Case No. 2304900/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Tutt**

Respondent: **Morrison Data Services (Water) Limited**

Heard at: London South (by CVP) **On:** 8-10 February 2023

Before: Employment Judge Self

Appearances
For the Claimants: Mr A Watson - Counsel

For the Respondent: Mrs D Henning – Solicitor

RESERVED JUDGMENT

The Claims of unfair constructive dismissal and wrongful dismissal are not well-founded and both Claims are dismissed

REASONS

1. By a Claim Form lodged with the tribunal on 22 September 2021 the Claimant contended that he had been constructively unfairly dismissed and wrongfully dismissed and sought compensation. He resigned effective from 1 September 2021 (without notice) and ACAS Early Conciliation (EC) had been undertaken between 25 August 2021 and 1 September 2021.

2. A previous claim had been lodged (2302330/2021) on 2 July 2021 and the ACAS EC for that was between 28 May 2021 and 3 June 2021. That claim was withdrawn by the Claimant on 14 July 2021.

3. All witnesses provided a witness statement and the Claimant gave evidence on his own behalf. There was oral evidence from Mrs Goff, Miss Jordan, Mr Wynn and Mr Ward. There was a bundle of documents of just under 250 pages and such documents as we were taken to in the bundle were considered. The parties' advocates made closing submissions which we also took into account.

4. Prior to hearing evidence there was an application by the Respondent which had been made on 16 December 2021 for the claim to be struck out ***"following the principles of res judicata by reason of both cause of action dismissal and issue estoppel and pursuant to Rule 52 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1***" (hereafter "the Rules"). That Rule reads:

   Where a claim or part of it has been withdrawn under Rule 51 the tribunal shall issue a judgement dismissing it (which means that the claimant may not commence a further claim against respondent raising the same, or substantially the same, complaint) unless:
   a) the claimant has expressed at the time of withdrawal or wish to reserve the right to bring such a further claim and the tribunal is satisfied that there would be a legitimate reason for doing so or
   b) **the tribunal believes that to issue such a judgement would not be in the interests of justice.**

5. The application is set out at page 37 of the bundle but to summarise the Respondent asserted that the Claimant resigned by letter on 30 June 2021 asserting therein he had been constructively dismissed. On 2 July 2021 the Claimant submitted a claim (2302330/2021) for a protective award alleging that the Respondent had failed to consult during a TUPE transfer which had taken place on 1 April 2021. The Respondent was the transferor in that transfer. On 14 July 2021 the Claimant withdrew that claim and on 1 September 2021 a dismissal Judgment was issued. The Respondent's application concluded with:

   "It is the Respondent's primary case that there should be finality in litigation and that this claim should be dismissed".

6. On 16 December 2021 (the same date as the application) the Claimant responded as follows:

   "The Claimant objects to the Respondent's application. The Claimant denies that the first claim for the protective award is substantially the same as this claim for constructive dismissal. It is entirely clear that the legal basis of the two claims are different. There is no cause of action estoppel. Furthermore it is not reasonable to suggest that the constructive dismissal claim could have been raised at the same time as the claim for the protective award.

   There has been no actual determination of any issue relevant to the substantive case.

   The claimant therefore avers that there has been no abusive process and this has not been made out on the facts in the Respondent's

application. It is wrong to suggest that because a matter could have been raised in earlier proceedings it should have been, to the extent that raising it in later proceedings is abusive. (**Johnson V Gore Wood (2001) 1 All ER 481**.

7. For reasons that I have not been able to determine that application was not dealt with prior to the hearing and so it fell to me to determine it as a preliminary point at this hearing.

8. The first claim was in the bundle and available for consideration. It was lodged on 2 July 2021 and lodged against both the Respondent and the transferee, Siemens Limited. The only box ticked at 8.1 of the Claim Form (203) is under ***"I am making another type of claim which the Employment Tribunal can deal with"*** and beneath that is stated "**Protective Award Claim"**. The Claimant was, at that time acting in person and the claim was lodged was two days after he had resigned. At (201) the Claimant had indicated on his Claim Form that his employment was still continuing. That is in conflict with his resignation on 30 June 2021 and must have been an error (195).

9. There is nothing within the Claim Form that refers to the Claimant's resignation, nor that he considered that his resignation constituted a constructive dismissal or indeed that he was owed notice pay. The text provided at 8.2 of the Claim Form is solely directed at the issue of the Protective Award and even suggests that a stay may be appropriate so that his Trade Union could possibly take on the running of his case. At (212) the Claimant withdraws his Claim because he has been told that his Union have been recognised and will take the claim on.

10. The transfer having taken place on 1 April time was running out for any claim for a Protective Award to be lodged at the Tribunal as any claim for that would need to be lodged by 6 July 2021 at the latest. The Claimant makes it clear that further particularisation may be required and that he has specifically logged it in order to protect his decision. At that point the Claimant still had the best part of three months to bring his claim for constructive dismissal.

11. The Claimant referred to **Virgin Atlantic Airways Limited v Zodiack Seats UK Limited** and in particular paragraph 25 thereof:

    "Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers…they are distinctive although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation." This purpose ***"makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive."***

12. It is acknowledged that for cause of action estoppel there does not need to have been a judicial decision, order or judgment in previous proceedings. There does not need to have been an investigation on the facts or evidence heard. A formal decision under Rule 52 can be sufficient as the Claimant would have had the opportunity to proceed to a final decision had they wished to do so (**Barber v Staffordshire County Council (1996) ICR 379**).

13. The Respondent seeks to have the extant claims dismissed. I am quite satisfied that the first claim quite simply did not contain anything other than the Protective Award claim and when that claim was withdrawn the Claimant waived his right to personally bring a claim for that Protective Award personally. His withdrawal was not in respect of any unfair or wrongful dismissal claim. I do not accept the Respondent's contention that the first claim is substantially the same complaint as the second claim and there is nothing within any of the Claimant's actions that suggests that it was substantially the same.

14. The circumstances are not uncommon and driven by the relatively short time limits within the Employment Tribunal. Often individuals bring more than one claim. I am unable to criticise the Claimant for lodging the Protective Award claim when he did and equally I am also unable to be critical of him for not lodging his constructive dismissal claim at the same time. The Claimant issued his claim with the assistance of a representative shortly thereafter and I can see no abuse of process at all. The Respondent only accepted the Claimant's resignation after inviting him to reconsider at 1604 on 2 July.

15. The application to dismiss the Claim is not well-founded on any of the grounds set out by the Respondent and the application to dismiss this claim is refused.

16. The Claimant's continuous employment started with Southern Water Services on 10 July 1989 and he was transferred to Siemens Metering Services on 1 February 2007. The only contract produced to us is one dated 1 December 2004 which describes the Claimant as a Meter Reading Inspector. There was, however, harmonisation, so that from 1 August 2009 Siemens policies would take over from any Southern Water policies (51).

17. From 1 October 2017 the Claimant was promoted to the role of Customer Accounts Officer (CAO) which was a Field operations Zone 2 grade and had a salary of £22,400 per annum (54). The role profile is as set out at (55-57). The Claimant maintained that this work was distinct to reading meters on a cyclical basis and was primarily customer appointments in order to resolve consumption issues, meter exchanges, updating customer information on new properties and final reads for people moving.

18. On 3 February 2021 the Respondent via Mr Wynn, an Employee Relations Specialist wrote to Ms Goff from Siemens to give her information about the measures which it was envisaged that the respondent may take in relation to Affected Employees from Siemens including CAOs upon transfer, thereby looking to comply with their obligations under the TUPE Regulations 2006 as amended. So far as is relevant to these proceedings:

    a) Measure 3 - ***"The job title of Customer Account Officer shall remain unchanged"***
    b) Measure 7 – ***"It is envisaged that transferring employees who carry out specific activities or restricted duties will carry out all meter reader work and will receive training or retraining to do so if required."***
    c) Measure 9 – **"All Meter Readers and Customer Account Officer employees will be home / start finish for the purposes of the Working Time Directive. Travel of up to one hour per day (30 minutes at both the start and end of the day) is considered as commuting time and not included in calculations for payment purposes. The working day for payment purposes will commence upon attendance at the first visit and the end of the last visit will align with the completion of the working day"**

    The letter concluded that ***"the above will be reviewed on an ongoing basis and any amendments additions or deletions will be advised in writing and logged via version control."***

19. There was a TUPE Consultation Meeting on 4 February 2021. There was a range of managers from both Siemens and the Respondent including the correspondents in the above letter and Trade union representation as well from Unison and the GMB. So far as measure 9 was concerned Ms Goff confirmed that the same start finish proposal as suggested in the Measures was in operation at Siemens. It was suggested that the one-hour commute time should not be split equally at the start and the end of the day and Mr Wynn undertook to amend it.

20. On 5 February the Claimant wrote to Ms Goff expressing his concern that incorrect information had been passed onto the Respondent. He cited that there should not be any changes to his terms and conditions of employment. He produced a copy of his role profile and noted that there was no reference to cyclic meter reading. He accepted that during the previous consultation it had been noted that cyclical meter reading would be the exception not the rule but pointed out that this did not appear thereafter. He indicated that he had not done any cyclical meter reading since his promotion and that he was concerned that the Respondent may have the wrong impression about the extent of his duties.

21. The Job Profile states under Purpose of the Role, ***"Assist in all aspects of customer account management e.g., liaising with customers advising customers collecting account data customer metre management et cetera"***

22. Under Areas of Responsibility / Tasks:

    Collect meter, customer, property, and associated data in accordance with business processes and Regulator standards. Operate meter reading equipment in accordance with business processes.

23. Ms Goff replied to the Claimant the same day stating that she would forward the Claimant's email to the Respondent and that she was setting up a call to discuss matters the following week where she would take questions.

24. The Claimant's email was forwarded on and there was a meeting to discuss matters. On 8 February the Claimant wrote to Ms Goff setting out that in his view that the obligation to carry out additional tasks not in their job description or contract of employment was ***"a fundamental change in the contract of employment"***. So far as measure 9 was concerned his view was that this added an hour a day of work and so meant 260 hours unpaid over a year. He concluded by saying that the variations to his contracts were void if the sole or principal reason for the variation was the transfer and that it appeared to him that his specific role was being made redundant and the option of a redundancy position should be given to him.

25. On 9 February Ms Goff confirmed that she had passed the Claimant's emails on but that she regarded the travel to work time as being the same as at Siemens and she said that she had checked this issue with Mr Davidson. Mr Ward confirmed in his statement that he was told by Mr Davidson that the Claimant had had an issue with this term for some time prior to the transfer, which indicated that the Claimant knew that he was obliged to work in that manner but did not like doing so and in all probability did not comply with it. In response to Ms Goff the Claimant said that ***"in the early days management tried to implement it and when I asked for it in writing it was never forthcoming. It is not current practise"***.

26. In a later email he contended that his working day started at the time he starts work from home and that it must be working time as he is only allowed to use his van in working hours.(83).

27. There was a second consultation meeting between management and the Trade Unions on 11 February. The Respondent stated:

    "With regards to the CAO roll (the Respondent) confirmed there is no intention to change the role profile. They have a comparable role in

other contracts which is also more appointment based. Sometimes they are asked to pick up meter reading where there is an increase in volume, however some work will be absorbed by (the Respondent's) staff and there is no plan to change the CAO role"

28. The travel to work issue was discussed at length. It was said that both companies worked the same system but that the wording needed to be adjusted for clarity. A further Measures was sent out on 11 February. Measures 3, 7 and 9 remained unchanged (89-91).

29. Having been sent the minutes the Claimant wrote again on 17 February (95). He indicated that he had concerns at what he saw as a conflict with the CAO role staying the same (Measure 3) and Measures 5 and 7 and the possibility of doing cyclical meter reading. He accepted that some CAOs did do meter reading of this type but that it was on overtime or a favour to their manager but the proposed "change" was a step too far. He reiterated that in his view the commuting policy was not the same.

30. There was a further Consultation meeting between managers of both transferor and transferee and Trade Unions. Measure 7 was brought up and the discussion is recorded as follows:

"**David Wynn could not stress enough to the group that the role of the CAO would not be changing. Measure 7 states they will be provided with training IF asked to do something different. David Wynn reiterated that CAOs would only be asked to cyclic reading, for example, if there was a requirement in a certain area and that this would not be the norm. Claire Goff and Andy Woodhouse (GMB Rep) asked if the Measure statement could be reworded to say something along the lines of "it is envisaged that transferring employees who carry out specific activities or restricted duties may be asked to carry out cyclic meter reading when assistance is required and will receive training or retraining to do so if required."**

31. In relation to Level 9:

"(The Respondent) stressed nothing is changing to the way in which this is managed in Siemens. Julian Donaldson of Siemens confirmed that if employees exceeded the one-hour travel time per day they would either have their workload reduced or be paid for it. Olivia Jordan, of the Respondent, confirmed that this is the exact approach they take in the respondent and they don't intend to change this."

32. A further measures letter was sent out by Mr Wynn after the meeting. Under Measure 7 it stated that the following Measure was agreed:

"It is envisaged that transferring employees who carry out specific activities or restricted duties will continue to do so but will also carry out ad hoc water metre reader work and will receive training or retraining to do so if required. There is no plan to charge change the primary work undertaken in either of the two frontline roles."

Measure 9 as set out previously was also marked up as agreed.

33. On 22 February the latest Measures document was circulated and the Claimant responded on 23 February. He indicated that the change in wording in Measure 7 did not calm his nerves in respect of that Measure. He reiterated that cyclic meter reading was not in his contract. He acknowledged that some CAOs had done it to help out their Team Leader and that some had done it as overtime. He also indicated that he was surprised to see that the measure had been agreed. The Claimant in a further email on 24 February asked that if nothing was changing re Measure 9 then surely the measure could be deleted.

34. There was a further consultation on 25 February (111). It was said that there was no proposal from the respondent to change the role profile of CAOs and so Ms Goff asked why the Measure could not be removed. The Response from the Respondent was that ***"there will be certain occasions when they want the CAOs to carry out ad hoc meter reading on an individual basis and that as the current role profile did not cover it that was why the Measure was there***." Ms Goff suggested that wording such as cyclical work being the exception to the rule and the Trade union rep Mr Woodhouse suggested no more than 5%. Bizarrely Ms Gallagher suggested "less frequently than frequently" whatever that might mean. No real conclusion was reached on the face of the minutes. It is clear that the intention of all was that CAOs doing cyclical work was intended to be a rare occurrence.

35. There was further discussion about Measure 9 and the working time issue and Ms Gallagher stated that she would insert some wording saying that the situation was unchanged and this was agreed. Ms Goff had raised the point that some employees had a different view of what the present circumstances were.

36. On 4 March having been provided with the meeting notes the Claimant concluded that so far as Measure 7 was concerned that there ***"was a change to my contracted job role and I do not agree with the change"*** as he was being demoted to a meter reader. The Claimant expressed concerns over Mr Woodhouse not liaising with his Union colleagues and that he wanted the Measure removed.

37. Ms Goff replied that she did not believe the Respondent would remove Measure 7 as they wanted to be able to call on the claimant to do meter

reading work on the rare occasion they needed help with it and she did not consider the Claimant was being demoted (125).

38. On 5 March 2021 there was further Measures letter sent out to Ms Goff (131). Regulation 7 had the words ***"exception not the rule"*** added when referring to the requirement to do ad hoc Water Meter Reading Work. There were additions to Measure 9 that travel in excess of 1 hour would usually be paid as overtime or the contract manager may agree to use it as part of the working day. It was said that this was unchanged from Siemens. On 11 March and 17 March at the end of the consultation period a further Measures letter was sent out with no further amendments to the measures the Claimant was complaining about and marked up as agreed. I have seen no challenge by the Claimant's Trade Union or, indeed, any of the Trade Unions involved to say that they disagreed that matters had been agreed in the meeting

39. The Claimant had his one-to-one Consultation on 17 March (149-151). The Claimant brought up with Ms Jordan of the Respondent's HR department his concerns over Measure 7 and Measure 9 in a very similar fashion to before. Ms Jordan indicated that the provision was drafted so that the Respondent, if there was need for some meter reading, could ask the Claimant if he wanted to do overtime and if the Claimant wanted to say "No" he was at liberty to refuse it.

40. So far as Measure 9 was concerned the Claimant made the point that he had never seen a Siemens policy that stated that the work day started at the point of the first appointment and not when he left home. He raised the point about only using the van for business mileage and if that was the case surely he was working when he drove to his first call and if that was the case it should be working time.

41. On 22 March the Claimant was sent a letter confirming that he would transfer to the Respondent on 1 April and a final Measures statement was sent with that letter. The Claimant was informed that unless he formally objected he would transfer on 1 April but with his continuity of employment intact.

42. *On 25 March the Claimant chased Ms Jordan up about the points he had raised in the one to one and on 26 March Mr Baker from the GMB also wrote a letter enquiring after the same. Later that day Ms Jordan confirmed to the Claimant that his job description / role profile was to remain the same and that Measure 9 merely reflected that which they had been told and which they believed was in place already.

43. On 31 March 2021 the Claimant raised a formal grievance with Ms Goff (168) in relation to his position re measures 7 and 9 and she responded the following day to say that Siemens no longer employed the claimant and so she would pass the grievance onto the Respondent. On 1 April 2021 the

Claimant effectively copied his grievance and sent it to Ms Jordan of the Respondent.

44. Ms Jordan responded the same day stating that she would not be progressing the grievance and the matter was closed. She contended that the Measures were consulted at length with the Trade Unions and that was where the grievance should be directed if they had agreed something the Claimant did not agree with (173).

45. On 18 April Mr Baker from the GMB wrote in response to Ms Jordan effectively disagreeing with her response and decision not to further the grievance (174-175) and on the following day Ms Jordan wrote direct to the Claimant pointing out that the respondent did not recognise Trade Unions and that if the Claimant wanted any further clarification he was at liberty to contact her direct. It was reiterated, however, that she considered that the grievance would not be reopened. On 21 April the Claimant asked for the grievance policy and it was forwarded to him on 26 April. The Claimant asked where in the policy he would find authority for the stance the respondent had taken and Ms Jordan stated that:

"A grievance is to be made in relation to terms / conditions and any perceived unfair treatment during the course of course of your employment with the Respondent.
As you are aware the special measures of the terms and conditions to which you TUPE transferred over from Siemens to the respondent. As you've already been informed the Special Measures are discussed and agreed with the recognised Trade Unions of behalf of all transferring employees and are not for any further discussion once agreed and the transfer has taken place.
Your request to raise a grievance in relation to the Special Measures relating to your TUPE transfer will not proceed as it is not deemed as a grievance, as any outcome will not change the Special Measures in any form".

46. On 30 May 2021 a letter was sent from the GMB (Mr Baker) to employees stating that as a result of the Transfer the Respondent had sought to add one hour per day to working travel arrangement without making good pay for this time which could potentially be seen as a variation to contract because of transfer leading to a potential contract breach. He suggested that a grievance be lodged. Mr Baker had been at the consultation meetings and I can see no complaint by Mr Baker at the time of the consultation and it is unclear why he suddenly seemed to form a contrary view, when it would have been his role to be more vocal at the consultation stage.

47. On 3 June Mr Wynn wrote to the Claimant in relation to the fact that the Claimant had entered Early Conciliation and had intimated a claim. The

background was set out and Mr Wynn suggested that both the Claimant and Mr Baker were acting vexatiously and unreasonably and that if the Claimant brought a claim and was ultimately unsuccessful an application for costs would be made against the Claimant and his representative as any claim would be considered vexatious and without merit. He pointed out that he could seek up to £20,000 in costs at the tribunal and that figure could be higher if he went to the County Court. The letter was open and not without prejudice.

48. On 30 June 2021 the Claimant resigned contending that the Respondent were in breach of contract in relation to Measure 7 and Measure 9 and because the employment relationship had irrevocably broken down and there had been a breach of the implied term of trust and confidence. On 1 July the Claimant was asked to reconsider and in reply cited the letter sent by Mr Wynn as being the last straw.

The Law

Unfair Constructive Dismissal

50. The statutory basis for constructive dismissal is set out at section 95 (1) (c) of the Employment Rights Act 1996 and that section states that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

51. It follows that the test for constructive dismissal is whether the employer's actions or conduct amounts to a repudiatory breach of the contract of employment (**Western Excavating (ECC) Limited v Sharp (1978) 1 QB 761**).

52. It is an implied term of any contract of employment that the employer shall 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 employer and employee (**Malik v BCCI SA (1998) AC 20**).

53. Any breach of the implied term of trust of and confidence would amount to a repudiation of the contract of employment and the test of whether or not there has been a breach of the implied term is objective (Malik at 35C). There is no need to demonstrate intention to breach the contract. Intent is irrelevant.

54. A relatively minor act may be sufficient to entitle the employee to resign and leave the employment if it is the last straw in a series of incidents. The particular incident which finally causes the resignation may in itself be insufficient to justify that action, but that act needs to be viewed against a background of such incidents that it may be considered sufficient to warrant treating the resignation as a constructive dismissal. It is the last straw that causes the employee to terminate a deteriorating or deteriorated relationship.

55. It is clear that the repudiatory conduct may consist of a series of acts or incidents, some of which may be more trivial, which cumulatively amounts to a repudiatory breach of the implied term of trust and confidence. The question to be asked is whether the cumulative series of acts alleged, taken together, amount to a repudiatory breach of the implied term. Although the final straw may be relatively insignificant, it must not be entirely trivial. It must contribute something to the preceding acts.

56. The paragraphs prior to his one within this Law section are a summary of Lord Dyson's Judgment **in London Borough of Waltham Forest v Omilaju (2005) ICR 481**.

57. In **Kaur v Leeds Teaching Hospitals NHS Trust (2018) EWCA Civ 978** it was identified that normally it will be sufficient to ask and answer the following questions to establish whether an employee has been constructively dismissed.

    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 date?

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

    d) If not, was it nevertheless a part of a course of conduct which viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence?

    e) Did the employee respond to that breach?

Conclusions

58. It is accepted in this matter that there was a TUPE transfer and in such circumstances there is an obligation to inform and consult with appropriate representatives of employees who may be affected by the Transfer. That took place and in this case Trade Union representatives were present throughout the consultation meetings. The obligation under Regulation 13(2)(c) and (d) TUPE is to inform the representatives of **"the measures which he envisages will, in connection with the transfer, take in relation to any of the affected employees."**

59. Neither "Measures" nor "envisages" are defined within the Regulations but judicially Measures has been described as any "action, step, or arrangement" and "envisages" is anything the employer visualises or foresees. The duty to inform and consult is not limited to measures that will amount to a change in contractual terms and conditions of employment. An employer is not obliged to change its position.

60. It is clear within the papers that there was extensive discussion about the transfer with the right people and ultimately no claim has been brought on the basis of a failure to consult. There were a number of meetings at which views

were canvassed including via Ms Goff from the Claimant. It is not clear why the Claimant did not go via his trade Union representatives save that it would appear that at least one of the trade Union reps and the Claimant did not necessarily see eye to eye.

61. The Claimant asserts that there are a chain of events that led to his resignation and I will deal with each in turn whilst keeping in mind that I need to consider them as a group when considering whether or not there has been a repudiatory breach of contract.

62. **Measure 7** – I do not consider that the Respondent were in breach of contract in relation to the changes proposed in this Measure and I take the following matters into account:

a) The only contract I have seen is the Southern Water Services contract. In that document is stated that ***"during your employment you can be required to undertake such other duties and / or hours of work temporarily or on a continuing basis as may reasonably be required of you commensurate with your position in the organisation"***.

b) The Claimant's role profile with Siemens states that he would ***"assist in all aspects of customer account management … collecting account data, customer meter management etc."*** That was said to be the purpose of the CAO role and the areas of responsibility / tasks stated:

i) **"*Collect meter, customer, property, and associated data in accordance with business processes and Regulator standards".***

ii) Operate meter reading equipment in accordance with business processes.

d) I have seen the role profiles for both Meter Readers and CAOs at the Respondent and accept that they are lifted word for word from the Siemens' role profiles. I note that the matters set out at b) i) and b) (ii) above are the same in both the Meter Reader and the CAO profile.

e) Whilst I accept the Claimant's evidence that he personally did not do any cyclical water meter reading I find that his role profile was wide enough for him to be required to do it and also that it was something he could have been asked to do under paragraph 1.5 of his contract of employment set out at (a) above. I do not accept as he suggested that the Measures meant that he had suffered a demotion

f) I find that Measure 7 was simply a clarification of an entitlement that Siemens had always had but never exercised. There was no material change. As explained to the Claimant in his one to one any request would be the exception and not the rule and that he would have a right to refuse.

That was the same as at Siemens In actual fact that came to pass and the Claimant was never asked to do any cyclical meter reading.

g) I do not find Measure 7 to have been unreasonable in any way and was merely a restatement perhaps with clarification of what the Claimant was always able to be asked to do. Even if there was a change contrary to what I have set out there was no obligation on the Claimant to do cyclical work nor was he asked to do it.

63. So far as measure 9 is concerned it is clear that from Siemens' perspective there was no change being proposed and the 30 minutes at the start of the day / end of day travel was what the Claimant and others in his role were obliged to do. That was confirmed by Adrian Baker of the GMB in a Consultation meeting. The Respondent were entitled to believe that was so on what they had been told.

64. I accept the Claimant's evidence that it was not something that he did and I am sure that he clocked his time in an alternative fashion and for whatever reason his manager did not take up the issue with him. I am also quite satisfied, however, that the Claimant knew that his working day would not start until his first customer but simply chose to ignore it. I accept that there is no clear email or circular which is specifically addressed to the Claimant, but I accept the evidence that he had been railing against it for some time before the transfer was even contemplated and that he knew what he should be doing in respect of clocking on and off. Again there was nothing unreasonable from the Respondent's perspective in accepting what they were told from Siemens and the Trade Union.

65. If the Claimant was not satisfied then his options were set out in the letter of 22 March 2021 (160) in that he could formally object to the transfer and his employment would come to an end and this would have been deemed a resignation.

65. The next issue is the failure to deal with the Claimant's grievance. The subject matter of the grievance was in respect of Measures 7 and 9 and related to matters that had been discussed at length within the TUPE consultation with the Claimant's representative and which had ended up as agreed by the Trade Union on the Claimant's behalf. There was no obligation upon the Respondent to agree to the matters during the consultation and no obligation for them to consider them further in another setting.

66. Whilst some employers may have heard the grievance I do not accept that it was in any way unreasonable for the Respondent to refuse to deal with matters that had been discussed so extensively and agreed by the Claimant's representatives over a two-month period. I agree that if there was a problem then that should have been properly addressed to the Claimant's Trade Union. Even if there had have been a grievance hearing I am quite satisfied that the Claimant had no argument to deploy other than ones which had been

fully aired at the TUPE consultation and that the outcome would have been the same. The Claimant told me that the object of his grievance was to get the agreed Measures revoked and there was no prospect of that happening.

66. The next issue is the costs warning letter which the Claimant cites as the final straw. Mr Wynn sets out why he considers that the Claimant is acting vexatiously and unreasonably and points out the potential pitfalls if a costs order was successful against the Claimant. There is nothing inaccurate in the letter in the sense that if the Claimant was found to have been acting unreasonably the Tribunal would "be able" to make the award cited and it would be possible to pursue a sum in excess in the County Court.

67. I accept that the maximum down side is used but I do not consider that this is anything other than a legitimate technique when confronted with potentially lengthy and expensive litigation. The Claimant was a member of the Union and could have sought advice there or elsewhere as to what seriousness to attach to the letter and act accordingly. The Claimant is signposted to ACAS for assistance. Further the letter is written not between employer and employee but as litigant and Respondent in proposed legal proceedings. Although a forceful approach I do not consider that sending such a letter was in any way unreasonable.

68. I note the Claimant's reaction to the letter as set out at paragraph 29. The Claimant was very invested in the position he had taken. One could use the word entrenched. I do not accept that there was any likelihood of a grievance being able to reassure the Claimant. His suggestion that he was open to being told he was wrong is not accepted. I consider that the Claimant's alleged reaction was not objectively justified.

67. Taking these matters individually and collectively I do not consider that the employer has without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee for the reasons cited above. I find that the Respondent did have reasonable and proper cause to act in the way it did in relation to the Measures, the grievance and the costs warning letter. It acted in good faith taking into account what it had been told by Siemens and the Trade Union in the consultation and the decision to not hear a grievance and to write the costs warning letters were perfectly reasonable in the circumstances that pertained in this case.

68. There actions were certainly not calculated to destroy or seriously damage the relationship of trust and confidence nor was it likely to do so on an objective basis.

69. Answering the questions set out in **Kaur**:

> What was the most recent act or omission on the part of the employer which the employee says caused or triggered his resignation?
>
> ***The Costs warning letter***

Has he or she affirmed the contract since that date?

No, the Claimant resigned almost immediately after receipt of the letter

If not, was that act or omission in itself a repudiatory breach of contract?

No, the costs warning letter was not a repudiatory breach of contract.

If not, was it nevertheless a part of a course of conduct which viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence?

No, having viewed the conduct cumulatively I do not consider that it amounted to a repudiatory breach of the implied term of trust and confidence.

Did the employee respond to that breach?

Not relevant following the answer to the previous question.

70. Following on from my findings above the claim for unfair dismissal is not well-founded and is dismissed. As there was no breach of contract the claim for wrongful dismissal must fail and is dismissed as well.

Employment Judge Self
27 April 2023