THE INDUSTRIAL TRIBUNALS

CASE REF: 17941/18IT

CLAIMANT: **David Bolton**

RESPONDENTS: **1. David Hogg (previously trading as D.A.S.H. Books Ltd)**
2. David Hogg

DECISION

The title of the first named respondent is amended to: David Hogg (previously trading as D.A.S.H. Books Ltd.)

The tribunal is unanimously satisfied that:

1. The claimant was unfairly constructively dismissed. The first named respondent is ordered to pay to the claimant the sum of £3,150.00.

2. The first named respondent failed to pay to the claimant holiday pay in the amount of £2,990.00. The first named respondent is ordered to pay to the claimant £2,990.00.

3. The first named respondent made an unlawful deduction from the wages of the claimant for his “lying week”. The first respondent is ordered to pay to the claimant the sum of £525.00.

4. The first named respondent failed within a reasonable time to provide the claimant with particulars of his contract of employment. The first respondent is ordered to pay to the claimant £1,050.00.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Browne**

Members: **Mr S Kearney**
Mr R Robinson

APPEARANCES:

The claimant represented himself.

The respondents were represented by Mr David Hogg, the second named respondent.

ISSUES AND EVIDENCE

1. The claimant started employment with the first named respondent, then owned and run by the second named respondent, in August 2017. He was employed as an agent, selling books.

2. On the claimant's version, he was given the option by Mr Hogg of being employed, with a set wage, or self-employed, receiving commission. Being unaccustomed to the latter, he decided to opt for being employed.

3. No contract of employment was provided to the claimant until 23rd November 2017, after he requested one when a dispute arose as to his holiday pay entitlement. The two-page contract provided stated that he was employed on a forty-eight week basis, which left four weeks for holidays, but no mention of payment.

4. The claimant was adamant in his evidence that there had never been any mention of this, and that Mr Hogg, rather than tell him what later appeared in the letter, fobbed him off with excuses, such as that his bank had been hacked in to, or his house had been hit by lightning, to avoid discussing the issue.

5. On Mr Hogg's evidence, the claimant was to be employed initially, and would move to becoming self-employed after a few months. On his evidence, all his other agents were self-employed.

6. Mr Hogg gave evidence that the claimant's sales figures and general performance quickly became matters of concern to him after his initial employment, and that they had met several times about them.

7. Mr Hogg accepted that he did not have any disciplinary procedures in place, and there was no formal disciplinary documentation or records of any meetings or complaints about the claimant's performance.

8. He said that in December 2017, he met the claimant and hand delivered a letter to him, setting out his complaints about the claimant's performance, and saying that his status from then on was as self-employed. He produced a screenshot of such a letter from his computer, but no original.

9. The claimant's case was that he never met with Mr Hogg about these issues; nor did he receive such a letter, and was specific in his allegation that it had only been compiled by Mr Hogg in anticipation of these proceedings.

10. There were numerous other allegations made by the claimant and Mr Hogg as to each other's honesty and business practice, but they are not relevant issues for this tribunal.

11. The primary complaint by the claimant was his holiday pay. On his evidence, Mr Hogg was so evasive that the claimant eventually lost all faith in what he was being told. He therefore told the tribunal that this resulted in him resigning by giving the required two weeks' notice on 3rd September 2018. He did not receive payment of his notice pay.

12. He also did not receive the £525 representing the "lying week" non-payment for his first week of employment.

13. Mr Hogg gave evidence that the two had agreed to meet in early August 2018 about the claimant's poor performance. He stated that the claimant initially cancelled the meeting, citing the ground of ill-health, but that he then resigned.

LAW AND CONCLUSIONS

14. The claimant's case to the tribunal is that he was forced to resign because of the respondents' conduct towards him. Such conduct amounts to a dismissal for the purposes of Article 127 (1) (c) of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order"), which states:

> *"—(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to paragraph (2) and only if)—*
>
> *(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*
>
> *(b) he is employed under a limited-term contract that terminates by virtue of the limiting event without being renewed, or]*
>
> ***(c) 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.***
>
> *(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—*
>
> *(a) the employer gives notice to the employee to terminate his contract of employment, and*
>
> *(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire; and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given."*

15. The source of the claimant's dispute with the respondents arose from what he alleged was the non-payment of holiday pay. The relevant legislation is contained in Article 45 of the 1996 Order, which states:

> *"Right not to suffer unauthorised deductions*
>
> *45.— (1) An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this Article "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Paragraph (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this Article a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this Article an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This Article does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer."

16. The authors of ***Harvey at D1 [403]*** describe four conditions that an employee must meet if he/she is to claim constructive dismissal:

(i) There must be a breach of contract by the employer. This may either be an actual breach or an anticipatory breach.

(ii) That breach must be sufficiently important to justify the employee resigning, or else it must be the last of a series of incidents which

justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting repudiation in law.

(iii) He must leave in response to the breach and not for some other, unconnected reason.

(iv) He must not delay too long in terminating the contract in response to the employers breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

17. The leading case in relation to constructive dismissal is ***Western Excavating (ECC) Ltd v Sharp (CA) [1978] ICR 221*** in which it was held that an employee's entitlement to terminate his contract of employment by reason of his employer's conduct was to be determined in accordance with the law of contract and not by applying a test of unreasonableness to the employer's conduct. However, the courts mitigated the impact of this approach by recognising that there is an implied contractual term to the effect that the employer should not behave in a manner that would undermine the relationship of trust and confidence between employer and employee.

18. 'The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'

19. The precise terms of this formulation have been the subject of comment and refinement. In ***Baldwin v Brighton and Hove City Council [2007] ICR 680, [2007] IRLR 232*** the Employment Appeal Tribunal had to consider the issue as to whether in order for there to be a breach the actions of the employer had to be calculated and likely to destroy the relationship of confidence and trust, or whether only one or other of these requirements needed to be satisfied. The view taken by the Employment Appeal Tribunal was that the use of the word 'and' by Lord Steyn in this passage was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met. In ***BG plc v Mr P O'Brien [2001] IRLR 496***, Mr Recorder Langstaff QC in giving a decision of the Employment Appeal Tribunal in a constructive dismissal case formulated a test as follows:-

> *"The question is whether, objectively speaking, the employer has conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee."*

20. The courts have also considered situations where a series of incidents has occurred and the employee resigns in response to the last actions of the series which constitute the so-called "last straw". In ***Lewis v Motorworld Garages Ltd [1986] ICR 157***, Glidewell LJ stated at page 169 F:-

> *"The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulated series of acts taken together amount to a breach of the implied term? ... This is the 'last straw' situation."*

21. The Employment Appeal Tribunal considered the so called last straw doctrine in ***Thornton Print Ltd v Morton [2008] UKEAT/0090/08/JOJ***. In that case Judge Serota QC endorsed the judgment of the Court of Appeal in ***Omilaju v London Borough of Waltham Forest [2005] 1 All ER 75*** and stated that:-

> *"The principle, if it be one, means no more than that the final matter that leads to the acceptance of a repudiatory breach of contract when taken together and cumulatively with earlier conduct entitles a party to accept a repudiatory breach of contract, whether that last matter is in itself a breach of contract or not."*

22. In ***Brown v Merchant Ferries Ltd [1998] IRLR 682***, the Northern Ireland Court of Appeal said that although the correct approach in constructive dismissal cases was to ask whether the employer had been in breach of contract and not to ask whether the employer had simply acted unreasonably; if the employer's conduct is seriously unreasonable, that may provide sufficient evidence that there has been a breach of contract. For a claim of constructive dismissal to succeed it must also be unfair.

23. The tribunal is satisfied that the claimant's version of events is the correct one. It found him to be a very compelling witness. The tribunal concluded that his evidence was credible as to the process by which he was recruited, and that the respondents produced nothing to significantly undermine it.

24. The tribunal found Mr Hogg's evidence to lack credibility or consistency. The notion of someone transitioning from employed to self-employed while under a contract of employment would require them either to resign or to be dismissed to have any legal effect. There was no evidence that any such process had been undertaken, with no documentary evidence to support it.

25. The only documents produced were the two-page "contract", which was only two pages long, and contained nothing of any substance. In addition, it had only been supplied by Mr Hogg to the claimant when a dispute arose over holiday pay.

26. There was no mention in it of any pending or proposed move to being self-employed. Such a fundamental and novel shift in employment status would reasonably be expected to be set out clearly.

27. The tribunal does not accept Mr Hogg's evidence as to the provenance of the purported letter of December 2017. It considers that it more likely than not was prepared after the event, for use in these proceedings.

28. The tribunal is satisfied that the claimant was repeatedly misled by Mr Hogg, to the point where he could not reasonably be expected to believe what he was being told. The information being provided was material to a key part of his contract of employment, namely holiday pay, which was, in effect being withheld from him. The respondents were therefore in breach of the contract between the parties.

29. He therefore reasonably concluded that he had lost all trust and confidence in his employer, and he could not reasonably be expected to have remained.

30. The claimant was therefore unfairly constructively dismissed.

31. The tribunal also concluded that the first named respondent failed to pay to the claimant: his notice pay; his holiday pay; and £525 for his first week of employment.

32. The tribunal is satisfied that the second named respondent was at the material time the sole trader operating the first named respondent. It therefore orders that the title of the first named respondent be amended to that of David Hogg (previously trading as D.A.S.H. Books Ltd).

REMEDY

33. The tribunal is satisfied that the appropriate remedy is the payment to the claimant of the oustanding monies owed to him by the first named respondent. Therefore the first named respondent is ordered to pay to the claimant the following amounts:

UNFAIR CONSTRUCTIVE DISMISSAL

Notice pay: 2 weeks x £525 = £1,050.00

Loss of income for three weeks from 01/10/18 until 20/10/18: 3 x £525.00 = £1,575.00

Loss of statutory rights 1 x £525.00 = £525.00

There is no future loss, as the claimant started a new job on 20th October 2018.

"LYING WEEK"

1 X £525.00 = £525.00

HOLIDAY PAY

£2,990.00

FAILURE TO PROVIDE EMPLOYMENT PARTICULARS

The tribunal considers that the appropriate remedy is two weeks' pay (the maximum allowed being four weeks)

2 x £525.00 = £1,050.00

The first named respondent is therefore ordered to pay to the claimant a total of £7,715.00.

34. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: **8 May 2019, Belfast.**

Date decision recorded in register and issued to parties: