# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr L Anderson**

**Respondent:** **Manpower UK Limited**

**Heard at:** **Leicester** **On:** **Monday 24 October 2016**

**Before:** **Employment Judge Britton (sitting alone)**

**Representatives**

**Claimant:** **Mr M Anastasiades, Solicitor**
**Respondent:** **Mr D Maxwell, of Counsel**

# JUDGMENT

This claim of constructive unfair dismissal is dismissed.

# REASONS

**Introduction**

1. The claim (ET1) was presented to the Tribunal on 9 June 2016. It is a claim for constructive unfair dismissal albeit in many ways it has been presented as if it was a claim for unfair dismissal. The factual scenario relied upon is fully pleaded. In due course a response (ET3) was filed defending the case on the basis that interalia the Claimant was not dismissed, if that was being argued, and that otherwise it did not act in a way by which it repudiated the contract of employment, thus entitling the Claimant to resign and claim constructive unfair dismissal.

The legal framework

2. Essentially a Claimant has the initial burden of proof under Section 95(1)(c) of the Employment Rights Act 1996 (the ERA). At that first stage he needs to satisfy the Tribunal on the balance of probabilities that:-

> "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."

3. The seminal legal authority on the issue of constructive dismissal is **Western Excavating (ECC) Limited v Sharp** [1978] IRLR 27CA and the dicta of Lord Denning MR:-

> *"An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employer in those circumstances is entitled to leave without notice or to give notice but the conduct in either case must be sufficiently serious to entitle him to leave at once."*

4. But I remind myself as per **Sparfex Limited v Harrison** [1980] IRLR 442 CA that:-

> *"Lawful conduct is not something which is capable of amounting to repudiation. Therefore conduct cannot be repudiation unless it involves a breach of contract."*

5. And as to repudiation:

> *"Conduct is repudiatory if viewed objectively it evinces an intention to no longer be bound by the contract. Neither the intentions of the party nor their reasonable belief that their conduct would not be accepted as repudiatory are determinative*: See **Lewis v Motorworld Garages Limited** [1985] IRLR 465 CA.

6. Finally as to the jurisprudence, I of course remind myself of the duty which is to be implied in all contracts of employment of trust and confidence. This was first made plain in **Woods v WM Car Services (Peterborough) Limited 1981 IRLR 347 EAT** and subsequently reiterated inter alia in **Malik v BCCI [1997] IRLR 462 HL**:-

> "The implied obligation extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee if conduct objectively considered is likely to so cause."

7. But of course I remind myself of the fundamental dicta in this respect in **Woods**:-

> "It is clearly established that there is implied in a contract of employment a term that the employers will not, **without reasonable and proper cause**[1] conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

[1] My emphasis

Evidence received

8. I have had before me a joint agreed bundle of documents. I will refer to it from now on with the prefix BP followed by the page number. I also had helpful opening submissions from Mr Maxwell which Mr Anastasiades accepts constitute an accurate summary of the legal issues engaged. I should make it clear that of course if I was to find that the Claimant proves that the employer has repudiated the contract of employment, then I shall need to go on to deal with whether or not this was an unfair dismissal. But of course I do not get there unless I am satisfied that this was a constructive dismissal. As to sworn evidence, I have heard under oath from three witnesses, in each case their evidence in chief is by way of a written statement. Thus first from the Claimant; thence for him from Matthew Garner; finally for the Respondent from Ms Rajwinder Virk. Many of the factual issues have become no longer in dispute.

**Findings of fact**

The working relationship; the safety regime

9. Manpower UK Limited (Manpower) is a very substantial business inter alia engaged in the supplying of labour to end users. In this case Manpower supplies labour to Calor Gas (Calor) at its huge depot in the village of Stoney Stanton in Leicestershire. It is the largest Calor Gas depot in the United Kingdom. It has large storage tanks on site in which is stored the gas. Supplies of it are being constantly brought in by large tanker lorries. Then there is an outward distribution system by which lorry tankers, usually smaller, take out deliveries of the gas to customers. That is a simple description of sophisticated operation.

10. Once such delivery driver was the Claimant who was placed by Manpower with Calor at Stoney Stanton on assignment starting circa September 2008.

11. Reverting to the modus operandii, adherence to a strict, rigorously enforced health and safety regime is understandably crucial both on site and when driving off site by such as the Claimant. Given the highly inflammatory nature of the gas, it does not take any stretch of the imagination to picture what would happen if there wasn't such a regime.

12. So anybody entering the site has to go through security. There are signs prominently displayed. No objects are allowed past security and onto site which might be capable of igniting, ie cigarette lighters, mobile phones or as engaged in this case, e-cigarettes or other vaporising items. The same applies to any driver such as the Claimant. That this is the policy is absolutely clear from the evidence that I have read and heard. Also it is self evident that any driver of this type of vehicle in this type of operation has a huge duty of care.

13. In terms of the interface to Manpower the Claimant was employed by it on an overarching contract whereby it undertook to find him assignments in between which he was not paid. He had been on assignment with Calor from September 2008 by way of a series of renewed assignments. On each occasion the renewal was by way of a Manpower document headed Specific Employment Details (SED). The last of those is at Bp46 dated 3 August 2010. The Claimant signed for the same, as was always the practice, at the depot where Manpower has a permanent office as it has many employees such as the Claimant assigned to

Calor Gas at the depot and indeed across the country. The manager for Manpower in charge of the contract with Calor is Ms Virk who is based in the Manpower office at Stoney Stanton. As to the SED in the box at which the Claimant has put his signature and the date, the first paragraph therein states:-

> *"I acknowledge receipt of this SED and the Handbook which together form my contract of employment. If any terms in this SED conflict with those in the handbook, this SED shall take precedence".*

14. Now the Claimant cannot really remember if he ever received a copy of the handbook. He wasn't adamant that he did not get one; when tested under cross examination he said he couldn't recall. Since 2010 up to when it was a hard copy, as with many employers, Manpower has in this respect gone paperless and thus the handbook is now on its Intranet. But the Claimant signed to say he had received the Handbook, as indeed he had on the previous SEDs, and thus if it was now on the intranet access to which he has in the office, then if he needed to it was his duty to familiarise himself.

15. The significance of the Handbook is that it is headed **Manpower UK Limited Working with Calor Gas**[2]. It has obviously been written with Calor as it is inter alia tailored to the safety regime to which I have now referred. There is a section prominently headed **SMOKING AT WORK**. It was lasted revised November 2015

Made plain is that the policy extends to vehicles. Thence under the heading SCOPE:

> *" 2.1 All forms of traditional smoking apparatus such as standard cigarettes and cigars are covered under this policy as well as electronic cigarettes and vaporisers."*

16. There is also a manual supplied to every driver by Calor and which is regularly updated. The Claimant accepts that a copy would always be in his cab. As per the Handbook it is obviously his responsibility to familiarise himself with its terms; and in any event there are regular briefings. The latest update to the drivers manual issued by Calor in February 2013 (Bp 47A), inter alia states in bold:-

> **"It is Calor policy that drivers must not carry matches, lighters or other sources of ignition whilst on duty nor should they be carried in the cabs of vehicles, doing so will result in disciplinary procedures.**
>
> **Any employee found smoking on a vehicle carrying dangerous goods , or in its vicinity or in a depot or filling plant, other than in a specially designated smoking area, will be subject to disciplinary proceedings which could result in dismissal."**

17. That the Claimant knew of the policy and that it was in the manual, he conceded to Mr Maxwell. In that sense I find that the reference to a later policy (Bp53), and which the Claimant highlighted as if to suggest the edict only applied in the described circumstances, namely an accident or emergency, is not on

[2] My emphasis

point. Bp 47A was not superseded by that protocol neither was Bp51 which in fact comes after. The Claimant when questioned no longer relied on this narrow interpretation, if he ever really was. As to the rationale behind including e-cigs and vaporisers, as explained before me via Ms Virk, but it is of course within my own knowledge as a judge who keeps abreast of events, there has been clear publicised evidence that these devices, still in their relative infancy, can, like some mobile phones, self ignite. That is why the policy rules out any form of ignitable device. Hence the stricture at Bp47A "or other sources of ignition": And of course an e-cigarette or vaporiser has within it a source of ignition: hence the vaporising. It follows that that it is a source of ignition the Claimant eventually agreed to when questioned by Mr Maxwell. Furthermore as to knowledge of the critical importance of safety at all times, and the absolute prohibition on having any means of possible ignition on site or in the cab, I factor in Ms Virk, who I found a very impressive witness; consistent and compelling. She is adamant that when anybody is even being interviewed for a post with Manpower for placement at the Calor Gas depot, the first thing they are told is that this is a high inflammatory risk site and operation:and the strictures about what is not allowed on site or in the cab are spelt out . Mr Garner paints a picture of the drivers being unaware of these fundamental issues. I think he was trying his best to help the Claimant. But I don't buy his evidence. It just does not fit with the picture that I got from the Claimant and Ms Virk. He otherwise cannot assist me.

18. Finally the relationship of Manpower to Calor and the remit in relation to Manpower employees such as the Claimant is spelt out in the Handbook (Bp69), which of course forms part of the contract of employment; thus:-

> *"Although it is important for you to remember that you are a Manpower employee, while on assignment you will be subject to instruction from anyone by the Client and where this is necessary for you to carry out the work. By reason of this relationship between Manpower and its clients, the Client may, of its own volition, ask at any time that you be removed from an assignment. This may not necessarily mean the termination of your employment with Manpower. If you are removed from an assignment because of your conduct or performance, your continued employment is likely to be reviewed, which will usually involve the disciplinary process."*

19. That an employee of Manpower who is removed from an assignment[3], is not thereby dismissed by Manpower and that such action in itself is not repudiatory has been specifically determined in **Buffrey and ors v Manpower PLC (2003) UKEAT/0443/02/RN**[4] .

20. As to the working relationship between Manpower and Calor in relation to Manpower employees on assignment to the depot including of course drivers, it is[5] as follows: Day to day operational command is with Calor. It undertakes the training and updates in that respect of all drivers whoever might be supplying them. The role of Manpower, who have three people on the site headed up by Ms Virk, is that it is ultimately responsible for matters such as discipline. Of course the team is also tasked with such as putting through the hours of Manpower employees on the assignment to payroll; holidays and such as sickness absence; but Manpower calls the shots.

[3] Of course that would include at the best of the Client in this case Calor

[4] See the full extract at Para 22 of Mr Maxwell's opening submissions.

[5] And was when the Claimant's assignment was ended.

21. Thus the assigned drivers, such as the Claimant come under the day to day control of Calor management: ultimately and in particular the depot manager, Mr Ally Statham. But on a day to day basis the command and control is with his line reports responsible for the drivers, namely driver trainer coordinator Shaun Williams and his number two Phillip Randle. The Claimant accepted, and I gave him a description with which he agreed, that they are very much like senior NCO's in terms of what drivers do and do not do. The Claimant must follow their orders. If he thinks they are acting unreasonably, his port of call is Ms Virk who can then endeavour to intercede. Similarly if for example Mr Statham wants the Claimant removed from the assignment, Ms Virk can plead on behalf of such as the Claimant; but the end game position as per the contract to which I have now referred is held by Calor; for its own reasons it can unilaterally require the removal of a Manpower worker assigned to the depot irrespective of what Ms Virk might plead on behalf of the affected worker.

Material events

21. Sometime in the run up before Christmas 2015, and I will accept the evidence of the Claimant that is more likely to have been October than later as thought by Mr Williams, the Claimant was driving back to the depot in his tanker through Stoney Stanton when, as bad luck would have it, Mr Williams, who was passing the other way saw him at the wheel with an e-cigarette in the vicinity of his mouth. It does not matter if the Claimant was smoking it. The policy is clear. He must not have such a device in the cab. The Claimant accepts that when he got back to the depot Mr Williams had a word with him. Having told him what he seen Mr Williams said: "I don't think that's a good thing to be doing, do you?". The Claimant accepts in answer to a question from me that he took that from Mr Williams to be a coded reprimand and that he was not to do it in future.

22. What is also not in dispute is that on 19 February 2016 the Claimant was in his cab driving this time out of Stoney Stanton away from the depot with a cargo of Calor Gas on board when he was seen again by Mr Williams: this time with him was Mr Randle. Both could see that he was holding an e-cig to his lips. Was he smoking? Does it matter? The Claimant picked up this reference to smoking, particularly as stated by Mr Randle, from the statements both made that day (Bp55-56) having immediately reported the matter to Mr Statham on their return to the depot. In the claim it was clearly pleaded as an issue. I would accept that it might have been difficult for Messrs Williams and Randall to see the vapour: but it is obvious to me from close scrutiny of the statements that they have put two and two together. And to do so was not unreasonable: the Claimant accepts that he had in his hand, so again visible because he is of course high up in his cab at his steering wheel, his e-cigarette device: also that he probably had it close to his mouth as he was using it to stop smoking cigarettes: it was a comfort even if though he did not smoke it in the cab.

23. The core point is that whether or not he was smoking is a red herring. The policy is clear: no e-cig in the cab. The Claimant knew that if not before, then certainly when Mr Williams told him not to do so after the sighting in October.

24. As to the reporting of him to Mr Statham, as the Claimant had apologised after the first occasion and made clear he would never do it again (Bp55), Mr Williams decided to leave it at that having consulted with Mr Randle. The Claimant has alleged in this case a bad motive for them to subsequently report

him on 19th February: They might have some resentment for his lifestyle. He has two expensive holidays a year and drives a Mercedes. But that makes no sense; if they resented his affluence, then Mr Williams would have reported him after the first incident.

25. Having had the report of Messrs Williams and Randle, Mr Statham summonsed Ms Virk to see him. She duly attended. Also present was Mr Williams. He relayed the substance of the incidents and that this was the second occasion which was why it was serious. Mr Statham told Ms Virk that the Claimant was no longer permitted to work for Calor. Once the Claimant got back to the depot as he was still out delivering or en-route back to the depot he was to be ordered off site. Obviously, this meant that the placement by him with Calor was at an end.

26. Ms Virk was taken aback that they would want to get rid of the Claimant. She saw him as an extremely good worker with whom she had a very good working relationship. The Claimant doesn't disagree with her. She entreated on his behalf with Mr Statham. This was whilst the Claimant was en-route back to the depot having now been ordered to return. Her overtures meant that Mr Statham went to his superior in Calor, Mr Collins. Ms Virk then pleaded with him as well. Mr Collins then consulted HR within Calor. The upshot was that he reported back to Ms Virk that this was a "zero tolerance" situation. The requirement that the Claimant be immediately removed stood. Ms Virk tried once more. She went to her superiors and they in turn went to HR in Manpower, but the view was that Calor was contractually entitled to do that which it was insisting upon and therefore there was nothing that Manpower could do about it. Contractually that is correct.

27. It follows that so far in the scenario the Respondent had not acted at all in breach of its contract of employment with the Claimant. There has not been a failure, as submitted by Mr Anastasiades, by Manpower to use its best endeavours to dissuade Calor. Ms Virk tried her best; and given her close working relationship with Calor was probably the person most likely to succeed if anybody was going to do so. She met a rock and a hard place. Is Calor Gas entitled to take its stance? It is not a matter for me. It is contractually entitled to do so. The fundamental is that it is not the Claimant's employer.

The final chapter

28.This is about what happened when the Claimant got back to the depot and was seen by Ms Virk. The Claimant in the particulars of claim at Para 17 (Bp16) says she told me " *sacked with immediate effect*." But at paragraph 24 he states in the context of his resignation letter dated 24 March that the " words that Raj Virk used were that he was being " *let go for using an e-cig*". Under cross examination he made plain that it was the latter phrase that was uttered. Ms Virk disputes that she said this. So there is a conflict.

29. This was not a two minute discussion between the Claimant and Ms Virk. When he got back to the depot, Ms Virk, clearly upset at the bad news she had got to give him despite her efforts, dealt with this matter gently and at some considerable length. To the Claimant it was "all a whirlwind". I have no doubts he was taken aback.

30. Mr Anastasiades makes the point that there are no notes. Should Ms Virk

have kept some? In a perfect world probably yes, but it does not mean as I am not yet dealing with whether there was a dismissal and therefore the ACAS code of practice applies, that it means that what she tells me is therefore not believable. Her position is clear. In the 15 years she has been doing this job, working her way up to the senior role in charge of dealings with Calor, she has had to release many people from assignments at Calor. The latter is a hard task master. She has had to release people from assignments at Calor simply because they have come on site with a cigarette lighter or a mobile. She has never used the words "let go". She is acutely aware that this would mean that she was dismissing the employee. This she cannot do without bringing in HR and the use of the dismissal procedure. In circumstances such as this she always says: "*I am sorry but I have got to release you from this assignment".*

31. In so doing it would mean the employment was preserved for the reasons I have already rehearsed. She has the corroboration in that the same day at 13:58 she e-mailed (Bp 54), Lutterworth, which is the main Manpower centre for the redeployment of drivers, asking Nico to find the Claimant another assignment. She said:

> *" I have a driver who has worked for Calor for over 8 years and was released today because he was seen using an e-cigarette, due to it being an ignition source we had to release him immediately.*
>
> *He is a lovely guy and I would definitely recommend him"*

32. Nico duly offered the Claimant another assignment the following day. He rejected it as unsuitable.

33. This scenario does not square with the Claimant having been dismissed by Ms Virk or otherwise by Manpower. And in particular I note the use by Ms Virk of the words " had to release him" which is entirely consistent with her evidence. Then finally there is the further corroboration provided by her letter(Bp57) to the Claimant dated 19th February and which she signed:

> "Further to our conversation earlier we regret to confirm the end of your assignment at Calor. This is due to you being seen using an E-cigarette whilst at work driving a Calor vehicle.
>
> As per the employee handbook page 2 "By reason of the relationship between Manpower and its clients, the client may, of its own volition, ask at any time that you be removed from an assignment".
>
> I would like to clarify it is your assignment at Calor which has ended and not your employment with Manpower. Therefore we will endeavour to find you suitable employment through ourselves or our network of branches."

It then gives details of who to contact.

34. It has been suggested on behalf of the Claimant that Ms Virk may not have written this document: the inference being that it has been written post the inception of proceedings to bolster the Respondent's defence.

The fact that the Claimant may not have got it, perhaps through the fault of the Post Office is neither here nor there. I believe Ms Virk: she typed this letter on the 19th February printed it out and signed it. She has no office backup. She then put it in an envelope properly addressed to the Claimant, and placed it in the outward mail tray for posting that night.

35. On 14 March the Claimant wrote to the Respondent a letter (Bp58) headed **" Appeal notice against termination of my employment by reason of Dismissal".** He therefore sought an appeal hearing believing he had been dismissed and gave his reasons why it was unfair. He made no mention of constructive dismissal. Ms Virk replied on 17 March (Bp 59) reiterating that:

> *" I confirm that no disciplinary action has been taken against you, therefore you were not afforded the right to appeal".*

36. Nevertheless she was prepared to treat the letter as a grievance and invoke the grievance procedure if he wished. From the tenor of that letter she was clearly hoping that this way she could set his misunderstanding at rest and hopefully they might be able to move on; perhaps another position could be found.

37. The Claimant's reply to that was to resign with immediate effect (Bp 60); essentially because he believed that he was being misled by her, and that everything that had happened meant that trust and confidence had gone and because he had been "sacked on the spot". Ms Virk replied (Bp61) reiterating her regret that he was taking this view; making plain he had not been dismissed; and urging him to reconsider his resignation.

**Conclusion**

38. In reality as is by now obvious this muddled claim was as presented primarily one of unfair dismissal. But the Claimant was not dismissed; at best he misunderstood the position. But relying as he does on the belated resignation letter at Bp 60 can the Claimant establish on the facts that he has been constructively dismissed?

39. That brings me back to where I started with and the legal framework:-

(i) Has manpower breached the contract of employment per se, that is the SED in conjunction with the Manpower Handbook? The answer to that question is no. Contractually it had the right to remove the Claimant from the assignment if as in this particular instance that was the dictate of the end user: Calor.

(ii) Has it acted without reasonable and proper cause? Well no. The reasonable and proper cause is that it was required to remove him from the depot: In passing Calor clearly had justification. Finally Ms Virk used her absolute best endeavours to try and dissuade Calor from that insistence.

40. It follows that the Claimant has not established that he was constructively

dismissed. The claim is accordingly dismissed.

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Employment Judge Britton

Date 10 November 2016