EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4118342/2018

Held in Glasgow on 14, 15 and 16 January 2019

Employment Judge: Robert King

Mr R Gordon	**Claimant** **Represented by:** **Ms A Buchanan - Solicitor**
European Circuits Limited	**Respondent** **Represented by:** **Mr I Burke - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was unfairly dismissed and that the respondent is ordered to pay the claimant -

(1) a basic award for unfair dismissal of **Nine Thousand, Three Hundred and Thirty Six Pounds (£9,336).**

(2) a compensatory award of **Fourteen Thousand, Seven Hundred and Six pounds and Forty Eight Pence (£14,706.48)** made up of:-

(a) loss of earnings of **Fourteen Thousand and Thirty Two Pounds (£14,032),**

(b) loss of pension benefits of **Four Hundred and Twenty Four Pounds, Forty Eight Pence (£424.48), and**,

(c) an award for loss of statutory rights of **Two Hundred and Fifty Pounds (£250).**

(3) The total award made by the Tribunal is therefore **Twenty Four Thousand and Forty Two Pounds and Forty-eight Pence (£24,042.48).**

The Tribunal also dismisses the claimant's claims that he was automatically unfairly dismissed contrary to section 103A of the Employment Rights Act 1996.

REASONS

Introduction

1. The claimant originally presented claims of (1) automatic unfair dismissal contrary to section 103A of the Employment Rights Act 1996, and (2) unfair dismissal contrary to section 98 of the Employment Rights Act 1996 with alternative claims that he had either been unfairly dismissed for misconduct and/or capability or, alternatively, that he had been unfairly constructively dismissed.

2. At the outset of the hearing, the claimant's representative confirmed that the claimant was no longer pursuing his claim that he had been automatically unfairly dismissed contrary to section 103A of the Employment Rights Act 1996.

3. The claimant gave evidence on his own behalf and led evidence from one witness, Alan McLean. The respondent led evidence from its managing director Mark Briscoe and its manufacturing supervisor Aaron Christison.

4. A joint bundle of documents was lodged and both parties made submissions at the conclusion of the hearing.

Findings in fact

Having heard evidence, the Tribunal considered the following facts to be admitted or proved: -

5. The respondent carries on the business of manufacturing and assembling printed circuit boards for commercial clients. Mark Briscoe and his father originally created the business. The business operates in a high-pressure market and its success depends on its ability to produce quality products for its customers.

6. The respondent employed the claimant as a machine operator between 1 July 1999 and 21 June 2018. The claimant was a full-time employee and normally worked a 38-hour week; 8.45 a.m. to 4.40 p.m. Monday to Thursday and 8.45 a.m. to 12.50 p.m. on a Friday. His weekly net pay was £322, and he was a member of the respondent's occupational pension scheme to which the employer's contribution was £7.58 each week.

7. At all material times during his employment, the claimant reported to the manufacturing supervisor Aaron Christison and he, in turn, reported to the managing director Mark Briscoe.

The reduction in the claimant's working hours in January 2015

8. In January 2015 the respondent's business suffered a downturn in orders, resulting in a reduced requirement for the manufacturing work carried out by the claimant. In response to that downturn, as of 19 January 2015, the respondent reduced the claimant's working hours from full-time hours of 38 hours down to 15 hours per week over a two-day shift pattern in terms of which he would work on a Tuesday and a Thursday from 7.45 a.m. to 3.45 p.m.

9. The respondent selected the claimant and one other employee to have their hours reduced because of their limited skillset relative to other employees for whom there was still adequate work that they were able to perform.

10. The respondent did not carry out any consultation with the claimant in relation to the reduction in his working hours before it imposed this measure.

Furthermore, the respondent had no contractual right to impose such a reduction in hours unilaterally. Nevertheless it imposed the reduction as of 19 January 2015.

11. Although the claimant felt 'shattered' that the respondent had imposed this reduction in his working hours he continued to attend faithfully and did not miss a day's work. While he believed he had been treated unfairly he was initially reluctant to complain because he did not wish to make things worse for himself, which he feared would be the result of raising a complaint.

12. The claimant eventually sought advice from the Greater Pollock Citizens Advice Bureau who wrote to the respondent's managing director Mark Briscoe on 24 March 2015 asserting on the claimant's behalf that the reduction in his hours had been unlawful. On receipt of that letter, Mr Briscoe approached the claimant and explained that he had received the Citizens Advice Bureau letter, but that he had intended to return him to full time hours in any event. Soon thereafter**,** the respondent returned the claimant to his contractual full-time hours, which he continued to work until the termination of his employment.

13. Shortly before the claimant's representative wrote this letter to the respondent, the claimant had told Mr Christison that he did not think that Mr Briscoe wanted to give him his full-time hours back. Mr Christison responded ''*you are right, he doesn't want you back.*'' During the period when the claimant was on reduced hours, a limited amount of overtime was nevertheless still worked in the manufacturing department.

The Hot Air Solvent Levelling ('HASL') machine

14. The claimant worked in the manufacturing and inspection part of the business. In addition to panel plating, etching, testing, drilling and gold plating circuit boards the claimant's duties included the operation of the Hot Air Solder Levelling ('HASL') machine.

15. The purpose of the HASL machine is to apply a coat of solvent to the circuit boards before they are passed to the assembly section of the factory. It is important that the solvent coat on the circuit boards has a smooth finish, lest it becomes impossible to connect the electrical components to them and they cannot be used.

16. The HASL machine operates as follows. A circuit board is connected to a set of clamps and lowered into a container of solvent. Once the circuit board is coated in solvent, jets of high-pressure hot air are directed at it to dry it and to remove excess solvent in order to provide it with a smooth level finish. The direction of the hot air is controlled by air blades, which must be calibrated at the correct angle in order to ensure that all the excess solvent is removed.

17. The claimant was responsible for ensuring that the HASL machine was properly maintained and the air blades were properly calibrated. In order to be effective, the air blades should point at an angle of 3 to 5 degrees below the horizontal. Due to the high pressure coming through the blades, they can often become loose or lose their downward angle. It is also possible that if the clamps that hold the circuit boards become bent out of shape, they can brush against the air blades and knock them out of their optimum position.

18. The claimant was highly experienced in the respondent's manufacturing processes. He was fully aware of the need to produce a smooth finish on the circuit boards so they would be ready for assembly and of his role in that process.

The respondent's management of the claimant's performance

19. On 29 January 2015, the respondent's Quality Manager Stephen Blake issued the claimant with a verbal warning in respect of various *"non-conformances"*, which referred to defects in circuit boards he had produced. Mr Blake told the claimant that Mr Briscoe had instructed him to deliver this warning. The respondent did not send a letter to the claimant in advance of delivering this verbal warning and it did not provide him with an opportunity to make representations at a hearing. The claimant was issued with this verbal

warning without any procedure being followed. Nor was he offered the right to appeal against the warning.

20. On 22 April 2015, the claimant received a written warning in respect of further *"non-conformances"*, which referred to further defects in circuit boards he had produced. Once again, the respondent did not send a letter to the claimant in advance and it did not provide him with an opportunity to make representations at a hearing. Without any prior notice, Mr Briscoe and Mr Blake simply took the claimant into an office and delivered the warning.

21. Despite the claimant's protests, they were unwilling to consider his explanation that many of the non-conformances were caused by faults in the manufacturing process that resulted in 'over plating' of some of the circuit and were not attributable to his personal performance. The claimant felt that he had been subjected to a 'character assassination' in this meeting and he was not offered a right of appeal against the written warning.

22. In addition to issuing the verbal and written warnings in January and April 2015, Mr Briscoe spoke to the claimant on a regular basis between April 2015 and June 2018 when there were faults with the finish of the circuit boards that he had produced. Such conversations took place approximately every 6 to 8 weeks and normally occurred in the inspection area with no prior notice from Mr Briscoe. On these occasions Mr Briscoe usually spoke to the claimant in a loud voice and in an aggressive manner, gesticulating towards him. He did not allow the claimant a proper opportunity to explain what he believed were the reasons why there had been problems in the production process. The claimant was intimated by Mr Briscoe's behaviour at these times and as a result felt unable to challenge his criticism, even though he considered it to be unfair and unjustified.

23. On several of the occasions when Mr Briscoe criticised the claimant's performance in this manner, the claimant's feeling of intimidation was such

that he would walk away from the situation to another part of the factory in order to put space between them.

24. While the claimant loved his job, Mr Briscoe's repeated criticism became unbearable for him because he believed that Mr Briscoe was constantly criticising him without justification. The claimant's health suffered as a result and he tried to avoid Mr Briscoe if at possible.

25. Although the claimant was unhappy about Mr Briscoe's treatment of him and aware of the respondent's grievance procedure, he did not raise a grievance against him. He did not believe there was anybody in the respondent's business that was senior enough to deal independently with a grievance about Mr Briscoe and therefore he felt that raising a grievance would not resolve his concerns.

26. The claimant spoke to Mr Christison on several occasions about Mr Briscoe's treatment of him. He made it plain to Mr Christison that he believed Mr Briscoe was criticising him unfairly and acting in an intimidating manner towards him and that this was affecting his wellbeing at work. Mr Christison's response to the claimant was always that the claimant should *"keep his head down"*. Mr Christison also believed there would have been no point in the claimant raising a grievance against Mr Briscoe. Mr Christison was fully aware that Mr Briscoe's treatment of the claimant was having an adverse effect on his wellbeing at work but took no action to assist him.

The events of 13 June 2018

27. On the morning of 13 June 2018, Mr Briscoe approached the claimant in the manufacturing area and told him that the air blades on the HASL machine were set at 18 degrees below the horizontal and were not operating properly. He asked the claimant, *"I want to know why you are not maintaining the HASL machine".* The claimant explained that he believed he *had* been maintaining it as required but that the machine was often affected by process faults that were beyond his control. He suggested that the problem might have been

caused by one of the clamps holding the circuit board becoming bent out of shape, knocking against one of the air blades and changing its angle.

28. When Mr Briscoe again insisted that the claimant had not been checking the machine properly the claimant told him that he checked it every day and that he recorded those checks on a whiteboard on the front of the machine. The claimant felt *'useless'* because of the way Mr Briscoe spoke to him.

29. After Mr Briscoe left the area, the claimant inspected the air blades on the HASL machine. He noted that the rear air blade had excess movement in it and that the casing on the air blade had also moved. He showed this to Mr Christison and explained that he believed this was the likely cause of the poor finishing on the circuit boards and that it had occurred beyond his control. He asked Mr Christison to explain this to Mr Briscoe on his behalf because by now he felt unable to speak to him personally because of the way he had been spoken to earlier that day. Despite the claimant's request Mr Christison did not speak to Mr Briscoe.

30. During the afternoon of 13 June 2018, Mr Briscoe approached the claimant, this time carrying an EXMEL board with him. He complained to the claimant that the finish on the board had been poor. His manner towards the claimant was aggressive. The claimant was confused because he understood that he had completed work on this EXMEL board in March 2018. He explained to Mr Briscoe that he believed there had been a problem with the HASL machine at the time, which had caused excess movement in the rear air blade and that his had caused the finish to be poor. In response Mr Briscoe shouted '*"Look, this is the problem with you, you don't listen. All I want you to do is your job."* Mr Briscoe then walked away. The claimant felt *'totally deflated'* because of the way Mr Briscoe had spoken to him.

31. Later that day, the claimant told Mr Christison that he was *'about to walk'* because he felt that Mr Briscoe was *'at him all the time.'* In response Mr

Christison simply shook his head. At this point, the claimant felt very low because he believed that he was on his own and nothing was going to change.

32. The claimant went home after work on 13 June 2018 feeling extremely depressed about the events of that day. He felt unwell and had a sleepless night. His wife suggested that he should take the next day off work because she was concerned that he was in no fit state to return. However, the claimant insisted that he would go back to work the next day as normal and therefore he did.

The events of 14 June 2018

33. At 8.30 a.m. on 14 June 2018, Mr Briscoe approached the claimant in the inspection area. He carried with him circuit boards that had previously been prepared by the claimant for the customer, Expert Sleeper, which had initially been over plated and burnt and therefore had to be redone. Only the claimant and Mr Briscoe were in the inspection area at that time. Mr Briscoe asked the claimant *"Why does this keep happening all the time?"* The claimant felt tightness in his chest, and he became light headed. He said to Mr Briscoe, *"I've had enough of this. I'm not feeling well, I'm going up the road."* As the claimant walked away, Mr Briscoe shouted his name, but the claimant kept on going, left the premises and drove home. On his drive home he had to stop his car and pull over to the side of the road because he was shaking.

34. When the claimant arrived home on 14 June 2018 his wife was concerned for his health and telephoned his GP, whom the claimant then saw the following day. Having left work after his altercation with Mr Briscoe, the claimant did not contact the respondent again that day. Nor did the respondent contact the claimant on 14 June 2018 to inquire about his welfare.

35. On 15 June 2018 the claimant rose from his bed at 11.30 and he then visited his GP. He did not contact the respondent at all that day. His failure to contact the respondent on a day of absence was in breach of the respondent's employee handbook, which provides that -

"Employees absent through sickness must arrange to inform a Manager by telephone or message within one hour of shift starting. This is to allow management to make alternative manning arrangements'

The claimant was aware that he should have notified his employer if not attending work. However, his head was *"all over the place".* Following their consultation, the claimant's GP provided him with a fit note dated 15 June 2018 confirming that he was unfit for work because of "*work related stress*".

The events of 18 June 2018

36. On Monday 18 June 2018, the claimant remained unfit to work because of work related stress. Although the claimant did not telephone the respondent to report his absence, his son attended at the respondent's premises at 11.30 a.m. that day and hand delivered the claimant's fit note to a member of staff at reception.

37. Mr Briscoe believed that, by walking out of the respondent's premises on 14 June 2018, the claimant had indicated his intention to resign from his employment, which had subsequently been confirmed by the claimant's failure to contact the respondent on 15 June 2018 in compliance with the employee handbook requirement.

38. In any event, when he received the claimant's fit note on 18 June 2018, Mr Briscoe's reaction was that the claimant was not genuinely ill because he believed he had shown no signs of illness before leaving work on 14 June 2018. In the circumstances Mr Briscoe concluded that, by submitting a fit note when he was not genuinely unfit to work, the claimant was in effect making a fraudulent claim for statutory sick pay.

The respondent's letter of 18 June 2018

39. On 18 June 2018, Mr Briscoe sent a recorded delivery letter to the claimant in the following terms -

"Dear Robert, we do not accept your fitness for work statement and therefore return it enclosed.

We instead seek your letter of resignation. We have enclosed a copy of stated events on Thursday 14th June 2018.

You left your place of work at 8.30 am stating "I've had enough I'm am away up the road" thus intimating your intention to leave despite being asked to stop and listen, you carried on and left. This is deemed gross industrial misconduct in the form of a breach of discipline.

On Friday 15th June 2018 you should have phoned one hour before your starting time as per your terms and conditions and again contact should have been made on the Monday however no contact was made until receiving a doctor's letter mid-morning, which is again a breach of contract.

We await your resignation in writing."

40. Attached to that letter was a document dated 14 June 2018 in the following terms:-

"14 June 2018

On the 13th June 2018 Robert was asked why he was not maintaining the HASL as it had been the cause of rejected boards from EXMEL he had no answer and again negated the responsibility.

Then on the 14th June Robert was approached by Mark Briscoe to ask about some scrap panels in the quarantine area which had not been marked up which again was Robert's responsibility. The job was W10178 for Expert sleepers.

The panels had been burnt as too many amps had been applied by Robert. A second batch had been made and plated by Thomas with half the amps which resulted in perfect panels.

Robert was asked by Mark after so many years of experience how this kind of incident keeps happening his response was "I've had enough of this I'm heading up the road'' he promptly left ignoring Mark Briscoe's request to wait. He left in such a haste machines were left on and processes incomplete leaving his fellow workers to pick up on where he left off.

As a result of Robert leaving the factory, he has breached his contract and ECL accepts he has resigned from his position. ECL now seeks a letter from Robert to confirm he has left.

Mark Briscoe

Proofread and agreed events by Aaron"

41. Although Aaron Christison had signed this document as an accurate account of the events described, he had not in fact heard the words that the claimant had spoken. Furthermore, the words that Mr Briscoe and Mr Christison had attributed to the claimant were inaccurate because they did not reflect that the claimant had also told Mr Briscoe that he felt unwell.

42. On receipt of the letter of 18 June 2018 and the accompanying document dated 14 June 2018, the claimant could not believe what was happening to him. He had never previously had a day off sick throughout his employment and he did not know exactly how the sick pay rules worked. Nevertheless, he did not believe the respondent was permitted to reject his fit note in circumstances where he was genuinely unfit to work because of work related stress and had produced a GP fit note to that effect. Furthermore, as far as he was concerned, he had not resigned from his employment on 14 June as the respondent now claimed.

43. Even though he disputed the terms of the respondent's letter and the accompanying disciplinary document he did not feel able to challenge the respondent's position; particularly as Mr Christison had supported Mr Briscoe's version of their conversation on 14 June 2018, even though he knew Mr Christison had not heard it. In all the circumstances the claimant felt that his only option was to tender his resignation.

44. The claimant therefore wrote to the respondent on 20 June 2018 in the following terms: -

> *"I am sending you my letter of resignation and hereby resign from European Circuits as from 20/06/18."*

The respondent accepted his resignation and his employment was therefore terminated by his resignation.

45. Since the termination of the claimant's employment, he has made reasonable attempts to find alternative work; initially and immediately after his resignation at a local level and subsequently by applying for jobs online.

46. The claimant has been unable up to the hearing date to find full time work. However he has been in part time employment with "Helen's Delicatessen", 1085 Paisley Road West, Glasgow, since 3 December 2018 where he works 16 hours per week, earning net pay of £125 per week.

Submissions for the claimant

47. On behalf of the claimant, it was submitted that the claimant had been constructively dismissed in terms of section 95(1)(c) of the Employment Rights Act 1996 and that his dismissal had been unfair. Reference was made to the principles set out in the leading case of ***Western Excavating (ECC) Limited v Sharp 1978 ICR 221***. The test was an objective one; whether the employer intended to break the contract was irrelevant.

48. It was submitted that the term of the contract that the respondent had breached was the implied term of trust and confidence ***(Malik & others v BCCI 1997 IRLR 462***) and that any breach of that term would amount to a fundamental breach entitling the employee to resign ***(Morrow v Safeway Stores 2002 IRLR 9).***

49. The respondent had acted in breach of the implied term of trust and confidence on various occasions over the past four years, particularly since the claimant's return to full time hours in 2015. Although the claimant had continued to work after those breaches had occurred, he was entitled to revive those breaches and rely on the events of June 2018 as being the last straw ***(Kaur v Leeds Teaching Hospital NHS Trust 2018 EWCA 978).***

50. The breaches of the implied term of trust and confidence that the claimant sought to rely on were as follows: -

- In 2015, the respondent had unilaterally reduced the claimant's weekly working hours from full time hours of 38 per week to 15 hours per week in circumstances where it had no contractual right to do so and where the claimant had not agreed to the reduction in his hours. Furthermore, there had been no consultation about that reduction. The respondent had also kept the claimant on reduced hours even though there was overtime available within the manufacturing department in where he worked.

- While recognising the respondent's entitlement to criticise his performance in circumstances where that was justified, the claimant believed that the frequency and manner in which he had been criticised and challenged about his performance had amounted to further breaches of the implied term of trust and confidence having regard to the fact that Mr Briscoe would shout and gesticulate at the claimant to the extent that the claimant would often have to walk away from the situation.

- In respect of those times when warnings had been issued, there had been no proper formal disciplinary or poor performance procedures adopted by the respondent at all. Specifically, there had been no letters inviting him to meetings, no right to be accompanied, no notes of hearings taken and no right of appeal against the decisions taken to impose either the verbal warning or the written warning in early 2015. Warnings were simply issued to the claimant without any due process having been followed.

- The respondent had failed to support the claimant when he approached his supervisor Aaron Christison and raised with Mr Christison his concerns about his treatment by Mr Briscoe.

- The events of 13 and 14 June 2018 had given rise to a fundamental breach of contract on the part of the respondent. The criticism Mr Briscoe had meted out to the claimant was unreasonable and Mr Briscoe had crossed the line by shouting and gesticulating at the claimant and not allowing him to have his say.

- When the claimant had left his work on 14 June 2018, it was clear from the words he had spoken to Mr Briscoe that he had not resigned from his employment. He had been unwell, and he had clearly told Mr Briscoe that was the case before he left the premises. While the claimant accepted that he had not followed the respondent's sick absence reporting procedure because he had failed to phone and report his absences on 15 or 18 June 2018, he had been genuinely unwell, as evidenced by the fit note that he asked his son to take to the respondent on Monday 18 June 2018.

- It was submitted that the respondent's position was confused. On one hand Mr Briscoe said that he believed the claimant had resigned on 14 June 2018. However, that was inconsistent with his having then prepared a note of a disciplinary nature and having sent that to the

claimant on 18 June 2018 seeking his resignation. The respondent's letter of 18 June 2018 was not a letter accepting the claimant's resignation. Even on Mr Briscoe's evidence, that letter gave him a choice to resign or not.

- It was submitted that if the respondent genuinely believed that the claimant had resigned on 14 June 2018 then there was no need to request his resignation. The reality was that the contract was still subsisting by 18 June. It was submitted that the claimant's actions, however interpreted, were in the heat of the moment and ought to be given special consideration by the respondent, particularly in circumstances where he had lengthy service and no previous sickness absences.

- An effective resignation had to be clear and unequivocal and it was submitted that there had been no such resignation. Furthermore, on any view the respondent was not reasonably entitled to take the view that he had resigned on 14 June 2018 ***(Atlantic Air Limited v Hoff UK EAT/0602/07***).

- It was submitted that the contents of the letter of 18 June 2018, accompanied by the disciplinary note of 14 June 2018 were the final straw that had entitled the claimant to resign. It was entirely unreasonable for the respondent to refuse to accept his fit note on the ground that Mr Briscoe claimed; namely that the believed the claimant was trying to make a fraudulent claim for statutory sick pay. The fit note that had been produced evidenced the claimant's ill health and it ought to have been accepted. It was entirely unreasonable for the respondent to write to the claimant in the terms that it did on 18 June 2018, which amounted to a material breach of trust and confidence. The reality of that letter was that Mr Briscoe was not giving him the choice to resign or not. He was effectively forcing him to come to work unfit or to resign.

- It was submitted that, even leaving aside the other previous acts in breach of the duty of trust and confidence, the respondent's letter of 18 June 2018 and its accompanying document had amounted to a fundamental breach of the implied term of trust and confidence entitling the claimant to resign.

- In any event, based on the last straw doctrine, the claimant was also entitled to rely on the respondent's previous treatment of him.

- The claimant had not delayed unduly in submitting a fit note. He had been off sick on 14 June 2018, had seen his doctor on 15 June 2018 and had asked his son to deliver the fit note on the morning of 18 June 2018. There had been no unreasonable delay on his part in contacting his employer in all the circumstances, albeit it was accepted that there had been a technical failure to follow the employee handbook.

- In the claimant's submission, he had been unfairly constructively dismissed and that his dismissal had been unfair. He had been a long serving employee with an excellent attendance record. The respondent should have taken account of his stress related absence and its response to his fit note was unreasonable in all the circumstances. In effect the respondent had refused to allow the claimant to have time off work whilst sick and to receive his contractual sick pay. These were not the actions of a reasonable employer.

- In relation to financial loss it was submitted that the claimant had taken reasonable steps to find alternative employment and that he had mitigated his loss by taking part time work in December 2018, having failed thus far to have secured full time work. However, he was still attempting to find full time work.

Respondent's submissions

51. On behalf of the respondent, it was submitted that the test as to whether there had been a repudiatory breach was objective one and did not turn on the perception of the claimant.

52. Reference was again made to ***Malik and others v BCCI*** and the formulation of the test to be applied by the Employment Tribunal, namely to determine whether the employer has *"without reasonable and proper cause, conducted itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".* In the respondent's submission, the respondent's conduct towards the claimant had not met that test. Mr Briscoe had been entitled to criticise the claimant in relation to certain quality matters at work in circumstances where his business relied on providing a quality product.

53. Weight should be placed on the evidence of Aaron Christison who said that he had witnessed the claimant and Mr Briscoe speaking in loud voices to one another and gesticulating at one another during the exchanges that they had. Such exchanges were not unusual and had never previously resulted in the claimant raising any grievance or walking out.

54. In relation to the 2015 reduction in the claimant's working hours, it was accepted that on the claimant's account of the circumstances in which his hours had been reduced that could amount to a repudiatory breach of contract. However the claimant had not accepted the breach and he had returned to work.

55. In circumstances where the reduction in working hours was three years old by the time of the claimant's resignation and the nature of the incident was entirely different from the events of 2018, it was no longer fair and reasonable for the claimant to rely on that alleged breach. Both in terms of its character and the length of time elapsed since; it could not be included in any alleged course of conduct.

56. The claimant's evidence was that the alleged breach of contract was Mr Briscoe's management of the quality issues and that Mr Briscoe kept blaming him and picking on him. It was submitted that Mr Briscoe's conduct during the conversations that they had did not amount to conduct that met the test in Malik.

57. The claimant had failed to make clear in his resignation that he was resigning because of the respondent's conduct, which undermined his claim (**Walker v Wedgewood & Son 1978 ICR 744).**

58. The claimant had in fact resigned from his employment on 14 June 2018. That had been confirmed by his failure to subsequently follow the company sickness absence procedures on 15 and 18 June. Against the background of the nature of the respondent's business and the relationship between the claimant, Mr Briscoe and Mr Christison, it did not ring true that the claimant was unable to contact anybody to tell them that he was sick. He knew his obligation in terms of the employee handbook. If he felt unable to speak to Mr Briscoe, he could have contacted Mr Christison who lived in the same street as the claimant.

59. The respondent's letter of 18 June 2018 was simply seeking confirmation of the claimant's resignation, which the respondent had already accepted when the claimant had terminated his employment by resigning without notice on 14 June 2018. That letter did not alter the fact that the respondent had reasonably concluded that he had already terminated his employment by resignation on 14 June 2018. That conclusion could be reconciled with the respondent's letter of 18 June 2018 because the letter was in keeping with the sympathetic way the respondent had always treated the claimant and it had offered him a chance to reconsider.

60. The respective parties' evidence about the discussions between Mr Briscoe and the claimant were characterised by each saying that the other raised his voice and gesticulated. Mr Briscoe had accepted that he has raised his voice,

whereas the claimant had not. Mr Christison had said that he had seen these exchanges, and both had both raised their voices and gesticulated. Mr Christison had also spoken of the claimant on one occasion having slammed a door and slammed his hand on a desk. It was reasonable to accept Mr Christison's evidence that such discussions could become heated on both sides. In any event the conduct alleged on the part of the respondent was not of a sufficiently serious nature to breach the implied term.

61. In relation to the events on 13 and 14 June 2019, Mr Briscoe's conduct and approach to such discussions had been no different from the many other discussions he had with the claimant over the years about the quality of his work. Such conversations had taken place within the claimant's work area within the manufacturing section of the factory. They had not happened in public. Mr Briscoe was fanatical about quality and he was entitled to speak to the claimant about quality issues. They had taken place at an appropriate time and in the appropriate area.

62. Mr Briscoe's performance management of the claimant had in fact been too lenient over the years. Nevertheless, Mr Briscoe would have permitted the claimant to return to work on Thursday 14 June 2018 if he had returned later that day and his leaving the premises would have been forgotten about.

63. The claimant's act of walking out on 14 June 2018 and not having subsequently made contact in terms of the employee handbook amounted to a breach of his contract on his part.

64. The claimant had failed to mitigate his loss. In particular, he had sought to apply for jobs that were plainly outside his line of experience. It was submitted that he had gone for numbers of applications in order to meet his obligation to produce evidence that he had mitigated his loss rather than genuinely applying for jobs.

65. Finally, it was submitted that if the Tribunal found in favour of the claimant that it would be appropriate to apply sections 122(2) and 123(6) of the Employment Rights Act 1996 and to reduce any basic or compensatory award because of the claimant's contribution to his dismissal by virtue of his leaving work on 14 June 2018 and making no subsequent attempt to contact the respondent in compliance with the employee handbook.

Relevant law

Constructive dismissal

66. The relevant law is contained in the Employment Rights Act 1996. Section 94 (1) of this act provides an employee with the right not to be unfairly dismissed by his employer.

67. Section 95 (1)(c) provides that an employee is to be regarded as dismissed if -

> *"the employee terminates the contract under which he was employed (with or without notice) in circumstances which he is entitled to terminate it without notice by reason of the employee's conduct."*

68. The leading case relating to constructive unfair dismissal is ***Western Excavating (ECC) Limited v Sharp [1978] ICR 221*** in which Lord Denning held that

> *''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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.''*

69. Unlike the statutory test for unfair dismissal, there is no band of reasonable responses test. It is an objective test for the Tribunal to assess whether, from the perspective of a reasonable person, in the position of the innocent party,

the contract breaker has clearly shown an intention to abandon and to refuse to perform the contract. ***(Tullet Prebon plc v BGC Brokers LP 2011 IRLR 420***)

70. In ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*** the Court of Appeal stated that 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 ***Waltham Forest v Omilaju [2004] EWCA Civ 1493)*** of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a previous affirmation, because the effect of the final act is to revive the right to resign.)

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

71. In the present case the claimant relies on an alleged breach of the implied term of trust and confidence. As established in ***Malik v BCCI 1997 ICR 606***, this is a requirement that an employer must not -

‘‘*without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee”.*

72. There is no rule of law that a constructive dismissal is necessarily unfair. If it finds there has been a constructive dismissal a Tribunal must also consider whether that dismissal was fair or unfair having regard to section 98(4) of the Employment Rights Act 1996, which provides -

> ‘’ (4) Where the employer has fulfilled the requirements of sub-section (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’’

73. The Tribunal must therefore consider whether the respondent had a potentially fair reason for the breach ***(Berriman v Delabole Slate 1985 ICR 546)*** and whether it was within the range of reasonable responses for an employer to breach the contract for that reason in the circumstances. When making this assessment, the Tribunal must not substitute its own view of what it would have done but consider whether a reasonable employer would have done so, recognising that in many cases there is more than one reasonable response.

Words of resignation

74. Once an employee has spoken unequivocal and unambiguous words of resignation, his employer can take them at face value and accept the resignation. Once accepted, the employee cannot retract it without his employer’s consent ***(Sothern v Franks Charlesly & Co [1981] IRLR 278***

CA). However, there may be special circumstances which might indicate that the resignation might not be intended. This might arise out of personality conflicts or words spoken in the heat of the moment or under extreme pressure, or the character make up of an employee.

Discussion and decision

75. The Tribunal recognises the respondent's right to demand high standards of performance and quality of product in order to allow it to compete and expand in a demanding market place and, consequently, its right to manage its employees' performance in order to achieve the level of quality required. However it had no doubt that the respondent had treated the claimant with little or no regard for his employment rights when it came to performance management.

76. It was also clear from the evidence that the respondent's approach to managing the claimant's performance had worsened since January 2015 when it reduced his working hours in January 2015 with no lawful right to do so. That act on its own had amounted to a fundamental breach of contract that would have entitled the claimant to resign at that time had he accepted that breach. However, he chose not to resign because of his love for the work that he did for the respondent.

77. The Tribunal found that thereafter the respondent repeatedly failed to respect the claimant's employment rights. This was manifest in its treatment of the verbal and written warnings that he was given; each of which was delivered without any attempt to observe the most basic of lawful procedures that should be applied in any case involving alleged poor performance and without allowing the claimant on either occasion a reasonable opportunity to explain why he believed that the circuit boards had not been finished to the required standard.

78. Furthermore, it was clear that Mr Briscoe's approach to routine performance management of the claimant was to speak to him in an aggressive manner

with a raised voice and with arms gesticulating in his direction. Even if criticism of the claimant's performance was justified in an environment where quality was critical to the success of the respondent's business, Mr Briscoe's manner of delivering that criticism was unjustified and entirely unreasonable.

79. It was unacceptable that Mr Briscoe did not see fit to change his management style even when he saw that the claimant's response to criticism delivered in this way was to walk away from the situation and put distance between them. He also spoke to Mr Christison about what he believed was Mr Briscoe's unfair treatment of him. For the respondent to continue with this style of performance management when it was obvious to both Mr Briscoe and to Mr Christison that the claimant could not cope with it was demonstrably unfair.

80. In all the circumstances the Tribunal finds that Mr Briscoe tried to intimidate the claimant into reaching the required standards and that his behaviour towards him was neither proportionate nor compatible with the general duty of co-operation. It also finds that the claimant's line manager Mr Christison failed to take steps to protect the claimant from Mr Briscoe's intimidating behaviour when concerns were raised directly with him.

81. So far as the events of 13 and 14 June 2018 are concerned the Tribunal had no doubt that the claimant left his work on 14 June 2018 in response to Mr Briscoe's intimidating behaviour towards him on 13 and 14 June 2018, which had culminated in their altercation on the morning of 14 June. The claimant left his work that morning because he believed that Mr Briscoe had, once again, criticised him unfairly for production faults that were beyond his control. He left his work because Mr Briscoe's behaviour towards him on 13 and 14 June had caused him to become unwell due to work related stress. The Tribunal was in no doubt that the words spoken by the claimant on 14 June 2018 before he left the premises made it clear that he was leaving for that reason and that they were not words of resignation.

82. Even if it was not apparent to the respondent that the claimant was unwell, it must have been obvious to them that he was in some distress, having regard to the fact that he walked out and did not return that day when he had never done so previously in similar circumstances.

83. While there was a technical failure on the claimant's part to comply with the absence reporting provision of the respondent's employee handbook on the mornings of the days of his absences on 15 and 18 June 2018, that failure did not amount to confirmation, as alleged by the respondent, that he had already resigned on 14 June 2018. By then he was suffering from work related stress and having regard to the source of that stress his failure to comply with the employee handbook was not unreasonable.

84. The claimant also acted reasonably when, having seen his doctor on Friday 15 June 2018, he asked his son to hand deliver his fit note to the respondent on 18 June 2018. A reasonable employer would have accepted the claimant's fit note in those circumstances. Mr Briscoe had no reasonable basis to conclude either that the claimant was not genuinely unwell or that his intention was to fraudulently claim statutory sick pay. His response to what he claimed was serious misconduct on the claimant's part was, without further inquiry, entirely unreasonable.

85. In all the circumstances, the terms of the respondent's letter of 18 June 2018 were unjustified and they were clearly not, despite Mr Briscoe's assertion, a genuine attempt to offer the claimant a choice. The respondent was effectively insisting that the claimant should either return to work when he was not medically fit to return, or he should resign. That was not a reasonable choice to ask the claimant to make.

86. Furthermore, there were wholly unjustified disciplinary accusations in the letter of 18 June 2018 and the accompanying note that purported to summarise the events of 14 June 2018. To characterise the claimant's departure from the premises on 14 June 2018 as *'gross industrial misconduct'*

in circumstances when he had told Mr Briscoe he was unwell and where, by the time Mr Briscoe wrote this letter, that fact had been confirmed by the claimant's fit note, was wholly disproportionate and unreasonable. Nor was it reasonable or proportionate, on the evidence available to him, for Mr Briscoe to characterise the claimant's failure to comply with the reporting rules on sickness absence as a breach of contract.

87. The unfairness of the accompanying note of the respondent's version of the events of 14 June was compounded by the fact that Mr Christison had knowingly misrepresented by his signature that he had heard the words that Mr Briscoe claimed amounted to words of resignation. The claimant knew that Mr Christison had not heard that conversation. He was therefore entitled to believe that he would no longer be treated fairly by either Mr Briscoe or Mr Christison.

88. The respondent's conduct in sending the letter of 18 June 2018 was entirely disproportionate and unfair, having regard to (1) the effect of the letter being to require the claimant to either return to work or resign despite his having delivered a legitimate fit note on 18 June, (2) the wholly unjustified disciplinary accusations and (3) the deliberate and serious misrepresentation by Mr Christison that he had heard the claimant use words of resignation on 14 June.

89. Applying the test in ***Malik*** the Tribunal finds that the respondent's conduct in relation to (1) the reduction in the claimant's working hours, (2) its failures to observe basic fairness in its formal performance management of the claimant, (3) the intimidating manner in which Mr Briscoe regularly criticised the claimant's performance prior to 13 June 2018 when the respondent knew he could not cope with that manner of criticism, (4) the intimidating manner in which Mr Briscoe criticised the claimant's performance on 13 and 14 June, and, (5) the letter of 18 June 2018, amounted to a course of conduct that was calculated and likely to destroy or seriously damage the relationship of

confidence and trust between the respondent and the claimant and that it did so without reasonable and proper cause.

90. The Tribunal was in no doubt that the claimant resigned in response to the respondent's letter of 18 June 2018 and that he was entitled to do so in circumstances where that was 'the last straw' in a course of conduct comprising several acts that viewed cumulatively amounted to a breach of the implied term of trust and confidence. The Tribunal also finds that the claimant resigned without delay in response to the letter of 18 June 2018.

91. The claimant was entitled to resign notwithstanding that he had previously affirmed earlier breaches in respect of the reduction in his working hours and in respect of the respondent's unfair and disproportionate treatment of his performance.

92. The Tribunal finds that the reason for the claimant's dismissal was that he left work on 14 June 2018 following an altercation with Mr Briscoe and subsequently failed to contact the respondent on 15 and 18 June in breach of the handbook requirement to do so. That was a reason relating to his conduct and was a potentially fair reason.

93. For the reasons set out above the Tribunal finds that the respondent failed to act reasonably and within the band of reasonable responses in dismissing the claimant for that reason. It therefore finds that the claimant was unfairly constructively dismissed.

Award

94. The claimant has lodged a schedule of loss confirming gross annual pay of £20,228, gross weekly basic pay of £389, net weekly basic pay of £322 and net employer's pension contributions of £7.58 each week.

Basic Award

95. At the date of termination of his employment the claimant was aged 53 and had completed 18 years of continuous service. He is therefore entitled to a basic award of £9,336 (1 x 6 x 389 = 2334 + 1.5 x 12 x 389 = £7,002).

96. In relation to compensation, the claimant was dismissed on 21 June 2018 and has only obtained part time work as of 3 December 2018 with a take home pay of £125 per week. His loss of basic salary to the date of the hearing is 30 weeks x £322 = £9,660 from which must be deducted 6 weeks x £125 = £750 from his part time job. This makes a net loss to the date of hearing of £8,910.

97. The Tribunal finds that the claimant is also entitled to a further six months loss of pay from the date of the hearing in respect of future earnings. The Tribunal takes into account that the claimant was employed in a highly specialised engineering role for 18 years and that this will disadvantage him in the general job market. His future loss should be at the rate of £197 per week, which makes a total of £5,122 for future loss. His total loss of earnings is therefore £14,032.

Loss of pension benefit

98. The claimant has lost £7.58 per week by way of employer's pension contributions. He has incurred 30 weeks' loss to the date of the hearing and is entitled to a further six months' worth of contributions in terms of future loss, thus making a total of 56 weeks at £7.58 totalling £424.48.

Loss of statutory rights

99. Having been unfairly dismissed the claimant has lost a number of statutory employment protection rights that are dependent on a qualifying period of service – most notably the right not to be unfairly dismissed until he has worked for a new employer for two years. In the circumstances he is entitled to a payment of £250 in respect of the loss of those statutory rights.

Employment Judge	**Robert King**
Date of Judgment	**18 February 2019**
Entered in register and copied to parties	**18 February 2019**