EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4100857/2022

Held at Glasgow on 4, 5 and 6 May 2022

Employment Judge W A Meiklejohn

Mr R Bodman	**Claimant** **In Person**
Halfords Autocentres Ltd	**Respondent** **Represented by:** **Ms A Baylis - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is as follows -

(a) the claimant was not unfairly dismissed by the respondent and his claim of unfair dismissal fails and is dismissed; and

(b) the claimant did not suffer an unlawful deduction of wages and his claim in respect of that fails and is dismissed.

REASONS

1. This case came before me for a final hearing to deal with both liability and remedy. The claimant appeared in person and Ms Baylis represented the respondent. The hearing was conducted on a hybrid basis with all of the respondents witnesses participating remotely by means of the Cloud Video Platform.

Nature of claims

2. The claimant brought claims of constructive unfair dismissal and unlawful deduction of wages. In relation to the unfair dismissal claim, the claimant alleged that he had resigned in response to a breach by the respondent of the obligation of mutual trust and confidence. In relation to the unlawful deduction claim, the claimant alleged that the deduction by the respondent of the sum of £2673.60 from his pay in December 2021 was unlawful. These claims were resisted by the respondent.

List of issues

3. At the start of the hearing Ms Baylis provided me with the respondent's chronology and list of issues. I understood that the chronology had been largely agreed with the claimant.

Amendment

4. In the course of the claimant giving his evidence, it became apparent that he might be relying on a different *"last straw?* event from the one understood by the respondent in terms of his ET1 . It was agreed at the start of the third day of the hearing that it would be appropriate for the claimant to make an application to amend. The proposed amendment was in these terms -

"The claimant asserts that finding out what Ms Sheret had said on 29 November 2021 was the last straw which caused him to resign. "

5. Ms Baylis did not object, subject to being allowed to cross-examine the claimant further on the veracity of this assertion. I dealt with this by (a) allowing the amendment and (b) recalling the claimant as a witness so that he could be further cross-examined.

Evidence

6. It was agreed that, given the nature of the claims, I should hear the claimant's evidence first. I then heard evidence from the respondent's witnesses who were -

- Mr J Blanchard - Regional General Manager
- Mr D Gillies - Regional General Manager

- Mr N Quinn - Regional General Manager
- Mr S Jones - Group Employment Tax and Payroll Manager

7. I had a bundle of documents extending to 356 pages, supplemented by two additional documents added in the course of the hearing. I refer to these below by page number.

Findings in fact

8. The respondent described itself in the grounds of resistance as a business that provides vehicle servicing and part of the Halfords group which is a retailer providing motoring and cycling products and services at various UK sites. Each Regional General Manager ("RGM") was responsible for a cluster of Halfords Autocentres in a particular area, with typically around 100 employees employed across those centres. Each centre had a Centre Manager ("CM") for whom the RGM was line manager.

9. The claimant has spent his working life in the motor trade. He is a time served mechanicftechnician. Since 1992 he has worked in a managerial capacity. He joined the respondent as an Assistant CM on 21 October 2013, working initially in Aberdeen. He became CM there when the previous CM was dismissed. After being in Aberdeen for around nine months, the claimant moved to become CM in Clydebank. While he was there Mr Quinn became his RGM. The claimant remained in Clydebank for some four years.

10. The claimant next moved to Paisley, again as CM. Around the same time the claimant became a Senior Manager in Scotland. This meant that while he continued to be the Paisley CM, he took on some additional responsibilities to assist Mr Quinn. There followed moves to Rutherglen, then Pollokshaws Road, Glasgow, then back to Rutherglen.

11. On or around 6 March 2020 the claimant was told by Mr Quinn that he was moving to Kirkintilloch, starting on 9 March 2020. It was not in dispute that the respondent was entitled to move a CM from one centre to another in reasonable proximity. There did not appear to be any set amount of notice which should be given. I accepted the claimants evidence that he regarded this move as being required of him at short notice. I did not believe that the move was, as the

claimant contended, connected with the outcome of a disciplinary appeal he had submitted, as detailed below.

First incident

12. This took place on 10 January 2020 while the claimant was still working at Rutherglen. A customer's vehicle was booked in for a particular date. The appointment was moved to a date 3/4 days later, but the customer was not advised of this. The customer complained. It was alleged that the claimant was rude to a colleague in the respondent's customer support team and failed to act in the customer's best interests.

13. An investigation under the respondents disciplinary procedure (83-89) was conducted by Mr G Pearce, Regional Manager. This included meeting with the claimant on 23 January 2020. The notetaker at this meeting was Mr A Cliberon, Senior Manager. The outcome of the investigation was disciplinary action against the claimant.

14. The claimant's disciplinary hearing took place on 10 February 2020. It was conducted by Mr M Ramsay, Regional General Manager. The notetaker was Mr D Curnick, Senior Manager. Mr Ramsay's decision, recorded in his letter to the claimant of 11 February 2020 (131-132), was to issue the claimant with a first written warning, to remain on his personal file for 12 months.

15. The claimant was offered, and exercised, a right of appeal. The appeal hearing took place on 5 March 2020. The appeal officer was Mr S Warburton, Regional General Manager, and the notetaker was Ms D Boulton, HR Business Partner. During the appeal hearing, the claimant alleged that Mr Pearce had referred during the disciplinary hearing (which the claimant had recorded covertly) to the claimant being *"thrown under a bus"* by Mr Quinn.

16. Following the appeal hearing Mr Warburton held a conference call with Mr Pearce (again with Ms Boulton as notetaker) on 6 March 2020. Mr Pearce denied making the alleged comment. Mr Warburton spoke to Mr Cumick on 6 March 2020 and he too said that he did not recall the reference to the claimant being *"thrown under a bus".* Mr Warburton's appeal process also involved speaking with Mr Quinn on 6 March 2020, Ms C Crawford on 6 March 2020 and with Ms J Kendall, Customer Service Adviser, on 9 March 2020.

17. Mr Warburton issued his appeal outcome letter on 11 March 2020 (158-161). Of the fourteen points which he had identified in the claimant's appeal, he partially upheld two but rejected the others. He upheld Mr Ramsay's outcome decision.

Second incident

18. Mr D Fleming worked for the respondent as a technician at Kirkintilloch. He was employed prior to the claimant becoming CM for Kirkintilloch on 9 March 2020. In the period up to June 2021 the claimant became aware of rumours that Mr Fleming was to be going to court. The claimant was unclear as to the nature of the charge against Mr Fleming but became aware that it was rumoured to relate to a stabbing.

19. The claimant also became aware that Mr Fleming had been arrested by the police while at work in Kirkintilloch, sometime in the latter part of 2019 or early in 2020. The claimant had not been told about this when he took over as CM in March 2020. Mr Quinn said that he was not made aware of this by the claimant's predecessor as Kirkintilloch CM, as he should have been.

20. Mr Fleming approached the claimant and asked to change his work days on the rota because he needed to see a lawyer about a pending court case. The claimant accommodated this request. The claimant asked Mr Fleming if he wanted to talk about it. Mr Fleming said no, it was private. The claimant did not pursue the matter further and so remained unaware of what charge Mr Fleming was facing.

21. At some point during the first two weeks of July 2021 Mr Fleming approached the claimant and asked if he could provide a character reference. In the course of this conversation the claimant was told by Mr Fleming that the case did not involve a stabbing but related to his cousin. Mr Fleming did not provide any other information as to what the case was about. The claimant told Mr Fleming that he was not able to provide a reference, and if one was to be provided it would need to come from a RGM or from HR.

22. The claimant was not at work on 14 July 2021. When he returned to work on 15 July 2021 he discovered that his Assistant Manager, Mr G O'Donnell, had sent an email providing a character reference for Mr Fleming (162-163). It had been sent on 14 July 2021 from the email account of the respondents Kirkintilloch

premises. In the email Mr O'Donnell described himself as employed by the respondent as a manager.

23. The claimant spoke to Mr O'Donnell about the reference email. He told Mr O'Donnell he had no right to do it. Mr O'Donnell's response was that it had been a personal reference from himself. He said had prepared it on his own phone and then forwarded it to the Kirkintilloch email account so he could print it off. The claimant told Mr O'Donnell that the matter would not be swept under the carpet and that he (the claimant) was waiting until the court case to see whether the reference was used or not.

24. On 22 July 2021 Mr Fleming's grandfather came into the Kirkintilloch premises and spoke to the claimant. He said that Mr Fleming had been imprisoned for five years for attempted rape. The claimant, knowing that Mr Quinn was on holiday, contacted Mr G Carrie who had replaced the claimant as Senior Manager in Scotland. He reported what had happened to Mr Fleming.

25. The claimant had been planning to speak with Mr Quinn on his return from holiday on 26 July 2021 . However, the claimant had to attend a funeral on that date. On 27 July 2021 Mr Quinn came to the Kirkintilloch premises (with Mr Carrie) and asked for access to the branch email account. The claimant pointed out the email Mr O'Donnell had sent and Mr Quinn indicated that this was what he had been looking for.

First investigation

26. On 28 July 2021 Mr Quinn held an investigation meeting with Mr O'Donnell. Mr Carrie acted as notetaker. The upshot of that was that Mr O'Donnell was suspended, disciplined and dismissed.

27. On 29 July 2021 (or perhaps 30 July 2021 - the claimant later sought to correct this) Mr Quinn held an investigation meeting with the claimant. Again Mr Carrie acted as notetaker. From the notes of the meeting (172-180) it was apparent that Mr Carrie had asked three questions of his own. It was also apparent from the notes (at 173) that the claimant made reference to having spoken to Mr Quinn about Mr Fleming in advance of the court hearing at which the latter was sentenced, stating *"When I spoke to you about it / did say he had a court case..."*.

The claimants position was that this conversation occurred on 19 July 2021 . Mr Quinn's position was that no such conversation took place.

28. In his investigation report (181-183) Mr Quinn recommended that the claimant should face disciplinary proceedings for alleged gross misconduct. He explained this as follows -

"Roy knew about a serious situation and never escalated it to a senior level to be assessed and dealt with in doing so has left the company exposed to reputational risk and dispute"

29. Mr Pearce was appointed as the disciplinary officer and wrote to the claimant on 3 August 2021 (185-186) inviting him to a disciplinary hearing, to be held by conference call, on 6 August 2021. Around the same time, and perhaps in response to Mr Pearce's letter, the claimant raised the issue of Mr Carrie having interjected during the investigation meeting. The claimant thought he might have done this with Ms S Hards of HR. In any event Mr Pearce wrote to the claimant again on 6 August 2021 (187-188) inviting him to a rescheduled disciplinary hearing, again to be held by conference call, on 13 August 2021.

First disciplinary hearing

30. This was conducted by Mr Pearce on 13 August 2021 with Mr A Oliveira as notetaker. Mr Pearce was clearly aware that the claimant had an issue with the investigation meeting because he asked the claimant about this at the start of the disciplinary hearing. The claimant referred to Mr Carrie having asked questions and expressed the view that *"any investigation carried out incorrectly is void".*

31 . Mr Pearce adjourned the meeting to seek advice from HR. When the meeting resumed, Mr Pearce told the claimant that it would not proceed and the matter would *"be reinvestigated by someone impartial".*

Second investigation

32. Mr Cliberon was appointed to conduct the second investigation. He wrote to the claimant on 20 August 2021 (193-194) inviting him to an investigation meeting, to be conducted via Teams, on 24 August 2021 . It appeared from the notes (195-

206) that the meeting was actually conducted by conference call. Mr B Cunliffe acted as notetaker.

33. The notes recorded (at 199) the claimant telling Mr Cliberon that on 19 July 2021 he spoke to Mr Quinn about some colleague issues and mentioned that Mr Fleming had a court case. Mr Cliberon then told the claimant *"Neil doesn't remember this call".* However, it was not until 25 August 2021 that Mr Cliberon met with Mr Quinn via Teams and asked him whether the claimant had spoken to him regarding Mr Fleming's case on 19 July 2021. Mr Quinn replied *"No, if I was made aware of any of these allegations I would have escalated this up the line to the business. There is no way I would have kept this to myself."*

34. In his investigation report (207-209) Mr Cliberon recommended that the claimant should face a disciplinary hearing to answer allegations of gross misconduct. The points upon which Mr Cliberon relied to support his recommendation were -

    (a) The claimant was aware of a potential court case regarding a colleague in his centre but failed to take any action to investigate.

    (b) The claimant was made aware between 5 and 9 July 2021 that Mr Fleming would be attending court on 22 July 2021 but did not inform senior management.

    (c) The claimant failed to take action about or to report Mr O'Donnell's reference for Mr Fleming found on the company email system.

Second disciplinary hearing

35. Mr Blanchard was appointed to conduct the disciplinary hearing. He wrote to the claimant on 1 September 2021 (211-212) inviting him to a meeting, to be conducted by conference call, on 8 September 2021 (although Mr Blanchard's evidence was that this was actually done on Teams). His letter set out the allegations of gross misconduct against the claimant in these terms -

    - *A serious breach of management duty and responsibility specifically related to*

        - *You failing to report to senior management that you had been made aware that a Centre Colleague was in court for serious charges.*

- *Failure to report or take action that the Assistant Manager had provided a personal reference using the Centre Company email account.*

- *Failing to report two incidents to senior management which could bring the Company into disrepute.*

• *Your actions have brought into question the trust and integrity in you as our Colleague.*

36. At the disciplinary hearing the claimant expressed the view that Mr Cliberon should not have conducted the investigation because he had been involved in the previous investigation (into the first incident). Mr Blanchard disagreed, on the basis that that investigation was in respect of unrelated events and the disciplinary sanction had expired.

37. Having conducted the disciplinary hearing, Mr Blanchard contacted HR to check that he had covered everything and that his proposed decision was sound. He then issued his outcome letter dated 10 September 2021 (233-234) in terms of which he gave the claimant a final written warning. He set out the rationale for his decision in these terms -

• *When you took over at the Kirkintilloch Centre on 9th March 2021 (sic) and heard rumours regarding an arrest surrounding Darren Fleming's behaviour, you admitted that you failed to seek advice or report this to anyone or challenge or investigated these rumours by speaking with the Colleague.*

• *By your own admission when Darren Fleming had reported the court case to you in early July 2021 in person you chose not to seek advice, investigate further or report to senior management or the people advice team.*

• *You admitted that you knew the reference given by Gerald O'Donnell was factually incorrect and had been given without approval and using Halfords email address, despite knowing this, you failed to make senior management or HR aware, or take any formal action as the Centre Manager, your only response was that "you were dealing with it and*

awaiting the outcome of the court hearing". This does not alter the fact that Gerards actions were not authorised and he had provided false information using Company emails, which has the potential to bring the Company into disrepute.

- *You admitted that the reference had been done on 14th July 202 1 and you had found out about it on 15th July 2021, but had taken no action whatsoever by 28th July 2021 at the point of Neil Quinn, Regional General* ***Manager*** *carrying out an investigation into the reference, this was also after Darrens court hearing and he had left the company on 22nd July 2021.*

- *Your actions have brought into question the integrity and confidence in you as a Centre Manager and your conduct has fallen well below the standard expected of a Centre manager.*

- *You have failed in your management duties and responsibilities to report and take action with serious wrong doing, your actions could have resulted in your dismissal from the Company, however I have taken into account your length of service when making my decision.*

- *Having checked on call recordings for your centre unfortunately the centre(s) is not on VOIP and therefore not recorded so I am unable to verify any calls attempted to Neil Quinn, however this has no bearing on your actions prior to this date.*

38. Mr Blanchard advised the claimant of his right to appeal against the decision to give him a final written warning. The claimant did not appeal. The claimant's evidence was that he had not appealed *"due to the first disciplinary".* His perception was that he was made "a *scapegoat.* I understood this to mean that (a) management should have been aware of the fact that Mr Fleming was facing possible criminal charges because they should have been told that he had been arrested at the Kirkintilloch premises and (b) he should have been told about Mr Fleming's arrest when he became CM at Kirkintilloch.

Grievance against claimant

39 Mr S Naqvi worked for the respondent as a floating MOT tester. On or around Monday 9 August 2021 there was an incident between him and the claimant The background was that on the previous Friday, despite having not been on rota the previous day, Mr Naqvi asked to get away early to pick up his medication. On Monday 9 August 2021 Mr Naqvi again asked the claimant about getting off for his medication. The claimant said that he would contact the customer about bringing forward the time of the last MOT test of the day, to let Mr Navqi away.

40. Around 4.00pm Mr Navqi was carrying out the penultimate MOT test of the day. The claimant was in the workshop labelling tyres for customers. According to the claimant Mr Navqi approached him *"bawling and shouting, in my face"* and told the claimant that he was a *"bad man".* This led to an exchange of words between them. The claimant told Mr Navqi that he had rebooked the last MOT. Mr Navqi continued to shout at him, and aborted the MOT test he was carrying out. Mr Navqi said that he was finished, that he was not coming back. The claimant then told him *"Leave the building, leave the building now"* or words to that effect The claimant sent an email to Mr Quinn to report what had happened.

41. On 10 August 2021 Mr Navqi emailed Mr Quinn (235) complaining about the claimant. The email subject heading was *"Discrimination".* This was treated by the respondent as a grievance. Mr Gillies was appointed to investigate. In a telephone conversation with Ms N Kydd of HR on 18 August 2021 Mr Navqi said that he did to intend to attend a meeting with Mr Gillies and wanted his grievance dropped. Mr Navqi confirmed this in an email to Ms Hards on 24 August 2021 (237). Ms Hards wrote to Mr Navqi on 25 August 2021 (238) acknowledging that he wished to withdraw his grievance and stating that *"we now consider the matter closed".*

42. Notwithstanding this, Mr Gillies considered that Mr Navqi's complaint raised issues of racism and bullying which were serious and merited investigation. Accordingly he proceeded with an investigation. His methodology was to speak to any person mentioned by Mr Navqi initially and thereafter to speak to others who were mentioned as the investigation progressed.

43. In the course of his investigation, Mr Menzies spoke to the following people -

Name	**Date of interview**	**Notes (in bundle)**

Mr Navqi	3 September 2021	239-243
Mr Navqi	17 September 2021	244-249
Mr Quinn	30 September 2021	250-253
Claimant	5 October 2021	254-257
Mr F Smith	5 October 2021	258-259
Mr E Pepper	5 October 2021	260-261
Ms C Crawford	10 November 2021	262-267
Mr G Fems	27 October 2021	268-271
Mr K Williams	28 October 2021	270-271
Mr C McGuire	9 November 2021	272-275
Mr G Carrie	29 November 2021	276-280
Ms L Sheret	29 November 2021	281-288

44. In the course of Mr Gillies' meetings with Mr Navqi, a further allegation was made that the claimant had sprayed air freshener near Mr Navqi which Mr Navqi said *"made me feel humiliated and I felt he thought I was stinky".* The claimants response to this was that he sprayed air freshener regularly throughout the day and not just in the MOT office. He showed Mr Gillies boxes of air freshener in the office. Mr Gillies must have accepted the claimant's explanation about this because he said in his report *T've been unable to clearly establish racist behaviours by Roy".*

45. When Mr Gillies met with Mr Quinn, he was told about an incident on 7 September 2021. Mr Quinn had initially been unwilling to allow the claimant time off to attend a disciplinary meeting (about an unrelated matter). The claimant had reacted aggressively. He called Mr Quinn a *Tucking liar"* and a *"lying bastard".* Mr Quinn took out his phone, left the room and went outside. His purpose was to seek advice from HR. The claimant followed him to the car park, indicating that he wanted to see who Mr Quinn was calling. Mr Quinn told him to back off.

46. When interviewed by Mr Gillies , the claimant denied that he had raised his voice, gestured as if to punch the desk, and swom at Mr Quinn. He did admit following Mr Quinn to the car park. If it had been necessary for me to determine the matter, I would have preferred the evidence of Mr Quinn about this incident. I believed that the claimant could behave in an aggressive manner, as illustrated by his heated exchange with Mr Navqi.

47. Apart from meeting with Mr Gillies on 5 October 2021 , the claimant was unaware as to the progress of Mr Gillies' investigation. However, on 29 November 2021 , when he was medically certified as not fit for work, the claimant received a call from Mr Pepper telling him that Mr Gillies had been at Kirkintilloch to interview Ms Sheret. Ms Sheret had worked alongside the claimant at Kirkintilloch for three days before the claimant had commenced a period of sickness absence on 9 November 2021 .

48. The claimants evidence was that Mr Pepper had told him what Ms Sheret had said about him to Mr Gillies. According to the notes of her meeting with Mr Gillies, she had referred to the claimant -

- using nicknames
- making racist comments
- being *"frosty"* towards Mr Quinn
- alleging that Mr Quinn had sent her to Kirkintilloch to spy on him
- getting heated, raising his voice and swearing
- as *"older"* and being *"abrupt"*

She also made some positive comments about the claimant, including that there were no issues between the claimant and a recently recruited Asian employee.

49. I did not regard it as credible that Mr Pepper had told the claimant all of this. It was not, on the balance of probability, likely that (a) Ms Sheret would have disclosed all of these details to Mr Pepper and (b) Mr Pepper would have reported them verbatim to the claimant The claimant's evidence that Mr Pepper had said to him *"They're out to get you, Roy"* was credible but I was not

persuaded that Mr Pepper had told the claimant about any of the other statements made by Ms Sheret. I considered it more likely that the claimant had read this when it appeared in the bundle and had conflated it with what Mr Pepper said to him at the time.

50. Mr Gillies prepared an investigation summary report dated 1 December 2021 (289 -292). He found that the evidence gathered during his investigation did not *"fully corroborate Syed's specific allegations"* about the claimant *("Syed"* being Mr Navqi). I understood that to mean that Mr Navqi's grievance against the claimant was not upheld. There was no recommendation for any disciplinary action against the claimant.

51 . The recommendations which Mr Gillies did make in relation to the claimant were expressed in these terms -

"My 1st recommendation would be to revisit Halfords Values training and create an(d) action plan to review. There is a pattern within the various investigation notes indicating Roy's behaviours are out of step with the expectations of demonstrating the Halfords Values. It is reasonable to take a view Roy's behaviours, tone, language, and attitude are seen by a number of colleagues as hostile and aggressive.

My 2nd recommendation is that Roy establishes a developmental plan around his behaviours. To support, this plan should be based on 360 degree feedback around management/leadership styles."

52. Mr Gillies' report also set out a number of recommendations for Mr Quinn. These are not relevant to this case apart from demonstrating that there was no bias in favour of Mr Quinn in Mr Gillies* investigation. However it was a little ironic that these recommendations included the statement that *"Timing is of the essence where there are any allegations of behaviours towards others of discrimination, racism, bullying etc",* in the context of criticising the delay between Mr Navqi's email of 10 August 2021 and Mr Gillies meeting with him on 3 September 2021 , when Mr Gillies* own investigation took more than three months and was effectively hanging over the claimant for that period.

Claimants criticisms of Mr Quinn

53. The claimant complained that Mr Quinn had given him targets which were unacceptable and that there had been *"broken promises"* about providing him with additional staff. Mr Quinn denied this. Targets were set at a more senior level and handed down to Mr Quinn and other RGMs. Mr Quinn had a degree of flexibility in adjusting targets for individual centres, and it was potentially to his own financial advantage that centres should achieve target.

54. My view of this was that Mr Quinn did not set targets for the claimant which were unfair. I noted that the claimant had been subject to a performance improvement plan ("PIP") at the time of the second incident, at which point the PIP had been put on hold. Mr Quinn said that the PIP was put in place because the claimant was failing to achieve his sales target and because there had been some customer complaints.

55. The claimant was also critical of Mr Quinn for not contacting him when he was off sick. The Colleague Handbook (at 72) states that the respondent defines short-term absence as *"a period of absence which is less than four weeks"* and long-term absence as "a *period of absence of four weeks or longer",* it describes the steps an employee must take during short-term absence in relation to keeping in touch with their manager. It does not impose any reciprocal obligations on the manager. The Handbook also describes the management actions that will or may be taken in the case of long-term absence, including an occupational health appointment and a home visit.

56. My view of this was that when the claimant went off sick, as detailed below, there was no specific obligation on Mr Quinn to make contact with him. Given that the claimant had told Mr Quinn by email (295) when his absence started on 9 November 2021 that he had been suffering from *"chest pains, stress and anxiety",* it was reasonable for Mr Quinn not to make contact but to give the claimant time and space to recover.

57. The claimant alleged that he had been warned by other managers to be *"very careful"* because Mr Quinn *"seemed to have it in for [him]".* He said that he had been told this by MrC McGuire, Mr D Leonard, Mr G Murdoch and Mr J McDonald over a period of some eighteen months since the first incident.

58. The claimant alleged that Mr Quinn had refused a holiday request This related to an exchange of emails on 4 November 2021 (293). The claimant asked to take four days in lieu, to be taken on dates later in November 2021. Mr Quinn replied promptly pointing out that on two of those dates there would be no-one running the Kirkintilloch centre *"due to others on days off'.* He asked the claimant to *"revisit your Schedules".* Mr Quinn's reply to the claimant concluded *"Have a relook at it all and if you are comfortable with all of the above and have it covered then I will authorise and we can catch up later".* In my view this could not fairly be described as a *"refusal".* It was a sensible and constructive response consistent with Mr Quinn's own management responsibilities.

59. Mr Quinn had appointed the claimant as Senior Manager in Scotland which indicated a favourable disposition towards him at that time. That status had later been removed which indicated a less favourable disposition. It was apparent from Mr Quinn's evidence that he recognised both positive and negative aspects of the claimant's managerial capabilities and character. If he had been so ill-disposed towards the claimant as alleged, it was more probable than not that he would have initiated a disciplinary process after the incident on 7 September 2021 (see paragraphs 45-46 above). In my view, the facts (a) that Mr Quinn had not done so and (b) that he had subsequently invited the claimant to reconsider his resignation, demonstrated that the claimants perception of Mr Quinn *"having it in for him"* was incorrect.

60. That said, some of the language Mr Quinn used about the claimant during his meeting with Mr Gillies on 30 September 2021 was fairly strident. When speaking about the claimant he used the phrase *"what the west coast of Scotland may call a bigot"* and (in the context of using nicknames) described the claimant as *"spreading venom".*

Claimant's sickness absence

61. The claimant said that from around September 2021 he began to experience some health issues. He described being unable to get to sleep at night, having palpitations and being *"all worked up".* He said that he was taking what was happening at work home with him. He was feeling unwell and made an appointment to see his GP.

62. Having attended his GP on 9 November 2021 the claimant emailed Mr Quinn on that date (295) in these terms -

"/ have just had a consultation with my doctor and he has advised me to refrain from work until he meets me again next Wednesday 17th November.

Due to the chest pains, stress and anxiety that I've been under my doctor is concerned I'm heading fora stroke. He's prescribed medication and advised the next time I get the chest pains I've to go straight to A&E.

I will keep you updated in due course."

63. Mr Quinn replied almost immediately -

"Thanks Roy and I hope you start feeling better asap and take care of yourself.

Can you please send me over a sicknote to cover your period off?"

64. There was a further exchange of emails between the claimant and Mr Quinn on 16 November 2021 (297). The claimant told Mr Quinn that he had been advised to continue to refrain from work (per his doctor's certificate which he attached) and that his self-certification certificate for his first week's absence would be completed on his return to work. Mr Quinn responded thanking the claimant for the update.

65. The claimant submitted further doctor's certificates covering the period up to 14 December 2021. Only the last of these was included in the bundle (300) stating the reason for absence as *"Work related Anxiety and stress".* Following his resignation the claimant remained medically certified as unfit for work until 14 February 2022.

Claimant resigns

66. The claimant wrote to the respondent on 29 November 2021 as follows -

"Due to the state of my current health problem - (work related stress and anxiety), I would like you to accept my resignation from my position of Autocentre Manager at Kirkintilloch 379."

67. Mr Quinn replied to the claimant on 1 December 2021 (304-305) asking the claimant to confirm his intended leaving date and reminding him of the

respondent's grievance policy if he wished to raise any issues. Mr Quinn also invited the claimant to reconsider his resignation.

68. The claimant responded by email on 3 December 2021 (306) confirming that his leaving date would be the last date of his current medical certificate, ie 14 December 2021. Mr Quinn replied on 6 December 2021 (307-308) acknowledging this and confirming that the claimant would be paid up to that date.

69. Within his ET1 the claimant listed a number of matters under the heading *"Constructive Dismissal"* which can be summarised as follows -

- Two flawed investigation meetings rendering the process unlawful and tainted with apparent bias.
- Blaming him for the email reference sent by Mr O'Donnell.
- Issuing him with a final written warning for a serious breach of management duty which was totally outwith his control.
- Investigating him for using an air freshener in the reception area and office and using nicknames.
- Not being contacted by his immediate line manager regarding his health situation.

The claimant stated that *"This led to my decision to resign (while unwell), as they breached the implied term of mutual trust and confidence."* In the course of his evidence the claimant said that the respondent *"put me down"* and that anything he suggested was *"knocked on the head".* He said that he felt Mr Quinn was out to get him and that he *"just could not take any more of if.*

70. Insofar as the claimant was now asserting, per his amendment, that the *"last straw"* causing him to decide to resign was finding out what Ms Sheret had said on 29 November 2021, my findings as recorded at paragraph 49 above are relevant.

Alleged unlawful deduction

71. When absent from work due to sickness, the claimant was entitled only to Statutory Sick Pay ("SSP"). When the claimant queried the deduction of £2673.60 shown in his December 2021 payslip Mr Jones emailed him on 23 December 2021 (310) to provide an explanation. The gist of this was -

    (a) The relevant period for the purpose payment of annual salary was the calendar month, ie an employee received one-twelfth of his or her annual salary each month.

    (b) The relevant period for what Mr Jones called *"timesheet stuff"* such as absence and sickness was the period from the 16th of the previous month to the 15th of the current month.

72. What happened in the claimant's case was as follows -

    (a) In November 2021 according to his payslip (321) he was paid his normal monthly salary of £2505.00 from which was deducted £556.27 for unpaid absence. This was to reflect that he had been absent between 9 November and 15 November 2021 .

    (b) In December 2021 according to his payslip (311) he was paid salary of £1 131.29 and SSP of £369.34. £127.61 was refunded as a correction of too much being deducted in November for unpaid absence. Holiday pay due on termination of employment of £1500.49 was also paid. There was a deduction of £2673.60 for unpaid sickness.

    (c) In recognition that the claimant had not been paid in respect of four lieu days due to a payroll error, a separate payment of £344.24 was processed also in December 2021 .

73. Mr Jones provided a spreadsheet (358) which sought to explain the calculation of the deduction of £2673.60. This was confusing in a number of respects -

    (a) The total deduction per the spreadsheet was stated to be £2673.69 and not £2673.60.

    (b) While the daily deduction was normally £1 15.62 equalling a day's pay, for three days the daily deduction was £81 .89.

(c) The period covered by the spreadsheet was 15 November to 14 December 2021 (as opposed to a period starting on 16 November 2021 which would have been consistent with the explanation Mr Jones gave of how the system worked).

(d) It was counter-intuitive that the deduction should amount to more than one month's gross pay.

(e) Days upon which the claimant would not have been required to work were coded *"RESTNP".* These were shown as single days being 22 November, 28 November and 5 December 2021, and then three consecutive days being 12, 13 and 14 December 2021.

74. The claimant's contract of employment (42-53) stated that he worked a minimum of 44 hours per week according to a rota. The spreadsheet identified days upon which, but for his sickness absence, the claimant would have been required to work by the code *"EXHENT".* It appeared that the claimant might be required to work 5 days in one week and 6 days in the next. The daily rate of pay (£1 15.62) was based on working 260 days in a calendar year.

75. Mr Jones' explanation for the amount of the deduction exceeding a month's gross pay was that there could be a different number of working hours/days in a month measured from the 16th of the previous month to the 15th of the current month when compared with the current month on a calendar basis.

Mitigation

76. Following his resignation, the claimant remained unfit to work until 14 February 2022. He had been fit to work since then. He had so far restricted his search for fresh employment to the motor trade where his whole working life had been spent. He had applied for six jobs by the end of March 2022 and perhaps the same since. He had tried to use contacts within the trade but so far without success. He had not applied for any managerial jobs because, he said, his experience with the respondent had dented his confidence.

77. Mr Blanchard said that he would expect someone looking for a job in the motor trade to get one very quickly. He said there were a lot of vacancies with people

leaving the industry. Mr Quinn said that there plenty of opportunities in the garage trade, both at technician and management level.

78. The claimant had been planning to work until he reached the age of 67 (in December 2022). He would be able to access his Halfords pension at that age. He intended to do so and not to work beyond that age. The claimant had commenced his state pension when he attained the age of 66 in December 2021 but had not otherwise been in receipt of benefit.

Comments on evidence

79. It is not the function of the Tribunal to record every piece of evidence presented to it and I have not attempted to do so. I have sought to focus on those parts of the evidence which I considered to have the closest bearing on the issues I had to decide.

80. The respondents witnesses gave their evidence in a straightforward manner and all were credible. Mr Blanchard had no prior knowledge of the claimant before his involvement as disciplinary officer for the second incident. He came across as confident about handling a disciplinary process and comfortable that he had produced an outcome which was fair to the claimant.

81. Mr Gillies had approached the grievance investigation conscientiously and had conducted a thorough, if a little protracted, series of interviews. He had sought to be fair to all parties.

82. Mr Quinn was challenged in cross-examination and in my own questioning and gave measured and sensible answers. He may well have found the claimant somewhat difficult to manage but was prepared to recognise his strengths as well as his weaknesses.

83. Mr Jones did his best to explain the complexities of the respondent's payroll system as they applied to this case. That I found some aspects of the spreadsheet to be confusing should not be taken as a criticism of his evidence.

Submissions - respondent

84. Although the claimant had led, it was agreed that Ms Baylis would make her submissions first. She provided those submissions in writing, supplemented

orally at the hearing. As those written submissions are available within the case file I will deal with them briefly here.

85. Ms Baylis submitted that the claimant had been involved in a series of incidents which the respondents had been obliged to investigate. Their decisions were lenient, but the claimant was unable to accept that he might have made mistakes and saw legitimate investigations as personal attacks.

86. Ms Baylis said it was accepted by the respondent that Mr Quinn thought the claimant was underperforming and was aggressive and rude to customers, it was accepted that the claimant disliked Mr Quinn, but she submitted that it was clear that Mr Quinn had no intention of getting the claimant sacked because he did not report the claimant for other offences as he might have done. The claimant had resigned because he had grown paranoid that he was going to be dismissed and wanted to jump before he was pushed.

87. In relation to credibility, Ms Baylis said that the claimant lacked an ability to reflect on his own behaviour objectively. He could not accept that he might have been wrong when he did nothing on finding a fraudulent character reference written by one of his employees to be used in a live court case for another employee. He failed to recognise that other employees found him aggressive, hurtful and discriminatory.

88. The series of incidents leading to the alleged constructive dismissal had been investigated by people within the respondent who had no knowledge of the claimant and no detailed knowledge of Mr Quinn. They had concluded that the claimant was someone who lacked self-awareness and could get aggressive when challenged. These characteristics had, Ms Baylis contended, been on display during the hearing.

89. Turning to the alleged breaches upon which the claimant's constructive dismissal claim was founded, Ms Baylis made the following points -

    (a) In relation to the allegedly flawed investigation meetings, Mr Carrie intervening was not a material breach.

(b) In relation to the allegation that the claimant had been blamed for not reporting Mr Fleming's arrest when the claimant was manager of another centre, the claimant had misunderstood what he was accused of.

(c) In relation to the character reference for Mr Fleming, the claimant had again misunderstood what he was accused of. It was highly unusual to discover a fraudulent reference but do nothing about it.

(d) In relation to the final written warning, Mr Blanchard was a credible, sensible witness.

(e) In relation to implementing an investigation of the claimant for using nicknames and air freshener, an investigation into a grievance could not be a breach of contract.

(f) In relation to the allegation that Mr Quinn was making the claimant's chores as awkward as possible, this was the hardest part of the claim for the respondent to answer because there was no concrete evidence. However, Ms Baylis argued, what the evidence showed was normal management behaviour. The only valid accusation related to the request for time off to attend a disciplinary hearing. The claimant was clearly angry about this but one would need to read deeply into Mr Quinn's personality to find against the respondent.

90. In relation to the new *"last straw"* incident when Mr Pepper told the claimant about Mr Gillies' interview with Ms Sheret, it seemed unlikely that Ms Sheret would have told Mr Pepper that she had tried to get the claimant dismissed. Ms Baylis suggested that the claimant had resigned because he was worried about what Ms Sheret might have said. However, if this genuinely was his *"last straw",* he would have put it in his ET1. Instead, Ms Baylis argued, he was adding it now after reading the case papers.

91. Moving to the unlawful deduction claim, Ms Baylis said that the respondents case rested on the spreadsheet about which Mr Jones had given evidence.

Submissions - claimant

92. The claimant said that the key issue was that when he took over as CM at Kirkintilloch, management had not told him about Mr Fleming's earlier arrest If

he had been told, it would have given substance to the rumours and he would have dealt with the matter differently. He believed that the information had been withheld from him deliberately.

93. In relation to the reference for Mr Fleming, the claimant said that he had told Mr O'Donnell that he could not do a reference from Halfords. He did not know what Mr O'Donnell had done on 14 July 2021 until after the event. He had not withheld information. He had told Mr Quinn about the pending court case during the conversation on 19 July 2021. The claimant observed that Mr Quinn was saying that he could not recall that conversation, not that it did not take place.

94. The claimant submitted that he had been made a scapegoat for managements failure to tell him about Mr Fleming's arrest He referred to section 8.3 of the Colleague Handbook - "….*we need to know if you are detained by the police for questioning, arrested or prosecuted on any matter which may result in your honesty and integrity being brought into question".* It was inconceivable that management were unaware of Mr Fleming's arrest, and yet they had not told him about it.

Applicable law

95. The right not to be unfairly dismissed is found in section 94 of the Employment Rights Act 1996 ("ERA")-

(1) An employee has the right not to be unfairly dismissed by his employer.

96. Section 95 ERA deals with the circumstances in which an employee is dismissed. In relation to constructive dismissal, it provides as follows -

(1) For the purposes of this Part an employee is dismissed by his employer if....

(a) ….

(b) ….

(c) the employee terminates the contract under which he is employed (whether with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. …

97. Section 98 ERA deals with the fairness of a dismissal. In terms of section 98(1) it is for the employer to show a potentially fair reason. Section 98(4) details the matters to be considered in determining whether the dismissal is fair or unfair having regard to the reason shown by the employer.

98. Section 13 ERA deals with unauthorised deductions from wages and, so far as relevant, provides as follows -

(1) An employer shall not make a deduction from wages of a worker employed by him unless -

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) ....

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion....

99. In the case of Western ***Excavating (ECC) Ltd v Sharp 1978 ICR 221*** it was established that unreasonable conduct by the employer is not sufficient for the purposes of a constructive dismissal claim. There needs to be a breach of an actual term of the contract - express or implied - which is serious enough to be fundamental or repudiatory. Adopting what Ms Baylis said in her written submissions, for an employee to succeed in a claim for constructive dismissal four conditions must be met -

(a) There must be a breach of contract (it can be an actual breach or an anticipatory breach);

(b) The breach must be fundamental and capable of entitling the employee to repudiate the contract (ie resign without notice);

(c) The employee must leave in response to the breach; and

(d) The employee must not delay too long otherwise the breach will be deemed to have been waived.

100. In ***Malik v Bank of Credit and Commerce International SA 1977 ICR 606*** the implied term of trust and confidence, upon which the claimant relies in this case, was expressed (by Steyn LJ) in terms that the employer shall not -

"….without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee."

Discussion

Constructive dismissal

101. I reminded myself of the language of section 95(1)(c) ERA - for there to be a dismissal, the employee must have resigned in circumstances where he was entitled to do so without notice (irrespective of whether he actually gave notice) by reason of the employer's conduct. The focus is therefore on what the employer did which is said to have entitled the employee to resign. I approached this by working through the list of issues.

Two flawed investigation meetings rendering the process unlawful and tainted with apparent bias. Flaws identified:

1 At the 30 July 202 1 meeting the notetaker (Mr Carrie) intervened and asked three questions rendering the process void.

2 At the 13 August 202 1 meeting the matter was reinvestigated as a disciplinary meeting which was incorrect, also it was not conducted impartially.

102. There was nothing unlawful in Mr Carrie asking questions at the meeting on 30 July 2021. There is no rule of law to the effect that a notetaker cannot do this. There might well be a need for the notetaker to ask questions to clarify a matter for his or her notes, or perhaps to ask a question which the investigating or disciplinary officer (as the case might be) appears to have omitted. What is important is the overall fairness of the process.

103. I was satisfied that there was nothing improper, and certainly no issue of bias, in Mr Carrie asking his questions. It was not a breach of any express or implied

term of the claimants contract of employment It did not breach the obligation of trust and confidence.

104. The meeting held on 13 August 2021 was not investigative. It was a disciplinary hearing which had been duly convened by Mr Pearce, having been rescheduled from 6 August 2021. When the claimant raised his concern about the way in which the investigative meeting had been conducted, Mr Pearce paused to seek HR advice. Having done so, he told the claimant that the disciplinary hearing would not proceed and the matter would be reinvestigated by someone impartial.

105. Given that the claimant's criticism of Mr Carrie's questions at the investigation meeting on 30 July 2021 was not well-founded, this was quite generous towards the claimant. There was no obligation in law to restart the process. There was no breach of contract here.

Accusing and blaming the claimant for not reporting an incident which occurred in Kirkintilloch when he was the manager of another centre.

106. This issue was at the heart of the claimants case. He believed that management (ie Mr Quinn) must have known about Mr Fleming being arrested at the Kirkintilloch Centre and had deliberately withheld this information from him. This, he believed, made him a scapegoat. I agreed with Ms Baylis that this indicated that the claimant had misunderstood the allegation brought against him.

107. The claimant was not accused of failing to report that Mr Fleming had been arrested. As the claimant correctly pointed out under reference to the Colleague Handbook, the primary responsibility for reporting his arrest to the respondent lay with Mr Fleming. The claimants predecessor was also under an obligation to report it. I accepted Mr Quinn's evidence that he was not aware of the arrest at the time which indicated that the claimant's predecessor had failed to report it.

108. What the claimant was accused of was as set out by Mr Blanchard in his letter to the claimant of 8 September 2021 (211-212) - see paragraph 35 above. These were his own management failings which brought into question the respondent's trust in him. These matters were properly investigated, and in that context I found no issue with Mr Cliberon carrying out the second investigation having previously

acted as notetaker at the investigation meeting held on 23 January 2020. They were framed as allegations of gross misconduct and found by Mr Blanchard to merit a final written warning. This was again quite generous towards the claimant. Another manager might well have come to the view that an employee found to have committed acts labelled as gross misconduct should be dismissed. There was nothing here which amounted to a breach of contract.

Accusing and blaming the claimant for an email reference which was written and sent on 14 July 2021, being the claimant's day off, by his Assistant Manager who later admitted it and was dismissed.

109. My comments above in relation to the previous issue also apply here. The claimant again misunderstood the allegation. He was not blamed for what Mr O'Donnell had done. He was accused of failing to report, and to take action on, what Mr O'Donnell did. This was properly investigated by Mr Cliberon and dealt with leniently by Mr Blanchard, given that it was framed as an allegation of gross misconduct. There was again nothing here which amounted to a breach of contract.

Issuing him with a final written warning fora serious breach of management duty which was totally outwith his control.

110. I can deal with this briefly. The respondent did not believe that the claimant had spoken with Mr Quinn on 19 July 2021 , and had grounds for that belief based on Mr Quinn's evidence. The allegations were that the claimant (a) failed to report to senior management that he was aware that Mr Fleming was in court on serious charges and (b) failed to report or take action about the fraudulent reference. These were the claimant's own failures. It is simply incorrect to say that these were *"totally outwith his control".* There was no breach of contract here.

Implementing an investigation on the claimant for using air freshener and nicknames.

111. Mr Navqi complained about the claimant He headed his complaint *"Discrimination".* He alleged behaviour which, if found to be substantiated, would almost inevitably have been classed as bullying. The respondent treated this as a grievance which was entirely reasonable. They had no choice but to initiate an investigation.

112. The claimant was upset that the respondent had continued with the investigation after Mr Navqi withdrew his grievance. In my view the respondent was entitled to do so. It was reasonable to continue to investigate Mr Navqi's allegations against the claimant because they were of a serious nature. If, notwithstanding withdrawal of his grievance, Mr Navqi had presented a claim to the Tribunal alleging racial discrimination and harassment, the respondent would potentially be vicariously liable for the claimants conduct. They would be in some difficulty in defending such a claim if they had not conducted an investigation.

113. The claimant has attempted to trivialise the complaint about his use of air freshener. However, the potential for this to be discriminatory was explained by Mr Navqi to Mr Gillies at their meeting on 17 September 2021 (see paragraph 44 above). Similarly the use of nicknames carries the risk of giving offence, possibly unwittingly. The respondent would have been unwise not to investigate these matters. Their investigation was appropriate and entailed no breach of contract.

The claimant's line manager making his chores as awkward as possible - accusations, blame, lack of staff, unachievable targets, victimisation, refusal of holiday request.

114. Apart from the request to take days in lieu as holiday (see paragraph 58 above) which I did not regard as a refusal of a holiday request, there was little specification of what Mr Quinn was supposed to have done. The claimant alleged that Mr Quinn set *"unachievable targets"* when the centre had a *"lack of staff",* but I had no evidence to substantiate this. In any event (a) it was not in Mr Quinn's own financial interest to set targets which the centres under his line management could not achieve and (b) targets were handed down to Mr Quinn from more senior management.

115. I noted that at the time of the second incident the claimant was on a PIP, which was then put on hold. There was no evidence that the claimant had challenged the decision to impose the PIP. That indicated that Mr Quinn had concerns about the claimant's performance and was taking steps to address those concerns. That was appropriate management action rather than *"accusations", "blame"* and/or *"victimisation".* In short, I found no breach of contract here.

The claimant's line manager not contacting him when he was off sick with work related stress.

116. I have covered this at paragraph 55 above. There was no obligation on Mr Quinn to contact the claimant while he (the claimant) was absent due to work related stress. It was the claimant who was under an obligation to keep in touch with the respondent. I would not, as Ms Baylis sought to do, have characterised Mr Quinn's replies to the claimant's emails on 9 and 16 November 2021 as keeping in touch with the claimant given that the contact was initiated by the claimant on each occasion. I did however take her point that, when an employee is suffering from work related stress, it can be stressful for that employee to have to engage with work related people and issues while recovering.

117. In the absence of any obligation, express or implied, on the respondent to keep in touch with the claimant, I found no breach of contract in their not having done so in the period between 9 November 2021 when the claimant's sickness absence began and 29 November 2021 when he intimated his resignation.

118. Before continuing to work through the list of issues, I will deal with the matter of whether the conduct of the respondent said to be a breach or breaches of contract might, when viewed cumulatively, amount to such a breach. This engages the question of whether there was a *"last straw".* Ms Baylis reminded me that the issue is whether the effect of the employer's conduct as a whole, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it - ***Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666***.

119. I reminded myself of what the Court of Appeal said in ***London Borough of Waltham Forest v Omilaju 2005 ICR 481***, per Dyson LJ -

"(19) ….The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

(20) I see no need to characterise the final straw as "unreasonable" or "blameworthy conduce. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

(21) If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle. "

120. I also reminded myself of what the Court of Appeal said in ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA 978,*** per Underhill LJ (at paragraph 55) -

"....In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

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

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

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

*(4) If not, was it nevertheless a part (applying the approach explained in **Omilaju)** 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 ….).*

(5) Did the employee resign in response (or partly in response) to that breach?"

121. Answering Underhill LJ's five questions in the present case -

(1) The most recent act was said by the claimant to be what Ms Sheret said about him in her interview with Mr Gillies on 29 November 2021.

(2) No.

(3) No.

(4) No.

(5) No (as there was no breach).

122. Accordingly, I decided that the conduct of the respondent, viewed cumulatively, did not amount to a breach of the implied term of trust and confidence, and there was no *"last straw".*

123. In the course of finding that there had been no breach of contract by the respondent, I have in effect answered the next series of questions in the list of issues, but I will cover these now.

Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and whether it had reasonable and proper cause for doing so.

124. The respondent did not do so, for the reasons explained above.

Was *the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end. The claimant relies on the "last straw doctrine. The claimant will have to prove that the last straw contributed to the breach.*

Did the claimant resign in response to the breach?

125. There was no breach, and no *"last straw".*

Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

126. No, but the issue is in any event academic in the absence of any breach. The remaining points in the list of issues would be engaged only if I found that the claimant was constructively dismissed which I did not.

127. My view of all of this is that, for the reasons set out above, there was no breach by the respondent of any express or implied term (including the implied term of trust and confidence) of the claimant's contract of employment. There was no conduct on the part of the respondent in response to which the claimant was entitled to resign. He was not constructively dismissed.

Unlawful deduction of wages

Did the respondent make a deduction from wages without it being authorised by law or by the written consent of the claimant?

128. Although the spreadsheet provided by the respondent to explain the deduction of £2673.60 was confusing in a number of respects, the principles behind it were clear. The time periods used for calculation of salary and sickness absence were different. It was the calendar month for salary and the period from the 16th of the previous month to the 15th of the current month for sickness absence.

129. The consequence of this was that if an employee was absent between the 16th and the end of a month, he or she would be paid their full salary for that month. This would involve an overpayment, which would then be recovered in the following month. In the claimant's case, this meant -

(a) His absence between 9 and 15 November 2021 was reflected in a deduction of £556.27 from his November pay. This was miscalculated by £127.61, and this was paid to him in December 2021.

(b) His absence between 16 and 30 November 2021 was not reflected in his November 2021 pay, and so there was an overpayment.

(c) His December 2021 pay comprised a payment for the part of the month (1 to 14 December) during which he remained employed, amounting to £1 131 .29. He also received SSP for days when he would otherwise have been working, in the sum of £369.34. The actual daily amount of SSP varied depending on whether the claimant would have been working for 5 days or 6 days in a particular week. In addition he received holiday pay of £1500.49.

(d) From these amounts there required to be deducted the salary paid in respect of his absence between 16 and 30 November 2021 and in respect of his absence between 1 and 14 December 2021. This was where the sum of £2673.60 came from.

(e) The fact that this amounted to more than his normal monthly salary was explained by Mr Jones as set out in paragraph 75 above.

130. While I had some concerns about the spreadsheet (as set out in paragraph 73 above), these were relatively minor matters. I was satisfied that the spreadsheet was broadly accurate. I reminded myself that the burden of establishing that there had been an unlawful deduction from his wages lay with the claimant. I was not satisfied that he had discharged that burden and accordingly his claim that there had been an unlawful deduction from his wages could not succeed.

Employment Judge: Sandy Meiklejohn
Date of Judgment: 13 May 2022
Entered in register: 16 May 2022
and copied to parties