EMPLOYMENT TRIBUNALS

Claimant: **Mr J Levy**

Respondent: **Harrogate and District Hospital NHS Foundation Trust**

Heard at: **Leeds** **On:** **1 to 3 February 2017**

Before: **Employment Judge Rogerson**

Representation

Claimant: Mr D Robinson-Young, Counsel

Respondent: Mr B Daniel, Solicitor

JUDGMENT

1. The Claimant's complaint of unfair dismissal fails and is dismissed.
2. The Claimant's complaint of breach of contract fails and is dismissed.

REASONS

Issues

1. The Claimant makes complaints of breach of contract and constructive unfair dismissal. For the breach of contract complaint he claims damages of seven months salary of £10,500 from September 2015 to his resignation on 5 April 2016.

2. At a Preliminary Hearing on 26 July 2016 his breach of contract of complaint was clarified and he identified the breach as a breach of the 'duty of care' by the Respondent by them sending a letter to him in September 2015 which he said presented 'a barrier' to his return to work. It was alleged that this letter contained fabricated allegations which were unlawfully disclosed to others. The Respondent's denied any breach of contract and contended that it had made every effort that it could to procure the Claimant's return to work.

3. At a second Preliminary Hearing before Employment Judge Maidment on 6 January 2017, the Claimant was given leave to amend his claim to include a complaint of constructive unfair dismissal. It is clear from the Case Management Order that that decision was made on the basis that this Tribunal would determine whether the Respondent had acted in breach of contract as alleged, whether there had been a fundamental breach of the contact, whether the Claimant resigned in response to that breach, and whether he delayed in doing so, waived any breaches and had affirmed the contract of employment.

4. Before I heard any oral evidence from the witnesses I raised with Mr Robinson-Young, a number of areas of the Claimant's witness statement which required further clarification. One of the areas was the fact that the Claimant had commenced new employment in December 2015, but there was no mention of this new employment in his witness statement or any account taken of this income. This was relevant to his claim for damages against the Respondent which covered the period December 2015 to April 2016. Mr Robinson-Young explained that the Claimant had commenced this employment on 29 December 2015 and he had continued in that job until August 2016, when he had to stop that employment due to an operation.

5. I also asked Mr Robinson-Young to confirm the fundamental breach of contract the Claimant relied upon. He explained that it was the disclosure of an investigation into alleged criminal activities by Mr Tritschler. As a result of this the Claimant could not attend any meetings until Mr Tritschler had been 'dealt' with. Mr Robinson-Young also confirmed that the last straw was a communication with Mrs Pugh, in which the Claimant was told there was 'not an investigation' as a result of which the Claimant resigned.

6. I heard evidence from the Claimant and I also heard evidence from his wife, Ms Yoshi Katayama. For the Respondent, I heard evidence from Mr S Ash who is the Hotel Services Manager, Mr T Tritschler who is the Senior HR Adviser, Mr S Moss, the Counter-Fraud Manager and Mrs E Pugh, the HR Business Partner. I also saw documents from the agreed bundle of documents. From the evidence I saw and heard I made the following findings of fact.

Findings of Fact

1. The Claimant commenced his permanent employment with the Respondent on 3 December 2012. He was employed for 37.5 hours a week as a porter earning £1200 a month net. His employment ended on 5 April 2016 by reason of his resignation without notice.

2. He is claiming constructive unfair dismissal. The burden of proof is with the Claimant to prove dismissal in this case because the Respondent contends there was no dismissal the Claimant resigned voluntarily. Section 95(1)(c) Employment Rights Act 1996 provides for a dismissal in circumstances where "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". What are the circumstances which entitle an employee to treat themselves as dismissed by the employer? The guidance given by the Court of Appeal in the case of **Western Excavating ECC Ltd v Sharp** [1978] IRLR 207 is clear and provides that:

> *"Whether an employee is entitled to terminate his contract of employment without notice by reason of the employer's contract must be determined in accordance with the law of contract. The words 'entitled' and 'without notice' in the statute are the language of contract connoting that as a result of the employer's conduct the employee has the right to treat himself as discharged from any further performance of the contract. A test of unreasonable conduct similar to the concept of unfairness not dependant upon a contract test was incorrect since it would not give effect to the words 'without notice'……..*

> *"An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or* ***which shows the employer no longer intends to be bound one or more essential terms of the contract.*** *The employee in those circumstances is entitled to leave without notice or to give notice but the conduct in either case must be sufficiently serious to entitle him to leave at once".*

3. A good starting point usually is to look at the resignation letter because it is usually in the Claimant's own words and sets out the reason in his mind at the time of resigning. Surprisingly, the Claimant's resignation letter makes no reference to the two specific events he now relies upon, which are the conduct of Mr Tritschler in sending the letter and the conduct of Mrs Pugh in sending the email. I have to agree with Mr Daniels comments in closing submissions, that the Claimant has during the course of this hearing presented different characterisations of the breach of contract he relies upon which have evolved as the case has progressed. In his ET1 Claim form at paragraph 9 he states "I received a private and confidential letter which had been copied to other parties, across departments which I did not give any consent". It continues "that there was a fraud investigation regarding myself in fraud activity. This was early September". That is what the Claimant has to say about the letter sent by Mr Tritschler which he relies upon as a fundamental breach of contract.

4. At the Preliminary Hearing, the same letter of 7 September was described as a 'barrier' to the Claimant's return to work. At this hearing the disclosure by Mr Tritschler of an investigation into alleged criminal activities of the Claimant was the fundamental breach of contract. The Claimant could not attend meetings until Mr Tritschler had been dealt with by which he means 'disciplined'. This letter and the Claimant's interpretation of it was key to the success of the Claimant's case and so I set out the background facts to that letter being sent first.

5. The Claimant had been absent from work from 25 March 2015 and was receiving sick pay at half pay and was due to exhaust his entitlement to any occupational sick pay by 23 September 2015. After that he would only be entitled to statutory sick pay.

6. The Claimant's line manager was Mr Stan Ash. He liked the Claimant and they got on very well. Mr Ash as line manager sought advice from HR about the steps he should take in relation to the absence of the Claimant who was one of two employees he managed that were absent on long-term sickness. He was managing their absences in accordance with normal practice. Occupational advice had been sought and an attempt had been made to meet with the Claimant to discuss the occupational health advice and the next steps.

7. A meeting had been planned for 23 July 2015. On 22 July the Claimant confirmed to Mr Ash that all emails were to be sent to his union representative, Hilary Bland because he said "I would like union involvement".

8. On 24 July 2015, Mr Tritschler, a Senior HR Adviser, tasked with overall HR responsibility for attendance management within the organisation, received information from a colleague, who had reported seeing the

Claimant working at tearooms. Mr Tritschler contacted Mr Moss who is part of the Audit Yorkshire Organisation which provides internal audit and counter fraud assistance to the Respondent and other health bodies. It is clear from the emails of 24 July and 27 July 2015 from Mr Tritschler that his concern was that the Claimant was reporting off sick and failing to attend meetings because he was too ill which potentially conflicted with the information he had received from a colleague. It was perfectly reasonable for Mr Tritschler to act upon that information, in good faith. The veracity of the information could be tested by Mr Moss as part of his role but he had a responsibility to put that information forward for investigation by Mr Moss. The financial costs to the NHS of fraud are significant and if employees are absent due to sickness but are seen working elsewhere that is a legitimate concern for the employer. Mr Moss contacted the tea rooms which are run by the Claimant's wife. The Claimant, his wife and family reside in the upstairs part of the business and the tea rooms are located downstairs. Mr Moss spoke to the Claimant's wife and was told that the Claimant helped out but received no remuneration and this help was in order to assist with his recovery based on the medical advice that the Claimant had received.

9. In terms of the help provided by the Claimant in the tea rooms there was a dispute of evidence. Mr Moss said that he was told it was clearing and helping with shopping for items for the business. The Claimant and Ms Katayama were adamant it was shopping only and the only reason why he might be seen downstairs was because the living quarters were upstairs and he had to pass through the downstairs for access to the living quarters.

10. Ms Katayama states in her witness statement that she told Mr Moss she encouraged the Claimant to be "about" and if he was seen in the tea rooms, that was part of his mental recovery as recommended by his GP but he was definitely only doing some shopping for her. She said she made a note in her diary which was not produced for this hearing.

11. Mr Moss relies on his recollection of the events and his email. He recalls that he was told that the Claimant was clearing tables as part of the information as well as shopping. He remembers thinking at the time these were innocuous light duties for which The Claimant was not paid. He confirmed that information in his email to Mr Tritschler. That email is at page 228 and refers to the Claimant shopping for provisions from the supermarket and clearing tables in the tea rooms. I preferred and accepted Mr Moss's evidence.

12. The other contemporaneous documents were the letters sent to and from Mr Moss and Ms Katayama dated 28 July 2015. It is clear from those documents that Mr Moss was from the Counter Fraud Team, and that he was making enquiries into the Claimant in relation to "an allegation that he had undertaken work at the tea room whilst on occupational sick leave from the Trust". Mr Moss was satisfied this was unpaid. Ms Katayama was unhappy that any enquiry was made and Mr Moss informed her of the complaints procedure.

13. The Claimant's evidence was that he thought everything had been done and dusted and any misunderstanding had been cleared up when he and his wife spoke to Mr Moss. Mr Moss agreed that that was the case because he was only concerned if fraud was involved and as far as he

was concerned there was no remuneration which meant there was no fraud. He was happy to provide a statement to Mr Tritschler if he wanted to pursue the matter further, but Mr Tritschler did not request a statement.

14. Mr Tritchler was entitled to investigate the Claimant's unwillingness and inability to attend meetings with the Respondent to discuss his long-term sick in light of this information. It would have been reasonable for Mr Tritschler to pursue this further with the Claimant at their next meeting to seek an explanation from the Claimant. However Mr Tritschler chose not to conduct a HR investigation. It was also clear from the email of 11 August 2015, that Mr Tritschler knew about the correspondence between Mr Moss and Mrs Katayama because he refers to it in his letter to the Claimant. He knew the Claimant/ his wife were unhappy about Mr Moss's enquiries. He could have chosen not to mention this at all and could have ignored it, or could tell the Claimant and share his knowledge of events so that they could discuss it at the next meeting, if the Claimant wanted to. He chose to be open and transparent. I accepted his evidence that by including this he intended to reassure the Claimant about any concerns that he might have had given his contact with Mr Moss and his understanding that a complaint might be made. The critical letter in this case is at page 235 to 236 and I am not going to set it out now in full because it is a lengthy letter but the points that are made in this letter have to be seen in context.

15. By this time the Claimant had been absent since 25 March 2015. He had not attended any meetings to discuss the Occupation Health Advice the Respondent had received or the steps the Respondent could take in light of that advice to assist him to return to work. That was why he was being invited to a 'long term sickness meeting' (the heading of the letter) with his manager, Stan Ash, Mr Tritschler, and the Claimant's Union Representative.

16. The language used in relation to that meeting is the language of reassurance- 'please do not worry'. It tells the Claimant which topics will be discussed, which are all about helping the Claimant return to work (the nature of ill health, likely return date, use of Occupational Health Service, paperwork which may need to be completed related to pay, further assistance required to promote recovery, any reasonable adjustments, any other relevant policies guidance and to set further review meeting dates to discuss your health and progress as appropriate). It is the paragraph that follows this, that the Claimant relies upon as a fundamental breach of contract:

> *"I feel that it is also opportune to discuss some other factors and* ***hopefully to reassure you in terms of recent events****. I was informed in late July that the NHS local Counter Fraud Team had received information which suggested that you were working elsewhere whilst receiving sick pay from the Trust. I would like to confirm that whilst they informed us of their investigation and the subsequent response from yourself and your partner, their procedures are entirely separate to the long term management of your sickness absence. I understand from them that you wish to complain about their investigation and that they have provided you with the details of how to undertake any such complaint-if there is*

any additional information that you require then I would be willing to answer any questions"

17. There is nothing in that paragraph that entitles the Claimant to treat himself as discharged from further performance of the contract or would indicate to the Claimant that the Respondent intended not to be bound by one or more essential terms of the contract. There was no fundamental breach. All that Mr Tritschler was doing was his job. He was trying to help the Claimant get back to work after a lengthy absence.

18. The Claimant's focus is on the reference to 'an investigation'. I accepted Mr Daniels' submissions that the investigation is clearly expressed in the language of 'their investigation' which can only be a reference to the investigation carried out by Mr Moss because there was no other investigation. That paragraph was not 'inappropriate or inaccurate' as the Claimant asserts. His case at this Tribunal hearing was that Mr Tritschler had planted this in the letter it in order to get rid of him. There is nothing to support that assertion and I do not accept it. Why would Mr Tritschler offer to help the Claimant provide further information to put in a complaint against the Trust if he was trying to get rid of him? There was a much easier way to do that if that was what he wanted to do. He could have used the information from Mr Moss, to conduct his own investigation and pursue a disciplinary case against the Claimant.

19. There was nothing unreasonable about the content of the letter that Mr Tritschler sent to the Claimant and nothing that would entitle the Claimant to treat it as a fundamental breach of contract on the part of Mr Tritschler as an employee of the Respondent.

20. The second complaint about the letter is that this matter should not have been disclosed to anyone other than the people that needed to know. There was no wider distribution of the letter than was necessary. The letter was marked "Strictly Private and Confidential" and was copied to the Claimant's union representative and his line manager. That was the standard practice and the Claimant had specifically requested that his union were copied into correspondence prior to this letter. This complaint was not made out on its facts and was not a fundamental breach of contract by the Respondent.

21. The Claimant's email sent immediately after receipt of this letter is useful to consider. His view about the Moss investigation at that time was that there was no need to mention it in the letter when it was "*as a result of a misunderstanding"*. He states "*I assume you have been informed with the fact I help my wife's business as part of my mental health treatment as advised by my therapist".* He asks for an explanation as to why it is referred to in the letter. Mr Tritschler responds "I raised the matter of the information from the counter fraud team as they made us aware that you wanted to raise a complaint so thought that **it would be an opportunity for you to discuss any concerns that you may have**".

22. A further problem for the Claimant is that he does not resign in response to the letter sent on 7 September 2015. He waited a further period of seven months. He does not pursue a grievance/complaint or provide any details of the complaint to Mrs Pugh despite her numerous requests for this information.

23. Mrs Pugh's view, with which I agree, having looked at the letter, was that there was nothing wrong with it. She decided no action needed to be taken against Mr Tritschler but she did arrange for another HR officer to attend the meeting that had been planned, as requested by the Claimant. Despite her best efforts the Claimant did not attend. She spent the next seven months attempting to arrange meetings, agreeing to any of the barriers that the Claimant put up for those meetings not taking place. For example changing the location, the timing, agreeing to delays, obtaining medical updates. It was however a completely pointless process because at this hearing the Claimant said he had decided he was not going to attend any meetings until Mr Tritschler was disciplined. That was an unreasonable position for the Claimant to adopt. Mr Tritschler had been removed as the HR officer and another HR officer had been appointed immediately after he had raised a concern. Once that step had been taken the Claimant should have carried on with the process intended to get him back to work.

24. At this hearing he said he had lost all trust and confidence with **all of HR** by the time of the 7 September letter and he had no intention of attending any meetings. If that was the case why didn't the Claimant resign at that point? Why present a picture to Mrs Pugh which was not true. The Claimant continues to provide a misleading picture in his correspondence with Mrs Pugh giving her the false impression that he would be willing to attend the meeting when that was not the case.

25. There are a number of communications between the Claimant and Mrs Pugh and the Claimant and his Union consistent with this misleading picture. Unfortunately for the Claimant, by December of 2015, the Union's position was clear they were not supporting the view the Claimant had taken about the September letter and breach of confidentiality. They expected that the union representative and line manager should be copied into that correspondence so that they could assist their union member at that meeting. They would have raised an issue with the Respondent if they had not been copied in.

26. By December 2015, the Claimant also knows that there had never been any HR investigation because Mr Moss had confirmed that to him. By a very clear letter dated 8 December 2015 Mr Moss confirmed that HR was not undertaking any investigation into any allegation of fraud. He confirms "*the decision not to progress an investigation was based on the outcome of my preliminary enquiries which were passed to HR in August 2015. For your information the preliminary enquiries comprise the telephone call with Mrs Katayama and the letter of 28th and Mrs Katayama's response"*.

27. By December of 2015, it could not have been made any clearer to the Claimant that there was only one investigation and that was the investigation conducted by Mr Moss. Nothing more and nothing less. That was the context in which the last straw the Claimant relies upon has to be considered.

28. The Claimant relies on an email of 4 March 2016 from Mrs Pugh to the Claimant. The content of that email is as follows: "*I can only reiterate there is no investigation file to share. Fraud made some initial enquires into an allegation but as they informed us that there were no findings for a case there was no formal HR investigation".* It is not clear what if anything in that email is capable of constituting a last straw. In cross-examination the Claimant said it was a last straw because "one minute it was an

investigation then it wasn't, and it kept changing. It was confusing". When pressed he said "*Mrs Pugh had an opportunity to call me in and explain to me that there wasn't a HR investigation and it was only in March when I was told that there was not an investigation*". However, he knew in September 2015, there was no HR investigation. If he was still unsure he was told again in December 2015. There was nothing to support this was a last straw and I did not find it was. Furthermore, for it to be a last straw it has to contribute something to any earlier breaches and revive the earlier breaches of contract. Based on my findings of fact there were no earlier breaches a last straw could revive. This was an entirely innocuous act on the part of the employer which cannot be a final straw even if the employer genuinely but mistakenly interpreted it as an act that was hurtful and destructive of his trust and confidence in the employer.

29. From receipt of that email the Claimant waited a further month before resigning and he cannot explain the delay or why he resigned when he did.

30. There was one further area of evidence that I need to mention. The Claimant sought and obtained employment elsewhere in December 2015, at a time when he was an employee of the Respondent and was deliberately delaying attending a long-term sickness absence meeting. Unbeknown to the Respondent, the Claimant was able to work elsewhere for 9 hours a week. He did not make the Respondent aware of this new employment and was telling the Respondent that he was too ill to attend a meeting intended to help him get back to work for the Respondent. There is an implied 'duty of fidelity' to your employer as part of the contract of employment. You cannot be faithful to that duty when you are telling your employer you are unfit to work for them and unable to attend meetings, but you are at the same time able to work for another employer and provide them that faithful service. The Claimant would have been better served spending his time and effort attending the meeting and working with the Respondent to get back to a full time well paid job than adopting the course of action that he did that has resulted in these proceedings.

31. The breach of contract claim made by the Claimant takes no account of the other job the Claimant was performing and paid for at a time when is also claiming his full wages from the Respondent. The Claimant had exhausted his entitlement to occupational sick pay from the 23 September 2015, and was only entitled to statutory sick pay thereafter. He has no claim in contract for the wages he claims from September 2015 until his resignation. In all of the circumstances set out above the Claimant's complaint of breach of contract and constructive dismissal fail and are dismissed.

Employment Judge Rogerson

Date: 21 March 2017

Sent on: 23 March 2017