EMPLOYMENT TRIBUNALS

Claimant: **Mrs. T Oakes**

Respondent: **Streamline Press Limited**

Heard at: **Via Cloud Video Platform**

On: **18th, 19th and 20th January 2021**

Before: **Employment Judge Heap**

Representation
Claimant: **Mr. J Fireman – Counsel**
Respondent: **Ms. C Thompson – Solicitor**

COVID-19 Statement

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was V – fully remote. A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The complaint of a breach of Section 11 Employment Relations Act 1999 is dismissed on withdrawal.

2. The claim of constructive unfair dismissal is well founded and succeeds.

3. The complaints of detriment contrary to Section 45A Employment Rights Act 1996 are well founded and succeed.

4. The complaint of a breach of Regulation 12 Working Time Regulations 1998 is well founded and succeeds.

5. The remedy to which the Claimant is entitled will be determined at a Remedy hearing with a time estimate of 3 hours. Notice of hearing will follow.

6. Case Management Orders are attached.

REASONS

BACKGROUND & THE ISSUES

1. This is a claim brought by Mrs. Tracey Oakes (hereinafter referred to as "The Claimant") against her now former employer, Streamline Press Limited (hereinafter referred to as "The Respondent") presented by way of a Claim Form received by the Employment Tribunal on 2nd October 2019. The Claim is one of unfair constructive dismissal contrary to Sections 95 and/or 101A Employment Rights Act 1996; detriment contrary to Section 45A of that Act and a breach of Regulation 12 Working Time Regulations 1998. All claims are resisted by the Respondent.

2. The claim has been the subject of two Preliminary hearings but unfortunately those did not identify that the Claimant was advancing complaints of detriment and so the hearing was listed before an Employment Judge sitting alone. Prior to the commencement of the hearing that position was notified to the parties and helpfully both were prepared to consent to the hearing proceeding before me sitting alone. Both parties provided written consent to that position in accordance with Section 4(3)(e) Employment Tribunals Act 1996 and so the hearing was able to proceed accordingly. I am grateful to both parties for their cooperation in respect of that matter.

THE CLAIMANT'S POSITION

3. The Claimant contends that from June 2016 onwards she and her fellow workers were not afforded adequate rest breaks as required by Regulation 12 Working Time Regulations 1998. Her position is that the only breaks that were provided were ad hoc of no more than 5 or 10 minutes or so on a sporadic basis. She contends that she complained about that state of affairs and as a result was subjected to detrimental treatment at a meeting in June 2019 and on 31st July 2019 by her then line manager, Mr. Sims.

4. It is common ground that the Claimant left work at the Respondent on 31st July 2019 never to return and that she had resigned. Her position is that in doing so she was constructively dismissed and she relies on the following five incidents as being destructive of the implied term of mutual trust and confidence and/or in the alternative that she was constructively dismissed contrary to Section 101A Employment Rights Act 1996.

5. It was clarified by Mr. Fireman that the acts that the Claimant relies upon as being destructive of mutual trust and confidence are the following:

    a. The Respondent's breach of its obligations to provide the Claimant with a 20 minute uninterrupted rest break away from her workstation;
    b. The Claimant being informed at a meeting in April 2017 that she was not entitled to rest breaks and how the Respondent dealt with her earlier grievance about those matters;
    c. The Claimant being informed at a June 2019 meeting that it was not how the Respondent worked to give rest breaks;
    d. The Claimant again raising concerns about the issue of rest breaks during hot weather and her desire for breaks to be provided; and

e. The events of 31st July 2019 in respect of meetings with Alan Squire and Kevin Sims.

6. The Claimant also relies upon, as part of the background to those matters, what she says was a continuous pattern of her raising complaints or concerns about the lack of rest breaks and the way in which the Respondent dealt with those.

THE RESPONDENT'S POSITION

7. The Respondent contends entirely to the contrary. It is their position that the Claimant was afforded adequate rest breaks in accordance with Regulation 12 Working Time Regulations 1998 and that she was not subjected to any detriment as a result of raising complaint about that position.

8. Insofar as the matter of constructive dismissal is concerned, the Respondent's position was that there was no fundamental breach of contract which entitled the Claimant to resign and as such she should not be treated as having been dismissed.

THE HEARING

9. The claim was originally listed for 3 days of hearing time. As a result of the ongoing Covid-19 pandemic, the hearing proceeded by entirely remote means via Cloud Video Platform.

10. It is fair to say that there were some technical difficulties encountered during the hearing but fortunately those were able to be overcome and I am satisfied that we were able to have an effective hearing.

WITNESSES

11. During the course of hearing, I heard evidence from the Claimant on her own behalf. In addition to his evidence, I also heard from the Claimant's husband, Mr. Stephen Oakes.

12. I also heard from a number of individuals on behalf of the Respondent. Those individuals were as follows:

- Alan Squire – a former Director of the Respondent;
- Kevin Sims – the Claimant's line manager during the course of her employment with the Respondent;
- Sean Nooney – a manager working for the Respondent in the finishing team;
- Joseph Hawker – a finishing operator employed by the Respondent;
- Violeta-Daniela Tufan – a finishing assistant employed by the Respondent; and
- Denise Darby – a hand finisher employed by the Respondent.

13. The Respondent also adduced a witness statement from a now former employee, Connor Hearne. Mr. Hearne was not called to give evidence and I understand in that regard that he has left employment with the Respondent. I was nevertheless invited to place reliance on that statement. For the reasons that I shall come to

below, I have not found myself able to place any reliance on Mr. Hearne's witness statement given that his evidence has not been tested.

14. I make my observations in relation to matters of credibility in respect of each of the witnesses from whom I have heard oral evidence below.

15. In addition to the witness evidence that I have heard, I have also paid careful reference to the documentation to which I have been taken during the course of the proceedings and also to helpful submissions made by Mr. Fireman on behalf the Claimant and Ms. Thompson on behalf of the Respondent.

CREDIBILITY

16. One issue that has invariably informed my findings of fact in respect of the complaints before me is the matter of credibility. That is not least on the basis that the parties are diametrically opposed on the core issue of whether there was an entitlement to rest breaks which can largely only be resolved via witness evidence. Therefore, I say a word about the issue of credibility now.

17. I begin with my assessment of the Claimant. Ultimately, I found her to be a credible and satisfactory witness. The evidence that she gave was consistent with the documentary evidence; her Claim Form and her witness statement. The Claimant was able to give significant detail in respect of certain parts of her evidence, such as the detail in respect of conversations or meetings that she had attended. Whilst Ms. Thompson points to the fact that the Claimant's statement referenced not even being afforded "so much as a five minute break" but there having been an acceptance that on occasion a ten minute break might have been taken and references that as exaggeration, I am satisfied that that evidence was not exaggerated or inconsistent as the Claimant's consistent account was that on the vast majority of days that were worked she would not be afforded a break at all.

18. I was also satisfied that the evidence of Mr. Oakes was credible and that he was giving a truthful account. Whilst he has some form of vested interest in these proceedings as the Claimant's husband, I take account of the fact that he has remained a loyal and valued employee of the Respondent. I consider it highly unlikely that he would give false evidence against his present employer with whom he has a longstanding career.

19. I was less impressed with the witnesses for the Respondent. In respect of Mr. Squire whilst I considered some elements of his evidence to be truthful, I certainly did not accept his account on the core element of breaks or how they were dealt with. Particularly, his account that it was always intended that staff would take "sensible breaks" to eat their lunch and that they were aware in both June 2016 and again in April 2017 when the entitlement to a rest break was raised by the Claimant that the "sensible breaks" would still include a 30 minute paid lunch break.

20. Amongst other things, that is not consistent with paragraph 8 of the ET3 Response which references a 20 minute paid lunch break; was not consistent with the evidence of other witnesses who also referenced a 20 minute lunch break and, most importantly, did not make sense. In this regard, the evidence of Mr. Squire was that his intention was that workers would still have a break of no

less than 30 minutes, but if that was the case it begs the question why it was necessary to have a meeting in June 2016 to specifically remove that entitlement from them.

21. I did not consider Mr. Noony or Mr. Sims to be particularly compelling witnesses, especially, as I shall come to, I considered the evidence of both Mrs. Futan and Mr. Hawker to be, in the case of the former untruthful, and in the case of the latter at best unreliable. I am satisfied that that gave credence to the account of Mr. Oakes that the Respondent had placed pressure on employees to give evidence in support of their position.

22. That position was also supported by the fact that by the time of the hearing the Respondent was no longer calling Connor Hearne to give evidence because he was not working for the Respondent anymore. No application for a Witness Order was made. As his evidence has not been tested and of those staff whose was, they failed to come up to proof, I can place no weight on it.

23. Ultimately, I accept the position as advance by Mr. Fireman that the Respondent's witnesses were effectively toeing the party line.

24. The exception to that was Ms. Darby who I did not consider to be untruthful or unreliable but who, ultimately, was not able to give any actual evidence relevant to the Claimant's circumstances or the issues in the claim. She could speak only to her own position under different line management working a different job in a different building.

25. Finally, I return to the evidence of Mr. Hawker and Mrs. Futan. In respect of the former I considered his evidence to at best be unreliable given his clear recollection in his witness statement was that he "could confirm" that Mr. Sims had not told the Claimant to "get out" but his oral evidence was that he had been too far away to hear any of the conversation at all. He was not able to reconcile that evidence with what had been put in his statement and I remind myself that each witness was given the opportunity to correct any inaccuracies at the outset of their evidence. Mr. Hawker did not do so. Moreover, he maintained that an entitlement to a 30 minute paid rest break was included in his contract of employment yet admitted that he had not in fact read it to confirm that position. If the rest break was included in a contract of employment, I have no doubt that it would have been disclosed in support of the Respondent's position. I therefore found his evidence, at best, unreliable.

26. His evidence (and that of Ms. Futan and Mr. Sims) that the Claimant would refuse to take her breaks when they were offered to her also held absolutely no logic. It is inconceivable to think that a person who had gone so far as to raise a grievance about rest breaks, bring it to the attention of her local member of parliament and worked in a relatively monotonous role in a noisy and dirty factory environment would refuse a break when it was specifically offered to her. I did not accept that evidence at all.

27. Turning then to Ms. Futan, I found her evidence to be inconsistent, unreliable and entirely lacking in credibility. Particularly, she was not able to give any credible account of why messages that she exchanged with the Claimant clearly appeared to agree that there had been a meeting at which they were told that staff were not entitled to breaks. She was at pains to say that the "rules" to which

she referred to in those messages was about a move to work in a different building. That flew in the face of the Claimant's evidence (which I accepted) that she had no problem at all with that move and Mrs. Futan's own witness statement set out that the Claimant had a problem with breaks, not the requirement to work at a different site. Mrs. Futan's oral evidence differed entirely on that point and she was evasive when asked to explain it by Mr. Fireman. Moreover, the message exchange was clearly about an issue of breaks and nothing about the move to premises over the road was referenced.

28. Mrs. Futan's evidence was also not credible given that she claimed in her witness statement to have attended a meeting in April 2017 regarding the removal of a contractual entitlement to paid rest breaks. When it was pointed out to her by Mr. Fireman that she would not have attended that meeting because at the time she was employed by Data Mail (who operated out of the Respondent's premises) and not the Respondent and all Data Mail employees were entitled to an undisputed paid rest break, her position changed and she accepted that she was not at the meeting. Her position then changed again and she gave an unconvincing account as to how she had come to attend the meeting but not participate. That was not consistent with her witness statement which made it plain that she was saying that *"we had been incorrectly told that we were entitled to a 30 minute break"*. As a Data Mail employee, there was no question that she was entitled to that break and so no reason at all for her to be at the meeting.

29. A further issue of significance in Mrs. Futan's evidence was that during the course of cross examination she made reference to lunch breaks being 10 to 20 minutes. That was of significance firstly because it aligned with part of the Claimant's evidence that breaks of no more than ten minutes here and there were allowed and secondly that anything less than 20 minutes would not accord with the requirements of Regulation 12 Working Time Regulations 1998.

30. When Mrs. Futan was asked by Mr. Fireman to repeat her answer she omitted any reference at all to ten minutes. When I raised with her that she appeared to have now changed her reply and reminded her of her evidence only a few seconds earlier she denied having made any reference to 10 minutes. I have a clear note of her first answer and am satisfied that her evidence changed, no doubt when she realised her error in referring to anything less than 20 minutes being taken for lunch.

31. In short, unless I have expressly said otherwise, I prefer the evidence of the Claimant to that of the Respondent.

THE LAW

32. Before turning to my findings of fact, I remind myself of the law which I am required to apply to those facts as I have found them to be.

Constructive Unfair Dismissal

33. A dismissal for the purposes of Section 95 Employment Rights Act 1996 includes a situation where an employee terminates the employment contract in circumstances where they are entitled to do so on account of the employer's conduct – namely a constructive dismissal situation.

34. Tribunals take guidance in relation to issues of constructive dismissal from the leading case of **Western Excavating – v – Sharp [1978] IRLR 27 CA**:-

"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; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

35. Implied into every contract is a term that an employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. Breach of that implied term, if established, will inevitably be repudiatory by its very nature.

36. The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is to be judged by an objective assessment of the employer's conduct. The employer's subjective intentions or motives are irrelevant. The actual effect of the employer's conduct on an employee are only relevant in so far as it may assist the Employment Tribunal to decide whether it was conduct likely to produce the relevant effect.

37. If there is a fundamental breach of contract, an employee must, however, resign in response to it. That requirement includes there being no unconnected reasons for the resignation, such as the employee having left to take up another position elsewhere or any other such reason if that is unrelated to the breach relied upon. However, if the repudiatory breach was part of the cause of the resignation, then that suffices. There is no requirement of sole causation or predominant effect (see **Nottinghamshire County Council v Meikle [2004] IRLR 703**).

38. It is possible for an employee to waive (or acquiesce to) an employer's breach of contract by their actions. In those circumstances, an employee will affirm the contract and will be unable to rely upon any breach which may have been perpetrated by the employer in seeking to argue that they have been constructively dismissed.

39. In addition to complaints of "ordinary" constructive unfair dismissal, there are certain categories which are "automatically" unfair. One of those categories is where an employee has been dismissed (including constructively dismissed) where the reason or principle reason for that dismissal is that the employee refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998 or refused (or proposed to refuse) to forgo a right conferred on him by those Regulations.

Complaints pursuant to Section 45A Employment Rights Act 1996

40. Section 45A Employment Rights Act 1996 provides as follows:

"45A. Working time cases.

A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker—

(a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,

(b)refused (or proposed to refuse) to forgo a right conferred on him by those Regulations,

(c) failed to sign a workforce agreement for the purposes of those Regulations, or to enter into, or agree to vary or extend, any other agreement with his employer which is provided for in those Regulations,

(d) being—

(i) a representative of members of the workforce for the purposes of Schedule 1 to those Regulations, or

(ii) a candidate in an election in which any person elected will, on being elected, be such a representative, performed (or proposed to perform) any functions or activities as such a representative or candidate,

(e) brought proceedings against the employer to enforce a right conferred on him by those Regulations, or

(f) alleged that the employer had infringed such a right.

(2) It is immaterial for the purposes of subsection (1)(e) or (f)—

(a) whether or not the worker has the right, or

(b) whether or not the right has been infringed".

41. Claims of unlawful detriment under Part V of the ERA - which includes Section 45A Employment Rights Act - can be enforced by complaint to an Employment Tribunal under Section 48 of that Act. Section 48(2) provides that on such a complaint, "*It is for the employer to show the ground on which any act or deliberate failure to act was done*."

42. The term “detriment" is not defined within the Employment Rights Act 1996 but guidance can be taken from discrimination authorities and, particularly, from **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285.** In this regard, for action or inaction to be considered a detriment, a Tribunal must consider if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. However, an "unjustified sense of grievance" is not enough to amount to a detriment.

43. When considering a claim of detriment in this context, the Tribunal is concerned with the ground, or reason, for the employer’s action or decision. In both cases this must be that the worker has refused, or proposed to refuse, to comply with a requirement that the employer imposed (or proposed to do so) in contravention of the Working Time Regulations (here, to forego the rest breaks as provided by Regulation 12). Under Section 45A Employment Rights Act, the requirement is only that this is the ground for the employer’s action; that is, that it materially influenced – in the sense of being more than a trivial influence - the employer’s actions.

Rest breaks

44. An entitlement to rest breaks is provided for by Regulation 12 Working Time Regulations 1998. The relevant parts of that Regulation are as follows:

> *“(1) Where an adult worker’s daily working time is more than six hours, he is entitled to a rest break.*
>
> *(2) The details of the rest break to which an adult worker is entitled under paragraph (1), including its duration and the terms on which it is granted, shall be in accordance with any provisions for the purposes of this regulation which are contained in a collective agreement or a workforce agreement.*
>
> *(3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one.”*

FINDINGS OF FACT

45. I ask the parties to note that I have only made findings of fact where those are required for the proper determination of the issues in this claim. I have inevitably therefore not made findings on each and every area where the parties are in dispute with each other where that is not necessary for the proper determination of the complaints before me. The relevant findings of fact that I have therefore made against that background are set out below. References to pages in the hearing bundle are to those in the bundle before me and which were before the Tribunal and the witnesses.

46. The Claimant commenced employment with the Respondent on 6th April 2016 as a Print Finishing Assistant within the Alpha Card Department ("The Department"). Her application for that position followed on from her being notified about a vacancy for a Print Finishing Assistant with the Respondent by her husband, Stephen Oakes. Mr. Oakes was already in employment with the Respondent and still remains in their employ. He is a longstanding employee of nearly a decade and I accept the Claimant's evidence that he is somewhat laid back and less inclined to make waves or be concerned about issues like taking breaks.

47. The position with the Respondent suited the Claimant because she had recently left an administrative post for family reasons; needed some flexibility to be able to take telephone calls for the same family reasons and had undertaken that type of work previously.

48. The work that the Claimant undertook in the Department involved taking finished product from the production line and then placing it in boxes and on to pallets. She worked, generally speaking, an 8-hour shift between 8.00 a.m. and 4.00 p.m. On occasion the Claimant would work for up to 10 hours but no more than that; her evidence being that she flatly refused to work a 12 hour shift as some other employees, Mr. Oakes included, would often do.

49. There are two units from which the Respondent operates which are unit 11 and unit 42. The Claimant and the other Alpha Card employees are based at unit 42 although staff do switch between units when the need arises. Unit 11 houses administrative as well as production staff. Both units have a canteen and there is a mobile sandwich van ("The Cob Van") which the Respondent has for the use of both sites where staff can purchase hot and cold sandwiches. The Cob Van is situated two minutes' walk or so from unit 42. The evidence of Mr. Oakes, which I accept, is that on the odd occasion when he did use the Cob Van he would order his food, return to his workstation whilst it was prepared, collect it and then eat at his machine whilst still operating it unless it was a runny egg sandwich where he would turn his machine off whilst he ate his lunch. I accept, however, for the most part Mr. Oakes did not leave his work station during the working day and would eat his lunch whilst he was still operating his machine.

50. It is not in dispute that at the time that the Claimant joined the Respondent she was told at interview by her interviewing manager, Alan Hague, that she would be entitled to a paid half hour lunch break. That was an error by Mr. Hague who, it seems, had become confused by arrangements for other employees within the Department who had transferred to the Respondent under the Transfer of Undertakings (Protection of Employment) Regulations ("TUPE") and had had the entitlement to a paid half hour break included within their contracts of employment prior to the transfer. It does not appear to be in dispute that at that time the way that breaks worked was that they would generally be taken between 12.30 p.m. to 1.00 p.m. when the machines would be turned off and staff would eat their lunches. Where a job was urgent breaks would be staggered with some staff remaining on the machines and taking their break half an hour either side of the usual time for lunch. Staff therefore covered for one another whilst they were able to take their lunch breaks.

51. It is also not in dispute that in June 2016 the Claimant and other Alpha Card staff (other than those who had transferred to the Respondent via TUPE) were told by Mr. Squire that they had been incorrectly told that they were entitled to a paid 30 minute rest break and that was being removed.

52. I accept the evidence of the Claimant that from that time until April 2017 there were no arrangements for breaks to be taken and that any that were provided by the Respondent were ad hoc and of ten minutes or so duration when production was paused or when Mr. Sims went over the road to unit 11. I also accept that those breaks were not able to be taken every day or with any form of regularity. I do not accept the evidence of the Respondent that regular breaks were being taken as that flies in the face of the Claimant's grievance, which I come to below.

53. The evidence of Mr. Squire was that from June 2016 the Respondent implemented a policy of "sensible breaks". By this, it is said (by Mr. Squire at least) that this still included a 30 minute paid lunch break and other breaks during the course of the day as and when production dictated.

54. As I have already said above, I do not accept that from June 2016 the Respondent was complying with the Working Time Regulations. By April 2017 the Claimant decided to raise a grievance about the lack of rest breaks afforded to herself and her colleagues and she wrote to Mark Lockley, a Director of the Respondent, on 24th April 2017 about that situation. I accept that the Claimant's colleagues had also discussed amongst themselves their dissatisfaction with the situation, but the Claimant was the more vocal of the group and therefore the one to raise the matter with the Respondent. If regular breaks were being taken and the Working Time Regulations were being complied with, there was no reason why the Claimant would have raised her grievance.

55. The pertinent parts of the Claimant's letter said this:

> *"When I started working at Streemline* (sic) *(Alpha Card Dept.) over thirteen months ago it was on the understanding (albeit verbal) that we all had a thirty minute paid lunchbreak. This arrangement worked very well as we staggered our breaks so that all positions were covered and production did not suffer.*
>
> *……..*
>
> *I can honestly say that every "Alpha" employee works extremely hard, usually for up to twelve hours a day without any rest breaks, eating their lunch whilst operating machinery in a very dusty and noisy environment. I believe that this is detrimental to their health & wellbeing.*
>
> *We only ask that we be allowed to take a 20 minute rest break (legal requirement), away from our work stations to eat our lunch. I do understand that this break does not have to be paid. We have enough staff to cover each position (as we do when the smokers take cigarette breaks). The smokers are taking up to four cigarette breaks daily (average time taken 6 minutes per break totalling 24 minutes, paid). I feel that this is unfair towards non-smokers as there is no legal right to a cigarette break.*
>
> *These views are shared by all of the Alpha employees that I have spoken to and they said that they would speak up if we had a meeting.*

Can we please have something in writing regarding the rest break so that each employee can decide whether they want to take 20 minutes unpaid, clock in/out 20 minutes earlier/later or decide not to take a break at all?"

56. The Claimant's letter also attached a copy of the Working Time Regulations.

57. I accept the Claimant's explanation that she had waited until she had over one years' service with the Respondent before raising the matter because she believed that that was the qualifying period to bring an Employment Tribunal claim for unfair dismissal (although of course by that time it was two years) and she was concerned that the Respondent might dismiss her for raising a complaint.

58. Although the grievance letter was addressed to Mr. Lockley, he passed it to Mr. Squire to deal with.

59. The evidence of Mr. Squire was that he considered the Claimant's letter to be a grievance. Despite that, he did not follow the Respondent's grievance procedure. Instead, he arranged a meeting with the Alpha Card staff, which included the Claimant and Mr. Oakes.

60. However, I can see why Mr. Squire chose to hold a group meeting with all relevant staff members rather than just the Claimant given her reference to other staff "speaking up" if there was a meeting.

61. I do not accept the evidence of Ms. Tufan (for the reasons given above) that she was present at the meeting and I therefore also do not accept her evidence of what she says happened. I prefer the evidence of the Claimant and Mr. Oakes on that point.

62. At the meeting it is said by the Respondent that there were three "options" given to the Department staff. It would have been obvious that two of those options were not going to be attractive on the basis that they involved either working longer hours to obtain a 30 minute unpaid break or shortening the working day and receiving less pay. The third option that it is said was given was for what Mr. Squire termed paid "sensible" breaks. The evidence of Mr. Squire was that the "sensible" breaks would be as and when production allowed but would include a break for lunch which would not be less than 30 minutes duration. That should be contrasted with the ET3 Response which referenced a 20 minute break; Mr. Sim's evidence that a lunch break would be for 20 to 30 minutes and the evidence of Mr. Harker and Mrs. Tufan that it would be for 20 minutes (or 10 minutes during one of the slips in her evidence).

63. Mr. Squire's evidence was somewhat non-sensical that a paid 30 minute lunchbreak would still be taken given that that exact arrangement was specifically removed from staff in June 2016. The Respondent's position at paragraph 8 of the ET3 Response for the break to be taken at a "sensible" time in production with, for example, cover being provided for breaks on long runs was precisely the arrangement which had been operating well prior to June 2016. If nothing was to change, it is difficult to see why it was necessary to go to the trouble of removing the entitlement to a rest break in the first place.

64. I do not accept the Respondent's evidence that "sensible" breaks provided for somewhere between 20 and 30 minutes for lunch and that that was what was offered. I prefer the evidence of the Claimant that she and others were told that their previous entitlement to a rest break had been a mistake; that they were not going to be permitted a set rest break but that if the Respondent did allow a such break then staff would be required to work for an additional half an hour because a full 8 hour shift was required. That was, of course, one of the "options". I accept that that was not an attractive proposition for those present at the meeting and so it was only the Claimant in reality who was vocal about the issue of breaks. The reality was that "sensible" breaks had no set duration and were intended to be only very ad hoc arrangements during any break in production so that the running of the machines was not compromised. In short, production was prioritised over the Respondent's statutory obligations.

65. I also do not accept that paid 20 or 30 minute rest breaks was what happened in reality either between June 2016 and April 2017 or after the meeting. Mr. Sims' evidence was that staff were thereafter entitled to a 20 to 30 minute rest break at lunch and that that would be dealt with by staff covering for each other whilst they took their lunch. I did not accept that evidence.

66. I also did not accept the evidence of Mrs. Futan or Mr. Harker that they would take breaks of at least 20 minutes for lunch but that the Claimant would refuse when they offered to cover for her whilst she took her own lunch. Aside from the obvious fact that it would be nonsensical for the Claimant to refuse to take a break when she had been campaigning for them for all staff (and Mr. Harker could not explain the illogical nature of that suggestion when asked about it) I did not accept their evidence where it conflicted with that of the Claimant for the reasons that I have already given above.

67. Instead, I accept the Claimant's evidence that after the meeting, breaks of no more than five or ten minutes here and there were allowed and that those would take place during a break in production or when Mr. Sims had to attend a meeting at unit 11. That resulted in people still having to eat their lunch whilst operating machinery and I accept that that was the "norm" because the Respondent wanted to continue to run the machines without breaking production for the full shift.

68. After the meeting, there was no written outcome to the grievance even though the Claimant had requested that in her letter and the Respondent's Grievance Procedure required one to be provided (see page 62 of the hearing bundle). The evidence of Mr. Squire was that he did not think that a written outcome was needed after the meeting.

69. I also accept the Claimant's evidence that she continued to raise the issue of rest breaks with Mr. Sims but her representations did not change the situation. Mr. Sims' evidence was that the Claimant did not discuss breaks with him and his frustration which, as I shall come to, boiled over on 31st July 2019 was because she continued to complain to others and go over his head. However, he accepted that the Claimant may have spoken to him about breaks on 22nd July 2019 and I shall come to that further below. The fact of Mr. Sims frustrations also gives credence to the Claimant's account that she was continually raising the issue of breaks contrary to the Respondent's assertion.

70. In the meantime, in June 2019 there was a further meeting at which the Claimant and two of her then colleagues, including Mrs. Tufan, were present. The meeting was led by Sean Nooney and Mr. Sims. I do not accept the evidence of the Respondent that that was about recent redundancies and the fact that the staff who were present would now need to work at unit 11. Instead, I accept that it was about the fact that the Respondent wanted to raise with the Claimant that she and Mrs. Tufan had been complaining about a lack of breaks. I do not accept that the only reference to breaks was for Mr. Nooney to say that breaks at unit 11 would be the same as at unit 42.

71. I note in accepting the Claimant's version of events that Mr. Sims' maintained that the meeting could not have been about breaks because Mr. Nooney would not have been aware of any complaints about breaks. That was contradicted by Mr. Nooney's own evidence that he was aware that the Claimant had been raising issues about having breaks. Again, that is not consistent with the Respondent's account that she did not raise the matter regularly.

72. I accept that during the meeting, those present were told that it was not how the Respondent worked and that they had never taken breaks. I also accept that they were told that they were lucky to have jobs given the recent redundancies and that they did not want to hear negativity.

73. The Claimant's evidence, which I accept, was that she had been angry about what had been said at the meeting. I can appreciate why that was the case given that again the Claimant had been told that the Respondent was not prepared to comply with the Working Time Regulations and that was clearly a matter of considerable importance to her.

74. At the end of the meeting, the Claimant and others were each asked if they were happy. All others replied that they were other than the Claimant who replied "no comment" on at least two occasions. The fact that the Claimant said "no comment" also reinforces the fact that the meeting was about breaks and not redundancies because the Claimant was more than happy to work at unit 11. It also accords with paragraph 5 of Mrs. Tufan's witness statement (before she sought to change her evidence as set out above) which was that it was the situation with breaks that the Claimant was not happy about. Whilst the Claimant was certainly not happy about the situation, I accept that she made the "no comment" remark because she had been told that there should be no more negativity.

75. On 21st July 2019 the Claimant and her husband had attended her grandson's christening and during the course of the day Mr. Oakes had felt unwell. The following day, the Claimant therefore spoke to Mr. Sims about her husband having a break during the course of his 12 hour shift which he was working in very hot weather. Again, I accept that nothing changed after that point and irregular 5 or 10 minute breaks remained the norm.

76. The Claimant took advice from ACAS on a number of occasions who told her that the Respondent was in breach of the Working Time Regulations.

77. Shortly afterward, on 30th July 2019 the Claimant spoke to David Marsden who I understand to be a Warehouse Manager. She told him what she had been advised by ACAS and he asked her if she wanted to speak to one of the

Directors of the Respondent, Mark Lockley. The Claimant said that she did and Mr. Marsden offered to make the necessary arrangements. Again, if the Respondent was complying with the provision of 20 minute rest breaks as they contend, it would be nonsensical for the Claimant to have asked for this further meeting. It appears that Mr. Squire became aware of the Claimant's request and agreed with Mr. Lockley that he would pick the matter up with the Claimant because he had dealt with the June 2016 meeting. That is therefore what happened.

78. The meeting between the Claimant and Mr. Squire took place on 31st July 2019. I prefer the evidence of the Claimant as to what happened at that meeting to that of Mr. Squire for the reasons that I have already given above with regard to credibility. During the meeting the Claimant told Mr. Squire that she had been advised by ACAS that the Respondent was breaking the law in respect of the matter of rest breaks. Needless to say, if what Messrs. Squire and Sims contended in their evidence was correct and that workers were getting a half hour lunch break plus additional breaks, there would have been no basis for the Claimant to have made these representations to Mr. Squire.

79. I am satisfied that Mr. Squire told the Claimant that the Respondent was only a small company and needed to have the machines running all day so that they could not afford to let the staff take breaks but that he indicated that he would speak to Mr. Sims to see if breaks of ten minutes or so could be taken here and there. I am satisfied that that was Mr. Squire's idea of "sensible breaks" and that the sensible pointed to when there were times that production would not be affected.

80. The Claimant told Mr. Squire that they should be entitled to 20 minutes of break time which was uninterrupted and away from their workstations. She was told in reply that the staff would not want that as the time would be unpaid. Mr. Squire was undoubtedly correct about that from the reactions at the June 2016 meeting but that does not negate the fact that the Claimant was correct in what she was saying and there was a very good reason for the breaks to be implemented given health and safety considerations. That was all the more so having regard to the nature of the Respondent's workplace which involved operation machinery in a dusty and often hot environment.

81. Mr. Squire told the Claimant to tell Mr. Sims that he wanted to speak with him. I am satisfied that that would have been to discuss breaks of ten minutes or so "here and there" and not to put into place any arrangements for the statutory breaks to which the workers were entitled to under the Working Time Regulations.

82. The Claimant returned to unit 42 and approached Mr. Sims, telling him that Mr. Squire wanted to talk to him about breaks. Mr. Sims did not react to this well. I am satisfied that he shouted or at the very least raised his voice towards the Claimant and that he said words to the effect that he was "sick of all this"; that he didn't want to hear it and that he had never stopped her from taking a break. He told her that he had a job to get out (that being an order he wanted to get out by the end of the day) and that she should "get back to work".

83. The Claimant became angry as a result of what Mr. Sims had said and she raised her voice back at him. It is clear that things became heated on both sides. However, I am satisfied that the Claimant's raised voice was in response to the actions of Mr. Sims. At the conclusion of the altercation, the Claimant said to Mr. Sims that he could not talk to her like that and that she "was off". She then clocked out before the end of her shift and went to leave the premises.

84. As she did so she saw David Marsden who saw that she was upset and took her back to see Mr. Squire again. She told Mr. Squire that she did not want to work for the Respondent anymore; that Mr. Sims had shouted at her and that she thought that he was a bully.

85. In response, Mr. Squire suggested that she return the following day for a meeting with himself and Mr. Sims to try to resolve the situation. The Claimant initially agreed but did not attend the meeting because she believed that nothing would change. Having regard to the inaction or refusal of the Respondent to provide for rest breaks as they were legally obliged to do for over 3 years, I have little doubt that she was correct about that.

86. The Claimant did not return to work for the Respondent again after 31st July 2019 and Mr. Oakes confirmed to Mr. Squire the following day that she would not be returning.

87. The Respondent next received contact from the Respondent by letter dated 20th August 2019. That letter accepted the Claimant's resignation on 31st July 2019 and made reference to earlier requests to put the reasons for that in writing. I am satisfied that there were no earlier requests as there is no documentation to that effect or witness evidence to suggest when those requests had been made. The letter enclosed the Claimant's final wage slip and P45.

88. The Claimant wrote a relatively long letter in reply (see pages 72 and 73 of the hearing bundle). The letter is consistent with the Claimant's case before me about the events from June 2016. She complained that she had continually raised the issue about the Respondent failing to comply with the Working Time Regulations as to rest breaks; recounted the details of the April 2017 meeting and the meeting with Mr. Nooney and Mr. Sims and her conversation with Mr. Squire on 31st July 2019. The final part of the letter said this:

"I felt that this issue would never be resolved lawfully, I felt bullied and humiliated and can no longer work for a company that has little regard for the physical and mental wellbeing of it's staff. I have come to realise that no amount of complaining or no amount of meetings is ever going to resolve the current situation. This is why I resigned."

89. There was no reply to that letter from the Respondent. That might be considered to be odd if the Claimant's complaints and version of events were false and she had in fact been afforded the opportunity to take adequate rest breaks. Nevertheless, that is not a significant part of my acceptance of the Claimant's account and preference of that account over that of the Respondent.

90. The Claimant's evidence was that she did not intend that letter to be a further grievance but only by way of reply to the letter from the Respondent.

CONCLUSIONS

91. Insofar as I have not already done so, I turn to each of the complaints that is before me for determination.

Constructive dismissal

92. I begin with the complaint of constructive unfair dismissal. Insofar as the "ordinary" unfair dismissal complaint is concerned the Claimant relies of course on the five acts set out above as being destructive of the implied term of mutual trust and confidence along with a general pattern of her complaints about rest breaks being ignored.

93. I deal with each of those five acts in turn. The first is the Respondent's breach of its obligations to provide the Claimant with a 20 minute uninterrupted rest break away from her workstation. I remind myself that the Respondent is not obligated to make a worker take their break but must ensure that they are able to do so if they wish. I am satisfied that the Respondent did not comply with their obligations and that, in fact, entirely to the contrary it was made plain that breaks of anything over and above five or ten minutes at "sensible" times in production – i.e. when production stopped or when Mr. Sims had a meeting – was all that would be permitted. I am also satisfied that more often than not, there would be no break at all and the Claimant and others would be required to work a lengthy shift in a factory environment without any time away from their workstation.

94. The second matter relied on by the Claimant is being informed at the meeting in April 2017 that she was not entitled to rest breaks and how the Respondent dealt with her earlier grievance about those matters. I have accepted the Claimant's account of that meeting and that she was told that there was no entitlement to breaks other than "sensible" breaks which was no different to the previous position. That was of course entirely wrong and the Claimant's grievance about the matter was never resolved or properly responded to.

95. The Respondent could and should have been aware that they were required to comply with Regulation 12 of the Working Time Regulations and there is no good reason or justification for not permitting appropriate rest breaks to be taken once the matter was raised by the Claimant.

96. The third matter relied upon was the Claimant being informed at the June 2019 meeting with Mr. Nooney and Mr. Sims that it was not how the Respondent worked to give rest breaks and that they should be grateful to just have a job. As set out above, I accept the Claimant's account of that meeting. I also accept that it would have been upsetting and made the Claimant angry that she was being taken to task for raising her statutory entitlement to a rest break and that the Respondent was still not taking those concerns seriously and complying with the Working Time Regulations.

97. The fourth issue concerns the Claimant's discussion with Mr. Sims on 22nd July 2019 where she asked that her husband be able to have a break because of the hot weather, long shift and his spell of illness the day previously. Again, that simple request that the Respondent should comply with their statutory duty to allow rest breaks was ignored.

98. The final matter relied upon is the events of 31st July 2019 in respect of her discussions with Alan Squire and the altercation with Mr. Sims. I accept that the Claimant's attempts to get the Respondent to comply with the Working Time Regulations was again rebuffed by Mr. Squire who continued to prioritise production over compliance and referred only to the possibility of ten minutes or so "here and there" which was in no way different to the existing position.

99. The last straw was the actions of Mr. Sims towards the Claimant when she informed him that Mr. Squire wanted to see him about the issue of rest breaks. I am satisfied that he did raise his voice to the Claimant and act entirely inappropriately in what he said and did.

100. That brings me to whether those acts, either singularly or cumulatively, breached the implied term of mutual trust and confidence. I am entirely satisfied that they did. Aside from the fact that the Claimant was being denied her statutory rights under Regulation 12 Working Time Regulations to take a 20 minute rest break, her attempts over the best part of three years to get the Respondent to comply with their statutory obligations were entirely rebuffed and she was effectively fobbed off with references to "sensible" breaks which were nowhere near what she and other workers were entitled to. She was also taken to task for raising those matters by both Mr. Sims and Mr. Nooney in June 2019 and suffered being taken to task by Mr. Sims on 31st July 2019 and told to "get back to work". All of those matters when viewed together clearly were so serious as to breach the implied term of mutual trust and confidence.

101. The Respondent's actions in dealing with matters in the way that they did and in failing and refusing to comply with the requirements of Regulation 12 Working Time Regulations and deal with the Claimant's concerns was a matter that was so serious that it went to the very heart – or root – of the contract.

102. I have no doubt that the Claimant resigned in response to the breach. No other reasons have been advanced for her having done so. I am satisfied that the actions of Mr. Sims in raising his voice to the Claimant and reacting – at best in a state of frustration – at her further attempts to get the Respondent to comply with their statutory obligations was the last straw for the Claimant and when set against the background of earlier rebuffs regarding her breaks, it entitled her to resign and treat herself as dismissed.

103. It follows that the Claimant was constructively dismissed. No potentially fair reason for dismissal has been advanced and therefore I find that dismissal to be unfair.

104. I am also satisfied that the dismissal of the Claimant was unfair having regard to the provisions of Section 101A Employment Rights Act 1996. The actions of Mr. Sims and all that had gone before it took place because the Claimant was refusing or proposing to refuse to forgo her rights to rest breaks under the Working Time Regulations 1998.

Breach of Regulation 12 Working Time Regulations 1998

105. As I have already indicated above, I am entirely satisfied that from no point after June 2016 did the Respondent afford the Claimant the opportunity of a 20 minute uninterrupted rest break away, if she chose, from her workstation. The Respondent made plain that only five to ten minute ad hoc "sensible" breaks when production would not be affected would be permitted and I am satisfied that that is what happened in reality. That falls woefully short of what the Claimant was entitled to under Regulation 12 and it follows that her complaint in this regard is well founded and succeeds.

Detriment contrary to Section 45 Employment Rights Act 1996

106. The Claimant relies on two acts of detriment. The first of those is the meeting with Mr. Nooney and Mr. Sims in June 2019.

107. I must firstly be satisfied that the Claimant has been subject to detriment in respect of that meeting. I am satisfied that she was. The Claimant was clearly subject to disadvantage in being called to a meeting and taken to task for raising her complaints about rest breaks. Her evidence was that she was angry about how she was treated. Her concerns were trivialised; ignored and she was told that she was lucky to have a job. I accept that she was angry – and reasonably so – about that meeting and what was said and done.

108. I then turn to the motivation of Mr. Nooney and Mr. Sims in respect of what was said at that meeting. The entire reason for the meeting was that both were aware that the Claimant was "complaining" about not having rest breaks. In doing so, she was refusing – or at least proposing to refuse – to forgo her right to rest breaks under Regulation 12 Working Time Regulations. The actions of Mr. Sims and Mr. Nooney in taking her to task for that was not only materially influenced by that position but motivated entirely by it. It follows that this complaint of detriment is well founded and succeeds.

109. Finally, I turn then to the second act of detriment which is the actions of Mr. Sims on 31st July 2019. The Claimant was clearly disadvantaged by the actions of Mr. Sims. She was again taken to task in very strident term for raising issues surrounding breaks. Mr. Sims raised his voice at the Claimant and made plain his "frustrations" at her continuing to raise the issue of breaks. That was done in public and made clear his contempt for the Claimant's position on rest breaks. I am therefore satisfied that she was subjected to detriment.

110. I turn then to whether that treatment of the Claimant was materially influenced by the fact that she had refused or proposed to refuse to forgo her statutory right to rest breaks. That can again be answered in short terms. Mr. Sim's clearly treated the Claimant as he did because she was again raising the matter of an entitlement to rest breaks. The very words that he said made that plain. Whilst he may have been frustrated about the timing of the Claimant's intervention into his work because he wanted to get a job out, it is plain that the influence for what was said to the Claimant was because she was again raising issues about the right to rest breaks. This aspect of the claim is therefore also well founded and succeeds.

111. For the reasons that I have given the claim therefore succeeds. I have heard no evidence on remedy and therefore and the remedy to which the Claimant is entitled will be determined at a Remedy hearing if the matter cannot be resolved between the parties beforehand.

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Employment Judge Heap

Date: 4th February 2021
JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Note:

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.