**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case no 4101251/2023**

**Held at Dundee on 15, 16, 17, 20, 22, 23 and 24 November 2023**

**Employment Judge W A Meiklejohn**

| | |
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| **Mr Andrew N Douglas** | **Claimant**<br>**In person** |
| **Northern Tool and Gear Co Ltd** | **Respondent**<br>**Represented by:**<br>**Mr R Russell – Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that the claimant was not constructively unfairly dismissed by the respondent, and his claim is dismissed.

**REASONS**

1. This case came before me for a final hearing to determine both liability and, if appropriate, remedy. The claimant appeared in person. The respondent was represented by Mr Russell.

2. The hearing proceeded as normal on 15, 16 and 17 November 2023. Unfortunately the claimant sustained injuries in an incident occurring over the weekend of 18/19 November 2023. The hearing resumed briefly on 20 November 2023, at which time it was agreed that it would be adjourned to

allow the claimant more time to recover. The hearing then recommenced on 22 November 2023 (and on that date only was conducted by means of the Cloud Video Platform because the Dundee Employment Tribunal could not accommodate an in person hearing).

**Nature of claim**

3. Because the claimant's ET1 claim form made reference to the respondent allegedly not following the procedure in the Company Handbook for calculating holiday pay, the claim was initially understood to relate to both unfair dismissal and holiday pay. However, the claimant clarified at the start of the hearing that he was pursuing only a constructive unfair dismissal claim.

**Evidence**

4. The hearing proceeded on that basis. I heard evidence from the claimant. I then heard evidence for the respondent from (in this order) –

- Mr Gordon Strachan, Managing Director
- Ms Mhairi Davidson, Managing Consultant with 121 HR Solutions Ltd
- Ms Cate Hodgson, Senior Consultant with 121 HR Solutions Ltd
- Ms Barbara Carr, formerly Quality Manager with the respondent
- Ms Sandie Holmes, Managing Consultant with 121 HR Solutions Ltd

5. Mr Graeme Strachan is the respondent's Production Director. He did not participate as a witness but was mentioned frequently during the evidence. To differentiate between them, I will refer to Mr Gordon Strachan as "Mr Strachan" and Mr Graeme Strachan by his full name.

6. I was provided with a joint bundle of documents extending initially to 372 pages. This was supplemented during the hearing by one additional

document submitted by the claimant. I refer below to documents in the bundle by page number.

**Findings in fact**

7. The claimant is a time-served engineer. He was employed by the respondent as a CNC Machinist from 15 July 2013 until his resignation on 28 October 2022. Prior to joining the respondent, the claimant worked for a number of local engineering firms, including a previous spell of two years with the respondent.

8. The respondent is a family owned business which manufactures gears and transmission parts and undertakes engineering work on a sub-contractor basis. Its customer base spans a number of sectors. It operates solely in Arbroath and currently has around 32 employees. At the time of the events described below, the respondent's management team comprised Mr Strachan, Mr Graeme Strachan, Ms Carr and Mr Iain Smith, Finance Manager.

***Disciplinary issue***

9. The sequence of events which culminated in the claimant's resignation began on 27 October 2021. Mr Strachan approached the claimant at his machine and asked him to undertake a particular job. This entailed turning the bores of gears for a customer called SKB using cubic boron nitride ("CBN") inserts supplied by Sandvik. The background to this was that Mr Strachan was looking to reduce the number of different suppliers used by the respondent and the CBN inserts had been provided by a Sandvik representative on a free trial basis.

10. The claimant argued with Mr Strachan, stating that his machine could not hold the tolerance required for this job. The claimant told Mr Strachan that the job should be done on a grinder (in terms which were less than complimentary about the ability of the grinding operator). Mr Strachan

disagreed and told the claimant to do the job using the instructions provided on the box containing the Sandvik inserts.

11. The claimant continued to protest. According to the claimant's own record of this conversation (44-50) prepared when he returned home shortly after the incident, he spoke to Mr Strachan in terms which were disrespectful and insubordinate –

*"Are you for real – do you listen to anything you are told? This machine can't hold the twelve microns tolerance even on soft steel without an intermittent cut and without having to achieve a 0.4 microns surface finish. So, you can bash your head off the wall all you like but your no bashing mine off it. If you want these turned on here, you can show me how to do it because I don't know how. How about you finally show me the skills of your 40 years of your experience that you keep telling everyone about …."*

*"You really don't get it do you? Maybe if you listened to your employees who have highlighted the poor production rate of the grinding operator and concentrated on doing something about that, this wouldn't be a problem. Anyway, you stay and turn ten components to show me how to do it, I'll even set the machine up for you if time is an issue. If it's that easy … just one pass on the face and one through the bore, it shouldn't take very long should it."*

(In response to Mr Strachan asking the claimant if he was refusing to do his job) "*No, I'm telling you that I don't know how to do the job. Yet you say it's no problem. Are you refusing to help me? If you complete ten components, then either a miracle has happened, I will bow down to you and thank you for sharing your wisdom, then I can carry on and turn the rest. Or perhaps you'll finally understand all the different issues that arise relating to turning these parts on this machine – since your incapable of listening to fact and discussing engineering problems in a constructive manner. Clearly you are incapable of processing information to make suitable judgements about which*

*manufacturing techniques are quicker, or more efficient and therefor better for production time and quality."*

*"Complete waste of time. All you have done lately is knowingly waste company time. As an employee of the company, you should be getting pulled up for that …. Absolute insanity this is, you do know the definition of insanity that the dictionary gives, don't you? To repeat something time and again the same way, expecting a different outcome. This is by definition, insanity."*

12. Mr Strachan's version of this conversation was captured in an email he sent to Ms Carr (51), also shortly after the incident, was not materially different except that he referred to profane language used by the claimant.

13. The claimant then told Mr Strachan that his *"head was burst with this"* and that he was leaving to go home. Mr Strachan referred to the claimant saying that he was leaving due to his "*brain melting".* The claimant then put on his jacket, clocked out and walked towards the exit door. Mr Strachan followed him. The claimant did not accept that he had given Mr Strachan a single finger gesture but, given the claimant's state of agitation at this time I believed that, on the balance of probability, he had done so.

14. As he left the factory, and as Mr Strachan approached, the claimant slammed the exit door. Mr Strachan followed the claimant outside and told him that he was suspended on full pay for 24 hours, to allow him time to cool off. A statement was taken from another employee, Mr C Cooper, who had seen the claimant slamming the exit door as he left the factory. This was confirmed in writing on 28 October 2021 (52).

***Disciplinary meeting***

15. Ms Carr wrote to the claimant on 28 October 2021 (53) inviting him to a disciplinary meeting on 1 November 2021. The allegation was that the

claimant "*refused to follow reasonable instructions and …. acted in an aggressive manner by slamming a door close to the Managing Director, at approximately 2.50pm on Wednesday 27th October".* The claimant was advised that the respondent regarded this as serious misconduct, and that the outcome might be a disciplinary warning. He was informed of his right to be accompanied.

16. The disciplinary meeting took place as scheduled. The claimant was accompanied by a work colleague, Mr S Robb. Mr Smith acted as notetaker. The notes of the meeting were produced (59-62). I was satisfied that these were broadly accurate.

17. At the start of the meeting the claimant sought to introduce a grievance against Mr Strachan. He had prepared a proposed grievance (56-57). He said that he had been advised by ACAS that the disciplinary meeting could be postponed so that his grievance could be heard concurrently. Ms Carr adjourned the meeting to take advice on this. When the meeting reconvened, Ms Carr told the claimant that as his grievance had not yet been raised before the disciplinary meeting, it could not be discussed. The claimant accepted this. The meeting then continued for a little under two hours, with a one hour break for lunch midway through this session. It reconvened on 2 November 2021 for a little over half an hour.

18. After taking advice from Ms Hodgson, Ms Carr issued her outcome letter on 8 November 2021 (67-68). She recorded her decision in these terms –

- *I believe that the instructed task (which was to try machining the parts using a new type of insert) was reasonable. It was possible to attempt and with no foreseeable safety concerns. The fact that the request was to try something implies that there is a risk that it may not produce the desired outcome. There should not have been any risk of your reputation as a machinist being impaired because of producing scrap parts as a result of trying. On the contrary, it was an opportunity to*

*extend the breadth of experience and knowledge of yourself and the company.*

- *I believe that although you stated that you asked for help from the Managing Director, to show you how the job could be done, the manner in which you addressed him was inappropriate. You were telling him what to do and making disparaging comments from the outset. This is not conducive to a respectful working relationship between employees of any standing within the company. Furthermore, I believe that the task of trying-out what was requested by the Managing Director was within your capability and would not have needed his immediate assistance to demonstrate. This is justified by the fact that you carried out the instruction in question when you returned to work on Friday 29th October.*

- *I found that the evidence in relation to the allegation of acting in an aggressive manner by slamming the door was inconclusive, albeit that the door was closed loudly and was witnessed.*

- *In mitigation, I have taken into consideration that you mentioned in your account that you have previously reported your concerns about certain aspects of production strategy to management and that the apparent repetition of similar issues made you feel as if your concerns were being ignored.*

19. Ms Carr's outcome letter recorded that she decided to take no formal disciplinary action but to issue a verbal warning, to remain on the claimant's record for six months. She advised the claimant of his right of appeal but he did not exercise this.

***Informal grievance***

20. On 15 December 2021 the claimant was told by Mr O Price that Mr Strachan had been overheard speaking about him to Mr Graeme Strachan in a derogatory manner. A meeting was arranged and took place at 9.00 on the same date. This was attended by the claimant and Mr Strachan, with Ms Carr acting as notetaker. The notes were produced (93-96) and the claimant confirmed that these were accurate.

21. At this meeting the claimant said that he wanted to raise an "*unofficial"* grievance against Mr Strachan. The claimant complained about –

- the need for careful work planning by management, without contradictory instructions from Mr Strachan and Mr Graeme Strachan
- employees being spoken about disrespectfully
- being consulted by colleagues with machine queries
- Mr Strachan allegedly lying to him about the SKB bore (referring to what the Sandvik representative had said) and a broken tool

22. Mr Strachan acknowledged that there had been a heated discussion between himself and his brother, but stated that he did not have any issue with the claimant. There was then a discussion about the recent disciplinary issue – the claimant complained that he now had a disciplinary record whereas Mr Strachan "*had got away scot-free".*

23. Mr Strachan said that he would "*need to take things on board"* and would speak to his brother about trying to improve things. Mr Strachan said that he would *"try to be more polite and less aggressive to people".* He acknowledged that he could sometimes react instantly/inappropriately when caught unawares by something. There was discussion about training and the cost implications for the respondent, and how the financial pressures on the respondent created stress for Mr Strachan.

24. For the sake of completeness I will deal with the two matters where the claimant contended that Mr Strachan had lied to him –

(a) The claimant's position was that Mr Strachan told him that the Sandvik representative had said that the inserts *"would do the job"* and that Mr Strachan said that the Sandvik representative had provided technical information in terms the cutting speed and feed rate. The claimant had spoken to the Sandvik representative who told him that he had given Mr Strachan no such information. Mr Strachan's position was that the Sandvik representative had not said that the inserts would work. His advice to Mr Strachan was to follow the instructions on the box (containing the inserts) as a starting point. While there were areas of conflict here, I was not persuaded that Mr Strachan had lied to the claimant. There was simply no reason for him to do so when all he was asking the claimant to do was to try out a product supplied by Sandvik on a free trial basis.

(b) The claimant's position was that Mr Strachan had broken a tool and had not admitted to this at the time. Mr Strachan's position was that he accepted he had broken the tool but had *"closed down the conversation"* with the claimant about it. My view of this was that (i) Mr Strachan might have been initially evasive when asked about the tool but (ii) there was no conclusive evidence that he had lied to the claimant about it.

25. The claimant did not submit a formal grievance after the meeting on 15 December 2021. Mr Strachan thought that he had *"cleared the air"* with the claimant at the meeting. They had discussed matters and *"there was a plan moving forward".* However, subsequent events proved that the claimant was less willing to put the disciplinary issue behind him.

***Claimant's personal issues***

26. On or around 20 February 2022 the claimant separated from his partner. This was evident from an email of 28 March 2022 (102) sent by the ex-partner's solicitor to the solicitor subsequently instructed by the claimant.

27. On 22 February 2022 the claimant became upset and tearful at his work station and went home to compose himself. He telephoned Ms Carr to report this. Ms Carr's note of this conversation (98) referred to the claimant having consulted with his GP and having taken Fluoxetine, an anti-depressant medication, since Christmas 2021. Ms Carr's note also stated –

*"Underlying issues mean that potential disruption to attendance – Andy has discussed this with Gordon."*

28. There was a conflict in the evidence as to when this conversation between the claimant and Mr Strachan had taken place. The claimant said that it was after the separation occurred, whereas Mr Strachan recalled it was earlier. I preferred the claimant's evidence here because Mr Strachan was less precise in his recollection, but I did not regard the point as material.

29. The claimant met with Mr Strachan and Ms Carr on 23 February 2023. Ms Carr made a note of their discussion (100). This recorded that the claimant asked if Ms Carr could accompany him to act as notetaker at a *"solicitor meeting"* later that day, which was agreed by Mr Strachan. Mr Strachan was supportive when the claimant asked about holidays at Christmas 2022 because he was concerned that he might miss spending time with his children.

30. Ms Carr made a note of a discussion with the claimant on 11 March 2022 (101) which recorded that the claimant was currently staying at his sister's house, and would be seeking legal advice about a plan he had agreed with his ex-partner. Ms Carr made a note of a further discussion with the claimant on 30 March 2022 (104) which occurred after the claimant became tearful at his machine, having been upset by the terms of a letter from his ex-partner's solicitor. It was apparent from the terms of this note that the claimant was

concerned about how his separation from his ex-partner would impact on his relationship with his children.

***Noise issue***

31. In early April 2022 there was an issue of noise from a particular machine within the respondent's factory. Ms Carr took decibel meter readings at various locations on 5 April 2022 (105-111). The respondent provided employees affected by the noise with ear defenders.

32. The claimant was adversely affected by the noise and this led to a meeting with Mr Strachan and Ms Carr on 7 April 2022. Ms Carr made a note of their discussion (112-114). This recorded the claimant referring to the noise as a *"new phenomenon"* which was *"agitating him".* The claimant did not want to operate his own machine when the noise was present as he did not feel that he could *"function normally".*

33. According to Ms Carr's note, the accuracy of which was not challenged, when Mr Strachan observed that other employees were managing (ie despite the noise) the claimant referred to *"everyone else"* being *"shite at their job".* The outcome was that the claimant agreed to take 8 April 2022 as a holiday, and to return on 11 April 2022 when Mr Strachan would find work for him to do elsewhere in the factory while the noise issue persisted.

***Events of 26 April 2022***

34. On 26 April 2022, which was a normal day of work for the claimant, he went to a public house at lunchtime and consumed alcohol. Upon his return to work the claimant reported to Mr Graeme Strachan that he had done so and said that he was leaving. The claimant did not accept that this was *"unacceptable conduct"* and described the way in which he dealt with the matter as *"appropriate".* The claimant did however accept that the respondent had *"cut him some slack"* by not taking any disciplinary action over this.

35. This incident was recorded in an email which Ms Carr sent to herself on 26 April 2022 (125). In this Ms Carr was setting out what Mr Strachan said to her, reflecting what Mr Graeme Strachan had reported to Mr Strachan. In her email Ms Carr referred to the claimant having "*drunk 3 pints".* In his evidence to me, Mr Strachan referred to being told that the claimant had consumed *"two or three drinks".*

36. The respondent's disciplinary rules and procedures were contained in the company handbook (287-301), to which reference was made in the claimant's contract of employment (280-286). Those rules set out a non-exhaustive list of examples of gross misconduct offences rendering an employee liable to summary dismissal. The list included –

- *Drinking alcohol or being under the influence of alcohol/drugs and/or drug abuse whilst attending work.*

37. The claimant's conduct on 26 April 2022 merited a disciplinary response and he was fortunate that Mr Strachan decided not to pursue this. This was lenient treatment of the claimant by the respondent, and consistent with their recognition that the claimant was going through a difficult time outside of work.

***Absence on 5 May 2022***

38. The claimant was absent from work on the afternoon of 5 May 2022. Ms Carr conducted a return to work interview with him on 6 May 2022. The relevant form was produced (128-129). Within this, Ms Carr recorded some work-related concerns expressed by the claimant –

*"Andy …. was also feeling stressed at various aspects of the workplace environment"*

*"…. finding it difficult to tolerate some aspects of current workplace behaviours & practices"*

*"Some reasonable adjustments were made in response to a recent issue concerning the workplace environment (Temporary noise problem due to machine in disrepair)"*

39. After the section of the form dealing with the claimant's absence record, Ms Carr completed the summary and next steps section in these terms –

*"Andy to provide suggestions for workplace adjustments to line management"*

40. In advance of this meeting, Ms Carr had obtained from Mr Smith details of the claimant's absences in 2021 and 2022 to date (126). In 2021 the claimant's absences were mainly for medical appointments. I noted that his absence following the incident with Mr Strachan on 27 October 2021 was recorded as *"at request of management (fully paid)"*. His day of absence on 28 October 2021 was recorded in the same terms.

41. The claimant's absences in April and May 2022 were recorded in these terms –

| ***Start*** | ***End*** | ***Hours*** | ***Notes*** |
|---|---|---|---|
| *Tues 05/04/22* | *Tues 05/04/22* | *5.25* | *Left at 10.50am (pay full shift per Gordon verbal)* |
| *Wed 06/04/22* | *Thu 07/04/22* | *16.50* | *Going to doctor …. (full pay per Gordon)* |
| *Fri 22/04/22* | *Fri 22/04/22* | *2.00* | *Appointment* |
| *Tues 26/04/22* | *Tues 06/04/22* | *3.50* | *Left early (1.24pm)* |

*Tues 03/05/22 Tues 03/05/22 2.00 Left early (2.45pm) (made time up am Wed 04/05)*

*Thu 05/05/22 Thu 05/05/22 4.00 Left at lunchtime, feeling unwell*

42. I noted two particular points arising from these absence records and the return to work interview notes of 6 May 2022 –

(a) The claimant was treated more favourably than he might have been on a number of occasions – when he walked out on 27 October 2021 his absence was recorded as "*at request of management (fully paid)"* and he suffered no loss of pay in respect of his absences on 5, 6 and 7 April 2022.

(b) While the claimant raised work-related issues at the return to work interview on 6 May 2022, he did not do so during the various meetings which took place in February and March 2022 (see paragraphs 29 and 30 above).

***Medically certified absence***

43. The claimant began a period of medically certified absence on 12 May 2022. He provided a Fit Note (131) which gave the reason for absence as "*depression".*

44. The claimant attempted to return to work on 25 May 2022 but, according to the claimant, this "*did not go well".* At that time, it was the respondent's practice to conduct return to work interviews at 11.45, shortly before the lunch break. The claimant had intended to request at this meeting that colleagues should not bring their own issues to him, and that his own work should be "*clearly set out"* to make it easier for him to return.

45. The claimant spoke with a colleague, Mr S Clark. According to the claimant, Mr Clark told him that Mr Strachan had asked that the words "*Stolen from NT&G"* should be etched on a caliper tool. The claimant asserted that this reflected the respondent's attitude to employees. The claimant also said that Mr Clark had told him about an alleged error by Mr Graeme Strachan. The claimant felt he could not stay and clocked out at 11.00.

46. The claimant consulted his GP and provided a second Fit Note (134) covering a period of one week from 26 May 2022. This gave the reason for absence as "*Stress at work".* On receipt of the second Fit Note, Mr Strachan contacted Ms Hodgson of 121 HR. Ms Hodgson was 121 HR's account manager for the respondent. In his email to Ms Hodgson on 26 May 2022 (135), Mr Strachan stated that he had suggested a meeting with Ms Carr and himself but the claimant had indicated that he wanted to have a meeting with the respondent's HR consultants.

47. This led to Mr Strachan writing to the claimant on 27 May 2022 (141) to invite him to what was described as a *"Welfare meeting"* with Ms Hodgson on 30 May 2022. The agenda for this meeting was expressed as –

*"1. Your medical condition and the prognosis for the future.*

*2. Entitlement to Statutory Sick Pay.*

*3. Consideration of job adjustments.*

*4. The way forward/ongoing review."*

The claimant was offered the right to be accompanied by a trade union representative or work colleague. He was also offered the option of making a written submission, or for the meeting to take place at his home.

***Welfare meeting***

48. The meeting between the claimant and Ms Hodgson took place on 30 May 2022. Following the meeting, Ms Hodgson wrote to the claimant on 3 June 2022 (142-143) to summarise their discussion. She recorded –

- That the claimant said that his GP had revised the reason for absence to work related stress, and that he felt the workplace environment had caused his ill health.

- The claimant's belief that the issues stemmed from a disciplinary incident which occurred in October 2021.

- The claimant's reference to an incident when he alleged that, at a time when he was in an office with Ms Carr receiving support, having felt anxious at work, Mr Graeme Strachan had *"burst into the office"* and shouted at himself and Ms Carr, leaving him *"humiliated"* and increasing his "*feelings of anxiety".*

49. Ms Hodgson also recorded that the claimant summarised his position by making a number of suggestions –

*"1. You feel that every drawing should be properly checked prior to being issued to an engineer to ensure that they do not contain errors. This is because you feel that all other staff bring drawings to you when they have queries, rather than raising any queries with Graham or Gordon.*

*2. You wish to see that every employee is treated consistently and fairly and that employees should feel comfortable to speak out if they perceive that there are concerns at work.*

*3. You would like a written apology from Graham regarding the incident detailed above.*

*4. You would like a written apology from Gordon for initiating the disciplinary situation which resulted in your informal verbal warning.*

*5. You would like return to work meetings to take place as soon as the absent employee returns to work, and not later in the day; in order that any required adjustment can be made at the start of the working day.*

*6. You believe the business should reflect on your absence, and pay you full pay for your periods of absence."*

50. After meeting with the claimant, Ms Hodgson spoke with Mr Strachan and Mr Graeme Strachan. This informed what she then said to the claimant in her letter of 3 June 2022 (142-143). She told the claimant that –

- Mr Strachan was confident that drawings were correctly and properly checked before being issued, but would ensure that other employees refrained from approaching the claimant with queries.

- Mr Strachan was happy to make himself available to any employee with a concern, and was "*confident that processes in the business are sufficiently robust to provide a fair and consistent working environment".*

- Mr Graeme Strachan had "*unreservedly apologised"* for the incident about which the claimant complained.

- No apology was due for the disciplinary process as this was done fairly and in line with the ACAS Code. In any event, the informal warning had expired.

- It had been agreed that, where practicable, return to work meetings would take place at the start of the working day.

- The respondent did not operate a policy of occupational sick pay and so the claimant was not entitled to receive pay other than SSP for periods of absence.

Ms Hodgson also advised the claimant that Mr Strachan would ensure that he (as opposed to Mr Graeme Strachan) would be his *"direct point of contact for work going forward".*

***Events of 7 June 2022***

51. The claimant returned to work on 7 June 2022 after his period of medically certified absence. He attended a return to work meeting with Ms Carr. She completed the usual form and added some notes (148-150) which related to the events I now describe.

52. Part way through the return to work meeting, Mr Strachan knocked and entered the room. His purpose was to welcome the claimant back and tell him about some of the items covered in Ms Hodgson's letter of 3 June 2022, and he did so.

53. According to the claimant, Mr Strachan's arrival "*threw my mind into disarray".* The claimant told Mr Strachan that he would need to make a written reply to the *"drivel"* contained in Ms Hodgson's letter of 3 June 2022. Mr Strachan said that was his prerogative. The claimant then referred (according to Ms Carr's note) to *"letting the courts decide, and letting ACAS decide".*

54. Mr Strachan then left the meeting. Ms Carr sought to continue with the return to work meeting, but the claimant became unsettled and indicated that he was going to go home. The claimant clocked out and walked through the factory towards the exit door. Mr Strachan was standing beside the door, speaking to another employee.

55. According to the claimant, he told Mr Strachan that he was leaving, that he had told Ms Carr why, and Mr Strachan should speak to her. Mr Strachan followed the claimant into the car park and questioned why he was leaving. The claimant again referred him to Ms Carr, and asked Mr Strachan not to follow him out. The claimant went home and telephoned Ms Carr. In the email record Ms Carr made of this call (145) she noted that the claimant had said that he would not be returning that day, that he became upset and started to cry, and was *"unhappy about how things had changed so quickly from him just wanting to get on with his job quietly, to being worked-up about the letter and the workplace problems that he knew he would have to raise in writing".*

56. According to Mr Strachan, when he asked the claimant why he was leaving, the claimant *"became very aggressive and abusive in his tone and used several expletives".* The claimant said it was *"fucking ridiculous"* that the respondent was not going to pay him for being off, and made reference to two other employees who had been paid when they were off. Mr Strachan explained that these were staff members whose contracts included paid sick leave. The claimant said that he was going to ACAS and told Mr Strachan that he was going to "*take him down".*

57. I regarded these accounts of the exchange between Mr Strachan and the claimant as he left the factory as complementing rather than contradicting each other. I believed that the claimant had used profane language. That he would do so when agitated was demonstrated by the events of 27 October 2021 (see paragraph 12 above).

58. Before moving on, I will deal with a point which arose during Ms Carr's evidence, which commenced at around 11.15 on 23 November 2023. When asked about what Mr Strachan had said to the claimant at the meeting on 7 June 2022, she replied that there was *"nothing unreasonable in itself in what Gordon said".* Her evidence-in-chief concluded at 12.20 when there was a short break at the claimant's request prior to starting his cross-examination of Ms Carr. Before this break, and again before the lunch break at 13.00, I

reminded Ms Carr that she must not discuss her evidence with anyone else involved in the case.

59. When the hearing resumed after lunch, Ms Carr asked if she could expand on one of her earlier answers, or whether she would need to await a further question. Mr Russell quite properly objected to Ms Carr being allowed to revisit an answer she had already given. I upheld that objection.

60. A little later, during my own questioning of Ms Carr, I asked about her use of the words "*in itself"* in her answer relating to what Mr Strachan had said to the claimant during the meeting on 7 June 2023. It transpired that this was the matter upon which she had wanted to expand.

61. In answer to my question, Ms Carr referred to her notes on the return to work interview form (at 150). She said that she had spoken to Mr Strachan before the return to work meeting with the claimant. Mr Strachan had asked her to report to him after the meeting, and indicated that he would then tell the claimant about the arrangements which were being put in place for the claimant in relation to his return to work and in response to the welfare meeting.

62. Ms Carr said that she had advised the claimant of this at the start of the return to work meeting on 7 June 2022. The claimant's response was to ask Ms Carr to tell Mr Strachan that he (the claimant) did not want to speak with him (Mr Strachan) at present, and just wanted to get on with his job. Ms Carr intended to relay this to Mr Strachan after the return to work meeting. I did not believe that Mr Strachan was aware of the claimant's wishes when he entered the room where the claimant and Ms Carr were meeting.

***Events of 27 June 2022***

63. Ms Carr conducted a return to work meeting with the claimant on 27 June 2022. Her note of this (152-154) recorded the reason for absence as "*Andy's*

*mental health suffered due to stress caused by his ongoing dissatisfaction at various practices in the workplace".*

64. Ms Carr's note also recorded that the claimant telephoned after the meeting to pass on a message to Mr Strachan. He intended to prepare a response to the letter from Ms Hodgson and requested a meeting with Mr Strachan that afternoon. He indicated that he would not be returning to work on 27 June 2022.

65. There was then an exchange of emails between Mr Strachan and the claimant on 27 June 2022, setting up a meeting that afternoon. It was not apparent from the evidence that such a meeting took place. An email of 27 June 2022 from Mr Smith to Mr Strachan and Mr Graeme Strachan (155) recorded that the claimant had submitted a further Fit Note covering the period from 27 June to 24 August 2022.

***Ms Carr discloses relationship with claimant***

66. The claimant and Ms Carr began a relationship in mid-April 2022. Ms Carr told Mr Strachan about this in early July 2022. She conducted a number of meetings with the claimant in her capacity as a member of the respondent's management team between those dates.

67. Ms Carr accepted that she should perhaps have told Mr Strachan about her relationship with the claimant earlier than she did. She said that there was a sensitivity around the claimant's young family in terms of who they told about the relationship – "*we did not want the kids to find out in the wrong way".*

***Claimant returns to work***

68. The claimant returned to work on 12 July 2022. Mr Smith conducted his return to work interview and completed the usual form (157-159). The reason for absence was recorded as "*stress at work".* Mr Smith set out the adjustments the claimant was seeking. In addition to adherence to matters

noted on the previous return to work interview form (and in the welfare meeting outcome letter), the claimant sought clarification on (a) the respondent's grievance procedure where both directors were part of the grievance and (b) his point of contact when Mr Strachan was on holiday.

69. Mr Smith prepared a letter to the claimant dated 12 July 2022 (160) responding to the clarification items. In this he advised the claimant that (a) he should lodge his grievance with his line manager in the first instance, and they would then step back from direct involvement and (b) his point of contact would be Mr Graeme Strachan when Mr Strachan was on holiday, as nobody else had the required knowledge.

70. There followed a spat between the claimant and Mr Strachan on 13 July 2022 about provision of this letter to the claimant. The claimant asked about the letter at 8.05 and requested that it should be emailed to him. Mr Strachan told him it was in the post. Shortly before 10.30 the claimant told Ms Carr that he was leaving and would be *"back after the holidays".*

71. The claimant emailed Mr Strachan at 13.13 again asking for the letter to be emailed, and alleging that he was being treated unfairly. Mr Strachan responded at 14.12 repeating that the letter was in the post and denying that the claimant was being treated unfairly. At 14.18 the claimant asked again for the letter to be emailed. Mr Strachan then emailed Mr Smith at 14.20 asking him to send a copy of the letter by email, and this was duly done.

***Use of holidays during sickness absence***

72. Having indicated that he would not be returning to work until after the summer holiday break in July 2022, the claimant wanted to use one week of his annual holiday entitlement while on medically certified absence in the period before that break. His request to do so was declined, as confirmed in Mr Smith's email of 14 July 2022 (165), in terms of which the claimant was told that the use of holidays to cover periods was at the discretion of management.

73. The claimant challenged this in an email to Mr Smith on 15 July 2022 (164), pointing out that the issue was not addressed in the company handbook, and that the reference to it on the notice board made no mention of *"at the discretion of management".* Mr Smith told the claimant that his involvement was restricted to holding the return to work interview, that he had been instructed to pass on any questions to Mr Strachan (who was at that point on holiday) and that he was copying in Mr Graeme Strachan.

74. According to the claimant, he raised the matter with Mr Graeme Strachan who gave him "*two separate contradictory reasons".* Having told Mr Smith that he intended to raise a grievance against the directors, the claimant asserted that Mr Strachan was punishing him for threatening to raise a grievance.

75. Mr Strachan subsequently emailed the claimant on 6 August 2022 (183) attaching a copy of the respondent's holiday application form (184). Mr Strachan referred to having granted the claimant's application for a *"floating"* day of holiday on 19 July 2022.

***Claimant raises grievance***

76. The claimant wrote to Mr Graeme Strachan, as his line manager, on 15 July 2022 raising a grievance (166-168). After narrating the matters about which he was unhappy, the claimant set out his grievance in these terms –

*"Graeme Strachan for:*

*A continued breach of policy with regards to ensuring a positive and fair working environment. Including bullying and harassment.*

*And*

*Not adhering to company policies regarding the "quality of product" systems, thereby frustrating other employees and endangering the future of the company by losing faith with customers.*

*Gordon Strachan for:*

*A continued breach of policy with regards to ensuring a positive and fair working environment. Including bullying and harassment.*

*And*

*Victimisation, regarding the withholding of the right to utilise holiday pay to cover absence due to sickness against previous company legislation."*

77. Mr Strachan decided to ask 121 HR to deal with the claimant's grievance. He wrote to the claimant on 1 August 2022 (169) inviting to attend a grievance meeting at 121 HR's Glasgow office (169). The claimant was unhappy about the meeting being held in Glasgow and objected in terms of his email to Ms Davidson (who was originally going to deal with the grievance) on 2 August 2022 (179-180). The venue was changed to the respondent's premises in Arbroath per Ms Holmes' email to the claimant of 3 August 2022 (181) in which she also advised the claimant that she would now be hearing his grievance.

***Data protection complaint***

78. The claimant wrote to the respondent on 3 August 2022 (173-174) to raise a data protection complaint. He stated that he was "*horrified and upset to be approached by another member of the workforce, who apparently had insight into my HR meeting in Glasgow".* He did this after seeking advice for the Information Commissioner's Office ("ICO").

79. The background to this was that, after the venue of the grievance meeting had been changed from Glasgow to Arbroath, a work colleague made a

comment to the claimant which indicated knowledge of the fact that the claimant would no longer be going to Glasgow. The claimant's interpretation of this was that "*senior management were speaking about me behind my back".*

80. The claimant sent a reminder to Mr Strachan on 8 September 2022 (232). Having sought advice from Ms Hodgson, Mr Strachan responded to the claimant on 12 September 2022 (233) in terms which indicated that he had spoken to two colleagues named by the claimant, and had spoken to the ICO. Mr Strachan told the claimant that the ICO had said "*whilst this could be construed as a minor breach of privacy, they would recommend that the internal investigation was enough as no important personal information had been released".*

81. The claimant did not regard this as an adequate investigation and believed that Mr Strachan should have questioned the other members of the respondent's senior management team. It was apparent from Mr Strachan's evidence that he suspected the colleague by whom the claimant was accompanied at the grievance hearing might have been the source of the information.

***Grievance hearing and outcome***

82. The grievance hearing took place in Arbroath on 9 August 2022. It was conducted by Ms Holmes. The claimant was accompanied by his colleague, Mr Steven Robb. Ms Emma Canning, an HR Administrator with 121 HR, acted as notetaker and participated via Zoom. The hearing was video recorded. Ms Canning thereafter produced a written record (201-212) the accuracy of which was not disputed.

83. Ms Holmes sent an email to Ms Hodgson on 19 August 2022 (213) detailing her time spent on the grievance –

*"Prep time – 30 mins*

*Actual hearing on site including follow up investigation with Directors – 3 hours*

*Follow up investigation – 30 mins*

*Write up findings – 1 hour"*

Ms Holmes explained in evidence that the grievance hearing itself had lasted approximately two hours and she had then spent approximately one hour with Mr Strachan and Mr Graeme Strachan. The follow up investigation was with Ms Carr.

84. Ms Holmes wrote to the claimant on 19 August 2022 (197-200) with her grievance outcome. A copy of the written record was sent to the claimant on the same date. I summarise the grievance outcome in the following paragraphs, identifying the various elements of the grievance as Points A-D for ease of reference. Grievance Points A and B related to Mr Graeme Strachan and Grievance Points C and D related to Mr Strachan.

85. Point A –

*A continued breach of policy with regards to ensuring positive and fair working environment including bullying*

This related to the incident where Mr Graeme Strachan had entered a room where the claimant and Ms Carr were having a meeting (see paragraph 48 above, third bullet point). Ms Holmes did not agree that this was *"bullying"* as Mr Graeme Strachan had been concerned for the claimant's welfare. Ms Holmes recorded that the claimant had agreed to the removal of the reference to *"harassment"* from his original grievance. Point A was not upheld.

86. Point B –

*Not adhering to company policies regarding "quality of product" systems, thereby frustrating other employees and endangering the future of the company by losing faith with customers*

This related to parts being booked out (for delivery to the customer) without the final inspection being carried out properly. Ms Holmes was aware of the prominent notices within the factory (121-123) reminding employees of the procedures to be followed when parts were (a) received at final inspection (121), (b) being booked out (122) and (c) being sent to the customer (123). Ms Carr as Quality Manager kept a record of all reports of non-conforming product ("NCR" – non-conformance report).

87. The claimant in evidence referred to NCR 22273 in April 2022 (124) where Ms Carr had written "*Better diligence on the part of the Production Director would be needed to help to avoid this type of occurrence in future".* Ms Holmes' conclusion was that it was a director's prerogative to book out products which ended up being returned – "*Employees have been known to raise concerns at times on matters but the Director is ultimately responsible for making the final decision".* Point B was not upheld.

88. Point C –

*A continued breach of policy with regards to ensuring a positive and fair working environment including bullying and harassment*

This related to (a) Mr Strachan's intervention during the claimant's return to work meeting with Ms Carr, (b) Mr Strachan's behaviour during the disciplinary incident on 27 October 2021, (c) a return to work interview not being held until 11.45 and (d) the situation involving Sandvik. Ms Holmes found that Mr Strachan had acted reasonably towards the claimant in these matters and that there was no form of bullying and harassment. Point C was not upheld.

89. There was one point in her outcome letter where Ms Holmes clearly got it wrong. Her outcome letter included this –

"*You had been instructed to trial the inserts in accordance with the instructions on the box, it was not Gordon making up the instructions himself but to follow what the manufacturer stated and Gordon did this then said he tried the instructions and stated "the old magic is still there". This evidences ….*"

This was incorrect. Mr Strachan did not try to follow the Sandvik instructions himself. He used the words quoted in an entirely different context.

90. Point D –

*Victimisation, regarding the withholding of the right to utilise holiday pay to cover absence due to sickness against previous company legislation*

This related to the claimant's request to use a week of his holiday entitlement prior to the summer break in July 2022. Ms Holmes noted that such requests were normally for a single "*floating day".* She recommended that the respondent should approve payment for the week requested by the claimant. Point D was partially upheld.

***Grievance appeal and outcome***

91. The claimant exercised the right of appeal Ms Holmes had offered in her outcome letter. His letter of appeal (221-229) was expressed articulately in considerable detail. I will not rehearse that detail but will refer below to the summary in the appeal outcome letter.

92. Mr Strachan wrote to the claimant on 5 September 2022 (230) to acknowledge his appeal letter and to advise that Ms Davidson would conduct the appeal hearing in Arbroath on 14 September 2022, with Mr Smith acting

as notetaker. Mr Robb who had accompanied the claimant at his grievance hearing was not available on that date, and the claimant chose to attend alone on the basis that the hearing was to be recorded.

93. Ms Davidson conducted the appeal hearing on 14 September 2022. A copy of the recording was sent to the claimant on 20 September 2022. Ms Davidson wrote to the claimant on 22 September 2022 (238-241) with her appeal outcome. She referred to having interviewed five employees as part of her investigation. I will summarise her findings by reference to the same Points A-D but without repeating the substance of each point.

94. Point A –

Ms Davidson referred to having met with "*your colleague"* by which she meant Ms Carr. She stated that *"at no point did your colleague corroborate that they felt disrespected, humiliated or threatened".* Ms Davidson quoted a definition of *"bullying"* and, applying this, found *"no evidence of this type of treatment".* However, she also stated that *"the relationship between you and Graeme is such that on this occasion you found the situation intimidating, despite there being no evidence of inappropriate or bullying behaviour directed at you".* Point A was not upheld on appeal.

95. Point B –

Ms Davidson did not find that final inspection failure issue complained about by the claimant amounted to a flagrant breach of a director's responsibility under the Companies Act 2006 to "*exercise reasonable care, skill and diligence when carrying out their duties".* Her final sentence of the relevant paragraph was expressed in these terms –

> *"However, my investigation would conclude that the decision made by the director was not intentionally to jeopardise the sustainability of the business or breached."*

It was obvious that some words have been omitted from the end of this sentence. It seemed to me equally obvious that those words must have related to the director's duties point.

96. Ms Davidson then addressed an additional point raised by the claimant in his appeal letter *"in relation to the Production Director instructing that a load of around 700kg was lifted using a crane with a safe working limit of 500kg".* Ms Davidson found that this process involved "*guestimation".* An error had been made but she *"did not find that this was intentional or in any attempt to cause harm or a regular occurrence evidencing negligence".* Point B was not upheld on appeal.

97. Point C –

After finding that there had been no deliberate or malicious intent on the part of Mr Strachan to cause upset at the time of the claimant's return to work meeting with Ms Carr, Ms Davidson said this in her outcome letter –

> "*On meeting with the staff, it was clear that there is no basis which identified the relationship between management and staff was or ever had been, of a bullying or intimidating nature.*
>
> *There have been no incidents witnessed or otherwise that Gordon had previously behaved in a way that was intimidating, or aggressive. Staff suggested that there is a culture where management and staff may get involved in "heated discussions", but it was highlighted by more than one staff member that this was not always initiated by management.*
>
> *Staff stated that there is a culture that frequently uses profanities. This was demonstrated during our meeting in your choice of language with me. Nevertheless, staff did indicate that there are times where management could consider and reflect how they have addressed staff. In the instances that were described, staff felt that it was borne from frustration and lack of patience but was not a frequent occurrence.*

*Overall staff did not describe the workplace in a derogatory way or advise they had concerns with the directors."*

Point C was partially upheld on appeal. I found that it was reasonably obvious that *"partially upheld"* was in reference to the *"times where management could consider and reflect how they have addressed staff".*

98. Point D –

This related to the claimant's request to use part of his holiday entitlement to cover a week of sickness absence. Once again I quote from Ms Davidson's outcome letter –

"*Whilst this request and refusal did happen, there is no evidence that this was a deliberate attempt to punish. It is evident that the process of using "floating" days in place of "sick days" requires to be revisited to ensure consistency in practice."*

Point D was partially upheld. I found that it was reasonably obvious that *"partially upheld"* was in reference to the need to revisit the use of floating days to cover sick days to ensure consistency in practice.

99. In the concluding section of her outcome letter, Ms Davidson –

(a) Suggested consideration be given to mediation.

(b) Referred to points A and C not being upheld, whereas it was clear from the earlier part of her letter that it was points A and B which had not been upheld.

(c) Told the claimant that her decision was final and that there was no further right of appeal.

***Events following appeal outcome, including claimant's resignation***

100. Ms Davidson emailed the claimant on 23 September 2022 (242-243) attaching the grievance appeal outcome. On 17 October 2022, the claimant emailed Ms Davidson (247) attaching a document containing a number of points upon which he sought clarification of the outcome (248-250).

101. Ms Davidson did not reply to the claimant. Her evidence about this was that she "*would not normally have any further involvement apart from implementing recommendations. There's a need to move on and try to foster a better relationship."*

102. On 27 October 2022 there was an exchange of emails between the claimant and Mr Strachan (259-260). The claimant sought Mr Strachan's help to understand the outcome of the grievance procedure. He said –

"*Please reconsider your position on this or I shall have no option than to terminate my employment, much to the detriment of both myself and that of Northern Tool and Gear."*

103. In his reply, Mr Strachan told the claimant that the grievance procedure had been exhausted and there was no further right of appeal. Mr Strachan said that he was "*ending my involvement with this".* The claimant responded attaching a copy of the document he had emailed to Ms Davidson. Mr Strachan replied, almost immediately and without reading the document, "*I stick by my previous email".*

104. On 28 October 2022 the claimant went to the respondent's premises and gave Mr Strachan his letter of resignation. This was recorded in an email sent by Mr D Clark to Mr Strachan on that date (261) –

"*On the morning on 28th October, Andy Douglas entered the production office at Northern Tool and Gear and handed a letter of resignation to Gordon Strachan. This was accompanied by verbal abuse directed towards Gordon*

*wishing him a miserable life. This abuse was delivered in a threatening manner. Gordon and Andy then left the office."*

105. The claimant's letter of resignation was in these terms –

*"Your recent refusal to aid me in the understanding of the recent grievance procedure outcome is wholly unfair. It has bestowed further upset and frustration upon me, over and above that which I have endured to date by the many inappropriate actions of both you and Graeme.*

*You have left me no option other than to terminate my employment with Northern Tool and Gear as I am not being treated in accordance with my contract.*

*Thereby, as of today, 28 October 2022, I give one week of notice to you in accordance with the requirements laid out within my contract.*

*This is a decision that I have arrived at with great difficulty and am aggrieved at having to do so."*

***Alleged toxic culture***

106. The claimant's position was that there had been a toxic culture within the respondent's factory from the time he first worked there. In support of this he referred to the list of employees he had produced (373-376) which covered all employees of the respondent since 2011. He believed that this disclosed a high turnover of staff.

107. Mr Strachan and Ms Carr agreed that there were from time to time *"heated exchanges"* between management and employees on the shopfloor. These included the use of profane language.

108. Ms Hodgson had been 121 HR's account manager for the respondent since 2018. She visited the respondent's premises on a quarterly basis and also

conducted an annual review. She described the respondent as a *"traditional family run business with long serving staff".* She said that during her association with the respondent she had not heard anyone else complain about a toxic culture. She had not been involved in any grievances or disciplinary issues, apart from those involving the claimant.

109. None of the respondent's witnesses shared the claimant's view that there was a high turnover of staff. Mr Strachan referred to the respondent's difficulty in recruiting and retaining skilled operators. The claimant spoke of the skills and experience of the workforce diminishing. The claimant's employee list (at 373) disclosed (a) 3 deaths, 5 ill health leavers and 14 retirals since 2011 and (b) that of the 35 employees who started since 2011, 20 had left. Those figures painted a picture of long serving employees who were skilled and experienced working with the respondent until retiral or death/ ill health, and being replaced by younger employees who lacked the same skills and experience and were more inclined to leave for better pay elsewhere.

110. While the claimant clearly believed that there was a toxic culture, I found that the evidence did not support this.

***Mitigation***

111. The claimant provided evidence that he had been awarded Jobseeker's Allowance from 24 November 2022 (307). He provided details of his efforts to secure alternative employment (331-372). He also provided evidence that he had been accepted for a course of study at Dundee and Angus College with effect from 28 August 2023. I noted Mr Strachan's evidence that skilled machine operators were much in demand, and found it somewhat surprising that the claimant had not been able to secure comparable employment. However, in view of my decision, I did not consider it was necessary to say more about mitigation.

**Comments on evidence**

112. It is not the function of the Tribunal to record every piece of evidence presented to it, and I have not attempted to do so. I have focussed on those parts of the evidence which I believed to have the closest bearing on the issues I had to decide.

113. I was satisfied that all of the witnesses sought to tell the truth as they perceived it to be. However, in the case of the claimant, his evidence was given through the prism of his views that he was better at his job than his colleagues and that he had been poorly treated by the respondent. That resulted in some distortion of his perceptions which was unfortunate as he is clearly intelligent and capable of expressing himself in an articulate way.

114. Mr Russell was critical of Ms Carr for seeking to change her position on a previous answer, and for not disclosing her relationship with the claimant sooner than she did. I believed that criticism was a little harsh. Ms Carr found herself in a difficult position in terms of (a) the conflict of interest between her senior position with the respondent and her relationship with the claimant and (b) being cited as a witness for the respondent by whom she was no longer employed. What Mr Russell described as hesitance on her part in answering simple questions might more charitably be ascribed to seeking to choose her words carefully.

115. Mr Strachan was a credible witness who made concessions where it was appropriate to do so. He was able to recognise that there might be faults on both sides. His treatment of the claimant, for example in terms of the claimant (a) not facing disciplinary action when he was drinking at lunchtime on 26 April 2022 and (b) being paid when absent from work on more than one occasion, was more generous than another employer might have been. He readily acknowledged that the claimant was good at his job.

116. Ms Davidson, Ms Hodgson and Ms Holmes were all credible and reliable witnesses.

**Submissions – claimant**

117. The claimant accepted that he had worked for the respondent for some 12 years and was now asserting that there had always been an "*air of toxicity",* yet he had not raised a grievance until 2022. Why was that and what changed? The claimant said that the skills and experience of the workforce had diminished to the point where resilience to workplace issues had all but disappeared.

118. The claimant contended that management were clearly struggling and that their behaviour worsened. He contended that Mr Strachan had been untruthful. He said that he had endured a course of inappropriate conduct by Mr Strachan and Mr Graeme Strachan. He raised a grievance in the course of which further lies were told. He knew the process was flawed. Mr Strachan was aware of the untruths but did not say so. This clearly broke the obligation of trust.

119. Until the grievance appeal hearing the claimant said he did not know that he would have to resign in order to bring a claim before the Tribunal. The claimant submitted that the appeal process had been *"not much better"* than the original grievance. The outcome had been unclear, and the respondent (and 121 HR) had chosen to cease communication with him.

120. In his response to Mr Russell's oral submissions, the claimant said that if Mr Strachan had been *"held to account for his blatant lies"* he would have been able to return to work. The claimant said that his "*trust was broken by the failings in the grievance process".* He said in effect, that if there was a *"final straw",* it was when Mr Strachan did not flag up the *"false information"* in the grievance outcome.

**Submissions – respondent**

121. Mr Russell provided detailed written submissions (supplemented orally at the hearing) and, as these are available on the case file, I will summarise them briefly.

122. Mr Russell contended that the claimant's assertion that there had been a toxic culture in the workplace from the very start of his original period of employment was contradicted by the claimant (a) choosing to return there and (b) not raising earlier grievances. His evidence that he lost trust in the respondent from the time of the disciplinary process in October 2021 was, Mr Russell argued, fatal to his case. Mr Russell said that, in reality, nothing had changed apart from the issues which arose in the claimant's personal life.

123. Mr Russell submitted that the claimant had a *"blinkered view".* He alleged that the respondent's senior management did not support him when they could hardly have been more supportive. This was important because the crucial issue was how the respondent had treated the claimant.

124. Mr Russell argued that the bar was set high in terms of the nature of the conduct by an employer which would justify an employee resigning and claiming constructive dismissal. The true position was that the claimant would not accept a blemish on his record (in the form of the warning he received in November 2021) and thereafter would not let the matter go.

125. Mr Russell referred to (a) the meeting on 15 December 2021, (b) the welfare meeting on 30 May 2022, (c) the claimant's actual grievance and (d) the grievance appeal. In essence the claimant was raising the same matters because he was not getting what he wanted. He became a difficult employee. Mr Russell acknowledged that the claimant's mental health might have been a factor, but his behaviour had been unacceptable.

126. Mr Russell submitted that there had been nothing done by the respondent, no work-related issue, to cause the claimant to become stressed at work. There had in fact been no conduct on the part of the respondent which came close to the legal test for constructive dismissal.

**Applicable law**

127. Section 95 of the Employment Rights Act 1996 ("ERA") provides, so far as relevant, as follows –

*(1) For the purposes of this Part an employee is dismissed by his employer if …. –*

*(a) ….*

*(b) ….*

*(c) the employer 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.*

128. In ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*** Lord Denning said this –

*"An employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged."*

129. Where, as in this case, the term of the contract of employment said by the employee to have been breached by the employer is the implied term of trust and confidence, the courts have said the following. In ***Malik v Bank of Credit and Commerce International SA [1997] IRLR 462*** Lord Steyn stated *"The employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee."* In ***BCCI v Ali (No 3) [1999] ILRR 508*** the High Court in England said that the test was *"whether the conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after discovering it and can walk out of his job without prior notice."*

130. The claimant has not argued that there was a *"last straw"* event which caused him to resign. However, I considered that he could have done so and that it was appropriate to consider this. In ***London Borough of Waltham Forest v Omilaju [2005] ICR 481*** Dyson LJ said this –

*"19. …. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*

*20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts*

*or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.*

*21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."*

131. In ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*** Underhill LJ said this (at paragraph 55) –

*"…. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*

*(1) 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?*

*(2) Has he or she affirmed the contract since that act?*

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

*(4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts or omissions which amounted to a repudiatory breach of the **Malik** term? (If it was, there is no need for any separate consideration of a possible previous affirmation ….)*

*(5) Did the employee resign in response (or partly in response) to that breach?*

**ACAS Code**

132. I reminded myself of what the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) (the "Code") says under the heading "*Keys to handling grievances in the workplace"* at paragraphs 32-45. The key elements are identified as –

- Let the employer know the nature of the grievance
- Hold a meeting with the employee to discuss the grievance
- Allow the employee to be accompanied at the meeting
- Decide on appropriate action
- Allow the employee to take the grievance further if not resolved

**Discussion and disposal**

133. Mr Russell in his written submissions set out *"suggested key questions for the Tribunal"* as follows –

(1) Did the instances relating to breach of trust and confidence, so far as proved to have occurred, amount to conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee?

(2) If so, was there a reasonable and proper cause for that conduct?

(3) If there was a fundamental breach, did the claimant resign in response to it?

134. I was happy to adopt this approach. However, bearing in mind what Lord Denning said in ***Western Excavating***, I would add a further *"key question"* –

(4) Did the claimant wait too long before resigning, and in so doing affirm the contract?

*What were the alleged breaches of contract by the respondent?*

135. The matters complained of by the claimant can be listed as follows (and in compiling this list I have sought to avoid duplication where the same matter was complained of more than once) –

(a) The disciplinary process and outcome in October/November 2021.

(b) The need for careful work planning by management, without contradictory instructions from the directors.

(c) Employees being spoken about disrespectfully.

(d) Being consulted by colleagues with machine queries.

(e) Mr Strachan allegedly lying to him.

(f) The incident when Mr Graeme Strachan interrupted a meeting between the claimant and Ms Carr.

(g) The timing of return to work meetings.

(h) Payment for periods of absence.

(i) The incident when Mr Strachan interrupted a return to work meeting between the claimant and Ms Carr.

(j) Continued breach by both Mr Graeme Strachan and Mr Strachan of policy with regard to ensuring a positive and fair work environment, including bullying and harassment.

(k) Mr Graeme Strachan not adhering to company policies with regard to "*quality of product*" systems, thereby frustrating other employees and endangering the future of the company by losing faith with customers.

(l) Victimisation by Mr Strachan regarding withholding of the right to utilise holiday pay to cover absence due to sickness.

(m) Conduct and outcome of the claimant's grievance.

(n) Outcome of the claimant's grievance appeal.

(o) Refusal to assist the claimant to understand the grievance appeal outcome.

136. Before addressing whether any of these matters amounted to a fundamental breach of the claimant's contract of employment and in particular the implied condition of trust and confidence, I reminded myself of the nature of an employer's conduct which might be capable of constituting such a breach. In terms of section 95(1)(c) ERA, the employer's conduct must be such that the employee is entitled to terminate his contract without notice (irrespective of whether he actually does so).

137. This broadly corresponds with the nature of the conduct of an employee in response to which an employer is entitled to dismiss the employee summarily and without notice, normally referred to as gross misconduct. It requires a

very serious breach which, as Lord Denning put it, goes "*to the root of the contract"* or shows that the employer "*no longer intends to be bound by one or more of the essential terms of the contract of employment".* That, as Mr Russell observed, sets the bar high. Conduct to which an employee objects or which he/she finds unreasonable will not necessarily suffice.

*Did any of the matters complained of amount to a breach of trust and confidence?*

138. I reminded myself of what was said by the courts in ***Malik*** and ***Ali***. Did any of the matters complained of by the claimant involve conduct by the respondent (or those for whose actions the respondent was responsible) of such a nature that the claimant could not be expected to tolerate it a moment longer, so that he was entitled to walk out of his job without notice? I considered whether each of the matters complained of by the claimant satisfied this test -

(a) The disciplinary process and outcome in October/November 2021 – Based on the claimant's own account of the events on 27 October 2021 (see paragraph 11 above) he behaved badly and could not reasonably complain when his bad behaviour resulted in disciplinary action. That action was taken in compliance with the Code. The sanction of an informal verbal warning was lenient. There was no breach of contract.

(b) The need for careful work planning by management, without contradictory instructions from the directors and (k) Mr Graeme Strachan not adhering to company policies with regard to *"quality of product"* systems, thereby frustrating other employees and endangering the future of the company by losing faith with customers – I considered these were similar complaints and therefore dealt with them together. I could understand that the claimant was frustrated when he observed policies and systems not being followed. However, I did not believe that this amounted to treatment <u>of the claimant</u> by the respondent of a nature that entitled him to leave without notice. If that were the case, then every employee who was aware of the directors' alleged failings would also be entitled to leave. It would take an extreme failure on the part of the directors to create such a

situation. No such situation existed here, and there was no breach of contract.

(c) Employees being spoken about disrespectfully – This was what triggered the claimant's informal grievance on 15 December 2021. The evidence did not disclose what Mr Strachan was alleged to have said about the claimant. To speak in disrespectful terms about an employee within his or her earshot would be inappropriate but, without knowing what was said, it was not possible for me to determine whether the language used was sufficiently offensive to entitle the claimant to leave there and then (which, in any event, he did not do). I found no breach of contract here.

(d) Being consulted by colleagues with machine queries – I could understand that this would be distracting for the claimant, and might indicate some inadequacy in training on the part of the respondent. I was not persuaded that this impacted so adversely on the claimant that he was entitled to walk out. I also noted that Mr Strachan took steps to address the matter when the claimant raised it. There was no breach of the claimant's contract of employment.

(e) Mr Strachan allegedly lying to him – My findings at paragraph 24 above deal with this point. There was no breach of contract.

(f) The incident when Mr Graeme Strachan interrupted a meeting between the claimant and Ms Carr – The fact that an *"unreserved apology"* was conveyed to the claimant by Ms Hodgson following the welfare meeting on 30 May 2022 indicted that the claimant had been subjected to inappropriate treatment on this occasion. However, I found that it was not so inappropriate as to entitle the claimant to walk out. There was no breach of contract.

(g) The timing of return to work meetings – The timing of such meetings was a matter for the respondent. The claimant had no contractual right that they be held at a particular time. When the claimant raised the matter, the

respondent changed their practice in line with the claimant's suggestion. There was no breach of contract.

(h) Payment for periods of absence – This was covered expressly in the *"Sick Pay"* section of the claimant's contract of employment (at 284). The claimant had no contractual right to payment when absent due to sickness beyond SSP. There was no breach of contract.

(i) The incident when Mr Strachan interrupted a return to work meeting between the claimant and Ms Carr – The claimant's position was that he had told Ms Carr that he did not want to speak to Mr Strachan, and Ms Carr had advised Mr Strachan of this before the return to work meeting during which this occurred. I did not consider that this could preclude Mr Strachan from deciding to join the meeting to welcome the claimant back to work, which I accepted was his purpose in doing so. There was no breach of contract.

(j) Continued breach by both Mr Graeme Strachan and Mr Strachan of policy with regard to ensuring a positive and fair working environment, including bullying and harassment – Looking at matters in the round, I found that there had been occasions when the claimant was entitled to believe that the behaviour of Mr Graeme Strachan and Mr Graeme Strachan towards him could have been better. Mr Strachan effectively acknowledged this during the meeting on 15 December 2021 (see paragraph 23 above). However, I did not find that there had been any behaviour which was so egregious as to entitle the claimant to leave without notice. There was no breach of contract.

(k) Mr Graeme Strachan not adhering to company policies etc – I have dealt with this above.

(l) Victimisation by Mr Strachan regarding withholding of the right to utilise holiday pay to cover absence due to sickness – This involved an exercise of discretion by management. Both Ms Holmes and Ms Davidson sided

with the claimant over this issue in the sense that they believed the claimant's request should have been granted. They highlighted the need for consistency. However, Ms Davidson found "*no evidence that this was a deliberate attempt to punish"* the claimant, a conclusion with which I agreed. There was no breach of contract.

(m) Conduct and outcome of the claimant's grievance – The claimant was not happy with the outcome of his grievance and, not having secured the result he wanted, he has criticised the extent of Ms Holmes' investigation. My view of this was that while Ms Holmes could no doubt have spent more time investigating, the issue was whether her investigation had been adequate. She spent a total of 1.5 hours with Mr Strachan, Mr Graeme Strachan and Ms Carr. The Code does not attempt to specify what amounts to an adequate investigation, which is not surprising because each case will depend on its own circumstances. I was satisfied that Ms Holmes dealt with the claimant's grievance in accordance with the Code and that her investigation was sufficient. The fact that the claimant's appeal was partially successful did not negate this finding. There was no breach of contract.

(n) Outcome of the claimant's grievance appeal – The claimant was not satisfied with aspects of the appeal outcome, as detailed in the document (248-250) attached to his email to Ms Davidson of 17 October 2022 (247). There were a couple of mistakes in Ms Davidson's outcome letter (an incomplete sentence and a typographical error) but in my view (i) the meaning of the letter was adequately clear and (ii) the claimant was in effect trying to continue the appeal process after being told that the decision was final. There was no breach of contract.

(o) Refusal to assist the claimant to understand the grievance appeal outcome – I found it was reasonable for Ms Davidson not to engage with the claimant following receipt of his document referred to in the preceding paragraph. Her remit was to deal with the appeal, and she had completed this. Mr Strachan could have followed up on the points raised by the

claimant but equally he was entitled to take the line that he did, that *"the decision is final and there is no further right of appeal".* Given the claimant's reluctance to let go of past issues (such as the disciplinary process) and move on, it was unsurprising that Mr Strachan responded as he did. It cannot be said that no reasonable employer would have acted in this way. There was no breach of contract.

139. The findings I have made in paragraph 138 are sufficient to dispose of this case. If there was no breach of contract, the claim of constructive unfair dismissal was bound to fail. There was no conduct of the respondent in response to which the claimant was entitled to resign. The remaining *"questions for the Tribunal"* did not therefore require to be answered.

140. Because I believe that this could have been pled as a *"last straw"* case, I will deal with the series of questions posed by Underhill LJ in ***Kaur*** (see paragraph 131 above) –

(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?* In my view, this was Mr Strachan's answer to the claimant on 27 October 2022 when the claimant sought Mr Strachan's help to understand the grievance appeal outcome. I noted that the claimant referred to Mr Strachan failing to point out the error made by Ms Holmes in her grievance outcome (see paragraph 89 above) as a *"final straw"* event but I found this unconvincing.

(b) *Has he or she affirmed the contract since that act?* No, the claimant's response was to resign.

(c) *If not, was that act (or omission) by itself a repudiatory breach of contract?* No (see paragraph 138(o) above).

(d) *If not, was it nevertheless a part (applying the approach explained in* ***Omilaju****) of a course of conduct comprising several acts or omissions*

*which amounted to a repudiatory breach of the* ***Malik*** *term?* To answer this question, I had to consider whether the earlier acts complained of by the claimant cumulatively amounted to a breach of the implied term of trust and confidence. My findings that none of the earlier acts amounted individually to a breach of contract did not mean that they could not cumulatively do so. I therefore revisited the earlier acts. What I found was a series of events or incidents about which the claimant was unhappy, on occasion with some justification (for example the occasion where Mr Graeme Strachan had not followed company policies and systems, and the incident for which Mr Graeme Strachan had apologised). However, what I also found was that the outcome of the disciplinary process in October/November 2021 cast a long shadow in the sense of affecting the claimant's perception of subsequent events. When viewed objectively, I did not find that the earlier events cumulatively amounted to a breach of the implied term of trust and confidence.

(e) *Did the employee resign in response (or partly in response) to that breach?* My answer to the previous question rendered it unnecessary to answer this one.

141. Accordingly, for the reasons set out above, the claim of constructive unfair dismissal brought by the claimant had to fail and required to be dismissed.

**Employment Judge:** **A Meiklejohn**
**Date of Judgment:** **12 December 2023**
**Date sent to parties:** **13 December 2023**