# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Pike

**Respondent:** Fish Composites Limited

**Heard at:** Reading (by CVP) **On:** 9-11 September 2024

**Before:** Employment Judge Anstis

**Representation**
Claimant: Mr N Brockley (counsel)
Respondent: Mr P Diamond (counsel)

# RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal is dismissed.

2. The claimant claim of breach of contract in respect of notice pay is dismissed.

3. The respondent has made unlawful deductions from the claimant's wages. If not paid to the claimant since the hearing, the respondent must pay the claimant **£569.00** in respect of unlawful deductions from wages.

4. When the proceedings were begun the respondent was in breach of its duty to provide the claimant with a written statement of employment particulars. It is just and equitable to make an award of an amount equal to four weeks' gross pay. In accordance with section 38 Employment Act 2002 the respondent shall therefore pay the claimant **£2,572.00**.

# REASONS

INTRODUCTION

1. The claimant's claim is of constructive unfair dismissal, with an associated claim for notice pay. He also claims for unpaid pension contributions, although

I understand that by the time of this hearing all pension contributions have been paid, albeit some paid late, so I have made no order in respect of that.

2. The claimant claims that the deduction by the respondent of three days annual leave from his final salary (said to be on account of overtaken annual leave) was an unlawful deduction from wages, and this is accepted by the respondent.

3. The claimant says he is entitled to additional compensation on the basis that he did not have a statement of terms and conditions of employment that complied with section 1 of the Employment Rights Act 1996.

4. The breach of contract said to be the foundation of the claim of constructive unfair dismissal is a breach of the duty of trust and confidence, culminating in a "last straw". The claimant describes his resignation in the following way in his claim form:

> *"It was apparent to the Claimant that the Respondent was simply now looking to go through a process which would check the boxes so as to ensure that his 'redundancy' was effected without the obvious procedural defects which had previously existed. The damage, however, had already been done. And given the issues which had been occurring over the previous months, which were clearly designed to push the Claimant from the business, the Claimant considered that the underlying obligation of trust and confidence had been irreparably breached by the Respondent.*
>
> *The Claimant therefore chose to accept the Respondent's breaches and, on 4 August 2023, he tendered his resignation …*
>
> *… the last straw was the conduct of the Respondent during the week commencing 24 July 2023"*.

5. The respondent does not accept that there was a constructive dismissal, and the primary question for determination by the tribunal was whether the claimant was constructively dismissed.

THE HEARING

6. The hearing took place by video (CVP) over three days from 9-11 September 2024. Both parties had been represented by solicitors throughout the process and were represented by counsel at the final hearing. The claimant and his partner gave evidence, and the tribunal heard evidence from Peter Murphy and Chris Sherliker on behalf of the respondent. I apologise to the parties that the production of this reserved judgment has taken longer than I had anticipated at the end of the hearing.

THE FACTS (CONSTRUCTIVE DISMISSAL)

## Introduction

7. In this section I will concentrate on the facts relevant to the question of constructive dismissal.

8. The claimant was employed by the respondent as a Senior Naval Architect.

9. The respondent was founded by Mr Sherliker and Mr Murphy around 2013. Mr Sherliker bore the title "design director" and Mr Murphy bore the title "managing director". The respondent has always been a small enterprise, pooling the efforts of Mr Sherliker and Mr Murphy together with at most two or three other employees and drawing on contractors for particular specialist expertise. In those circumstances there does not seem to be any particular significance to the job titles adopted by Mr Sherliker and Mr Murphy, except that the designation of Mr Murphy as "managing director" meant he would take the lead on administrative matters.

10. The claimant was an old acquaintance of Chris Sherliker. He joined the respondent in early 2016 alongside another employee. There was talk at the time of the claimant and the other employee joining Mr Sherliker and Mr Murphy as partners in the business and having an ownership stake, but nothing came of that.

## Earlier matters

11. The matters that the claimant relies on as contributing to a fundamental breach of contract (prior to the week of the "last straw") are:

    a. "Haphazard" payment of his pension contributions to the pension provider. By the time of this hearing all necessary pension payment has been made, but the claimant's position that since 2021 pension contributions has been paid in a "haphazard" manner does not seem to be disputed by the respondent. While the claimant may not have been fully aware of the scope of this he had been aware of pension problems from 2021 onwards.

    b. The claimant makes a related point that "*during the course of my employment the respondent has had a history of being generally inconsistent in relation to the exact date on which salary payments were made each month, and has failed to provide me with itemised pay statements each month, or at all, or P60 documentation each year*". In particular, the claimant says that his pay for July 2023 was paid on 31 July rather than 28 July and "*the last paper copy P60 I have is from 2019*".

    c. "*A marked deterioration in* [Mr Sherliker's] *attitude towards me from around February 2023 when the rebranding of the respondent was done*". The claimant's account of this starts with his recruitment in 2016

> and says that things got worse after the Covid-19 pandemic on a return to office working. He complains, for instance, that Mr Sherliker would not respond if the claimant said "bless you" when he (Mr Sherliker) sneezed. The claimant acknowledged that "*this example … might seem trivial, it was illustrative of the rude, passive aggressive and hostile conduct of* [Mr Sherliker] *on a day to day basis*". Whatever force this example may have had lapsed considerably on the claimant's acceptance in cross-examination that Mr Sherliker often wore headphones in the office and may not have heard what the claimant said.

12. As often occurs in cases such as this, both parties took the opportunity in their evidence to revisit difficulties that had arisen in their working relationship along the way. In particular, the claimant took the view that he had long been underpaid (or not given any pay rise) by the respondent in contrast to what he saw as excessive director's drawings by Mr Sherliker and Mr Murphy. It has not been suggested that he was contractually entitled to a pay rise or more pay, and I do not see that this has any relevance to or adds anything to his claim of constructive dismissal.

13. There was some suggestion from the claimant as to whether these supposedly excessive director's drawings had led to the respondent's difficult financial situation in July 2023, and this was developed by Mr Brockley into a suggestion that by that time the directors were acting in breach of their legal duties. Any such question would be outside the jurisdiction of the employment tribunal, and the relevant point for this case is what the respondent did when it considered it had financial difficulties, not how it got into that position.

14. There may be some significance to the pension contribution point and the P60 or pay problems, but by the claimant's own account these problems were very long-standing. Beyond that, I'm afraid that the overriding impression I got from the claimant's evidence on these points was less that there had been a series of actions that individually built up to be or contribute to a breach of contract and more that he had built up considerable resentment towards the respondent on a series of matters that were long-standing (pay or pension issues, him not receiving the recognition he thought he was due, pay rises), none of his business (the directors' drawings) or trivial (the sneezing).

**Redundancy and the meeting of 25 July 2023**

15. Turning to the events of week commencing 24 July 2023, the claimant describes the meeting of 25 July 2023, concerning either an actual or potential redundancy dismissal, in the following way:

> *"I was completely shocked to be told during the course of the meeting on the 25 July 2023 that I was to be made redundant. Pete just said that there was a requirement to cut overheads. Pete attempted to demonstrate this by a few graphs and the like ... I was not given copies*

*of any of the material Pete presented so cannot say whether or not those in the bundle are the same as those put onto the overhead projector on the 25th July. Whilst the spreadsheets purported to show a poor cashflow situation, they did not represent the reality of the working situation i.e. that there was still a significant amount of work required to be undertaken and that, bearing in mind the small number of individuals employed by the business, it was not possible to lose an employee without then restricting the Respondent company's ability to fulfil the pipeline of work. I did not say anything much at all as I was stunned and in shock. There was no explanation given for the decision to specifically make me redundant given my skills and experience, and the pivotal role that I played in securing and delivering on a significant number of projects, making me redundant would result in a large skills gap within the Respondent company which would need to be filled one way or another and which was not capable of being filled within the existing workforce. Other than suggesting that I was apparently a specialist in 'sail boats' (which is not true) and as the Respondent was not doing 'sail boats' my skills were no longer required, no other explanation was offered for singling me out. I did not believe this was true at all. In the 7½ years that I had been with the Respondent company, I have been involved in working on around 106 projects, of which only two had been for sail boats. Furthermore, even if I had only worked on sail boats, in Pete's New Year post he was bragging about the respondent securing the 'Clipper' contract which was a contract for a fleet of sailing boats. The position of the respondent company did not stack up, not to mention the fact that I was being told that I was being made redundant without any prior warning or procedure followed.*

*At this meeting Chris did not say anything very much preferring to let the 'Managing Director' do the work. Chris did have some minimal input saying words to the effect that there was to be a week's consultation but that my employment would end on the 31st July 2023, the following Monday."*

16. In his statement Mr Murphy describes financial difficulties affecting the respondent, including a large unpaid dept on one contract. He says:

*"I spoke to Chris Sherliker and presented the cashflow against labour forecast. It was evident that the company position was not sustainable and we needed to consider cutting costs. Being a design company our only real option was labour. We had no choice but to consider our options on staff redundancies.*

*We considered our two members of staff to have significantly different skill sets, one being a senior member of staff and Naval Architect, the other a design engineer with less than a year's experience. Based on*

*project work at the time the decision was to consider the claimant's position as being at risk."*

17. And in respect of the meeting of 25 July 2023 he says:

*"I met the claimant along with Chris, my co-director on 25th July 2023. We all discussed the situation that I outlined previously in this statement and we were honest with the claimant about the financial situation of the company. I emailed the claimant the same day to summarise what we talked about …"*

18. The email in question has the subject "Meeting notes" and under the heading "synopsis of meeting":

*"Chris and Pete informed Nick that whilst best efforts have been made to generate work for the business, the current forecast of known work falls significantly short of that required to sustain all members of the team. This means the survivability of the company is at risk and we need to make difficult decisions to reduce labour through redundancy.*

*Chris and Pete regretfully informed Nick his position of Senior Naval Architect at Fish Composites is at risk of redundancy on the grounds that Nick's expertise in sail boat design is unlikely to be utilised within the forecast and there is little call for naval architecture at present.*

*This meeting was held to inform Nick of the situation, we are now entering a period of consultation which will last 1 week.*

*We appreciate time for reflection will be required and that this is a very difficult position to be in. We do not expect you to work from the office Wednesday or Thursday. We suggest Friday may be a time to get together as a team if you feel this is appropriate.*

*We are deeply saddened by this scenario. If you have any questions at this stage please let us know and we will do our best to answer them."*

19. The respondent was a small business with four employees, including the two directors and co-founders. It was dependent on individual client contracts for work. There was some ongoing work (the tribunal heard, for instance, of the Ribeye contracts), but most work was short-term individual contracts. Work was projected by Mr Murphy across a timeline of a few weeks. There was no substantial pipeline of expected work at that time, and charts produced by the respondent show that at this stage the respondent's work was almost hand-to-mouth, with work projected for a handful of weeks at most.

20. I accept that in those circumstances the only real way in which the respondent could cut costs was by redundancy, and that meant looking at dismissal of either the claimant or the only other non-director employee who was much

more junior than the claimant and had very short service. In order to most effectively save money it was rational for the respondent to look at dismissing the claimant as redundant. How they went about that and the events of the meeting of 25 July 2023 are another question, but I do not accept as a matter of fact any allegation by the claimant that this suggestion of redundancy was a false concoction set up with the purpose of dismissing him.

21. An important dispute of fact is whether during that meeting the claimant was given notice of dismissal, to take effect on 31 July 2023. It is the claimant's position that he was given notice of dismissal at that meeting. The respondent says he was not. Their position, as outlined in the "meeting notes", is that there would be a consultation period of one week.

22. The earliest record of the meeting is the "meeting notes" which support the respondent's position that this was to be a consultation period, and that the claimant was at risk of redundancy, not that he had been given notice of dismissal.

23. The claimant points to a WhatsApp exchange between the two directors from 25 July as follows:

> *"we can't or have no need to stop him coming in"*
>
> *"I do with he'd stop making vague statements like I'm seeing someone next week."*
>
> *"I think he is saying he is going to see Rob and hadn't yet clocked that his redundancy pay will be capped"*
>
> *"I guess he is working out what we will owe him"*

24. The claimant says "*Their messages are based on their assumption that Chris and Pete had actually achieved my redundancy that day.*" but I do not see that that necessarily follows from these messages. It is clear that they were contemplating the claimant's dismissal, but that is as consistent with the one week's consultation contended for by the respondent as it is with the one week's notice contended for by the claimant.

25. A difficult point that arises from the claimant's position that he was given notice to expire on 31 July 2023 in that meeting is how it is that he then came to resign on 4 August 2023.

26. On the claimant's case, he had on 25 July 2023 been given notice of dismissal to take effect on 31 July 2023. As we shall see, by 28 July 2023 the respondent was taking steps to remove any question of redundancy, but this was not framed as a withdrawal of notice that had been given, and in any event if notice had been given it could not be revoked without the claimant's consent (see point (2) at para 97 of Omar v Epping Forest [2024] IRLR 92).

There was nothing in the correspondence or evidence to suggest that the claimant ever gave explicit consent to the withdrawal of the notice he says was given to him. The best that could be said was that his attendance at work on 31 July 2023 and afterwards was an implicit consent to the withdrawal of notice, but it is clear that no-one saw it that way at the time, and in fact everyone behaved simply as if there was no dismissal on 31 July 2023.

27. Other than the claimant's assertion that he had been given notice of dismissal in his lawyer's correspondence, neither the claimant nor the respondent acted as if the claimant had been given notice of dismissal to take effect on 31 July 2023.

28. Those factors lead me to conclude that the claimant was not given notice of dismissal at that meeting (as to which see point (6)(i) of para 97 of Omar). Given his long-running discontent with the respondent he was inclined to take the worst possible view of this meeting, and this included taking what had been spoken of as a consultation period as being sometime like notice of dismissal. It was not.

**Events following the meeting of 25 July 2023 – to 28 July 2023**

29. The claimant sought legal advice on his position following this meeting. He went to work the following day to pick up some things. Following this the claimant worked from home. He was invited in to a further meeting but declined to attend pending advice from his solicitor.

30. 25 July was a Tuesday. The claimant had told the respondent he was taking legal advice on his position. Towards the end of the working day on Friday 28 July Mr Murphy sent an email to the claimant to say:

> *"Just wanted to update you on some discussions our side.*
>
> *Having consulted legal advice we are of the opinion that unintentionally we may have not fully followed the due process required for the consultation period. This means the only reasonable course of action for us is to take your position off risk of redundancy.*
>
> *We are happy to discuss any aspects of this you may have concerns with and sincerely apologise for any distress this has caused.*
>
> *Once we have had time to re-assess the company situation we will openly discuss this with you so you have as much clarity as possible moving forwards."*

31. Mr Murphy describes this as telling the claimant that he was "*no longer at risk of redundancy*" given that the respondent had, in the meantime, picked up some additional work including on the Ribeye contract.

32. This email arrived at a time when the claimant was finalising his response to the situation with his lawyers, and only half an hour later the claimant's lawyers sent the respondent a four-page letter making points along the lines of those made in this case (including an age discrimination claim originally brought but later withdrawn in this case) and making a data subject access request. This letter starts:

> *"We are instructed to act on behalf of Nick Pike in relation to matters arising out of the termination of his employment with Fish Composites Ltd, which is to be effective as at 31 July 2023."*

33. Similarly the letter includes a statement of the claimant's position that:

> *"We have advised our client that he has strong grounds to pursue a complaint of Unfair Dismissal consequent to the advised termination of his employment, to be effective as at 31 July 2023."*

34. This reflects the claimant's consistent position, expressed in his witness statement as being that he was told in the meeting that "*my employment would end on the 31st July 2023*". The underlining is the claimant's emphasis, taken from his witness statement.

35. The letter functions as a clear statement of the claimant's legal rights, but other than the data subject access request does not appear to require the respondent to do anything. So far as that afternoon's correspondence regarding the redundancy situation is concerned, the letter says:

> *"Constructive Unfair Dismissal*
>
> *We are instructed that today, notably after our client had indicated that he was seeking legal advice on the apparent termination of his employment, correspondence has been sent purporting to wind back the actions of the Company and take our client 'off risk' of redundancy. There has been no explanation as to what, in reality, this means to our client. Arguably, this action is an acceptance by the Company that, indeed, no genuine redundancy situation exists.*
>
> *To the extent that the Company wishes to proceed with my client's redundancy, however that it will simply now tick the correct boxes so as to appear to be following a proper process, in the face of our client quite rightly seeking legal advice, this step is disingenuous and places our client in the untenable situation which his redundancy remains a fait accompli, and the question is more now one of when it happens rather than if.*
>
> *Notwithstanding that any dismissal at the end of an elongated redundancy process would remain substantively unfair, the manner in which the Company has handled this situation – in particular advising*

> *our client that he was to be made redundant on 24 July 2023 – represents a fundamental and repudiatory breach of the implied obligation of trust and confidence, in respect of which our client's position is reserved."*

36. So by the end of Friday 28 July 2023 the respondent had purported to withdraw any threat of redundancy and the claimant had written asserting his position that he had been given notice of redundancy to take effect on 31 July 2023 (the following Monday), and that such a dismissal would be unfair, wrongful and an act of direct age discrimination, and that in addition "*the manner in which the company has handled this situation … represents a fundamental and repudiatory breach of the implied obligation of trust and confidence*".

**From 31 July 2023**

37. On 31 July 2023, the day he says his dismissal was due to take effect, the claimant says that "*I did not attend the office but worked from home from 8.30 am onwards. I thought they might have wanted an opportunity to discuss the letter from my solicitor and they would be unable to do so with me present.*" He then describes receiving an email from Mr Murphy saying:

> *"Hi Nick*
>
> *We note you are not in the office this morning and we have had no contact about sickness or an issue of attending. We haven't agreed to any change of working hours, working from home or holiday.*
>
> *We assume you will work from home today, as it is now too late to travel in.*
>
> *Unless there is a reason outside of your control, we will expect you will be in the office tomorrow. Wednesday we will work from home as normal. Thursday and Friday will be office days."*

38. The following day the claimant was asked to attend a "*open discussion*" about "*how to move forwards based on the current work forecast*", to take place the following Monday. He worked all day that day and the following day. As he points out, there had been no response by the respondent to the letter from his solicitors.

39. On 4 August 2023 the claimant resigned, with immediate effect. Under the heading "*reason for my resignation*" he said:

> *"The contents of the open letter of the 28th July from* [my lawyers] *are repeated. That letter clearly sets out the reasons for my resignation …*
>
> *I am resigning in response to a repudiatory breach of contract by my employer, and in particular a breach of mutual trust and confidence,*

> *and I therefore consider myself constructively dismissed. I now consider that my position at Fish Composites Limited is untenable and my working conditions intolerable, leaving me no option but to resign in response to your breach of contract."*

THE LAW (CONSTRUCTIVE DISMISSAL)

40. The classic statement of what a constructive dismissal is can be found in Western Excavating v Sharp [1978] QB 761:

> *"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."*

41. In this case, as in many other cases of alleged constructive dismissal, the claimant says that the respondent has breached the implied term of trust and confidence. That term provides that an employer must not, without reasonable and proper cause, conduct itself in a way calculated or likely to destroy or seriously damage the mutual trust and confidence between employer and employee.

42. Guidance on the correct approach to addressing this was given by the Court of Appeal in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, where tribunals were invited to consider five questions:

    a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, their resignation?

    b. Has the employee affirmed the contract since that act?

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

    d. If not, was it nevertheless part of a course of conduct which cumulatively amounted to a breach of the duty of trust and confidence?

    e. Did the employee resign either wholly or partly in response to that breach?

43. In a "last straw" case such as this, an "entirely innocuous act" cannot count as a last straw, although the act does not have to be unreasonable or blameworthy. The point is whether it contributes something to the breach (Waltham Forest v Omilaju [2004] EWCA Civ 1493).

DISCUSSION AND CONCLUSIONS (CONSTRUCTIVE DISMISSAL)

44. Applying the Kaur guidance, the first thing I have to identify is the most recent act or omission that the employee says caused or triggered their resignation – that is, the "last straw".

45. The claimant's claim form identifies this as being "*the conduct of the Respondent during the week commencing 24 July 2023*". The respondent's actions during that week were (i) the "redundancy consultation" meeting at which (on the claimant's case) he was given notice of dismissal and (ii) the notification at the end of the week that they had "*take*[n] *your position off risk of redundancy*".

46. Where the alleged final straw is "*conduct … during* [a] *week*", which itself consisted of two events it is not entirely clear what should be regarded as the last straw. The claimant's resignation letter says that his lawyer's letter of 28 July 2023 gives the reasons for his resignation. This says "*the manner in which the company has handled this situation – in particular advising our client that he was to be made redundant on 24 July 2023 – represents a fundamental and repudiatory breach …*".

47. There are difficulties for the claimant in establishing that any of the two events that week amounted to a final straw. Working backwards, notification to the claimant that he was no longer to be considered to be at risk of redundancy can scarcely be said to contribute something to a repudiatory breach of contract. It is "*an entirely innocuous act*". In any event the claimant's emphasis throughout has been on being given notice of dismissal, not the subsequent email at the end of the week. But I have found that the claimant was not given notice of dismissal in the meeting on 25 July 2023, and so there was nothing in that week that could amount to a last straw or contribute to a constructive dismissal.

48. There are some further points that can be made on the question of affirmation (the second point under Kaur). First, I have no doubt that by continuing to work the claimant has affirmed any breach of contract that may relate to the earlier alleged breaches of contract such as difficulties with his pension contributions or pay. Those were long-standing and in the case of the pension contributions issue originated in 2021. Second, if it were the case that the claimant had been given notice of dismissal on 25 July 2023 then surely working on beyond 31 July 2023, as he did, should be taken as affirmation of his contract of employment following any such breach.

49. The claimant has not established the last straw that he relies upon, and his claim of constructive dismissal does not succeed. Both the claims of unfair dismissal and for notice pay depend on there being a constructive dismissal, so they must be dismissed.

UNLAWFUL DEDUCTION FROM WAGES

50. The claim of unlawful deductions from wages relates to a deduction of three days holiday pay from the claimant's final salary.

51. The respondent has accepted that this money was owing to the claimant and said that it would be paid to him without the need for any tribunal order. I have provided for this in the judgment. The amount deducted was £569.00.

A FAILURE TO PROVIDE PARTICULARS OF EMPLOYMENT

52. The judgment in respect of unlawful deductions from wages gives the opportunity for consideration of an uplift in compensation under s38 of the Employment Act 2002, which applies where there is an award in favour of a claimant in respect of a particular claim (including unlawful deductions from wages) and (s38(2)(b)):

> *"where the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Right Act 1996"*

53. By the end of the hearing, the respondent accepted that the claimant had not had a statement of particulars of employment complying with section 1(1). The only question was whether the appropriate award would be two weeks or four weeks' pay. In the absence of exceptional circumstances (which do not arise in this case) I must increase the award by two weeks' pay and may, if I consider it just and equitable in all the circumstances, increase the award by four weeks.

54. The respondent is a small employer, but this is not a case simply of insufficient particulars of employment having been given, or some technical breach. There was a complete failure to provided anything that recognisably constituted a written contract of employment or written particulars of employment. In those circumstance I consider the appropriate additional award to be four weeks' pay.

55. The parties had produced differing figures for weekly pay in their schedules of loss, but this does not matter in circumstances where the statutory cap on a week's pay applies (s38(6)(b)) and both figures are above the statutory cap. The relevant cap is the one applicable on the effective date of termination: 4 August 2023 (s38(7)(b)). That is £643, so the additional award is 4 x £643 = £2,572.00.

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Employment Judge Anstis
Date: 1 December 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON – 4/12/2024

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FOR EMPLOYMENT TRIBUNALS

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