Claim No. 2423871/2017

EMPLOYMENT TRIBUNAL

BETWEEN

CLAIMANT	AND	RESPONDENT
Mr Stuart Marsh		Westward Airways (Lands End) Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: BODMIN

On Thursday, the 27th September 2018
and Friday, the 28th September 2018

Employment Judge: Mr D. Harris (sitting alone)

Representation:

For the Claimant: In person
For the Respondent: Mr Nazim Shah (Solicitor)

JUDGMENT

1. The Claimant's claim of unfair dismissal is dismissed.

2. In respect of the Claimant's claim of an unlawful deduction from his wages, the finding of the Tribunal was that the Respondent had unlawfully deducted the sum of £1,685.83 from the Claimant's wages.

3. The Respondent shall pay to the Claimant the sum of £1,685.83 being the sum unlawfully deducted by the Respondent from the Claimant's wages.

REASONS

1. By his Claim Form received by the Employment Tribunal Office on the 20th November 2017, the Claimant brought the following claims against the Respondent:

   1.1 constructive unfair dismissal;
   1.2 an unlawful deduction by the Respondent from the Claimant's wages.

2. The Claim Form also claimed damages for personal injury in the sum of £1,000 for a stress-related injury that the Claimant experienced during the 3 months' notice period that he worked after giving written notice of his resignation to the Respondent on the 29th June 2017. That claim was dismissed by the Tribunal for want of jurisdiction.

The claim of constructive unfair dismissal

3. The Claimant's claim of constructive unfair dismissal was set out in his Claim Form, which was treated by the Tribunal as his evidence-in-chief in the absence of a witness statement from the Claimant. In summary, he contended that the Respondent was in fundamental breach of his contract of

employment by refusing requests for holiday leave that he made in 2017 and by publishing the Claimant's result of revalidation testing in the Spring 2017 edition of the Respondent's in-house magazine.

4. The claim of unfair dismissal was denied by the Respondent. In relation to the allegation that the Respondent had unreasonably refused the Claimant's requests for holiday leave, the Respondent accepted that the requests had been refused but asserted that the requests had been refused for valid business reasons. It was denied that the refusal of the requests for holiday leave amounted to a fundamental breach of the Claimant's contract of employment.

5. In relation to the publication of the Claimant's revalidation results in the in-house magazine, the Respondent accepted that the results should not have been published without the Claimant's knowledge and permission but it contended that its intention in publishing the results was to celebrate the achievements of the Claimant and his work colleagues. It was denied that the publication of the results amounted to a fundamental breach of the contraction of employment.

6. The Tribunal heard oral evidence from the Claimant and from three witnesses that were called to give evidence by the Respondent: namely, Christopher Pearson (Airport Manager & Senior Air Traffic Control Officer), Deborah Stephens (Deputy Air Manager) and Stuart Reid (Chief Financial Controller).

7. In addition to hearing oral evidence from the above-named witnesses, the Tribunal also read and considered the 81-page bundle of documents that had been prepared by the Respondent and the Claimant's contract of employment dated the 29th October 2014 that was produced by the Respondent during the final hearing.

8. When cross-examined, the Claimant explained that the airport at which he worked for the Respondent, namely Land's End Airport at Kelynack, St. Just, Penzance in Cornwall, is recognised as a Level 3 Airport by the Civil Aviation Authority. To maintain the status as a Level 3 Airport, the Respondent must ensure, inter alia, that at least 4 firefighters are on duty whilst the airport is in operation. In order to achieve that target, the Respondent maintained 2 crews of firefighters, with 5 firefighters in each crew. That meant that at any particular time, if one firefighter from one of the crews was absent for any reason, there remained 4 firefighters in that crew. If the number of firefighters on duty dropped below 4 for any reason, then the Respondent's airport would lose its Level 3 status and would be downgraded to Level 2. If that were to happen, there would be serious consequences for the Respondent's business. The operations that the Respondent would be able to undertake from the airport would be significantly curtailed if it was downgraded to Level 2. That was not disputed by the Claimant.

9. The Claimant then explained the contractual position regarding requests for holiday leave. The position was set out in the contract of employment dated the 29th October 2014. Under the heading, "**Holidays**", the following paragraph appeared:

> **Holiday periods must be agreed in advance with your Manager and should avoid peak periods. Usually only one person from each RFFS watch will be allowed on leave at any one time. Exceptionally, your Manager may approve otherwise if cover can be provided.**

10. The Claimant stated that in January 2017 he had requested a fortnight's leave for the last week of September and the first week of October 2017. That request was refused by Deborah Stephens on the grounds that another member of the Claimant's crew might be on a training course for the first week in October 2017. The Claimant asked whether the training course could be brought forward to June 2017 but that request was refused by Deborah Stephens. The Claimant came up with a number of solutions that he thought would enable his request for leave for the first week in October 2017 to be granted but each of his proposals was dismissed by Deborah Stephens. Then, a fortnight later, the Claimant was informed that he would not be able to go on leave for the last week of September 2017 because that

date too potentially clashed with a training course for another member of the crew.

11. The Claimant was disappointed and frustrated that his request for leave in September and October 2017 had been refused but he accepted the decision.

12. The Claimant next requested leave on the 26th April 2017 for the 1st and 2nd May 2017. Those dates coincided with the World Pilot Gig Championships, which are held on the Isles of Scilly each year over the early May Bank Holiday weekend. The Claimant accepted that that was the Respondent's busiest weekend of the year as it flew all the competitors and spectators to and from the Isles of Scilly. The Claimant's request for leave over that weekend was refused by Deborah Stephens and Christopher Pearson because it was the Respondent's busiest weekend in the year and because it would put the Respondent at risk of being downgraded to Level 2 if another crew member were to go on sick leave over the weekend. In response to the refusal of his request for leave in early May 2017, the Claimant submitted a grievance to the Respondent.

13. Not long after the request for the May leave had been refused, the Claimant discovered that his revalidation results had been published by the Respondent in its in-house magazine. It showed that he had achieved the lowest test results compared to his colleagues. It also gave an incorrect percentage result for the Claimant. He was upset that his results had been made public and he told the Tribunal that he had been teased by his colleagues about the results.

14. The Claimant also discovered, around that time, that a work colleague had been granted a request for leave at short notice, which made the Claimant feel that he was being treated differently from others. In a further grievance that he submitted to the Respondent on the 4th August 2017, he stated that he felt discriminated against and bullied. The Claimant explained to the Tribunal that it was against that background that he resigned by way of his letter of resignation dated the 29th June 2017.

15. The Claimant's letter of resignation stated:

> **It is with genuine sadness that I find myself with no remaining alternative but to offer my 3 months notice to resign from my role within the Fire Crew at Lands End Airport finishing date being 30th September 2017.**
> **I will be taking away many happy memories, and hopefully leaving some as well.**

16. The Claimant explained, in cross-examination, that he felt that his opening sentence in his letter of resignation summed up his position. He explained that it was the cumulative effect of the refusals of his requests for leave, the publication of his test results and the discovery that a work colleague had been granted leave at short notice that led to his decision to resign.

17. The first witness called by the Respondent was Christopher Pearson. He explained the reasons for the refusals of the Claimant's requests for leave. In respect of the request that had been made in January 2017 for leave in September/October 2017, Mr Pearson stated that the proposed dates for the leave clashed with a fire training course. He stated that the course could not be re-scheduled to June 2017, as suggested by the Claimant, as that would have meant that the Respondent lost 4 months of training certification that would otherwise have expired in September/October 2017. He stated that the Claimant's proposal of a shift-swap could not be entertained because of the length of the leave. In respect of the leave that had been requested in May 2017, Mr Pearson stated that it clashed with the World Pilot Gig Championship on the Isles of Scilly. That was a peak period for the Respondent and for that reason leave could not be granted. Mr Pearson also stated that another employee's request for the same period had been refused, thereby making the point that the Claimant was not being singled out.

18. In relation to the publication of the Claimant's test results, Mr Pearson stated that the reason the results were published was because it was felt by the Respondent that they were excellent. He conceded, however, that the results should not have been published without the Claimant's permission and he stated that a new policy had been put in place which requires employee approval prior to publishing.

19. The Tribunal next heard from Deborah Stephens. Her explanation of the reasons for refusing the Claimant's requests for leave were consistent with the reasons given by Mr Pearson.

20. The last witness for the Respondent was Mr Stuart Reid. He gave evidence as to the ways in which the Respondent had dealt with the Claimant's grievances and gave evidence about the recoupment of training costs from the Claimant's wages when his contract of employment came to an end.

The law applicable to the claim of constructive unfair dismissal

21. When considering the principles of law relevant to the claim, the Tribunal reminded itself of the provisions of Sections 95 and 98 of the Employment Rights Act 1996. The Tribunal also reminded itself of the following authorities: *Western Excavations v. Sharp* [1977] EWCA Civ 165, *W.E. Cox Toner (International) Ltd v. Crook* [1981] ICR 823, *London Borough of Waltham Forest v. Omilaju* [2004] EWCA Civ 1493, *Software 2000 Ltd v. Andrews & others* UKEAT/0533/06 and *Shipperly v. Nucleus Information Systems Ltd* UKEAT/0340/06.

22. The Tribunal adopted the approach that it was for the Claimant to show that he was entitled to treat himself as dismissed by the Respondent by reason of a fundamental breach of contract on the part of the Respondent. In respect of the last straw doctrine, which had been raised by the Claimant, the Tribunal reminded itself that the quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of contract on the part of the Respondent. The act complained of does not have to be of the same character as the earlier acts but its essential quality, when taken in conjunction with the earlier acts complained of, amounts to a breach of the implied term of trust and confidence. The final straw must contribute something to that breach although what it adds may be relatively insignificant.

23. Furthermore, if the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need for the Tribunal to examine the earlier history to see whether the alleged final straw does in fact have that effect.

The decision on the claim of constructive unfair dismissal

24. On the basis of the evidence it heard and the principles of law summarised above, the Tribunal was not satisfied that the Claimant had shown that he was entitled to treat himself as dismissed by the Respondent by reason of a fundamental breach of contract on the part of the Respondent.

25. The Tribunal was satisfied that the Respondent's refusal of the Claimant's requests for annual leave in 2017 did not amount to a fundamental breach of the Claimant's contract of employment. The Tribunal was satisfied that there were sound and valid business reasons for refusing the requests that had been made by the Claimant. The Tribunal rejected the Claimant's case that he was being victimised or bullied by Deborah Stephens when she refused his requests for leave. There was no basis for a finding by the Tribunal that the Claimant was being treated differently from others in relation to requests for holiday leave. Though the Claimant was able to point to a colleague who had been granted leave at short notice in May 2017, it was clear to the Tribunal that the period of leave that was granted on that occasion did not clash with a peak period or give rise to any operational problems for the Respondent. The same could not be said for the requests that had been made by the Claimant.

26. The first request, in January 2017, clashed with an essential firefighting training course and the second request, in April 2017, clashed with the Respondent's busiest weekend of the year. It was clear to the Tribunal that the Respondent had considered the impact of the Claimant's requests upon its operational activities and its business and it had sound economic reasons for refusing the requests. There was no hostility being shown towards the Claimant when his requests were refused. The Claimant was plainly disappointed by the Respondent's refusals of his requests but that did not render the refusals a fundamental breach of the Claimant's contract of employment.

27. The Claimant undoubtedly believed that he was being treated unfairly by the Respondent but the Tribunal was satisfied that he was not being treated differently from others in the way that his requests for leave were dealt with. Those requests were dealt with in accordance with the contractual position regarding requests for holiday leave and the Claimant was unable to show that there had been any breach of contract on the part of the Respondent.

28. In relation to the publication of the Claimant's test results, the Respondent had acknowledged that the results should not have been published without the Claimant's permission. It was for the Tribunal to consider whether the publication, by itself or taken with the Respondent's refusals of the requests for holiday leave, amounted to a fundamental breach of contract. On that question, the Tribunal was satisfied that there had been no breach of the implied term of trust and confidence in the Claimant's contract of employment. The Respondent had not intended to cause any distress or upset to the Claimant by publishing the results. The Respondent, so the Tribunal found, was genuinely proud of the results that had been achieved by the Claimant and his colleagues and wanted to celebrate the achievement. Though the Claimant, had he been asked, did not want the results to be published, the Tribunal was satisfied that the publication, against the Claimant's wishes, did not amount to a fundamental breach of contract on the part of the Respondent. Upon discovering that the Claimant had not wanted the results published, the Respondent apologised promptly to the Claimant and put in a place a new measure to ensure that the same thing could not happen again. Against that background, the Tribunal was not persuaded that the relationship between the Claimant and the Respondent had been destroyed by the publication of the results.

29. The Claimant put his case on the basis that it was the cumulative effect of the refusals of his requests for holiday leave, the publication of the test results and his discovery that a colleague had been granted leave at short notice that amounted to a fundamental breach of contract on the part of the Respondent. The Tribunal, however, for the reasons set out above, did not accept that case. The Claimant had failed to establish a final straw that was capable of contributing to a series of earlier acts that showed a fundamental breach of contract by the Respondent and had failed to establish a series of acts, taken individually or together, that showed a fundamental breach of contract by the Respondent. The claim of constructive unfair dismissal is therefore dismissed.

The unlawful deduction claim

30. This claim can be dealt with shortly. The background to the claim is the Respondent's recoupment of the sum of £1,685.83 from the Claimant's wages when his contract of employment came to an end. The recoupment had been achieved by reducing the Claimant's entitlement to holiday pay by the sum of £976.42 and then by deducting two lump sum payments of £354.71 and £354.70 from the Claimant's wages for August and September 2017.

31. The total sum of £1,685.83 represented the Respondent's assessment of the balance of training costs that it contends were recoverable from the Claimant's wages. The Claimant had undertaken training in February 2017 at a cost to the Respondent of £2,380.

32. On the 15th March 2017, the Claimant signed a "Training Agreement", which authorised the Respondent to recover the cost of training from his wages at a reducing rate over a 2-year period following the training (in the event of the contract of employment being terminated during that 2-year period). According to the formula set out in the Training Agreement, at the time when the Claimant's contract of employment came to an end, the sum of £1,685.83 was recoverable in respect of the cost that had been incurred in providing the Claimant with training in February 2017.

33. The difficulty, however, for the Respondent was that the Training Agreement post-dated the training. The Claimant had undertaken the training in February 2017 and he signed the Training Agreement on the 15th March 2017. In the judgment of the Tribunal, it was not permissible for the Respondent to seek to recover the cost of training that had taken place before the Training Agreement had been signed. If the training had taken place after the 15th March 2017, then on the face of it, the cost of the training could have been recouped to some degree. On the facts of the case, however, the training had taken place before the Training Agreement had been signed, which meant, in the judgment of the Tribunal, that it was not permissible for the Respondent to seek to recover the cost, or part thereof, of the training that had taken place in February 2017.

34. Accordingly, there had been an unlawful deduction from the Claimant's wages in the sum of £1,685.83. The Tribunal therefore ordered that that sum be repaid to the Claimant.

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Employment Judge David Harris

Dated: 5th November 2018