EMPLOYMENT TRIBUNALS

Claimant: Mr A Shaw

Respondent: The Unity Partnership Limited

HELD AT: Manchester **ON:** 20 June 2017 and 26 June 2017 (in chambers)

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: In person
Respondent: Mr J Campbell, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal is not well-founded.

2. The remedy hearing provisionally arranged for 14 August 2017 is cancelled.

REASONS

Claims and Issues

1. The claimant claimed constructive unfair dismissal. The issues were agreed to be as follows:

(1) Did the claimant resign because of an act or omission or series of acts of 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, therefore, had to 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 trust and confidence between the parties.

(3) Did the claimant waive any breach by his conduct?

(4) If the claimant was constructively dismissed, was the reason for dismissal a potentially fair one?

(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?

(6) If the dismissal was unfair, should any compensation be reduced or increased by up to 25% to reflect a failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures?

(7) If the dismissal was unfair, in a case where such an assessment may be made, what are the chances the claimant would have been fairly dismissed had a fair procedure been followed?

(8) If the dismissal was unfair, has the claimant contributed to the dismissal by his conduct?

Facts

2. The claimant was employed by The Unity Partnership Limited at relevant times. The Unity Partnership Limited is a joint venture company owned by Kier Workplace Services and Oldham Council. One of the functions of The Unity Partnership is to be responsible for payroll services on behalf of its clients. One client is an account to run a payroll service for Oxfordshire Schools' employees. This consisted of running a payroll account for around 3,500 teachers and support staff.

3. The claimant began employment with Oldham Metropolitan Borough Council on 20 May 1996. His employment transferred to The Unity Partnership Limited in February 2013 by operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006. The claimant began working as a wages clerk. He was promoted a number of times, ending as Payroll Manager. He held this role for The Unity Partnership Limited at times relevant to this claim.

4. In February 2015, the claimant was seconded to Oldham Council to assist with the implementation of a new payroll/HR system known as the A1 Project. The claimant was initially informed verbally that this would be for a few months. Nothing was ever put into writing relating to the terms of the secondment. There was some suggestion in Mr Hopkinson's investigation that this was not really a secondment. However, I note that the Project Manager, Basit Habib, used the term "secondment" in a corporate core brief in April 2015 in which he wrote that it had been decided at the A1 programme board meeting on 16 May that the claimant's secondment to the programme (plus backfill for Unity) should be extended by 12 months. The claimant apparently learnt of the extension of his secondment on receipt of a copy of this briefing.

5. During the claimant secondment to the A1 Project, the respondent arranged cover for the claimant's role at Unity. An interim Payroll Manager, Ian Simpson, was

appointed in February 2015. The claimant was given a period of one week to do a handover with Mr Simpson. The claimant did not consider this to be adequate but he was informed that Mr Simpson was an experienced payroll professional. Ian Simpson left some time in August 2015 and in early September 2015 Saundra Loftus began work as interim Payroll Manager. The claimant was not involved in any handover to Ms Loftus. At some point during the claimant's secondment, Lisa Teasdale was appointed as Service Delivery Manager.

6. It is a common feature of payroll systems, not just the one operated by the respondent, that dates of Bank Holidays have to be put into the system by the start of the year. This was not done for the respondent's system for 2016. It was the evidence of the claimant, and it was accepted by Mike Hopkinson, that a Payroll Manager should be aware of the need to put in Bank Holiday dates. At the time for putting in the 2016 Bank Holiday dates, the claimant was seconded to the A1 Project. Ms Loftus was in position at the start of the year. Bank Holiday dates were not put into the respondent's system. This led to an issue with the 3 May Bank Holiday with some payments for Oldham Council being made later than they should have been. It appears there was no investigation or disciplinary proceedings arising from this error. It also appears that the failure to input Bank Holiday dates into the payroll system was not corrected after this mistake. This problem was not brought to the attention of Mike Hopkinson who subsequently investigated the error which led to the claimant being issued with a final written warning. During the investigation into the error which led to the claimant's final written warning, Mr Hopkinson interviewed Ms Loftus and formed the view that she had no understanding that Bank Holiday dates should be put in.

7. Janette Savage became responsible for payroll in March 2016.

8. During the claimant's secondment, he was called on by the respondent on a significant number of occasions to assist on payroll matters. The claimant says that the respondent was supposed to get the agreement of the A1 Project Manager before he did work for the respondent. By 25 May, when the incident leading to the claimant's final written warning occurred, the claimant had been informed that his secondment was coming to an end and he would return to his substantive role on 31 May.

9. On 25 May 2016, Lisa Teasdale asked the claimant to assist with the submission of the Oxfordshire Schools' payroll BACS. The process involved two authorised people and, whilst the claimant was on secondment, these had normally been Emma Ashton, HR Administration Manager, and the acting Payroll Manager, who at 23 May 2016 was Saundra Loftus. Emma Ashton was absent from absent from work on 25 May. Saundra Loftus ran the payroll and validation. It subsequently emerged that she put in the wrong date, not taking account of the Bank Holiday. Lisa Teasdale asked the claimant to do the final stage of the payroll, submitting this to the BACS system. In the course of the internal investigation, there was some dispute as to whether Lisa Teasdale had alerted the claimant at an earlier stage that he might be needed to cover for the absence of Emma Ashton on leave. However, the claimant said he was not asked until 25 May and he was asked because Emma Ashton was on sick leave. This is supported by a statement produced by Emma Ashton for these proceedings. In any event, the claimant was asked at a late stage on 25 May to assist. The claimant understood this to be the last day on which the payroll could be submitted for BACS payment. The respondent says that, although

they would normally do this two working days ahead, in fact, it would have been possible to submit it one working day ahead of time. However, I accept that the claimant believed on 25 May that this was the last day for its submissions.

10. The claimant agreed to help on 25 May and do the submission of the payroll. The claimant was under time constraints. He needed to finish some work first for the A1 Project and then he needed to leave, he told the investigation, by 4.00pm for childcare reasons. The claimant said throughout the internal proceedings and in these Tribunal proceedings that he was led to understand that he would be given the relevant paperwork by Saundra Loftus. He has said that if he had had this paperwork, he would have checked this before submitting the payroll to the BACS system. However, he was unable to find Saundra Loftus in the time available and was not given the relevant paperwork. He, therefore, submitted the payroll without having done the final check envisaged by the process to make sure the information submitted was correct. He did so on the understanding that Saundra Loftus had checked the information.

11. After submission, a report is produced by the system. The claimant printed this out. The report contained clear error messages about an invalid payment date. The claimant signed the report, although he says this was simply to confirm he had submitted it. The claimant says he did not read the report. He was unaware of the error messages. Even a quick glance at the report would have brought to the claimant's attention the error messages. The claimant put the printed report on Saundra Loftus' desk and left work. The mistake in the date for payment led to approximately 3,500 employees on the Oxfordshire Schools' payroll not being paid on time.

12. On 31 May 2016, the claimant returned to his substantive role as Payroll Manager. This was the first day after the Spring Bank Holiday. The respondent began to receive calls from Head Teachers saying that people had not been paid. The claimant became aware of these calls on 31 May.

13. Janette Savage received calls from schools and also from her director asking her what had gone on. She asked Mike Hopkinson, Head of Performance and Governance for Kier Workplace Services, to look into the sequence of events and find out what had gone wrong with a view to putting corrective steps in place. Mr Hopkinson's role is separate from HR processes. His investigation is a reactive process aimed at understanding the causes of the problem as quickly as possible. It was intended to be an independent review. He makes recommendations as part of his report but it is not binding on the respondent. It is not a formal HR process. Following his report HR may, as they did in this case, start an HR investigation and take disciplinary proceedings if considered appropriate.

14. On 1 or 2 June, the claimant attended a meeting with Lisa Teasdale, Emma Ashton and Janette Savage. Janette Savage made criticisms of the service and the claimant told her that he had not been in the service for around 15 months and her criticism should be directed at Saundra Loftus and Lisa Teasdale as Saundra's manager.

15. Mike Hopkinson interviewed the claimant, Lisa Teasdale and Emma Ashton on 9 June 2016. He did not interview Saundra Loftus on that day because she was on leave.

16. By 15 June, Mike Hopkinson had produced a report which was virtually in its final stages, which included a recommendation of disciplinary action against the claimant.

17. The claimant was suspended on 17 June 2016 and Ms Teasdale confirmed his suspension by a letter of that date, writing that the action had been taken pending further investigation into the allegations:

> "(1) You failed to take note of an error warning from the BACS confirmation and as a result a large number of employees were not paid on their payment date. As Payroll Manager, accountable for the correct and prompt payment of our customer payrolls, you failed to take responsibility for the key accountability placed upon this role.
>
> (2) Your failure to act upon the error message resulted in a loss of business reputation resulting from the negative press as this was taken to BBC Radio Oxfordshire.
>
> (3) Your failure to run the payroll resulted in a financial loss to the business as yet unestablished."

18. There was a further issue raised about pensions auto enrolment but this did not form part of the later disciplinary action.

19. Mike Hopkinson interviewed Saundra Loftus by telephone on 17 June 2016. The investigation report records that this was a short interview to confirm specific points. This contrasted with the interviews of Mr Shaw, Ms Teasdale and Ms Ashton on 9 June, which were described as "full interviews". Mr Hopkinson informed the tribunal that Ms Loftus was interviewed by telephone on 17 June rather than having an "in person" full interview because of the distance involved for him to travel from his home address in Lincolnshire to the respondent's premises. He regarded the key issue as being the safety net of the final sign off, although there were potentially errors in earlier parts of the process. By the time Mr Hopkinson interviewed Ms Loftus, he had largely finalised his report and the claimant had already been suspended. Mr Hopkinson told the Tribunal that, if Ms Loftus had not been on leave at the time, they would have had a full interview with her. With the benefit of hindsight, he thought perhaps he should have raised more diligently the separate issues about errors earlier in the process. However, he felt at the time that he understood the situation well enough to issue the report. The final version of the report was approved on 20 June 2016.

20. Mr Hopkinson noted in his report that the claimant was a payroll and payroll system subject matter expert with significant years of service and experience in the role as Payroll Manager. He noted that the claimant had confirmed what each of the sign off stages were for and what it would normally check. Mr Hopkinson wrote that although the claimant was delivering a temporary project role, when requested, he accepted the task and was fully experienced to be able to complete it. He wrote that the claimant did not perform the normal checks but signed off the final payroll BACS without checking or paying attention to the errors. Mr Hopkinson wrote that he and the claimant had jointly examined a successful report and the failed report side by side, and that the two reports were significantly different and errors were shown

clearly on the page signed by the claimant. Mr Hopkinson expressed the view that it was very unlikely that the errors were not seen by the claimant.

21. Mr Hopkinson noted that Ms Loftus said she had had a conversation with the claimant on the Thursday morning, raising with the claimant the errors, and that the claimant had said it was ok. The claimant had said he did not recall that conversation.

22. Mr Hopkinson wrote:

> "The purpose of the final check performed by AS is to ensure that everything went to the BACS system correctly, including the dates of payment and the amounts. The issue should have been identified by AS under the final quality assurance check and the issue could have been recovered if this had been acted upon quickly. Recovery would have meant timely correction and no impact on individuals.
>
> There is a further question as to why, having processed the BACS with errors, this was not raised during the following day following SL's query when there remained time for a resolution."

23. Mr Hopkinson wrote that he believed that the request to sign off the BACS payment was reasonable in terms of duties, role and experience, but noted there was an issue surrounding the immediacy of the requirement for it and personal commitments for childcare. Mr Hopkinson commented, "While these are environmental factors they in no way excuse failure on AS's part."

24. Mr Hopkinson noted that the Bank Holidays had not been entered on the system, describing this as:

> "A systemic failure of handover, monitoring and clear requirements of Payroll Manager's role rather than specific individuals. However, it is hard to overlook the accountability that AS should have in ensuring that his handover was appropriate to those who took on his role while under secondment."

25. When giving evidence in this Tribunal, Mr Hopkinson told the Tribunal that he had in mind the lack of documented procedures in making these comments. He accepted in evidence that the claimant had not been responsible for a handover to Saundra Loftus.

26. In the section "root cause" Mr Hopkinson wrote the following:

> "Three significant root causes have been identified –
>
> - Entry of dates into bottom line system for Bank Holidays.
> - Poor handover process and lack of documented process.
> - Reckless approach to quality assurance process by AS meant that the final assurance step was not completed with professional diligence and care and the payment was processed incorrectly."

27. In his conclusion and key findings Mr Hopkinson wrote, "This was an avoidable situation brought about by a lack of diligence and professionalism from the claimant", although he also noted there were wider issues which needed to be resolved. He wrote:

> "It is my belief that there was no reasonable way that AS could have not seen the errors due to the significant difference between success and failure reports and that this was a serious and conscious lack of professional diligence.
>
> Therefore the conclusion is that this was a conscious act and known failure to provide a key quality assurance step which led to serious consequences for Kier and our customers."

28. As previously noted, Mr Hopkinson recommended that a formal HR procedure be instigated on the following foundations:

> "(1) The lack of professional diligence and care and the actions of AS contravene the Employee Behaviour Code of Practice which reasonably sets out that employees act at all times in good faith and in the best interests of the company, its customers and fellow employees.
>
> (2) That in accordance with the Employee Behaviour Code of Practice this incident constitutes an act of gross misconduct and specifically 'gross negligence or incompetence in performing your duties'."

29. The report was presented to Janette Savage who decided that there was a need for an HR investigation. Kara Haycocks, Business Development Manager, was appointed to carry out the HR investigation. She wrote to the claimant on 29 June 2016 inviting him to a disciplinary hearing on 7 July 2016. She wrote that she would chair the meeting with someone from HR to advise and take notes. The allegation to be considered was described as follows:

> "You failed to take note of an error warning from the BACS confirmation and as a result a large number of employees were not paid on their payment date. As Payroll Manager, accountable for the correct and prompt payment of our customer payrolls, you failed to take responsibility for the key accountability placed upon this role."

30. She wrote that, as the allegation fell into the category of gross misconduct, a potential outcome from the hearing could be the claimant's dismissal. She enclosed a copy of Mr Hopkinson's investigation report.

31. Following the claimant's suspension, and shortly before the letter of 29 June, the claimant visited his GP who issued a fit note initially for two weeks' absence, giving the reason for absence as work related stress. Further fit notes were issued subsequently and the claimant did not return to work prior to his resignation. The disciplinary hearing did not go ahead on 7 July due to the claimant's illness.

32. The claimant had a telephone appointment with Occupational Health on 21 July.

33. On 22 August 2016, the claimant wrote by email to Janette Savage. He complained about what he described as "unsatisfactory treatment", including a complaint that he felt totally ignored since his suspension and was not feeling able to attend the scheduled disciplinary meeting due to stress. He concluded:

> "Assessing my treatment it is obvious that the organisation no longer requires my services. I am old enough and realistic enough to know when someone is not wanted. I also have a young family and the stress of my treatment is having a detrimental impact on us all. I would therefore welcome the opportunity to have a Protected Conversation with you under section 11A of the Employment Rights Act 1996 and hopefully come to a mutually beneficial solution."

34. Janette Savage replied by email on 23 August. She wrote:

> "At this point no decisions have been reached about your blameworthiness or not in relation to the Oxford Academies' payroll. The purpose of any investigation is to allow you the opportunity to present the facts surrounding the events in May."

She wrote that she would consider carefully the claimant's request and be in touch with him shortly.

35. A "without prejudice" meeting was held in early September 2016 but no settlement resulted.

36. On 20 September, Kara Haycocks wrote to the claimant, requiring him to attend a disciplinary interview on 30 September. The allegation to be considered was the same one as included in the letter of 29 June 2016. The letter was headed "Investigation Interview", unlike the previous letter which had been headed "Notice of Disciplinary Meeting". Ms Haycocks wrote:

> "This is not a disciplinary hearing although a formal record will be taken and a disciplinary hearing may be convened as a result of the meeting."

She wrote that the aim of the investigation was to help them establish the relevant facts and that no disciplinary action would be taken until the matter had been fully investigated.

37. The claimant attended the investigatory meeting on 30 September. Points made by the claimant included that, at the time the error occurred, he was not the Payroll Manager but in a secondment position. He accepted that he had enough knowledge to run the payroll. He said he had been asked late in the day to assist and was asked by Lisa Teasdale to submit the files after approval. He said he could not find Saundra Loftus and he, therefore, had no paperwork to check against, and it was all so last minute. He said:

> "I logged into bottom line report but I needed to run it. Felt I had no other option but to hit the button. I then ran off the report and signed it off."

He said the report had to be submitted that day. He assumed that Saundra Loftus had done what she needed to do. He said that, on submission, there was an error

message but he did not look at it. He said the purpose of his signature was just to say he had submitted it then said:

> "Really it is to say I have checked but I had no paperwork to verify against. If I had the paperwork and had enough time I probably would have done this but again, I did not have the paperwork. There was pressure to submit this. That signature is that the payment has been made."

38. The claimant said Saundra Loftus had not checked with him about the error message. He said there had been a similar error message on previous reports regarding the issue of Bank Holiday dates and Saundra was aware of the issue. The loading of the Bank Holiday dates was her responsibility and he did not know why it had not happened as he was seconded at the time. He did not know why he had been asked so late. He said he had childcare responsibilities. He said he felt he had been singled out and got the blame.

39. Ms Haycocks said she felt she needed to speak to Saundra Loftus. However, Saundra Loftus was not interviewed since she had left the organisation. Ms Savage said in evidence that Ms Loftus would have been part of the investigation if she had not left. She said the respondent would have taken appropriate steps which could have included disciplinary action against Ms Loftus.

40. Ms Haycocks also interviewed Lisa Teasdale.

41. Ms Haycocks produced an investigation report on 12 October 2016. She noted in the report that, at the point she picked up the investigation, Saundra Loftus had left the business and, therefore, she had been unable to interview her. Ms Haycocks noted that, at the point the Oxfordshire payroll failed to run, the claimant was seconded to the project team and not responsible for the monthly running of the payroll. She wrote that there was, however, an expectation, as and when the need arose, for the claimant to step in and assist, being one of only a handful of staff familiar with the signing off process. She recorded that the claimant was asked by Lisa Teasdale to complete the submission process into the bottom line system to make the payments. She recorded the claimant's opinion that the request was made to him very late and that the process should have been done on or about 22 May. She recorded that the claimant had tried to locate the final report for checking and, despite being told that Saundra Loftus would be available with the other report and on hand should he have any questions, Ms Loftus could not be located. Ms Haycocks wrote:

> "It has been difficult to ascertain how thoroughly Andy has sought either Saundra or the other report. However, bearing in mind it was late afternoon and Andy himself felt under pressure to complete the process, it is reasonable to surmise any attempt to locate either Saundra or the file lacked rigour."

42. Ms Haycocks noted that there were error messages on the submission report that the claimant signed as being correct. The claimant had admitted he failed to spot the error message. She wrote:

> "In signing off the report Andy has certified to say the submission has been checked and there are no errors. When agreeing to fulfil this task on Lisa's request it is reasonable to surmise that it was Andy's responsibility to identify

> and then act upon these errors. Andy's role on this occasion was one of a final quality assurance check. If Andy had fulfilled his role and acted upon the error message the issue could have been recovered."

She wrote:

> "The error message was as a consequence of the missing Bank Holiday dates which had not been inputted into the system. In carrying out my investigation I have established that as part of any payroll it would be standard industry wide practice to upload Bank Holiday dates into the payroll system at the start of the year. It has been difficult to ascertain whose responsibility this was in relation to the Oxfordshire account. As Andy was assigned to the project team it is reasonable to state that it was not Andy's responsibility."

She continued:

> "It would be safe to surmise, Andy would not have been aware of the lack of dates in the system at the point he signed off the final report, having been seconded into the project team. It was the failure to input these dates which triggered the error message in the report Andy signed and resulted in the non payment of the Oxfordshire Schools' account."

43. In her conclusion Ms Haycocks wrote:

> "The failure to input the correct Bank Holidays onto the system resulted in the subsequent failure of the May Oxfordshire payroll. It has been difficult to establish whose responsibility this was (although I am confident that this was not a role Andy should have undertaken as he was on secondment). Nevertheless, at the end of May, Andy took responsibility for signing off the final submission for payment. The report contained a number of error messages, despite which there was no action taken on the back of those error messages. When signing off this report, Andy, in his capacity is endorsing the payment is correct and has been submitted, certifying to say that the documentation is ready to be filed."

Ms Haycocks wrote:

> "Andy admits that he had to make a snap judgment and submitted the payment files and signed off the report despite not having the other report to hand, cognisant of the fact that by not completing this process would have resulted in the non payment of the Oxfordshire Schools' staff. Despite acknowledging the fact that the process he followed that afternoon was not normal practice, once the report had been signed Andy simply left the document in Saundra's desk."

44. She wrote that he made no attempt to follow this up with Saundra or a more senior manager regarding the fact that the appropriate paperwork was not available and the submission had been completed without it, or to check they were happy that the process had been completed to a satisfactory level. She wrote that she would have expected an experienced manager to pick this up the following day when colleagues were back in the office.

45. Ms Haycocks noted that there appeared to have been no proper handover between interim managers and that monitoring processes were unclear resulting in a systemic failure i.e. the failure to upload Bank Holiday dates. She wrote:

> "Nevertheless, it is hard to overlook the accountability that Andy had when authenticating the payroll and signing off the report as being accurate."

46. Ms Haycocks recommended proceeding to a hearing for gross misconduct due to the severity of the impact of the claimant's actions.

47. By a letter dated 12 October 2016, the claimant was invited to a disciplinary hearing on 25 October. The allegation was stated to be as follows:

> "You failed to take note of an error warning from the BACS confirmation and as a result a large number of employees were not paid on their payment date. As Payroll manager accountable for the correct and prompt payment of our customer payrolls you failed to take responsibility for the key accountability placed upon this role."

48. The claimant was informed that a potential outcome from the hearing could be his dismissal. He as informed of his right to be accompanied.

49. The claimant put forward written representations on 15 October 2016.

50. On 20 October 2016, the claimant attended an interview for a position of Payroll Manager with the New Bridge Group of Schools. The claimant was offered and accepted the job on the same day. The commencement date was to be as soon as possible but no later than 1 January 2017.

51. The claimant made further written representations to the respondent by email dated 21 October 2016.

52. On 24 October 2016, the claimant visited the New Bridge Group to complete the necessary disclosure and barring service forms.

53. The disciplinary hearing was held on 25 October 2016, conducted by Janette Savage with Louise Busby from HR to advise and take notes. During the course of the hearing, the claimant said he had been asked by a phone call on the afternoon to sign off the May Oxfordshire payroll. He accepted that he had assumed responsibility by taking on the task. He said there was no paperwork as promised. He had been told Saundra Loftus would be available but she was not and time was pressing. He said that the file should have been pre approved and should be correct and all that he was doing was "hitting a button and submitting the bottom line file". He said he would have expected Saundra Loftus to have approved and ensured everything was correct. He said he did not do any checking himself. When asked the point of his signature, he said, "I had to submit and make an assumption that the Payroll Manager had completed the process correctly". He said that, if given time, normally he would have checked the paperwork before submitting the file. The claimant agreed that he had made a mistake but said his mistake was minimal and there had been problems throughout the process not just him.

54. By a letter dated 8 November 2016, Ms Savage informed the claimant of the outcome of the disciplinary hearing. She decided to issue the claimant with a final written warning. She expressed her reasoning as follows:

> "Based on your significant experience as a Payroll Manager you should have taken responsibility when signing off the files and it was your lack of diligence and professionalism that allowed the error to occur. You should have flagged the errors on the payroll report to a member of the management team, either by talking to them directly or raising via an email. This is a significant failing on your part which resulted in a large number of employees not being paid on the correct payment date. However I have taken into account your mitigation that there were errors in the file that had been processed on the system, you were contacted late on 25 May 2016 and there was no-one for you to ask and no supporting documentation for you to confirm the payroll file. However, that said, given your level of experience and knowledge of managing payroll systems you should have raised the error on the BACS report. Moving forward, I expect that you take full responsibility when managing the payrolls and that any issues or errors are raised immediately with your line manager."

55. By a letter dated 14 December 2016, the claimant appealed against the final written warning. His grounds of appeal were stated to be that he considered the procedural process was flawed because he considered that Janette Savage had already been involved in the process and made up her mind and had been influenced by Lisa Teasdale. He also argued that the decision was too harsh since he was not Payroll Manager at the time of the incident and no sanctions were taken against Saundra Loftus who was responsible for the error occurring in the first instance.

56. The claimant obtained a further fit note from his GP on 14 November 2016 signing him as not fit for work until 14 December 2016 due to a stress related problem.

57. On 16 November 2016, the claimant sent an email to Janette Savage. He requested a meeting or discussion revisiting the settlement they discussed in a previous meeting in September.

58. On 28 November 2016 the claimant wrote to Janette Savage:

> "Yet again I am left feeling frustrated at your apparent inability to reach a satisfactory agreement. Whilst I appreciate the fact that the decision needs to be made within the business at a more senior level I cannot comprehend why the decision to offer me a settlement has taken so long, since this was mentioned during a meeting some time ago.
>
> With this in mind I have taken the advice of my GP, who I have spoken to today, who has advised me to resign for my own welfare, and the advice of my solicitor who suggests I should resign with effect from 30 November 2016. I understand that I should give eight weeks' notice but as I will not be returning to work in that time, due to the ongoing stress this is causing me, I would suggest that you should pay me my notice period and any outstanding annual leave I have, which I would appreciate you informing me of how many days' leave I have owing to me.

> I feel that this decision needs to be taken due to your obvious time wasting in reaching a conclusion to this matter, further adding to the unnecessary stress and anxiety you are causing me."

59. He asked for confirmation that he still had the right to appeal after the termination of his employment.

60. The claimant gave evidence that he contacted New Bridge Group once he had sent his letter of resignation asking when they would like him to start. It was then arranged that he would start on 1 December 2016.

61. On 30 November 2016 the respondent wrote inviting the claimant to an appeal hearing on 7 December 2016. The claimant started his new job on 1 December 2016. The appeal hearing was heard on 7 December. By a letter dated 14 December 2016 the claimant was informed that his appeal was not upheld.

62. By a letter dated 25 January 2017 the claimant was informed that his employment with the respondent was ending on 26 January 2017.

Submissions

63. Mr Campbell spoke to written submissions. In summary, he argued that the respondent had not been in repudiatory breach of contract. The decision not to give the claimant the settlement he wanted could not be capable of contributing to any alleged acts which cumulatively amounted to a repudiatory breach. The refusal of a settlement could not be "the last straw" that destroyed the claimant's trust and confidence. The decision to issue the claimant with a final written warning was not a repudiatory breach by the respondent; it was a perfectly reasonable course of action.

64. Mr Campbell also submitted that the decision to issue the claimant with a final written warning played no part in the claimant leaving the respondent's employment since he had already been offered and accepted new employment before he even attended the disciplinary hearing. Mr Campbell argued that the claimant had affirmed the contract by remaining in employment where he tried to secure a settlement. He argued that the claimant's delay in resigning combined with the other relevant circumstances, including both the acceptance of sick pay and the claimant's efforts to secure a settlement whilst still in employment, meant that he had affirmed the contract.

65. The claimant made oral submissions. He said he had admitted that he played a small part in the errors; the majority of errors lay with others. This was overlooked. He disagreed that it was not possible to miss the error reports, saying he scribbled on this as he was running to get home. If the error four weeks' earlier had been investigated, the incident would not have happened. He appealed in the expectation that the sanction would be lessened because he wanted to clear his name.

The Law

66. 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 a right not to be unfairly dismissed by his employer. Section 9591)(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".

67. 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 affirmed the contract by conduct which may include delay.

68. 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.

69. 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."

70. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident even though the "last straw" is not by itself a breach of contract: *Lewis v Motorworld Garages Limited [1986] ICR 157 CA*. The last straw does not have to constitute unreasonable or blameworthy conduct but it must contribute, however slightly, to the breach of the implied term of trust and confidence: *Omilaju v Waltham Forest London Borough Council [2005] ICR 481 CA.*

Conclusions

Was there a repudiatory breach of contract by the respondent?

71. The claimant relies on the implied duty of mutual trust and confidence. The claimant confirmed in cross examination that the details of claim in section 15 of the claim form correctly stated what the claimant's claim was about. The claimant wrote there that his claim was about the inequity in the decision made in issuing him with a final written warning when the person employed as Payroll Manager and ultimately responsible for the error faced no sanctions whatsoever.

72. From the resignation letter it appears that the claimant is also relying on the respondent's failure to offer him a satisfactory financial settlement.

73. I agree with the respondent's submissions that the decision not to give the claimant the settlement he wanted cannot possibly be capable of contributing to a repudiatory breach of contract. There is no obligation on an employer to make any sort of offer of settlement. It is difficult to envisage any circumstances in which failure to offer a settlement could contribute to a breach of contract, and I am satisfied that, in the circumstances of this case, the failure to offer a settlement satisfactory to the claimant did not contribute to any breach of contract and it cannot, therefore, constitute a "last straw" for the purposes of claiming constructive unfair dismissal.

74. I conclude that the respondent was not in breach of the implied duty of mutual trust and confidence issuing the claimant with a final written warning. There were

clearly grounds for concern about the claimant's conduct and, whilst there were considerable mitigating circumstances, the claimant did take on responsibility for the final stage of the payroll process. It was reasonable for the respondent to consider that this responsibility was greater than simply pressing the button to submit the payroll. The claimant himself accepted in the investigation that normally he would have checked the figures before submitting the payroll. However, he did not do so because he was unable to find Saundra Loftus and obtain the necessary paperwork. There were grounds on which the respondent could conclude that he should have seen the error reports, once the report was printed, and brought this to the attention of a member of the management team. The fact that Saundra Loftus may have borne a degree of responsibility for the late payment does not absolve the claimant from responsibility for his own errors at the final stage of the process. By the time of the HR investigation, Ms Loftus had left the organisation and disciplinary action against her was not, therefore, possible.

75. The claimant has not specifically argued that the respondent's conduct prior to the issue of a final written warning amounted to a breach of the implied duty of mutual trust and confidence. However, I am satisfied that the respondent was not in breach of that duty by investigating and then taking disciplinary proceedings against the claimant, culminating in the final written warning.

76. Since I have concluded that the respondent was not in repudiatory breach of contract, the complaint of constructive unfair dismissal cannot succeed. However, I go on to consider the other elements of the claim.

Did the claimant resign because of an act or omission (or series of acts of omissions) by the respondent?

77. The claimant sought and obtained other employment prior to the disciplinary hearing. It appears that the claimant looked for alternative work because he was unhappy about the way the respondent was dealing with him following the payroll failure on 25 May. However, at the point the claimant accepted the new employment, the disciplinary hearing had not taken place and he had not been issued with a final written warning. The claimant did not, therefore, resign because of the final written warning.

78. Whilst the claimant said that accepting new employment did not mean necessarily he was going to leave, I do not find this persuasive. It appears to me more likely that the claimant had decided to go and it was merely the timing of his departure that remained to be decided. It appears the claimant remained in employment hoping both to clear his name and to negotiate a suitable settlement. If I had found that the issue of a final written warning was a breach of contract, I would not have concluded that the claimant left in response to such a breach.

Did the claimant waive any breach by conduct?

79. I have concluded that there was no breach so this question does not arise. I would have been reluctant, however, to conclude that the claimant had affirmed any breach, given that the claimant continued to make known his objections to the conduct of the respondent.

Summary of conclusions

80. I conclude, for these reasons, that the claimant was not constructively dismissed. I conclude that the complaint of unfair dismissal is not, therefore, well-founded.

Employment Judge Slater

Date: 12 July 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

13 July 2017

FOR THE TRIBUNAL OFFICE