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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4111247/2021

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**Held in the Glasgow Tribunal on 17 – 19 January 2022
(By Hybrid Hearing (In Person and CVP))**

Employment Judge S Cowen

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Mr Donnachie

**Claimant
In Person**

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Waukesha Bearings Limited

**Respondent
Represented by
Mr Duffy -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The claimant's claim for unfair dismissal is dismissed.

REASONS

Introduction

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1. The claimant brought a claim for constructive unfair dismissal against the respondent, as his former employer. The claimant claims he was forced to resign his employment, due to the breach of trust and confidence which

occurred as a result of the evidence gathered in a disciplinary procedure in late 2020 and early 2021.

2. The respondent says that the claimant resigned due to finding a new job and/or that the actions of their employees were not repudiatory in nature.
5 They say that the claimant has no loss of earnings in any event, as he started a higher paid job the following week.
3. The case management of this case was dealt with by EJ Eccles who set out standard directions to a final hearing. The parties were able to agree a joint bundle of productions which were referred to throughout the hearing. The
10 respondent provided written closing submissions.
4. The claimant represented himself in person and gave evidence to the Tribunal. Mr Duffy, a solicitor, represented the respondent by CVP and there were four witnesses who gave evidence on behalf of the respondent, all on CVP, Ms Lisa Curran, Mr Ewan Blackwood, Mr Kenny Frew and Mr Dean
15 Lewis. The case was listed for three days and we were able to complete the evidence and submissions in that time, but the judgment was reserved.

Facts

5. The claimant worked for the respondent as a machine operator in their plant making heavy parts for the oil and gas industry. He enjoyed his job and the
20 company of his colleagues.
6. During the Covid pandemic he continued to work and the respondent put in place controls on 19 May 2020 to ensure that people were socially distanced, wore masks when moving around and confirmed each day when they attended for work, that they were not showing symptoms of the virus. These
25 requirements altered as the pandemic evolved.
7. Towards the end of September 2020, there were a number of cases of Covid within a separate dept in the respondent's plant. The first person reported ill on 23 September, then 25 September, 28 September and 29 September.

5 These workers subsequently admitted that they had not been following the Covid protocols. An agreement was reached with management that they would not be disciplined (an 'amnesty') on the basis that the company rules on facemasks had not been clear to them. On 29 September 2020 a meeting was held and a memo issued to all staff which outlined that the rules would be strictly enforced from now on. The claimant was aware of this.

8. On 30 September 2020 the claimant attended work. He began to experience a sore throat in the afternoon, whilst at work. He thought it might be due to a lot of mask wearing. He attended a meeting in the canteen held by Ms Bernadetti and Mr Frew, which lasted about 45 minutes, where they were instructed about a new mask that was going to be provided. He completed his shift and went home where he felt 'not great'. That night he was restless and had to have a drink in the middle of the night as he felt hot. He had a headache in the morning and took paracetamol, before heading to work on 10
15 October, to start at 6am. He checked the online government guidance which said that you should not go to work if you had; i) a fever, ii) a persistent or new cough, or iii) a loss of taste or smell. The claimant did not consider that he had any of these symptoms so went to work.

9. When the claimant filled in the Covid security form that day, he was undecided about whether he was 'fit to work'. He looked for his manager, Mr Connor and explained that he didn't feel well. Mr Connor took him to the Health & Safety office to check his temperature, which was within normal limits. Mr Connor told him to go to his machine and start work.
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10. Within 5 minutes, Mr Connor appeared beside the claimant and said he had changed his mind and the claimant should leave and have a Covid test. The claimant did as he was told and tested that day.
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11. Later that day - 1 October 2020 - there was a phone call between the claimant, Mr Connor, Ms Peart and Ms Curran of HR. The purpose was to establish whether it was likely that the claimant had contracted Covid at work,

or elsewhere. The answers noted by Ms Peat were subsequently shown to the claimant who indicated that he did not agree them.

12. The notes include a reference to the claimant having a cough. This was discounted at the disciplinary hearing as not accurate. Other than that, the symptoms reported by the claimant, did not, at the relevant time, fall within the government guidance for not going out/suspecting Covid. Nor did those of his girlfriend.
13. The following day – 2 October – the claimant received a positive Covid result. He reported this to his employer and a further phone call with Ms Peart occurred. The purpose of which was to identify any other members of staff with whom the claimant may have been in contact (track and trace).
14. Once again the notes identify that the claimant asserted that he did not have the listed Covid symptoms, but he did not feel entirely well, so was asking for advice from his manager, when he arrived at work on 1 October. He indicated that he did not think he was sufficiently unwell that he could not work. The account given by the claimant on 2 October as to the events of 30 September and 1 October was consistent. The records taken by Ms Peart indicate that ‘symptoms’ started half way through the shift on 30 September. The claimant’s symptom was a sore throat which was not on the government advisory list at that time.
15. The respondent had not reported the outbreak of Covid in the workplace to the Public Health Protection Unit (‘PHPU’) prior to the claimant’s positive test. They did so on 2 October, indicating that they had five positive cases within fourteen days. In fact by 2 October, the respondent had seven such cases. The respondent corresponded with PHPU and informed them that the business was closed from 1 October to 5 October for the purposes of a virucidal deep clean. The PHPU responded to say that they were satisfied with this course of action. The Environmental Health department also visited

the respondent and made recommendations of other ways in which they could avoid any further outbreak.

16. When the claimant returned to work, he was notified that he was being investigated for an allegation of gross misconduct, specifically that his actions were 'likely to endanger seriously the health and safety of your colleagues, namely your attendance at work while displaying Covid-19 symptoms on 30 September and 1 October 2020'.
17. Mr Blackwood, one of two shift managers (the other being Mr Connor) was asked to undertake an investigation into the claimant's actions. The claimant attended an investigatory interview on 21 October 2020 at which he gave the same consistent version of events. He also indicated to Mr Blackwood that he was suffering from stress as a result of the investigation.
18. Mr Blackwood carried out an investigation, in which he spoke to a number of witnesses, including Mr Connor. The version of events set out by Mr Connor did not concur with that of the claimant. Mr Connor said that the claimant had told him that he "had a high temperature and had been unwell through the night." Also that he "felt like he was burning up.... like he had sore bones/flu symptoms". Some of these phrases are repeated a number of times, as is the fact that Mr Connor says the claimant was sweating.
19. Mr Blackwood also spoke to Ms Bernadetti, who spoke of the claimant's "girlfriend not being well since Monday and they kept their daughter off nursery, but [the claimant's] girlfriend also continued to go to work and so did [the claimant]".
20. Ms Peart was interviewed and said she did not recall the claimant referring to a cough when she called him, but that if it was in the notes then she considered that it was likely to be correct.

21. Mr Blackwood held a third and final meeting with the claimant on 10 November 2020 at which the claimant was told that the matter would be referred to a disciplinary hearing. A letter confirmed Mr Blackwood's view.
22. The claimant was invited to attend a disciplinary hearing on 18 November 5 2020. There was correspondence between the claimant and respondent with regard to the fact that the claimant's trade union representative was not allowed to attend the hearing in person, but was allowed to attend remotely. The hearing was rearranged for 8 December 2020. The respondent's production manager, Mr Frew was appointed as the disciplinary officer. The 10 claimant and his representative were given the opportunity to give their response to the allegations.
23. On 17 January 2021 Mr Frew wrote to the claimant to say that the allegation that he attended on 30 September with Covid symptoms had not been proved and would be removed. In relation to the allegation on 1 October, Mr Frew 15 found that the claimant was 'hot' and that this was a red flag. He also found that Mr Connor saw him sweating, which should have meant that the claimant did not attend work. He concluded that there was no evidence of collusion between the managers. Mr Frew also concluded that the claimant's version of events had changed through the process. This was incorrect. He found that 20 the claimant had breached the respondent's Covid rules and he issued a final written warning for a period of 12 months.
24. The claimant issued an appeal which Ms Curran decided should be heard by Mr Lewis as he was independent of the respondent, as he was the manager of another of the group companies.
25. 25 Around this time the claimant went off sick with work related stress. He was dealt with under the absence management procedure, also by Mr Blackwood.

26. On 18 December 2020 the claimant wrote to the ‘integrity counts’ email address to raise his concerns about the fact that he had been disciplined for attending with Covid and that the company had failed to follow the appropriate procedures to ensure the health and safety of the staff. The respondent
5 replied to this by treating his email as a grievance. When the claimant argued that he wanted it dealt with independently, he received an email from Rich Strickland the VP Human Resources of the respondent’s parent company, indicating that they intended to deal with the matter within the respondent’s own grievance procedures.
- 10 27. On 29 January 2021, the claimant replied to Mr Strickland, pointing out that he felt he was the subject of a “witch hunt and character assassination I have had to endure since October”. He blamed Mr McCready and Ms Bernadetti for not dealing with the Covid outbreak appropriately.
- 15 28. The claimant met with Mr Lewis on 4 February 2021 to consider his disciplinary appeal and grievance. The claimant outlined the way in which he believed that the company had failed to respond quickly enough to the Covid outbreak and that the plant had not been closed immediately. He also outlined a number of points which he disagreed with in the decision of Mr Frew in respect of his disciplinary outcome. He made the point that Mr Connor had
20 embellished the claimant’s situation on 30 September. At the end of this meeting Mr Lewis agreed to investigate the points raised by the claimant in relation to both the disciplinary appeal and also the grievance.
- 25 29. Mr Lewis interviewed a number of the HR and management of the respondent in order to investigate the points raised. He spoke to Jan Peart and Jason Macready with regard to the closing of the plant. In response to questions from Mr Lewis, Mr Macready said that he had been told that the claimant had said in the initial interviews that his wife wasn’t feeling good on Monday and talked of not sending their child to school. He also told Mr Lewis that there was something about a meeting on Wednesday 30 September with the guys
30 in the canteen and that the claimant was “slumped in the corner”.

30. Mr Lewis wrote to the claimant on 18 March 2021 setting out his decision in respect of both the grievance and the disciplinary appeal. He addressed each of the points raised, but did not uphold either the grievance or the disciplinary appeal.
- 5 31. The claimant remained off sick with work related stress. During this time he contacted the managing director of the parent company Mr Ulrichs to outline his complaint about the way in which his complaints had been handled. Mr Ulrichs replied to the claimant to point him towards his disciplinary appeal and grievance process.
- 10 32. On 22 March 2021 the claimant requested sight of the documents relied upon by Mr Lewis in his decision making. Copies of the relevant interview notes were sent to the claimant on 1 April 2021. The claimant identified aspects of these statements which he considered to be untruthful and hurtful. In particular he considered the comments by Mr Macready to be offensive and
15 untrue with regard to his family and also his own actions on 30 September.
33. The claimant believed that the views of Ms Peart and Ms Bernadetti were supportive of these views and considered those to also indicate a bias against the claimant.
- 20 34. The claimant concluded that he could not return to work with an outstanding final written warning remaining in place for another 6 months as he believed that it was likely that his managers, whom he considered were prepared to lie about him, would find a reason to dismiss him within that period. The claimant therefore took steps to find alternative work.
- 25 35. By 9 April the claimant had been offered work with another company, whom he had previously worked for. He did not receive a contract of employment until 26 April and did not sign it until 29 April 2021. The claimant sent a letter of resignation to the respondent on 9 April 2021 giving four weeks' notice. He entered into discussion with Ms Curran who wanted to try to mediate with the claimant and potentially dissuade him from resigning. However, the claimant

decided to sign the contract with a new employer and to stand by his resignation. On 26 April he told Ms Curran to go ahead and process his resignation.

5 **The Law**

36. This is a claim for constructive unfair dismissal. Under s.95(1)(c) an employee can terminate a contract of employment 'in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct'. In such circumstances the employee will be treated as dismissed.

10 37. In considering whether such a dismissal is unfair the Tribunal considers whether the circumstances allow the employee to treat himself as dismissed. The test for constructive dismissal was set out in *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 as; "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which
15 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."

20 38. Further consideration of the type of breach of contract which could occur was found to include a breach of the implied term of trust and confidence. *Malik v Bank of Credit; Mahmud v Bank of Credit* [1997]UKHL 23 identified the term; "It is expressed to impose an obligation that the employer shall not:...without reasonable and proper cause, conduct itself in a manner calculated and likely
25 to destroy or seriously damage the relationship of confidence and trust between employer and employee."

39. It has also been established that an employee may resign as a result of a number of acts by his employer if it is considered to be a course of conduct by the employer over a period of time. There may come a point at which the

employee leaves, due to some final act which may not of itself be sufficient to justify resignation, but taken together with other previous actions be sufficient to warrant a claim for constructive dismissal. This was referred to in Woods v W M Car Services [1981 ICR 666 as the 'last straw'. In Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA, the court said that an
5 entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test must be an objective one, of whether trust and confidence has been broken.
10 The last act does not have to be unreasonable, but it will be unusual to find that the conduct of the employer is perfectly reasonable, but a last straw has occurred.

40. There may be a number of reasons why the employee resigns, but in order to claim constructive dismissal, the employee must show that an effective
15 cause for such a resignation was the fundamental breach of contract; Nottinghamshire County Council v Meikle [2004] IRLR 703 which indicated that the employee may resign due to the breach, but also due to the fact that they have the offer of another job. This will still amount to constructive dismissal, if the effective cause of the resignation was the breach of contract.

20 41. Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 set out the guidance for Tribunals in considering constructive dismissal cases as;

“ (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

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

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions

which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

- 5 (5) Did the employee resign in response (or partly in response) to that breach”

Decision

42. The claimant was employed by the respondent for 10 years prior to his resignation. During the pandemic the respondent’s plant remained open and
10 work continued. The employees were given instructions on social distancing, mask wearing and reporting symptoms in order to keep each other safe.

43. In the week commencing 25 September 2020 there was an outbreak of Covid in another department where five other employees contracted Covid. The respondent carried out a clean of the premises but did not close the plant.
15 They did not report the outbreak to the PPHU as the rules indicated.

44. The claimant attended work on 30 September as usual and complied with the workplace rules on Covid safety by wearing a mask. He began to feel that his throat was sore, but was not aware that this was the start of Covid symptoms.
20 That night, he felt hot when sleeping, but did not feel so the next morning. He did however have a headache, so took paracetamol before going to work. The claimant was not experiencing a fever, a cough, or a loss of taste and smell when he arrived at work. He had a headache and had had a sore throat the previous day. He therefore felt unwell, but not to a point where he could
25 not work. Had there been no pandemic, it would have been appropriate for the claimant to attend work and to seek the reassurance/assistance of his manager about his condition. However, due to the Covid pandemic the respondent had become more strict about when staff should remain at home. However, this did not extend beyond the government guidance at the time.

45. The claimant clearly stated throughout the disciplinary process that he did not say that he had a cough. This was ultimately accepted by Mr Frew who dismissed that allegation. However, it had been said by Mr Connor during the investigation. Mr Frew accepted Mr Connor's view that the claimant was sweating and spoke of 'burning up' and found that the claimant had therefore attended work with symptoms of Covid. The claimant was disappointed that Mr Frew dismissed Mr Connor's evidence in some regards but relied on it in other ways. However, the claimant does not assert that the decision of Mr Frew amounted to a breach of contract. The outcome clearly did upset the claimant's relationship with his employer, as he appealed against the decision, but he did not assert that it amounted to a fundamental breach, nor caused him to resign.
46. Further, the claimant tried to raise with the senior management, the fact that his was not the first case of Covid and that in fact, management had not followed national guidance on when companies should report outbreaks of Covid within the workplace. This was not considered in detail by the senior managers. This too was not relied upon by the claimant as a breach of a fundamental term of his contract, but clearly also caused him to consider that his employer was not caring for his (and his colleagues') health and safety.
47. The stress of the situation had an impact on the claimant who was signed off sick by his GP due to workplace stress. This too did not amount to a fundamental breach of the implied term of trust and confidence, but also added to the claimant's concerns about himself and his employment.
48. The point which the claimant relied upon as the breach of trust and confidence was when he saw the content of the statement made by Mr Mcready in the appeal process. Mr Mcready's statement relied upon what he says he heard from Mr Connor about what the claimant said. It is therefore 'second hand' information. The claimant took particular offence to the statements about his partner and daughter which were incorrect.

49. The claimant also considered that the statement by Mr Connor that he had a fever and was sweaty when seen on 1 October, was also a fundamental breach of trust and confidence.
50. Mr Connor was a shift manager, and therefore one of two immediate managers. Mr Mcready as the site manager was the highest level manager at the location. The claimant's concern was that they had not been truthful, not just about the claimant, but also about his family. He believed that they were likely to try to find another reason to discipline him during the period of the final written warning and that this would lead to his dismissal.
51. The fact that the claimant had been disciplined and received a final written warning were all parts of a course of conduct which seriously damaged the relationship between the parties. However, none of them individually was perceived by the claimant as a breach of the implied term of trust and confidence sufficient to warrant his resignation.
52. As referred to in *Kaur v Leeds Teaching Hospital NHS Trust* [2018] IRLR 833 and *Omilaju* it is these matters together, with the final straw of seeing the offensive comments, which the claimant felt pushed the actions over the line of amounting to a breach of the implied term of trust and confidence.
53. The test for whether these acts were capable of contributing to a breach, is an objective one. I therefore have considered them in turn and conclude that the bringing of a disciplinary procedure against the claimant, the outcome and the appeal may all objectively have contributed towards a cumulative breach of trust and confidence. But the last straw of seeing the statement Mr Mcready must also play a part.
54. Whilst it is understandable that the claimant felt that the site manager could not be trusted as he had passed on unreliable evidence; it was that fact that the claimant felt this indicated that he could not continue to work for the respondent due to any possible further disciplinary action and dismissal, which prompted him to resign. Objectively this is not a reasonable conclusion.

It is at least equally possible that the claimant would do nothing to warrant any other disciplinary action and the warning would pass. The claimant had no reasonable basis to conclude that there would be a further disciplinary process or dismissal in the future. This was not sufficient to amount to a last straw.

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55. I therefore do not hold that the claimant's view that Mr Mcready's statement either was of itself, or cumulatively pushed the other matters into, a fundamental breach of trust and confidence was objectively correct.

56. For this reason the claimant's claim for constructive unfair dismissal is dismissed.

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Employment Judge: Sally Cowen
Date of Judgment: 30 January 2022
Entered in register: 07 February 2022
and copied to parties

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