EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102243/2017

Held in Glasgow on 11 and 12 June 2018

Employment Judge: Ms M Robison

Mr C Adams	**Claimant** **Represented by** **In person**
Carpetright plc	**Respondent** **Represented by** **Ms D Dickson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim for unfair dismissal does not succeed and therefore is dismissed.

In respect of the claim for unlawful deduction from wages, the respondent shall pay to the claimant the sum of **THREE HUNDRED AND TWENTY NINE POUNDS AND SEVENTY ONE PENCE (£329.71)**.

REASONS

Introduction

1. The claimant lodged a claim with the Employment Tribunal on 31 July 2017, claiming unfair constructive dismissal. The respondent entered a response resisting the claim.

1. The hearing took place over two days on 11 and 12 June 2018. At the hearing, the claimant appeared in person and the respondent was represented by Ms D Dickson, solicitor.

2. During the hearing, the Tribunal heard evidence from the claimant. For the respondent, the Tribunal heard from Mr Craig Watson, who conducted the disciplinary hearing. The Tribunal was referred by the parties to a number of productions from a joint bundle of productions. A supplementary bundle was lodged in respect of remedy. These documents are referred to by page number.

Findings in Fact

7. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

Background

8. The claimant worked for the respondent for over 22 years, with a break of around three months in 2000, having worked his way up from being a warehouseman through sales to becoming assistant manager, then branch manager and regional fitting manager. When he resumed employment on 27 November 2000, he commenced as assistant manager, and was promoted to branch manager in one of the larger stores.

9. The claimant was very proud of his track record, believing that he had worked very hard to progress with the respondent, and having remained loyal to them through the years. He had put himself forward willingly for training, and at one point was a “boom truck” trainer himself. He was proud of his achievements, having won some awards. He said that he had been moved to stores which needed additional support because of his skills in administration, motivation and man management.

10. Latterly he worked at the respondent’s store at The Forge, which he said was a mid sized store in terms of turnover. At one point The Forge was designated a

"store of excellence" which meant that new recruits would come to the store for further training.

Relevant policies and procedures

11. The respondent's disciplinary policy sets out the procedure for disciplinary and grievance.

12. At 3.1.2 (document 5, page 2), headed Suspension, it states that "the company may suspend any colleague on basic pay at its absolute discretion. Suspension may be imposed where appropriate to assist in orderly investigations or to allow a "cooling off" period. Suspension is not a disciplinary penalty and carries no implication of guilt. Whilst on suspension, a colleague must be available to work or to attend meetings if required by management during normal working hours. A colleague on suspension may not go to his/her normal place of work or other company premises without authority and may not contact any colleagues other than witnesses to assist his/her case. Permission must be sought and obtained from a senior manager or the Human Resources Department."

13. At 3.3.1 it states that "the level of disciplinary action taken will depend on the circumstances and the seriousness of the issues" and "you have the right of appeal against any disciplinary decisions made".

14. 3.3.4 sets out the four levels of disciplinary action, namely verbal warning, first written warning, final written warning (called a first and final warning) and dismissal. It states there that, "Disciplinary action will normally be taken at the lower level for minor offences, where informal counselling has failed or is inappropriate, and at higher levels for more serious offences, or in cases where you have already received lower level warnings. You should note that disciplinary action can be taken at any level (including dismissal) in a particular case, depending on the company's view of all the circumstances and the seriousness of the issue. It is not a term of your contract that you will receive any or any number of warnings before dismissal".

15. 3.3.6 sets out a non-exhaustive list of the offences which will normally be regarded as gross misconduct, and includes “a serious failure to comply with company procedures, in particular those relating to cash, illegal discounting, stock handling or transfers, administration or security, as set out in company directives, whether that failure is deliberate or careless”.

Introduction of House Flooring Surveyors

16. Prior to November 2016, estimators, who visited homes to take measurements for the floor coverings, were employed in stores, or sometimes would be shared with another store. This resulted in days when the estimator was not available due to holidays, illness, days off etc. or inefficiency where two estimators in stores close to each other were working in the same area.

17. Consequently the respondent decided to centralise the system. A new system was rolled out following a trial. Craig Watson was responsible for delivering this project. Around 300 estimators who were employed by the respondent at that time went on a 16-week course (one day each week) at the end of which they required to sit an exam, and if they failed that exam they would get further training. This involved an understanding of the “surveyor’s journey”, i.e. the steps to be taken to maximize sales. All (but one) agreed to new terms and conditions (with an increase in salary because they would no longer earn commission) and were thereafter engaged centrally as so-called “Home Flooring Surveyors” (HFS or surveyors).

18. In order to increase efficiency and streamline the system, a central computerised booking system was introduced, so that a bank of surveyors would be available seven days each week and also in the evenings, and the most appropriate surveyor based on geographical location would be utilised. Time slots on the computer where referred to as “tiles”, and would be coloured green, amber or red, the green tile being the optimum in terms of the best utilisation of surveyors’ time, although amber and red could be selected if necessary to suit the customer. This meant that customers could be given a time slot which they preferred, and surveyors travelled less.

19. Prior to that system being introduced, other members of staff would on occasion visit homes to take measurements.

20. The respondent also engaged fitters to fit the carpets, but they were self-employed and were selected from a list of approved fitters who were put through assessment courses. They were not expected to undertake measurements of rooms. However, on occasion, fitters were required to take measurements where necessary, if it was in the best interests of the customers.

21. After the new system was introduced, other members of staff could be used to undertake measurements but only in exceptional circumstances where no other surveyors were available. There was no expectation that fitters would or should undertake measurements.

22. Managers were aware of the change in the system and of the heavy investment in the new system. They were advised further of the details of the system during training which took place at Uddingston. The expectation was that surveyors would always be used to take measurements, and that because of the centralisation there would be very few occasions when a surveyor would not be available. However, it did happen that on occasion the “tiles” would be greyed out which would mean that no surveyor was available. On such occasions, it was expected that the member of staff would contact the retail administration manager or the regional manager who would attempt to ascertain whether an estimator was in fact available to be deployed at a time which best suited the customer.

Staffing levels at Forge Store

23. In or around May 2016, Mr Robert Spiers became the regional manager for the claimant’s division (approximately central west Scotland). The claimant repeated concerns he had previously raised with the interim manager Mr Kai Clarke about staffing levels in the store, to which he attributed a fall in sales. This was because he believed that when the staffing levels had been at full complement, the store had performed well. Latterly, turnover had decreased, because

although there was a high volume of customers, transaction values were low (involving for example take away cuts).

24. By February 2017, the staff employed at the Forge consisted of the claimant, as full-time manager, a full-time assistant manager, Anne Cavin, and two part-time sales administrators, “Maureen” and Maud Lynas, as well as a part-time warehouseman named “Jonathan” who worked late nights, Tuesday and Thursday. This level of staffing meant that the claimant had to work in the warehouse as well as the “front of house”.

25. The claimant raised his concerns on a number of occasions about staffing levels with Mr Spiers and was assured that the situation would improve. However, it took from May to December of that year for him to authorise a warehouseman but only on a part-time basis, which the claimant thought would free him up to do “front of house”. However, by that time Maureen, an experienced sales administrator, had left. Prior to this two other experienced salesmen had been promoted and an administrator had left to take up a full-time job, who was not replaced.

26. Decisions about increased staffing are made at board level and are based on store turnover. The store at The Forge was not making sufficient turnover to justify a full-time warehouseman.

27. The claimant would prepare staff rotas four weeks in advance and e-mail them to his regional manager and to Audrey Bell the retail administration manager (RAS), but on occasion, due to holidays, sick days, days off, the claimant was occasionally left to “single man”, that is, he was the only person working in the store.

28. The claimant dealt with deliveries, and this required input from a person trained on the boom truck, but at that time he was the only member of staff who was trained. Deliveries were Wednesday and Friday. He went to college on a Wednesday. Mr Spiers got the deliveries changed to Tuesdays and Thursdays.

Other staff offered to do the training but with the limited staff levels it was not possible to let them off on training for two days.

Events Leading to Disciplinary Hearing

29. On the morning of Monday 13 February 2017, the claimant returned from a week's holiday. He was expecting a trainee designate to be in store, believed to be Paul McMirren, he was told Paul was unavailable, and another experienced store manager arrived named "Mairi". Shortly after, Ms Bell appeared, and the claimant understood that she was making a standard visit to check paperwork. Later that morning, Mr Spiers arrived and asked him to attend a meeting in the tea room. It transpired that this was a first investigation meeting. Ms Bell took notes at this meeting (Page 86- 97). These record that the complaint related to "using fitters to carry out estimates", but a further complaint against the claimant was discussed during the meeting, namely processing sales prior to the order being paid. The claimant was not given the opportunity to read over or to countersign these notes.

30. During the meeting, when it was put to him, the claimant immediately confirmed that he had used fitters to undertake measurements. He apologised for not having informed Mr Spiers. He said this was not because he had problems with the system of booking surveyors, but that on occasions the slots available were not suitable for customers. He did not think there was any point in contacting Ms Bell because she would be working with the same system, as he assumed that meant that no surveyors were available. He said that he sent fitters out for so-called "maybe measures" at times which suited customers most (where the customer had not yet selected a floor covering, although these were discouraged) and where he had concerns about the sub-floor (as he considered that some surveyors had made errors in that regard). He confirmed that this practice was not for financial gain but in the interests of customers. He said that he was aware that this did not accord with company policy. He said that the practice would stop.

31. Following a break of around 15 minutes, Mr Spiers informed the claimant that they would require to suspend him pending further investigation, which suspension was confirmed in writing by letter dated 13 February 2017. In that letter it stated that he was suspended on full pay pending further investigation into: "using fitters to carry out measures in customers' homes when they are not employed by the company; processing sales prior to the order being paid". The letter continued, "Please note that suspension is not a disciplinary penalty or sanction and carries no implication of guilt. Whilst on suspension you must be available for work to attend meetings if required during normal working hours. You should not, however, make contact with anyone within Carpetright, Storeys, our customers or agents without the authorisation of HR or your Regional Sales Manager".

32. It transpired that in the period considered by Mr Spiers, the claimant had engaged fitters on fifteen occasions (see invoices pages 51-69). The fitters were not paid. Fourteen of the fifteen occasions led to orders. Home Flooring Surveyors are estimated to cost £60 per visit and although this was a centralised cost, and did not affect the bottom line of store profits, the claimant was aware of that cost. While the respondent monitored how many home visits (by HFS) for measurements were converted to sales, the measurements undertaken by fitters were not recorded in the system as "conversions", so that a lower number of conversions would be recorded for the store.

33. Before interviewing the claimant, Mr Spiers had interviewed the assistant manager, Anne Cavin on 10 February 2017 (see notes pages 70-77). When questioned she said that they used fitters when the diary was "greyed out" and that it was an exception rather than the norm. She confirmed that the fitters were not paid, but that if they did the measuring they would get the job. When asked if she had anything to add, she is recorded as saying "apart from if it was to manipulate figures not sure Colin is sly, maybe to try to get sales in he may have been".

34. Mr Spiers had also interviewed Maud Lymas on 10 February 2017 (see notes pages 78 – 85). It is recorded there that when he put to her that she thought the

main reason is conversions (although she had not mentioned conversion, according to the notes), she is recorded as saying "Yes, he is playing the game". When asked whether she had anything to add, she said that, "Colin is struggling in the store; he wants to do well but is failing every [month?]….under pressure with staffing levels and holding a [resentment?] towards other people who have bigger stores than him when he has been here longer". When asked why he used fitters, she said "keeps the conversion rate down and majority of them are Colin's done by fitters".

35. After interviewing the claimant, Mr Spiers interviewed Gerald McKeown, an HFS (pages 102 – 103) who is recorded as saying that he got on well with the claimant, and that he knew they were short staffed but not that they were using fitters. Mr Spiers interviewed three fitters, namely David Milligan (pages 99-101), John (Grant) (page 105) and Paul McCabe (page 107). John (Grant), when asked if he minded doing measurements, is recorded as saying "If I have time but I would rather not do them". Paul McCabe said he did not mind doing it when he was not busy and that sometimes it was best because it meant that the house was measured properly. He confirmed that he did not get paid, and that sometimes he got the job but not all the time; he said it was "no big issue".

36. The claimant was subsequently invited to attend an investigation meeting by letter dated 16 February 2017, which took place on 21 February and was conducted by Mr Spiers. Although notes of that meeting were taken, they were mislaid. Mr Spiers provided a summary of the meeting. The claimant accepted this was accurate, but written from Mr Spiers' perspective. He took issue with the note that he had acknowledged that he should not have used fitters because they were not qualified, because in his view they were qualified. He confirmed that he had been asked about manipulating conversion figures, and while it is noted "to be honest if he had done that the conversion would have gone up as 1 of the 15 measures converted in to sales" (by which it was understood he meant that only one of the 15 measures was not converted into sales), this is not something which he actually said to the claimant.

37. On 22 February 2017 the claimant was signed off sick for four weeks due to stress at work, and then for a further 28 days on 22 March. In the meantime, an occupational health report was commissioned and produced, although the claimant confirmed to HR that he would be returning to work on 5 April (page 118). He was advised that he was still suspended.

38. By letter dated 19 April 2017, the claimant was invited to attend a disciplinary hearing on 25 April, to answer the following allegations: "1. you have failed to follow our normal processes with regards to home measures, as on 15 separate occasions you have used fitters to go and carry out home measures in Carpetright Customers' homes; 2. this is against the Companies (sic) best financial and commercial interests as we have invested in our Home Flooring Surveyor teams to carry out home measures, whereas fitters are neither employed nor trained to do so; 3. you failed to report the issues you had with the diary system to your regional manager or senior management, which leads the Company to believe your actions may have been dishonest". The issue of processing sales prior to the order was not included.

39. The letter continued, "Please be advised that the Company considers this to be a serious matter and potentially gross misconduct. If the Company believes that the above allegations are reasonably proven, subject to any mitigating circumstances you may put forward, then a possible outcome of this meeting could be disciplinary action being sanctioned against you, up to and including summary dismissal".

40. Certain documents were enclosed, including the statements from Anne Cavin, David Milligan, Gerald McKeown, John Grant and Paul McCabe. The claimant sought copies of the notes from the meeting with Maud Lymas and copies of the relevant invoices as well as notes from the second investigation meeting; the former two but not the latter were produced.

41. The hearing was conducted by Craig Watson, regional manager for east area of Scotland and Berwick. Notes were taken by John Keegan (pages 126 – 163). These were checked and signed on every page by the claimant. Each of the 15

occasions that fitters were used was discussed in some detail, and the claimant was afforded an opportunity to explain his rationale in each case for engaging a fitter.

Outcome of Disciplinary Hearing and Resignation

42. By letter dated 27 April 2017, the claimant was advised of the outcome of the disciplinary hearing. That letter stated: "Having carefully considered everything that was said during the hearing, I have taken into account the following: It was established that you had failed to follow normal processes, albeit in your eyes this was in order to improve service to your customers. It was also established that you were aware that you should have informed your regional manager or senior management, however you chose not to. You also were aware that by instructing fitters to carry out estimates rather than using the Home Flooring Surveyors that you were going against the Companies (sic) best financial and commercial interests. However you justified this by your belief that it was the right thing to do for your customers. You also agreed and acknowledged that you should have reported the issues you had with the diary system to your regional manager, however you denied that your actions were dishonest in any way. Whilst I believe that you made the wrong decision, it is my genuine belief that your actions were not dishonest. It is therefore my decision that on this occasion you are to be issued with a first and final written warning for your failure to follow normal company processes and procedures which were not in the Companies (sic) best financial and commercial interests, and for failing to report the issues to your regional manager or senior management. This warning will remain on your file for a period for 12 months from the date of this letter. You should be aware that this warning and further unacceptable absences (sic) will be taken into consideration in any subsequent disciplinary action concerning your conduct during this time up to and including dismissal following warnings. I also recommend that going forward the practice of using fitters for estimates must stop with immediate effect, and that if there are any issues with regards to using the system and which prevents the booking of the Home Flooring Surveyors, then you must inform either your RAS or regional manager immediately…you have the right to appeal against this decision…..".

43. On receipt of that letter, around 4 pm, the claimant telephoned HR to advise that he was handing in his notice with immediate effect. This is recorded in an e-mail dated 27 April, stating "He said that reading through the statement and seeing himself described as dishonest by his close colleagues and having his personal integrity questioned has left him feel like he cannot return to work as he feels that he has been treated like a criminal, and he would like to leave with immediate effect and start afresh" (page 168).

44. The claimant confirmed his resignation as at 27 April 2017 in an undated letter stating (page 169,) "This decision has not been taken lightly but after extensive consultation with my family, taking account the content of the investigation statements and the effect this has had on myself I feel this is the appropriate action to take".

45. On return following sick leave (after 5 April 2017), because the claimant believed that he would be dismissed, he had made enquiries with Tapi Carpets, where a ex-colleague was a senior manager. He was advised that no positions were available at that time. The day after he was informed of the outcome of the disciplinary hearing, he again contacted the regional manager for Tapi Carpets. He asked to be considered for any new manager's position which may become available in the future. He was told that an assistant manager's position would become available in a few weeks. However, he was engaged in the role of warehouseman to assist in setting up a new store from 1 May 2017, whereafter he was engaged in the role of assistant manager.

46. By letter dated 2 June 2017 the claimant set out his concerns to the CEO.

47. The claimant subsequently received copies of his pay slips for the months of March (SB8) in which the sum of £193.31 is deducted for over-discounting; April (SB9) in which the sum of £129.88 is deducted for over-discounting; and May when the sum of £576.66 is deducted from sums due to him. Although the claimant resigned on 27 April, he was paid until 30 April.

Relevant law

54. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (the 1996 Act). Section 94(1) states than an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) states that an employee is dismissed if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is commonly known as "constructive dismissal".

55. In **Western Excavating Ltd v Sharp 1978 IRLR 27**, the Court of Appeal set out the general principles in relation to constructive dismissal. Lord Denning stated that "An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".

56. The duty of mutual trust and confidence is a term which is implied into every contract of employment. This means that an employer must not, without proper and reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee (**Mahmud v Bank of Credit and Commerce International SA 1997 IRLR 462 HL, Baldwin v Brighton and Hove City Council 2007 IRLR 232 EAT**).

57. The EAT has confirmed in **Leeds Dental Team v Rose 2014 IRLR 8** that it is not necessary to show a subjective intention on the part of the employer to destroy or damage the relationship to establish a breach.

58. When considering whether there has been a breach of the implied term, "the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it" (**Wood v WM Car Services Ltd 1982 ICR 666 EAT**, per Mr Justice Browne Wilkinson).

59. There may be a series of individual actions on the part of the employer which do not in themselves amount to a fundamental breach, but which may have the cumulative effect of undermining the mutual trust and confidence term implied into every contract of employment. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal. This is commonly referred to as "the last straw" (**Lewis v Motorworld Garages Ltd 1985 IRLR 465 CA**).

60. Where there is a breach of the implied term of trust and confidence, that breach is "inevitably" fundamental (**Morrow v Safeway Stores plc 2002 IRLR 9 EAT).**

61. The fundamental breach need not be the sole cause of the employee's resignation. Where there is more than one reason why an employee left a job it is necessary to examine whether any of them was a response to the breach, and not necessarily the principal or main cause of the resignation (**Wright v North Ayrshire Council 2014 IRLR 4).**

62. The question whether the employer has committed a fundamental breach of the contract of employment is to be judged according to an objective test and not by the range of reasonable responses test (**Bournemouth Higher Education Corporation v Buckland 2010 ICR 908 CA**).

63. Thus in order to claim constructive dismissal, the employee must show that:

    (1) There was an actual or anticipatory breach of contract by the employer.

    (2) The breach was sufficiently serious to justify the claimant's resignation; or that it was the last in a series of incidents which justified the employee leaving.

(3) the claimant resigned in response to the breach, although it need not be the sole or even the principal or main cause for the resignation.

(4) the claimant did not delay too long in terminating the contract in response to the employer's breach.

Respondent's submissions

64. Ms Dickson provided detailed submissions, which she handed up after delivering oral submissions. In summary, she submitted that the claimant's claim for constructive unfair dismissal should not succeed because there was no evidence to support his claim that there was a fundamental breach of contract. Even if there were acts which amounted to a fundamental breach, the claimant delayed too long in resigning. She further argued that there was no unlawful deduction of wages beyond a sum deducted in error from his May salary.

65. She referred to the relevant provisions of the Employment Rights Act, and the tests from relevant cases, namely **Western Excavating** and **Lewis**.

66. She relied also on the recent case of **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978** and in particular paras 66-70 and 75, submitting there were parallels with this case and in particular that there was no conduct of the respondent, who had carried out a disciplinary process, which could be said to amount to a repudiatory breach. Further in this case, the claimant was relying on the last straw, but he stated that was the comments made by the claimant's colleagues during the investigation. If this is the last straw, that cannot contribute to a breach of the mutual trust and confidence term, and nor can a reasonably worded outcome letter.

67. Ms Dickson summarised the evidence. With regard to the concerns about staffing levels, while the claimant raised the issue in meetings with his regional manager, who had ensured that delivery days were changed to accommodate his college attendance, he did not make any formal complaint.

68. The claimant admitted his fault from the outset, and the respondent was entitled to regard that as serious, and to suspend in terms of the disciplinary policy, which states that "the company may suspend any colleague on basic pay as its absolute discretion", whereas here the respondent had exercised its discretion to suspend him on full pay, making it clear that suspension was not considered to disciplinary sanction. Here the respondent was entitled to carry out the disciplinary procedure, and the claimant raises no concern about that.

69. With regard to his concerns about the investigation, while the claimant said that his integrity was being called into question, he referred to no specific evidence in support of that beyond the fact that he was asked if the fitters were paid. This was his impression, speculation and opinion and he does not rely on any facts to support his argument that Mr Spiers carried out the investigation inappropriately, other than that he preferred the approach of Mr Watson.

70. He says that he resigned because of the implication that he was dishonest, but in the outcome letter Mr Watson specifically rejected the notion that he was dishonest in any way. This is not sufficient to justify his resignation that day. The claimant knew that his practice of using fitters was not permitted, and he disagreed with the respondent's response because he thought he had good reason for his action, but that does not mean that the respondent's response was unreasonable.

71. Ms Dickson argued that the claimant resigned not in response to any breach, but voluntarily to take up new employment with Tapi, which he did just one working day after his resignation, having made enquiries in advance of his resignation.

72. With regard to remedy, she was able to agree certain figures in the schedule of loss, but argued that there was no basis for an uplift under the ACAS code and nor for his claim for overtime during his suspension, and in any event, this was not related to any breach of contract.

73. With regard to the claims in respect of unlawful deductions, she explained that the practice was that the claimant would receive the bonuses and deductions of the manager who had replaced him during his suspension. She relied on Mr Watson's evidence regarding the practice of making deductions to commission when a manager had gone over the agreed discount limit of 10%. However, the claimant was also in receipt of the bonus which was in fact earned by the manager who replaced him. In regard to the May payslip, she accepted however that an error had been made by payroll, who had treated the claimant as if he was on sick leave, whereas he had returned to work but was suspended. Account however also had to be taken of an overpayment of three days' pay because he had resigned on 27 April but been paid to the end of the month. She accepted that he was entitled to £329.71, that is 4/7 of the deduction.

Claimant's submissions

74. Mr Adams submitted that he had been unfairly constructively dismissed because the respondent had breached the implied term of mutual trust and confidence.

75. He relied on a number of factors in support of that submission. In particular, he relied on the fact that the respondent had failed to give him support when he was under pressure given the staffing shortages, which he had no control over. The shop was one where there was a high volume of customers but low value of sales, so that given the practice of basing staff numbers on budget and turnover, he was not permitted to take on a full-time warehouseman which would have allowed him to concentrate on front of house and improve turnover. He organised the rota four weeks in advance, and he forwarded this to the RAS and the regional manager, but he was not able to prove the staff shortages or the times he was lone working because of the respondent's failure to retain the copies of the rotas. He had raised his concerns on a number of occasions with Mr Spiers.

76. He relied too on the way that the investigation was carried out. In particular, he relied on the behaviour of the employer, which he described as an "ambush", in

calling him into an investigatory meeting on his return from a week's leave, without writing to him or giving him any warning, with three managers turning up that day which he described as "heavy handed". He relied in particular in the fact that the decision to suspend him appeared pre-meditated, given that he had produced all the paperwork for the RAS, and when he had immediately accepted what he was being accused of, and apologised for it. There was a failure in this case to seek to resolve the issues informally, as recommended by ACAS, despite his admissions at the first investigatory hearing.

77. He argued that there was a failure in this case in respect of due process and a lack of care in the conduct of the investigation which he submitted was unacceptable given that his career was on the line. This related particularly to the loss of the minutes for the second investigation, and the fact that some of the interview notes were not signed or dated.

78. With regard to the allegations, these related to practices which were commonplace in the company, and in accordance with the culture of the business, at least until the recent past, and indeed Mr Watson had confirmed that fitters were used to take measurements in the past. Further he was aware that other stores used them when HFS were not available.

79. Athough they had dropped the allegation relating to outstanding balances, still this was initially something he was accused of when that practice is commonplace.

80. He said that the actions of the regional manager were calculated to lead to a breakdown of trust and confidence. He came to the view, although he accepts it is only his opinion and has no evidence to support it, that Mr Speirs was intent on ousting him and replacing him with the interim manager, which is what in fact happened.

81. He argued in essence that the first and final written warning was overly harsh, particularly given his long and loyal service, and the fact that he had never previously received a warning. This was one step off dismissal, and when they

could treat him in this way for what he viewed to be a minor matter and when this warning would remain on his record for 12 months, he was concerned that he could face dismissal for other actions for which he did not consider he was culpable.

82. While the final straw was the outcome letter, and the information from the investigation, his reason for resigning was a combination of these factors: the implication that he was being dishonest, in being questioned about whether he had paid the fitters, which was unfounded and untrue. The comments made by colleagues contributed to his decision, but that was not the deciding factor, which was that he could not return when his integrity had been called into question after he had held a position of trust for many years and been awarded store of excellence. He said that returning would suggest that how he had been treated was acceptable, but if was far from that.

83. The claimant also made submissions on the unlawful deduction of wages claims although he confirmed during the course of the hearing that he was not arguing that he resigned because of these deductions. While he was aware of the policy in relation to over-discounting, he was not well-versed in it because it had never happened to his pay before. He accepted the respondent's position regarding the mistaken deductions relating to SSP.

84. The claimant also relied on a detailed schedule of loss which he had produced, but confirmed that he was not claiming pension loss or holiday pay.

Tribunal's discussion and decision

Observations on the witnesses and the evidence

85. In this case, I found both the claimant and Mr Watson to be credible witnesses and indeed there were little if any disputed facts. As is often the situation in these cases, the differences came down to an interpretation of opinion about the facts, and the application of the relevant legal principles to them.

Constructive dismissal

86. In this case, the claimant ultimately resigned, but that does not of course prevent him from pursuing a claim for unfair dismissal. According to the relevant law set out above, a resignation will be deemed to be a dismissal if certain conditions are satisfied.

87. The first and key question which the Tribunal must consider in this case is whether there was an actual or anticipatory breach of contract. In this case, the claimant argues that the implied term of trust and confidence was breached. The claimant came to this conclusion after he had received the disciplinary outcome letter.

88. Following the **Malik** formulation, the requirement is to consider whether the respondent had conducted itself in a matter which was calculated, or if not, which was likely, to destroy or seriously damage the relationship of trust and confidence between the employer and the employee, where there was no proper and reasonable cause for the respondent's behaviour.

89. In **Wood**, the EAT accepted that the breach of this implied term might consist of a series of actions on the part of the employer, which cumulatively amount to a breach of the term, even if each individual act may not do so.

90. In the course of evidence and submissions, it became clear that the claimant had resigned because of the conduct of the employer and his fellow colleagues. The claimant was relying on a course of conduct, and the disciplinary outcome letter was the "last straw".

91. With regard to the staffing levels, in so far as the claimant does rely on these as an element of the course of conduct, I accepted that the claimant did raise these concerns with Mr Clarke and then on numerous occasions with Mr Speirs. I accepted that this put the claimant under pressure and that it took a long time for more staff to be approved, and even then sanction was only given for a part-time warehouseman. I noted however that the claimant had not lodged any formal complaint or grievance in respect of his concerns. I noted too that Mr

Spiers had sought to relieve the claimant of some of the pressures by changing the delivery days to accommodate his college commitments.

92. The claimant took issue with the way the investigation was carried out. In particular, he took issue with the way in which he was informed about the allegations and the lack of warning. He found that three managers attending the store the morning after returning from holiday was “heavy handed”, especially when he got no warning of them attending or of the intention to hold an investigatory meeting. He also said in evidence however that the presence of the three managers was not unusual or a particular concern to him, and it was the fact of the lack of warning about the investigation which concerned him. Further, he also accepted in cross examination that the respondent was entitled to investigate issues which came to light. The holding of initial investigation meetings without warning, perhaps to ensure that evidence is not destroyed, is common practice.

93. The claimant also raised concerns about the notes that were taken during the investigation, with the fact that some were not signed or dated but particularly with the fact that notes for the second investigation meeting were not retained and therefore not supplied. The claimant argued that this was evidence of a failure to follow “due process” especially given an employee’s career was on the line. I accepted that there was nothing deliberate or intentional, or even necessarily negligent in this, and that the notes of the meeting were simply mislaid.

94. The claimant had a particular concern about the fact that he was suspended. He took issue with the fact that at the end of the meeting, he was suspended although he had been entirely open and honest about his actions, which were all recorded in paperwork and for which there was an audit trail, as is clear from the fact that they were able to identify the fact that this had happened on 15 occasions (and the relevant invoices were produced). His view that the decision to suspend was pre-determined and that suspension was not appropriate in the circumstances, in contrast to situations where there might be dishonesty or bullying or harassment, or behaviour which might be repeated or present a

security risk. Here he had admitted his actions, accepted the position, apologised and said that the practice would be stopped. He was noted as saying, “I apologise for not flagging this to you and I probably should have”, and said “that’s now going to be stopped”. Claimant was “flabbergasted” to find himself in this position.

95. Neverthless, it is clear from the respondent’s policies that the respondent is entitled to suspend the claimant in such circumstances. In particular, it is noted that the disciplinary policy states that the company may suspend any colleague at its absolute discretion. The policy specifically states that, “the company may suspend any colleague on basic pay at its absolute discretion. Suspension may be imposed where appropriate to assist in orderly investigations or to allow a “cooling off” period. Suspension is not a disciplinary penalty and carries no implication of guilt”. While Ms Dickson accepted that there may be circumstances when that step is exercised unreasonably, in this case, where the claimant had admitted that he was at fault, and further investigation was appropriate, she submitted that they were entitled to suspend.

96. In this case, the suspension was to allow for further investigation of the claimant’s practice. I noted that the claimant clearly did understand that what he did was a breach of company procedures, that he apologised and he knew that he should have advised senior management. He suggested that they overreacted. Perhaps he was not expecting them to take it so seriously, but he did accept that he had not followed normal practice and procedure, and he was well aware that the company had invested a good deal in the centralised estimating service, and he did accept that the respondent was entitled to investigate the circumstances of a breach of company procedures.

97. Indeed, it might be suggested that the investigation was necessary to get to the bottom of his rationale because, even after hearing evidence, it was not entirely clear why he did what he did. Beyond accepting that he was doing it for the benefit of customers, and clearly not for any financial gain which was accepted by the respondents, he did put forward a variety of reasons some but not all of which appeared to relate directly to difficulties that he had in meeting customer’s

requirements. He seemed to suggest that sometimes he engaged fitters when customers had not put in a firm order (the so-called "maybe measures") but also that he thought the fitters were better at doing the measuring, because there had been mistakes made in the past by the HFS in regard to subflooring and door clearances. He certainly did not accept that the fitters were not qualified to do the job, whereas the respondent's position is that they were not approved to do the job particularly since they are not employed by the respondent. The claimant also insisted that there was no problem with the system. While he mentioned "buffering", he said from the outset that this was not what led to him calling upon fitters to do the measuring and so that was why he did not report those concerns.

98. The claimant made no specific submission regarding the length of the suspension, but I did note that for a large part of the period while he was suspended he was on sick leave, and that the respondent took the step of obtaining an occupational health report regarding his fitness to proceed with the disciplinary process.

99. With regard to the disciplinary stage, the claimant did not express concern about how the process was carried out, indeed he thanked Ms Wallace (HR) for her support and professionalism, and he compared the way the disciplinary hearing had been conducted by Mr Watson favourably with the way that the investigation had been conducted by Mr Spiers.

100. In this case the claimant resigned on being advised of the outcome of the disciplinary hearing. I accept that an outcome letter could potentially amount to a last straw but that of course would depend on its content. It is relevant therefore to consider the terms of that letter, and the claimant's stated reasons for resigning in response.

101. The claimant's reasons for resigning in response to the letter (or viewing the letter as the last in a series of events) are recorded as concerns following "reading through the statement and seeing himself described as dishonest by

his close colleagues and having his personal integrity questioned" (page 168). The claimant said in evidence he stood by those reasons.

102. It was apparent that the claimant was particularly concerned about the implication that he had been dishonest. He was concerned that his integrity was called into question, especially after so many years of loyal service, and he was not given the benefit of the doubt. He understood this to be implied by the words and actions of Mr Spiers. This was because during the course of the investigation he asked questions about whether the fitters were paid. The claimant thought that this implied that he believed that he had a financial arrangement with the fitters. In the allegations, it is stated that he was suspected of dishonesty but this related to the fact that he had not told his senior managers about the practices although he had said that he was aware that he should do that. That issue was explored in the disciplinary hearing, and the conclusion of Mr Watson was very clear, specifically "it is my genuine belief that your actions were not dishonest." In the letter, Mr Watson states that he took account of the fact that the claimant's explanation was that his actions were for the benefit of customers; that he accepted he knew the correct procedures but failed to follow them, and failed to inform senior management of his actions or concerns about the booking system for surveyors, or any issues with the booking system.

103. The claimant also expressed concern that he had been described as dishonest by his close colleagues, stating in his resignation letter that, "This decision has not been taken lightly but after extensive consultation with my family, taking account the content of the investigation statements and the effect this has had on myself I feel this is the appropriate action to take".

104. It was clear that the reason, or at least part of the reason, for resigning was because of the way he had been described by colleagues. Given that the concerns related not to the actions of managers but to colleagues, I accepted Ms Dickson's submissions that this could not be an event which contributed to the course of conduct which precipitated the resignation of the claimant. In any event, the claimant confirmed in evidence that was only part of the reason.

105. There was a concern expressed about the inappropriate "unacceptable absences" but that was clearly a mistake on the part of the respondent, and I did not understand the claimant to make any issue of that in submissions.

106. The claimant also took issue with the fact that, despite his admission from the outset, and despite the fact that he was not found to have done anything dishonest, he was issued with a first and final written warning, which he said was "one step off dismissal".

107. In the respondent's disciplinary policy, at 3.3.1 it states that "the level of disciplinary action taken will depend on the circumstances and the seriousness of the issues" and "you have the right of appeal against any disciplinary decisions made"; 3.3.4 sets out the four levels of disciplinary action, and that "You should note that disciplinary action can be taken at any level (including dismissal) in a particular case, depending on the company's view of all the circumstances and the seriousness of the issue. It is not a term of your contract that you will receive any or any number of warnings before dismissal"; and 3.3.6 sets out of non-exhaustive list of the offences which will normally be regarded as gross misconduct, including serious breach of company procedures.

108. The respondent's disciplinary procedure thus sets out the process to be follow, and specifically provides for a range of sanctions and gives managers discretion to deal with misconduct. The respondent's disciplinary procedure expressly gives the right to issue a so-called first and final written warning as a penalty for misconduct.

109. I took it that the claimant's concern with the imposition of a first and final written warning which he said was "one step off dismissal", was that it was overly harsh in the circumstances. I was aware that the EAT, in the case of **BBC v Beckett 1983 IRLR 43**, held that the imposition of a punishment which was grossly out of proportion to the offence could amount to the repudiation of the contract of employment. I therefore considered whether or not the punishment was proportionate to the offence in the circumstances of this case.

110. Here, the procedure expressly provided the disciplining officer with a range of options which he could have imposed on the claimant taking into account all the circumstances of the case. Managers had a range of options which they could consider, namely verbal, first written warning and final warning dismissal without notice. Given that the policy allowed for dismissal for a breach of company policies, which was admitted to have taken place here, it could not be said, viewed objectively, that the sanction was disproportionate to the conduct in question. It should be noted too that while it is clear that the claimant could have appealed the outcome, he chose not to.

111. In this case the respondent relies on their policies and procedures to support their submission that they had reasonable and proper cause for their conduct, including the decision to suspend, to investigate further, to hold the disciplinary hearing and to issue the sanction in terms of their disciplinary policy.

112. Ms Dickson relied in particular on the case of **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**. Although the facts of that case relate to a claim for constructive dismissal following a final warning issued after a disciplinary process, it in fact concerned an appeal against strike out and questions of relying on a breach after affirmation. However, Ms Dickson relied on one particular passage at paragraph 75, in which Underhill LJ found that "the judge at first instance was right to find that what occurred in this case was "the following through, in perfectly proper fashion on the face of the papers, of a disciplinary process". Such a process, properly followed, or its outcome, cannot constitute a repudiatory breach of contract, or contribute to a series of acts which cumulatively constitute such a breach. The employee may believe the outcome to be wrong; but the test is objective, and a fair disciplinary process cannot, viewed objectively, destroy or seriously damage the relationship of trust and confidence between employer and employee"

113. This is a case where the respondent has followed a disciplinary process and it could not be said, objectively speaking, that there was anything unreasonable or objectionable about how it was conducted. Although I had some sympathy for the claimant, and his views that the respondent had overreacted and taken the

situation too seriously, and I accepted that his subjective impression was that the behaviour meant that he could no longer work there, but in the circumstances, I find that they were entitled to.

114. In response to questioning, the claimant said he thought that the actions of Mr Spiers were designed to oust him, and to replace him with the interim manager which is what happened. However, the decision of Mr Watson was not to dismiss him, so that his theory could only have been fulfilled if others in the organisation were party to it and shared that view. It only came to pass because of his own actions.

115. While I accept from the claimant's perspective he had come to the view that trust and confidence was seriously damaged, I could not say that this was conduct which, viewed objectively, was likely to seriously damage the relationship of trust and confidence, or that it was conduct which the claimant could not be expected to put up with. In these circumstances, I have found that the employer's conduct, from an objective standpoint, could not be said to breach the implied term of mutual trust and confidence.

116. I find therefore that the claimant was not dismissed in terms of the relevant provisions of the Employment Rights Act, and so that his claim for unfair dismissal cannot succeed and is dismissed.

Unlawful deduction from wages

117. The claimant also took issue with two deductions from his wages, set out in the pay slips for March and April. Clearly the claimant was not working during March and April so that initially it did appear odd that he should have had deductions for those months. I also noted that the respondent's policy is that an employee can be suspended on basic pay, whereas here the claimant was suspended on "full pay".

118. During the course of the hearing, it became clear that "full pay" included any bonus which the claimant's temporary replacement was earning in his store. That meant however that the claimant's policy of reducing bonus where a

manager has “over-discounted”, that is reduced discount below the standard level of 10%, also came into play when determining “full pay” on suspension.

119. Although there was no documentary evidence to support this practice, Mr Watson gave evidence explaining how the bonus system worked. Crucially perhaps when I asked the claimant during the hearing whether he was aware of this practice, he said that he was aware of it, but that since he was not in the habit of “over-discounting” this kind of deduction had never happened to him before. I therefore accepted that these deductions were not unlawful.

120. The claimant also took issue with a third deduction from his wages, which apparently related to the fact that HR had understood that the claimant was absent from work but that he had not submitted a sick line, when in fact he had informed HR that he was fit to return, but was told he was still suspended. This meant that there was an unauthorised deduction. It was accepted during the course of the hearing that this deduction was an error and sums ought to be repaid to the claimant.

121. The respondent did not however accept that full sum should be returned but only in respect of four of the seven days to which that relates. This related to the fact that the claimant had been paid for three more days in April after his resignation (with immediate effect). It was agreed that the sum in question was £329.71. I accept therefore that there was an unlawful deduction to that limited extent, and I uphold the claimant’s claim for unlawful deduction of wages and order the respondent to pay to the claimant the sum of £329.71.

Employment Judge: M Robison
Date of Judgment: 25 June 2018
Entered in register: 28 June 2018
and copied to parties