EMPLOYMENT TRIBUNALS

Claimant: **Mr C Lewis**

Respondent: **Railscape Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **12 January 2021**

Before: **Employment Judge Moor**

Representation
Claimant: In person
Respondent: Mr Rahman, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the complaint of unfair dismissal is not well founded and does not succeed.

REASONS

1. This was a remote hearing to which the parties did not object (video V) because it was not practicable to have a hearing in person. I have been referred to a joint bundle of documents and witness statements.

2. The Claimant resigned on 25 February 2020 and brings a constructive unfair dismissal.

Issues

3. At the outset of the hearing, I established with the parties that the Issues were as follows:

4. Did each or all of the following acts by the Respondent amount to a fundamental breach of the contract of employment:

   4.1. the suspension of the Claimant on 19 February 2020;

   4.2. the requirement to return his car; and

4.3. the invitation to the disciplinary meeting.

The Claimant relies on the implied term that an employer should not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust.

The Respondent will say that the allegations that arose around the Claimant's failure to attend a meeting at Network Rail on 17 February 2020 were serious and that it had reasonable and proper cause to raise them as disciplinary allegations; that it had reasonable and proper cause to suspend pending investigation, which was in accordance with its disciplinary procedure and, as part of that, require him to return his car, which was provided for work purposes.

5. If I find there was a constructive dismissal, the Respondent argues that it had a potential fair reason for dismissal namely conduct.

6. If there was a dismissal, the Respondent does not suggest that it followed a fair procedure under s98 of the Employment Rights Act 1998, but it argues that there should be a reduction to both the basic and contributory awards:

6.1. to reflect 'contribution' namely the Claimant's blameworthy conduct in respect of the meeting; and

6.2. to reflect the chance that he would be dismissed.

7. If the Claimant is successful, I should also ask:

7.1. Whether the Respondent had breached the ACAS Code paragraph 8 by the suspension and if that breach was unreasonable whether the award should be increased.

7.2. Whether the Claimant had breached the ACAS Code by failing to bring a grievance or go through the disciplinary process. And if that breach was unreasonable whether the award should be decreased.

Findings of Fact

8. Having heard the evidence of the Claimant, Mr V Omidina, Mr D Robinson, Mr M Hayes and Mr J Philpot, and having read the documents referred to me, I make the following findings of fact.

9. From 20 July 2015, the Claimant was employed as a contract delivery manager at the Respondent company, which provides services to Network Rail including tree work, environmental work, and building and fencing.

10. Network Rail was and is the main and most important customer of the Respondent. It holds a Principal Contractor License with Network Rail. This meant that the Respondent can solely manage work and appoint contractors to complete work. It holds overall responsibility for safety management at work sites.

11. The Claimant's job required him to be accountable for all aspects of contract works in his area (Hull and the London North East routes).

12. The Claimant's contract of employment referred to the Respondent's disciplinary procedure.

13. On the power to suspend, the Disciplinary Procedure provided: '*You may be suspended from work in order to allow the company to carry out or conclude an investigation or if it is considered necessary to remove you from site. Suspension is not a disciplinary sanction or action and will normally only be considered where the matter to be investigated is thought to involve serious misconduct; an investigation may be hindered if you were in attendance at work; … or where there is a risk to the Company or individuals.'*

14. On disciplinary investigation, the Disciplinary procedure provided: '*in some cases you may be invited to attend an investigative meeting prior to a formal disciplinary meeting in order to assist with the investigation… At other times, the company … may believe that the investigative meeting should be held as part of the formal disciplinary meeting.*'

15. Network Rail held SAI (AC) 2500 Contractor Update Sessions. These were sessions for the trial of a proposed new standard know as Single Approach Isolation (SAI – AC0 2500 trial). I accept the Respondent's evidence that it was important for it to have an experienced employee at these sessions in order to show to Network Rail that they were engaging with it. Indeed Mr Omidina, of Network Rail, regarded attendance as essential although Network Rail did not mandate it. Although Mr Omidina did not think that failing to send a senior manager at the meeting would bring the Respondent into disrepute because it was a session to give information rather than receive. Mr Hayes, managing director of the Respondent, was of the view that non-attendance would create a bad impression and reputational damage. I equally accept that was his genuine view. His clear concern that non-attendance was a problem is consistent with Network Rail regarding attendance as essential. I also accept that the sending of an inexperienced apprentice to the meeting alone, could reasonably be viewed by Mr Hayes as a problem because it made it appear that the Respondent was not taking the session seriously. This is so even if Mr Omidina disagrees. Two business people can both reach reasonable but different views of this question.

16. On 17 December 2019, Network Rail sent an email to previous participants for a final session before the start of the SAI25000 Trial Isolation. It subsequently asked attendees to confirm their attendance on 6 February 2020. I find the Claimant is likely to have received such an invitation, because Mr Omidina's evidence was that the Claimant was included in the email list as a previous participant.

17. Mr Gorman, Rail and Safety Compliance officer at the Respondent, was also sent an invitation to the SAI session, but he was to be on annual leave. He thought it would be good for his apprentice, Will Gowers, to attend along with the Claimant. Mr Gowers was 18 and inexperienced, having only been in his training role for 3 months. Mr Gorman told Mr Gowers he would go as an observer. Mr Gorman spoke to the Claimant on 13 February to confirm his attendance and suggest that the Claimant met Mr Gowers who was getting the train. The Claimant agreed to do so (66). There is no doubt to me about this evidence, in

particular, because the Claimant had included the Session on his work roster for the relevant day.

18. The Claimant in his evidence states that he did not know Mr Gowers was an apprentice. I accept this because they worked in different offices and Mr Gowers was new.

19. The Claimant decided to change his work schedule for Monday 17 February. Records show he tried to call Mr Gorman at 8.38 on Friday 14 February. I also accept he tried to call Mr Gowers at head office but could not get through. The Claimant did not send an email to either of them. He had both of their email addresses. I accept the Respondent would have expected him to do this. It would have been the simplest way to let them know he had decided not to attend, especially for Mr Gowers as they had a plan to meet beforehand. I also accept that, given the importance of the session, Mr Hayes would have expected the Claimant to contact him if he had no other option, so that he could have arranged for another manager to attend.

20. On Sunday 16 February, the Claimant changed his work roster to remove reference to the Session and including instead quotes, safe work packages (SWPs) and task briefs.

21. After the SAI session on 17 February, Mr Gowers told a colleague that he felt out of his depth. He had been asked questions to which he could not provide immediate answers. He told Ms Gosling that National Rail managers had made comments that it had not been professional of the Respondent not to send someone.

22. Mr Hayes phoned the Claimant on Monday 17 February 2020. At this point Mr Hayes had found out that the Claimant had not attended the SAI session.

23. Mr Hayes recalled the Claimant told him that he was doing quotes, SWPs and task briefs and that he had 10-15 SWPs to produce. The Claimant recalls he said he was ‘aiming’ to do SWPs. I accept that both men honestly hold different memories of what was said about the SWP work. In fact that day the Claimant’s work did not involve doing SWPs. Mr Hayes found this out later.

24. The Claimant told Mr told Hayes he’d had to cancel a meeting as the person he was planning to meet was unable to get to the location due to flooding and that he was unable to get there due to flooding. The Claimant recalls he was specific that this was at Total Trees. Mr Hayes recalls that the Claimant simply said ‘a meeting’. On this issue I prefer Mr Hayes recollection, because he had called specifically to find out about the Claimant’s movements.

25. Mr Hayes must have asked the Claimant why he did not attend the SAI meeting (because he referred to this in a later text on the same day). The Claimant told Mr Hayes he had to work from home collating Scottish Structures project work, which was urgent.

26. The Claimant sent a text message to Mr Hayes saying he was not actually asked to attend the SAI meeting. He said when he had received the email from Mr Gowers asking whether he was going he had not known anything about the meeting and that he had only told Mr Gowers that he ‘might be’ going.

This explanation at the time was contrary to the information Mr Hayes had already seen, namely that the session was on the Claimant's original roster, therefore he concluded he must have planned to go at a certain point. It also shocked Mr Hayes because the Claimant was expected to attend. (It is also contrary to the evidence I have heard from Mr Omidina that the Claimant had been included in the invitation email.) I find, contrary to the suggestion he made in his text to Mr Hayes, that the Claimant knew about the meeting from the Network Rail invitation; had made a clear arrangement with Mr Gowers that he would attend; and had set out this plan in his original roster. He then changed his decision to attend on Sunday 16 February.

27. Mr Hayes then spoke to Mr Cowan, of Network Rail, who told him his opinion that it was not very professional of the Respondent only to have sent an apprentice to the meeting.

28. Mr Hayes was concerned about the Claimant not attending the meeting and further investigated what he had done on 17 February. He looked at the log of SWPs created and discovered none had been produced by the Claimant on that day, contrary to what he recalled the Claimant had said in their phone call. He found out the Claimant had only been on the work system that day for 10 mins.

29. Mr Hayes was concerned that the Claimant had committed serious misconduct: his concerns were that he had brought the Respondent into disrepute by not going to the meeting; and had been inconsistent in his explanations for not attending and in the work he had been doing on the Monday. Mr Haynes was concerned that the Claimant had changed his roster to hide fact he was supposed to be going.

30. Mr Hayes decided that the matter should be considered at a disciplinary hearing and appointed Mr Philpot, a contracts manager who had no previous dealings with the Claimant, to deal with it.

31. Mr Hayes decided that the Claimant should be suspended. He thought there was a risk that the Claimant might try to cover his tracks on 17 February by changing information on their systems (as he already arguably done in the roster change). He also thought there was a risk that the Claimant might try to influence witnesses. I accept that these reasons were in his mind at the time. Indeed, Mr Hayes argues he was justified in his concerns because the Claimant had contacted Mr Omidina, asset manager for Network Rail, after suspension in breach of the prohibition on doing so set out in the suspension letter. He said the Claimant should have checked with him first whether he had permission to contact the client.

32. Mr Haynes stated in his evidence and I accept that suspension was unusual except in drugs/alcohol investigations. He states, and I accept, that he did not take the decision lightly. I do so despite the letter sent to the Claimant explaining that suspension was 'standard' practice. It was plainly not standard practice in Mr Haynes view nor as set out in the disciplinary procedure.

33. The Respondent suspended the Claimant on full pay by letter of 19 February inviting him to a disciplinary meeting on 26 February 2020. The letter informed him that the suspension was because the allegations were of serious

misconduct and in order for allegations to be investigated. This latter point was because of the risks Mr Hayes had identified, set out above.

34. In the letter the Claimant was informed suspension was not a disciplinary sanction.

35. The allegations were:

> '*your failure to attend the SAI session… You normally attend such meetings with John Gorman… However on this occasion he had notified you that she would not be attending. Instead he suggested his apprentice attend, as he felt it would be good experience for him and he could learn from you at the meeting. With your failing to attend the apprentice was left as the only person representing Railscape at the meeting, which was wholly unacceptable.*
>
> *When asked why you failed to attend the meeting you informed Michael Hayes that you were unable to get there as part of the route you would take was flooded, in addition you advised that the person you are due to meet with was also having difficulties getting to the meeting for the same reason. Having checked the Environment Agencies [sic] website for flood warnings for the route you take, there were no such areas affected by flooding.*
>
> *You were asked again today, why you did not attend the meeting and gave a completely different reason, saying you tried to contact John Gorman on Friday to say you were unable to attend, as you had other priorities namely heavy workload including producing urgent SWP's and other paperwork for work in Scotland. On further investigation it has been confirmed that no SWPs were produced by you on Monday 17/02/20 and your access to other documentation on the rail Railscape server… was extremely limited with no additional or new paperwork added.'*

36. The Claimant was warned that the matter could be regarded as possible gross misconduct, which could lead to his dismissal. But he was told no decisions would be made until he had a further opportunity to put forward his side of events.

37. The Claimant was asked to return his car during the suspension period. The Claimant accepted in his evidence that he was not inconvenienced by the return of the car and that it was provided to him for work purposes.

38. Mr Philpot was aware that Mr Haynes had essentially reached a view that this was a serious matter. I was concerned about this because Mr Haynes was more senior than Mr Philpot. But I was impressed with Mr Philpot's evidence. He did not know the Claimant well. He was very clear that he would have been happy to make up his own mind independently of any view reached by Mr Haynes. I asked him what the outcome might have been, for example, if further investigation showed that the matter was a failure to communicate and the Claimant did have good reason, namely the Scottish Structures work, for not attending. He thought this would result in a warning. While plainly this was a hypothetical scenario, Mr Philpot struck me as someone who would not do the managing director's bidding if he had reached a different conclusion.

39. In a text on 19 February 2020 the Claimant asked to speak to Mr Haynes. Mr Haynes replied, stating his concern at the non-attendance at the meeting and the embarrassment it had caused, but said he could not speak to the Claimant 'until it is clear what occurred' i.e until the investigation and disciplinary was over. In my view it would not be reasonable for the Claimant to read into this text or the disciplinary invitation letter that any decision had been made about guilt or sanction:

40. Late the night before the disciplinary hearing, on 25 February at 22:28, the Claimant sent an email to Mr Hayes in which he resigned. Hayes sent it straight to Mr Philpot.

41. The Claimant gave his reasons again for not attending the SAI session. He complained about the removal of his car which was not a pool car. He stated that the suspension was used as a disciplinary sanction and he should have been told before he was suspended that he was going to be; that he was not responsible for Mr Gowers; that he had not used the Total Trees meeting as an 'excuse' for not attending the meeting; that he had attempted to contact Mr Gowers and Mr Gorman to let them know he was not attending because of workload. In the last paragraph he summed up his reasons for resigning: that he should not have been suspended; that the allegations did not constitute gross misconduct; that he had not had an opportunity to defend himself before suspension; and he would not get a fair hearing at the meeting. He asserted a breach of his contract. He said he would be seeking legal advice on the question of constructive dismissal

42. At this hearing the Claimant has contended that the disciplinary allegations were created in order to replace him with Mr Robinson. I do not accept this. Mr Robinson was recruited in early March 2020. He was a tree specialist. He was recruited to cover a different job role and a different area: the Midlands (albeit that their areas overlapped to some extent).

43. There had been a relationship problem between Mr Rowlands, the Claimant's line manager, and the Claimant. Mr Haynes had heard about it and organised a satisfactory way of working that meant the two could avoid each other. This matter had been resolved before the matters leading to the disciplinary allegations. In my judgment, it had nothing to do with the disciplinary allegations arising. Mr Rowlands was not involved in raising the allegations or investigating them.

Legal Principles

44. Section 95(1)(c) of the Employment Rights Act 1996 ('the ERA') provides that there is a dismissal where the employee terminates the contract in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct. This is known as a 'constructive dismissal'.

45. An employee is entitled to terminate without notice (treat himself as constructively dismissed) when the employer has committed a repudiatory breach of contract, Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, namely: *'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'*.

46. Here the Claimant relies on the implied term existing in all employment contracts 'the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee', see Malik v BCCC SA [1998] AC 20, 34H-35D (Lord Nicholls).

47. A breach of this implied term is inevitably a repudiation of the contract, see Browne-Wilkinson P in Woods v WM Car Services (Peterborough) Ltd [1982] ICR 666, 672A. The test of whether there is a breach of it is objective, and not dependent on the employee's subjective view.

48. The question of whether suspension is a breach of contract will first depend upon the express terms of the contract of employment. It may also depend on whether the disciplinary procedure was incorporated into the contract.

49. Further, in recent times the application of the implied term of trust and confidence principles in the appellate courts have shown that the use of suspension risks being regarded as a breach of the implied term unless there is reasonable and proper cause to suspend, see Gogay v Hertfordshire CC [2000] EWCA Civ 228. In Crawford v Suffolk Mental Health Partnership NHS Trust [2012] EWCA Civ 138 Elias LJ expressed the view in clear terms that suspension should not be a knee-jerk reaction and, if it is used in such a way, would be a breach of the implied term.

50. The ACAS Code on Discipline and Grievance ('the Code') provides at paragraph 8: '*In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.'* But this should be read with a little caution because the legal test of whether suspension is a breach of the implied term is not necessity but whether there was 'reasonable and proper cause' for it, as the decision in London Borough of Lambeth v Agoreyo [2019] EWCA Civ 322 makes clear.

Application of Facts and Law to Issues

51. I will consider whether the Respondent followed the express terms of the contract and, in the alternative, whether it was in breach of the implied term. Mr Rahman agreed that this latter question came down to the objective question whether the Respondent had reasonable and proper cause to suspend.

52. The disciplinary procedure was referred to in the contract. It stated that suspension would normally only be considered where the matter is thought to involve serious misconduct or where an investigation may be hindered if the employee were in attendance at work (so far as is relevant here).

53. First, in my judgment it was open to the Respondent objectively to conclude that there was an allegation of serious misconduct to be answered here. My reasons are:

53.1. As a matter of fact the Claimant had failed to go to the SAI session on 17 February 2020. He had planned to go and colleagues knew this: it was on his roster and he had made an arrangement to meet with Mr Gowers.

53.2. Attendance at the session was regarded as important by the Respondent and by its main client. It was also an opportunity for the Respondent to engage with its most important client.

53.3. The Respondent could objectively conclude that failure to attend such an important session (and leaving an apprentice to represent the Respondent) could have led to reputational damage. Indeed, this is what Mr Cowan of Railscape told Mr Haynes.

53.4. It was therefore reasonable for Mr Hayes to decide that it was an important meeting at which senior management attendance was required and that it was potential misconduct for the Claimant to decide not to go without properly informing anyone.

53.5. It was also objectively open to Mr Haynes to form a view that the Claimant had tried to mislead him. On the information Mr Haynes had the time of suspension, it was reasonable for him to consider that the Claimant may have been trying to hide his decision not to go: the Claimant had misled him about not knowing about the meeting in his text and it only being a possibility that he would go (because it was in his original roster); the Claimant had changed his roster at the last minute; the Claimant had not emailed his colleagues to inform them as Mr Haynes would have expected; and, according to Mr Haynes' genuine recollection of the phone call on Monday, the Claimant had told him he had been doing SWPs on Monday when further investigation showed this had not been the case. For all those reasons Mr Haynes could reasonably have formed the view that the Claimant had sought to mislead him about what he was doing on the Monday.

53.6. On the question of the meeting that the Claimant referred to, Mr Haynes knew it was not the SAI meeting but he was concerned, in my view, that the Claimant was being vague about it so as to give that impression.

53.7. These genuine concerns about the Claimant's honesty made the failure to attend the meeting all the more serious. The allegations raised the question of a loss of trust and that alone was a serious misconduct issue.

54. The question for me is only whether objectively the Respondent could decide that there were serious *allegations* of misconduct here. This is not to say that, after a full investigation and having heard all of the evidence, it was inevitable that the allegations would be made out. (Indeed, on the evidence I have heard, if I had been the decision-maker at the disciplinary hearing, I may well have concluded that this was probably a failure by the Claimant to communicate effectively with his colleagues along with an inept attempt to explain the matter to Mr Haynes. But that is not relevant to the issues before me namely whether the suspension and disciplinary hearing invitation was breach of contract.)

55. Second, in my judgment Mr Haynes did reasonably reach the view that

the investigation might be hindered if the Claimant were in attendance at work. The risk of hindrance was in his mind both to people and documents. The fact that the Claimant had changed his roster at the last minute was a relevant factor in reaching this conclusion. Mr Haynes was identifying a risk. His decision was not a 'knee jerk' reaction but a considered one.

56. I therefore find that the Respondent followed the approach to suspension set out in its disciplinary procedure. The two reasons set out above (the fact of serious allegations and a risk to the investigation) equally gave the Respondent reasonable and proper cause to suspend. I also take into account that the Respondent had arranged for a very short period of suspension and had told the Claimant expressly that this was not a disciplinary sanction.

57. Finally, the Claimant suggests he should have been spoken to prior to the suspension letter. The disciplinary procedure did not require this. Nor, in my view, does the implied term of trust and confidence: some employers would prefer to speak to an employee about suspension, others would prefer the clarity of a letter, neither is an approach that undermines trust.

58. For these reasons, in my judgment, the suspension was not a breach of contract or a breach of the implied term as to trust and confidence.

59. Further, I do not consider that the removal of the company car for the period of suspension was a breach of the contract. The clear evidence is that it was provided for work purposes. This removal was no indication of any permanent arrangement. Nor do I consider the removal of the car or laptop gave any indication of a pre-decision. Nor was the Claimant, on his evidence, inconvenienced by it.

60. The Claimant was concerned about the way in which the disciplinary allegations had been drafted. In my view they properly set out the concerns that Mr Haynes had: failure to attend the meeting; possible dishonesty in different explanations having been given. It is only in relation to the suggestion that the Claimant referred to not going to a meeting because of flooding as an 'excuse' for not going to the SAI session that the drafting could be called into question. It is clear that he did not do this expressly in his call with Mr Haynes but I have found that Mr Haynes could reasonably have concluded that impliedly this is what the Claimant was doing. This drafting therefore was not such as to amount to a breach of the implied term on its own.

61. In my judgment the Claimant acted in haste by resigning. He has given a robust defence of his actions to me at this hearing. He could easily have done so to Mr Philpot at the disciplinary hearing. The suspension and invitation to the disciplinary hearing, read objectively, could not have suggested to the Claimant that the Respondent had made up its mind. The suspension followed the disciplinary procedure. And, while Mr Haynes had expressed his concerns to the Claimant, he had also said he could not speak to him until 'it was clear what occurred'. This did not suggest he had a closed mind. He had appointed an impartial person to conduct the hearing and reach an independent decision.

62. During the Tribunal hearing the Claimant suggested that a further breach of procedure and/or contract was that there should have been an investigation hearing before the disciplinary hearing. But the disciplinary procedure allows the

matter to go straight to a disciplinary hearing at which further investigation will take place. This is what occurred here. Nor does the ACAS Code on Discipline and Grievance require such a two-stage process. The letter of invitation made it clear that the disciplinary hearing was the Claimant's opportunity to discuss the allegations: he was being given the opportunity at that meeting to raise any matter he wished.

63. For those reasons, in my judgment, there was no fundamental breach of contract here and therefore the Claimant was not dismissed. It follows that the unfair dismissal complaint is not well-founded and does not succeed.

Employment Judge Moor
Date: 20 January 2021