EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr A Daffin		**FCC Environment Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 14 & 15 May 2018

EMPLOYMENT JUDGE GASKELL **MEMBERS:** Miss SP Outwin
Mr TC Liburd

Representation
For the Claimant: **In Person**
For Respondent: **Mr C Breen (Counsel)**

JUDGMENT

The unanimous judgment of the tribunal is that:

1 The claimant's claim, pursuant to Section 48 of the Employment Rights Act 1996 (ERA) that he had been subjected to detriment contrary to 47(B) ERA is not-well founded and is dismissed.
2 The claimant was not dismissed by the respondent: his claim for unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1 The claimant in this case is Mr Alan Daffin who was employed by the respondent FCC Environment (UK) Limited as a workshop supervisor from 26 January 2015 until 12 July 2017 when he resigned.

2 By a claim form presented to the tribunal on 7 August 2017, it is the claimant's claim that he had made protected disclosures to his employer; because of which he suffered detriment; such that his employer was in fundamental breach of the employment contract; and that his resulting resignation was accordingly a constructive unfair dismissal.

3 The respondent denies that the claimant made any protected disclosures; and that he did not suffer detriment by reason of any disclosure he did make. Further, the respondent did not act in fundamental breach of the employment

contract and consequently the claimant's resignation was not a constructive dismissal.

Issues

4 The issues for determination by the tribunal are simply these: -

(a) Did the claimant make one or more protected disclosures?
(b) If so, did he suffer detriment as a result?
(c) Did the respondent behave towards the claimant in a manner which constitutes a fundamental breach of the employment contract (in relation to the alleged detriments or otherwise)?
(d) Did the claimant resign as a result of such breaches?

Law

Protected Disclosures

5 The Employment Rights Act 1996 ("ERA") as amended by the Public Interest Disclosure Act 1998 ("PIDA") and further amended, most recently by the Enterprise and Regulatory Reform Act 2013 ("ERRA") provides so far as relevant as follows:

Section 47B(1): A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that he has made a protected disclosure.

Section 103A: An employee who is dismissed shall be regarded ….as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

Section 43A: In this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance of any of Sections 43C to 43H.

Section 43B(1): In this part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following: -

(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed.

Section 43C: A qualifying disclosure is made in accordance with this section if the worker makes the disclosure

(a) to his employer …

6 The statutory provisions should be given a purposive interpretation to advance so far as possible the aim of encouraging responsible whistle blowing: ***Hibbins v Hesters Way Neighbourhood Project*** [2009] IRLR 198; ***BP PLC v Elstone and Another*** [2010] IRLR 558.

7 There is a distinction between "information" and an "allegation."[1] For example "the [hospital] wards have not been cleaned for two weeks. Yesterday sharps were left lying around" is information. "You are not complying with Health and Safety requirements" is an allegation. A statement by an employee's solicitor that he believes he has been ill-treated, and that if not treated better he will resign and claim constructive dismissal, is not a disclosure of information but a statement of the employee's position. There is also a distinction between "to disclose and merely "to communicate". ***Cavendish Munro Professional Risks Management Limited v Geduld*** **[2010] IRLR 38.**

Constructive Dismissal

8 ERA further provides as follows: -

Section 94: An employee has the right not to be unfairly dismissed by his employer.

Section 95: For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice) - *Direct dismissal,*
(c) 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 - *Constructive dismissal.*

Section 98:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show: -

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

9 There are many decided cases which provide guidance to employment tribunals about the law of dismissal and of constructive dismissal. We found the following to be particularly relevant when considering the facts of this case: -

Western Excavating (ECC) Ltd, -v - Sharpe **[1978] IRLR 27 (CA)**
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.

The employee must make up his mind to leave soon after the conduct of which he complains if he continues the 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.

Garner -v- Grange Furnishing Ltd. **[1977] IRLR 206 (EAT)**
Conduct amounting to a repudiation can be a series of small incidents over a period. If the conduct of the employer is making it impossible for the employee to go on working that is plainly a repudiation of the contract of employment.

Woods -v- WM Car Services (Peterborough) Ltd. **[1981] IRLR 347 (EAT)**
It is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The employment tribunal's function is to look at the employer's conduct and determine whether it is such that it's cumulative effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it.

Malik –v- BCCI **[1997] IRLR 462 (HL)**
The obligation (to observe the implied contractual term of mutual trust and confidence), extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. If conduct, objectively considered, is likely to cause damage to the relationship between employer and employee a breach of the implied obligation may arise. The motives of the employer cannot be determinative or even relevant.

Waltons & Morse –v- Dorrington **[1997] IRLR 488 (EAT)**
It is an implied term of every contract of employment that the employer will provide and monitor for employees, so far as is reasonably practicable, a working environment which is reasonably suitable for the performance by them of their contractual duties.

GAB Robins (UK) Ltd. –v- Gillian Triggs **[2007] UKEAT/0111/07RN**
The question to be addressed is whether, taken alone or cumulatively, the respondent's actions amount to a breach of any express and/or implied terms of the claimant's contract of employment amounting to a repudiation of that contract.

Tullet Prebon PLC & Others -v- BCG Brokers LP & Others
[2011] IRLR 420 (CA)
A repudiatory breach of contract; conduct likely to damage the relationship of trust and confidence must be so serious that looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the putative innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.

Evidence

10 The tribunal heard evidence from the claimant on his own account and from five witnesses called on behalf of the respondent. We do not find that any of the witnesses was dishonest or telling lies; we do find that the claimant was willing to make serious allegations as to collusion on the part of Mr Farmer without any basis.

Facts

11 The claimant's case is that between January and June 2017 he informed Mr Farmer that some of the respondents LGV drivers were regularly driving long hours in breach of regulations; further, he informed Mr Farmer the drivers were working unjustified overtime. The claimant's principal concern with regard to the latter disclosure was that the unjustified overtime suppressed the organisation's profits and this in turn suppressed his bonus.

12 It is curious that the claimant's case is that these disclosures were made to Mr Farmer: Mr Farmer does not accept that; but Mr Stass confirms such disclosures were made to him. Either way, disclosures of the nature alleged by the claimant were made to the respondent's managers.

13 The claimant confirmed in evidence that the making of these disclosures did not prompt any change in his treatment by the managers who he says at all material times prior to 10 June 2017 held him in high regard.

14 There was an incident on 10 June 2017 at the workshop: those involved were the claimant, Mr Tex Richardson and Mr Mick Vernon. The claimant's account is that Mr Vernon was concerned that the claimant's disclosure about overtime would adversely affect his income and that he threatened the claimant as a result. Mr Richardson and Mr Vernon deny any threat to the claimant and indeed their account to the respondent was that the claimant had threatened Mr Richardson by text later that day.

15 Mr Farmer and Mr Stass investigated the claimant's complaint and found that on the evidence they really could not decide what precisely had happened: they had two opposing versions and they could not choose between. This was

explained to the claimant at a meeting on 29 June 2017 and, disappointed with the outcome, the claimant purported to resign with immediate effect.

16 At this stage Mrs Glease of HR became involved: she wrote to the claimant on behalf of the respondent refusing to accept his resignation in those circumstances and asking him to contact her. When they spoke, she invited the claimant to pursue an appeal against the decision is taken by Mr Farmer and Mr Stass. The claimant had made it clear that the only acceptable resolution to the situation for him was the dismissal of Mr Vernon.

17 Mr Morris, a manager from another division of the respondent, dealt with the claimant's appeal: they met on 12 July 2017; before the meeting ended; and before Mr Morris had reached any conclusions; the claimant resigned. It was clear to him that Mr Vernon was not going to be dismissed.

18 Independently of this, because of complaints raised against the claimant and because of concerns regarding his manner of communication, Mr Sheridan had been asked to undertake an investigation. His report was finished after the claimant's resignation; if the claimant had still been employed he would have recommended disciplinary action against the claimant. Mr Sheridan's report is hotly disputed by the claimant; but it is of no consequence to the decision which we have had to make.

Discussion and Conclusions

19 We have firstly considered whether the claimant made any protected disclosures: -

(a) The question of the drivers driving excess hours and contravening regulations: clearly has the potential to be a protected disclosure. But we have been provided with no details as to precisely what was disclosed and the burden of proof is on the claimant to prove that it was a protected disclosure. On the evidence before us, it seems that what he said went no further than an allegation of illegality rather than the provision of specific information. This being the case, the disclosure would not be a disclosure qualifying for protection.
(b) The question of unnecessary overtime with its adverse effect on profits and bonuses, in our judgement, cannot be said to have a wider public interest. For this reason, it would not amount to a protected disclosure.

20 The detriments alleged are the threats of violence said to have been issued by Mr Vernon and the respondents failure to provide a safe working environment by failing to act against Mr Vernon.

(a) Even on the claimant's account, Mr Vernon's behaviour was linked only to the disclosure relating to unnecessary overtime and we are of the view that this was not a protected disclosure.
(b) Even if the claimant is right, and the failure to dismiss Mr Vernon left him unsafe: it cannot be said that the reason for the respondent's lack of action was because of the disclosure. It was because the respondent could not reach any firm conclusions as to precisely what had happened.

21 So far as the constructive dismissal is concerned, if an employee is threatened with violence; and complains about it; and the employer ignores the complaint; or fails to investigate it; or wilfully reaches a conclusion that no action can be taken when the evidence clearly suggests otherwise; then we have no hesitation in finding that that conduct could amount to a breach of contract by the employer.

22 But that is not this case, we are satisfied that the respondent in this case diligently investigated the claimant's complaint and reached reasonable and genuine conclusions. The mere fact that the claimant disagrees with those conclusions is not to the point. The respondent has clearly demonstrated every intention to fulfil its obligations. Accordingly, in our judgement, there was no breach of the employment contract here and as such there can be no constructive dismissal.

23 The claims are without merit and are dismissed.

Employment Judge Gaskell
25 July 2018