THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	***Respondent***
Mr S Obadiaru	**Interserve Security (First) Limited**

AND

Date of Hearing: 13-15 November 2017

RESERVED REASONS OF THE EMPLOYMENT TRIBUNAL

The Claims and Background

1. This was a claim for constructive unfair dismissal and breach of contract brought in June 2017. The respondent is an outsourced guarding and security company. One of its key clients is the BBC: the respondent provides security services to the BBC's National Centre Control Rooms (NCCR) in both Salford and London. The NCCRs oversee the BBC's sites and the respondent's staff are required to monitor CCTV cameras, respond to emergency situations, deal with alarms (for lifts, fire etc.) with a view to ensuring the sites' safety and security at all times.

2. The claimant was originally employed by Reliance Security Services Limited on 1 February 2001. His employment was transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) to Wilson James Ltd and then again under TUPE to the respondent in May 2014. The claimant was a Team-Leader in the London NCCR. The claimant's role was to supervise the NCCR officers on shift as well as carrying out the main NCCR duties himself.

The Issues

3. There was a Case Management Discussion on 31 July 2017, which set out the issues for determination in this case. I reconfirmed those issues with the parties at the commencement of the Hearing. These were as follows:

<u>Constructive Unfair Dismissal (section 95 (1) (c) Employment Rights Act 1996)</u>

The claimant had resigned (with immediate effect) on 10 March 2017.He said that this was as a result of the following events:

a. the respondent’s failure to deal with the collective grievance raised by staff in the London NCCR on 21 February 2016 and also the claimant’s grievances raised on 15 December 2016 and 30 January 2017. The respondent said that the collective grievance had been dealt with and that the claimant had not raised any further grievances (but only concerns);
b. the respondent’s accusation that the claimant had been sleeping on duty on 14 October 2016, which the claimant said was false;
c. the disciplinary investigation and meeting into that allegation, which the claimant said was unfair. The claimant’s case on unfairness primarily related to the improper use by the respondent of CCTV footage of him in the NCCR and the fact that he was not given copies of such CCTV footage to enable him to defend himself against the allegations;
d. the sanction of a Final Written Warning to the claimant given on 28 February 2017, which the claimant said was unjustified;
e. the claimant’s suspension from work in the NCCR on 1 March 2017 pending obtaining alternative employment with the respondent on the BBC contract. The respondent said that following the Final Written Warning, the BBC had requested that the claimant be removed from the NCCR and the respondent suspended him on full pay pending redeployment. The claimant says the suspension was unnecessary and “hasty” as he had worked in the NCCR during the disciplinary investigation. He said that he could have continued to work there during any period of looking for deployment. He regarded his suspension as humiliating and embarrassing;
f. the claimant also raised in his oral evidence (though this had not been raised specifically as a separate issue or in his witness statement) his belief that the respondent and the BBC had been conspiring to remove him and his other Team-Leader colleagues from the London NCCR to avoid making redundancy payments.

- Did the events listed above individually or cumulatively amount to a breach of the implied term of trust and confidence? The claimant’s case as put at the Hearing was that the suspension on 1 March 2017 was the “last straw” which led to his resignation;

-If the events listed did amount to a repudiatory breach of contract, did the claimant resign in response to those breaches?

-If there was a dismissal, what was the reason for the dismissal and was that dismissal fair in all the circumstances?

<u>Breach of Contract</u>

If the respondent’s breaches led to a constructive dismissal, was the claimant entitled to his notice pay as a result of those breaches of contract?

4. The Employment Judge explained to the claimant that it was understood that he denied that he had been asleep on duty. However, it was not part of the

Tribunal's determination to decide whether or not this was the case. The Tribunal would only determine the issues as set out above.

Application to Amend

5. The claimant had applied on 10 August 2017 to amend his claim to include a detriment claim under section 47B of the Employment Rights Act 1996 (ERA) on the grounds that he had made a public interest disclosure. This application was refused by EJ Grewal on 30 August 2017.

The Conduct of the Hearing

6. The Hearing was originally listed for 4 days; however due to the Employment Judge's availability, the evidence and submissions were heard within 3 days and Judgment was reserved. A provisional date for a Remedies Hearing (if needed) was agreed with the parties for 22 January 2017.

Documents

7. There was an agreed bundle of documents and a short supplementary bundle of documents supplied by the claimant, which was added to that bundle. Page references in this Judgment and Reasons are to that bundle. The Tribunal was also assisted by written and oral submissions from both parties.

Witnesses

8. The Tribunal heard evidence from the claimant and from the following, on behalf of the respondent: Chris Jenkins (Senior Cluster Manager) – the investigating officer; Steve Curlewis (Account Manager) – the disciplinary decision maker; Andreas Engelbrecht (Cluster Manager BBC West 1) – dealing with claimant's grievances/concerns and his re-deployment and Mark Murphy (Account Director-BBC Security) – dealing with the claimant's re-deployment; the appeal against the disciplinary decision and the collective and the claimant's grievances.

9. Each witness had produced a written statement which was taken as his evidence in chief. The witnesses were cross-examined by the other side and were asked questions by the Employment Judge. It was also agreed with the parties (at the claimant's request) that the usual order of presentation of evidence would be reversed, so that the respondent's witnesses would give their evidence first. This was to assist the claimant who was not legally represented.

CCTV Footage

10. The Tribunal was also shown the relevant CCTV footage relating to the respondent's allegation that the claimant had been asleep on duty on the morning of 14 October 2016 (his shift would have commenced on 13 October). The claimant had been offered an opportunity to see this footage on 9 February 2017 at the second stage of the disciplinary hearing, but had declined to do so

as he believed that it had been manipulated and was fabricated. However, he agreed that it would assist the Tribunal to view the footage in determining his claim. The claimant was shown the CCTV footage (for the first time) during an adjournment on the first morning of the Hearing. The footage was then viewed in Tribunal (as part of Mr Jenkins' evidence). The entire footage was approximately 5 hours' long, but it was agreed that the Tribunal would view the extracts upon which the respondent had based its findings against the claimant. The footage was viewed on two screens: a smaller screen (Mr Jenkins' laptop) which displayed the date and time of the footage and a larger screen (Mr Smith's laptop) which was easier to view but which could not display the time/date. The Tribunal viewed the larger screen, but could cross-refer to the smaller screen to double-check the relevant time etc.

Findings of Fact

11. The Tribunal heard detailed evidence over the course of 2 days, but will only make such findings of fact as are necessary to determine the issues set out above.

The Collective Grievance

12. In or around 2011/2012 CCTV cameras had been placed in both London and Salford NCCRs. This had originally been to enable both control rooms to work together as if on the same site. The claimant accepted in his evidence that this was sensible and also that staff in the NCCRs had been fully aware of the presence of the CCTV cameras. However, in 2014, following a request from the BBC the cameras in the Salford NCCR had been moved to focus on a fire alarm panel. This meant that the Salford team could see the staff in the London NCCR but not vice versa.

13. The claimant said that between 2015 and 2016 several malicious and unproven allegations had been made against London NCCR staff by their Salford counterparts. He gave two examples: William Peart who had been holding a pen but was accused of smoking and Chioyen Chidebe who had been adjusting his reading glasses on his nose but had been accused of making a rude gesture with his fingers. This had led to ill-feeling between the two NCCRs.

14. On 21 February 2016 the eight members of the London NCCR staff (including the claimant, Mr Chidebe and Lee Davison) sent to Mr Engelbrecht, a document headed "Concerns about CCTV recordings of London NCCR" (pages 146-149). This set out the background to the installation of the CCTV cameras but noted that the London NCCR staff had never fully understood the need for the cameras. The London NCCR staff believed that the cameras were used disproportionately and discriminatorily to monitor them. The staff recognised that the CCTV footage belonged to the BBC, who was responsible for authorising the release of that footage.

15. The document also summarised the Information Commissioner's Office (ICO) guidance on CCTV monitoring and the purposes for which this should be used. The staff concluded that the current CCTV recording of the London NCCR team

fell short of the ICO Guidelines; that they believed they were being unfairly monitored by the Salford NCCR team (and that this conduct was tacitly supported by the respondent's management on the BBC contract) and that they were being discriminated against (although they did not specify on what grounds/protected characteristics this discrimination was based). They requested that the CCTV cameras in the London NCCR be turned towards the fire alarm panel, as they were in Salford. They felt they were being subjected to an intrusive level of scrutiny, which was not consistent with their Salford colleagues.

16. The document stated that "the London NCCR team is ready to pursue this matter in a grievance if its concerns are not properly dealt with". The inclusion of this sentence must indicate that the 21 February 2016 document was not regarded by its authors as a grievance, otherwise that statement would be unnecessary. The staff allowed 7 days for resolution of their concerns, failing which the matter would be escalated upwards.

17. In his oral evidence Mr Engelbrecht said that he had replied to this document in some detail, explaining (inter alia) that the intention behind the cameras in both NCCRs was to facilitate co-ordination between the North and South sites –so that a Team Leader on one site could effectively manage both NCCRs. It also provided monitoring for lone working (which was a safety issue for staff). He also noted in this response that the respondent was endeavouring to redress the matter and to change the position of the cameras in the Salford NCCR to achieve their original purpose. The delay had been caused by some cost implications but it was hoped that the change could be made at the end of March 2016.

18. Mr Engelbrecht could not recall the exact date of his response, nor did he have a copy of it. However, he noted that the substance of his response was contained in a document headed "Grievance against the Discrimination of London NCCR Staff" (pages 155-161): this document took the paragraphs of his response and then set out the London NCCR's staff's counter points to each issue. The Grievance document was sent to Simon Dobell and copied to Mr Engelbrecht on 17 March 2016. Mr Engelbrecht concluded that his initial response would have been sometime between 21 February and 17 March 2016. He also noted that a grievance meeting was arranged with Simon Dobell on 25 April 2016, though Mr Engelbrecht had not attended this meeting himself.

19. Mr Engelbrecht said that he had kept the London NCCR staff updated on progress in moving the cameras in Salford. He said by May 2016 all operatives in Salford could be visible to the London NCCR and vice versa. He regarded this as resolving the grievance. This fact was confirmed by an email dated 19 October 2016 to Nigel Brown at the BBC (pages 195 C-D) though it was noted that this had taken longer than expected. It was acknowledged that the respondent had not confirmed this formally in writing to the London NCCR team until 10 April 2017, when Mark Murphy wrote to them. The Tribunal notes the delay in dealing with a formal response, but accepts Mr Engelbrecht's evidence that the substance of the collective grievance (as set out in the document of 21 February 2016), namely the disparity of the CCTV camera positions on the

respective sites had been effectively addressed by the respondent in or around May 2016.

Investigation into Claimant's alleged misconduct

20. There had been ongoing investigations as far back as February 2016 into NCCR officers taking excessively long breaks. Dan Vickers had been asked by Simon Dobell the respondent's Account Director (and predecessor to Mr Murphy) to look into break rotas not being followed in the London NCCR. Mr Vickers had prepared a report (having viewed CCTV footage in the period 21-26 January 2016) which concluded that officers in the London NCCR were taking excessive time away from their work stations, which was unauthorised. (pages 136D-F). It may well have been this report which led to some of the London NCCR staff's concerns in their collective document of 21 February 2016.

21. There were various concerns expressed with regard to breaches of agreed break rotas in May 2016 (page 116B) and a report was produced in October 2016 by Julie Pasat dealing with issues relating to the NCCRs (page 195D). Nigel Brown (BBC Corporate Security Manager) then expressed concern about the respondent's staff taking excessive breaks especially as the BBC were entering a stage where the NCCRs became extremely important to their operations (page 195C). He requested an immediate report. This was actioned by Mr Engelbrecht.

22. On 3 November 2016 Paul Connor (Cluster Manager North) provided a preliminary report having reviewed CCTV footage of the London NCCR relating to three randomly selected dates in October (1,8 and 13), which appeared to show the claimant sleeping during the night shift of 13/14 October 2016. He recommended that a full investigation of both NCCRs was undertaken (pages 195M-N).

23. Mr Jenkins was asked by Nigel Brown to carry out that investigation. The background to this was that the NCCRs had potentially missed alarms or serious incidents, which had led to BBC, staff and property being put at risk. As part of this exercise Mr Jenkins reviewed CCTV footage for the October dates mentioned in Paul Connor's report and also for both London and Salford on various dates in November 2016.

24. The claimant put much emphasis in his evidence and in his cross-examination of the respondent's witnesses on the fact that proper permission had not been obtained to view the CCTV footage and, therefore, its use in disciplinary investigations against him was improper or (in his view) was inadmissible. Mr Jenkins accepted in his witness statement that representatives at the BBC had twice refused permission to use the CCTV footage. However, he also said that he had referred the matter to Nigel Brown (who had requested the investigation); Mr Brown had escalated the matter to his manager, Carol Ann Kinley-Smith (Head of BBC Corporate Security and Investigators) – she was more senior that the two people who had previously refused permission. Ms Kinely-Smith authorised use of such CCTV footage. Nigel Brown then gave permission first verbally and then in writing on 10 November 2016 (page 195CC)

CCTV footage of the NCCRs from 1-31 October 2016 to be reviewed and used in any necessary disciplinary action. This was justified as “it is believed that NCCR staff are engaging in activities that had led to the security and safety of BBC staff and property being compromised”.

25. Although not strictly relevant to the issues in this case as the events arise after the claimant’s resignation, the Tribunal notes that the claimant complained direct to the BBC on 5 April 2017 about the use of the CCTV footage. He received a response on 3 July 2017 from Simon Marr (Director BBC Safety Security & Resilience) confirming that Mr Brown’s decision to view the CCTV footage was justified (pages 290-292). The claimant accepted in his oral evidence that the purpose of NCCR activities is to protect the BBC’s staff and security and that it would not be acceptable for the respondent’s staff to compromise that aim. The Tribunal finds that the respondent’s use of the CCTV footage in its disciplinary investigations was not improper and permission had been obtained from the BBC.

26. Mr Jenkins concluded his investigations and gave the results to both the respondent and Mr Brown at the BBC. He found that excessive breaks were being taken and recommended that for 3 officers, including the claimant, disciplinary action should be commenced. Mr Jenkins believed that the CCTV footage he had viewed showed the claimant appearing to be asleep for a sustained period of time and also suggested that the claimant was attempting to hide his actions, by moving a chair to obscure his own position.

27. On 12 December 2016 Mr Jenkins invited the claimant to an investigation meeting on 14 December (page 196). He cites the allegation of sleeping whilst on duty and notes the dates as 13, 14, 15 and 16 October 2016.

<u>Investigation Meeting on 14 December 2016</u>

28. The notes of this meeting are at pages 197-199. Mr Jenkins’ summary report is at page 200. During the interview, Mr Jenkins described to the claimant what he had viewed on the CCTV footage. The claimant was asked to explain various actions which had been observed, such as dimming the control room lights; moving to terminal 4; moving a spare chair to apparently obscure his head/face from the camera and then appearing not to move very much. The claimant had said that he was simply fidgeting and denied that he had been asleep.

29. In response to Tribunal questions, Mr Jenkins said that he had not shown the claimant the relevant CCTV footage at the investigation meeting. This was because he did not have the correct software package on his laptop to enable him to show the footage with the dates and times displayed. Mr Jenkins said he had only obtained the relevant software (Vigilant Verifier) on 15 December 2016, the day after the investigation meeting. He acknowledged that he had not offered to show the claimant the CCTV footage without the dates: this was in case he could not use it at a later stage. The Tribunal accepted Mr Jenkins’ evidence on this matter. Mr Jenkins believed that a copy of his summary investigation report had been sent to the claimant.

The CCTV footage

30. The Tribunal does not intend to describe the footage in any great detail, especially as it not part of its function to determine whether or not the claimant was asleep on duty.

31. However, the Tribunal does observe that it viewed extracts of the CCTV footage of the London NCCR for the early morning of 14 October 2016 (from 00:36 to 03:23). In summary the footage showed the claimant dimming the control room lights at 00:36:15 and moving to the terminal 4 computer at the end of the room. The claimant then moved a spare chair and appeared to adjust the headrest of that chair; he then sat in his own chair with his back to the camera and moved the spare chair behind him. This had the effect of obscuring his head/face from the camera. He did then appear to be fairly still for some time. The claimant said he was viewing his computer screen and the large screen on the wall to his right. The claimant's colleague Mr Chidebe (who was at a terminal nearer the camera) appeared to be speaking either into his headset or to the claimant and also to be using his computer mouse and keyboard.

32. At 00:45:00 the claimant moved his chair to check an alarm that had gone off near the door. He then returned to terminal 4 in the former position, again moving the spare chair behind him. He did not appear to move; nor did he appear to use his keyboard or mouse (unlike his colleague Mr Chidebe). At 01:37:50 Mr Chidebe moved over to the big screen and then back to terminal 3. Following this, the claimant moved to terminal 2. At 02:00:00 the claimant returned to his position at terminal 4 and did not appear to move again until 03:22:46, when he stretched his arms out above his head. The claimant said he was scratching his ears. At 03:23 the claimant moved to terminal 3 and the footage ceased.

33. The claimant has denied throughout that he was asleep and the Tribunal makes no finding as to whether or not that is the case. However, the Tribunal does find that, from viewing the CCTV footage, it was not unreasonable or perverse of the respondent to form the belief that the claimant had been asleep. The claimant conceded in his oral evidence that the respondent could have formed this view from the CCTV footage, even though he denied it.

Claimant's email of 15 December 2016 – alleged grievance

34. The day after the investigation meeting the claimant sent an email to Mr Engelbrecht. In this email (pages 202-3), the claimant said that he wished *"to formally bring to [Mr Engelbrecht's] and the company's attention"* the fact that current use of the 24 hour CCTV monitoring of both NCCRs did not comply with the ICO's Guiding Principles on Camera Surveillance. The claimant believed that the respondent and the BBC's current practice was unfair and excessive. In summary, the claimant accepted that there may be a legitimate aim for such surveillance but the current practice did not take into account individuals' privacy and so was disproportionate. The email did not mention the word "grievance".

35. The claimant was asked about this omission and was referred in cross-examination to the respondent's Grievance Policy (page 104-6) which states that an employee must clearly state that the Grievance Procedure is being used. The claimant said that he had never seen that document; it had never been sent to him and he had not been made aware that he could access it on the company's intranet. He agreed that he had never formally asked for a copy of the Grievance Policy, but regarded it as the respondent's responsibility to provide this to him. The Tribunal accepts the claimant's evidence on this point. However, the Tribunal notes that the claimant had been an active participant in the collective concerns in February 2016 and the elevation of those concerns to a grievance in March 2016. Further, the claimant made several references in his evidence to the ACAS Code, which he had obtained via the Internet. The Tribunal finds that given both those facts, on a balance of probabilities, the claimant would have been aware of how to raise a formal grievance. His use of words in his email of 15 December 2016 was ambiguous and did not make it clear that he was raising a grievance. The Tribunal also notes the timing of the email, namely immediately following the investigation meeting with allegations of the claimant being asleep on duty and the use of CCTV footage in the investigation process.

36. Mr Engelbrecht replied to the claimant's email on the same date (page 202) saying that he would pass the concerns on. The claimant did not refer in his evidence to any emails or letters chasing Mr Engelbrecht on this matter.

<u>Disciplinary Hearing on 30 January 2017</u>

37. On 25 January 2017 Mr Curlewis invited the claimant to a disciplinary hearing on 30 January. The allegation was that he had been sleeping on shift during the period 13-16 October 2016. The claimant was given the right to be accompanied and was told that the allegation (if proven) may result in a formal warning being placed on his file. There was no reference to dismissal being a possible outcome.

38. Information was enclosed namely: CCTV screenshots for 14-16 October; the notes of the investigation meeting with Mr Jenkins and his investigation summary report. It was accepted that the claimant had not been sent a copy of the respondent's disciplinary policy. Mr Curlewis also accepted in cross-examination that the screen shots he had sent were those of 15 November 2016, which he conceded had been done in error. However, he said that he had not taken the November screen shots into account in reaching his disciplinary decision. I found Mr Curlewis' evidence to be credible on this point.

39. Mr Curlewis chaired the disciplinary meeting on 30 January and the claimant was accompanied by this colleague Lee Davison. Notes of the meeting are at pages 221-224. During the meeting both the claimant and Mr Davison referred to the collective grievance raised by London NCCR staff saying they did not believe it had been addressed and also complaining about failure to follow ICO guidance on CCTV monitoring. The Tribunal has found that the complaint about camera positions in the respective NCCR's contained in the collective grievance had effectively been addressed in April/May 2016.

40. The claimant was taken to and accepted that at the end of this meeting he had acknowledged that he felt he had been treated fairly and had been given the opportunity to put forward his points. He confirmed that this was correct.

Claimant's document of 30 January 2017

41. This document (pages 207 – 214) was given by the claimant to Mr Curlewis following the first disciplinary meeting. It was also sent to him electronically on 2 February 2017 (page 215). The document sets out the claimant's "defence" to the allegations that he was asleep on duty on 13-16 October 2016. He also sets out the text of his email dated 15 December 2016 and notes that it has not been addressed. He states that he believes that the allegations are being brought against him as a malicious response to the London NCCR staff. The claimant also stated that he believed there was a "witchhunt" against London NCCR staff. He also complained that there had been no resolution of the collective grievance of February 2016.

42. The claimant accepted that he had not specifically said he was raising a separate grievance, but said that he regarded the document as being both a defence to the disciplinary allegations and raising concerns which in his mind were equivalent to a grievance.

Second Disciplinary Meeting on 9 February 2017-11-15

43. Following the submission of the claimant's "defence" document (referred to above) Mr Curlewis felt that further investigation was required. In the light of the claimant's comments about ICO Guidance, he re-checked Mr Brown's permission to use the CCTV footage. He also asked Mr Engelbrecht to speak to Mr Chidebe who had been in the NCCR on 13/14 October 2016. Mr Engelbrecht did so and reported that Mr Chidebe had initially said that he could not recall that day but when showed the screen shot had then said that he did not think the claimant had been sleeping: he commented that officers sometimes change their body position when taking a screen break (page 220).

44. Mr Curlewis said that he had read the claimant's defence documents and his comments about the use of CCTV monitoring and his reference to the unresolved grievances. However, he did not believe that the claimant was raising a formal grievance; rather he felt that the claimant was trying to obscure the main issue relating to the disciplinary allegations.

45. Mr Curlewis wrote to the claimant on 7 February (page 229) inviting him to a further disciplinary meeting on 9 February 2017. This letter is headed "*Invitation to a Disciplinary Hearing Outcome Meeting"* and the body of the letter states that Mr Curlewis is in a position to provide an outcome to the claimant in person. However, in response to Tribunal questions Mr Curlewis said that this was incorrect and that he had not reached any conclusion on the disciplinary matter. The notes of that meeting are at pages 225-227. The claimant was again accompanied by Mr Davison. These notes support Mr Curlewis evidence that he

did not give any disciplinary outcome at that meeting. The Tribunal finds that the letter was unhelpfully misleading but was a genuine mistake.

46. At that meeting, Mr Curlewis offered the claimant the opportunity to view the CCTV footage. This was the same as the footage as seen by the Tribunal at the Hearing on 13 November 2017 with the times/dates. The claimant refused to view the CCTV footage. He said that he wanted to have a copy so that he could view it first and would not agree to view it with Mr Curlewis in the disciplinary meeting. Mr Curlewis said that he did not have permission to give the claimant a copy of the footage to take away, but he could view it with Mr Curlewis in the meeting. The claimant also said that he refused because he believed the footage was of 14 November and not the October dates. However, if the claimant had viewed the footage he could have seen this and pointed it out. I do not accept this as a plausible explanation for his refusal to view the CCTV footage..

47. The claimant was asked why he refused. He said that he believed that it had been manipulated and he did not trust the respondent. The claimant also said in cross-examination that he believed that the respondent and the BBC were colluding to remove Team Leaders from the London NCCR. They had decided to remove that role and they did not want to make redundancy payments and so had made up the allegations against the claimant (and others) by manipulating the CCTV footage so as to be able to remove them. This would suggest that the claimant had lost trust in the respondent as at 9 February 2017.

<u>Disciplinary Outcome 28 February 2017</u>

48. Mr Curlewis confirmed the outcome of the disciplinary investigation in a letter dated 28 February 2017 (pages 229-232). He summarised the content of the disciplinary meetings and his interpretation of the CCTV footage. He noted Mr Chidebe's comments, but did not find his statement to be credible; bearing in mind what he (Mr Curlewis had viewed on the footage). He concluded that the allegations against the claimant had been made out but he took into account the claimant's long service and decided that a First and Final Written Warning (FWW) would be placed on the claimant's file for a 12 month period. Mr Curlewis also provided further documents requested by the claimant, which Mr Curlewis had used in reaching his disciplinary decision.

49. Mr Curlewis then noted that following the internal disciplinary findings, the BBC had been unhappy with the claimant remaining in the NCCR and had requested his removal. However, the respondent had persuaded the BBC to allow the claimant to remain working on the BBC contract in a different role. This was supported by an exchange of emails between Mark Murphy and Nigel Brown (pages 233-234). These emails were put to the claimant who said that he believed that they were a sham. The Tribunal does not accept the claimant's evidence on this point and finds that the respondent had arranged with the BBC to retain the claimant on the main contract even though he had to be removed from work in the NCCR.

50. There would be a two week period during which the respondent would seek to redeploy the claimant in a suitable alternative position. If this was unsuccessful then his employment would be terminated for “some other substantial reason” SOSR.

Suspension 1 March 2017 and offer of redeployment

51. Mr Engelbrecht met with the claimant on 1 March 2017 and personally gave him the Disciplinary Outcome Letter. He said that he then told the claimant that there were 7 security officer positions available on the BBC contract in the W1 and W2 areas: four of these were on the site where the claimant worked (but not in the NCCR). The claimant had the necessary skills for these roles but the hour rate was about £2 lower. The respondent agreed to maintain the claimant’s higher rate of pay for 8 weeks if he chose to accept one of the alternative roles.

52. Mr Engelbrecht said that he told the claimant that if he wanted any of these roles they would be his, unless any of his fellow colleagues on the redeployment list also wanted them, in which case their would have to be a “competition” between them. The claimant said that he was told that he had to apply for each role and would have to be interviewed, which he did not want to do. There is a disparity in the evidence here. The Tribunal notes the email from Mr Engelbrecht to the claimant at page 243 on 1 March 2017 attaching two vacancy lists for the organisation (including other contracts as well as the BBC). This invites the claimant to consider the lists and revert to Mr Engelbrecht by 4pm on 3 March 2017 with his choices or views on the content. This does not support the claimant’s evidence that he needed to apply for the roles. The Tribunal prefers Mr Engelbrecht’s evidence on a balance of probabilities. Mr Engelbrecht indicated that he would update the lists over the two week redeployment period, which he did.

53. Mr Engelbrecht then suspended the claimant on full pay with immediate effect. It was this suspension which the claimant said he regarded as the last straw in the sequence of events. He said that this action was hasty. He had continued to work in the NCCR since the alleged incident in mid-October 2016 and there was no reason for the respondent to send him home on 1 March pending redeployment. He could have continued to work in the NCCR till he took on any new role. He said that being sent home had humiliated him and disgraced him in front of his colleagues. The claimant pointed out that the email from Nigel Brown (BBC) of 24 February 2017 required his removal from the NCCR “as soon as possible”. He said that as the respondent had already waited 5 days before suspending him they could have waited for another two weeks.

54. The Tribunal finds that the claimant’s evidence about his embarrassment etc was genuine and he could not understand why he had to be suspended. However, given the commercial importance of the BBC contract and the fact that the respondent had already persuaded the BBC to allow the employees to be retained on the contract, the Tribunal finds that it was not unreasonable for to suspend the claimant pending redeployment, so as not to appear to disregard the client’s instructions. The suspension, whilst perhaps insensitive and unnecessary in the sense that the claimant had not proved to be a security risk

since October 2016, was not a breach of contract and was certainly not a repudiatory breach of contract by the respondent.

55. In response to Tribunal questions, the claimant said that if he had not been suspended, he may have remained in employment with the respondent if his grievances had been dealt with.

Claimant's resignation on 10 March 2017

56. The claimant did not respond to Mr Engelbrecht's emails/telephone calls about potential roles within the BBC. He said that he did not believe he would get the jobs as his other colleagues had not succeeded in obtaining roles. The two week redeployment period was due to expire on 15 March 2017 (being 2 weeks from the date of suspension).

57. On 10 March 2017 the claimant wrote to Mr Murphy resigning with immediate effect and claiming "fundamental breach of contract; anticipated breach of contract and breach of trust and confidence" (page 262-270). The claimant noted that his position in the NCCR had been replaced and he regarded this as a prejudging of the position with regard to his dismissal for SOSR on 15 March 2017. This unfortunately indicates a total misapprehension by the claimant as to why he was removed from the NCCR: namely at the client's request. That action was not a dismissal; nor was it a breach of contract. Further, it was not one of the events cited by the claimant as leading to his decision to resign (as set out in the issues).

58. The claimant also confirmed in his oral evidence that he had not resigned because he believed there was a conspiracy to remove him: he had looked at the matter as a whole. He said that he had not mentioned his belief in the conspiracy to avoid the redundancy payments prior to raising it in his oral evidence because he could not put down everything in writing. I did not find this explanation to be credible: the claimant had been articulate and thorough in his conduct of the case. I do not find it plausible that he would have omitted to mention such a crucial factor in the alleged breakdown of his relationship of trust and confidence with his employer.

59. Following the claimant's resignation, Mr Murphy regarded this as an appeal against the FWW and also formally considered the claimant's complaints (alleged grievances). These were not upheld other than the claimant's outstanding sick pay, which was duly paid. This was recorded in his letter dated 10 April 2017 (pages 278-279).

Conclusions

Did the events listed above individually or cumulatively amount to a breach of the implied term of trust and confidence?

60. The Tribunal refers to its finding of fact above in respect of each of the matters raised by the claimant to support his constructive dismissal claim. The Tribunal

does not find that any or all of them cumulatively amounted to a breach of the implied trust of and confidence.

The Grievances

61. The Tribunal has found that the collective grievance was effectively disposed of in May 2016, although it was not formally confirmed in writing until April 2017. The Tribunal has found that the claimant had not properly raised any grievances on 15 December 2016 and 30 January 2017. He had raised "concerns" and complaints, which were couched in ambiguous terms. Even if the claimant had not seen the respondent's grievance procedure he was not unfamiliar with how to raise a grievance and was well able to articulate his claims if he so wished. The respondent is not free from criticism in its conduct in dealing with the claimant's concerns and its HR team could have played a more proactive role in assisting management in this regard. However, the respondent's procedural and communication failures do not amount to a breach of contract such that all trust and confidence would be lost.

The Disciplinary Allegation/Investigation/Sanction

62. The Tribunal's findings are set out above in some detail. The Tribunal makes no finding as to whether the claimant was asleep on duty. However, from the CCTV footage viewed by the Tribunal (which was available for the claimant to view on 9 February 2017 at the second disciplinary meeting), the Tribunal finds that it would have been reasonable for the respondent to believe that the claimant had been asleep in the early morning of 14 October 2016. The claimant raised various complex and sometimes confusing arguments about why the CCTV footage was inaccurate and unreliable and incorrect. However, the Tribunal saw no evidence to show that the footage had been wilfully or maliciously fabricated as part of a pre-meditated plot between the respondent and the BBC. Further, the claimant gave no plausible explanation for his refusal to view the footage prior to the Tribunal hearing.

63. The claimant and his NCCR had objected at an early stage to the use of CCTV cameras to monitor them constantly in their workplace. However, this of itself was not a breach of contract. This had been in place since 2012. The discrepancy complained of between the two NCCR's had been rectified in May 2016. There was no breach of contract here. Again, the respondent's conduct could have been better. There had been no written communication to the employees of any CCTV monitoring policy/the use of the cameras. This was not best practice- but it was not a breach of contract and was not a sufficient reason for the claimant to refuse to view the CCTV footage which formed part of the disciplinary allegations against him.

64. The respondent should also incur criticism with regard to its conduct of the various meetings and the confusing nature of some of its correspondence with the claimant. However, none of those actions are found to be breaches of contract of the implied term of trust and confidence. The claimant could have appealed his FWW but he did not choose to do so, instead he chose to resign.

65. The Tribunal also notes that as regards the fairness of the disciplinary sanction, applying by analogy the test usually used in conduct dismissals, bearing in mind the reasonable belief of the respondent in the claimant's misconduct, the FWW was a reasonable sanction (with the reasonable range of responses). Therefore, it could not be seen as a breach of contract.

The Suspension

66. The claimant said that this act was the last straw for him. He said that he regarded this action as hasty and unnecessary and it was the trigger for his resignation. The Tribunal has some sympathy with the claimant's view that there was no reason why he would represent a threat to security if he had remained in the NCCR until redeployment. It is possible to see how this could have been perceived by him as destroying trust and confidence. However, the Tribunal also recognises that his removal was required by the client and it was primarily that fact, which motivated the respondent's action. Looked at objectively the suspension was not an act which could have been viewed as a breach of that implied term.(**Omilaju v Waltham Forest LBC [2004] EWCA Civ 1493)**

67. The claimant did not repeat in any detail in his submissions the allegation raised in his oral evidence that there was a conspiracy between the BBC and the respondent to remove him from the NCCR. It is not plausible that if he really believed this he would not have included it in his resignation letter; his ET1 or his witness statement. It may well have been that the respondent had sought to restructure the manning of the NCCR but there was no evidence before the Tribunal to lead to the conclusion that this had led to a falsifying of CCTV footage to create the impression that the claimant may have been sleeping on duty.

68. The claimant's claims for constructive dismissal and breach of contract do not succeed.

Employment Judge Henderson on 16 November 2017