



EMPLOYMENT TRIBUNALS

Claimant: Mr T Smith

Respondent: Amalgamated Construction Limited

HELD AT: Manchester

ON: 7 November 2017 &
6 December 2017
(in Chambers)

BEFORE: Employment Judge Slater
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Miss B Clayton of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of constructive unfair dismissal is not well founded.
2. The remedy hearing provisionally arranged for 29 January 2018 is cancelled.

REASONS

Claims and Issues

1. The claimant claimed constructive unfair dismissal. The issues were agreed at the outset of the hearing to be as follows:

- (1) Did the claimant resign because of an act or omission (or series of acts or omissions) by the respondent?
- (2) If so, did the respondent's conduct amount to a fundamental breach of contract? The claimant relied on the implied duty of mutual trust and confidence. The Tribunal would therefore consider whether the respondent, without reasonable or proper cause, conducted itself in a

manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties.

- (3) Did the claimant affirm any breach of contract by his conduct or delay?
- (4) If the claimant was constructively dismissed, was the reason for dismissal a potentially fair? The respondent would rely on redundancy or some other substantial reason.
- (5) If the dismissal was for a potentially fair reason, did the respondent act reasonably or unreasonably in all the circumstances in constructively dismissing the claimant for that reason?

The Facts

2. The respondent is a provider of specialist multi discipline engineering services throughout the UK. A large part of the respondent's work is railway work. They have a contract with Network Rail for maintenance work to structures. Some of this is planned work, but much of it is emergency work on 24 hour callout. I accept Mr Ahmed's evidence that most of the work relates to matters which will take a few days although some work will last for weeks.

3. The claimant began work for the respondent on 18 November 2013. His job title as set out in his contract was civil craftsman. His initial site location was given as LNWAM which stands for London North West Asset Maintenance. The London North West ("LNW") region covers the West of England between London and Carlisle. Clause 5 of the claimant's contract stated:

"You may be required to transfer from one workplace/site to another on the instructions of the company and in accordance with your terms and conditions of employment."

4. Clause 6 provided:

"Your normal hours of work will be 39 hours per week Friday to Thursday. Your daily start and finish times will be in accordance with the shift pattern requirements of the company."

5. The claimant was paid weekly in accordance with his contract, with his basic rate of pay stated to be £10.15 per hour.

6. Clause 12B of the contract stated:

"The company reserves the right to temporarily lay off individuals (on statutory guaranteed pay) when necessary and in accordance with the relevant company procedure."

7. The general terms and conditions of employment for weekly paid employees contained a section dealing with temporary lay off, stating:

"In certain circumstances the company may experience a temporary reduction in its workload. If this situation arises the company will first try to find alternative work within its other operations. However if this is not sufficient to

alleviate the problem, the company will then decide whether it is appropriate to consider temporarily laying off a number of employees to safeguard the longer term employment prospects.”

8. The general terms and conditions referred to the contractual term previously quoted relating to the right to temporarily lay off individuals. They referred to the right to statutory guaranteed pay. They referred employees to the respondent’s separate policy on temporary lay off for more information. This policy referred, amongst other things, to the possibility of entitlement to a redundancy payment where an employee had been laid off for four or more consecutive weeks or for at least six weeks in any continuous 13 week period.

9. During a period of lay off, an employee remained employed by the respondent although, other than statutory guaranteed pay payable for the first five days and then periodically (five days in every 13 weeks), the employee would be unpaid.

10. In oral evidence, I was told that employees, during a lay off, would be free to take work with other employers. To work in the railway industry for Network Rail, a worker has to be sponsored by a company. Ms O’Brien gave evidence that, if an employee during a lay off, wanted to work for another company on a Network Rail project, the respondent would have to de-sponsor them so that they could then be sponsored by the new company. She said that this had been done in the past. The claimant was, however, unaware of this; nobody told him about this.

11. The claimant’s contractual terms remained as originally issued to him, save for periodic pay rises. The claimant agreed that the contractual provisions relating to mobility and lay off continued to apply to him. The claimant suggested that, although his contract was for the position of civil craftsman, he was, in practice, although not in name, taken on by the site manager, Mr White, as an assistant site manager. Mr White has left the respondent. The claimant has suggested that he was routinely paid for 13 hours’ overtime, whether or not he worked this, in recognition of this unofficial status. The respondent challenged this. I do not find it necessary to make any findings of fact about this.

12. There is a dispute between the parties as to the extent to which the claimant was office based, working first from the Trafford Park office and then moving to Irlam, and the extent to which he was out working on site. The respondent has accepted that, for the majority of the time, the claimant was office based. I do not consider it necessary to make a finding as to the percentage of time the claimant spent office based as opposed to on site.

13. The claimant has been concerned by what he considers has been the respondent painting a false picture of his role with them, which he has referred to as them suggesting he has worked most of the time on site “in orange pants wielding a shovel”. The thrust of the claimant’s questions to Mr Ahmed at this hearing were directed to seeking to establish his largely office based planning and supervisory role.

14. It is common ground that from, at the latest, January 2017, there was a reduced workload in the business unit where the claimant worked alongside Jonathan Wright, a site manager. The claimant was party to conversations with Jonathan Wright relating to temporarily laying off some members of their team.

15. It is common ground that, on 1 March 2017, there was a discussion between the claimant, Jonathan Wright and Mr Ahmed, Regional Director, about workload. Mr Wright and the claimant informed Mr Ahmed that there was one week's work, or possibly slightly more, available for their team at that time. Mr Ahmed had made enquiries with Network Rail and found that there was no budget for any planned works in that area in the near future. Mr Ahmed made enquiries as to work elsewhere in the respondent's business. As a result of these enquiries, Jonathan Wright was transferred to work in Barnsley in the London North East region which Mr Ahmed also looked after. Mr Wright and the claimant had three people working with them at the time. These three were transferred to work on another site around Blackburn.

16. Mr Ahmed was informed of a position in Liverpool to work on nights as a supervisor starting from the following Monday. Mr Ahmed and the claimant spoke on 2 March 2017 and Mr Ahmed told the claimant about this role. The claimant wrote in his resignation letter that Mr Ahmed said this was a permanent move. In oral evidence, the claimant did not say Mr Ahmed described it as "permanent" but said it was "ongoing". Mr Ahmed says that he mentioned it was "weeks" and that he would not have suggested it was permanent because none of their jobs are permanent; they are weeks or months long. Mr Ahmed says he told the claimant he did not know the exact duration of the work but that they were looking at weeks. Whatever the exact words used, I find it more likely than not that Mr Ahmed would not have suggested that this was likely to be a permanent move since, in the nature of their work, projects were, at most, months long. If there was any discussion about the likely length of the work, I find it more likely than not that Mr Ahmed said he did not know exactly how long it would be, but it was likely to be weeks.

17. It is common ground that the claimant raised a concern about the impact of such a move on his childcare arrangements. It is common ground that the claimant asked if he could work part-time from Irlam. They discussed this but Mr Ahmed said "no" since he concluded that there was nothing meaningful that the claimant could do part-time from Irlam.

18. There is a dispute as to whether the claimant asked if he could be given more notice of the move to allow him to sort out childcare arrangements. The claimant said he asked this and Mr Ahmed refused the request. Mr Ahmed says this was not raised at this meeting or subsequently, and, if it had been, he would have agreed to delay the move to allow the claimant to sort out arrangements. Whether, in fact, Mr Ahmed would have been able to agree this with the manager in Liverpool is uncertain since the vacancy was to start the next Monday and the manager of the Liverpool job was chasing Mr Ahmed on Friday 3 March to find out whether the claimant was going to be starting. Mr Ahmed said in evidence, when I asked why he was having the conversation with the claimant so close to the proposed change of location, that there was a requirement in the business for that Monday and Mr Ahmed did not want to miss that opportunity. In the claimant's resignation letter dated 29 March 2017, the claimant wrote that he informed Mr Ahmed that the change may cause issues with his contact with his son and that he asked if it was possible to reduce his hours at Irlam but was told this was not possible. The claimant did not refer to asking for more time to see if he could make arrangements for childcare to allow him to take the position in Liverpool. The claimant made no notes of the conversation at the time. I consider it entirely possible that the claimant has an honest belief that he must have asked Mr Ahmed whether he could have more time

before making the move. However, I consider the account in the claimant's resignation letter likely to be more reliable than the claimant's current recollection, since it was written much closer to the events. I find, on the balance of probabilities, that the claimant did not ask at the time that he be given more notice to allow him to make suitable arrangements. If he had been willing to go to Liverpool if he could make suitable childcare arrangements, then I consider that it is likely the claimant would have raised this at some point subsequently during his lay off before his resignation. I consider it likely also, if this was the case, that his trade union representative would have raised this with Ms O'Brien; instead, the conversations between Ms O'Brien and Mr Hocking focused on whether the respondent could contractually require the claimant to work on the Liverpool job or lay him off. I conclude that it is more likely than not that the claimant had concerns other than simply his childcare arrangements which stopped him from pursuing the opportunity in Liverpool. I find that the claimant was particularly concerned about what he considered to be a reduction in status, going from an office based managerial role, which he considered he had in substance, if not in contractual job title, to a more hands-on, site based role.

19. The claimant told Mr Ahmed that he would be contacting his trade union representative and obtaining a copy of his contract. I find that he told Mr Ahmed that he would get back to Mr Ahmed after he had received advice from his union representative.

20. The claimant attempted to speak to Mr Ahmed on the morning of Friday 3 March 2017 but Mr Ahmed was just going into a meeting and, by the time this concluded, the claimant had left the office. It is common ground that Mr Ahmed made a number of attempts to contact the claimant by phone that day. The claimant said they did speak some time before 3.30pm that afternoon but Mr Ahmed disagrees. I do not find it necessary to make a finding of fact on this since the contents of the alleged conversation do not raise anything new. There is agreement that there was a conversation later that afternoon. When it is agreed that Mr Ahmed and the claimant did speak, it is common ground that the claimant said he would not be going to Liverpool on Monday. There is a dispute as to whether the claimant said he could not say whether he would go to Liverpool until after he received advice from his trade union representative or whether he said he would not be taking the job following advice from his union. Mr Ahmed says that he asked the claimant why he would not be taking the job and the claimant said that this was as he had been doing the role of a site manager and was now being forced to go back onto site.

21. The claimant alleges that Mr Ahmed told him that, as he had "got the union involved, I had muddied the waters and made his life hard so he was going to have to put me on lay off". The claimant made this allegation in his resignation letter dated 29 March 2017. On the balance of probabilities, I prefer the evidence of Mr Ahmed that the claimant told him that he would not be taking the job in Liverpool following advice from his trade union as he had been doing the role of a site manager and was now being forced to go back onto site. This appears more consistent with the claimant's concern about his role.

22. Mr Ahmed did inform the claimant that he would have to lay him off. I find that this was because the claimant did not want to go to Liverpool and there was no alternative work available at the time.

23. I accept that lay offs were not uncommon in the business, given the fluctuating nature of the work. The claimant was aware of other people who had been laid off in the past. Mr Ahmed could potentially have sought to enforce a move under the mobility clause but I accept his evidence that he has never done this, instead putting people on lay off if they do not wish to do the only alternative work available or if there is no alternative work available.

24. Mr Ahmed also informed the claimant during that conversation that a representative of the respondent would contact him to collect his work van, laptop and mobile phone. It is common ground that when someone is laid off, company equipment is collected immediately or very soon afterwards.

25. On 2 March 2017, the claimant had emailed Sarah O'Brien, HR adviser, asking for a copy of his employment contract that he had signed. Ms O'Brien sent him a copy of the contract. Mr Ahmed spoke to Ms O'Brien the same day. Mr Ahmed told Ms O'Brien about his conversation with the claimant about the job in Liverpool. He said that the claimant had advised him that he had been in touch with his union who had advised him not to take the job on site in Liverpool until they had seen a copy of his contract. Ms O'Brien confirmed to Mr Ahmed that she had sent the claimant a copy of the contract earlier that day.

26. On 3 March 2017, Ms O'Brien had a number of calls from Raymond Hocking, the claimant's trade union representative. I accept Ms O'Brien's unchallenged evidence about the content of these calls. Mr Hocking stated that it was an unreasonable request to travel to Liverpool as it was not within 14 miles of the claimant's home address and it was a breach of the claimant's contract. Ms O'Brien informed Mr Hocking that the claimant was not contracted to a permanent location and that his contract stated that he may be required to transfer to one work site or another to meet the requirements of the business. She confirmed that she had sent the claimant a copy of his contract by email as requested. She told Mr Hocking that she did not know how long the work in Liverpool was likely to last but her understanding was that it was temporary. She said there was no other work available at that time and that, if the claimant refused this work, it was highly likely that he would have to be placed on temporary lay off until further work became available. Mr Hocking said that they could not temporarily lay the claimant off work as this was illegal. Ms O'Brien explained that the claimant's contract clearly states that the company has the right to temporarily lay off individuals when necessary. Mr Hocking replied that the contract was not applicable and was outdated. Ms O'Brien also explained to Mr Hocking that the Liverpool site was within daily commutable distance for the claimant who had the use of a company commercial vehicle with fuel for business travel, including home to work journeys being paid for by the company via a fuel card. She also told Mr Hocking that the claimant would be paid either working time or travel time as appropriate from his home address to the Liverpool site and back to his home address so there was no detrimental financial impact to the claimant in accepting this alternative work.

27. Ms O'Brien wrote to the claimant on 6 March 2017 confirming his temporary lay off.

28. Within a few days of the claimant being laid off, Ms O'Brien attempted to contact the claimant to see whether he would be available to work a Saturday night shift in the Anglia region. She was unable to contact the claimant but left a message

on his mobile phone but did not receive a response. The claimant gave evidence that he picked up the message too late but, in any event, this would have been too far to go for one shift from his home in Crewe.

29. In an email dated 20 March 2017, relating to arrangements for collecting the van, laptop and mobile phone, the claimant made the allegation, for the first time, that, on 3 March 2017, when informing the claimant that he was on temporary lay off, Mr Ahmed had said to him, "because you got the union involved it has muddied the waters and made my life hard so I'm going to put you on lay off". Ms O'Brien replied to this in an email dated 20 March 2017, stating that, although they were aware that he had contacted his union to discuss the alternative work he was offered, this had nothing to do with the decision to place him on temporary lay off, which was entirely down to the shortage of work and the claimant's refusal to undertake the alternative work they had available for him.

30. The claimant's work's van, laptop and mobile phone were collected on 22 March 2017. There had been a delay in doing so due to a miscommunication.

31. The lay off understandably caused the claimant considerable financial difficulty. He explained to the Tribunal that, because he was still technically in the employment of the respondent, although not receiving pay (other than the very limited periodic statutory guaranteed pay), he was not able to obtain a reduction in his council tax or claim Jobseeker's Allowance.

32. On 29 March 2017, the claimant emailed a resignation letter to Ms O'Brien.

33. The claimant's resignation letter also raised a grievance regarding his temporary lay off. The claimant explained in some detail why he considered that he had been undertaking a role as a site manager or assistant site manager. He wrote in relation to events that:

"On Thursday 2 March 2017 Ifi Ahmed (Regional Director) informed me that I would have to relocate to Liverpool to work permanently on night shifts as a supervisor from the following Monday when I had been doing my current job role based in Manchester since November 2013 working days, thus changing my job role, location and time pattern with only two working days' notice and no discussion leading up to it. At the time I did inform him that this may cause issues with me with contact with my son who I share with an ex partner. I did ask if it was possible to instead reduce my hours at work in the AMCO Rail Irlam depot to three or four days a week if it was possible and would help the situation. He told me that this was not possible."

34. As previously noted, the claimant did not assert that he had asked Mr Ahmed if the move to Liverpool could be delayed to allow him to make suitable childcare arrangements. In relation to the telephone conversation with Mr Ahmed on 3 March 2017, the claimant asserted that Mr Ahmed had told him that as he had "got the union involved I had muddied the waters and made his life hard so he was going to have to put me on lay off". The claimant concluded his letter as follows:

"The above series of events have left me with several [sic] financial problems which have now led me to having legal problems with factors such as paying my child maintenance and my mortgage due to the fact that whilst on

temporary lay off I am technically still in AMCO Rail's employment even though I am not receiving any payment from them or being given any work by them. Therefore I feel that AMCO Rail have placed me in a position of constructive dismissal whereby I have no choice but to resign from my job in order to pursue alternative employment.

Therefore I would like you to please take this letter as notice of my resignation from AMCO Rail due to constructive dismissal."

35. The claimant did not state expressly in his letter whether he was resigning with immediate effect or giving notice to terminate at a future date.

36. Ms O'Brien replied by email on 29 March 2017, advising him that he was contractually obliged to give one week's notice so that this would mean that his employment with the company would terminate on 5 April 2017 and asked him to confirm that this was correct. The claimant replied to confirm that his employment would therefore terminate on 5 April 2017.

37. Ms O'Brien also wrote that a full investigation had begun into the grievance he had raised. She asked him to confirm whether or not he had any documents, evidence or comments he wished to be taken into consideration during the investigation and, if so, to send them to them by close of play on 3 April 2017.

38. In a further email on 29 March 2017, the claimant asked that all future communications be directed to his union representative. Ms O'Brien replied, writing:

"We appreciate that you have a union representative. However we will only communicate with you direct. There is no problem for you to communicate with your representative or for him to attend a formal grievance hearing with you, but any communications from us will be directed to yourself."

39. On 29 March 2017, the claimant notified ACAS of a potential claim.

40. On 4 April 2017, Mr Esterhuysen wrote to the claimant inviting him to attend a formal grievance hearing on 19 April 2017. The claimant did not attend this hearing or advise the respondent that he would not be attending. The claimant gave evidence that his trade union representative had advised him not to attend the grievance hearing but he did not inform the respondent of this at the time. The claimant gave evidence that he was aware of the grievance hearing. The respondent sought to contact the claimant on 19 April 2017 and spoke to the claimant's father who said he did not believe the claimant had received the letter. From the claimant's evidence, we now know that the claimant had received the letter.

41. In a document commenting on the respondent's response, the claimant alleged that Mr Esterhuysen had, on previous occasions, referred to him as a "soutie", which the claimant said was a derogatory term used by the Afrikaans population of South Africa to describe the population of South Africa with English heritage. Mr Esterhuysen denied this and also disagreed that the term was derogatory. I do not consider it necessary to make a finding of fact as to whether Mr Esterhuysen used this term in reference to the claimant and as to whether this could reasonably be regarded as derogatory, since the claimant accepted that this had no bearing on his resignation.

42. On 20 April 2017, Ms O'Brien emailed the claimant to ask him to confirm whether he would like the grievance hearing rescheduled or whether he would like them to deal with it in his absence and write to him to confirm the outcome. The claimant did not respond to this letter. The respondent sent a further letter on 25 April 2017 asking the claimant to contact Ms O'Brien urgently to confirm whether he would like the grievance hearing to be rearranged or for them to deal with the grievance in writing based on his letter of 29 March 2017, their investigations and any other documentation he may wish to submit. The claimant did not respond to the letter.

43. The ACAS early conciliation certificate was issued on 29 April 2017.

44. I was not shown any outcome to the claimant's grievance.

45. The claim form was presented to the Tribunal on 25 May 2017.

Submissions

46. Miss Clayton, for the respondent, produced a written skeleton argument and made supplementary oral submissions. In summary, her submissions were that the claimant's contract contained a mobility clause and a lay-off clause. The respondent acted in accordance with those terms on account of the temporary dip in work. There was, therefore, no breach of contract entitling the claimant to consider himself dismissed. She submitted that the crux of the case was whether the claimant requested additional time to consider the Liverpool job; the respondent says he did not. She submitted that, if the tribunal found in favour of the respondent on the facts, there was no basis for finding a breach of the implied duty of mutual trust and confidence. She submitted that if events were looked at objectively from either party's point of view, there was no basis for concluding that the respondent was in repudiatory breach of contract. Alternatively, Miss Clayton submitted that the claimant had unreasonably delayed in resigning; his resignation was more than three weeks from the original lay off and he did not chase up the Liverpool job or any other job in that time. She submitted that the delay prevents the claimant from relying on the lay off as the reason for dismissal. If the tribunal found the claimant had been constructively dismissed, Miss Clayton submitted that this was a fair constructive dismissal by reason of redundancy or some other substantial reason. The respondent had looked at alternative work for the claimant which had been refused; the respondent acted reasonably.

47. The claimant made oral submissions. He said that, after three weeks of not receiving pay, he had no choice but to resign. It had played on his mind that the respondent had said to ACAS that he had been occasionally in the office and was generally in the labour force. Paperwork listed him as a manager or an assistant site manager. The claimant said he was office based, not on a varying shift rota at a number of locations.

The Law

48. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) provides that an employee is to be regarded as 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."

49. An employee will be entitled to terminate a contract of employment without notice if the respondent is in fundamental breach of that contract and the employee has not lost his right to rely on that breach by affirming the contract by his conduct.

50. An implied term of an employment contract is the term of mutual trust and confidence. This is to the effect that an employer will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Limited 1981 ICR 666*, said that the tribunal must "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."

Conclusions

51. I consider first the reason for the claimant's resignation. In his resignation letter, the claimant referred to the respondent changing his job role, location and time pattern with only two working days' notice and no discussion leading up to it. He referred to raising the issue of problems that the move would cause for contact with his son and his request to work part time from Irlam that was refused. He did not refer to asking for more time to make arrangements before starting work in Liverpool. He referred to the serious financial difficulties caused by the lay off, concluding: "Therefore I feel that AMCO Rail have placed me in a position of constructive dismissal whereby I have no choice but to resign from my job in order to pursue alternative employment."

52. I found that the claimant was particularly concerned about what he considered to be a reduction in status, going from an office based managerial role, which he considered he had in substance, if not in contractual job title, to a more hands-on, site based role. The short notice was a concern for him. He was concerned about the impact on his contact with his son of the change in location and working pattern. However, I found that the claimant did not ask for more time to make suitable childcare arrangements and he did not refer to this in his resignation letter so conclude that lack of time to make alternative childcare arrangements was not a factor in his decision to resign.

53. The claimant did not resign immediately after the move to Liverpool had been proposed and he had been laid off. I conclude that the immediate cause of the claimant's resignation was because the lay off was causing him financial difficulties such that he felt he needed to resign so he could seek alternative employment. There was no further action of the respondent after the lay off that caused the claimant to resign. There was no "last straw" after the lay off leading to his dismissal. But for the financial difficulties the claimant experienced, it seems likely that the claimant would not have resigned. He would, more likely, have remained employed, possibly pursuing the grievance which he submitted on resignation. The lay off caused the financial difficulties which led to the claimant's lay off, so the lay off was a reason for the claimant's resignation. Whilst the claimant was aggrieved about the other matters he referred to in his resignation letter, I conclude that these were not reasons for his resignation.

54. I consider next whether the respondent breached the implied duty of mutual trust and confidence; did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties?

55. Given my conclusions as to the reason for the claimant's resignation, it is strictly necessary only to consider whether the respondent was in fundamental breach of contract by laying the claimant off as it did. The claimant alleged that Mr Ahmed said that, by involving the union, the claimant had "muddied the waters" so he was going to have to lay him off. If true, this could have indicated that Mr Ahmed had an improper motive for laying off the claimant, which could have constituted a breach of the implied duty of mutual trust and confidence. The claimant did not satisfy me, on a balance of probabilities, that this was said. I found Mr Ahmed's account of the conversation to be more likely: the claimant told Mr Ahmed that he would not be taking the job in Liverpool following advice from his trade union as he had been doing the role of a site manager and was now being forced to go back onto site. It is common ground that the work where the claimant had been based was running out. On 1 March 2017, Mr Wright and the claimant had informed Mr Ahmed that there was one week's work, or possibly slightly more, available for their team at that time. Mr Wright was transferred to a job in Barnsley. The other three members of the team were transferred to work on a site around Blackburn. Mr Ahmed found out about an opportunity in Liverpool which he offered to the claimant. It may be that Mr Ahmed could have insisted on the claimant moving to this job, relying on the mobility clause in the contract. He did not. When the claimant refused the job, Mr Ahmed put him on lay off. The claimant's contract contained a provision entitling the respondent to temporarily lay the claimant off when there was a temporary reduction in workload and there was no alternative work available to alleviate the problem. I conclude that Mr Ahmed acted, as he was entitled to do, under the contract in laying the claimant off where the work the claimant had been doing had come to an end and the claimant refused the alternative work in Liverpool. There was no evidence of any other work available at the time which would have been more suitable for the claimant but was not offered to him. I conclude that the respondent was not in breach of the implied duty of mutual trust and confidence by putting the claimant on temporary lay off.

56. Since I have concluded that the lay off and the financial consequences flowing from this were the reasons for the claimant's resignation, and I have concluded that the respondent was not in fundamental breach of contract by putting the claimant on lay off, that means that the claimant was not constructively dismissed and the complaint of constructive unfair dismissal fails.

57. I did, however, go on to consider whether the respondent was in fundamental breach of contract by its actions surrounding the lay off. The short notice of a move from an area (first Trafford Park then Irlam) where the claimant had been office based for the majority of his time throughout his employment beginning in 2013 did cause me to question whether the respondent was relying on its contractual rights relating to mobility and lay off in an unreasonable way. An employer can breach the implied duty of mutual trust and confidence if it exercises a contractual right in an unreasonable way. Mr Ahmed only notified the claimant of the Liverpool job a few days before the claimant would need to start. I accept that Mr Ahmed did not find out about the job until after the discussion on 1 March about workload when he realised the urgent need to find alternative work for the claimant and others. I had no

evidence about when the respondent (as opposed to Mr Ahmed personally) would have known of a need for someone to start in Liverpool on Monday 6 March 2017. However, the claimant was clearly aware of the reduction in work; he and Mr Wright informed Mr Ahmed that there was only a week's work, or possibly slightly more, left for the team as at 1 March 2017. In these circumstances, the claimant must have been aware of the possibility that he would need to move to another job or be temporarily laid off. I found that, although the claimant had raised issues about contact with his child and requested part time working in Irlam, which was refused, the claimant did not ask for more time to make arrangements for contact with his child before starting the job in Liverpool; he refused the job in Liverpool for reasons other than the difficulty in making arrangements at short notice. I conclude, in these circumstances, that the respondent was not in breach of the implied duty of mutual trust and confidence by requesting that the claimant move to the job in Liverpool at short notice and then laying him off when the claimant refused.

58. I have also considered whether the respondent was in breach of the implied duty of mutual trust and confidence by requesting that the claimant move to a job which the claimant regarded as a demotion. The claimant was employed as a civil craftsman. It may be that the respondent was entitled to require the claimant to do the job in Liverpool, whether or not, in practice, the claimant had been doing a more supervisory, office based role for most or all of his employment. However, it is not necessary for me to decide whether that was the case. The respondent did not impose the move on the claimant. It offered the post to the claimant as alternative work and, when the claimant refused this, the respondent put the claimant on temporary lay off as it was entitled to do. There is no evidence that there was more suitable available work of a supervisory, office based nature, which could have been offered to the claimant at the time. I conclude that the respondent was not in breach of the implied duty of mutual trust and confidence by requesting that the claimant move to the job in Liverpool.

59. I conclude that the respondent was not in fundamental breach of contract and the claimant did not resign in response to such a breach. I conclude that the complaint of constructive unfair dismissal is not well founded.

Employment Judge Slater

Date: 7 December 2017

RESERVED JUDGMENT AND REASONS

SENT TO THE PARTIES ON
12 December 2017

FOR THE TRIBUNAL OFFICE