Case Number: 3400260/2013

EMPLOYMENT TRIBUNALS

Claimant Mr R P Brockbank

Respondent Povoas Packaging Ltd

HEARD AT: HUNTINGDON **ON:** 11th June 2013

BEFORE: Employment Judge Adamson

REPRESENTATION

For the Claimant: In Person

For the Respondent: Mr Harrison, Employment Law

RESERVED JUDGMENT

1. The Respondent unfairly dismissed the Claimant. A Hearing will be fixed to determine remedy.

REASONS

1. By a claim presented to the Tribunal on 1st February 2013, the Claimant complained that he had been unfairly dismissed by the Respondent. The Respondent disputes the claim. The claim is brought pursuant to Sections 95(1)(c) and 98 Employment Rights Act 1996. The Claimant complains that he was constructively dismissed, i.e. that he terminated the employment contract in circumstances in which he was entitled to do so with or without notice because of the Employers conduct. The Claimant alleges that the Respondent broke the implied contractual term of mutual trust and confidence i.e. that the employer will not without reasonable and proper cause act in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between employer and employee.

2. In complaints of constructive unfair dismissal, it is for the employee to establish the fact of dismissal. If the Claimant does so then it is for the Respondent to establish a potentially fair reason, i.e. one which falls within or is referred to in Section 98(1) of the Act. In this case, the Respondent does not plead any particular fair reason. It thus follows that if the Claimant establishes that there was a breach of the contractual term alleged and that

he resigned in consequence of that breach without having waived it, his claim succeeds.

3. I heard evidence on oath from both the Claimant and Mr Simon Pavoas, the Respondent's managing director. Both witnesses have prepared witness statements and I took some time at the start of the Hearing to read those statements and thus the statements were then taken as read. I was presented with a bundle of documents supplemented by the addition of an additional document of 2 pages at the start of the Hearing and I had regard to all documents to which I was referred. I had the benefit of oral submissions from both parties representatives.

4. The Respondent is a company in engaged in the manufacture and printing of plastic and polythene wrapping mainly for industrial use although also engaged in the production of such products for food purposes. The Respondent employs around 140 people. In respect of its work with food products, the Respondent is audited by the British Retail Consortium who require high standards which include restrictions on how the company operates so that products should not be contaminated. I accept Mr Pavoas' evidence that accreditation is very important to the Respondent. The Respondent has a company handbook which amongst other things provides in its rules and guidelines "no food or drink in production areas" and a disciplinary policy and procedure in conventional format. That policy provides that circumstances leading to disciplinary action include failure to observe company rules. The procedure further provides that in respect of any minor breach of company rules, an employee's team leader will inform and discuss the situation with the employee. In addition there are stages for recorded verbal warnings, first and final written warnings and dismissal for more serious matters. Taking food into the warehouse is not identified as an act of gross misconduct.

5. The Claimant's employment with the Respondent began on 10th August 2009 and continued until he resigned, the effective date of termination being 27th November 2012. The Claimant was provided with a written contract of employment which amongst other things provided that he was entitled to three breaks a day, namely half an hour for lunch and two breaks of fifteen minutes each. There is no dispute that on the 15th October 2012 while working in the warehouse, the Claimant was called to a meeting which resulted in a first written warning. There is a dispute as to whether the Claimant was given any notice of this meeting. Within the claim to the Tribunal, the Claimants' position and the evidence he gave to the Tribunal was that he had not been given any warning. That remained the Claimant's evidence to the Tribunal both in his written witness statement and orally.

6. In a grievance letter written by the Claimant to the Respondent dated 25th November 2012, i.e. while he remained employed by the Respondent, and in response to the Respondent's letter notifying him of the written warning, the Claimant denied that he had been informed that the meeting to which he had been invited was to be a disciplinary one and at no point during the meeting was that fact raised. Within the Tribunal bundle at page 50 there is a copy of a letter dated 12th October which invites the Claimant to a disciplinary meeting to answer the allegations that:

- The allegation that you have failed to observe company rules as you have taken unauthorized break during your working hours
- The allegation that you have failed to comply with company procedures as you were eating a sandwich in a prohibited area

Also contained in the bundle are notes of a grievance/disciplinary appeal meeting which took place on 25th January 2013 which records the Claimant admitting that he had received the (12th October) letter but had not read it and had lost it prior to attending the meeting. When the Respondent presented its response to the claim at the Tribunal, it did not address this point. The Claimant's evidence to the Tribunal is that he was not invited to sign the notes of the disciplinary meeting (which appears to be undisputed) and he did not accept them as correct. At no stage during the period between receiving those notes from the Respondent and this Hearing has the Claimant otherwise disputed the accuracy of the notes. The Claimant simply maintained his original position to day.

7. Within the Tribunal bundle are notes of the disciplinary meeting, which are brief. The Claimant's evidence, which I accept, there being nothing to suggest that this was inaccurate, was that when during that meeting he raised the fact that on a notice board it referred to him having an entitlement to a break, the meeting adjourned to visit that notice board yet there was no indication of this in the notes. During the disciplinary meeting, while the notes do not record the Claimant admitting eating a sandwich or taking a bite out of a sandwich as he said to the Tribunal, there was no dispute that he had done so. Following that disciplinary meeting the Claimant was issued with a first written warning for the following:

- Failure to comply with company rules as you were eating a sandwich in a prohibited area
- Failure to clock in and out, leading to falsification of paid time

There was no dispute at this Hearing that there had been no discussion during the disciplinary meeting regarding falsification of paid time. It was also conceded by the Respondent's representative that requirement for the Claimant and others in his position with the Respondent to clock in and out at break times was more honoured in the breach and indeed on the 30th November 2012, the Respondent wrote to the Claimant conceding that "following an investigation, it was not common practice for warehouse staff to clock their breaks prior to [the Claimant's] warning. However the first written warning would still be upheld for eating in the warehouse which you did concede you had done......"

8. Having regard to the notes of the disciplinary meeting and the fact that certain matters were not discussed yet for which he was disciplined and the matters not recorded and a lack of any signed notes together also with the fact that the Claimant was invited to a disciplinary meeting in respect of breaks which was in line with his employment contract and in line with the Respondents practices, (as per the concession and the letter of 30th November) I accept the Claimant's evidence that he did not see the invitation for the disciplinary meeting letter until the appeal meeting on 25th January 2013.

9. I find that the first the Claimant was aware that he was to attend a meeting was when he was asked by an HR Administrator for the Respondent, Anna Gorska, and one of her colleagues, Beata, when they approached the Claimant and asked him if they could have a chat about his eating in the warehouse "now if possible". The Claimant understood this was an informal chat and the meeting was not described as a disciplinary or an investigation. I am not persuaded that there was any investigation (having particular regard to the matters referred to before regarding the Claimant's employment contract and the Respondent's letter of the 30th November). I am satisfied that the Claimant was asked if he wanted anyone to attend with him, but not knowing the potential seriousness, declined. The subject of clocking in and out was not raised neither was the subject of failing to do so leading to falsification of paid time.

10. Although not part of the claim as formally pleaded, the issue of pay arose during the Hearing and evidence was given. I was informed by the Respondent that the Claimant received the same general pay award as others each year being a cost of living increase when such were made but had not received any additional awards. I accept Mr Povoas' oral evidence that on one occasion the Claimant approached him while Mr Pavoas was walking across the warehouse and the matter not dealt with at that time. I further accept that the topic was not dealt with, as the Respondent's mechanism for dealing with individual pay issues was, as notified to all staff when they received notification of any annual pay award, namely that the employee should raise the matter with their team leader which the Claimant did not do. I do not regard that matter of being of any significance in these proceedings.

11. One issue to do with pay which is of some relevance, again although not pleaded within the claim, although dealt with within the witness statements was whether the Claimant would be paid sick pay or full pay for a period of time during a period of the Claimant's absence from work during November 2012 about which more below. The Claimant had three absences from work about which I was informed. On the 20th October 2011, the Claimant felt faint, approached Beata and subsequently fainted. The Claimant was then absent from work through ill health until the 9th January 2012. The last fit note for the Claimant, dated the 5th January 2012, had the comments endorsed "fit to return to work from 9th January 2012. Has seen Cardiologist and deemed fit to return". The Claimant's next absence from work was for about half a day on 12th September 2012 when he was slightly injured by falling boxes. The final period began on the 23rd October 2012 when the Claimant experienced a sharp pain in his chest. The Claimant was absent from work for a week. One of the Respondent's first aiders who is experienced in such matters and is involved with the St Johns Ambulance was understandably concerned that the Claimant may have suffered a heart attack. In the event, the matter was identified as a pulled muscle. The Claimant was provided with a fit note and signed off work for one week. When the Claimant wished to return to work, the Respondent did not allow him to do so immediately.

12. The Respondent's position is that it was concerned and it had to act in accordance with its duty of care. Letters were written to the Claimant's GP

seeking information regarding the Claimant's suitability to return to work. Incidentally within the first letter of the 29th October, the Respondent inaccurately referred to the Claimant having been absent on two occasions following fainting at work. In a second letter, further information was given to the GP. The Claimant's GP replied to the Respondent on the 1st November informing that the incident of the previous week had been diagnosed as musculo skeletal chest pain and that the incident of the previous year which had required the Claimant to be absent for some nine weeks had been investigated by cardiology and nothing significant was involved. The GP informed that he was happy for the Claimant to return to work. In response to other letters, the GP further informed that as with any of his patients he could not guarantee that the Claimant would not suffer any particular illness or injury in the future and suggested an occupational health assessment by a suitably trained occupational health physician. The Respondent took prompt action to obtain such a report, the Claimant being assessed on the 19th November and the report being written two days later. The recommendation was that the Claimant was able and fit to return to work at his present level of functioning and health. From the beginning of November until that report was received around the 23rd, the Claimant was required to work restrictive duties and could not drive fork lift trucks.

13. The Respondents position is that the assessment was carried out of concern for the Claimant and also because of its own potential liability. I accept the Respondent's evidence that it acted in what it considered to be the best interests of both itself and the Claimant. The Claimant was, however, informed during the period when he was initially not allowed to return to work and then returned on restricted duties that the question of his pay, whether it was statutory sick pay or full pay, was to be researched. That matter was researched and when the Claimant returned to work that he was informed that he would be paid in full, which he subsequently was.

14. When the Claimant returned to work to carry out his full duties, on Monday 26th November, he delivered a grievance letter to the Respondent. The letter was described as being in response to the written warning issued on the 23rd October and also being an official grievance. Within the letter, the Claimant referred to having gained legal advice and support from ACAS. The Claimant raised a number of matters, in particular:

   - The notice he had been given for his grievance meeting on the finding of failure to clock in and out leading to falsification of paid time;
   - That he had been unfairly treated following his recent period of illness about which details were given at some length.

15. When the Claimant began his duties he was given tasks to complete by his team leader. About half an hour later, the Claimant had a conversation with Mr Povoas about which there is considerable dispute. There is no dispute, however, that the Claimant's team leader was in the vicinity during that conversation. The situation is that the Respondent has a number of fork lift trucks that have sensors on them and which require a pin to be entered before they can be driven. The effect is that in respect of those vehicles should there be an accident, the fact of the accident and the driver's information is immediately recorded. The Claimant was driving the one fork

lift truck which did not have that sensor and which required a key to start it. The Claimant's position was that he had a key for the fork lift truck which evidence I accept. Mr Povoas' position is that the use of the fork lift truck that the Claimant was driving was for limited situations only, in written evidence it was for emergencies and in oral evidence it was for driving between one factory and another some few hundred yards away along a highway. The Claimant's evidence is that he had not been restricted on driving the particular fork lift truck that he was. Having regard to the fact that the Claimant's team leader was in the vicinity and clearly the Claimant had not been pulled up about it by him, I am satisfied that the there was no restriction on the Claimant using the fork lift truck that he was.

16. The environment in which the parties work is a big space and noisy. Mr Povoas' accepts that he may speak loudly and I would not regard that as untoward in itself. To the Tribunal, Mr Povoas' evidence is that at the time the conversation took place the Claimant was not carrying out work but wasting time. Again because of the team leader being in the vicinity, I do not accept that to be the case. I find that the Claimant was carrying out duties which were required of him and if that was not the most efficient use of his time, that was not something that his immediate management had thought fit to challenge or otherwise criticise the Claimant for. I am satisfied that during this conversation Mr Povoas said to the Claimant in a loud and abrupt manner "I didn't think you were stupid enough to write a letter like this" and "I will tear you apart if you take this to ACAS – your job has never been the same as the others", "who told you to move that pallet? We have other people to do that – the yard needs sweeping – get back on your brush – you are not sitting on that fork lift doing nothing just wasting time". I further accept that the Claimant's team leader had been writing down the Claimant's mistakes albeit nothing had been drawn to his attention before.

17. I accept the Claimant's evidence that he felt intimidated by Mr Povoas and left the building. Before he did so, I find that the Claimant offered Mr Povoas the keys and handed them to him together with his fob and left. The Claimant delivered a written notice of resignation the following day.

18. I find that the conduct of Mr Povoas on the 26th November was of itself sufficient to break the implied contractual term of mutual trust and confidence, there being no reasonable and proper cause established for his actions. I further find that the invitation for the Claimant to a disciplinary meeting without formal notice or warning and then to be given a written warning in respect of matters about which the Respondent knew or ought to have known were wrong, i.e. the clocking in and out for breaks and the linking of that in the warning with falsification of paid time also to be an act for which the Respondent did not have 'reasonable and proper cause' which the Claimant had not accepted. For those two matters I find that the Respondent broke the contractual term of mutual trust and confidence between the parties.

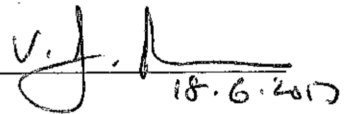
19. In respect of the Respondent seeking a medical report regarding the Claimant following his third absence from work, I was invited to infer that the reason was not as the Respondent asserted but was for an ulterior motive. Part of the Claimant's duties was to drive a fork lift truck which could cause

serious damage to property as well as kill people if driven badly. The Claimant had had a period about a year ago when he was absent for nine weeks through feeling dizzy and fainting and had recently suffered chest pains. Though the two may not be linked medically on the evidence before the Respondent. It is not unreasonable for a non medical person to be concerned that they might be. All employers have a duty of care to their employees, a requirement to provide a safe system of work. I do not make the inferences the Claimant seeks in respect of seeking an occupational therapist. In respect of the question of non payment of full salary to the Claimant once he had offered himself to return to work, in the absence of any contractual ability by the Respondent not to pay full salary it was in error but although worrying for the Claimant again that matter did not appear to have lasted too long and was corrected by the time the Claimant returned to work. I do not regard those matters as a fundamental breach of contract, the Respondent always having reasonable and proper cause for seeking medical opinion.

20. In respect of the issuing of a warning at all for eating of food stuffs in the warehouse, on the evidence I have I find that it was a decision within the range of reasonableness for the Respondent to issue and the Respondent did indeed issue the warning in respect of that matter for the reason it gave.

21. There being no potentially fair reason, I find the dismissal was unfair.

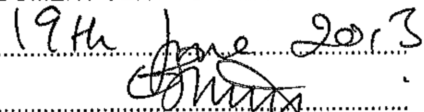
22. There will be a Hearing to determine remedy. Should the parties arrive at settlement of the remedy between themselves before the date of the Hearing they should inform the Tribunal as soon as possible in order that the Hearing date is vacated.



18.6.2013

Employment Judge, Huntingdon

JUDGMENT SENT TO THE PARTIES ON



19th June 2013

FOR THE SECRETARY TO THE TRIBUNALS