject to various exceptions and exemptions. The Scottish Government guidance was lodged (pages 127-
5 133). The claimant considered that he was exempt from wearing a face mask. He advised the Tribunal that this was due to a traumatic event in his past which he did not provide details of. In any event the claimant was, as at 11 January, aware that in terms of the Scottish office guidance there was no requirement for members of staff to prove that they were exempt
10 from wearing a face covering in regulated spaces such as by having to provide a medical note or other documentation.
47. Mr Nelson had simply not noticed before that the claimant was not wearing a mask. Most of the claimant's interactions with Mr Nelson were online and on other occasions their interactions were such that wearing a mask
15 was not essential (e.g. they were sitting down in a social distanced meeting). He asked the claimant and the claimant explained that he was exempt and the claimant also explained that he was not required to provide any proof of or give any reason as to why he was exempt. Mr Nelson responded to the effect that he would require to check the
20 matter with the respondent's HR department and health and safety. Mr Nelson did this because he simply did not know the answer and felt that it was his responsibility as a manager to find out what the situation was. Mr Nelson did not raise his voice to the claimant or in any way behave in an untoward manner towards the claimant at that meeting. He
25 did not question the claimant's suitability for his role. Mr Nelson's view was that the claimant was very good at his job and as noted above the respondent often have difficulty in recruiting national training managers who have the necessary skills and personal qualities. He did not wish in any way to cause a rift with the claimant.
- 30 48. Following the meeting the claimant did not raise any issues either with Mr Nelson or with HR. He did not raise a grievance.
49. On Friday 15 January the claimant was due to work at one of the respondent's depots. The claimant considered that the work could be done from home however he had not made any request of Mr Nelson that

he be allowed to work from home. On leaving for work at approximately 6.00 am the claimant noticed that the weather conditions were extremely dangerous, sheet ice similar to the situation when he had fallen on 5 January. He also became aware that the Police and Met Office had issued a weather warning for his area. A copy of this was lodged dated 11 January which noted that there was a yellow warning of ice which was valid between 8.00 am on 13 January and 10.00 am on 15 January in much of Scotland, the east of England and Wales. The claimant decided that it would not be safe for him to attend work and sent an email to Mr Nelson, a copy of which was lodged (page 146). It stated

“Morning Dave,

With the same conditions outside that led to my accident last week and continuing severe weather warnings I plan to work from home today.”

Later that day Mr Nelson called the claimant to confirm what work he had on in order that Mr Nelson could make sure that it could be done from home. In the course of the conversation he advised the claimant that the appropriate course of action was for the claimant to request that he be permitted to work from home rather than to simply announce this in a text message. In any event, Mr Nelson confirmed that he was authorising the claimant to work from home and so far as Mr Nelson was concerned that was the end of the matter. The telephone conversation was uneventful and although Mr Nelson made his point about the claimant requiring to request permission rather than simply announce that he was working from home Mr Nelson was not angry, aggressive or dismissive of the claimant. As it happens that same day another of Mr Nelson’s reports also telephoned him regarding working from home. This employee asked Mr Nelson if it was okay for him to work from home and Mr Nelson also agreed that this employee could work from home on 15 January. On 18 January the claimant wrote a letter of resignation which he emailed to the respondent. The letter of resignation was lodged (pages 147-149). The letter states

“I am writing to inform you that I am resigning from my position of National Trainer with immediate effect. Please accept this as my

5 formal letter of resignation and a termination of our contract. I feel that I am left with no choice but to resign in light of my recent experiences regarding your unreasonable demands to wear a face mask despite my stated exemption and the repeated occurrences of deplorable management conduct discussed at our meeting last Monday 11 January along with the bullying culture that enables this and which pervades the organisation – something that I have now complained about on multiple separate occasions to no affect.

10 The final straw which has forced me into this position was your unreasonable demand that I ignore both government regulations requiring everyone that can to work from home unless it is impossible to do so and Police/Met Office warnings on avoiding all unnecessary travel during severe weather warnings and travel to work on remote sites to perform routine planning and organisational tasks. These
15 demands show a reckless disregard for my and others safety which would require me to take personal risks that I cannot justify. After taking the time to consider this over the weekend I am unable to accept such demands and good conscience which have forced me to take this action based both on my reasonable concern and on
20 applicable law including (without limitation) the Employment Rights Act 1996 Section 44(1)(d) and (e) as amended. They have equally raised concern from colleagues and several locations that I would be expected to travel some distance to attend whilst many of their local colleagues are forced to work from home by the current restrictions.

25 You will recall that during our meeting last Monday I reported multiple examples of extremely poor judgment by members of management up to and including the senior management team some of which were overtly unlawful. I also complained for at least the fifth time about how this translates into very poor people management of both myself and
30 others. On none of these occasions which included at least two complaints to members of Human Resources was there any further inquiry into my complaints or even an acknowledgement thereof. This is entirely unacceptable and very poor practice and in my view reflects a systematic cultural issue within the organisation in which such
35 disgraceful behaviour is not only allowed to persist but flourishes to the point where it is considered the norm.

5 Your response to my concerns was to defend the organisation and belittle the events I reported, some of which affected me personally and were even reported by others who observed the situation and found it entirely inappropriate to the extent that they saw fit to raise it as a problem again nothing happened about it.

10 You then saw fit to inform me that I must wear a mask when at work to which I responded that I am exempt from such requirements. Despite my protestations I am not obliged to explain why I am exempt you repeatedly pushed me on this before stating that you would have to take further advice on the matter to which I responded that I would have the discussion with whoever was necessary. A week later I've had no response whatsoever which leaves the matter hanging unanswerd and is yet another example of how poorly such things are managed.

15 Lastly, due to the severe weather warning at the end of last week during which I saw the aftermath of at least one serious accident just yards from home I informed you that I considered it unsafe to travel for work that could easily be done from home (where everyone was advised to stay by Police Scotland for the duration of the event). Your response was that this was not my decision to make despite it coinciding with the extant Scottish Government insistence that people should work from home unless it is absolutely impossible to do so. Given that I and other members of my team have done so on multiple occasions (including several other people on the day in question) I find this to be both unreasonable and quite possibly biased against me individually which is entirely unacceptable. My personal safety is a major concern in these difficult times that it should be so blatantly disregarded is equally unacceptable.

25
30 You curiously and somewhat disingenuously commented that I had probably never worked from home before a valued judgment that is as out of place as it is incorrect. Indeed I have spent approximately a third of my career working from home including running two companies of my own and managing other people's companies from a home office.

35 In summary I consider this to be a fundamentally unreasonable breach of the contract on your part which gives me no option but to resign my

position. This is hard enough to do at the best of times and even harder during the current situation which is a measure of the seriousness of the matter.

5 I would be grateful if you could acknowledge this letter at the earliest available opportunity.

Lastly given the nature of my grievance it is my wish that all future correspondence be in writing. I will collate and return all company property in due course as soon as is reasonably practicable.”

10 50. The respondent decided that although the claimant had resigned they would treat his letter of resignation as a grievance and invited him to a grievance meeting which was held on 25 January online. The grievance was heard by Matthew Black, a Senior National Operations Manager with the respondent who had not had any prior involvement of the claimant having only spoken to him on a handful of occasions. Mr Adamson had
15 dealt with grievances before. He had not previously dealt with a grievance submitted after someone had resigned their employment but was guided as to the appropriate procedure by Mr Tim Popoliefvski of the respondent’s HR department. The meeting was recorded and a transcript of the recording was lodged (pages 151-161). I consider this to be an accurate
20 record of what took place at the hearing. Following this the respondent wrote to the claimant on 4 February 2021 confirming the outcome of the grievance which was that his grievance was not upheld. Mr Black understood from the respondent’s HR department that there was no right of appeal in the grievance procedure where the employee had already left
25 the organisation and advised the claimant that there was no right of appeal.

30 51. Following the termination of his employment the claimant did not claim benefits nor has he sought other employment. The claimant is a longstanding trustee of a private trust known as the Universal Community Trust which he advises was founded for the benefit of all under the principles of natural law. He is also a trustee of two of its beneficiary trusts. As part of this project he is involved in creating two digital currencies with which to fund its projects and communities and his plan is that once this project is up and running he will no longer have a requirement for an

income in what he terms “increasingly worthless fiat currency”. The claimant has cashed in part of his pension to fund his living expenses. The respondent lodged a selection of job advertisements (page 223-262). This shows a substantial number of jobs which would appear to suit the claimant’s skillset. The claimant confirmed that he had not applied for any of these jobs. The claimant confirmed that on the face of it many of these jobs would have been suitable for him.

Matters arising from the evidence

52. In general terms there was a stark difference between on the one hand the evidence of the claimant and the evidence of the respondent’s witnesses. In general I found the respondent’s witnesses to be credible and reliable. All were ready to concede matters where necessary but were clear in their evidence in relation to the various issues. I found Mr Lamont to be clear in his evidence that the claimant did not raise the issue of the Chief Executive’s training video and alleged improper use of his mobile phone when driving so I accepted his evidence he had been entirely unaware of the issue until the Tribunal process started. I also preferred his version of what had occurred at the two formula 1 events which was in keeping with the contemporary written record.

53. I also found Mr Andrew to be credible and reliable. I accepted his explanation as to why he telephoned the claimant. He accepted in cross examination that normally he would email and that he was usually loathe to contact an employee on their day off. I accepted his explanation to the effect that he had tried to contact the claimant but the claimant’s company mobile phone was off and he discounted email because he was aware the claimant had a poor internet connection. At the outset of his evidence Mr Andrew had clarified the content of his witness statement to the effect that whereas in the witness statement he had said that at the time of the phone call he was unaware of the reason why the claimant had taken that particular day off he now on reflection believed that he was aware and had had some kind of conversation about it with the claimant the previous week. I felt that this concession strengthened Mr Andrew’s credibility rather than detracting from it as suggested by the claimant’s representative. I accepted Mr Andrew’s description of the face to face

meeting which took place subsequent to this and his reasons for wanting it to be face to face. A feature of the evidence at the Tribunal in general was that the claimant would describe meetings as angry and aggressive and that managers had been dismissive towards him whereas the manager would describe an entirely unexceptional meeting where normal business matters had been discussed in a normal businesslike fashion. In each case I accepted the evidence of the manager. In each case the manager's version of events was in keeping with the contemporary written records. In addition, it was clear from all of the evidence including that of the claimant that the respondent operates a grievance policy which is very regularly used by their staff. The claimant had himself been required to chair grievance meetings and was extremely familiar with grievance processes. It was put to the claimant on a number of occasions that he could have issued a formal grievance. The claimant initially sought to hide behind the fact that, as with many companies' processes the first stage of the grievance process is said to be informal. It is very clear however that where an employee is not satisfied that his grievance has been dealt with properly the employee must raise this in writing in order to move on to stage 2. The claimant had at no point raised any written grievance despite being quite clear that this was the appropriate policy. When questioned in cross examination all the claimant could do was state that he wished he had.

54. Similarly the Tribunal found Mr Nelson a credible and reliable witness. I preferred his version of the various conversations which took place. I also accepted that the claimant had not raised the issue of the lack of high-vis vests at the Edinburgh depot with him. I also accepted that he had not treated the claimant aggressively at any point. Contemporary documentation around the exchanges which took place in December and January favoured his version of events rather than that of the claimant. I entirely accepted that, Mr Nelson did tell the claimant on or about 15 January that the claimant should ask to work from home but at the end of the day the decision was his manager's. There was nothing untoward in this.

55. Both Mr Andrew and Mr Nelson said that members of their team had asked to work from home and had been allowed to do so where this was appropriate. Both of them in fact said that they had not ever in fact refused a request to work from home. The claimant accepted in his own evidence that he had not made any request to work from home. He indicated in evidence that he was unaware he could.
56. I generally found Mr Black to be a credible and reliable witness although there was nothing in his evidence which really was particularly relevant to the claim. In his witness statement he had said that he understood the respondent's policy was that no appeal would be given on a grievance outcome where the employee had left. During cross examination he readily accepted that he was unaware of a specific policy but had simply been advised of this by the HR manager who was providing him with support. In any event nothing turns on this.
57. In general terms I agreed with the respondent's agent that the claimant was not a credible and reliable witness. The overarching feature of his evidence was that he claimed to have raised numerous matters at various times with a substantial number of people in circumstances where they had absolutely no recollection of the matter being raised and secondly where the claimant had not subsequently taken any actions whatsoever which would have been consistent with him having raised concerns which were unanswered such as raising a grievance, putting matters in writing etc.
58. The claimant in his evidence referred to having completed an anonymous survey sent out by the respondent on a regular basis and making various allegations about bullying in this. All of the respondent's representatives were unanimous in stating that the company sends out these surveys from time to time which are dealt with by an independent firm and are strictly anonymous. The company receives numerical information as to the percentage of people at each depot who have completed the form and their answer to various questions on an anonymised basis. If any written feedback is provided this is not passed on to the company. I was not prepared to make any finding that the claimant had in fact ever made any complaints in such a format. There was also a suggestion by the claimant

that he had raised an issue with Mr Nelson regarding non-payment of a bonus. I accepted Mr Nelson's evidence that this had not happened. In any event Mr Nelson was clear that the bonus referred to by the claimant in his claim was one which was entirely irrelevant to the claimant's employment. The claimant's position was that he had raised the matter and been told that Mr Nelson would look into it and would get back to him. Mr Nelson's position was that the matter had not been raised but that if it had been raised he would have been well able to answer the claimant straight away to the effect that this was a bonus which was only paid to weekly paid employees at depots as a thank you for the increased parcel levels which they had had over the previous month.

59. The claimant, in cross examination stated that the occupational health report had confirmed that he suffered from a stress related condition and that his manager should have been aware the situation was causing him stress. He denied the suggestion of the respondent's agent that all the report said was that stress was a known trigger for exacerbating his stomach condition. When the report was lodged the following morning it was clear that the version spoken to by the respondent's agent was correct and the report did not say the claimant was suffering from stress.

60. In addition to the above, the respondent's representative pointed out in her submissions various specific areas where the claimant adopted entirely inconsistent positions. I accepted all of these points. For the above reasons in general terms I preferred the evidence of the respondent's witnesses where there was a conflict between their evidence and that of the claimant.

Issues

61. At the outset of the hearing the parties confirmed that the sole claim now before the hearing was a claim of unfair constructive dismissal. In his resignation letter the claimant had referred to section 44 of the Employment Rights Acts 1996 but no such claim was before me and certainly the matter was not canvassed in submissions. Essentially it was the claimant's position that the respondent were in repudiatory breach of contract and the claimant relied in his submissions on 15 instances

culminating in the last straw which occurred on 15 January 2021 when it was alleged that Mr Nelson had spoken to the claimant inappropriately and unreasonably demanded that he was to travel regardless of the adverse weather.

5 **Discussion and decision**

62. Both parties made written submissions which were supplemented orally. Rather than seek to summarise them and undoubtedly do them less than justice I will refer to them where appropriate in the discussion below. The parties were in agreement on the appropriate law still remains that set out by Lord Denning in the case of ***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221

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 any further performance. If he does so then he terminates the contract by reason of the employer’s conduct he is constructively dismissed.”

63. The claimant in this case relied on the breach of the implied term of trust and confidence as set out in the case of ***Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)*** [1997] ICR 606. Given the nature of the implied term it is trite law that any breach of the implied term of trust and confidence will itself amount to a fundamental breach of the contract of employment justifying termination by the employee.

64. In this case based on the evidence I was not prepared to make a finding that any of the incidents which the claimant sought to rely upon had happened or at least had happened in the way that the claimant said they had. With regard to the last straw the claimant and the respondent were agreed that in fact the claimant had been allowed to work from home on 15 January. The claimant had simply been told that if he wished to work from home in future he required to ask permission of his manager rather than make a unilateral decision on his own behalf. There is nothing at all

unreasonable about that. With regard to the incidents in April where the claimant was telephoned by his manager I considered that there was nothing at all untoward in the way that Mr Andrew behaved. The company were faced with an unprecedented situation and the need to potentially furlough employees. It was entirely reasonable for him to want to contact the claimant direct and advise him of the call. There was nothing unreasonable about him deciding to use the claimant's own mobile phone to do so in these circumstances. It was certainly not a breach of contract. With regard to the meeting I do not consider that it was unreasonable for Mr Andrew, in the circumstances to want the meeting to be face to face. I observed that he himself travelled approximately twice as far as the claimant so that he could attend the meeting. He clearly believed that it was important that it should be face to face. I did not accept the claimant's evidence that the claimant was spoken to inappropriately during that meeting. With regard to the issues regarding the Chief Executive and high-vis vests the claimant appears to have formed a view that the Chief Executive of the respondent was behaving in a way which he considered to be inappropriate and in breach of health and safety. I do not accept the claimant raised the matter with his managers at the time. If he had and was dissatisfied with the outcome he could have raised a grievance. He did not do so. In any event I struggled to see how, even if it were true, the fact that another manager of the respondent breaches health and safety rules in a way which has no direct impact on the claimant can be viewed as a breach of the claimant's contract of employment. Clearly, if the Chief Executive's view of health and safety was such as to bring the whole company into disrepute in the same way as the BCCI case then this could be relevant but what was alleged in this case, even at its highest, fell very, very far short of that. As noted above I did not consider that I could make a finding as to what the claimant had said in his text response to the anonymous survey referred to by the claimant as the 8th incident. Similarly, with regard to the 9th incident I understood that it was no longer the claimant's case (if it ever had been) that he had been due payment of this bonus and that the bonus had been improperly withheld from him. I understood this to relate to the allegation that he had raised the matter with Mr Nelson and not received an answer. I did not accept he had raised the matter with Mr Nelson.

65. With regard to the 10th incident I accepted Mr Nelson's evidence that no such conversations had taken place. The claimant himself confirmed that he had never asked Mr Nelson if he could work from home. I did not consider the claimant's answer in cross examination as to why he had not
5 to be particularly convincing. The claimant said that he was unaware that he could ask to work from home. With regard to the 11th incident I accepted the claimant wrote to the Scottish Government and received a response from them. The fact that he could write to the Scottish Government whilst not raising anything in writing with his employers rather
10 begs the question as to whether this was indeed an issue which he wished to raise with his employer. With regard to the 12th incident I accepted that an instruction appears to have been given to staff at the Edinburgh office not to wear high-vis vests and given that the claimant was not cross examined on this I accept that the claimant did raise the matter with
15 individuals at the Edinburgh branch who told them that the instruction had come from the Chief Executive. I do not accept he raised this with his own line manager nor did he raise any grievance over it. Again, I am somewhat at a loss as to why this can be a repudiatory breach of the respondent's contract of employment with the claimant.
- 20 66. With regard to the 13th incident I do not accept that Mr Nelson was dismissive of the claimant at the return to work interview on 11 January. With regard to the claimant being asked about not wearing a face mask I accepted Mr Nelson's evidence regarding what had happened. Contrary to what the claimant subsequently states Mr Nelson did not insist on him
25 wearing a face mask. The claimant in evidence accepted that Mr Nelson did not. In any event the wearing of face masks was only enforced when individuals were moving from location to location. Given that in the meeting the parties were sitting down in a socially distanced meeting there would have been no reason for the claimant or Mr Nelson to be wearing a
30 mask even if neither were exempt under government policies. I entirely accepted Mr Nelson's evidence that up to that point he had simply not noticed that the claimant was not wearing a mask. The claimant in evidence sought to question that it was only since October that face masks had been obligatory. I did not accept this. I accepted the respondent's

position which was based on the various Scottish Government announcements that this had only become mandatory from October 2020.

67. With regard to the alleged last straw on 15 January I have already set out my position above. There was no last straw.

5 68. My finding on the evidence is therefore that the respondent were not in breach of contract with the claimant and that accordingly the claimant was not constructively dismissed by the respondent but simply resigned. The claim is dismissed.

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Employment Judge:
Date of Judgment:
Date sent to parties:

I McFatridge
23 June 2022
23 June 2022