# THE INDUSTRIAL TRIBUNALS

**CASE REF: 797/20**

**CLAIMANT:** **Michael Gray**

**RESPONDENT:** **Randox Laboratories Limited**

## JUDGMENT

The unanimous judgment of the tribunal is that the Claimant was unfairly constructively dismissed by the Respondent and is entitled to a monetary award in the sum of £50,633.50 as set out in the Conclusions, subject to the provisions of the Recoupment Notice attached.

**CONSTITUTION OF TRIBUNAL**

**Employment Judge:** **Employment Judge Crothers**

**Members:** **Mrs F Cummins**
**Mr N Jones**

**APPEARANCES:**

**The claimant was represented by Mr T Jebb, Barrister-at-Law, instructed by Worthingtons Solicitors.**

**The respondent was represented by Mr J Stewart, in House Solicitor, Randox Laboratories.**

**THE CLAIM**

1. (1) The claimant claimed constructive unfair dismissal, unauthorised deduction from wages and breach of contract (notice pay). The respondent denied the claimant's claims in their entirety.

**ISSUES**

2. The issues agreed in advance of the hearing were as follows: -

(1) Was the claimant constructively dismissed by the respondent?

(2) Did the respondent breach the claimant's contract of employment (notice pay)?

(3) Did the claimant suffer an unlawful deduction from wages?

The claimant withdrew his breach of contract claim on 20 April 2022 but confirmed that he was still pursing the claim for an unlawful deduction from wages. An amended Schedule of loss was provided to the Tribunal on 3 May 2022 incorporating this claim and is reproduced later in this decision.

## SOURCES OF EVIDENCE

3. The tribunal heard evidence from the claimant and from Heather Gray the previous joint owner of Design and Print along with her husband, on behalf of the claimant. On behalf of the respondent, the tribunal heard evidence from Cathy Hurrell, Assistant Human Resources Manager, Grant Graham from the respondent's manufacturing department, and Stephen Scott, Senior Buyer, within the respondent's purchasing department. The tribunal also received an agreed bundle of documents together with additional documents during the hearing.

## FINDINGS OF FACT

4. Having considered the evidence in so far as same related to the issues before it, the tribunal made the following findings of fact, on the balance of probabilities:-

(i) The claimant was employed by the respondent as a Printer from 2 October 1995 until the cessation of his employment by resignation, on 11 October 2019, being the effective date of termination of his employment. The claimant was located in premises on the Crumlin Road, Belfast where his parents, Heather and Jack Gray operated a business, Design and Print ("DP"). The claimant's initial employment arose out of a meeting he attended at the respondent's premises with his father. They met Dr Peter Fitzgerald, the current owner of the respondent and his brother Clem Fitzgerald. The claimant was employed by the respondent ("Randox") to produce sheets and booklets, associated plates, and artwork and film for their production. The claimant's duties are described in the Randox's response to the claimant's tribunal claim in the following terms: -

> *"The claimant's core duties were to print large bulk quantities of 'Instruction For Use' (IFUs) leaflets that were required by the Respondent…. to be inserted into Randox products being shipped to customers. The IFUs were printed, chopped and folded and returned to Randox by the Claimant. In addition to this the Claimant would have trimmed CD covers but this function ceased in October 2018.*
>
> *The Claimant's agreed [contracted] core hours were Monday to Friday 8.34am to 4.45pm with a 30 minute break but it is understood and accepted that there were times when a degree of flexibility was given the Claimant in relation to childcare arrangements".*

The claimant did not have a direct reporting line to Randox nor was he required to visit their premises as he was working off site. Occasionally the claimant assisted in other areas of DP's work when another employee was off on leave.

(ii) The claimant, who was aged 51 when his employment with Randox ceased, had had 25 years' service by that time and was earning £345 gross per week (£306.64 net). Had he been made redundant by the respondent, the claimant would have been entitled to 12 weeks' paid notice, or 12 weeks' pay in lieu of notice.

(iii) The tribunal accepts Heather Gray's evidence that the last purchase order received from Randox for procedure sheets (IFU's) was on 13 May 2019. There was no documentary evidence placed before the tribunal regarding any further orders of any kind placed with DP during the remainder of the month of May, or in June or July. Heather Gray rang Randox's Purchasing Department during May, June and July but was informed that Randox did not know why there were no further orders for the sheets produced by the claimant. The order placed by Randox with DP on 1 August 2019 did not relate to the procedure sheets for which the claimant was solely responsible. DP did produce other types of sheets, such as language sheets but these are not to be confused with the sheets produced solely by the claimant.

(iv) The tribunal accepts that in late July 2019 Heather Gray was led to believe by Stephen Scott, the Senior Buyer with Randox, that Randox was considering going paperless. The position is confirmed in an email from Heather Gray to Dr Peter Fitzgerald on 29 July 2019, which reads: -

> *"Dear Peter,*
>
> *We hope you and your family are keeping well.*
>
> *We are writing to inform you that it is with regret that we are providing you with two months' notice before we will cease trading.*
>
> *We have valued our relationship over many years and remember fondly our first meeting in Louden Street. We understand that the world is moving to a more paperless situation and have been told unofficially that this maybe the line that Randox are taking.*
>
> *Our last order for procedure sheets was on the 13th of May this year and despite repeated requests for information on where we stand we are sadly none the wiser. With supplies and overheads to pay we simply cannot continue.*
>
> *With regards to Michael we are very grateful for the arrangement we have had over many years but we do understand that redundancy may not be a consideration. However from our [family's] perspective we need to give him notice forthwith to find alternative means of income and we are grateful that you continued supporting Michael despite the lack of work for him.*
>
> *We wish continued success to you, your family and to Randox in the future.*
>
> *With Kind regards*

*Jack and Heather".*

(v) The tribunal does not accept the respondent's evidence that DP closed due to the Grays' wish to retire. It was evident to the tribunal that Heather and Jack Gray had to cease trading, not because they wished to retire at that point, but because they were forced to retire rather than risk getting into debt. The key component in their decision to close their business was the fact that no further orders were being placed by Randox for IFUs. In this context, the tribunal views the frustration of contract argument raised for the first time in the respondent's written submissions as being without substance as the claimant, on the evidence, also did nothing to frustrate the contract.

(vi) Grant Graham, who the tribunal found to be mercurial and evasive during parts of his cross examination and in answering clarification questions posed by the tribunal, finally clarified that between October 2019 and February 2020 the sheets previously produced by the claimant were now being produced in house via a PDF photocopying system. However, in February 2020 it appears that the work had to be outsourced to a company in Antrim which produced, according to Grant Graham's evidence, "millions and millions" of IFU sheets. However, in his witness statement placed before the tribunal, Grant Graham stated that the suggestion by the claimant in paragraph 4 of his witness statement relating to Randox going paperless in regard to procedure sheets seemed strange as no discussions had been held regarding this. Grant Graham asserted that Randox was still including sheets in all its kits and in OEM customer's products "to this day".

(vii) In areas of conflict of evidence, the tribunal preferred the claimant's evidence to Randox's evidence. This includes Grant Graham's evidence relating to the event which took place at DP's premises on Friday 6 September 2019 when Stephen Scott and Grant Graham arrived to view machinery. The tribunal is satisfied that a conversation of the nature described by the claimant did take place and that Grant Graham did launch into what the claimant described as a diatribe relating to how he had to spend a considerable amount of time organising and attending meetings with clients regarding the decision to go paperless and how, even after the decision had been taken, he had to spend more time in meetings with clients over issues that going paperless had raised. At that point the claimant also commented that an alternative position at Randox Headquarters would not be suitable for him. It is also clear that on 6 September 2019 Heather and Jack Gray were officially informed that Randox had decided to go paperless and, as a result of being so informed, felt that they had no option but to go ahead and close the business with attendant consequences for the claimant.

(viii) Cathy Hurrell, Assistant Human Resources Manager, had written to the claimant on 2 September 2019 to include the following: -

*"Dear Michael*

*We have been informed that Design and Print are ceasing business operations at the end of September 2019, therefore your position with Design and Print will no longer exist.*

*As you are an employee of Randox Laboratories Limited we therefore would like to meet with you on Monday 9th September 2018 at 9.00am to discuss moving roles to the main business of Randox Laboratories and looking at the opportunities that exist here."*

(ix) Although certain internal memoranda dated 3 September 2019 and 5 September 2019 were not made available to the tribunal, and the date for the meeting had to be readjusted to 12 September, the tribunal is satisfied on the evidence that the claimant was effectively in a potential redundancy situation. The whole tenor and nature of the approach by Randox up to the claimant's resignation on 11 October 2019 was to avoid any redundancy issue or redundancy discussion and to place pressure on the claimant to be deployed elsewhere. On 12 September 2019 he was offered a job as a Machine Operative being the only vacancy suitable for his experience and skill set. However, the claimant was informed that this alternative job was based at Randox Headquarters in Antrim, and that there would be a rotating shift early morning to afternoon and afternoon to early morning with Shift 1 beginning at 6.00 am to 2.40 pm Monday to Friday and Shift 2, 2.00 pm to 12.40 am Monday to Thursday, at 40 hours per week. This, combined with the fact that he did not drive a car and that there was no public transport available, meant that he assessed the job as being entirely unsuitable for him. The unsuitability was compounded by his concern as to how he could reach his children's school in an emergency in Greenisland and cope with the fact that his wife's job which he described as that of a Critical Care Scientist in Intensive Care would be affected. She was on call on designated nights and weekends and carried out early and late shifts, sometimes involving emergency cover. The shift work involved in the Machine Operative post therefore clearly presented a very substantial problem for the claimant in his personal circumstances.

(x) Cathy Hurrell explained at the same meeting, should the claimant accept the post, that he would be placed on a new contract without the benefit of continuity of existing terms and conditions but with the possibility of applying for flexi time. However, flexi time was not guaranteed nor would standard flexi time have mitigated the general unsuitability of the post. At the same time, according to Grant Graham's evidence, the work carried out by the claimant at DP was being absorbed by another team within Randox. It appears that no effort was made to discuss this with the claimant in order to afford him the opportunity, after the closure of PD, to relocate within the business and to carry on the same work, despite the fact that his contract did not contain a mobility clause.

(xi) The tribunal accepts the claimant's evidence that both Grant Graham and Cathy Hurrell agreed for the reasons discussed at the meeting pertaining to the claimant's difficulties, that the position was unsuitable for him and that there were no other current suitable positions to offer him. The claimant enquired as to whether Dr Fitzgerald would make a reasonable offer of redundancy and provide him with a reference. However, Cathy Hurrell did not communicate with Dr Fitzgerald on this issue and instead provided details of other vacant positions to the claimant on 13 September which the tribunal is satisfied, on the evidence, were entirely unsuitable for him, as apart from the issue of location, they did not match his skills set.

(xii) As further evidence of the pressure being placed on the claimant and Randox's desire to avoid any discussion regarding redundancy and a possible redundancy payment, Cathy Hurrell wrote to the claimant on 19 September 2019 in the following terms: -

*"Dear Michael*

*Thank you for meeting with Grant Graham and Myself on 12th September 2019. As discussed during our meeting, your position of Machine Operative located at Design & Print is coming to an end, due to Design & Print ceasing business operations on 30th September 2019. Following our meeting you have taken the time to review all our current job openings but have since requested the option of a redundancy settlement from Randox, unfortunately this is not an option we are considering as we are currently actively recruiting for Machine Operators within the company and as agreed by yourself during our meeting on 12th September this position would suit your skillset. It is therefore the decision of the company to relocate you to another area with the business which would best utilise your skillset.*

*We are offering you the position of Manufacturing Operative, we would like you to commence your new position on 1st October 2019. As discussed during our meeting this role is placed within the Auto Dispense Team, this department operates on a rotating shift pattern:*

- *Shift 1 - 6.00am to 2.40pm, Mon - Fri, 8hr/day, 40hr/wk*
- *Shift 2 - 2.00pm to 12.40am, Mon to Thurs, 10hr/day, 40 hr/wk.*

*Your salary will be remain the same at £9.08 p/h. Please report to reception at 8.45am on your start date where you will be met by your department manager.*

*Please confirm this appointment by completing the enclosed Offer of Employment Acceptance Form, returning it to me electronically. Our working Terms and Conditions are also enclosed for your information.*

*If you would like to come on site and visit your new department and work area to meet the team please contact me and I will be happy to arrange this for you.*

*I look forward to your positive response.*

*Yours sincerely*

*Cathy Hurrell*
*Assistant Human Resources Manager."*

It was acknowledged at the tribunal that the reference to "your position of Machine Operative located at Design and Print", was an error.

(xiii) On 24 September 2019 the claimant wrote to Cathy Hurrell reflecting on the concerns he had raised with Grant Graham. It was very clear from the discussion on 12 September that the position was unsuitable for him and that he had clearly stated so. He clarified that he had agreed to view all the open vacancies within the company despite the fact that Cathy Hurrell regarded them as unsuitable. Out of what he described as politeness and in case anything had been missed, the claimant included in the correspondence of 24 September 2019 to Cathy Hurrell the following: -

> *"At no time did I suggest I was going to reconsider the Machine Operator's position, I was very clear that it was unsuitable.*
>
> *I asked you to raise my request for a letter of recommendation on redundancy directly with Dr Fitzgerald, on the grounds my position would shortly no longer exist and the one being offered to me was unsuitable. Did you do so and what was his reply as this is unclear in your email?"*

In her reply of 30 September 2019 Cathy Hurrell states that she is still awaiting the offer of acceptance form from the claimant and requests him to confirm if he is or is not accepting the job offered. She also refers to the flexible working application form and asks for both forms to be returned on 30 September as the claimant's role with DP ended on that day.

(xiv) At 08:26 am on 3 October 2019 Cathy Hurrell wrote to the claimant expressing disappointment that he had not responded to her email of 30 September. She adds: -

> *"You were expected to report for work on Tuesday, in the absence of making contact with me regarding my below communication or reporting to work at Randox HQ, your absence from work is now unauthorised and therefore unpaid.*
>
> *I am requesting you to attend a meeting on Monday 7 October 2019 at 1.00 pm.*
>
> *Please contact me either by email or phone to confirm your attendance".*

The tribunal is satisfied that Randox, having extended his contract, had no contractual basis for concluding that the claimant's absence from work was unauthorised or for withholding pay from him.

(xv) The claimant's reply to Cathy Hurrell by email on 4 October 2019 includes the following, with necessary amendments, for clarification: -

> *"Regarding the acceptance form, I have to say I'm very surprised at the way Randox has continuously pushed this MO post at me. I was very clear in our meeting that it was not suitable for me, and I have repeatedly stated so in my emails, which you can refer to as several are contained in the thread below. I would also draw your attention to*

*your letter, I certainly did not say or agree that my skillset would suit this [MO] position. I would also refer you to my email of the 24th, [where] I rebutted a similar claim and pointed out it was Grant and yourself that said I was most suited to the role, as I certainly did not.*

*Anyway, I have attached the form to this email for you and I will also post the original to you as well.*

*Regarding the flexible working application form. I have to be honest, saying I have to apply for flexible working hours for the new post, which will have worse working hours & conditions than I already enjoy, really hasn't got much to [commend] it. I would also point out your email had no form attached it, or at least any that made it to me."*

(xvi) The tribunal considered other emails and documentation referred to it during the course of the hearing and also noted that a Randox Web Page Article dated November 2019 includes the following: -

*"In the latest of the list of initiatives aimed at improving its environmental friendliness, Randox Laboratories has announced the removal of IFUs from its products, in a bid to go paperless.*

*As of 1 June 2019, all Randox reagent, ELISA and QC kits no longer contain a copy of the products IFUs (instructions for use), to aid in reducing our carbon footprint".*

(xvii) The tribunal is satisfied in the context of its other factual findings, and in light of the considerable confusion and apparent obfuscation by Randox in parts of its evidence before the tribunal regarding the procedure sheets (IFUs), that there was still a possibility to be investigated for the claimant to be offered a continued role to avoid potential redundancy, at least until the alleged outsourcing of the work in February 2020 commenced. This reference to outsourcing however, has to be qualified by Graham Grant's witness statement referred to earlier at paragraph 4(vi), and by the fact that no documentary proof of outsourcing was placed before the tribunal.

(xviii) The tribunal considers it appropriate to set out the claimant's resignation letter to Dr Peter Fitzgerald dated 11th October 2019: -

*"Dear Peter*

*I hope you are keeping well.*

*As you are fully aware from my parents they have had to cease trading recently.*

*They could not carry on with no significant printing work being received from Randox.*

*I am writing to you directly out of respect as I agreed my employment with your directly, many years ago.*

*I would like to say that personally I feel it would've been better for my parents and for me to have perhaps received some advance communication or notice from Randox about the decision to go paperless.*

*Following our long term relationship I believe this would've been the most appropriate thing to do, and I would've then at least had some further advance notice that my role would be imminently ending.*

*Following so many years of a mutually beneficial situation I will admit to being a little angry about things ending how they have done, and without just at least some basic communication.*

*As you will know I have had a recent meeting with HR having initiated contact with them about my situation.*

*I was offered a position in Randox which I am unable to accept.*

*Whilst I appreciate this offer, it was the case when we both agreed my contract many years ago that my place of work would always remain in Belfast.*

*Due to my personal situation with my wife on call as a cardiac surgery tech at the Royal and with 2 small children – it is still the case that I am just unable to change my working location to Crumlin or Antrim.*

*I know that this is not your concern however I just wanted the opportunity to outline the above to you directly.*

*I am currently unpaid and would like to therefore resign with immediate effect, so that I can try to find something asap to support my family.*

*Many thanks for the employment you have provided me with over many years, and I wish you all the best.*

*Kind Regards*

*Michael Gray"*

(xix) The tribunal is satisfied that there is a sufficient basis for the claimant's unlawful deduction from wages claim in the amount of £242.10.

**THE LAW**

5. (i) Article 127 of the Employment Rights (Northern Ireland) Order 1996 ("the Order") provides that an employee is dismissed by his employer if the contract under which he is employed is terminated by the employer (whether with or without notice). Article 127 continues to provide as follows: -

*"127. – (1) for the purposes of this Part an employee is dismissed by his employer if … - (c) the employee terminates the contract under*

*which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".*

(ii) Article 156(2) of the Order states as follows: -

> *"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly".*

(iii) The Order further states at Article 157(6) as follows: -

> "*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding".*

(iv) Harvey on Industrial Relations and Employment Law **("Harvey")** states at Division D1, para. 403, as follows: -

> *"In order for the employee to be able to claim constructive dismissal, four conditions must be met:*
>
> *(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.*
>
> *(2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law.*
>
> *(3) He must leave in response to the breach and not for some other, unconnected reason.*
>
> *(4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract".*

**(See also *Western Excavating (ECC) Limited v Sharp 1978 IRLR 27*)**.

(v) **Harvey** continues at paragraph 462: -

*"(b)* ***The duty of co-operation and/or support***

> *The duty not to undermine the trust and confidence in the employment relationship could arguably be sub-sumed under a wider contractual duty which is imposed on the employer, namely to co-operate with the employee. Indeed, in* ***Malik v BCCI [1997] IRLR 462, [1997] ICR***

*__606,__ HL Lord Steyn commented that this was probably the origin of the term. An example of this, extending to an implied obligation to support the employee, can be seen in __Associated Tyre Specialists (Eastern) Ltd v Waterhouse [1976] IRLR 386, [1977] ICR 218.__ Here, the employee was a supervisor who was the subject of a number of complaints from the women she supervised because she imposed a strict discipline. She was told that management considered the complaints justified, that she must change her ways, and that the position would be reviewed within four weeks. Further complaints were made but she was not notified of them, nor was she given any guidance as to whether her efforts to improve were proving successful. Ultimately the women under her supervision walked out and she resigned. She claimed she had been unfairly dismissed and the tribunal found in her favour. The company's appeal to the EAT failed. The EAT accepted that it was a term of her contract that she was entitled to management's support in carrying out the employer's policy.*

(vi) Once a tribunal has established that a relevant contractual term exists and that a breach has occurred, it must then consider whether the breach is fundamental. Where an employer breaches the implied term of trust and confidence, the breach is inevitably fundamental **(*Morrow v Safeway Stores plc 2002 IRLR 9, EAT*)**. A key factor to be taken into account in assessing whether the breach is fundamental is the effect that the breach has on the employee concerned.

(vii) It is also possible for a tribunal to make a finding of contributory conduct in a constructive dismissal case in the event of there being a connection between the employee's conduct and the fundamental breach by the employer. As was pointed out in the Northern Ireland Court of Appeal case of ***Morrison v Amalgamated Transport and General Workers Union (1989) IRLR 361 NICA***, since it was open to a tribunal to declare a constructive dismissal fair, there could be no inconsistency in its holding that the employee contributed to the dismissal in the first place. All that is required is that the action of the employee to some extent contributed to the dismissal. Once a tribunal has found on the evidence that an employee has to some extent caused or contributed to his or her dismissal it shall reduce the compensatory award.

(viii) Unlike an anticipatory breach of contract, an actual breach of contract cannot be retrieved by the employer offering to make amends before the employee leaves. Once the breach has been committed it is for the wronged party to decide how to respond (***Buckland v Bournemouth University [2010] IRLR 445 CA***).

(ix) In ***Mahmud and Malik v Bank of Credit and Commerce International SA [1997] IRLR 606, ('Malik')*** the duty of implied trust and confidence was affirmed by the House of Lords in the following terms: -

*"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 the employer and the employee."*

Lord Steyn stated that: -

*"The implied obligation as formulated is apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."*

Harvey, at Division D1, states at paragraph 430: -

"*After a series of cases had gradually moved towards a recognition of this implied duty, the House of Lords finally affirmed its existence in **Malik v Bank of Credit and Commerce International SA [1997] IRLR 426, [1997] ICR 606**. The term (often referred to as 'the T & C term') was held to be as follows*: -

"*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 confidence and trust between employer and employee*."

This follows the formulation that had been adopted in a series of cases by lower courts, eg ***Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 346, [1981] ICR 666*** per Browne-Wilkinson J, approved by the Court of Appeal in ***Lewis v Motorworld Garages Ltd [1986] ICR 157***. However, a note of caution needs to be expressed in relation to the precise terms of the formulation adopted by Lord Steyn in the BCCI case, as referred to above. In ***Baldwin v Brighton and Hove City Council [2007] IRLR 232, [2007] ICR 680*** the EAT had to consider the issue as to whether in order for there to be a breach the actions of the employer had to be calculated and likely to destroy the relationship of confidence and trust, or whether only one or other of these requirements needed to be satisfied. The view taken by the EAT was that this use of the word 'and' by Lord Steyn in the passage quoted above was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met ie it should be 'calculated or likely'/ One important result of this is that, as 'likely' is sufficient on its own, it is not necessary in each case to show a subjective *intention* on the part of the employee to destroy or damage the relationship, a point reaffirmed by the EAT in ***Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT***. As Judge Burke put it:-

"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of …"

(x) The test for breach of the implied duty of trust and confidence is an objective one. The duty of trust and confidence may be undermined even if the conduct in question is not directed specifically at the employee. The duty may be broken even if an employee's trust and confidence is not

undermined. It also follows that there will be no breach simply because an employee subjectively feels that such a breach has occurred, no matter how genuinely this view is held.

(xi) The range of reasonable responses test is not applicable to constructive dismissal per se. However, it is open to the employer to show that such a dismissal was for a potentially fair reason in which case the range of reasonable responses test becomes relevant.

(xii) The breach of contract must be "sufficiently important" to justify the employee resigning or it must be the last in a series of incidents which justify his leaving. It must go to the heart of the contractual relationship between the parties. **Harvey** comments that where the alleged breach of the implied term of trust and confidence constitutes a series of acts, the essential ingredient of the final act is that it is an act in a series, the cumulative effect of which amounts to the breach. It follows that although the final act may not be blameworthy or unreasonable, it must contribute something to the breach even if it was relatively insignificant (**Harvey** Division D, paragraph 481.01). See ***Omilaju v Waltham Forest London Borough Council [2005] IRLR 35***.

(xiii) The employee must resign in response to the breach. In the recent EAT case of ***Wright v North Ayrshire Council [2014] IRLR 4***, ("Wright") Mr Justice Langstaff (President) states at paragraph 20 of his judgment that:

> *"Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause."*

(xiv) In ***Western Excavating (ECC) Ltd v Sharp (1978) IRLR 27 CA***, it was pointed out that an employee must make up his mind regarding resignation soon after the conduct of which he complains. Should he continue any length of time without leaving, he will lose his right to treat himself as discharged from the contract. However, where there is no fixed period of time within which the employee must make up his mind, a reasonable period is allowed. This period will depend on the circumstances of the case including the employee's length of service, and whether the employee has protested against any breach of contract.

## THE LAW ON COMPENSATION

6. (1) Article 157(1) of the Employment Rights (NI) Order 1996 ("the 1996 Order") provides that the amount of the compensatory award shall be:-

> *"Such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer".*

(2) The compensatory award should not be increased out of sympathy for the claimant or to express disapproval of the respondent (**Lifeguard Assurance Ltd v Zadrozny (1997) IRLR 56**).

(3) In ***Norton Tool Company Ltd v Tewson [1973] 1 ALL ER 183***, the NIRC said that compensation should be assessed under four main headings:-

(a) Immediate loss of earnings, ie loss of earnings between the date of dismissal and the date of the hearing.

(b) Future loss of earnings, ie anticipated loss of earnings in the period following the hearing.

(c) Loss arising from the manner of the dismissal.

(d) Loss of statutory rights, ie compensation for being unable to claim unfair dismissal for a period of at least one year.

In ***Tidman v Aveling Marshall Ltd [1977] IRLR 218***, the EAT held that it was the duty of each tribunal to raise and enquire into each of the four heads of compensation established by ***Norton Tool*** plus a fifth head of compensation – loss of pension rights. It should be noted that enquiring into a particular head of compensation does **not** mean that compensation has necessarily to be awarded under that head.

7. The tribunal also considered Harvey, Division D1, at 2546.01-2560 insofar as relevant, together with the case of ***Firth Accountant's Limited v Mrs J Law [UKEAT/0460/13/SM*** which shows that a reduction by virtue of the House of Lords decision in Polkey (***A.P.) v A.E. Dayton Services Limited (formally Edmunds Walker (Holdings) Limited ( [1988] ICR 142)***, a reduction can also apply to a case of constructive dismissal. Harvey, at Division D1 states as follows:

***"[2546]***

*The tribunal may reduce the compensatory award to reflect the chance that the employee may have been dismissed in any case at some point. This is known as the 'Polkey principle'.*

*If a fair process had been followed, would it have affected when the employee would have been dismissed? What chance was there of the employee still being dismissed at some point apart from any unfairness in the process? The tribunal will need to engage with the question of what would have occurred but for the unfair dismissal.*

*In some cases, it is difficult to be certain whether the dismissal would have occurred had the employer acted fairly. Classically this problem arises in circumstances where the employer has failed to act fairly because he has failed to apply certain procedural safeguards which might, had they been applied, have led to the employee retaining his job. In other cases, the tribunal may hold that the unfair process merely hastened the inevitable and that the assessment of loss ought to be confined to the several weeks that a fair process would have taken had the employer acted fairly. Where the tribunal considers there to have been a chance that the employee would not have been dismissed had there been no unfairness, an award of a percentage of the loss may be made for the loss to the employee of the chance that fairness would have saved them from dismissal. In other cases,*

*the tribunal may make a finding that the employee would have been fairly dismissed after a further period of employment; for example, a period of time taken to complete a fair process or a period of time after which the employee may have been fairly dismissed anyway.*

*The Polkey assessment must be by reference to how the particular employer in question would have acted and not by the standards of a hypothetical reasonable employer.*

***[2557.01]***

*The tribunal must be careful, however, to avoid ambiguity when adopting such a hybrid approach. In **Zebrowski v Concentric Birmingham Ltd** **UKEAT/0245/16** (31 January 2017, unreported) the tribunal applied a Polkey reduction in these terms: '…if a fair procedure had been followed by the respondent there was a 60% chance that the parties would have been unable to resolve the issues relating to the claimant's health concerns and his working environment and that the claimant's employment would in any event have terminated fairly by way of resignation/dismissal within two months.' **Zebrowski** was a constructive unfair dismissal case. The employee resigned in circumstances where the employer had failed to take proper steps to protect the employee's health and safety. The EAT found there to be no reason in principle why a Polkey reduction may not be made in such a case (in reliance on **Firth Accountants Ltd v Law** **UKEAT/0460/13**, **[2014] ICR 805** (see para [2701.06] ff)).*

*The EAT (Laing J) then went on to hold that the Polkey determination was ambiguous. Once the tribunal had found there to be a 60% chance that the employee would have been dismissed if the employer had gone about matters properly, it was not then open to the tribunal to seek to limit the claimant's compensation to the two-month period which it appears to have found it would take to conduct a fair process. This is because the tribunal did not find there to be a 100% chance that the claimant would have been dismissed after two months.*

*The EAT provided guidance for tribunals in the calculation of a Polkey deduction. The tribunal could either compensate the claimant fully for a certain period but only where the tribunal is 100% confident that dismissal would have occurred within that period (per O'Donoghue) or reduce compensation by a percentage throughout. The tribunal should not limit the period of compensation and then go on to apply a percentage reduction to the compensation arising by reference to the same period of loss.*

***[2557.02]***

*In **Johnson v Rollerworld** **UKEAT/0237/10** (30 November 2010, unreported) (Langstaff J presiding) the EAT confirmed that if the tribunal is contemplating a dismissal as being the event which gives rise to the end of compensation which would otherwise continue, it must necessarily be contemplating a fair dismissal.*

*However, it said, any such conclusion needs to be carefully expressed and in some detail. Similarly, when evaluating the chance that, if a fair procedure had been followed in a redundancy exercise, the employee would have survived it and continued in employment, the Tribunal must envisage that the consultation that was not carried out, which fairness required, would have been carried out in good faith and with an open mind. That requires an evaluation, based on evidence, of what alternatives to redundancy the employer would have considered, had it acted fairly:* ***Grayson v Paycare UKEAT/0248/15*** *(5 July 2016, unreported), Kerr J."*

## SUBMISSIONS

8. The tribunal had the benefit of written submissions from both parties. These are attached to this decision. It also considered further oral submissions from both sides' representatives on 14 January 2022, and at a further Submissions Hearing held on 7 April 2022 to consider the respondent's contention regarding frustration of contract, the nature of the claimant's contract on 11 October 2019, and the possible implications of the ***Polkey*** decision. Additional written submissions pertaining to this further hearing are attached to this decision.

## CONCLUSIONS

9. The tribunal having carefully considered the evidence before it and having applied the relevant principles of law to the findings of fact, concludes as follows: -

   (i) The tribunal is satisfied on the evidence, and on the facts as found, that Randox without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between itself and the claimant. This was manifested by the manner in which the Randox representatives conducted themselves in relation to the claimant's contract ending in relation to DP and the pressure it placed on the claimant to accept a job offer as a Machine Operative when the circumstances clearly showed that the offer was entirely unsuitable for the claimant in his personal circumstances. The other jobs were also entirely unsuitable for him. This ultimately led to the claimant's resignation on 11 October 2019. The exchange of emails preceding that date also point to the conclusion that Randox failed in its duty not to undermine the trust and confidence in its employment relationship with the claimant, and effectively ignored any representations from him regarding possible redundancy. Randox could have offered the claimant more support and co-operation and could on the tribunal's findings have investigated the possibility of offering to continue the claimant's employment in the aftermath of the closure of PD. His case as articulated by counsel, was that although there was a potential redundancy situation it was not inevitable.

   (ii) The tribunal is therefore satisfied that the breach of the implied term of trust and confidence by Randox went to the heart of the employment relationship, which both parties agreed continued in some form until 11 October 2019.

   (iii) Randox therefore breached the claimant's contract of employment. The breach was sufficiently important to justify the claimant's resignation. He left in response to the breach of the implicit term of trust and confidence and

wider duty to co-operate and support the claimant. The claimant did not delay in his resignation.

(iv) The tribunal is therefore satisfied that the claimant was constructively dismissed by Randox.

(v) The tribunal is satisfied that there was no failure by the claimant to mitigate his loss and that there was no contributory fault on his behalf.

(vi) An agreed Schedule of Loss subject to liability and the tribunal's own assessment of any loss, was presented to the tribunal at the hearing included the following:

| | |
|---|---|
| "Age at dismissal: | 51 |
| Full year's service: | 25 years |
| Gross weekly pay: | £345.00 |
| Net weekly pay: | £306.64 |

**Basic Award**

£345 x 1.5 x 10 = £5,175
£345 x 1 x 10 = £3,450
£5,175 + £3,450 = **Total: £8,625**

Unlawful deduction from wages – please see pay slip dated 10.10.2019

Net weekly pay of £306/64/38 hours per week = £8.07 net hourly pay
30 deducted hours x £8.07 net per hour

= **Total: £242.10**

**Compensatory Award**

Loss of salary (net figure) from 11 October 2019 x 115 weeks to date of hearing 29.11.21

£306.64 net per week x 115 weeks = £35,263.60

Loss of statutory rights = £500.00

Minus

Salary from casual employment which commenced on 04/11/2019 - 26/01/2020:

Wages received per week:

06/12/2019 = £340.60
13/12/2019 = £264.92
20/12/2019 = £325.23
27/12/2019 = £241.82

03/01/2020 = £191.90
10/01/2020 = £48.60
17/01/2020 = £48.80
24/01/2020 = £48.60
31/01/2020 = £106.50

Total = £1,616.97

Salary from casual employment which commenced on 30/11/2020 - 08/01/2021:

Wages received per week:

04/12/2020 = £129.12
11/12/2020 = £295.78
18/12/2020 = £262.95
24/12/2020 = £267.72
31/12/2020 = £177.28
08/01/2021 = £204.82
15/01/2021 = £63.92
29/01/2021 = £140.22

Total = £1,541.81

Income received from Job Seekers Allowance from 21/10/2019 - 01/12/2019:

£73.10 per week x 6 weeks = £438.60

Income received from Job Seekers Allowance from 03/01/2020 - 30/05/2020:

£73.10 per week x 13 weeks = £950.30
£74.35 per week x 8 weeks = £594.80

£950.30 + £594.80 = £1,545.10

Income received from Universal Credit 17/08/2020 - 17/07/2021:

17/08/2020 = £97.35
31/08/2020 = £97.34
17/09/2020 = £130.23
01/10/2020 = £130.23
17/10/2020 = £47.95
31/10/2020 = £47.94
17/11/2020 = £138.80
01/12/2020 = £138.80
17/02/2021 = £43.35
03/03/2021 = £43.35
17/03/2021 = £128.42
31/03/2021 = £128.41
17/06/2021 = £77.06
01/07/2021 = £77.06
17/07/2021 = £37.32

31/07/2021 = £37.32

Total = £1,400.93

Therefore:

£35,263.60 + £500 - £1,616.97 - £1,541.81 - £438.60 - £1,545.10 - £1,400.93 =

**£29,220.19**

**Loss of Pension from EDT to hearing date** at £13.80 per week

£13.80 x 115 weeks = **£1,587**

**Pension loss plus £29,220.19 =**

**£30,807.19**

**Future Loss**

Net weekly wage of previous employment = £306.64 x 26 weeks (6 months future loss from date of hearing - 29 November 2021)

**£7,972.64**

Pension Loss for 26 weeks after final hearing x £13.80

**£358.80**

**Future loss = £8,331.44 (less income received in December 2021 - £756.86) = £7,574.58**

**Total future loss = £7,574.58**

**£8,625 + £30,807.19 + £7,574.58 + 242.10**

**TOTAL CLAIM = £47,248.87**

10. **Remedy**

(1) No argument was presented relating to any failure by the claimant to mitigate his loss. The tribunal is satisfied that the claimant mitigated his loss.

(2) The tribunal is satisfied that the amounts specified in the Schedule of Loss are appropriate under the headings of basic award, compensatory award, pension loss, future loss and loss of statutory rights.

(3) The tribunal regards paras. 2557.01-2557.02 in Harvey, Division D1, as being especially relevant to the current case and repeats para. 2557.02 from Harvey, Division D1, with emphases added:-

> *"In **Johnston v Roller World UKEAT/0237/10** (30 November 2010, unreported) (Langstaff J presiding) the EAT confirmed that if the tribunal is contemplating a dismissal as being the event which gives rise to the end of compensation which would otherwise continue, it must necessarily be contemplating a fair dismissal. However, it said, any*

*such conclusion needs to be carefully expressed and in some detail. Similarly, when evaluating the chance that, if a fair procedure had been followed in a redundancy exercise, the employee would have survived it and continued in employment, the tribunal must envisage that the consultation that was not carried out, which fairness required, would have been carried out in good faith and with an open mind. That requires an evaluation, based on evidence, of what alternatives to redundancy the employer would have considered had it acted fairly:* ***Grayson v Pay Care UKEAT/0248/15*** *(5 July 2016 unreported), Kerr J."*

(4) The tribunal is not persuaded on the evidence, its finding of fact, and its evaluation at paragraph 9(i) either that consultation would have been carried out in good faith and with an open mind, or that a fair dismissal would have occurred in the future. This being so, the tribunal finds that it cannot engage the Polkey reduction principle in this case.

(5) **Basic Award**

£345 x 1.5 x 10 = £5,175
£345 x 1 x 10 = £3,450
£5,175 + £3,450 **= £8,625.00**

**Unlawful deduction from wages** **= £ 242.10**

**Compensatory Award**

Loss of net salary from 11/10/19 to 29/11/21 (date of hearing).
£306.64 x 115 weeks = £35,263.60

Less amount received from casual employment

4/11/2019 - 26/01/2020: = £1,616.97

30/11/2020 - 08/01/2021: = £1,541.81

Total = £3,158.78 **= £32,104.82**

Loss of Pension from 11/10/19-29/11/21

£13.80 x 115 weeks = £1,587.00

Loss of pension of 26 weeks after hearing

£13.80 x 26 weeks = £ 358.80

Total £1,945.80 **= £1,945.80**

**Future Loss from Date of Hearing**

| | | |
|---|---|---|
| 26 x £306.64 | £7,972.64 | |
| Less income December 2021 | £ 756.86 | |
| | £7,215.78 | **= £7,215.78** |
| Loss of Statutory Rights | | **£ 500.00** |
| **Total Compensatory Award** | | **= £41,766.40** |

**Total Monetary Award**

| | |
|---|---|
| £8,625.00 + £242.10 + £41,766.40 | **= £50,633.50** |

11. The prescribed element periods are from 21 October 2019 to 1 December 2019, 3 January 2020 to 30 May 2020 (JobSeeker's Allowance) and 17 August 2020 to 17 July 2021 (Universal Credit) the total amount of the prescribed element is £3,384.63.

12. The Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations (Northern Ireland) 1996 as amended applies in this case. It provides that part of the award (*"the prescribed element")* is retained by the respondent for a period to allow the Social Security Agency to recoup expenditure on relevant benefits.

13. The amount by which the monetary award exceeds the prescribed element (ie the amount that should be paid immediately) is £47,248.87.

14. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

**Employment Judge:**

**Date and place of hearing:** **29 November to 1 December 2021, 14 January 2022 & 7 April 2022, Belfast.**

**This judgment was entered in the register and issued to the parties on:**

Case Reference Number 797/20

In the INDUSTRIAL TRIBUNALS and THE FAIR EMPLOYMENT TRIBUNAL

BETWEEN

Michael Gray

(Claimant)

V

Randox Labortories Ltd

(Respondent)

**Introduction**

1. As agreed at the preliminary hearing on 6th November 2020[1] there are three substantive issues in this case:

    i. Constructive unfair dismissal.
    ii. Unauthorised deductions from wages.
    iii. Breach of contract (namely notice pay).

[1] See pages 34-39 of the bundle.

2. The breach of contract being relied upon in the claim of constructive unfair dismissal is breach of trust and confidence and the failure to pay wages towards the end of the Claimant's employment.

3. The test for constructive unfair dismissal as defined at Article 127 (1) (c) of the Employment Rights (Northern Ireland) Order 1996 is whether an employer's conduct amounted to a repudiatory breach of the contract of employment by the employer, that the employee resigned because of the breach of contract and that the employee did not waive that breach of contract previously. Where an employer breaches the implied terms of mutual trust and confidence, the breach is likely to amount to such a repudiatory breach.[2] Generally, the tribunal will ask whether there was a reasonable proper cause for the conduct of the employer and if not, whether the conduct was calculated or likely to destroy or seriously damage trust and confidence[3].

4. In respect of unauthorized deduction of wages, the relevant legislation is Article 45 of the 1996 Order which stipulates that an employer must not deduct wages from a worker employed by him unless the deduction is required or authorized by virtue by statute or by a relevant provision of the worker's contract or the worker has previously consented to the making of this deduction.

5. With regards to breach of contract, the only written contract between the parties appears at page 53 of the bundle.

6. There is a Schedule of Loss and while the Respondent disputes the Claimant's entitlement to same, it does not dispute the various sums set out.[4]

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[2] See, for example, *Praxis Care Group v Hope* [2012] NICA 8.
[3] *Woods v WM Car Services Peterborough Limited* [1981] ICR 666.
[4] See email from James Stewart to Robert Turkington at 13:03hrs on 29th November 2021.

**Factual submissions.**

7. Dealing with matters chronologically, in light of the documentary evidence and oral evidence in this case, the Claimant asserts that the Tribunal should conclude as set out below.

8. The Claimant commenced employment with the Respondent on 3rd October 1995 as a printer following a meeting between the Claimant, his father, Dr Peter Fitzgerald (the owner of Randox) and Dr Fitzgerald's brother Clem Fitzgerald.

9. A copy of the contract of employment is found at page 53 of the bundle, however it appears that this contract was not formalized in writing until October 2013.[5]

10. The initial terms and conditions appear to have been agreed orally between the parties in October 1995. In light of this, it is difficult to say precisely what those terms were, however in light of both the documentary and oral evidence in the case, the following terms appear to have been present throughout the duration of the contract:

    i. That the Claimant was to work remotely at the premises of Design and Print on the Crumlin Road, Belfast.[6]
    ii. That there was a degree of flexibility in respect of the Claimant's contracted core hours.[7]
    iii. That the Claimant did not have a direct reporting line, nor was he required to clock in or out, due to the fact that he worked remotely.[8]

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[5] See email exchanges between pages 54A and 54E.
[6] See email from Linda Magee at page 54C.
[7] See paragraph 4 of the ET3 response at page 18 of the bundle.
[8] See paragraph 5 of the ET3 response at page 18 of the bundle.

11. Within its own ET3 response, the Respondent describes the claimants "*core duties*" as "*to print large bulk quantities of 'Instruction For Use' (IFU's) leaflets that were required by the Respondent.*"[9] No other core duties are set out and in his evidence, the Claimant did not dispute that these were his core duties.

12. The Claimant submits that in early 2019, the Respondent made a decision to go paperless. To demonstrate this, the Claimant points to pages 78-80 of the bundle which contains an article taken from the Respondent's own website entitled "Randox Kits go paperless". The Claimant notes that the article suggests that Randox Laboratories had announced the removal of IFU's from its products, in a bid to go paperless.[10]

13. The Claimant notes that these IFU's are the same as the IFU's referred to in the Respondent's description of the Claimant's core duties. It is therefore obvious that the decision to remove these IFU's from Randox kits could have had a bearing on the Claimant's employment.

14. The Respondent disputes that it reached a decision to go paperless or at least to go entirely paperless. Leaving the apparent contradiction between this position and that of the internet article aside, it is suggested that this dispute of fact is of limited relevance to the central issues in this case.

15. This is because there can be no dispute that on 29th July 2019, Heather Gray (the previous co-owner of Design and Print) emailed the Respondent company to indicate to them that Design and Print intended to cease trading in two months' time. She is clear in her explanation that this was because she understood that Randox may be moving to a "*paperless situation*".[11]

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[9] See paragraph 4 of the ET3 response at page 18 of the bundle.
[10] See the first substantive paragraph on page 79 of the bundle.
[11] See page 55 of the bundle.

16. Even if Mrs Gray was wrong in her understanding of the position of Randox, this was her genuine belief which she says was evidenced by the fact that she had not had a purchase order since 13th May 2019.

17. The Respondent disputes the lack of orders and points to a subsequent purchase order dated 1st August 2019.[12] This was, of course, after Mrs Gray had already provided notice of the decision to cease trading. At hearing, the Respondent was unable to produce any evidence to support its assertions that any other orders had been made aside from that on 1st August 2019 (which itself was small in value, being only £340.00).

18. The Respondent also criticises Mrs Gray for communicating with Dr Fitzgerald directly as opposed to their Supplier Quality Team. However, there is no dispute that the email was received by the company, nor indeed that it was acknowledged by one of Dr Fitzgerald's assistants on 6th August 2019.[13]

19. The claimant submits though, that the disputes of fact during the period between May and August 2019 are immaterial to the central issues in this case.

20. The reality is that Design and Print made the decision to close its business meaning that there was no longer a requirement for the Claimant to continue out the work for the Respondent at the place where he was employed, namely the Crumlin Road.

21. In view of this reality, the Respondent should immediately have been aware of the potential for redundancy.[14]

[12] See page 266 of the bundle.
[13] See page 55 of the bundle.
[14] See Article 174(B) of the 1996 Order.

22. It is however clear from the evidence that the Respondent was not prepared to consider this and instead sought to offer the Claimant an alternative role within the organisation that was outside of the terms of the Claimant's contract of employment.

23. It is of significance that this work was not that of a "*printer*" but rather an "*auto dispense operative*".[15] This is in spite of the fact that Mr Graham's oral evidence was that the work carried out by Design & Print at the Crumlin Road location was absorbed into another team at another location within the business. It would surely have made more sense to have offered the Claimant the opportunity to relocate to that location to continue with the same work that he was doing, since presumably the new team had an increase in workload to reflect the work that it absorbed from Design & Print.

24. Instead, however, the Claimant was asked to attend a meeting on 12th September 2019 to which he was given no right of legal representation and was not told in advance what roles were being contemplated.

25. It is submitted that there is no accurate note of what transpired at the meeting as in oral evidence, Cathy Hurrell who typed up her written notes of the meeting, accepted that the typed notes did not match her handwritten notes on important matters (e.g., whether all parties agreed on the Claimant's suitability for the work).[16] She suggested that the typed notes were still accurate, but the Claimant asserts that this cannot be the case.

26. The Claimant asserts that at no point did he ever agree that he was suited to the role being offered. Furthermore, he asserts that he had no interest in the position (something with which Grant Graham agrees with at paragraph 8 of his statement) or that he was provided with detailed information about the role.

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[15] See page 239 of the bundle.
[16] These notes are found at pages 213-217 of the bundle.

27. There was a discussion about shift patterns at the meeting and the Claimant indicated that they may not be suitable to his wife (who worked shifts herself), but no equivalent shifts (to his present position) were ever offered to the Claimant.

28. In spite of the fact that the notes of the meeting are unreliable, on any reading of them, the Claimant did not want the alterative position and instead wanted an offer of redundancy. This is surely evidenced by the fact that towards the end of the meeting, attention appears to have turned to alternative roles within the organisation which (out of politeness) the Claimant said that he would look at.

29. Having looked at these roles, the Claimant clearly rejected same and again enquired about redundancy.[17]

30. In spite of this, the Respondent offered the Claimant the role that was discussed previously at the meeting.[18]

31. It is of note that this role had different terms and conditions from the contract upon which the Claimant was already employed. It is therefore submitted that he was under no obligation to accept it. Specifically, the terms and conditions varied in respect of the location of the employment and the shift pattern. There was also no reference to the Claimant working Flexitime and while subsequent correspondence suggested that the Claimant could apply for same, there was no guarantee that this application would be granted.

32. In the Claimants response to this offer[19] the Claimant queried why he was being offered a role that (in his view at least) everybody had previously agreed that he was unsuitable for.

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[17] See page 235 of the bundle.
[18] See pages 237 of the bundle.
[19] See page 246 of the bundle.

33. There then follow a series of back-and-forth correspondence between the Claimant and Cathy Hurrell. It is not proposed to go into the details of this correspondence aside from to submit that on any plain reading of same, the Claimant is continually rejecting the role and requesting redundancy, while Ms Hurrell continues to push the role to the extent that, for whatever reason, she forms the expectation that he will start the new position on 1st October 2019.

34. The Claimant was under no obligation to start the new role on 1st October 2019 and the Respondent should have been alert to the redundancy risks that existed at the time. Put simply though, it refused to consider this possibility.

35. Instead, the Respondent indicated that the Claimant's actions in failing to turn up for his new role on 1st October 2019 meant that he was now absent without leave, meaning that he was not entitled to be paid.

36. In cross examination, it was put to Ms Hurrell that there was nothing within the Claimant's contract that permitted these wages to be deducted and she was unable to disagree. It is also submitted that there is nothing in legislation that permits such a deduction.

37. By this stage, it was clear that the Respondent was not prepared to comply with its lawful responsibilities in respect of redundancy and had irreparably damaged the trust and confidence between the parties. This left the Claimant with no alternative but to resign.

**The 3 issues in the case.**

Constructive unfair dismissal.

38. The Respondent's actions in respect of its expectation that the Claimant would change the terms of his employment, in spite of the fact that he was clear that he did not wish to do so, amounted to a breach of trust and confidence.

39. The Respondent's actions in respect of it continuing to push a role upon the Claimant that he did not feel comfortable with amounted to a breach of trust and confidence.

40. The Respondent's actions in respect of how it dealt with (or failed to deal with) the issue of redundancy amounted to a breach of trust and confidence.

41. The Respondent's actions in respect of how the meeting of 12th September 2019 was conducted amounted to a breach of trust and confidence.

42. The Respondent's actions thereafter amounted to a breach of trust and confidence.

Unauthorised deductions from wages.

43. The Respondent cannot point to anything within the contract of employment or within legislation that permitted it to withhold pay in the manner that it did. As such, its actions amounted to an unauthorised deduction of wages.

Breach of contract (namely notice pay).

44. While not a significant feature of the hearing, there does not appear to be any dispute that no notice pay was given to the Claimant and that there is nothing within the terms of the contract of employment which permitted this.

45. In light of the above, the tribunal is asked to find in favour of the Claimant.

**Quantum**

46. As mentioned previously, while the Respondent disputes the Claimant's entitlement to the figures set out within the Schedule of Loss, the Respondent does not dispute the figures themselves.

47. The tribunal is therefore asked to award the Claimant the sum as set out within the Schedule of Loss.

**Tim Jebb BL**

**IN THE INDUSTRIAL TRIBUNAL**
**BELFAST**

**Between**

| **Claimant** | **Respondent** |
| --- | --- |
| Michael Gray | Randox Laboratories Limited |

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## RESPONDENT'S CLOSING SUBMISSIONS

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*References in square brackets are references to the Hearing bundle*

## INTRODUCTION

1. The claimant was employed by the respondent as a Printer, between 3rd October 1995 and 11th October 2019. The claimants place of work was at Unit H Edenderry Industrial Estate, 3267 Crumlin Road, Belfast BT14 7EE, which was occupied by "Design and Print" being a business run and owned by the Claimants Parents, Jack and Heather Gray.
2. The issues for the tribunal to determine are [pages 7-9] in the Claimants ET1, summarised as follows:

   2.1 The Claimant believes he was constructively unfairly dismissed by the Respondent, contrary to Art 126 of the Employment Rights (Northern Ireland) Order 1996 as amended.

   2.2 The Claimant believes he has suffered an unlawful deduction from wages, contrary to Art. 45 of the Employment Rights (NI) Order 1996.

## HEARING PROCESS

3. The Respondent in-house solicitor sought to refute the claimants claim in opening on the basis of ET3 submission [p18], and in the alternative, sought the court to

consider the "substance over form" of the unusual circumstances regarding the contractual arrangement in question. This was a late consideration by the Respondent on foot of recent decisions and ongoing litigation involving Uber, underlining the courts ability to look beyond contractual documentation to better assess the true legal relationship between the parties.

4. The Tribunal Chair indicated that it was very late to introduce this argument and stated that there would be "consequences" and an application would need to be made. The Respondent agreed to not pursue this point at the subject hearing, in consideration of their overriding objective to the Parties and the Tribunal, and to abandon this line of questioning.
5. The Trial Bundle was deficient. The Respondent made representations that no discourtesy was intended to the Court and considered it the claimant's obligation to produce the Bundle. This was not accepted by the Tribunal. The Respondent accepts there is an obligation on both parties to agree the Trial Bundle. The Respondent would like to clarify that this was done on the 15th November 2021 by email from Respondent to claimant representative, which can be produced for the court if directed.
6. At the direction of the Court the Bundle was to be served by the Claimant on the 22nd November 2021. The Respondent received a scanned bundle by email late afternoon Thursday 25th November 2021, and the hard copy was received by post on Friday afternoon 26th November 2021. This inhibited the Respondent's ability to prepare for the commencement of hearing on Monday 29th November 2021 and to reference the Trial Bundle appropriately, disrupting the Respondents cross examination of the Claimant.
7. The Respondent submits that this was contrary to the overriding objective to deal with cases fairly and justly, so far as practicable ensuring that the parties are on an equal footing, avoiding unnecessary formality and seeking flexibility in the proceedings.

**THE FACTS**

8. Following a meeting between the Claimants father and Randox CEO, it was agreed that the Claimant would receive pay and work at his parents' business Design and

Print, at their premises, carrying out orders provided to Design and Print by the respondent.

9. This relationship was later formalised and considered a contract of employment by the parties [p53 - p54]
10. The Claimants parents closed the business and retired in or around the end of September 2019.
11. The Respondent subsequently engaged with the Claimant with a view to redeployment.
12. During evidence it was established that whilst the Respondent was keen to redeploy the Claimant and avoid redundancy, described as "commendable" by the Claimants counsel, it is accepted that it would have been considered.
13. The Respondent gave evidence via Cathy Hurrell that they were not yet at that stage. It is the Respondent's case that redeployment was discussed with the Claimant, and it was not made clear that the Claimant was opposed to this.
14. It was put by the Claimants Counsel that the role was redundant. This is contended by the witness evidence of Graham Grant who indicated in cross examination that Randox has not gone paperless, and indeed they continue to print "millions" of IFUs, in house and via an external supplier.

**THE LAW**

**UNFAIR DISMISSAL- THE CORRECT APPROACH**

15. The definition of unfair dismissal is found in Art. 127(1)(c) of the Employment Rights (Northern Ireland) Order which provides as follows:

**127**

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

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

16. The Respondent submits that the claimant's situations does not meet this definition. The Respondent's conduct did not give rise to circumstances in which he was entitled to terminate his contract without notice. That is to say, there was no repudiatory breach of the employment contract by the Respondent.

17. The ‘circumstances’ relied upon by the Claimant to entitle him to terminate his contract of employment with Art.127(1)(c) were not related to the Respondent’s conduct. In fact, the circumstances were entirely the result of the occupiers of his place of work, “Design and Print” removing their premises as his place of work.

18. Further to this point, the Claimant referred at the hearing to the implied duty of trust and confidence, stating its breach as the reason the claimant was entitled to terminate his contract of employment without notice. In considering a potential breach of this implied term, the Tribunals’ function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see BAC Ltd v. Austin [1978] IRLR 332 and Post Office v. Roberts [1980] IRLR 347. The respondent submits that it acted fairly and reasonably in its attempts to redeploy the claimant, particularly since he was leading the Respondent to believe that he was interested in alternative roles.

19. What the tribunal should look at and assess is the reasonableness of the employer's conduct, not the level of injustice to the employee:
See **Chubb and Fire Security Ltd v Harper** [1983] IRLR 3.

20. With regard to whether the constructive dismissal was unfair because of some procedural error on the part of the employer, the dicta of the Northern Ireland Court of Appeal in the case of **Connolly v Western Health and Social Care Trust [2017] NICA** should be borne in mind:

> *“[41] But Article 130(4)(b) is also a protection to the employer. It conveys that even if an employer is guilty of one or more errors in procedure nevertheless that should not be equated with unfair dismissal unless those errors have indeed led to unfairness to the dismissed employee which would render it inequitable or contrary to the substantial merits of the case to dismiss them.”*

**Conclusion**

21. Consideration of redeployment of the claimant was within the range of reasonable responses in respect of the frustration of contract by the Claimants parents, following the closure of their business. It is noted that the claimants witness acknowledged that she was aware of the impact this action would have on the Claimant.
22. In addition, the respondent was entitled to conclude, on balance, that the claimant was considering roles to avoid redundancy, given the exchanges in this regard.
23. The Claimant has not mitigated his loss, in circumstances where the respondent offered him alternative employment. It is not an act of mitigation to refuse to travel for work or only take employment on a like for like basis.
24. With regard to any procedural defects that may be alleged, a counsel of perfection is not to be imposed in hindsight.
25. For the reasons set out above, both individually and cumulatively, the Tribunal is invited to dismiss the claim.
26. In the alternative it was heard that the contract and role ceased to exist, at that point, should the court find that redundancy was the appropriate position, then the claimant cannot be entitled to a loss of earnings claim, or a deduction of wage as he was de facto no longer in the employ of the Respondent.

**10 December 2021**

**James Stewart**
**In-house Solicitor**
**Randox Laboratories Ltd**

Case Reference Number 797/20

In the INDUSTRIAL TRIBUNALS and THE FAIR EMPLOYMENT TRIBUNAL

BETWEEN

Michael Gray

(Claimant)

V

Randox Labortories Ltd

(Respondent)

**Claimant's reply to the Respondent's submissions dated 10th December 2021.**

48. The Claimant does not seek to repeat his own written submissions of 10th December 2021, but simply intends to comment upon certain observations made by the Respondent in its submissions.

49. In that regard, the Claimant disputes the assertion of the Respondent at paragraph 2 of its submissions, that there are two issues for determination in this case. In actual fact, there are three substantive issues in this case, as agreed at the preliminary hearing on 6th November 2020[20]:

[20] See pages 34-39 of the bundle.

iv. Constructive unfair dismissal.

v. Unauthorised deductions from wages.

vi. Breach of contract (namely notice pay).

50. At paragraphs 3 – 7 of the Respondent's submissions (in a section entitled *"Hearing Process"*), the Respondent raises issues in respect of firstly an alternative legal argument that it chose not to pursue and secondly in respect of the trial bundle.

51. It is unclear why the issue of 'alternative legal argument' has been raised again by the Respondent in its submissions since it chose not to pursue the issue at the hearing.

52. With regards to the issue of the trial bundle, it is not necessary to go into the allegation raised by the Respondent, namely that the Claimant is responsible for the delay in the case, save to point out that the allegation is denied and indeed the issue itself has already been addressed by the Tribunal. The Claimant also notes that the Respondent's assertion that the Claimant's actions were contrary to the overriding objective was never raised at the hearing.

53. At paragraphs 8 – 14 of the Respondent's submissions, certain facts are set out. No dispute is raised with regards to the contents of paragraphs 8 – 11, albeit those factual assertions are only sparsely set out.

54. However, while paragraph 12 of the Respondent's submissions is somewhat unclear it appears to suggest that redundancy was in fact considered by the Respondent. The Claimant disputes this assertion and suggests that the evidence in this case is clear that the Respondent did not wish to consider redundancy.

55. The Claimant disputes the assertions made by the Respondent at paragraphs 13 and 14 of its submissions. As was set out in oral evidence and within the Claimant's own submissions, the Claimant was very clear in opposing the alternative role that was offered to him. Furthermore, the suggestion at paragraph 14 that the Claimant's role was not redundant because the Respondent continued to print IFU's can be disregarded as the role subsequently offered to the Claimant did not involve this.

56. The Respondent sets out *"The Law"* at paragraphs 15 – 20. With these paragraphs in mind, the Claimant disputes that the Respondent acted reasonably in its continual attempts to redeploy the Claimant to a specific role that the Claimant clearly rejected. The Claimant further disputes the assertion that the circumstances that gave rise to him the Claimant terminating his contract of employment did not relate the conduct of the Respondent. To be clear, the Claimant's case has always been that one of the reasons he resigned was because of the failure of the Respondent to comply with its lawful responsibilities in respect of redundancy, which had irreparably damaged the trust and confidence between the parties.

57. The Claimant now wishes to comment on the various assertions made by the Respondent in its conclusion at paragraphs 21 – 26.

58. With regards to paragraph 21, the Claimant does not dispute that the Respondent was entitled to offer the Claimant an alternative role. This, however, is not the issue. Instead, the issue concerns the failure of the Respondent to act appropriately once it became clear that this alternative role was not going to work out.

59. The subsequent observation of the Respondent at paragraph 21 that the Claimant's witness was aware of the impact on the Claimant of the decision to close Design and Print is irrelevant to this issue.

60. The Claimant disputes the observation at paragraph 22 of the Respondent's submissions that he was considering alternative roles to avoid redundancy. The evidence in the case is clear that the Claimant rejected the alternative role on a number of occasions and instead enquired about redundancy.

61. At paragraph 23, the Respondent raises the issue of mitigation of loss. However, this concept is not relevant to the liability issues in this case.

62. The subsequent suggestion at paragraph 23 by the Respondent that the Claimant was not entitled to reject the alternative role because it required travel to an alternative location or was not on a *"like for like basis"* is misguided. The reality is that the Claimant had a contract of employment with the Respondent which the Respondent was unable to honour. Once it was unable to do so, the Respondent should have considered redundancy. Instead, it continued to push an alternative role that the Claimant clearly indicated was not suitable.

63. At paragraph 26, the Respondent contends that if redundancy was appropriate, that the Claimant cannot be entitled to an award for loss of earnings or a deduction of wages. The Claimant suggests that there is no basis in law for this argument.

64. To be clear, if the tribunal finds that the Respondent should have offered redundancy, it will surely follow that its failure to do so amounted to a breach of trust and confidence, which would therefore amount to a repudiatory breach of the contract of employment. In this scenario, the tribunal would surely find that there has been constructive unfair dismissal and that the Claimant is entitled to both the basic and compensatory award as set out in the agreed schedule of loss.

65. The tribunal is therefore asked to find in favour of the Claimant and award him the sum as set out within the Schedule of Loss.

**Tim Jebb BL**

Case Reference Number 797/20

In the INDUSTRIAL TRIBUNALS and THE FAIR EMPLOYMENT TRIBUNAL

BETWEEN

Michael Gray

(Claimant)

V

Randox Labortories Ltd

(Respondent)

**Introduction**

1. This case ran as a full hearing between 29th November 2021 and 2nd December 2021. Both parties then filed written submissions and a further oral submissions hearing took place on 14th January 2022.

2. The tribunal has listed a further submission hearing to address the following:

> *"the possible implication of the Polkey case, Also, based on evidence before the tribunal, the effective date of termination of contract, the status of the Claimant's contract at the date of resignation, the respondent's submission regarding frustration of contract, and any other relevant issues that may occur. The tribunal expects all such to be completed within an hour."*

**Submissions.**

3. *Polkey* established that a deduction should be made from a compensatory award in an unfair dismissal case to reflect the chance that although a dismissal was procedurally unfair, it would have happened in any case. This principle does not apply to this case.

4. In these proceedings, while redundancy was always a possibility, it was never inevitable. Indeed, on the Respondent's own case, the Respondent continues to print IFU's for inclusion within all Randox kits. The tribunal is directed to paragraph 3 of Grant Graham's witness statement where he stated:

   *"In the Claimants witness statement at point 4 'Randox may be going paperless in regard of their procedure sheets' seems strange as no discussions had been made regarding this.* ***In fact, we are still including a sheet in all Randox kits as well as out OEM customers products to this day."*** (Emphasis added).

5. The above evidence was confirmed by Mr Graham in his oral evidence and indeed relied upon by the Respondent in its previous written submissions.[21]

6. The Claimant, however, was never considered for such a role in respect of this work. If this role did indeed exist, it appears to have mirrored the work that the Claimant had been doing previously and would have avoided the need for redundancy. Instead, the Claimant was offered roles that were different in description.

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[21] See paragraph 14 of the Respondent's written submissions dated 10th December 2021.

7. With regards to the date of termination of the Claimant's employment, there does not appear to be a dispute between the parties that the Claimant's employment ended on 11th October 2019.[22]

8. The Claimant was not physically at work from 1st October 2019 onwards due to the fact that the Respondent had failed to honour its own contractual obligations in respect of the Claimant's employment (by attempting to force him to accept an alternative role for which he was not qualified).

9. The Respondent failed to pay the Claimant any wages for the period between 1st October 2019 and 11th October 2019 in spite of it having no contractual basis to withhold wages.

10. At that time, both the Claimant and Respondent remained bound by the terms of the Claimant's employment as agreed on 3rd October 1995 between the Claimant, his father, Dr Peter Fitzgerald (the owner of Randox) and Dr Fitzgerald's brother Clem Fitzgerald. As previously highlighted, there was no written contract of employment in 1995 and the terms of same were not put into writing until October 2013.[23]

11. With regards to the issue raised by the Respondent concerning *"frustration of contract",* there is no evidence that the Claimant did anything to frustrate the contract. Indeed, the Claimant again notes the Respondent's assertion that the Claimant's role was not redundant by virtue of the decision of Design and Print to close down, due to the fact that the Respondent continued to produce IFU's.

12. If this is correct, then consideration could have been given to offering the Claimant a role within that particular team. The Respondent failed to do so and instead continued to insist that the Claimant accept an alternative role that was unsuitable for him.

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[2222] See section 5.2 of the ET1 on page 4 of the bundle along with section 6.2 of the ET3 on page 16 of the bundle. e
[23] See email exchanges between pages 54A and 54E.

13. In other words, even on the Respondent's case, there was no frustration of contract.

14. As mentioned previously, while the Respondent disputes the Claimant's entitlement to the figures set out within the Schedule of Loss, the Respondent does not dispute the figures themselves.

15. In light of the above and for the reasons previously set out, the tribunal is asked to award the Claimant the sum as set out within the agreed Schedule of Loss.

**Tim Jebb BL**

**IN THE INDUSTRIAL TRIBUNAL**
**BELFAST**

**Between**

| **Claimant** | **Respondent** |
|---|---|
| Michael Gray | Randox Laboratories Limited |

## RESPONDENT'S FURTHER

## SUBMISSIONS

*References in square brackets are references to the Hearing bundle*

1. The House of Lords decision in *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 has been brought to the attention of the parties by the court in relation to the subject matter.

2. In summary of that decision, it was held that a dismissal may exceptionally not be unfair despite a failure to follow procedure. Where a dismissal is unfair for procedural reasons, it is not rendered fair merely because the dismissal would probably have occurred in any event even if proper procedures had been adopted. The dismissal remains unfair but the compensation is calculated by reference to the extent of the chance that the employee would have remained in his job had proper procedures been adopted. If dismissal was a certainty, there is no loss.

3. It is the Claimants case that there was no mobility clause in the subject contract.

4. The contract was de facto terminated on the closure of the business by the Claimant's parents. This is acknowledged by the Claimants witness Heather Gray in the final sentence of her witness statement at paragraph 6 [tab 2 of witness bundle] as a known consequence of business closure.

5. It was therefore a certainty that the Claimant could not continue the role.

6. In such circumstances, a court can reduce the amount of the compensatory award to account for the fact that the employee would have been dismissed in any event. This reduction can be up to 100% with regard to future losses resulting from the dismissal.

7. If the court finds the respondents process to be unfair, then the respondent submits that Polkey decision is germane to the subject matter, and the claimants claim must be reduced accordingly.

James Stewart
In-house Solicitor

For the Respondent
Randox Laboratories Ltd
6th April 2022

Authorities:

*Polkey v AE Dayton Services Ltd* [1987] IRLR 503

Polkey v AE Dayton Services Ltd [1987] UKHL 8 (19 November 1987) (bailii.org)