EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103988/2022

Hearing held in Glasgow on 25, 27 & 28 October 2022

Employment Judge R Mackay

Mr P Burns	**Claimant** **Represented by** **Mr A McPhee, Family Friend**
Recycled Packaging Ltd	**Respondent** **Represented by** **Mr D Milne, Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

1. The claimant's application to postpone the hearing is refused.

2. The claimant's application to amend the claim to include a new claim under the Equality Act 2010 is refused.

3. The claimant's claim for unlawful deduction from wages succeeds and the respondent shall pay to the claimant the sum of **SIX THOUSAND FOUR HUNDRED AND FORTY POUNDS (£6440)**. This is a net sum. The

respondent is required to account to HMRC for income tax and national insurance due on the payment.

4. The claimant's claim for constructive unfair dismissal succeeds and the respondent shall pay to the claimant compensation of **TEN THOUSAND SEVEN HUNDRED AND THIRTY TWO POUNDS (£10,732)**.

REASONS

Background

1. In his original claim form, the claimant made claims of constructive unfair dismissal and unlawful deductions from wages under the Employment Rights Act 1996 (**"ERA"**). Shortly prior to the commencement of the hearing, he made an application to amend his claim to include a claim for failure to make reasonable adjustments under the Equality Act 2010. A linked application to postpone the hearing was made, partly on the basis that time would be required for the respondent to submit a revised ET3 and deal with any other procedural stages before the final hearing of the Equality Act claim (if allowed).

2. The respondent opposed both applications and following an adjournment, the tribunal refused them. Oral reasons were given at the hearing.

3. The hearing thereafter continued based on the two claims set out in the initial claim form. In submitting the initial claim, and during the latter stages of his employment, the claimant was assisted by a family friend, Mr McQueen. Mr McQueen also represented the claimant at the hearing.

4. Prior to the commencement of the hearing, the claimant obtained advice from a university law clinic. They assisted in a reformulation of the claimant's pleadings. With the agreement of counsel for the respondent, a revised ET3 was accepted (under deletion of those parts which dealt with the Equality Act claim which had been disallowed).

5. Parties agreed a joint bundle of documents which was lodged before the tribunal.

Observations on the Evidence

6. The tribunal heard from the claimant who gave evidence on his own behalf. It found him to be an honest and reliable witness. By is own admission, he has some difficulty with formal written material. To that end, he was assisted by Mr McQueen in the drafting of a number of items of correspondence with the respondent before his employment ended. The tribunal was, however, satisfied that he had a clear understanding of the points being made on his behalf and was in agreement with them.

7. For the respondent, evidence was led from Mr Michael McGuigan, General Manager for the respondent. In general terms, the tribunal found Mr McGuigan to be a credible and reliable witness. He did his best to assist the tribunal. In some respects, however, the quality of his evidence was hampered by the fact that he did not have direct knowledge of some of the matters on which he gave evidence. In some other respects, he gave evidence on matters where it was clear he played a subordinate function. In areas of conflict which emerged, therefore, the tribunal tended to prefer the evidence of the claimant. Any conflicts which are material to the decision of the tribunal are covered in the *Findings-In-Fact* section which follows.

Findings-in-Fact

8. The respondent is engaged in the recycling and disposal of various packaging materials. It has a depot at Hillington where the claimant worked. The respondent's office is at a separate location in Barrhead.

9. The claimant was employed as a Class 2 Driver. His role involved driving what are known as rigid vehicles between the depot and client premises, either collecting waste materials or delivering recycled materials. At the time of his dismissal, the respondent had approximately 20 employees. It

employed one other Class 2 Driver and a Class 1 Driver. The claimant was not qualified to operate Class 1 vehicles. Another activity undertaken by the respondent involves Class 2 vehicles used to uplift skips. This is an activity the claimant was qualified for, but did not do for the respondent. He had experience of doing so in his previous employment.

10. The claimant commenced employment in or around June 2009. It was accepted that he had 12 years' continuous service as at the date of termination of his employment.

11. The claimant reported to two directors of the company, Neill Frazher and Paul Frazher. Although Mr McGuigan had the title General Manager, he did not manage the claimant and was not based at the same premises. He had very limited day-to-day interactions with him.

12. From the outset of his employment, the claimant was contracted to work, and worked, five days a week.

13. Government measures implemented following the COVID 19 pandemic in March 2020 had a major impact on the respondent's business. The levels of available work diminished substantially.

14. As a consequence of this, the respondent placed a number of employees on furlough leave. The claimant was not placed on furlough. Instead, by letter dated 22 April 2020, his hours were unilaterally reduced from five days a week to three days a week. There was no advance consultation with the claimant before the decision to reduce his hours; nor was there any attempt to consider the claimant alongside others so as to ensure employees were treated consistently. The other Class 2 driver was placed on furlough leave.

15. The claimant was informed that the decision was not in any way based on his performance but was due to the reduced business needs. The letter went on to state: "*As soon as there is a further demand for Class 2 rigid work, the company will be keen to increase your hours again.*"

16. The claimant recognised the unprecedented circumstances at the time and accepted the respondent's decision.

17. In or around Autumn 2020, the respondent increased the claimant's working hours to four days per week. Around this time, the other Class 2 driver resumed full time work.

18. In December 2020, the respondent experienced a further slight reduction in workloads which it attributed partly to a seasonal drop off. As a result of this, the claimant's hours were reduced back to three days a week. Again, the claimant was advised that the respondent would look to restore his extra hours in the future. The other Class 2 driver remained working full time during this period.

19. Although the claimant had some concerns as to why he was being treated differently, he again accepted the change on the understanding that it was temporary and that he would revert to his full-time hours at some point in the future. There was no explanation was to why the claimant was not placed on part-time furlough leave once that became permissible under the relevant regulations.

20. At an earlier stage of his employment, the claimant was the subject of a formal meeting relating to excessive absences from work. By email of 18 February 2019, the claimant was given a final written warning. As part of that process, the respondent offered to reduce the claimant's working week to three or four days per week. The claimant refused that offer.

21. On or around 26 January 2021, the claimant was presented with a draft contract of employment. The draft stipulated that the claimant's working hours were three days per week. The date of commencement of continuous employment was incorrect. In a telephone call with Mr McGuigan, the claimant challenged those two aspects of the draft contract. No amendments were made and no contract was subsequently issued.

22. The claimant's evidence was that it was left with Mr McGuigan to look into the matter. Mr McGuigan's evidence was that he asked the claimant to submit supporting evidence. In relation to the working hours, it was not clear what evidence the claimant was being asked to submit. The position was clear. The claimant's original contracted hours were for a five day week; he had agreed a temporary reduction; he expected to return to full time; and he would not accept a permanent contract with lesser hours. In relation to the start date, it was reasonable to expect that the respondent would hold the necessary records. The tribunal was satisfied that the claimant understood the matter to be left with Mr McGuigan.

23. The tribunal was referred to a document dated 6 February 2021. In that, it was stated on behalf of the respondent that the claimant had tacitly accepted the contract of employment by virtue of a failure to raise a reasonable objection in writing. The claimant denied having received the document. The tribunal was satisfied that he had not received it. Mr McGuigan was not able to give any evidence as to how it had been delivered to the claimant. It was clear from the claimant's subsequent actions that he did not accept a permanent reduction in working hours and as he stated, had he received the document, he would have taken advice from Mr McQueen and challenged it. It was notable too that in subsequent dealings with the claimant, the document was never referred to by the respondent.

24. Even if the document had been received, the tribunal would not have been satisfied that the sequence of events could have resulted in the claimant tacitly accepting a permanent reduction in his working hours. Mr McGuigan gave evidence that no cogent reason was given for the claimant refusing to accept the contract. The reasons put forward by the claimant were self-evidently cogent.

25. The claimant gave evidence that he "*kept asking*" Neill Frazher about when his hours would be increased. In later correspondence he referred to three

such conversations and the tribunal accepted he raised it on those occasions at least. He did not receive a definitive response.

26. On 15 March 2021, the claimant was signed off work due to stress and anxiety. He returned to work on 14 June 2021.

27. During his absence, on 20 April, with the assistance of Mr McQueen, the claimant sent a letter to Mr McGuigan. In that, he referred to having had his hours reduced. He also stated that the respondent had employed more people since the reduction in his hours and stated that there had been no indication as to when he would return to his normal working week. He stated that he found the situation difficult to cope with.

28. Mr McGuigan responded by letter of 27 April 2021. In that, he advised that there had been recruitment of other drivers but those were either Class 1 or Class 2 who worked solely on work managing skips. He did not expressly address the point raised about the claimant's normal working week other than to say that the work for general Class 2 driving remained diminished. There was no reference to the claimant having tacitly agreed to reduced "normal" working hours.

29. During the course of his evidence, in seeking to justify not considering the claimant for work driving with skips, Mr McGuigan gave an account, based on a conversation he had with Neill Frazher that the claimant had accompanied a colleague to gain refresher training on operating skips and that had led to the colleague accusing the claimant of driving recklessly such that he was fearful for his safety. The tribunal had difficulty with this account. First, it was third hand. Secondly, no issue was raised with the claimant at the time. Had he driven recklessly, the tribunal would have expected that to be addressed. Thirdly, it was never raised with the claimant during the course of his employment as a reason for not doing skip work (which the claimant had highlighted he could do). Finally, there was no suggestion that the claimant had, at any time, during over 12 years of employment, driven in a

reckless manner. The tribunal saw the respondent's account as an unwarranted attempt to justify recruiting a Class 2 driver in circumstances where the claimant was still being asked to work reduced hours.

30. A conversation took place between the claimant and Neill Frazher in October 2021. The claimant again asked when he would be returning to full time hours. Mr Frazher replied to the effect that it was nothing to do with him and that he should speak to Mr McGuigan. The claimant gave evidence that Mr Frazher told him that he was unhappy that the claimant had been speaking about him and that he should get himself a representative. The tribunal was satisfied that the claimant's evidence on this (which Mr McGuigan sought to challenge) was reliable. The claimant referred to the comment that he bring a representative in an email of 19 December 2021 and that was not disputed in subsequent exchanges.

31. A number of attempts were made to convene a meeting between the claimant and Mr McGuigan to discuss the matter. No meeting ultimately took place.

32. In an email of 21 December 2021, the claimant stated that he would like to know when he would resume a five-day week. By email of 21 December 2021, Mr McGuigan replied to the effect that there was no scope to provide the claimant with any additional hours. He stated: "*We have you contracted as a Part Time member of staff …*".

33. By email of 13 January 2022, the claimant raised a grievance. In it, he referred to having asked Neill Frazher on three occasions when he would be returning to his normal working hours. He stated that the email from Mr McGuigan on 21 December 2021 made clear that the respondent had materially altered his working conditions without his consent.

34. By email the following day, Mr McGuigan invited the claimant to a meeting to hear his grievance. He was offered the right to bring a colleague or a trade union representative.

35. The claimant responded to the effect that he would be accompanied by Mr McPhee. Mr McGuigan sought confirmation as to who he was. The claimant described his as a "*personal colleague*".

36. Mr McGuigan responded to the effect that the claimant could only be accompanied by a work colleague or a trade union representative.

37. The claimant responded to say that he was not a member of a trade union and did not wish to bring a work colleague. Mr McGuigan responded to the effect that the respondent would not depart from the legal requirements regarding accompaniment.

38. By email of 2 February 2022, the claimant advised that he had spoken to a number of the respondent's employees but that they had all declined to accompany him. He stated that he was unable to represent himself so he awaited a response as to how to go forward.

39. During the course of the correspondence, the claimant referred to ACAS guidance on grievance procedures and the suggestion that it may be appropriate in some circumstances for an employer to allow a companion who does not fit within the statutory framework. He felt that the circumstances warranted that in his case.

40. The next communication between the parties was an email from Mr McGuigan to the claimant headed "*Informal Meeting*". In the email, Mr McGuigan stated that he would like the claimant to come in for an "*informal catch up meeting*". He also stated that an HR Business Partner would be present.

41. The claimant responded to the effect that he was puzzled by the email as there was no mention of the grievance meeting. He asked what the respondent had in mind for the meeting.

42. Mr McGuigan replied saying that the meeting was not a grievance meeting and was a meeting "*to touch base and have a general catch up*".

43. The claimant responded raising the question about accompaniment at the meeting. He also asked for more clarity as to what the agenda for the meeting was intended to be.

44. Mr McGuigan replied to say that he expected to see the claimant at the meeting the following day. In relation to the grievance meeting, he stated that the company was willing to have a grievance meeting but was awaiting confirmation from the claimant as to who, if anyone, he wished to bring with him. The tribunal was satisfied from the sequence of emails, however, that the matter had in fact been left in the respondent's court (see paragraph 38).

45. The email concluded with the question "*Are you saying you're refusing to follow clear and reasonable instructions from management while you are at work?*"

46. The claimant responded by email of 10 February 2022. He referred to what he said was "*a distinctly threatening tone*" in the most recent email. He stated that he did not think he was being unreasonable by declining to attend.

47. Mr McGuigan replied to the effect that he expected to see the claimant at the meeting. The claimant repeated that he would not attend.

48. The next communication between the respondent and the claimant was an invitation from Mr James Newton, HR Business Partner, inviting the claimant to attend a disciplinary hearing. The hearing was said to concern the following matters:

    (1) Refusing to carry out a reasonable request from management;

    (2) Insubordination towards management within the company;

    (3) Disregard for PPE within the workplace;

    (4) General attitude towards work colleagues and management.

49. The claimant was advised of the right to be accompanied by a colleague or a trade union official. He was advised that he may be issued with a written warning.

50. By email of 16 February 2022, the claimant asked for evidence of the four allegations. Mr Newton replied by email the following day. He referred to the emails surrounding the claimant's refusal to attend the meeting and stated that there would also be CCTV footage relating to an event on 9 February 2022 which would be shown to him at the meeting.

51. The hearing took place on 22 February 2022. The claimant attended alone. He felt that he would be dismissed if he did not attend.

52. During the course of the meeting, it was clear that allegations 1, 2 & 4 all related to the same issue, namely the claimant's refusal to attend the catch up meeting.

53. The third allegation related to a failure on the part of the claimant to wear appropriate PPE (a high visibility outer jacket) when walking through the depot. He accepted that he had failed to do so. He also stated that others routinely did so.

54. During the course of the disciplinary hearing, the claimant questioned why others who had not worn correct PPE were not subject to disciplinary proceedings. In response, Mr Newton stated that that was a different matter, and that the claimant should request a one-to-one with Mr McGuigan to discuss this.

55. The tribunal viewed the CCTV footage during the course of the hearing. The claimant was seen walking through the depot without a high visibility vest. The claimant highlighted what he said were other significant health & safety breaches evident from the footage. In particular: large rolls of polythene which he described as dead weights were piled horizontally at the side of a walkway; pallets of cardboard were stacked irregularly and materially above

head height; and a forklift driver was seen driving into a pile of packaging causing the item he was transporting to fall off his vehicle. Mr McGuigan confirmed that no one else was disciplined for what appeared to be significant breaches of health & safety on the CCTV.

56. By email of 28 February 2022, the claimant wrote to Mr Newton asking for confirmation of the outcome of the hearing given that a week had passed.

57. Mr Newton responded with the outcome that day. The outcome was to the effect that all four allegations had been substantiated (despite his having agreed at the disciplinary hearing stage to subsume allegations 1, 2 and 4 into a single one). The claimant was given a final warning. He was offered a right of appeal.

58. By email of 7 March 2022, the claimant requested a copy of the minutes taken at the disciplinary hearing. He himself had, without the knowledge of the respondent, recorded it.

59. The transcript was provided some time thereafter (the date was not clear). Having received it, the claimant wrote to the respondent, by email of 14 March 2022, highlighting a number of discrepancies in the account. In particular, the claimant denied having admitted that he should have attended the informal meeting as requested. The tribunal was satisfied that the claimant did not make such a concession. It would have been odd for him to do so in circumstances where he had taken such a strong stance over a long period of time. The claimant concluded by tendering his resignation with immediate effect. He was 57 at that time.

60. Mr Newton accepted the claimant's resignation and by email of 22 March 2022, Mr McGuigan responded to the issues set out in the claimant's final email.

61. Since the termination of his employment, the claimant has not worked at all. The respondent gave evidence of a number of opportunities that might have

been suitable for the claimant and highlighted the general shortages in the market for drivers within different industries. The claimant's position was that he did not feel able to apply for any alternative work due to his health. He stated that he had become a bit of a recluse.

62. The respondent was aware that the claimant had suffered from depression in the past – to the extent that he was asked at a meeting in October 2018 if he had suicidal ideation.

Submissions

63. On behalf of the claimant, the claimant's representative presented written submissions prepared by the university law clinic. Counsel for the respondent made oral submissions. The tribunal considered both in reaching its decision. Particular components of the submissions are set out in the *Decision* section which follows.

Relevant Law

Constructive Unfair Dismissal

64. Employees with more than two years' continuous employment have the right not to be unfairly dismissed, by virtue of s94 ERA. 'Dismissal' is defined in s95(1) ERA to include what is generally referred to as constructive dismissal. Constructive dismissal occurs where the employee terminates the contract under which he/she is employed (with or without notice) in circumstances in which he/she is entitled to terminate it by reason of the employer's conduct (s95(1)(c) ERA).

65. The test for whether an employee is entitled to terminate his contract of employment is a contractual one. The Tribunal requires to determine whether the employer has acted in a way amounting to a repudiatory breach of the contract, or shown an intention not to be bound by an essential term of the contract (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221). For this purpose, the essential terms of any contract of employment include the

implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (***Malik v Bank of Credit and Commerce international Ltd*** [1998] AC 20).

66. Conduct calculated or likely to destroy mutual trust and confidence may be a single act. Alternatively, there may be a series of acts or omissions culminating in a 'last straw' (***Lewis v Motorworld Garages Ltd*** [1986] ICR 157).

67. As to what can constitute the last straw, the Court of Appeal in ***Omilaju v Waltham Forest London Borough Council*** [2005] IRLR 35 confirmed that the act or omission relied on need not be unreasonable or blameworthy, but it must in some way contribute to the breach of the implied obligation of trust and confidence. Necessarily, for there to be a last straw, there must have been earlier acts or omissions of sufficient significance that the addition of a last straw takes the employer's overall conduct across the threshold. An entirely innocuous act on the part of the employer cannot however be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer.

68. In order for there to be a constructive dismissal, not only must there be a breach by the employer of an essential term such as the trust and confidence obligation; it is also necessary that the employee resigns in response to the employer's conduct (although that need not be the sole reason – see ***Nottinghamshire County Council v Meikle*** [2004] IRLR 703). The right to treat the contract as repudiated must also not have been lost by the employee affirming the contract prior to resigning.

69. The Court of Appeal ***in Kaur v Leeds Teaching Hospital NHS Trust*** [2018] EWCA Civ 978 set out guidance on the questions it will normally be sufficient for Tribunals to ask in order to decide whether an employee has been constructively dismissed, namely:

a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

b. Has he or she affirmed the contract since that act?

c. If not, was that act (or omission) by itself a repudiatory breach of contract?

d. If not, was it nevertheless a part (applying the approach explained in ***Omilaju***) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the ***Malik*** term?

e. Did the employee resign in response (or partly in response) to that breach?

70. If an employee establishes that they have been constructively dismissed, the Tribunal must determine whether the dismissal was fair or unfair, applying the provisions of s98 ERA. It is for the employer to show the reason or principal reason for the dismissal, and that the reason shown is a potentially fair one within s98 ERA.

Unlawful Deduction from Wages

71. It is unlawful for an employer to make a deduction from a worker's wages unless (a) the deduction is required or authorised by statute or a provision in the worker's contract or (b) the worker has given their prior written consent to the deduction (Section 13 ERA).

72. The relevant definition of wages is contained in Section 27 ERA.

73. Section 13(3) ERA provides:

"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount

of the deficiency shall be treated for the purposes of this Part [of ERA] as a deduction made by the employer from the worker's wages on that occasion".

74. The term "properly payable" was considered in ***New Century Cleaning Co Ltd v Church*** [2000] IRLR 27 at paragraph 62:

"*For wages to be "properly payable" by an employer, he must be rendered liable to pay, either under the contract of employment or in some other way".*

75. Guidance as to when a party might be inferred to have accepted a change in their contract is contained in ***Solectron Scotland Ltd v Roper & Others [2004] IRLR 4*** at paragraph 30:

"*If an employer varies contractual terms by, for example, changing the wage or perhaps altering the job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that, by acceding to it, they are doing so without prejudice to their contractual rights.*"

Decision

Unlawful Deduction from Wages

76. The claimant sought the difference in pay between his full-time hours and the three days per week provided to him from January 2021 until the time of his dismissal (59 weeks).

77. Counsel for the respondent submitted that the claimant had lost the right to claim based on his having continued to work without sufficient protest during that 59 week period. He referred to relevant passages of ***Selectron*** and also ***Rigby v Ferodo Ltd [1988] ICR 29 (HL)***. There was, rightly, no suggestion that there had been express agreement by the claimant to the change in hours.

78. The key question for the tribunal, therefore, was whether the claimant had by his acting demonstrated acceptance of the change or whether he had done enough to demonstrate his protest against it. The tribunal had no hesitation in finding that the claimant had not accepted the change. It is clear that he initially approached the matter on an informal basis, raising the question with Mr Neill Frazher on a number of occasions. He also raised the issue with Mr McGuigan and when Mr McGuigan suggested that his contract had been permanently varied in December 2021, he raised the matter as a formal grievance.

79. The tribunal was mindful of the claimant's limitations in dealing with written communications and his need for help in doing so. It made no criticism of him, therefore, for failing to put his concerns in writing at an earlier stage. It was also mindful of the fact that he was absent due to sickness for a number of months during the relevant period.

80. In considering this claim, therefore, the tribunal was satisfied that the claimant's contract of employment entitled him to payment for five days per week. Despite his agreement to a reduced commitment for a period, he withdrew that agreement in January 2021 and that from that point onwards, the sums properly payable under his contract of employment were for five days per week. Thereafter, he worked under protest, highlighting his concerns on a number of occasions, formally and informally, such that there was no implied acceptance of the change. The claim, accordingly, succeeds.

Unfair Dismissal

81. In his submission, the claimant identified a series of breaches resulting in a final straw which he said led to his dismissal. He did not rely on the unilateral variation of his contracted hours as implemented during 2020. He agreed to those temporary reductions until 25 January 2021 when he was asked to sign a contract permanently reducing his hours. He pointed to that as the first breach and identified a number of breaches thereafter resulting in the final

straw which he said was the provision and late and inaccurate minutes of the disciplinary hearing.

82. On behalf of the respondent, Mr Milne submitted that there was no course of conduct such as to amount to a repudiatory breach of contract. If there was, he submitted the claimant affirmed the breach by continuing to work.

83. The tribunal considered the questions set out in ***Kaur***.

84. First, it identified the most recent act on the part of the respondent which the claimant said caused his resignation: the lateness and deficiencies in the disciplinary minutes which he alleged.

85. It considered whether he affirmed the contract since that act and there is no question that he did. He resigned within days of receiving the minutes.

86. Thirdly, the tribunal considered whether that act was itself a repudiatory breach of contract and concluded that it was not; neither was it wholly innocuous or unblameworthy. Given the history the respondent had with the claimant, it was incumbent upon them to deal with the disciplinary process in a timely manner and not include elements in the minutes which were inaccurate (see paragraph 59).

87. The tribunal then considered whether the final act was nonetheless part of a course of conduct which viewed cumulatively amounted to a repudiatory breach of the ***Malik*** term. It had no hesitation in answering that question in the affirmative. The first breach relied upon by the claimant was the attempted imposition of a permanent reduction in his contractual hours on 25 January 2021. This was contrary to the respondent's earlier assertions that reductions in the claimant's hours were temporary and that he would resume his normal hours when that was possible. To impose a variation of such magnitude without consultation and without the agreement of the claimant in itself amounted to a material breach of contract. It was exacerbated by the

respondent's recruitment of another Class 2 driver whose work the claimant was qualified to do.

88. The claimant had been commendably understanding in accepting earlier reductions in his working hours without consultation and without explanation as to why he was being treated differently from others. At the time in January 2021 when he withdrew his agreement, the respondent acted in a material breach of contract by persisting in providing him with, and paying him for, hours lower than those to which he was contractually entitled. For the reasons outlined at paragraphs 21 to 24 above, the tribunal had no hesitation in rejecting the respondent's contention of any tacit acceptance.

89. That initial breach was in the view of the tribunal compounded by subsequent actions of the respondent. Despite a number of requests from the claimant to gain clarity as when his hours would be returned to normal, he did not receive a satisfactory response and was required to raise a grievance. The respondent's failure to engage with the claimant without the necessity of a formal grievance was unwarranted.

90. In terms of the grievance itself, the claimant focussed heavily on the respondent's unwillingness to allow him to bring a companion from outside the organisation who was not a trade union official. This clearly created a deterioration in the relationship between the respondent and the claimant. Standing the claimant's capabilities, his history of depression and the difficulties he identified in dealing with formal processes, the respondent's approach was at the very least lacking in consideration. Whilst technically compliant with legal requirements, when it became clear that the issue was a major barrier to the claimant in progressing with the meeting, the respondent's position became entrenched and uncompromising.

91. Moreover, at a time when the ball was still in the respondent's court to deal with the question of representation at the grievance meeting, to invite the claimant to a meeting described as informal, with a distinct lack of clarity as

to what the meeting was about, caused the claimant further concern. The tribunal was satisfied that it was reasonable to expect that that would be his reaction, particularly against the background of the suggestion to the claimant from Mr Frazher that he get a "representative". It is difficult to envisage how a meeting at that time could do anything other than address the subject matter of grievance. It seemed to the tribunal that the respondent was seeking to short circuit the grievance process by inviting the claimant to what was described as an informal meeting in order to discuss the grievance. An added unfairness was the absence of any entitlement on the part of the claimant to bring a companion to that meeting in circumstances where an HR Business Partner as well as the General Manager were to be present.

92. The tribunal then considered the issuing of warning and the disciplinary process which led to that. It had material misgivings about the respondent's approach. It is clear that the respondent was frustrated with the claimant's stance in refusing to attend a meeting. It was equally clear to the tribunal, however, that in framing the allegations, it sought to exaggerate the scope of misconduct alleged. Despite effectively conceding that three of the allegations all amounted to one thing, the respondent issued a warning which separated them without any basis for doing so.

93. The tribunal was particularly concerned about the insertion of the fourth allegation as it related to a failure to wear PPE. Whilst it recognised, as freely accepted by the claimant throughout, that he had been in breach of the rules, it was also satisfied that the claimant was not alone in this failing. There was no explanation as to why only the claimant was disciplined at this time. Moreover, the tribunal had serious misgivings about the respondent's inconsistency as it related to the failure to deal with other self-evident breaches of health & safety from the CCTV footage which it relied upon to discipline the claimant. These factors point to the claimant being "singled out" as he alleged.

94. Taking the course of conduct as a whole, including the final straw, the tribunal was clear that it amounted to a repudiatory breach of the ***Malik*** term.

95. The tribunal considered the respondent's submission that the claimant affirmed the breach of contract by continuing to work. For the reasons outlined in relation to the decision on unlawful deduction from wages above, the tribunal rejected that argument.

96. In then considering whether the claimant resigned in response to the breach, the tribunal found that he did. No other reason was advanced.

97. In terms of the fairness of the dismissal, the tribunal found it to be unfair. There was no meaningful attempt to advance any potentially fair reason.

Remedy

Unlawful Deduction from Wages

98. It was agreed by the parties that the tribunal should look at a 59-week reference period in assessing loss. The key difference between the parties was the respondent's submission that the weeks during which the claimant was absent due to sickness (and receiving SSP only) should be deducted from the calculation. The tribunal accepted that such that it awarded compensation for 46 weeks only.

99. Based on the respondent's calculation of full-time net pay of £351 per week, this gives rise to a shortfall of £140 per week, amounting to £6,440 net. The respondent is required to account to HMRC for income tax and national insurance due.

Unfair Dismissal

100. It was agreed between the parties that the claimant, if successful, would be entitled to a basic award calculated on the basis of 12 years' service. The difference between the parties was whether to use the claimant's full-time earnings or the reduced earnings actually received by him. Having found that

the reduced wages were unlawful, the tribunal considered it appropriate to use the claimant's full-time contractual entitlement

101. Based on gross weekly pay of £413, this results in a basic award of £7,434.

102. In assessing the compensatory award, the tribunal started by awarding loss of statutory rights of £500**.**

103. It went on to consider whether to make an award for lost earnings. It had regard to fact that the claimant has not worked at all since dismissal and considers himself unable to do so. There was, however, no medical evidence to that effect and despite his challenges with the respondent, he was able to work for the majority of the time. It also had regard to the significant employment opportunities available to the claimant given his skills set and his failure to make any applications whatsoever. Given the claimant's account that he had become something of a recluse, the tribunal found there to be an element of choice in the claimant's approach.

104. Against that background, the tribunal considered that it would not be just and equitable to make any award for future losses. In considering past losses (there being 30 weeks between the date of dismissal and the hearing) having regard to the circumstances of the case, the tribunal felt it appropriate to award losses of 8 weeks' net pay only. This amounts to £2808. Eight weeks was considered a reasonable time frame within which the claimant might have been expected to move on and focus on obtaining alternative work. There was no shortage of available positions.

105. Finally, the tribunal addressed the respondent's submission that any award should be reduced based on the claimant's conduct. It was not satisfied that any reductions should be made. Whilst the claimant was persistent in his challenges to the respondent about attending meetings, the tribunal found his responses to be justified having regard to the course of conduct against him by the respondent.

Employment Judge: **R Mackay**
Date of Judgment: **22 December 2022**
Entered in register: **23 December 2022**
and copied to parties