EMPLOYMENT TRIBUNALS

Claimant: **Mr T Heron**

Respondent: **Tyco Electronics UK Ltd**

Heard at: **Bristol** **On: 11, 12 & 13 December 2018**

Before: Employment Judge Maxwell

Representation
Claimant: in person
Respondent: Mr Galbraith-Marten QC

JUDGMENT

1. The claimant's claim of unfair dismissal in well-founded and succeeds.

2. The claimant is entitled to:

   2.1. a basic award of £2,253.15;

   2.2. a compensatory award of £26,036.64.

REASONS

Background

Claim

3. The claimant brings a constructive unfair dismissal claim against the respondent. He suffered an inhalation injury at work by the release of smoke or fumes from a drying machine. The claimant complains about that incident and various steps taken by the respondent thereafter.

Issues

4. The issues to be determined were agreed at a preliminary case management hearing ("PCMH") before REJ Pirani on 4 June 2018. For a breach of the implied term of trust and confidence, the claimant relies upon:

    4.1. failure to provide a safe system/place of work;

    4.2. delay in the grievance process;

    4.3. failing to take his grievance seriously;

    4.4. failed to act on the advice on an occupational health nurse;

    4.5. moved his place of work.

5. Whereas at the PCMH the respondent denied any negligence or breach of duty, or that that the claimant suffered an inhalation injury, I am told that liability has now been conceded in the claimant's industrial injury claim. The basis of any admission in those proceedings was not explained. Furthermore, the nature and extent of the claimant's injury and the consequences flowing from that are still disputed. The claimant does not and cannot bring a personal injury claim before the Tribunal and I will only make findings in connection with his injury to the extent that is necessary to determine his unfair dismissal claim.

Evidence

6. I heard evidence from the following witnesses:

    for the claimant

    6.1. Thomas Joseph Heron, the claimant;

    6.2. Michael James Newman, Maintenance Technician (his witness statement was admitted into evidence without any challenge by the respondent);

for the respondent

6.3. John McGregor, Safety Manager;

6.4. Lara Walton, HR Manager;

6.5. Bryan Neaves, Director of Environmental Health & Safety;

6.6. Mark Hickman, Plant Manager.

7. I was provided with:

7.1. an agreed bundle of documents, which excluding the pleadings and case management orders ran to 143 pages;

7.2. the respondent's skeleton argument and authorities.

Facts

8. The claimant was employed by the respondent as a Production Operator, from 28 April 2014. He worked at the respondent's Site H in Swindon. Much of the production at this site is concerned with the manufacture of wire. The respondent is a multinational telecommunications company.

9. The respondent operates a number of drying machines. These heat products, which is a process that releases volatiles. The volatiles are captured in desiccant beds. One such machine is known as X10.

10. On 25 January 2016, X10, was serviced by an external provider, Sterling Ancillary Services. During this servicing the test on the left-hand bed had to be terminated because of the fumes being generated. The report relating to this visit included for X10:

> **This dryer had a cycle fault which was traced to the reed switch on the changeover cylinder, these were reset.**
>
> **Because the beds had not been regenerated for some time the Desiccant was contaminated with volatile substances which when heated are released into the atmosphere through the dryer exhaust.**
>
> **The dryer was isolated and I would recommend a Desiccant change.**
>
> **In the future, the dryer should have extraction.**

11. At the end of January / beginning of February 2016, Mr Newman was instructed to "burn-off" the build-up of residue in X10. Mr Newman declined to do so because there was no extraction. Whereas the machine had previously been connected to the respondent's extractor system so that fumes might be vented away, following a move of X10 to a new location in the respondent's premises, the extraction was not reinstated.

12. An email chain of 26 and 27 January 2016 shows there was a proposal to put a trial compound into dryer X10 and suggests that machine had been used for this purpose previously.

13. On 22 February 2016, Mr Taylor, one of the maintenance technicians, believing he had fixed a fault on X10, turned it on and left it running. Mr Taylor then took a short break and whilst he was away the claimant, who had been working in the vicinity on another machine (X2), and several other employees, inhaled the smoke or fumes emitted. The claimant suffered an inhalation injury, others were also adversely affected.

14. The claimant believes that he breathed in smoke on that occasion. Mr Neaves, who was not present at the time but has relevant professional knowledge, is of the opinion that it will have been fumes rather than smoke which came from X10 and explains the contemporaneous reports of smoke on the basis that it is difficult for a lay person to discern the difference. I note, however, that the independent expert, Mr Ramsden, instructed at the grievance appeal stage to analyse what was likely to have been released on this occasion says that for these purposes "in reality they are the same thing". I accept Mr Ramsden's evidence on this point, as per his report.

15. An accident report form was completed by another employee on 23 February 2016:

> **Around 00.15 on 23/02/16 I first smelled very intense burning smell then noticed cloud of fumes increasing at the back of small braid area (B101, 102, 103, 104). After realising that the smoke was coming up from downstairs I went downstairs and saw smoke coming up from one of the extruders […] operator who was running that extruder (X10) assured me that he had already called maintenance and and that everything was under control.**

The form has a tick in the 'no' box for whether first aid was required and the claimant was named as having been a 'witness / observer'.

16. An email from the Shift Manager, Ian Causon, of 23 February 2017 provided:

> **It appears from what I can gather anything that is removed through the drying process can drop off the beds of the dryers, this is then burnt off when the dryers heat up again which causes the fumes, this is why the extraction is needed.**

17. Mr Causon also posed a question, which was answered by the supervisor Jon Bulley:

> **[Q] Do the fumes that are given off cause any threat to the Ops? [A] Unknown, this unit used to be inside an extracted large hooded frame with curtained sides, all other equipment producing fumes with a prorad are extracted and vented outside.**

18. Mr Causon's email and the associated chain was forwarded to Mr McGregor on 1 March 2016.

19. Whereas the other employees who were present on 22 February 2016 had only relatively minor and transient symptoms of poor health, the claimant

suffered more severely. He experienced wheeziness and shortness of breath which has persisted.

20. On 2 March 2016, the claimant contacted Mr McGregor by telephone. The claimant said he was unhappy at the response to this incident and was concerned by comments Mr Taylor had made that the product in the dryer was unidentifiable and may have been there for years. After meeting with the claimant, Mr McGregor made enquiries, interviewing Mr Taylor, Mr Bulley and two production operatives. Mr McGregor contacted the production team in the engineering group and was advised that the product in the dryer was 1667, which was made of several different chemicals. Mr McGregor also looked at the material data safety sheets ("MDS") for each of the chemicals. He completed an accident investigation report from:

> **The product involved contains respiratory irritants that are released when heated. The compound did not burn nor did it degrade. Exposed employees were concerned regarding what they had been exposed to through miscommunication by a fellow employee. The fumes was seen to be coming from the front and sides of the machine. Although a hood may have captured more of the fume, it would not have been sufficient to take away all of the fume.**

21. Mr McGregor met the claimant on 8 March 2018 to share his conclusions. Having gone though the chemicals comprising 1667 and their possible effects, the claimant expressed his concern that not all of the chemicals in the dryer had been identified and he reiterated the comments of Mr Taylor about the difficulty with identifying what was in the dryer. Mr McGregor went back to the engineering group and was told again that the chemicals in the dryer were one or more of those comprised in product 1667. Doubting the claimant would be satisfied with this response, Mr McGregor suggested he speak with the Senior Manufacturing Engineer, Phil Broadbent, as this was a person he believed the claimant held in high regard. The claimant did speak with Mr Broadbent.

22. Mr McGregor also wrote to the claimant's GP on 24 March 2016, identifying the chemicals he believed were in the dryer / fumes and the information about adverse effect for each of them taken from the MDS.

23. By an email of 31 March 2016, the claimant complained to Mr Bulley at length about the events of 22 February and the response to that. Twice repeated in the text were two questions:

> **1. WHAT HAVE I BREATHED IN??**
>
> **2. WHAT LONG TERM EFFECT COULD IT HAVE ON MY HEALTH??**
>
> **These two questions are very important to me and as of yet I have NOT received what I consider to be acceptable answers.**

The claimant also referred to Mr McGregor's investigation:

> **He also spent time in materials to establish what powders and chemicals went into 1667 compound and what effects they would have under the given conditions. He**

> **told me that one of the components was a mild irritant and another was an irritant. He said that my symptoms were consistent with what they would cause and could last up to four weeks but should have no permanent affect. John explained that there was a big difference between fumes and smoke and that the dryer in question has a maximum temperature and 180c and that 1667 compound can't burn at temperatures that low so he believed we were not looking at smoke.**
>
> **I thanked John for his thorough investigation but told him that all his hard work may have been wasted as it still didn't answer my questions because the investigations solely concentrated on 1667 compound and my concerns are with what else was in that dryer. John said he didn't know what else he could do as he had acted on the information he'd been given.**

24. Mr Bulley forwarded the email to Mr McGregor, who replied by a letter of 18 April 2016:

> **1) What have you breathed in?**
>
> **According to our records, the only compound that has gone through the X10 dryer since 2009 is the 1667.**
>
> **2) What long term effects could have on your health?**
>
> **From the data we have examined, (and we include copies of your information), there will be no long-term effects on health**
>
> **All of this information we have already provided to you. We have also written in response to a letter from your GP detailing all the substances contained in this compound, none of which will cause any detriment to your health beyond four weeks.**
>
> **As you may be aware, all of the other operators who went to investigate, and were exposed to the fumes at the same time as you, and for the same length of time lost their symptoms after a couple of days. We are therefore surprised that you continue to suffer from these symptoms.**

25. The claimant was offended by the reference in Mr McGregor's letter to the respondent's surprise at his prolonged symptoms. He referred to this as "besmirching" his character; he took the respondent to be casting doubt on the genuineness his symptoms. The content of this letter was drafted by Sarah Archer, HR manager.

26. In about April 2016, the claimant was asked to complete a form connected with ethical conduct training. On this, he ticked a box to say he wished to report an ethical conduct violation. When asked to expand upon his concern, the claimant referred back to his concerns about the incident of 22 February 2016 and the respondent's response. The claimant raised a formal grievance by an undated email or memo sent subsequent to 24 June 2016:

> **Firstly, my grievance is based on the handling of the incident on 22nd Fed 2016 when I suffered an inhalation injury at work through no fault of my own. Secondly, after receiving a pack from John McGregor (as requested by me) containing all documentation regarding the incident, it clearly shows that my character has been besmirched by two senior managers which I find totally unacceptable and unethical.**

> **As for a resolution, I'm not sure that is for me to say but I have asked two questions from day one that I would like honest answers to**
>
> **1) WHAT HAVE I BREATHED IN?**
>
> **2) WHAT LONG TERM EFFECT COULD IT HAVE ON MY HEALTH?**

27. The claimant was invited to and attended a grievance meeting chaired by Tony Mayell on 22 July 2017. The claimant was accompanied by Mr Newman. The claimant initially denied that he had raised a grievance, saying that after he "ticked the ethical conduct" he was told to raise a grievance. He went on, however, to say that he had gone "down this route" (i.e. raised a grievance) because "people involved besmirched [his] character". Mr Mayell said he understood there to be two elements to the claimant's grievance, the handling of the incident on 22 February 2016 and the "besmirching". The claimant said the incident had been handled poorly because he asked what he had breathed in and whether this would affect his health. Being told that it was likely 1667 and this would not burn at the dryer temperature was "not good enough". According to the clamant, people on the shop floor had said they put the wrong compound in the dryer. The claimant believed it was wrong to assume there had been no fire, as this would not have been seen if it were inside the dryer. Mr Mayell's response was that "hand on heart" he could not say 1667 was the only thing that had been in the dryer, but that was the only compound which had been identified as being put there and the claimant had been given all the information they had about it. In this regard the claimant observed "I know I'm not going to get an answer now". Mr Mayell said he would "get as much information as [he could put his] hands on". Separately, the claimant said if it had been 1667 then he was alarmed because the MDS for one of the chemicals, Antimony Trioxide ("ATO") included a risk of cancer by inhalation. Mr Mayell pointed out that it was an "encapsulated raw material" (as opposed to being in powder from). As far as his character was concerned, the claimant was concerned because it had been said that 3 others involved were "all ok in 3 days". The claimant did not say, in a direct way, that the "besmirching" was because these comments implied his injury was not genuine, but after talking around the subject for some time, Mr Mayell did reach that understanding. The claimant said his inhalation injury was worse at this point than it had been 5 months before.

28. The claimant was referred to occupational health and a report prepared on 3 August 2016. This included:

> **The specialist has given him a provisional diagnosis of Reactive Airways Dysfunction Syndrome, which is asthma-like illness, which normally develops after a single exposure to high levels of an irritating vapor, fume, or smoke. It causes coughing, wheezing, and shortness of breath. Tom is still under investigation and has a review appointment on 15th August. […]**
>
> **As Tom is still undergoing respiratory investigations I would strongly recommend he is not exposed to any respiratory sensitisers or irritants at work. Tom should also be restricted from climbing or carrying out roles that require extreme physical activity. […]**

Tom is fit to continue in his current role with the restrictions outlined below:

• Not to be exposed to any respiratory sensitisers or irritants at work […]

I would like to review Tom the end of September.

29. Mr Mayell wrote to the claimant with his grievance outcome in a letter of 31 August 2016. He summarised his findings as to the timeline and the information which the claimant had received following the incident. My Mayell decided that it was "unjustified" for the claimant to say there had been a lack of response by the company to the incident and his questions about that. Mr Mayell did, however, find that some areas could have been further explained and he provided additional information about the particular chemical, ATO, which had been identified as a possible carcinogen. As to the "besmirching", whilst Mr Mayell understood how the claimant came to be upset by these comments, he did not read them in the same way. Mr Mayell made two recommendations:

    29.1. that the claimant should be referred to OH in connection with his ongoing symptoms;

    29.2. notes made by Mr Broadbent (to which the claimant objected as "besmirching") should be removed from his personnel file.

    In summary, Mr Mayell concluded the company had thoroughly investigated the incident, but that further information could have been provided about volatiles and ATO, and that the wording of Mr McGregor's letter of 18 April was clumsy. Mr Mayell characterised these conclusions as partially upholding the grievance.

30. On 2 September 2016, the claimant met with Jon Bulley and Lara Walton, in order to discuss the recommendations of the OH report. The meeting included:

    TH - Gail (OH) doesn't know this place. I didn't want to come off a machine for the wrong reasons – other people would worry. I have no problem working on X2 – I'm careful, I will wear a mask for strip and clean. It's easier to not come off it.

    [...]

    TH - I'm OK, not breathing fumes all of the time, just now & then.

    JB - we have a duty of care towards you– that's why I came over to speak to you when I first got the OH report.

    TH - I understand, OH are trying to safeguard everyone. Working on the line doesn't make me any worse. I take the necessary precautions. The worst thing is emptying the bin if you've just done a purge (but OK if you leave it till it's cooled).

31. Following on from this meeting, Mr Bulley and Ms Walton decided to leave the claimant working on X2.

32. By an undated letter sent in September 2016, the claimant appealed the grievance decision. The letter set out a narrative, repeated the claimant's original two questions and asked a number of new ones.

33. On 13 October 2016, the claimant met with Mr Neaves for his grievance appeal to be heard. Mr Neaves decided a more robust investigation of the matters raised by the claimant was necessary and he would carry that out.

34. On 19 October 2016, the claimant was reviewed by OH. The report included:

> **Tom informs me today that his respiratory symptoms remain unchanged. He has been seen by his consultant and his medication has been altered. The new medication has helped increase his peak flow (which is a reading of how quickly air can be blown out of the lungs) readings slightly, however Tom is still experiencing shortness of breath on exertion. A diagnosis has not yet been given, but it is possible Tom has asthma.**
>
> **I would recommend the restrictions I advised in my report dated 3rd of August remain in place until the diagnosis and treatment plan has helped to control Tom's symptoms. Please see restrictions below:**
>
> **• Not to be exposed to any respiratory sensitisers or irritants at work […]**
>
> **I would like to review Tom in January/February or before if his condition deteriorates.**

35. In an email of 20 October 2016, Ms Archer wrote:

> **Yesterday, I spoke to the Occupational Health nurse after she had seen Tom.**
>
> **She was cross because Tom had told her that we had not implemented her restrictions from the last time we saw him, which were that he: […]**
>
> **It seems that in order to comply with the restrictions we will need to remove Tom from working on the X10 and X2 extruders and move him to Spooling, which is the only area that doesn't have the potential exposure to irritants. […]**

36. Mr Hickman responded to these observations by deciding that it would be necessary to move the claimant away from extruding, even if that was not what the claimant he wanted to do. This was done to protect to the claimant and ensure the OH advice was being followed. The claimant was, thereafter, moved onto the spooling operation, which was based at the same Site H in Swindon.

37. In the course of investigating the matters raised by the claimant in his grievance appeal, Mr Neaves conducted 8 interviews with members of staff between 24 November and 2 December 2016, variously covering;

    37.1. the fault identified with the X10 dryer in January 2016;

    37.2. the move of X10 to a new location without extraction;

37.3. the plan to "burn-off" or "regenerate" (witnesses used different words to describe the process) the contaminated desiccant beds;

37.4. opposition to the planned "burn-off";

37.5. the installation of temporary extraction;

37.6. the events of 22 February;

37.7. the enquiries made after 22 February;

37.8. the compounds put in the dryer and occasional trials;

38. Mr Neaves also commissioned a report from an external occupational hygienist, Paul Ramsden, addressing what was likely to have happened on 22 February 2016 and the health risks.

39. Mr Ramsden, having found it likely that 1667 was in the dryer on 22 February 2016, then in turn commissioned his own report from another external expert provider, to conduct experiments so as to measure the composition of the fumes released when the components of 1667 were heated to X10's usual operating temperature (110c), or to the regeneration temperature (250c). The results included that the fume may have contained respiratory sensitisers and irritants. Mr Ramsden concluded that the symptoms reported were consistent with short-term high exposure to respiratory irritants and that the long-term health consequences will only become clear with time. Mr Ramsden made various recommendations including:

39.1. the installation of exhaust ventilation for X10;

39.2. monitoring air quality in the vicinity of X10;

39.3. monitoring the claimant's health and making reasonable adjustments to allow for his condition.

40. Mr Neaves produced a confidential report for the company and, separately, a grievance appeal outcome letter for the claimant.

41. Mr Neave's confidential report included:

41.1. on 22 February the desiccant bed was regenerated, although he could not establish why that was done or who authorised it;

41.2. the immediate investigation was deficient in various important respects;

41.3. as a result, inaccurate and misleading information was given to the claimant, including about the risks to his health;

41.4. X10 should have been fitted with local exhaust ventilation ("LEV");

41.5. it was not acceptable that the advice of the service engineer about X10 desiccant bed regeneration was ignored;

41.6. extensive quotes from the report of Mr Ramsden.

42. Under the heading "Conclusions and Recommendations", Mr Neaves set out 6 numbered points:

> **1. The employees involved at the time of the event seemed unwilling or cautious about raising the fire alarm as a consequence of the fumes. If the area as a minimum had been evacuated the consequences could have been mitigated. *Employees should be retrained on the importance of raising the fire alarm for these type of events***
>
> **2. The initial response by supervision to the incident report did not consider the overall situation and that in fact employees had suffered health effects, although the severity of which were unclear at the time. The initial investigation did not treat the event as a high potential event deserving a full immediate investigation. *Supervisors should be re-trained on initial incident investigation.***
>
> **3. there were a number of failings in the CRAFT management of change process which led to the Simar 02 Dryer being moved with[out][1] full regard to the need for replacing the local exhaust ventilation (LEV). Risk assessments of the move do not appear to be "suitable and sufficient" and there are no COSHH assessments for the substances generated during drying and desiccant bed regeneration. The reaction by the Tier 3 management team to the advice by the Simar Service engineer appears indecisive and does not then lead to the issue being addressed, this in turn led to the dryer being put back into use with no apparent management control or oversight. *The CRAFT process should be reviewed and gaps in its effectiveness filled. The Tier 3 meeting process should be reviewed to ensure relevant issues are escalated and appropriate decisions taken rather than being left unaddressed.***
>
> **4. The full investigation left a number of issues unaddressed and as a consequence led to some root causes not fully addressed. Additionally the lack of full analysis of all data available and some information being inaccurate lead to some inaccuracy in communication to the employees affected, particularly Tom Heron. *Review and improve the robustness of investigations, consider having operations management critical review of more complex scenarios. If not already done the incident should be reported as TE recordable injury.***
>
> **5. Verbal and written communications with the affected employees was impacted by the above failings which led to as a minimum misunderstandings but also in part to a mistrust in the thoroughness and robustness of the site accident investigation processes in dealing with the root causes and ensuring the health impacts are fully addressed and understood. *Management should take the opportunity to learn from the failings to ensure processes are more robust.***
>
> **6. The initial grievance hearing for Tom Heron's concerns only considered certain aspects of his concerns and did not address his concern relating to the thoroughness of the investigations and consequential communications to him; and secondly the health impacts to him of the exposure to fumes. Although it is not possible as indicated in Paul Ramsden's occupational hygiene review to be precise about the exact nature and quantities of substances that Tom Heron was exposed to it is possible to say that there were respiratory sensitisers present and that these could cause the respiratory dysfunction syndrome (RADS) diagnosed by Tom**

[1] In this context, Mr Neaves must have intended to write "without".

Heron's medical specialist. It is also possible to state that it is extremely unlikely that Tom Heron was exposed to any Antimony compounds."

43. A grievance outcome letter was sent by Mr Neaves to the claimant on 26 February 2017 and this included:

    43.1. on the question "what have I breathed in?", the findings of Mr Ramsden as to the likely content of fumes from 1667 at 110c and 250c;

    43.2. on the question "what long term effect could it have on my health?", a summary of relevant findings made by Mr Ramsden;

    43.3. under the heading of "communication to you during the original investigation" part of his findings at "4." and "5." above.

    Mr Neaves advised the claimant his appeal was upheld and apologised for the delay, explaining that he had conducted a detailed and thorough investigation. The letter also stated this decision was final and there was no right of appeal.

44. In about early March 2017, the claimant, who was at the time working on spooling, sent a letter or memo in which he said he no longer wished to work on Sunday nights. The second reason he gave for this was:

    Most importantly. As work has picked up there are more extruders running on weekends now. Two weeks on the trot there has been three extruders running. As I am to be kept away from fumes, reference occupational health, I fear I am putting my health at risk

45. On 9 March 2017, Ms Archer wrote to Mr Neaves querying the safety of the claimant working in the vicinity of the extruders:

    It just occurred to us that given Tom's sensitisation to the chemicals in our wire and cable plant there may be an issue with him working anywhere in the vicinity of the extruders.

    He is currently working on spooling, but he passes the extruders on his way to break and to get water. Would you be able to confirm whether or not we should move him out of the area completely, as we don't want to risk any further problems with his health.

46. Mr Neaves replied the same day:

    A difficult question, but I would say that so long as the extrusion lines are running with the head extracts in place the amount of any sensitising vapour or fume in the atmosphere would be very very low, especially as not all compounds will contain the component that generates the sensitiser. So I would say that his exposure would be negligible walking past the break room etc. Obviously if he shows signs of problems, which of course will be quite difficult to verify, then it may be necessary to move him from the area altogether.

47. Mr Hickman and Ms Archer were concerned about the claimant's safety. They did not want to risk a further incident in which the claimant's respiratory health would be damaged by exposure to sensitisers. In cross-examination, the claimant said there was no evidence that he had been sensitised by the earlier incident, everyone else was at risk, and so why was he treated differently. Mr Hickman replied that the claimant was in a different position because of the incident in February 2016, when the claimant may have been sensitised and the risk to him was higher.

48. Mr Hickman and Ms Archer believed there was no location at site H where the claimant could work without some risk of exposure to fumes. There was another site nearby, Site A, but this carried out the same processes as Site H and the risk would be the same. There was then a site call "Raceway" which was considered as potentially suitable, although anodising took place there and it was not, therefore, entirely free of chemicals. Ms Hickman and Ms Archer believed the best option was to send the claimant to Techno, a warehouse located a few miles from the centre of Swindon.

49. On 22 March 2017, Mr Hickman and Ms Archer met with the claimant to explain they could not guarantee his safety at site H and they would be transferring him the to work at Techno warehouse the following week. The rationale for this move was explained to the claimant. The claimant was given reassurance about potential redundancies and shift pay, but still did not want to move. The claimant suggested a move to Raceway as an alternative, but Mr Hickman was unwilling to agree this and set out his concern that some chemicals were used there for anodising. The claimant was given a letter confirming the decision to move him to Techno and requiring him to report at that location from 10pm on 27 March 2017.

50. Following the meeting on 22 March 2017, the claimant decided he would not go back to work for the respondent again. He said that meeting was the "final straw" as he couldn't trust the people who had to look after him. When asked to expand upon this, the claimant said that he was not prepared to be moved for reasons that were not right, he was being singled out. The people he said who he needed to trust to treat him safely were Mr McGregor, Ms Archer and Mr Hickman. The claimant did not believe that he was being moved to protect his safety, rather he thought this was a punishment because he had made a nuisance of himself by persisting in his complaints and local management had not welcomed the findings of Mr Neaves.

51. The claimant was on sick leave from 23 March 2017 until the termination of his employment.

52. Although various further steps were taken by the respondent thereafter, the claimant said that because his mind was made up he had probably wasted the time of those concerned.

53. In April 2017, Andrew Donachie and Ms Walton looked at the compounds manufactured at site H. They obtained confirmation that each contained the sensitiser it was believed the claimant had been exposed to.

54. On 4 May 2017, Ms Walton wrote to the claimant's treating consultant, Dr Juniper, and asked for his opinion on various questions relating to the claimant's health and the risk of exposure to sensitisers. The doctor replied by a letter of 5 June 2017. He confirmed a diagnosis of mild asthma. On the risk posed by exposure to sensitisers, Dr Juniper said this was difficult to answer as there was no definitive evidence the claimant had been sensitised. In response to the question of whether it was appropriate for the claimant to work in an environment with the risk of exposure to sensitisers, the doctor gave a conditional answer, saying not if he had been sensitised but adding that the pattern of the claimant's inhalation was not typical for workplace sensitisation. This report was the subject of much debate in this hearing, the claimant saying Dr Juniper did not say he had been sensitised and the respondent's witnesses replying he did not say he had not.

55. An OH report on 5 June 2017 linked the claimant's stress illness to the dispute about his work location.

56. At a meeting on 12 July 2017 between the claimant, Mr Hickman and Ms Walton, there was a discussion about the report of Dr Juniper similar to that which took place at the Tribunal; the claimant saying the doctor had not said he was sensitised, Mr Hickman and Ms Waltson saying the doctor had not ruled that out. Mr Hickman on this occasion proposed a return to Raceway; this was not what Mr Hickman believed to be the safest option but he and Ms Archer were willing to offer that as the claimant had communicated (by way of Mr Donachie) that he had personal reasons for not wanting to work at Techno. Notwithstanding that both parties at the Tribunal knew what the claimant's personal reasons were, neither disclosed these in evidence. The respondent did not suggest to the claimant in cross-examination that his personal reasons were trivial or unworthy. The claimant declined the offer of Raceway. Asked what outcome he was looking for, the claimant said he was not answering that. He went on to complain that he had been moved without good reason. At this meeting, the claimant gave a letter to the respondent entitled "without prejudice", which included many complaints and allegations going back to the February 2016 incident, the handling of which he said was shambolic, referring to the move proposed to Techno, and some unrelated matters such as pay.

57. A follow-up letter was sent to the claimant, belatedly, on 5 September 2017. As well as reciting the discussion at the meeting in July, it also explained his sick pay had reduced and would cease on 23 October 2017. The claimant was told that given the length of his absence it was necessary to start the PHI process with the respondent's provider.

58. The claimant resigned by his letter of 11 September 2017:

> **I have given a great deal of thought to our recent conversations and correspondence and decided that my position is as untenable now as it became on 22nd March 2017. This is when I lost all confidence in the management following their stance on various issues including and that of my health and welfare. I can see no short term or long term solution to this situation. I feel I have no alternative but to give you notice and I consider this to be a case of constructive dismissal.**

Law

59. So far as material, section 95 of the **Employment Rights Act 1996** ("ERA") provides:

> **95 Circumstances in which an employee is dismissed**
>
> **(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only 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.**

60. Where, as here, the respondent denies dismissal, the claimant has the burden of proving dismissal within section 95(1)(c).

61. In accordance with **Western Excavating v Sharpe [1978] IRLR 27 CA**, it is not enough for the claimant to leave merely because the employer has acted unreasonably, rather a breach of contract must be established.

62. In order to prove constructive dismissal four elements must be established:

    62.1. there must be an actual or anticipatory breach by the respondent;

    62.2. the breach must be fundamental, which is to say serious and going to the root of the contract;

    62.3. the claimant must resign in response to the breach and not for another reasons;

    62.4. the claimant must not affirm the contract of employment by delay or otherwise.

63. Implied into all contracts of employment is the term identified in **Malik v BCCI [1997] IRLR 462 HL**:

> **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.**

64. In **Baldwin v Brighton and Hove City Council [2007] IRLR 232** the EAT held that a breach of trust and confidence may be caused by conduct calculated or likely to have the proscribed effect.

65. Either as an incident of of trust and confidence, or as a separate implied term, employers are under a duty to afford their employees a means of prompt redress with respect to their grievances; see **W A Goold (Pearmark) Limited v McConnell [1995] IRLR 516 EAT**, per Morrison J:

> **11. […] It is clear therefore, that Parliament considered that good industrial relations requires employers to provide their employees with a method of dealing with grievances in a proper and timeous fashion. This is also consistent, of course, with the codes of practice. That being so, the industrial tribunal was entitled, in our judgment, to conclude that there was an implied term in the contract of employment that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have. It was in our judgment rightly conceded at the industrial tribunal that such could be a breach of contract.**

66. At least insofar as the question of breach of the implied term of trust and confidence is concerned, the band of reasonable responses test does not apply; see **Buckland v Bournemouth University [2010] IRLR 445 CA**.

67. Furthermore, the decision in **Buckland** confirms that a repudiatory breach cannot be remedied; per Sedley LJ:

> **40. This account of the alternative courses which may be taken in response to a repudiatory breach leave no space for repentance by a party which has not simply threatened a fundamental breach or forewarned the other party of it but has crossed the Rubicon by committing it. From that point all the cards are in the hand of the wronged party: the defaulting party cannot choose to retreat. What it can do is invite affirmation by making amends.**

68. In a last straw case, the final act relied upon need not in isolation constitute a breach of contract, nor even amount to unreasonable or blameworthy conduct, although an entirely innocuous act will not suffice; see **Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA**.

69. Whilst mere delay will not amount to affirmation, where the employee continues to perform their contract a point may be reached when that becomes persuasive evidence they have indeed affirmed the contract; see **W E Cox Toner (International) Limited v Crook [1981] ICR 823 EAT**. A helpful summary of current state of the law with respect to affirmation was provided by the EAT in **Colomar Mari v Reuters Limited [2015] UKEAT/0539/13/MC**; Mr Galbraith-Marten invited me to to direct myself in accordance with that summary and I do so, per HHJ Richardson:

> **38. In Hadji v St Luke's Plymouth His Honour Judge Jeffrey Burke QC summarised the position as follows (paragraph 17):**
>
> **"The essential principles are that:**
>
> **(i) The employee must make up his [her] mind whether or not to resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed. Western Excavating v Sharp [1978] ICR 221 as modified by W E Cox**

> **Toner (International) Ltd v Crook [1981] IRLR 443 and Cantor Fitzgerald International v Bird [2002] EWHC 2736 (QB) 29 July 2002.**
>
> **(ii) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay - see Cox Toner para. 13 p446.**
>
> **(iii) If the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation: Fereday v S Staffs NHS Primary Care Trust (UKEAT/0513/ZT judgment 12/07/2011) paras. 45/46.**
>
> **(iv) There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive: Fereday, para. 44."**

70. Where the breach of contract relied upon is comprised of conduct over a period of time, if there was affirmation in the middle of this, the question may arise whether the claimant has lost the right to rely upon the earlier behaviour. This point was addressed recently by the Court of Appeal **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**.

71. Where the claimant resigns in part because of a repudiatory breach of contract, that will suffice, the breach need not be the only or the main cause for that decision; see **Nottinghamshire County Council v Meikle [2004] IRLR 703**.

72. If a constructive dismissal is established the employment tribunal must still consider whether the respondent has shown a potentially fair reason for dismissal within ERA section 98(1) and whether or not dismissal was reasonable in all the circumstances under section 98(4).

Conclusion

<u>22 February 2016</u>

73. I am quite satisfied there was a repudiatory breach of contract by reason of the release of harmful emissions from X10 on 22 February 2016.

74. The respondent acted without reasonable and proper cause, in that:

    74.1. no, or no sufficiently robust risk assessment was conducted with respect to relocating the X10 machine;

    74.2. the X10 machine was moved and the respondent did not reinstate the LEV, which was obviously necessary for its safe operation;

74.3. the release of excessive fumes by an attempt to regenerate the desiccant beds was identified by the service engineer shortly before 22 February 2016;

74.4. the maintenance engineer advised that he would not undertake an burn-off (or regeneration) because of the risk from fumes;

74.5. no reason has been established for the decision to operate the X10 dryer in the way it was on 22 February 2016, nor had the decision-maker been identified;

74.6. there was an obvious and foreseeable risk of injury to those working in the vicinity from the inhalation of fumes.

75. I am satisfied the respondent acted in a way likely to seriously damage or destroy trust the claimant's trust and confidence:

75.1. for the reasons set out above in connection with reasonable and proper cause;

75.2. because he was injured.

76. From the evidence in the occupational health reports, the report of Mr Ramsden and the answers given by claimant's treating consultant, Dr Juniper, I am satisfied that the 22 February 2016 inhalation caused the claimant to suffer with, at least, asthma or an asthma-like illness. His injury is consistent with short-term high exposure to the X10 emissions that day. Not only was this a breach of the implied term of trust and confidence, for the same reasons as set out above it amounted to a breach of the respondent's duty to provide the claimant with a safe system or place of work.

Initial Response

77. The initial response to this incident was wholly inadequate. By reason of the excessive production of fumes and lack of LEV, several employees were exposed to and inhaled significant quantities of potentially harmful smoke or fumes. The identification of this as a minor event was unjustified. An urgent enquiry into the content of the X10 machine, the smoke or fumes produced and the risk that might cause to the affected employees ought to have been recognised as necessary. Had the respondent acted promptly as it should, samples could have been taken to better ascertain what had been in the dryer and on the desiccant beds at the material time.

McGregor Investigation

78. The claimant's informal complaints about this event prompted Mr McGregor's investigation. Whilst this was more thorough than the initial response, it was still lacking in certain important respects. The claimant was still, justifiably, concerned that the content of X10 on 22 February 2016 had not been ascertained. No evidence has been put before the Tribunal about the

operation of the dryer after the incident and before 3 March 2016 and it may still have been possible to obtain useful samples at that time. This was not done and Mr McGregor relied on what he was told about the production history of this dryer. Such a production history may not, however, tell the entire story especially where, as here, occasional trials of new compounds were undertaken. Furthermore, whilst Mr McGregor gave the claimant and his GP information about the components taken from the MDS, this did not address the state in which the inhalation took place, namely as smoke or fumes produced on heating.

Grievance

79. Mr Mayell's grievance outcome represented an improvement on what had gone before, in that it involved a somewhat more detailed enquiry. At the Tribunal, the claimant accepted it would have been too late for Mr Mayell to take any useful samples from X10 as that opportunity had passed. Mr Mayell was also realistic, in that he accepted he couldn't say "hand on heart" that 1667 was the only compound in the dryer. Such evidence as Mr Mayell was able to obtain did suggest that 1667 was the compound most likely to be present. The notable deficiency, however, in Mr Mayell's approach was in providing more information taken from MDS, rather than obtaining an analysis of the likely content of the smoke of fumes emitted by X10 on the assumption it did contain 1667. The claimant's request to know what he had "breathed in" was both reasonable and necessary. Accurate information in that regard might be important for his future healthcare and he had no means of obtaining it other than from the respondent. Given a failure by the respondent to protect the claimant's health on 22 February 2016, he could reasonably require more information about what had been inhaled and in not providing this, the respondent failed to afford him reasonable redress with respect to his grievance. This omission amounted to the respondent acting without reasonable and proper cause, in a manner likely to seriously damage or destroy trust and confidence.

80. On the "besmirching" point, however, Mr Mayell reached a conclusion that, whilst generous to Mr McGregor, was reasonably open to him. This finding was not a repudiatory breach and did not contribute to one.

Grievance Appeal

81. At an early stage in his involvement, Mr Neaves decided, correctly, that this matter ought to have been explored far more robustly from the very beginning and, since that had not been done, in so far as he was able he would do that himself. Importantly, whilst it was too late for samples to be taken from the dryer, Mr Neaves did obtain an expert opinion on what the claimant would likely have been exposed to if it had contained 1667 and then was heated to either the drying or regeneration temperatures. Short of testing every compound or chemical that had ever been used at this site, to establish the content of smoke or fumes if it was heated to 110c and 250c, which the claimant did not contend for, there was little more that Mr Neaves could have

done. Sensibly, at this hearing the claimant did not criticise Mr Neaves' approach.

82. Unfortunately, Mr Neaves' investigations took some time to complete and the claimant did not get a grievance appeal decision until 26 February 2017. Whilst I accept that the enquiries made were extensive and this explains the delay, it did mean the claimant was left without a full and proper response to his grievance request to know what he had breathed in and what the risks of that were, until the very end of February 2017, more than a year after the event itself. There was, over that period, a failure by the respondent to provide the claimant with reasonable redress on his grievance. This was conduct for which the respondent did not have reasonable and proper cause, which was likely to seriously damage or destroy trust and confidence, and continued until this point.

Work Location Moves

83. The claimant argues that the respondent's failure to move him away from his position working on extruders was contrary to the OH advice given on 1 August 2016 and amounted to a repudiatory breach. The OH advice was that the claimant should not be exposed to any respiratory sensitisers or irritants at work. The question then is whether his role on the extruders did so expose him. He had been exposed to these on 22 February 2016, but that was an exceptional event the respondent wished not to see repeated. During the meeting on 2 September 2016, the claimant explained the safety precautions he was taking and said he was OK as he was not breathing in fumes all of the time. Whilst it could be argued, in terms of acting with reasonable and proper cause, that the respondent should have moved him any way, it is difficult to see taking the claimant's wishes into account at this time as likely to damage trust and confidence or evincing an intention not to be bound by the contract. I am not satisfied that leaving the claimant on extruders at this time caused or contributed to a repudiatory breach.

84. Somewhat inconsistently with his stance on 2 September 2016, when the claimant was next reviewed by OH the information he gave led the advisor to understand her recommendations about exposure to sensitisers or irritants had not been followed; i.e. that his position on the extruders was not suitable because of the fumes he was inhaling and his employer should have moved him. The OH advisor communicated her displeasure at this state of affairs to Ms Archer and the decision was then made to move the claimant away from extruders and to the spooling area. This was eminently sensible. The respondent had reasonable and proper cause to act as it did. Objectively, there would have been no risk of damage to trust and confidence.

85. The claimant worked on spooling until 22 March 2017, when he was told he would have to move to Techno, with effect from 27 March 2017. Subsequent to the report of Mr Neaves, Mr Hickman and Ms Archer became concerned that even on spooling, the risk of some exposure to sensitisers or irritants could not be entirely ruled out. This concern was taken up with Mr Neaves

and he responded on 9 March 2017, with the view that the claimant's "risk of exposure would be negligible walking past the break room etc" but that "if he shows signs of problems, which of course will be quite difficult to verify, then it may be necessary to move him from the area altogether". The decision then made, to move the claimant at a week's notice to a new job at a new location, against his wishes was a surprising one. I find that this step was a knee-jerk reaction and amounted to the respondent acting without reasonable and proper cause in manner likely to seriously damage or destroy trust and confidence:

85.1. the claimant had worked on spooling for several months;

85.2. whilst the claimant's contract had a mobility clause, he would have a reasonable expectation this would not be exercised against his wishes without good reason;

85.3. Mr Neaves could not, reasonably, be understood as advising that the claimant should be moved away from Site H;

85.4. the OH advisor had not advised the claimant be moved from Site H - indeed the inference I draw from the exchange which resulted in the move to spooling was that she was satisfied with that step;

85.5. whilst it was not unreasonable for the respondent to consider whether (in light of Mr Neaves' report) spooling remained a suitable work location for the claimant, further enquiries should have been made on the question of his health and any risks, either of the respondent's OH advisors or the claimant's treating physicians (such as was subsequently done with Dr Juniper) before instructing him to move to Techno;

85.6. Mr Hickman and Ms Archer knew, not least because Mr Neaves had so advised, that the claimant's trust in the company had been damaged by reason of the poor response to 22 February incident;

85.7. although I am satisfied that Mr Hickman and Ms Archer acted with good intentions and reject the suggestion this move to Techno was intended by them as a punishment, it was reasonably foreseeable that imposing it upon the claimant in the face of his opposition would further undermine his trust and confidence in the company.

86. If am wrong about the decision to move the claimant amounting to a breach of the implied term in isolation, then I would have found that taken together with the earlier matters (injury and grievance response) there was, cumulatively, a repudiatory breach of contract and the instruction to move on 22 March 2017 was the final straw, in the **Omilaju** sense; the last in a series of acts which taken together amount to a repudiatory breach of contract. This last act was not an entirely innocuous step and it did add to the repudiatory breach occasioned by the respondent injuring the claimant and then failing,

reasonably, to address his grievance in the period prior to the appeal decision of Mr Neaves.

Sick Leave

87. During the claimant's sick leave, the respondent assessed all of the compounds present at Site H, the fumes of which the claimant might have been at risk of occasional exposure. Appropriate enquiries were then made of Dr Juniper. Whilst the claimant is correct in saying that the doctor does not positively say that sensitisation had taken place and Site H was inappropriate, neither does the doctor offer a positive opinion that it was safe for the claimant to remain at that location. Mr Hickman's view in light of Dr Juniper's response and the claimant having already been injured once before, that it was safer to move him away from Site H was not an unreasonable one. There was further discussion with the claimant at which point he was offered Raceways. Unfortunately, the claimant no longer had trust in the respondent and was then not open to this proposal; which he would have accepted, indeed he proposed it, on 22 February 2017. Had the respondent taken these various steps before telling the claimant he had to move to Techno, I may not have found a repudiatory breach was caused or contributed to. Such a breach cannot, however, be cured. The respondent could merely invite affirmation.

Affirmation

88. The breach relied upon by the claimant was as at 22 March 2017. He did not resign until 11 September 2017. This was a delay of 5 and half months.

89. Whilst delay in and of itself does not amount to affirmation of the contract, a prolonged delay such as this might allow for an inference of implied affirmation to be drawn. Added to this is the claimant's acceptance of sick pay. He can only receive sick pay pursuant to his contract and as an employee of the company. Accepting sick pay is, therefore, consistent with the claimant calling for continued performance of that contract.

90. On the other hand, the claimant's absence from work and sickness was a reaction to what I have found amounted to a repudiatory breach of contract. The link between the claimant's absence and his dissatisfaction with the requirement to move him is made in the OH report obtained during that period and was known to the respondent. At the meeting on 12 July 2017, the claimant alleged a conspiracy behind the proposal to move him and handed in his without prejudice letter asserting the respondent was in breach of contract. These actions would seem to negative an inference of affirmation. Furthermore, during the meeting on 12 July 2017, the claimant said more than once that he had not expected some of the matters being raised on that occasion and the meeting was left on the basis that both parties would go away and do some thinking. The respondent's follow-up letter did not come until September and shortly thereafter the claimant resigned.

91. Notwithstanding the delay and receipt of sick pay, I am satisfied the surrounding circumstances point away from the claimant having affirmed the contract.

Reason for Resignation

92. The claimant resigned because he had lost trust in the respondent (in the person of several managers). This loss of trust came about because of the failure by the respondent to protect him from injury, the response to his initial complaints and grievance, and finally the instruction on 22 March 2017 that he must work from Techno. His resignation was in whole or large measure because of the repudiatory breach.

Unfair Dismissal

93. The claimant having accepted the respondent's repudiatory breach of contract by resigning, there was a dismissal.

94. The respondent does not contend there was a fair reason for dismissal.

Remedy

95. Subject to the question of liability, the parties had agreed figures for remedy (the basis for and calculation of which were explained and appeared correct) and I make awards in those sums.

Conclusion

96. Accordingly, the claimant's unfair dismissal claim is well-founded and succeeds.

97. The claimant is entitled to:

    97.1. Basic Award £2,253.15;

    97.2. Compensatory Award £26,036.64

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Employment Judge Maxwell

Date: 18 December 2018