



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106415/2019

Held in Dundee on 30 September and 1 and 2 October 2019

Employment Judge M Sutherland

Mr D Hill

**Claimant
Represented by:
Mr K McGuire
of Counsel**

Robertson Construction Tayside Limited

**Respondent
Represented by:
Mr J Boyle
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that-

1. The claimant was not constructively dismissed
2. The claimant was not retained under a contract of apprenticeship
3. The respondent is ordered to pay the claimant the sum of Four Hundred and Twenty One Pounds Forty Three Pence (£421.43) in respect of holiday pay.

REASONS

Introduction

1. The claimant made a complaint of constructive unfair dismissal, breach of contract and unlawful deduction from wages (including holiday pay).
2. The claimant had made a claim for unlawful deduction from wages in respect of expenses which was withdrawn. It was also agreed between the parties that the claimant was entitled to 7.5 days' holiday pay but the rate of pay remained in dispute.
3. On unopposed application by the claimant his breach of contract claim was amended to include a claim that his contract was one of apprenticeship and not employment, and he was therefore entitled to loss of earnings in respect of the unexpired period of his 6 year apprenticeship and also loss of opportunity.
4. The claimant was represented by Mr McGuire of Counsel. The respondent was represented by Mr Boyle, Solicitor.
5. The issues to be determined are as follows –
 - a. Whether the claimant's contract with the respondent was of service (employment) or apprenticeship? If he was employed under a contract of apprenticeship, was the claimant entitled to compensation for premature termination? If not, was the claimant entitled to 4 week's contractual notice or 2 week's statutory notice?
 - b. Was there a repudiatory breach of the claimant's contract? If so, was the breach a factor in the claimant's resignation? If so, did the claimant affirm the breach? If not, what compensation should be paid by way of a basic and compensatory award?
 - c. Whether the amount properly payable for monthly wages and holiday pay in respect of the period from 27 August 2018 to termination ought to have been calculated with reference to a salary of £18,000 rather than the £17,000 as paid amounting to an unlawful deduction from wages?

6. The respondent accepted that if the claimant was constructively dismissed that dismissal was unfair. Accordingly it was not necessary to determine whether the respondent had a potentially fair reason for any dismissal or whether the respondent acted reasonably in treating that as a sufficient reason for any dismissal.
7. The claimant gave evidence on his own behalf. The respondent led evidence from Kevin Dickson, Regional Managing Director.
8. The parties lodged an agreed set of documents. Additional documents were lodged during the hearing.
9. The parties made closing submissions.
10. The following initials are used by way of abbreviation in the findings in fact:

Initials	Name	Title
DG, OM	Donna Galbraith	Office Manager
GA, PCQS	Graham Anderson	Pre-construction Quantity Surveyor
IH, CM	Ian Hill	Commercial Manager
KD, MD	Kevin Dickson	Regional Managing Director
MB, CD	Mark Blyth	Commercial Director

Findings in fact

11. The Tribunal makes the following findings in fact:
12. The claimant was employed by the respondent as a Trainee Quantity Surveyor from 29 August 2016 until 7 January 2019. The respondent is a construction company based in Dundee and has around 80 employees. It forms part of the Robertson Construction Group which has around 3200 employees. The respondent has access to the Roberson Group policies and procedures and their dedicated HR function.
13. In correspondence with the claimant's father in June 2016 regarding the claimant's potential employment with the respondent, his uncle IH stated: "That's the apprentice position fully signed off/ approved by the top dogs!!. Stage 1 complete". The post was then advertised as that of a Trainee Quantity Surveyor.

14. The terms of the contract between the claimant and the respondent repeatedly described that as contract of employment and made no reference to “apprentice” or “apprenticeship”. The stated main purpose of the job was “to assist the Project Surveyors in the day to day running of contracts”. The stated duties of the job were: assisting with production of valuations; compiling material take-offs from plans; assisting with the compilation of tenders; preparing cash flow forecasts; preparing surveying reports; visiting sites and attending client site meetings; attending and contributing to project team meetings; and assisting the Project Surveyor in all day to day duties. The claimant received a significant amount of on the job training regarding these duties (supported and supplemented by his degree course) and was then expected to undertake that work. The consistent feedback from young people was that the respondent failed to provide structured development or training after induction.
15. The claimant was enrolled in the QS degree course at Napier University. The respondent met the fees for that course. The claimant was absent from his work with the respondent one day a week during term time to enable him to attend that course. The degree course was to take him six years to complete. Attainment of a higher national certificate in QS (but not a degree) was one of four targets specified in his job description.
16. Under the terms of the contract between the parties, following successful completion of a probationary period of three months, the position was made permanent and could be terminated on one month’s notice by the claimant and on four weeks’ notice by the respondent (where the claimant had up to four years’ service).
17. The claimant was initially employed on a salary of £14,000. Salary reviews were carried out annually. The claimant’s salary was increased to £17,000 on 1 September 2017. This was accompanied by a written contract amendment. The claimant was also entitled to a 4% employer pension contribution. The wages paid were significantly higher than that paid to the respondent’s trade apprentices.
18. On 28 July 2018 the claimant entered into a recoupment agreement with the respondent whereby the claimant agreed to re-pay a proportion of the

course fees if he terminated his employment within two years of completion of that part of the course for which payment was made. The respondent hoped to be able to retain staff who had trained with them.

19. Trainee QSs work in one of two teams – pre-construction ('pre-con') and construction. The pre-con team is based in the office and the construction team out on site. The pre-con team attend to tender and planning issues. The construction team attend to the build. The trainees are rotated between those teams to gain experience of both types of work and according to the needs of the business. The claimant started in pre-con in the office and moved to construction on site around December 2017. The construction team is headed up by MB, CD ('Commercial Director'). The phrase 'commercial team' was not used consistently. At times the phrase indicated the pre-con and construction teams taken together and at times it indicated the construction team. The MD was approachable and had an 'open door' policy.
20. Commercial meetings take place quarterly. These meetings were chaired by MB, CD (Commercial Director). The focus of these meetings is on operational /construction issues rather than on pre-con issues. Accordingly the pre-con QSs (IH, CM and GA, PCQS) were not expected to attend. (IH, CM is the claimant's uncle (his father's brother).) Given their rotation between pre-con and construction, all trainee QSs (including the claimant) were expected to attend and received invites to attend those meetings.
21. On 6 July 2018 the claimant was subject to a random drug test by the respondent which found that he had cannabis in his blood. The claimant explained that this was out of character and that he was not a habitual drug user. The respondent takes a zero-tolerance approach and their disciplinary policy states that illegal drug use is treated as gross misconduct. The disciplinary process lasted around four weeks. The claimant was dismissed for gross misconduct on 2 August 2018 by MB, CD. The claimant appealed against his dismissal. At the appeal hearing on 21 August 2018, KD, MD explained that the respondent did not want to put him on the scrap heap and that they wanted him to return to work rather than to dismiss him. Claimant was asked if he wanted to return to work. In response the claimant advised that he did want to return but wanted to

know the terms of his return in relation to bonus, salary progression and car allowance. The claimant also advised that when he was in the pre-con team he had been doing well but when he moved to site he didn't know what he was meant to be doing and his performance had dropped. The claimant also advised that he hadn't been doing well at university. In response KD, MD stated that: a final written warning would be issued which would remain on his HR file for 18 months; bi-monthly drug testing would be undertaken for a period of 12 months; a Performance Improvement Plan would be put in place in light of issues with the claimant's performance; a mentor would be appointed to support the claimant but his attitude would have to change and he would have to prove that he wanted to be a QS; he would require to re-sit the failed exams; and that in line with company policy the claimant was not entitled to a salary increase or a bonus because of the final written warning and that there would therefore be no salary increase or bonus. The claimant (via his father) asked whether there would be any kind of settlement figure if he were to instead be allowed to resign. KD, MD explained that he would only get one month's notice because he was confident in their disciplinary process.

22. After the appeal hearing and on the claimant's behalf, the claimant's father entered into extended negotiations via email with KD, MD regarding the two options: returning to the respondent on the proposed terms or resigning on one month's notice with an agreed reference. On 22 August 2018 the claimant (via his father) sought for the recoupment agreement to be waived in recognition of the risk that "if he comes back and things don't work." In reply KD, MD advised that he would not pay a fee penalty if he progressed with his studies.
23. On 22 August 2018, the claimant (via his father) wrote to KD, MD advising that the claimant had been told that a car allowance of £450 a month would be payable at the start of his third year. KD, MD was unable to confirm this and in reply he agreed to honour this by promoting him to Grade B which has the option of a car allowance.
24. On 22 August 2018, the claimant (via his father) wrote to KD, MD advising that the salary review was due to take place in August and that this was

anticipated to be £23k. On 23 August 2018 KD, MD replied advising that there would be no salary review and “salary will remain as current £17,000,” group policy does not permit a salary review in the circumstances but as a compromise a performance based salary review would be undertaken within 6 months. The claimant further replied that afternoon stating: “Conditions associated with continuation of employment: my current salary remains at £18,000 (not £17,000) and there is not an incremental increase just now. This will be assessed in 6 months); no discretionary bonus is payable; car allowance – Mark confirmed at my review last year I would receive an allowance from the commencement of year 3 and on that basis I recently committed to a personal contract purchase of a car. I look forward to this being honoured; there is no university fee penalty if my employment ceases within 18 months final written warning period”. KD, MD replied that evening stating “Thank you and all agreed”.

25. The claimant was re-instated with effect from 27 August 2018. The claimant was put back a year at University in light of his resists which were due summer 2019. Following re-instatement the claimant did not attend university whilst awaiting his resists.
26. On 31 August 2018 KT, MD wrote to the claimant to advise the outcome of the appeal hearing. The letter stated that the respondents would:

“restate your employment with [the respondent] with immediate effect subject to the following conditions: you will be subject to bi-monthly drug and alcohol testing for a period of 12 months; you will be appointed a mentor; you will be placed on a performance improvement plan; you will continue your University place, including resetting your failed exams and will not pay any fee penalty if you progress with your studies; you will receive a performance based review in 6 months and your salary will be assessed at this time; no bonus will be paid for 2017/2018; and the agreement of increasing to grade B, with a car allowance of £400 per month will be honoured; however as you were under the influence as defined in our Substance Abuse Policy (...) due to a positive result for drugs as part of the random drug testing programme, you are hereby issued with a final written warning (this letter) which will remain live on your

file for a period of 18 months period. Any further instances of a similar nature will be dealt with in line with our disciplinary policy and may ultimately result in dismissal. Payroll have been advised on your reinstatement and will process your August salary”.

27. The claimant was apprehensive about returning to work after his dismissal on 2 August 2018. Prior to his dismissal the claimant had been working in the construction team. Concerns had been raised regarding the claimant’s performance in that team. It was the head of construction, MB, CD, who had taken the decision to dismiss the claimant. The respondent was concerned that it would be stressful for the claimant to immediately return back to the construction team in those circumstances. The claimant was advised he was returning to pre-con based in the office rather than construction based on site. The claimant was advised that this was temporary and he would be rotated back to construction. GA, PCQS was appointed the claimant’s mentor. The claimant’s uncle IH, CM was appointed as his line manager. In light of the issues with his performance, the claimant was allocated less work than the other trainee QSs.
28. Following conversations with GA, PCQS and his uncle IH, CM, the claimant understood that he was not to attend the commercial meetings with the construction team because he was currently part of the pre-con team. On 31 August 2018 the claimant wrote to HR copying in KD, MD advising that *“I was told today I am no longer part of the commercial team which comprises of some 15 or so QS and have been excluded from attending the commercial team meeting today @ 14:00 hrs”*. KD, MD replied immediately stating *“For the avoidance of doubt, your role is the same as it was before, however working within the office as part of the pre-construction team. As you are aware the surveyors are rotated between pre-construction and site to give them the full rounded experience ... you should have been part of the commercial meeting and will find out why you have been left out ... Further rotation will be identified, as new sites are introduced, which will then dictate the revised reporting lines. Trust this is clear and please come and speak to me should you remain concerned”*.
29. A training scheme called the Emerging Talent Programme was set up in September 2018. On 19 September 2018 KD, MD excluded the claimant

from the pilot event taking place on 14 November 2018. He did not consider that that the claimant currently qualified as emerging talent in light of his re-sist and the issues with his performance.

30. On 2 October 2018 the claimant advised his uncle IH, CM that he hadn't yet been paid his car allowance for month end August and September and this was raised with HR. HR advised that they had not yet received the Contract Amendment and asked for this to be arranged now but backdated to August.
31. On 16 October 2018 the claimant was advised that he had been considered for but had not been allocated a place at the Roberston Group Catalyst Conference for Young People taking place on 30 October 2018. Five young people were allocated a place and six young people were not including the claimant and other trainee QSs.
32. The respondent was concerned that the claimant might be suffering from stress. The respondent arranged for the claimant to attend counselling sessions with DG, OM who is the respondent's mental health champion.
33. On 23 October 2016 the claimant attended a return to work interview with KD, MD. The claimant had been absent with a chest infection but had advised that he had some panic attacks leading up to his return to work following his dismissal. It was noted that the Performance Improvement Plan *"has been put on hold to ensure [the claimant] is in the best place to commence. Likely this will commence in the next 2 weeks depending on health and progression (latest end November)."* The performance review plan was an opportunity to address and remedy issues with performance but there was a risk of dismissal if the issues were not remedied. KD, MD had concerns with the claimant's performance and that the performance improvement plan would therefore be a negative rather than a positive experience. At that meeting the claimant advised KD, MD that he was unsure whether he wanted to continue training to become a QS. The Performance Review Plan was never implemented.
34. On 24 October 2018 the respondent issued to the claimant a written Amendment to Contract applicable from 1 September 2018. The amendment stated that the claimant's grade would increase to grade b and

he was eligible for a Car Allowance in accordance with the Company Car Allowance policy which was enclosed. The claimant was instructed to complete the enclosed Company Car Allowance/ Company Car Form and return it to the HR department. The Company Car Allowance Agreement form contained a declaration to be completed and signed by the employee regarding the car registration and mileage, that current valid car insurance including business travel is in place, that car breakdown cover is in place and that the car is fully serviced. The Company Car Allowance Agreement also specified the amount of the car allowance and was to be authorised by the respondent. The Company Car Allowance Agreement was signed by the claimant on 26 October 2018. The Company Car Agreement was then signed by KD, MD on behalf of the respondent on 31 October 2018. The signed Company Car Agreement form was not returned to HR but was instead found on the claimant's desk by DG, OM during a clear out after the claimant's resignation.

35. The claimant was invited to the Commercial Meeting on 2 November 2018. He remained on the distribution list for the Commercial Meetings when that meeting was cancelled on 31 October 2018.
36. The claimant was absent from work from 22 November 2018 until the termination of his employment. The claimant was signed off work with stress from 26 November 2018 until the termination of his employment.
37. On 12 November 2018 the claimant submitted to the respondent a mileage expenses claim for £140.64. The applicable rate was lower where employee was in receipt of a car allowance. Given that he had not yet been paid the car allowance, the claimant utilised the higher rate. On 13 November 2018 the respondent advised the claimant that the expenses claim was incorrect specifying various errors and asked him to resubmit the form. During a period arising prior to his dismissal on 2 August 2018, his expenses had remained outstanding (submitted but not paid) for three months.
38. On 30 November 2018 the claimant submitted a grievance to his mentor GA, PCQS. The grievance asserted in summary that: he had been excluded from attending commercial meetings; he had been removed from

the commercial team; he had been excluded from attending training courses including Emerging Talent and the Catalyst Conference; that the agreed Performance Improvement Plan had not commenced; that little work had been allocated to him; that his car allowance was still outstanding; and that his mileage expense claim was outstanding.

39. Following receipt of his grievance GA, PCQS called the claimant to discuss matters on numerous occasions but received no reply or response. On 13 December 2018 GA, PCQS wrote to the claimant asking after his health and asking him to make arrangements to meet informally and discuss progress in the matters he has raised. In recognition that he may be seeking an early response GA, PCQS suggested meeting at the office on 17 December. He further advised that *“if this not suitable, please let me know and we can make a different arrangement”*. The respondent’s grievance procedure provide that once a grievance has been set out in writing the employee should be invited to a meeting to discuss the grievance. The claimant’s father replied on the claimant’s behalf advising that the claimant was currently signed off with stress and attending a meeting would more than likely be detrimental to his health. It also stated that it would be beneficial in advance of any meeting to know the current state of progress and an update on progress was sought. He further stated that *“Based upon [the claimant’s] health and unknown ‘progress’ a meeting is not suitable therefore David would like to consider your proposal of a different arrangement”*. GA, PCQS replied on 18 December 2018 advising that he was sorry to hear that the claimant remained unwell, that he required to speak directly with the claimant on work related affairs, and that he would progress matters directly with him once his health improves (noting that he was signed off until 23 December).
40. There was no further contact or communication between the claimant (either directly or via his father) and the respondent until receipt of his letter of resignation. Claimant remained off work throughout that time. The respondent’s offices closed on 23 December for their 2-week Christmas shut down.
41. The claimant resigned without notice on 7 January 2019. His hand delivered letter of resignation stated -

“I refer to my grievance letter dated 30 November 2018 and confirm [the respondents] continued 5 months failure to pay my car allowance. [The respondents] have also refused to pay my November expenses, and failed to update me on any issue raised in my letter. [The respondents] have fundamentally acted in a way that makes my position untenable and I resign with immediate effect from my position as trainee quantity surveyor. I will lodge constructive dismissal papers shortly with ACAS to recover all sums that are reasonably and properly due to me however if [the respondents] wish to resolve matters out with said proceedings would be willing to enter into without prejudice discussions. Obviously such discussions would have to be held soon due to ACAS timescales.”

42. The claimant started work with Denfind Stone Limited, a quarry business, on 9 January 2019 doing consultancy IT work. At the time of starting work the claimant had been living with the owner of the business. The claimant had not previously been looking for other work and was ‘in the right place at the right time’. The claimant now works full time for Denfind Stone. Since his dismissal the claimant has not applied for work elsewhere. For the period from 7 January 2019 until 25 June 2019 the claimant incurred business costs of £3,805 in respect of his car (including finance, insurance, tax, maintenance and fuel), his mobile phone and laptop computer and tax and national insurance contributions. For the same period the claimant made gross earnings from his business of £9,668.79.
43. On 24 January 2019 and having found the Car Allowance Agreement Form, the respondent paid to the claimant the back dated car allowance.
44. In June 2019 the Robertson Group issued their Resource Planning Guidance for 2020 Young Person Strategy. It recognised one year fixed term modern apprenticeships; trade apprentices regarding electrical, plumbing and construction; trainees including QS; and degree apprentices which were available only in England and Wales.

Observations on the evidence

45. The standard of proof is on balance of probabilities, which means that if the tribunal considers that, on the evidence, the occurrence of an event

was more likely than not, then the tribunal is satisfied that the event in fact occurred.

46. KD, MD came across as a supportive and approachable manager. He did not seek to answer questions in a self-serving manner and came across as both credible and reliable. At times the claimant came across as opportunistic and sought to put an unreasonable interpretation on events.
47. The claimant asserted that he believed his salary had increased to £18,000 on or around July 2017. The claimant was in training to be a Quantity Surveyor. His gross monthly wages are stated on his payslips. The claimant was keen to understand the financial implications of his return to work. The claimant did not raise any issue with the payment of his wages during the course of his employment (including in his grievance or resignation). It is not considered credible that the claimant truly believed he was in receipt of a salary of £18,000.
48. The claimant asserted that he would be retained by the respondent as a QS for two years following completion of his degree course having regard to the terms of the recoupment agreement. This does not reflect the express terms of the recoupment agreement. The recoupment agreement stated that the claimant must re-pay a proportion of the course fees if he terminated his employment within two years of completion of that part of the course for which payment was made. There is no reference to retention or termination by the respondent. Whilst it is reasonable to infer that the respondent may well want to retain staff where they have paid for their training, the recoupment agreement does not provide a reasonable basis upon which to assert that a trainee would as a matter of course be retained for two years.
49. The claimant asserted that he had been advised that he had been removed from the commercial team. The phrase 'commercial team' was not used consistently. At times the phrase indicated the pre-con and construction teams taken together and at times it indicated the construction team. The claimant had been temporarily moved from the construction team to the pre-con team. Any reference to his removal would have been to his

removal from the construction team and would have been understood by him as such.

50. The claimant asserted that little work had been allocated to him. Whilst there was evidence that less work had been allocated to him there was no evidence that little work had been allocated to him compared to his peers or otherwise.
51. The claimant asserted that he had not stated that he was unsure whether he wanted to continue training to become a QS. There were issues with the claimant's performance at work and at university prior to his dismissal on 2 August. At his disciplinary appeal hearing the claimant required time to consider whether he wanted to accept the respondent's offer of re-instatement. As a condition of his re-instatement he sought suspension of the recoupment provisions in case things don't work out. Following the termination of his employment with the respondent, the claimant did not seek to continue his QS training either with another construction firm or through full time studies. (Prior to his appointment with the respondent the claimant had successfully applied for the full time QS degree course – this was changed to part time following his appointment). The claimant did not take his re-sit fixed for summer 2019. The claimant instead commenced IT work. It was apparent that the claimant had been unsure for some time whether he wished to continue training to become a QS and it is considered likely that he expressed this to KD, MD.
52. The claimant asserts that he was not given the opportunity to apply for the Robertson Group Catalyst Conference on 30 October 2018. It is not known when the applications were circulated and these may have been circulated prior to the claimant's reinstatement on 27 August 2018. In any event it is apparent from the evidence that the claimant was considered but was not allocated a place.
53. The claimant asserts that he left the Car Allowance Agreement form with KD, MD to return to HR. KD, MD asserts that he handed back the form to the claimant for him to return it to HR. The Contract Amendment letter requires the Car Allowance Agreement to be signed and returned to HR. The claimant was chasing up payment of the car allowance. Whilst it was

signed it was not returned to HR. The claimant asserts that this was because of inadvertence on the part of KD, MD. KD, MD asserts that this was because of inadvertence on the part of the claimant. Both parties appeared entirely genuine in their belief that the other was responsible for its return. KD, MD was entirely credible in his evidence that DG, OM had found it on the claimant's desk during a clear up after his resignation. The claimant was suffering from stress. The claimant had previously misplaced other items on his desk. It is considered likely that the claimant had simply forgotten that the form was on his desk.

54. The claimant asserted that in their reply to his grievance letter the respondent was proposing an alternative arrangement to holding a meeting with him to discuss matters and that the respondent reneged on that proposal. This is not a reasonable interpretation of the terms of that letter. It is apparent from the terms of the letter that a meeting was considered necessary but there were alternatives regarding the time or place or formality of that meeting. Nevertheless it was apparent from the reply sent on behalf of the claimant that the claimant was seeking a written response to his grievance as an alternative arrangement.

Submissions

55. The claimant's submissions were in summary as follows –
- a. The primary purpose of the claimant's engagement was training. The duration of his contract was six years which aligned to the length of his university course. If he had been based in England the claimant would have been a degree apprentice. The claimant's engagement met the test of apprenticeship.
 - b. The claimant resigned for the reasons set out in his letter of resignation. Those reasons amounted to a repudiatory breach of an express term and separately amounted to a breach of the implied duty of trust and confidence.
 - c. On his return to work the claimant had a contractual entitlement to a car allowance which was not paid for four months. There

was no affirmation because the claimant complained about the issue. The claimant was credible and reliable and the form was left with the MD to return to HR. Complaining about the failure to pay did not make sense if he was still in possession of the form.

- d. The claimant was not seeking to rely upon the payment of his wages at £17,000 rather than £18,000 as a repudiatory breach.
- e. There was a breach of the implied duty of trust and confidence for the reasons set out in the claimant's grievance: he had been excluded from attending commercial meetings; he had been removed from the commercial team; he had been excluded from attending training courses including Emerging Talent and the Catalyst Conference; the agreed Performance Improvement Plan had not commenced; little work had been allocated to him; his car allowance was still outstanding; and that his mileage expense claim was outstanding. The last straw was the failure to progress the grievance and to update him.
- f. The claimant is entitled to an uplift of 25% for failure to progress the grievance.
- g. The respondent agreed to the salary increase as admitted in the Response.
- h. The claimant's apprenticeship was terminated by the respondent and the claimant is entitled to the balance of his earnings for the remainder of his six year apprenticeship.

56. The respondent's submissions were in summary as follows –

- a. The claimant is described an employee by the parties. The contract was not for a fixed term. There was no structure to the training and it was not the main purpose of the contract.
- b. There was no breach of the implied term of trust and confidence. The claimant was discouraged from attending a commercial meeting because of a misunderstanding. He was

not excluded from all quarterly commercial meetings. The claimant was temporarily re-assigned to the pre-con team. The claimant was not removed from the commercial team. The claimant was excluded from attending a training course for emerging talent because he did not qualify in light of his re-sit and the issues with his performance. He was considered but not allocated for the Catalyst Conference taking place on 30 October. The respondent did not allocate little work to him; they allocated less work because of issues with his performance. The respondent delayed putting the claimant on an improvement plan because of concerns with his mental health and performance. The claimant went off sick before the improvement plan could be commenced.

- c. Entitlement to the car allowance was conditional upon return of the car allowance form to HR. The MD was credible and reliable in his evidence that the office manager had found the form when clearing out the claimant's desk.
- d. If the entitlement was not conditional and the car allowance has been outstanding for five months the claimant delayed too long on resigned and has acquiesced to the breach.
- e. The claimant's progress of the grievance was in line with the ACAS Code which requires the employer to arrange a meeting to discuss matters. The alleged failure to progress the grievance was an innocuous act and did not amount to a last straw.
- f. The reason for the claimant's resignation was not the last straw but the offer of work with a close friend.
- g. The claimant has not applied for other work or training and has not mitigated his losses.
- h. Any award should be decreased in light of a failure to follow the ACAS Code.

- i. Concept of constructive dismissal does not apply to termination of an apprenticeship at common law.
- j. The objective intention of the parties is that his salary on reinstatement was to remain unchanged (i.e. at £17,000 and not £18,000).

Discussion and decision

Contract of Apprenticeship or employment

57. Whether there is a contract of service or apprenticeship is determined by the common law. An apprentice is almost always retained under a limited term contract (*Wallace v C A Roofing Services Ltd [1996] IRLR 435*). An apprenticeship cannot ordinarily be terminated at will during its term (*Flett v Matheson [2006] IRLR 277, CA*). The essential feature of an apprenticeship is that the apprentice is to be taught a trade or calling (*Wiltshire Police Authority v Wynn [1980] ICR 649, CA*) whether by the employer or a third party. The teaching of a trade or calling is the primary purpose – undertaking work for the employer is secondary. The use of the label “apprentice” by the parties is indicative but not determinative unless nature of the relationship is ambiguous (*Young & Woods Ltd v West [1980] IRLR 201*). The payment of a lower wage is also indicative. An apprentice wrongfully dismissed may be entitled to enhanced damages by reason of the loss of prospects as a tradesman on completion of their apprenticeship (*Dunk v George Waller & Son Ltd [1970] 2 All ER 630, [1970] 2 QB 163, CA*).
58. The claimant was not retained under a limited term contract for either six years or for the duration of his training. He was retained under a permanent contract which could be terminated at will. Whilst he was being trained as a quantity surveyor that was not the primary purpose of the contract. Undertaking work for the employer was of equal if not greater standing. The contract was described by the parties as a contract of employment and not of a contract of apprenticeship. The wages paid were significantly higher than that paid to their trade apprentices. Applying the common law to these facts the claimant was retained under a contract of service and not a contract of apprenticeship.

Unfair dismissal

59. 'Dismissal' is defined in s 95(1) ERA 1996 to include 'constructive dismissal', which occurs where an employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct (s 95(1)(c)).
60. The test of whether an employee is entitled to terminate their contract of employment without notice is a contractual one: has the employer acted in a way amounting to a repudiatory breach of the contract or shown an intention not to be bound by an essential term of the contract: (*Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*).
61. The issues in this case are as follows – Was there a repudiatory breach of the claimant's contract? If so, was the breach a factor in the claimant's resignation? If so, did the claimant affirm the breach?

Was there a repudiatory breach of contract?

62. There must be a breach of contract by the employer. The breach must be "a significant breach going to the root of the contract" (*Western Excavating*). This may be a breach of an express or implied term. The essential terms of a contract would ordinarily include express terms regarding pay, duties and hours and the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (*Malik v Bank of Credit and Commerce International Ltd [1998] AC 20*).
63. The breach may consist of a one-off act amounting to a repudiatory breach. Alternatively there may be a continuing course of conduct extending over a period and culminating in a "last straw" which considered together amount to a repudiatory breach. The "last straw" need not of itself amount to a breach of contract but it must contribute something to the repudiatory breach. Whilst the last straw must not be entirely innocuous or utterly trivial it does not require of itself to be unreasonable or blameworthy (*London Borough of Waltham Forest v Omilaju [2005] IRLR 35*).

64. Whether there is a breach is determined objectively: would a reasonable person in the circumstances have considered that there had been a breach. As regards the implied term of trust and confidence: *"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of..."* (Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT).
65. The claimant asserts he had a contractual entitlement to a car allowance which was not paid. The claimant's entitlement was conditional upon completion and return to HR of the Company Car Allowance Agreement Form. The form was completed but was not returned to HR because of inadvertence on the part of the claimant. The claimant therefore had no contractual entitlement to a car allowance. Whilst KD, MD accepted that a failure to pay car allowance for four to five months was serious and would justify resignation these comments are only relevant where there is a contractual entitlement to that allowance.
66. The claimant also asserted that there was a breach of the implied duty of trust and confidence for the reasons set out in the claimant's grievance: he had been excluded from attending commercial meetings; he had been removed from the commercial team; he had been excluded from attending training courses including Emerging Talent and the Catalyst Conference; the agreed Performance Improvement Plan had not commenced; little work had been allocated to him; his car allowance was still outstanding; and his mileage expense claim was outstanding. The last straw was the failure to progress the grievance and to update him.
67. The claimant understood that he had been excluded from attending a commercial meeting. That arose because of a misunderstanding which was resolved by KD, MD on 31 August 2018.
68. The claimant was advised that he had been temporarily removed from the construction team as part of the plan for his reinstatement. Any reference to his removal was to his removal from the construction team. There was

no reasonable basis for asserting that he had been removed from the commercial team in the sense of being excluded from both the pre-con and the construction team.

69. The claimant was excluded from attending the Emerging Talent training by KD, MD because he did not qualify as emerging talent on account of issues with his performance at work and university. The claimant was considered for the Catalyst Conference but like other trainee Qs was not selected. That exclusion and non-selection was reasonable.
70. The agreed Performance Improvement Plan was delayed in discussion with the claimant because of concerns regarding his health and performance progression. The claimant went off sick before the period of delay had expired. The decision to delay the Performance Improvement Plan was reasonable in the circumstances.
71. The claimant did not have little work allocated to him. He had less work allocated to him because of concerns with his performance.
72. The car allowance was outstanding. KD, MD regarded the car allowance situation as a bit of a mess. The initial delay was caused by the failure to issue the Contract Amendment documentation which wasn't issued until October 2018 (although the claimant was advised that the payment would be backdated). Thereafter the car allowance was outstanding because of inadvertence on the part of the claimant who had failed to return the Car Allowance Agreement Form to HR.
73. The claimant's mileage expense claim was outstanding because issues had been raised with his expenses claim. There was no specified time period for payment of expenses, and it was not unusual for expenses to take months to progress.
74. The respondent did not fail to progress the claimant's grievance. The respondent wanted to meet with the claimant to discuss his grievance and that is entirely reasonable.
75. Objectively considered from the perspective of a reasonable person in the position of the claimant these events when considered together did not constitute a course of conduct calculated or likely to destroy or damage

the relationship of trust and confidence. There was no repudiatory breach and accordingly the claimant did not terminate his contract in circumstances in which he was entitled to terminate it. The claimant was not therefore constructively dismissed and instead resigned voluntarily.

76. In the circumstances it is not necessary to consider whether the alleged breach was a factor (i.e. played a part) in the claimant's resignation or whether the claimant affirmed the alleged breach.

Holiday Pay

77. It was agreed between the parties that the claimant was entitled to 7.5 days' holiday accrued but unused as at the termination date. It was also agreed that the daily rate of pay was £56.19 or £58.68 depending upon whether his annual salary at termination was £17,000 or £18,000. The explicit and objective intent of the parties was that the claimant was to "remain" at his "current" salary and "there is not an incremental increase just now". That current wage was £17,000 and not £18,000. The reference to £18,000 was made inadvertently and in error.
78. Accordingly the claimant is due payment of £421.43 (7.5 x £56.19) in respect of holiday pay.

**Employment Judge:
Date of Judgment|:
Date sent to parties:**

**Michelle Sutherland
16 October 2019
17 October 2019**