



EMPLOYMENT TRIBUNALS

Claimant: Mr M Maslanka

Respondent: Noble Foods Limited

Heard at: Nottingham **On:** Monday 25th June to Friday 29th June
Reserved Judgment Tuesday 3rd July 2018

Before: Employment Judge Macmillan

Members: Mr A O'Dwyer
Ms H Andrews

Representatives

Claimant: In Person

Respondent: Ms Jo Hale, Consultant

RESERVED JUDGMENT

1. The complaints of unfair constructive dismissal and age discrimination fail and are dismissed.
2. The complaint of unauthorised deduction from wages is dismissed on withdrawal by the Claimant.

REASONS

Background and issues

1. This is a claim by Mr Maslanka that when he resigned from the employment of the Respondent on 24 July 2017 he did so in circumstances which entitled him to claim that he had been constructively unfairly dismissed. He also contends that many of the circumstances which he claims amounted to constructive dismissal were also acts of direct age discrimination. In his claim form there was also an unquantified, and extremely vague, complaint of unauthorised deduction from wages. The nature of this complaint only became relatively clear during the course of the hearing, but Mr Maslanka indicated that given the smallness of the amounts involved, he did not wish to pursue it and the claim was withdrawn.

2. There has been significant prehearing case management by Employment Judge Britton in an attempt to clarify and narrow down the matters on which Mr Maslanka relies as justification for his resignation. This resulted in a Scott

Schedule which identified 14 separate issues. One of these, in relation to a reduction in his hourly rate, was abandoned by Mr Maslanka during the course of the hearing. Two, which related to events after his resignation, clearly could have no bearing on the constructive unfair dismissal claim. As one was a complaint that Mr Maslanka had been denied entry to the factory after his employment had ended and the other related to additional work burdens said to have been imposed on his wife and daughter-in-law who continued to work for the Respondent, they appear to have no bearing on the age discrimination claim either. Neither were pursued in evidence.

3. Although at the the start of the hearing Mr Maslanka agreed that the only issues in the case were those listed in the Scott Schedule, during his cross examination of witnesses he repeatedly strayed into other areas and had to be reminded by the Tribunal of the need to confine himself to the agreed list. Many of the extraneous issues he tried to explore appeared to be to do with the faults of others in performing their duties, rather than about their conduct towards him.

4. The competing contentions of Mr Maslanka on the one hand and the Respondent on the other can be summarised by two short extracts from the evidence. Mr Maslanka has a major issue with three managers, Mr Stephen Neil, Ms Rosie Thomas and Mr Sergio Fernandes and his Team Leader Mr Bart Kropinski. In his witness statement he contended that they were responsible for discrimination against employees “and that’s why I accuse them of modern slavery” and suggested that he was being “managed out”. In answering a question during cross examination, Mr Martin Troop, the Respondent’s Managing Director, said that the fundamental problem as he saw it was that Mr Maslanka wanted to manage the business which it was his (Mr Troop’s) responsibility to manage. He could not accept things when other people didn’t agree with him.

5. Until mid to late 2015 Mr Maslanka’s manager was Linda Sharp who was unfortunately involved in a serious car accident and was replaced by Mr Fernandes. Ms Sharp seems to have allowed Mr Maslanka considerable leeway in how he did his work. Mr Fernandes attempted to impose structure and order on the way Mr Maslanka worked for reasons which will become clear and it was this, the Respondent says, that led to the increasing breakdown in relations between them and the view which Mr Maslanka formed that he was being discriminated against and being subjected to “modern slavery”.

6. Mr Maslanka represented himself and has been assisted throughout the hearing by Polish language interpreters to whom we are extremely grateful. Mr Maslanka obtained witness orders for 4 former work colleagues to come to the Tribunal to give evidence to support him. We heard evidence in the end only from three of them: Mr Andrzej Dudzicz, Mr Krzysztof Halczak and Mr Marek Baronowski. They had refused to co-operate with Mr Maslanka in advance of the hearing, but he still insisted on calling them as witnesses asserting that they would tell the truth in the Tribunal. Despite in effect being cross examined by Mr Maslanka, none of them supported his case in any material particular and Mr Baronowski in particular painted a very different picture of Mr Fernandes and Mr Kropinski to the one which Mr Maslanka was propounding. No doubt as a consequence, Mr Maslanka then asked the Tribunal to discharge the witness order in respect of the fourth witness who could not in any event have attended until the last of the 8 scheduled days of hearing.

7. The Tribunal heard evidence for the Respondent from Mr Stephen Neil

who at the material time was the General Manager of their Gainsborough site; Ms Rosie Thomas who was the Technical Manager to whom Mr Fernandes reported; Mr Bart Kropinski who was the Team Leader in the Hygiene department in which Mr Maslanka worked; Mr Kevin Basley, the Production Planning Manager who dealt with the grievance which Bart Kropinski raised against Mr Maslanka in April 2017; Mr Joe Clarke the Factory Manager who heard Mr Maslanka's own grievance which he raised in June 2017; Mr Martin Troop the Managing Director of the Respondent's Poultry Division; and from Ms Kirsty Black the HR Manager. The one important figure in the story from whom we have not heard is Mr Sergio Fernandes whom Mr Maslanka portrays as the central villain of the piece. Mr Fernandes was subsequently dismissed by the Respondent for reasons wholly unconnected with Mr Maslanka's complaints. There are however a number of documents in the bundle, in particular contemporary e-mails from Mr Fernandes, which give us a flavour of his "voice" and his attitude towards the Claimant. What emerges rather contradicts Mr Maslanka's assertions about him.

The Law

8. The right not to be unfairly dismissed is created by sec 94 of the Employment Rights Act 1996. Section 95 defines the circumstances in which an employee is dismissed for this purpose. It provides so, far as material:-

"(1) For the purposes of this part an employee is dismissed by his employer if (and subject to subsection 2... only if) –

...

(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".

9. The meaning of this provision has had considerable attention over the years in the appellate courts. Paraphrasing the essence of a number of judgments, an employee is constructively dismissed if the employer, without reasonable and proper cause, breaks, or evinces an intention to break or no longer to be bound by, one of the principle terms of the employee's contract of employment; the employee resigns in response to that breach and does so without having first reaffirmed the contract, normally by delaying for an over lengthy period before resigning.

10. The general provisions relating to the fairness of a dismissal at sec 98 apply equally to dismissals under sec 95(1)(c) as they do to cases in which it is the employer who dismisses the employee. However, although Ms Hale does not expressly concede that the only issue is whether Mr Maslanka was entitled to resign in response to a fundamental breach of contract by the Respondent, no real point is taken about the fairness of the dismissal if the Tribunal find in his favour on that issue. Although Mr Maslanka has not expressly said so, the term of his contract on which he relies appears to be the implied term of mutual trust and confidence.

11. The complaint of age discrimination is one of direct discrimination. Employment Judge Britton in his prehearing case management had some difficulty in pinning down precisely the nature of Mr Maslanka's allegations. Direct discrimination is defined by sec 13 of the Equality Act 2010. Subsection (1) provides:

"A person (A) discriminates against another (B) if, because of a protected

characteristic, (A) treats (B) less favourably than (A) treats or would treat others”.

There therefore has to be a direct causal link between the treatment complained of and the protected characteristic – here the age - of the person less favourably treated: the treatment has to be because of their age. Mr Maslanka asserts that the treatment which he says he received at the hands of Mr Fernandes and Mr Kropinski was meted out to him by them because of his age. In one instance, the Bart Kropinski grievance, he asserts that the age discrimination arises because, in an attempt to resolve the grievance, he was told that he had to improve his relationship with Mr Kropinski and Mr Fernandes but, he claims, they were not told they had to improve their relations with him.

The Facts

12. The Respondent’s business is located in Gainsborough, Lincolnshire. It handles a large volume of end of lay hens and converts them into meat products. It employs some 240 people. Because of the nature of the work it is a highly regulated environment and health and safety and environmental health issues are paramount. Mr Maslanka was employed in the hygiene department. Initially he was employed solely as a cleaner but from a date in November 2015 he relinquished 2 hours of cleaning work and instead did two hours of light handyman duties. He worked split shifts with a gap of several hours between the morning and the evening shifts. He was one of a team of three; the other two team members being his wife Barbara and his daughter-in-law Alexandra.

13. We will deal with each of the issues in the Scott Schedule in the order in which they appear including making our findings in respect of them.

- the first issue

14. The first complaint by Mr Maslanka is that he was cheated on pay from September 2015 to the end of his employment. He alleges that the people responsible were Mr Fernandes, Rosie Thomas, Kirsty Black and Bart Kropinski. He alleges that there were frequent written complaints “for the correct calculation of the payment”. This is said to be relevant both for his constructive unfair dismissal claim and the complaint of age discrimination. He adds under the “any other comments column” in the schedule that the problem also affected members of his family, his wife, his daughter-in-law Alexandra and his son. The only evidence we heard in connection with his son is that there was an issue over the amount his son was paid when he did a very short spell of work for the Respondent which was amicably resolved. In connection with his daughter-in-law Alexandra, the complaint seems to be that on one occasion she was paid overtime (premium rate instead of standard rate) to which she was not entitled. When asked to explain the relevance of this to his claim Mr Maslanka asserted that the money had been taken from him and paid to her. Mr Maslanka’s assertion that the problems which he had had over pay was as a result of age discrimination does not sit happily with his complaint that two people considerably younger than him also suffered similar problems at the hands of the Respondent.

15. Although in evidence Mr Maslanka claimed that there were frequent issues over his pay, a word which he also uses in the Scott Schedule itself, this does not appear to be the case. The contemporary documents suggest that there were only 6 occasions when he complained that he had been underpaid. All but one of these were quickly resolved in his favour. The first complaint was that for the

week ending 20 January 2017, half an hour had been deducted from his pay. This was correct but it was as the result of the automatic functioning of the payroll system rather than the intervention of any individual. The payroll system assumes that after 5 hours of work the employee takes half an hour unpaid break. Because of the split shifts that he works Mr Maslanka does not take a break as such and it was accepted that the half hour's deduction should not have been made. It was promptly rectified. There was an issue in the following week as well. Mr Maslanka claimed that he had done 5 hours of authorised overtime for which he had not been paid. There was some misunderstanding about whether the work had been authorised and if so by whom, but this was quickly resolved and once again he was paid the sum due.

16. In April 2017 Mr Maslanka complained that he had not been paid 15 minutes overtime on 4 April and 15 minutes on 6 April. He contended that on both of these occasions he had been asked to stay over after work for a meeting with Rosie Thomas. Rosie Thomas confirmed that there had been a meeting on 4 April but she was unable to remember whether there had been a meeting on 6 April. Mr Maslanka was given the benefit of the doubt and both payments were authorised. However, in evidence he said that he would not have clocked out prior to going to the meeting with Rosie Thomas and it therefore seems that he may well not have been entitled to the sums which he claimed.

17. On 31 May Mr Maslanka complained that he had done half an hour's overtime on 15 May together with his wife and daughter-in-law but whilst they had been paid for it he had not. However, when Mr Basley examined the CCTV footage he found that Mr Maslanka had spent some of the time in the canteen and the remainder of the time sitting in his car waiting for his wife and daughter-in-law to finish. During the course of his evidence, Mr Maslanka seemed to be saying that he should have been paid the overtime simply because he was required to wait for his wife and daughter-in-law to finish their work, although when challenged on this point he denied that that was what he was contending. He insisted (a point which the Respondent's conceded) that the CCTV footage did not show the interior of the canteen and therefore they could not know whether he was working in the canteen or not. He claimed that in fact he had been working there and although he accepted that no manager had authorised him to do so he refused to accept that that had any bearing on his right to be paid. On this occasion the Respondent did not concede his entitlement to the overtime and in the judgment of this Tribunal they were right not to do so. He was either not working or was working overtime that had not been authorised.

18. During his grievance hearing on 21 June 2017 Mr Maslanka complained that other people were being paid for work which they were not doing. There was an occasion when the hygiene team (apart from himself, his wife and his daughter-in-law) were asked to attend work early for training but the training started later than expected and so they were waiting around for some time with nothing to do. There were also occasions when the evening hygiene team could not start work on schedule because production had not finished. There is an obvious distinction between these cases and the episode on May 31 in that Mr Maslanka's extra time had not been authorised. None of his witnesses supported his contention that people were paid for not working.

- first issue: conclusions

19. We are satisfied that Mr Maslanka's complaint that others were paid for

not working while he was not, is not correct. It is also not correct that he made frequent complaints about his pay. There were a small number of complaints, all of which apart from one being resolved in his favour. One underpayment was a function of the system. The others were genuine disputes about entitlement to small amounts of pay. On Mr Maslanka's own account, he was not the only one affected by errors of payment and he cites the other members of his family who have also had errors in their pay as well. There is nothing in this complaint to suggest that Mr Maslanka was in any way being singled out with regard to his pay; the incidents were not frequent, involved small amounts of money and (bar one) were resolved amicably. What happened was clearly unrelated to his age.

- the second issue

20. In the next complaint Mr Maslanka says that Mr Fernandes and Mr Kropinski were talking about him and other employees calling them idiots or whores. In evidence he added that Mr Fernandes frequently referred to Mr Kropinski as an individual and the members of the hygiene team collectively as his "bitches". This is said to have continued from September 2015 to the end of Mr Maslanka's employment and the detriment is said to be lack of respect of the employee and the elderly. Mr Maslanka made no complaint during the course of his employment about being called a bitch. The three witnesses he called all denied that either Mr Fernandes or Mr Kropinski used any of the terms complained of. During the course of his employment Mr Maslanka did complain that he had been called a whore and an idiot but not until the grievance which he raised on either the 13th or 16th June 2017 (there is some confusion about the date) very shortly before he resigned. The term 'idiot' first appeared in Mr Kropinski's earlier grievance about Mr Maslanka in which Mr Kropinski recorded that he had overheard Mrs Maslanka telling her husband to stop being an idiot as part of a conversation between them in which Mr Maslanka was berating Mr Fernandes and Mr Kropinski. We will deal with the circumstances of this grievance in more detail below.

- second issue: conclusions

21. The Tribunal are not satisfied that Mr Maslanka was ever called an idiot or a whore or a bitch by Mr Fernandes or Mr Kropinski. He made no contemporary complaint about the latter term, only a very belated complain about the first two and there is no independent evidence that such terms were used about him or anybody else. The observations which we make about Mr Maslanka and his relationship with Mr Troop in paragraph 31 below apply with equal force here.

- the third issue

22. The third complaint Mr Maslanka characterises in the Scott Schedule as "an unsuccessful attempt of the discipline and beginning of aggressive discrimination and intimidation". He says that the perpetrators were Mr Fernandes, Rosie Thomas and Mr Kropinski. The detriment is said to be writing reports about him and the threat of disciplinary dismissal.

23. On 31 October 2016 Mr Kropinski found Mr Maslanka in the ladies' toilets dismantling a radiator. This was an electrical radiator which had been faulty for some time and he was apparently attempting to find out what the problem was. He was not trained in electrical work, he was not employed to do electrical work and there is no evidence that he was qualified to do electrical work. Mr Kropinski reported this to Sergio Fernandes who came into the toilet to see for himself. Mr Fernandes thought there were serious health and safety implications and therefore summoned Mr Maslanka to a disciplinary hearing. The letter is dated

1 November and does not contain a threat of dismissal. It merely says that if the allegation of serious misconduct was established it could lead to a warning. There is nothing at all in the contemporary documents to suggest that there was ever a possibility of Mr Maslanka being dismissed for this action or being told that he was at risk of dismissal. In the end he received no disciplinary sanction because Mr Fernandes accepted his explanation which was that he had intended to take the radiator to the engineers to get them to fix it.

24. Also present at the disciplinary meeting was Mr Lee Green, the Health and Safety Adviser. Mr Maslanka insists that it was in fact Lee Green not Sergio Fernandes who chaired the meeting and took the decision not to discipline him but there is nothing in the contemporary documents, albeit they are rather sparse, to support that contention. The letter to Mr Maslanka requiring him to attend the disciplinary meeting is signed by Sergio Fernandes and contains the following statement: "I will chair the hearing with Lee Green, H&S Manager in attendance". This item in the Scott Schedule also contains the following as an alleged detriment: "Obstructing work and filling work documentation". Mr Maslanka did not deal with this in his witness statement and it is unclear what it refers to. It is possible that it is a reference to the disciplinary action taken against him the following year. We will deal with that at the appropriate place in the Scott Schedule.

- third issue: conclusions

25. Rosie Thomas had no involvement in this matter at all. Mr Kropinski merely discovered what Mr Maslanka was doing and, entirely properly, reported it to his line manager. This was not an unsuccessful attempt to discipline Mr Maslanka. Mr Fernandes, quite contrary to the picture which Mr Maslanka paints of him, took a lenient and humane view and did not discipline him when other managers might have well done so. Both Mr Fernandes and Mr Kropinski clearly had reasonable and proper cause to act as they did. If it is Mr Maslanka's case that a younger, similarly unqualified, man caught doing the same thing would not have been made the subject of disciplinary proceedings he has adduced no evidence to support it.

- the fourth issue

26. The next head of complaint is "they took away and limited my handy work". The culprits are said to be Mr Neil, Ms Thomas and Mr Dave Baldwin who managed Mr Maslanka during his handyman duties. The period in question is said to be from November 2016 to February 2017 and the detriment is that he was informed that he would be required to do some painting but without warning the work was given to others.

27. The Respondent accepts that Mr Maslanka's contention here is factually correct. He had been asked to paint a barrier and possibly some other areas. However, he was busy and there was a delay in the work being done partly due to problems with obtaining the correct paints. Although it is not clear whether Mr Maslanka was given the explanation at the time, the Respondent was faced with the need for the work to be done within a relatively tight time frame because they were due an audit by one of their customers. The work in question was not given to other employees. Outside contractors were brought in to do it instead.

- the fourth issue: conclusions

28. This issue seems to be rather trivial. Mr Maslanka has not claimed that he lost money as a result of not being allowed to do the painting. In particular, he

has not claimed that he had been promised overtime in which to do the work. We accept the Respondent's explanation. Hygiene related work can be time critical in an industry of this nature. That being so this clearly cannot have been an act of age discrimination – Mr Maslanka was not deprived of the work because of his age - nor was it a breach of the implied term of trust and confidence as the Respondent had reasonable and proper cause for their actions even if, which in our judgment they do not, they would otherwise have amounted to a breach of the implied term.

- the fifth issue

29. The next complaint also relates to Mr Maslanka's handyman work and a reduction in his rate of pay for a small number of weeks when in February 2017 he asked to be relieved of his handyman duties. During the course of the hearing Mr Maslanka said that he no longer relied on this complaint.

- the sixth issue

30. The sixth complaint in the Scott Schedule relates to the same issue. When Mr Maslanka asked to be relieved of his handyman duties he had two hours of his working morning for which new tasks had to be found. He did not want his hours to be reduced and so the Respondent found him additional cleaning work. A list of jobs for him to do in the 2 hours in the morning was produced and alongside it a list of additional so-called priority tasks which he was to fit in as he could. His complaint here, the detriment he says he suffered, is that all of these jobs were to be carried out in his basic hours; the Respondent "forced" him to do it saying that the factory must save money.

31. It is unclear why Mr Maslanka says he was forced to do this work. It is not in dispute that on giving up the handyman work he had 2 hours of his working day which needed filling. Although Mr Maslanka says he was threatened with disciplinary action by Mr Fernandes and Mr Kropinski if he didn't do the work in normal hours, there is nothing in the contemporary documents to support this and certainly no contemporary complaint by Mr Maslanka. It is important to note at this juncture that Mr Maslanka had a rather interesting relationship with Mr Troop the Managing Director. Mr Troop frequently worked late and his hours coincided with Mr Maslanka's evening shift. They had many conversations about Mr Maslanka's personal life as well as work and they seemed to have got on well together. There is no suggestion that he ever complained to Mr Troop that he was being forced to do the work or threatened with disciplinary action. Moreover, when he first mentioned this issue to the Respondent which appears to have been during the investigation of Bart Kropinski's grievance against him, he said something rather different. Although he complained about the time the additional jobs were taking he told Mr Basley who was investigating the grievance that he had no problem with the jobs

32. Although Mr Maslanka seems to be genuinely indignant about the additional work which he claims was forced on him, it is not at all clear why. Whilst it may be the case that the new tasks were not explained to him as clearly as they might have been, it is common ground (indeed he expressly complains that this is the case) that these tasks were to be performed in his normal basic hours. But his normal basic hours had a 2 hour gap in them as the result of him relinquishing his handyman duties. Whilst Mr Maslanka's assertions are bald and, generally speaking, lacking in detail, the evidence from the Respondent is much more detailed and in consequence more compelling. We accept the evidence of Steve Neil and Rosie Thomas that there was a list of tasks which

they devised specifically to fill the 2 hour gap in his day. Whilst Mr Maslanka would be required to look at each of the 5 or so sites on the list each day to see if anything was needed to be done, there was nothing laid down about what had to be done and no requirement that any particular task was to be done on any particular day. For example, although the car park appears on the list, this was simply a question of checking whether there was any litter which needed picking up. Although there was a second list of tasks which were labelled priority tasks the label was misleading. They were merely a list of one off tasks which were presented to Mr Maslanka in the order in which they were to be prioritised. They did not in any sense take priority over the daily additional tasks and he was simply expected to fit them in when he could. The only so-called priority task that we are aware of Mr Maslanka completing was done in overtime.

- the sixth issue: conclusions

33. In our judgment there is no substance this complaint at all. Mr Maslanka was clearly not 'forced' to do the additional tasks in any normal meaning of that word. While they were tasks that he was required to do, they were tasks which filled a gap which had arisen in his normal working hours after he asked to be relieved of his handyman duties. It cannot be a breach of the implied term simply to give an employee tasks to do in normal working hours in place of tasks which he has relinquished nor can it be less favourable treatment in light of the evidence from Mr Maslanka's own witnesses that no-one was paid for not working.

- the seventh issue

34. The next item on the Scott Schedule appears to contain two separate issues. The allegation reads as follows: "I was only given 5 minutes to get to my doctor. Some jobs requiring about an hour of work told me to do in 5 minutes". The second sentence seems to be a reference back to the sixth issue. In his grievance in June Mr Maslanka made a reference to being asked to complete jobs in 5 minutes when he thought they would take longer but he resigned before the Respondent was able to clarify what he meant and to investigate it. The detriment which he says he suffered is "because I object to this, I was threatened with another discipline. Which will be done by R Thomas and K Black". It is not clear whether this is a reference to the jobs being done in 5 minutes when he thought an hour was required or the doctor's appointment. It appears to be the latter but there is no contemporary evidence that he was threatened with any kind of disciplinary action.

35. Under the other comments column he says:

"other employees were given at least 30 minutes before a doctor's visit. As S Fernandes and B Kropinski cheated on overtime, I wanted to show this in my complaint. But all managers conducting this investigation hide the truth because they are afraid of being responsible for bad supervision".

It is not clear what those comments about Mr Fernandes and Mr Kropinski relate to. They may relate to an allegation which Mr Maslanka made in his grievance about alleged manipulation of the clocking system which was found to be baseless. We deal with that issue in more detail below. It may however be a reference to the fact that in order to get overtime to carry out one of the priority jobs, Mr Maslanka had to approach Mr Neil but we accept the Respondent's explanation that neither Mr Fernandes nor Mr Kropinski had the power themselves to authorise overtime.

36. The complaint about the doctor's appointment arose in this way. Mr Maslanka had a doctor's appointment to attend. The surgery is close to the factory, within easy walking distance. He was scheduled to end work at 11.00 in the morning and the appointment was for 11.10. He went to Rosie Thomas and asked – according to her - for an additional 5 minutes. He denies asking for 5 minutes. She wrote a note to Mr Fernandes authorising Mr Maslanka to leave 5 minutes earlier. He thought that this was not enough, so he complained to Steve Neil who said he could leave as early as he needed to in order to get to his appointment. He did so and attended for his appointment on time.

- the seventh issue: conclusions

37. The issue over the 5 minutes for the doctor's appointment is, in our judgment, extremely trivial. The difficulty may be that Mr Maslanka thought that 5 minutes was to be given a literal interpretation whereas Rosie Thomas clearly took it as an indication that he was permitted to leave early. It was not intended to mean only 5 minutes early. The issue was however satisfactorily resolved. At worst it was a minor misunderstanding.

- the eighth issue

38. The next item on the Scott Schedule is a complaint about disciplinary proceedings which took place on 18 April 2017. The detriment is that the Respondent did not accept Mr Maslanka's explanation of what had happened. The disciplinary proceedings arose out of his performance of the job given first priority on the so-called priority list. It was the removal of mastic from a wall in the main entrance area. There is no dispute that in order to perform this task Mr Maslanka brought with him from home an angle grinder without a disc guard and two extension leads. There is no dispute that he had connected the extension leads and had connected the angle grinder to the extension leads and was in place to use the angle grinder to remove the mastic from the wall. The only dispute appears to be whether or not he had started to do so. He claims that he had not.

39. The use of Mr Maslanka's own tools was a breach of health and safety rules because they were not PAT tested. Either during the disciplinary hearing or the subsequent appeal Mr Maslanka asserted that he had either not understood that he could not use his own tools or had been given permission previously to use his own tools on site. Mr Neil, who heard his appeal against the written warning which he received, checked this by contacting Mr Fernandes and Mr Baldwin, both of whom were clear that Mr Maslanka had never been given permission to use his tools on site. The notes of the disciplinary hearing suggest that Mr Fernandes had said at the hearing that Mr Maslanka knew he could not use his own tools because on a previous occasion he had brought in his own equipment to dry a room and had been told it was not permitted.

40. We pause here to record that our work has been made more difficult by the fact that all of the notes of meetings and hearings in the bundle are in manuscript which is not always easy to read. We note with concern (although ultimately it has no bearing on the outcome of this case) that it appears that Mr Maslanka was not supplied with the notes of interviews or disciplinary hearings even when he appealed against his warning. This, in our understanding, is not in accordance with good industrial relations practice.

41. Mr Maslanka faced a second disciplinary charge on the same occasion which was also health and safety related. The charge was that he had failed to

complete the health and safety pre-start check list on the electric floor scrubber on 4 April. However, it is clear from the contemporary documents that this was by no means the first time that it had been drawn to his attention that he had not carried out the necessary checks. Mr Maslanka's contention is that he was unable to complete the check list because the documents had been moved. It is not clear precisely what he is asserting here. The evidence from the Respondent is that all check lists of a health and safety nature are kept in the canteen. Mr Maslanka seemed to be denying that that was the case but he also seemed to be asserting that the right place for them, at least for the check list for the floor cleaner, was in the ladies' toilet where the floor cleaner was also kept, hanging on the wall above the cleaner where they used to be kept in Linda Sharp's time. The Tribunal got the strong impression that his complaint was that that is where the forms had been moved from, not that they had been moved from the canteen. However, as Mr Kropinski and other witnesses pointed out, if there was a shortage of a particular form Mr Maslanka knew he could obtain a copy from the office.

- the eighth issue: conclusions

42, Mr Maslanka was given a written warning. The evidence before the Respondent after what appears to have been a thorough investigation, was, in our judgment, more than ample for the reasonable employer to conclude that both disciplinary charges were made out. On the first, the only differences between Mr Maslanka and the Respondent was whether he had been stopped from using his own tools before actually starting work or whether he had already started work and whether he had been given prior permission to use his own tools on site. There was no dispute that he had failed to carry out the prestart health and safety check.

43. In our judgment, it is not possible for a reasonable decision by an employer after a reasonable investigation, to accept one version of events as opposed to another in a disciplinary hearing, to amount to a breach of the implied term of mutual trust and confidence. It is also said by Mr Maslanka to be a detriment that the Respondents rejected his proposal that they substitute a verbal warning for a written warning. These were two separate and unrelated health and safety incidents and in both cases he had a prior history of similar behaviour. That being so, a written warning was an entirely reasonable sanction.

44. Any contention that the decision was reached or the sanction imposed because of Mr Maslanka's age is unsustainable on the evidence. These were clear breaches of health and safety and Mr Maslanka has not identified a similar incident involving a younger person where no action was taken or a less severe sanction imposed.

- the ninth issue

45. The next complaint in the Scott Schedule is said to be about the disciplinary hearing itself but the detriment which Mr Maslanka has identified is a little obscure:

"a short meeting stating that S Neil believed S Fernandes and B Kropinski and a brief explanation of I do not have the right to 11 hour break. Am I a slave to S Neil?"

46. The second meeting with Mr Neil in connection with the appeal (not the original disciplinary hearing) was undoubtedly a short one because that is when

the decision was announced but the first meeting appears to have been a reasonably lengthy one after which Mr Neil conducted further investigations.

47. The complaint about the right to an 11 hour break requires some explanation. This is not a complaint by Mr Maslanka that the Respondent was acting in breach of the Working Time Regulations 1998 by failing to allow him a daily rest break of 11 hours. This is a one-off complaint relating to the overtime which Mr Maslanka did doing priority job number one. Mr Maslanka requested the overtime to work on a Saturday morning and when he was given it by Mr Neil he spoke to Mr Fernandes and was told that the work had to be done between 6 am and 11 am. His Friday evening shift did not end until 11.00 pm and so an 11 hour break would have meant that he could not start until 10.00 on the Saturday morning. The work he was to do on that day had not been imposed on him by Mr Fernandes: Mr Maslanka had asked to be allowed to do it. The requirement to perform the work between 6 am and 11 am arose because in the normal course of events there would be no one on site after 11 am and in particular no first aider. No one is permitted to work alone on site or in the absence of a first aider. Mr Maslanka arrived for work on the Saturday at about 7.30.

- the ninth issue: conclusions

48. Although on this occasion Mr Maslanka did not have an 11 hours break, this was a one off situation which arose because he requested the over-time on a Saturday morning. Ms Hale's contention that as a split shift worker he was not entitled to an 11 hours break does not appear to be correct, but Government guidance on rest breaks says that the rules do not apply to those who choose the hours they work. The short break was not imposed on Mr Maslanka. He chose to work on the Saturday morning and could have declined to come in once he knew the hours that he would be allowed on site. As the over-time was entirely voluntary – he had asked for it – there could have been no realistic risk of disciplinary action if he had changed his mind. There is an obvious suspicion that this issue would not have been raised if Mr Maslanka had not been disciplined for using his own tools that morning. Requiring an employee who has requested overtime on a Saturday morning to carry out the work between certain hours for health and safety reasons seems to be incapable of amounting to a breach of the implied term even if in order to get the work done the employee has to come in to work less than 11 hours after he finished his previous shift. In the absence of any evidence that a younger employee would have been treated any differently in similar circumstances no question of age discrimination can arise.

- the tenth issue:

49. The next allegation in the Scott Schedule reads "meeting after the report from RPS". The detriment is said to be: "they accuse me of bad behaviour and are forcing me to meet S Fernandes and B Kropinski and forcing me to apologise to them". His comment is "can I apologise to bad people".

50. The events which led up to Mr Maslanka's referral to RPS who are the Respondent's occupational health providers, are an important background to this issue. Mr Maslanka has a number of health issues. In addition to high blood pressure and diabetes he also has some mental health problems. So far as the Tribunal are aware the diagnosis is depression and he is being treated with a well-known anti-depressant. However, at times he becomes very emotional and upset (this happened on several occasions during the hearing) and prior to the referral to occupational health his aggressive behaviour and increasing refusal to take direction from managers was causing the Respondent considerable

concern. The first indication that matters were becoming seriously awry was a grievance taken out by Mr Bart Kropinski the hygiene team leader on 20 April 2017. He referred to a conversation which he had overheard between Mr Maslanka and his wife complaining about Mr Kropinski and Mr Fernandes. He confronted Mr Maslanka about it and his response, according to the grievance was thus: "Marek replied very mad 'I am not talking to you because you stitched me up and I got report because of you'. I replied 'no Marek you only got report because of you. I am only doing my job'. (This appears to be a reference to the disciplinary proceedings in respect of the floor polisher). Mr Kropinski goes on in his grievance letter. "I feel very unsafe around Marek. I feel he is provoking me so I shout at him or I do something stupid and lose my job...".

51. Mr Kevin Basley was charged with investigating the grievance and he met with Mr Maslanka on 4 May. Mr Maslanka appears to have accepted that there were problems in the relationship between him and Bart and Sergio Fernandes. The upshot was that Mr Basley told Mr Maslanka that he expected an improvement in the relationship and that both he and Mr Kropinski and Mr Fernandes should work on that. Contrary to Mr Maslanka's assertion, we accept the evidence of Mr Basley and Mr Kropinski that the same message was conveyed to Mr Kropinski and Mr Fernandes. Mr Kropinski told us that whilst he felt he was trying to improve the relationship, Mr Maslanka was not. The plan was that Mr Basley would review the situation in 4 weeks. However this did not happen because of subsequent events.

52. Two weeks after the initial grievance hearing Mr Basley interviewed Mr Maslanka again following a flurry of e-mails from Sergio Fernandes complaining about his behaviour. The tone of the e-mails is not in any sense dogmatic or aggressive but rather concerned not only about Mr Maslanka's behaviour but the impact it was having on Mr Fernandes's ability to manage him and the shift in general. On 17 May in a lengthy e-mail to Kirsty Black and Rosie Thomas he says this:

"I can no longer ask Marek to do something without him seeing it as an issue and causing unnecessary disruption to the shift. The simple fact I asked him to pay a bit more attention to the gents toilet before today's FSA audit... caused Marek to have a huge outburst".

In the same e-mail he reports Marek (Mr Maslanka) as saying to him "I will give you war" and he also reports a very disturbing episode witnessed by another Polish employee. The e-mail records it thus:

"As Bart (Kropinski) walked past, Marek started literally climbing the wall. Bart never did anything to justify that sort of behaviour. Gregorz stated 'you need to get this man to a doctor. What I just saw him doing is not normal'".

53. In consequence Mr Basley arranged to see Mr Maslanka again with Kirsty Black present. Mr Basley went through the various e-mails with him and Mr Maslanka became quite upset. He told Mr Basley that he had been taking double the dose of his prescribed medication because he was so stressed and that he was not due to see his GP until 31 May. Because Mr Maslanka became so upset Mr Basley adjourned the meeting and sent him home and arranged to meet him again on the following day. It was during the second meeting that Mr Maslanka was asked to see RPS and was placed on medical suspension. After

the meeting Mr Basley wrote him a letter outlining the issues which had caused them to meet. These included further failures to complete health and safety pre-start checks on the floor scrubbing machine; his Team Leader being concerned that he faced a load of abuse whenever he spoke to Mr Maslanka; accusing the Team Leader in an aggressive tone of lying when being accused of not completing prestart checks; throwing his arms around aggressively close to Bart Kropinski's face and saying "next few days I am going to my doctor and after you will see me in my office not me in your office" and Bart Kropinski's fear that Mr Maslanka was intending to cause him harm.

54. The report from RPS is dated 25 May 2017. It suggested mediation as a means of addressing the issues at work. It appears to be the Respondent's subsequent attempts to get Mr Maslanka to engage in mediation with Mr Fernandes and Mr Kropinski that he regards as the detriment arising from this issue: "forcing me to meet S Fernandes and B Kropinski and forcing me to apologise to them". It is not correct that he was forced into mediation. At the first meeting to discuss the possibility of mediation Mr Neil felt that Mr Maslanka was going to be agreeable to mediation although he does not appear to have expressly agreed. But in a subsequent telephone call he made it clear that he would not enter into mediation.

- the tenth issue: conclusions

55. There were no consequences for Mr Maslanka as a result of this refusal to engage in mediation and therefore it is not true to say that he was forced to meet Mr Fernandes and Mr Kropinski. He was certainly accused of bad behaviour. In our judgment no question of age discrimination can arise here. There is no suggestion that Mr Maslanka's erratic behaviour was attributable to his age; rather it seems to be attributable to some as yet not wholly understood mental health issues.

56. In our judgment there is also no question of the Respondent acting without reasonable and proper cause nor, indeed of their actions being in breach of the implied term. Beginning with the grievance from Bart Kropinski they were faced with growing evidence of Mr Maslanka's aggressive attitude towards his manager, erratic behaviour and general refusal to be managed. The Respondent was clearly under an obligation to investigate the grievance and to implement the recommendations of the occupational health report to try and resolve the matter by mediation. Although in the comments column in the Schedule to this issue Mr Maslanka asks rhetorically "can I apologise to bad people?" the evidence is overwhelmingly that it was his behaviour which was the cause of all of the issues leading up to the RPS report and its recommendations. As a small footnote we note that amongst the people whom Mr Maslanka accuses of committing the acts complained of in this issue is Mr Green the health and safety manager who appears to have taken no part in them at all and also Joe Clark who did not come into the picture until a little while later when he was asked to investigate Mr Maslanka's own grievance which at this point he had yet to raise.

- the eleventh issue

57. The last item in the Scott Schedule (apart from the two which deal with post termination events and are therefore not relevant) concerns Mr Maslanka's own grievance. The acts complained of are: "meetings regarding my complaint and the investigation being carried out" and the detriment which he claims to have suffered as a result is said to be: "accusing me to cover errors, managers and Team Leader". Under any other comments he has put "impunity for

employees and managers for breaking labour law and fraud". This was originally said to be both an act of age discrimination and part of the complaint of constructive unfair dismissal but during the hearing Mr Maslanka said that he had not intended to label this as an act of age discrimination.

58. Mr Maslanka raised a grievance on 13 June 2017, although the date on the grievance letter itself is 16 June. He attended an initial grievance hearing meeting on 21 June with Mr Clark at which he produced another extensive list of grievances. Both the original grievance letter and the additional letter are very hard to follow. It also appears that during the grievance meeting yet more issues were raised. His grievances included being forced to undertake extra cleaning work as part of his normal basic hours; being forced to take a shorter break than 11 hours; being called a whore and an idiot by Sergio Fernandes and Bart Kropinski; not being paid correctly; other employees being paid for work they were not doing; taking away work assigned to him as a handyman which caused him to resign from that position; and pursuing a second disciplinary charge against him when the first one failed. The general theme running through the litany of specific grievances is the management style of Sergio Fernandes and Bart Kropinski.

59. Mr Clark thoroughly investigated all of the allegations. He interviewed all of the members of the hygiene team individually and asked them all the same questions. None of them supported any of Mr Maslanka's allegations. In the hope that he would get some support from them in this regard Mr Maslanka asked for and was granted witness orders for Mr Dudzicz, Mr Halczak and Mr Baronowski. But in their evidence to us they would not support them either. In particular Mr Halczak said that he had always had good supervision and help from both Mr Fernandes and Mr Kropinski which he described as "very good". They all rejected any suggestion that some employees had been allowed to come into work early when they were not required and, effectively, to stand around being paid when there was nothing to do. They rejected any suggestion of unequal treatment. As part of the investigation, Kirsty Black asked Vicky Hand the Payroll Administrator to check whether, as Mr Maslanka claimed, Mr Fernandes was manipulating the clocking in system to enable some employees to be paid for hours they had not worked. Employees clock in and out using their fingerprints but this can be over-ridden by a manager. Vicky Hand checked time recording cards dating back to 16 January 2017 and found no evidence to suggest that Sergio Fernandes had overridden any fingerprint time records for any of the night hygiene team. The CCTV was also checked to see if people were in the canteen for long periods of time and thus abusing their breaks but nothing was found. Mr Clark was satisfied that there was no evidence to confirm any of Mr Maslanka's allegations.

60. On 29 June Mr Maslanka raised yet more questions in a letter to the Respondent. Two appeared to be repetitions of earlier questions but he now asked whether Mr Fernandes had allowed employees to start work two or three hours earlier than they were required when he knew that production was going to overrun and why he had paid overtime for employees employed only part time. The last point is about his own daughter-in-law Alexandra who did not work more than 40 hours a week and therefore did not qualify for premium rates if she worked additional hours. However, by mistake, on one occasion when she worked an additional half hour she was paid at premium rates, not standard rate. This seemed to offend Mr Maslanka because, as we have already mentioned, he felt that this was money which was being taken away from him and given to his

daughter-in-law. It is wholly unclear why Mr Maslanka thought that the over-paid money was being taken from him. The other issue referred to occasions when although the night hygiene team had arrived for work at the scheduled time they had not been able to start work because production had overrun. Again Mr Clark investigated these complaints and, unsurprisingly, found that nothing untoward had happened.

61. Mr Clark then wrote to Mr Maslanka inviting him to attend a meeting on July 4 but the meeting did not take place. He was invited instead to attend a meeting on the 10th. In the meantime, Mr Maslanka wrote another letter to Mr Clark suggesting he was being managed out of the business and raising the question of constructive dismissal. He says in the letter that he had turned to a lawyer for help. Mr Clark found this letter quite threatening.

62. At the meeting of 10th July Mr Maslanka was assisted, as he had been in all of the meetings to which we have referred in this decision, by an interpreter who was usually Michael Kulic. During the meeting Mr Maslanka said he was finding the situation stressful and he had taken more tablets. As Mr Clark began to explain that he could find no wrong doing or mistreatment of Mr Maslanka, Mr Maslanka became very distressed. He started to shake; he raised his voice and pointed his finger at Mr Clark. He said that people do not want to tell the truth to Mr Clark, something which Mr Clark did not accept. Mr Maslanka terminated the meeting by saying he would bring his resignation letter in. The resignation letter is dated the same date as the meeting but begins "I write to confirm my decision of constructive dismissal in 15 July 2017". The letter goes on to set out in considerable detail the compensation which Mr Maslanka requires for this act of alleged constructive unfair dismissal.

- the eleventh issue: conclusions

63. Although in the Scott Schedule the detriment which Mr Malanka is said to have suffered was being 'accused' in order to cover up the errors of managers and team leaders, he does not appear to have been accused of anything during the grievance process. All that happened was that, despite what appears to have been a thorough investigation, Mr Clark failed to discover any evidence whatsoever to support any of his complaints. The witnesses which Mr Maslanka called to the Tribunal all failed to support him. Mr Maslanka's grievance was handled exactly as one would expect the reasonable employer to handle a grievance. The real issue here appears to be simply that Mr Maslanka finds the outcome of his grievance unacceptable from which he concludes that foul play must be involved.

64.. In view of the criticism that we made earlier about the Respondent's failure to supply Mr Maslanka with interview notes, we should record that on this occasion at his request he was supplied with copies of all of the interview notes.

Discussion and Overall Conclusion

65. We appreciate that Mr Maslanka is not a well man. There is no reason to suppose that he is not genuinely and totally convinced of the rightness of his position, in particular that he has been the subject of grossly unfair treatment by Mr Fernandes and Mr Kropinski, not to mention the list of other people whom he names in the Scott Schedule as perpetrators of the acts of which he complains. But we are satisfied that there is no merit in any of the complaints. Some, even if Mr Maslanka's account of them were entirely true, appear to be very trivial, for example only being allowed 5 minutes extra to go to the doctors. Some appear

to have no basis in fact, for example the claim that he was called an idiot or a whore. Some are flatly denied by his own witnesses and receive no support from the people who were interviewed during the course of the investigation by Mr Clark.

66. The Respondent's belief expressed to us in evidence by Mr Troop that Mr Maslanka resented being managed, appears to be well founded. When one is of the mind that one is being ill-treated it is very easy to seize on the most minor and innocuous event and identify in it material which supports the belief which one already holds. One rapidly enters a vicious circle. That appears to be what has happened to Mr Maslanka. There is nothing in the evidence which we have heard that could possibly lead us to the conclusion that the Respondent has in any way acted unreasonably or improperly or inappropriately in connection with any of the matters on which he relies and there is therefore no basis on which we could begin to conclude that the Respondent is in breach of the implied term of mutual trust and confidence.

67. So far as the complaint of age discrimination is concerned, whilst it may be that Mr Maslanka is much older than any of the other protagonists in the story, that does not give him a basis for complaining of age discrimination. There is no evidence from which we could conclude that any of the matters of which he complains, even if they had been made out on the facts which by and large they are not, happened because of his age.

68. In conclusion we should add that the Respondent has tried extremely hard over a long period of time to accommodate an increasingly difficult and intransigent employee.

69. The complaints of constructive unfair dismissal and age discrimination therefore fail and are dismissed.

Employment Judge Macmillan
Date: 20th July 2018

JUDGMENT SENT TO THE PARTIES ON
30 July 2018

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FOR THE TRIBUNAL OFFICE