EMPLOYMENT TRIBUNALS

Claimant: Mr R Greensmith

Respondent: Nottinghamshire County Council

Heard at: Nottingham

On: 5, 6 and 7 February 2018

Before: Employment Judge Faulkner (sitting alone)

Representation
Claimant: Ms A Williams (Counsel)
Respondent: Mr E Beever (Counsel)

JUDGMENT

The Claimant was not dismissed. Accordingly, his complaint of unfair dismissal is not well-founded.

REASONS

Complaint

1.The Claimant complains of unfair dismissal only, asserting that his dismissal was either automatically unfair under s.103A Employment Rights Act 1996 ("ERA"), or ordinarily unfair contrary to section 94 ERA. Ms Williams confirmed that there was no complaint of detriment contrary to section 47B ERA.

Issues

2. It was agreed with the parties that this Hearing would deal with the question of liability only, not least given that pension loss may be significant in the event of the Claimant succeeding in his complaint.

3. The issues to be decided were therefore agreed at the outset to be as follows:

> 3.1. Did the Claimant resign as a result (at least in part) of an act or omission, or series of acts or omissions, by the Respondent?
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> 3.2. Did those act(s) or omission(s) amount to a fundamental breach of contract? Ms Williams confirmed that the Claimant relies only on breach of the implied term of trust and confidence.

3.3. Has the Claimant affirmed the contract following any breach?

3.4. If the Claimant was dismissed, the Respondent does not seek to argue that there was a fair reason for dismissal.

3.5. It must then be considered whether the reason or principal reason for dismissal was that the Claimant made a protected disclosure, it being conceded that he did so. In other words, was the protected disclosure the reason or principal reason why the Respondent behaved in the way that gave rise to the Claimant's dismissal?

Procedural issues

4. At the start of the Hearing, I notified the parties of my passing professional connection with Mr Beever. Over more than 20 years of legal practice – Mr Beever as a barrister and myself as a solicitor – I have attended a handful of events held at the chambers where he is a tenant, at which he either spoke or was present. We also attended employment judge induction training at the same time, during which we were assigned to the same small group. I have at no point instructed him. Ms Williams suggested that this was "an issue" but said that she had spoken with the Claimant who was content to proceed. As I made clear, I did not believe it was necessary for me to step aside from hearing the case based on such a limited connection to one of the representatives. Both counsel confirmed their agreement to proceed.

5. The other procedural matter it was necessary to deal with concerned whether a 17-page transcript of a meeting held on 6 April 2016, chaired by a former employee of the Respondent, Mr J Hundal, should be admitted to the Hearing bundle. It was provided by Ms Williams at the start of the Hearing. By agreement, Mr Beever and I read the document in a short adjournment. Mr Beever objected to its being admitted and maintained his objection having read it.

6. In deciding whether to admit the document, I had in mind the overriding objective to deal with cases fairly and justly, ensuring in particular that the parties are on an equal footing. It weighed heavily against admitting the document that the Claimant had discussed it with his solicitors but that it was still not disclosed before the Hearing. There were clear Orders in this case requiring advance exchange of documents and compilation of the bundle, and it is of course on the basis of documents so disclosed that parties decide which witnesses to call. The Respondent could not secure Mr Hundal's evidence at this late stage. The veracity of the transcript could perhaps have been tested by the Respondent listening overnight to a recording offered by the Claimant. Mr Beever's primary objection however was that whilst there was nothing of great surprise in the transcript, it was unknown what the Claimant might point to within it, a matter which was of particular concern given Ms Willams' statement that it was a piece of evidence relevant to the heart of the Claimant's case of lack of support by the Respondent. It was thus unknown what the Claimant might draw out of the document which the Respondent would be unprepared to respond to.

7. Having read the transcript myself, I was satisfied of the real risk of prejudice to the Respondent in the ways suggested by Mr Beever, but also considered the question of any prejudice to the Claimant of excluding it. He referred to the meeting in his witness statement, and in some contemporaneous documents, and so the Respondent was certainly on notice as to the content of those

elements of the meeting and the Claimant was thus free to refer to them. That in my judgement would overcome any prejudice to him of the transcript being excluded, at least to a significant extent. With that in mind, in view of the clear Order for disclosure, and given the absence of any explanation for the failure to disclose, I was not prepared to admit the transcript into the bundle and have not taken account of its contents in reaching my decision, other than as referred to by the Claimant in his statement or other documents already within the bundle.

8. The bundle therefore comprised 541 pages. Although there had been allocated reading time on the first day of the Hearing, I made clear to the parties that I had not read the whole bundle such that it was for them to take me to documents they deemed relevant to their respective cases. I heard oral evidence from the Claimant, Mr M Twells (the Respondent's Team Manager for County Supplies, where the Claimant worked), and Ms G Elder (the Respondent's Group Manager for Human Resources). Both counsel also made submissions. On the basis of this material, I make the findings of fact which now follow. Page numbers are of course references to the bundle.

Facts

9. The Claimant was employed by the Respondent at its County Supplies Depot, Calverton, from 2nd November 1998 to 20th January 2017 when he resigned. The Depot supplies stationery to schools and other council operations, and the Claimant was employed there latterly as warehouse manager. According to the job description at page 111, this meant that he was the "lead officer managing all matters related to warehouse management ...". The role included line management of over 20 staff, including ensuring their compliance with relevant rules and policies and taking appropriate action (including disciplinary action) if they did not. His line manager at the times relevant for this case was initially Pat Billam, and upon Mr Billam's retirement, Mr Twells.

Background events

10. It is the Claimant's undisputed evidence that over the years of his employment numerous complaints were brought against him, all of which were held to be unfounded. After time off in 2008 because of "depression and workplace stress" following one particular complaint, the Claimant was assured that any further vexatious complaints would be "taken extremely seriously and dealt with swiftly" (see his statement at paragraph 8). He says that he was able to return to work whilst an investigation was ongoing, even though he did not feel particularly supported and even though the person who made the allegations against him was still present. He tried to be professional. Further allegations were made against him, ranging from theft to aggressive behaviour, and again none were well-founded. One of the Claimant's colleagues, Mr Martin Francis, although not one of the complainants himself, supported a number of the complainants in his capacity as a union representative.

11. In 2015, Mr Billam asked the Claimant to look at establishing a contract for removal of scrap pallets from the Depot. After enquiries commissioned by Mr Billam, it transpired that employees were being paid for scrap pallets. Three employees, including Mr Francis, were suspended by Mr Billam in June 2015. Mr Billam informed the Claimant that he would be required to give evidence in the resulting investigation, and (the Claimant's evidence in this regard was undisputed) assured the Claimant that he would be protected from negative repercussions, and that on no account would the employees be reinstated. The

Claimant's specific fear was that following his participation in the investigation the suspended employees would make complaints about him if they remained employed, which would eventually lead to his dismissal, it seems on the basis that at some point one of the complaints against him would 'stick'. The Claimant was as notified interviewed as part of the investigation. In due course, the three employees were dismissed.

12. It is accepted that the Claimant made a protected disclosure in drawing the activities of the three employees to the Respondent's attention. The Respondent's Whistleblowing Policy is at pages 103 to 109, and includes statements that "you will be protected from possible reprisals … if you have made any disclosure in good faith" and that "protection of others [i.e. staff other than the subject of the whistleblowing] is paramount".

13. Mr Francis appealed his dismissal. The appeal was heard by elected members on 14th March 2016, who decided that he should be reinstated. Ms Elder says (paragraph 7 of her statement) that there was felt to be insufficient evidence to show that Mr Francis had himself received any cash. She met with Mr Francis prior to his return, a meeting which included discussions about expected behaviour. The Claimant and his colleagues were notified of the members' decision but were not given reasons for it. There was widespread concern about the decision and the consequences of Mr Francis' return. The Claimant's case is that whilst he did not object to the reinstatement per se, Mr Francis should have been redeployed, and that his return to the Depot made the Claimant's position untenable.

14. On 31 March 2016, Mr Billam emailed senior colleagues (pages 345 to 346) to say that he felt put in a position "where [he] [could] not carry out [his] full duties", believing Mr Francis would claim "victimisation" if he were challenged about his conduct at any point in the future. Ms Elder met with Mr Billam the next day. She subsequently wrote to the same senior colleagues, page 347, to say she had tried to reassure Mr Billam that he and his management colleagues (which would include the Claimant) "will have our full support, but I recognise that this is of little practical assistance in managing such a challenging situation". She says, and I accept as unchallenged, that what she meant by this was that simply saying staff would be supported was of little practical assistance. She also reported in the email that Mr Billam had said the situation "potentially places [the Claimant], the direct line manager, in a position which will cause him further stress, a condition he has previously suffered from".

15. Mr Billam discussed the matter with the Claimant - they had a good working relationship – and then emailed Ms Elder on 5th April 2016 (page 349) to report that "[the Claimant] has stated, in no uncertain terms, that it is totally unfair of [the Respondent] to put him in the situation where he is expected to manage Mr Francis" and that the Claimant had "been inundated" with colleagues (21 in total) stating strongly that Mr Francis should not return and that they would not work with him. He added, "I have no answers to the questions being asked by [the Claimant]". On 6th April (pages 355 to 358), the Claimant lodged a complaint about the reinstatement, sending it to Mr Billam and asking that it be escalated. He stated that he and colleagues had been reassured they would be protected from reprisals if they assisted in the disciplinary case but now, he said, "I feel that as a result of Mr Francis's reinstatement I will be subjected to victimisation, disadvantage and potential dismissal". He went on to refer to a complete breakdown in mutual trust between the management team and Mr Francis "which will become completely unmanageable", stating that his role would be

undermined and referring to his previous record of depression and workplace stress.

16. Later on 6th April, Mr Hundal met with the whole of the Depot team, including the Claimant. He was an experienced senior officer, and before the meeting had discussed the situation with Ms Elder, specifically the availability of counselling for staff, and the importance of providing more visible managerial support. The Claimant was told, I assume by Mr Billam, that the purpose of the meeting was for staff to express their concerns and to try to establish a solution. The Claimant's unchallenged account was that staff expressed widespread dismay at the reinstatement decision. Mr Hundal recognised that the management team would be undermined, but in the Claimant's opinion was unable to confirm what practical support measures could be put in place. He invited the Claimant and his colleagues to suggest themselves what support might be offered, but their response was that they had no experience to enable them to make any such suggestions; they did not know what support might be available. Mr Hundal remarked that staff would have to "play the cards they were dealt". When the Claimant and a colleague informed Mr Hundal of their respective mental health conditions his response was that they should seek medical advice and take time off. In his evidence the Claimant described the meeting as a "tick box" exercise by the Respondent. Mr Hundal continued to visit the Depot on occasions after this meeting, as part of his supervision of Mr Billam, and subsequently Mr Twells.

17. Mr Billam emailed Mr Hundal after the meeting (page 364) to say that he had met with the team and reiterated management support for staff. He stated, "as yet there have been no suggestions of how that support should be delivered, in order that staff concerns are alleviated. [The Claimant] was still feeling particularly stressed". Again, the Claimant says this was no more than "tick box" support from the Respondent. Mr Francis returned to work on 13th April 2016. On 7th April 2016, the day after the meeting with Mr Hundal, the Claimant had gone on sick leave. His sick note (page 365) gave the reason for absence as "purely work related". He did not return for the remainder of his employment with the Respondent, which terminated on 20th January 2017, over 9 months later.

Sickness absence

18. On the first day of his sickness absence, Mr Hundal wrote to the Claimant (pages 366 to 367) in response to his complaint about Mr Francis' reinstatement. Mr Hundal said that there was no basis for challenging the members' decision and that the Claimant's disagreement with that decision was not relevant in the circumstances. He went on to say, "I do recognise the challenging position you are now placed in by having to manage the outcome of the process", but stated that the Respondent has a duty of care to all staff which managers must discharge. Mr Hundal was not prepared to stop Mr Francis' reinstatement based on "potential concerns", saying that the Claimant's complaint "appears to make an assumption about [his] future position in relation to the management of Mr Francis" but Mr Francis had been advised of the behaviour required of him on his return, and if there were any bullying and harassment it would be investigated and action taken. The letter went on to suggest that the Claimant speak with his GP about his health and that Mr Hundal would be willing to make a referral to occupational health "for a view on what further support we can offer in addition to managerial support". He went on to say, "I need to emphasise it is not for employees to determine where they are placed and who they need to work with"; as a manager the Claimant had to maintain professional working relationships and manage the situation. The letter concluded, "I accept and acknowledge

there will be difficulties in tackling any issues that arise but can assure you of my full commitment in supporting managers … to enable them to undertake their management responsibilities and to ensure the continued smooth operation of the business as well as well-being of employees". The Claimant says he did not believe this would have happened in practice, saying in oral evidence, "What if [Mr Francis] had stabbed me?". Mr Francis had apparently previously thrown food over a female colleague.

19. On 31st May 2016, (page 377), the Claimant wrote to Mr Billam to highlight the distress caused by Mr Francis' reinstatement, which had taken place despite the "conclusive findings" of the disciplinary investigation and without considering the Claimant's role in the whistle-blowing and subsequent investigation. The Claimant reiterated his belief that he would be subject to "bullying, harassment and victimisation, as well as being constantly targeted" by Mr Francis, saying that the Respondent had placed him in an untenable situation, which was impacting on his health. Mr Billam replied on 15th June 2016 (page 381), recognising the Claimant's distress and asking to meet "to offer you support, discuss the prospect of your return and the involvement of occupational health; and give you opportunity to raise any queries or concerns you may have". This was the first of several letters sent to the Claimant headed, "Attendance Management Procedure".

20. The Respondent's Attendance Management Procedure is at pages 87 to 102. It includes the following:

> 20.1. at paragraph 3.3. a statement that initiating steps to dismiss should only be done after all reasonable alternative steps have been considered;
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> 20.2. at paragraph 3.9, regarding long term absence, a statement that where there is no immediate prospect of a return, a review or visit should take place after 4 weeks' absence or sooner;
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> 20.3. at paragraph 6.1, under the heading, "Long Term Sickness", a statement that a referral to occupational health will normally take place after 4 weeks of absence or within 3 months;
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> 20.4.at paragraph 6.3, a statement that managers are entitled to say they can no longer accommodate sickness absence and – this assessment should be made after consultation, consideration of the effects of the absence on service, colleagues, etc, and consideration of redeployment; in this case, the same procedure as for short term absence should be followed – this is at paragraph 4.4.1;
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> 20.5. at paragraph 4.4, there is a statement that following reviews, where it appears an improvement is unlikely, a formal hearing should be arranged; the primary function of the formal hearing is to allow consideration of the employee's sickness absence to date, management action taken to support and seek improvement, and to reach a decision which would be to take no further action, issue a further caution and require further monitoring, or issue a final written warning;
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> 20.6. at paragraph 6.9.2 it is said that where there is an underlying medical condition which means an employee is permanently incapable of carrying out their role, consideration should be given to redeployment; it goes on to say, "If an employee unreasonably refuses a suitable offer of

redeployment the [Respondent] reserves the right to deal with the matter in accordance with paragraph 4.4. above".

Paragraph 4.4.1 says that the procedure for a formal hearing will be in accordance with the Respondent's Performance Management Policy and Procedure. That Procedure is at pages 70 to 76, and includes a statement that there will be no formal action until the case "has reasonably been considered", meaning that the issues have been identified and, where practicable, an opportunity to improve given.

21. The Respondent is unable to explain why the Claimant was not contacted within the first 4 weeks of his absence. Mr Billam did however prepare the first occupational health referral and emailed it in draft form to the Claimant on 22nd June 2016 (pages 383 to 389), within three months of the start of the sickness absence. The form referred to the Claimant as "experiencing work related stress due to the future working relationship with a colleague – a factor which has previously caused him work-related stress". It also said that the Respondent could consider a temporary change in the Claimant's work activities. The Respondent's HR team wrote to the Claimant on 27th June 2016 (pages 391 to 392) making the referral and drawing his attention to the availability of a counselling service, but the letter was sent to the wrong address, and so the Claimant only saw it when Mr Billam produced it at their meeting on 29th June (see below). Ms Elder's evidence, which I accept as unchallenged, is this can only have been due to human error.

22. Mr Billam met with the Claimant on 29th June 2016 at the latter's home; the Claimant's daughter was also present. A transcript of the meeting is at pages 394 to 399. The Claimant expressed to Mr Billam how he felt very let down as he had not been contacted previously. He went on to describe Mr Francis' return as making it untenable for him to return to work and that because of the impact on his health he could "no longer continue", adding "the relationship between me and the [Respondent] is damaged beyond (sic), I just don't trust anyone anymore". Mr Billam informed the Claimant during the meeting that he was retiring, which the Claimant believes was the whole purpose of the meeting, rather than it being genuinely about his welfare. That is clearly conjecture. Mr Billam's retirement concerned the Claimant however, as if he returned to work he would be the most senior member of staff to have provided evidence in the 2015 investigation; he expressed that view to Mr Billam (page 397). Mr Billam asked several times what support would be beneficial; the Claimant said he did not know. Without going into any details, Mr Billam also said that there had been an incident at work recently, but that everyone had been told that unacceptable behaviour would result in disciplinary action. The Claimant says he did not believe that would be the case. Mr Billam also used the meeting to raise the option of counselling. The Claimant says the meeting offered him no support.

23. Mr Billam followed up the meeting with a letter dated 5th July 2016 (page 400). He referred to the Claimant saying that being asked to "get on with it" was too much, that he felt let down, and that he should have had a visit before 29th June, but that the Claimant welcomed the occupational health referral and felt that counselling may be of benefit. The Claimant wrote to Mr Billam on 11th July 2016 (page 401), reiterating his disappointment at not being contacted before, and referring to a significant deterioration in his health.

24. By 29th July 2016, Mr Twells had succeeded Mr Billam as the Claimant's line manager. Mr Twells wrote to the Claimant on that date (page 405) a standard

form letter under the Attendance Management Procedure, saying he would like to meet with the Claimant to "offer you support and give you the opportunity to raise any queries or questions you may have". They eventually settled on 16th August, with the meeting to take place at the Claimant's home at his request, the Claimant saying in his letter dated 5th August 2016 (page 409) that the circumstances around his illness had not changed, he felt he had little support, and he wanted to raise concerns about correspondence going to the wrong address. On 3rd August 2016 (page 408) the Claimant had requested from HR a copy of the Respondent's grievance procedure; this was sent to him by Mr Twells on 8th August 2016 (page 410).

25. Mr Twells says (see his statement at paragraph 9) that at the meeting on 16th August he spoke with the Claimant about "how he felt, what his plans were" but there was "nothing much forthcoming". He says that the Claimant wanted reassurance he would not be adversely treated by Mr Francis but "would not state what he considered would be suitable assurances" to facilitate a return to work. He says he tried to provide reassurance, going on to say "as a manager it falls to you to deal with staffing matters". He says, and I accept, that he informed the Claimant that the culture at the Depot was now different, that any issues of poor behaviour would be dealt with and that he wouldn't stand for bad practices, explaining his background as a manager. Mr Twells' evidence, which I accept having observed him for myself as a no-nonsense, plain-speaking individual, is that the behaviour of staff he manages has always been top of his agenda in any managerial role. His follow up letter dated 17th August 2016 (page 413) stated, "it was helpful to understand your worries and concerns during your current sickness and the past history … I hope that I was able to reassure you that I will help and support you when you are fit and ready to return to work". Referring to Mr Francis, the letter stated that the case was now closed, and reflecting on the Claimant's concerns about being "set up on return to work", Mr Twells said he would be there to support the Claimant and ensure he was "treated and respected correctly". He also asked the Claimant to keep him informed about his occupational health meeting. On the day of their meeting Mr Twells sent the Claimant a referral form for counselling (page 412), asking the Claimant to fill it in and sign it. Mr Twells acknowledged in evidence this was something of a delay from when Mr Billam first raised counselling at the meeting on 29th June, noting however that he had started in his new role halfway through July and needed to seek HR advice on both this and other sickness absences. The Claimant says he was not reassured by Mr Twells, because of his past experiences of returning to work and still being the subject of complaints.

26. The occupational health appointment took place on 22nd August 2016. The resulting report (pages 414 to 416) described the Claimant's condition as "depression, stress and anxiety", stated that he was fit for an alternative role, could not advise when he was likely to be able to return to his current role, and concluded, "Richard feels unless the issues at work are resolved his symptoms will not improve". A recommendation was made that the Claimant be seen by the occupational health physician. The next letter from Mr Twells to the Claimant was dated 2nd September (page 419) arranging a further meeting for 13th September "to offer you support and give us … the opportunity to discuss your occupational health report". On 13th September (see page 428) the Claimant was sent an appointment to see the occupational health physician, Dr Sampson, on 28th September.

Sick pay

27. On 25th August 2016, the Claimant was sent a letter by an unnamed "Payroll Assistant" (page 418) informing him that he would be going on to half pay from 30th September 2016. The Respondent's sick pay policy statement (page 110) states that "in certain exceptional circumstances" pay can be extended beyond the contractual 6 months full pay 6 months half pay. Those exceptional circumstances are said to be terminal illness, industrial injury, or "a case which is severe in character, [where] an extension of sick pay would, by alleviating anxiety, materially assist a recovery to health and hence a return to work". This may include severe financial hardship. On 5th September 2016 (page 420) the Claimant wrote to Mr Twells stating why a reduction to half pay would be unreasonable and unfair in his case. This essentially came down to the delay by Mr Billam in getting in touch with him when he first went off sick – 86 days – and his not being referred to occupational health for 140 days, though the Claimant conceded in evidence that the referral was actually made within the 3 months referred to in the Attendance Management Procedure. The Claimant said in his letter that his health had worsened as a result of these delays and he asked for an extension of full pay for 4.5 months, equivalent to the delays he had outlined. Mr Twells responded (page 425) on 7th September 2016 outlining the policy requirement for exceptional circumstances and asking the Claimant to complete certain forms. The Claimant did so (pages 436 to 437), making the same case and providing financial details.

28. On 6th October 2016, Charlotte Martin of HR wrote to the Claimant (page 438) to say that his extension of sick pay application had been considered "in discussion with senior management" and had not been granted "as you do not meet the required criteria". The letter explained that an extension is "normally agreed only in exceptional circumstances and are (sic) not an automatic right" and recited the grounds for an extension as above. The Claimant's evidence is that an extension of full pay would have "facilitated [him] to move forward", and that its denial was a tool used by the Respondent to put pressure on him to return to work. Ms Elder's unchallenged evidence is that it is rare for sick pay to be extended, and that she believes that Mr Hundal – who evidently made the decision – felt that extending sick pay for the Claimant would not materially assist his recovery of his health and his return to work.

Formal attendance management hearing

29. The welfare meeting on 13th September 2016 was followed up by Mr Twells' undated letter to the Claimant which appears at pages 430 to 431. Again, Mr Twells expressed the hope that he had been able to reassure the Claimant of his support on returning to work, recorded the Claimant's comments about stress and anxiety, and his feeling that he wasn't in a position to return, referred to the "impression" the Claimant had given that he had been assured that Mr Francis would not return to the Depot, and recorded the Claimant's view that the Respondent had failed in its duty of care because he had not previously had a welfare meeting. He went on to say: "We tried hard to look at ways that we could possibly support you back to work and I explained that we are working hard to make changes within the workplace. Matters are being dealt with and appropriate action is taking place where applicable". The letter acknowledged occupational health's suggestion of counselling, Mr Twells agreeing to arrange it and noting the agreement to another referral to occupational health, in which regard Mr Twells stated, "We would also ask occupational health the question of whether possible redeployment could be an option … you confirmed this is

something that you would be willing to consider". Mr Twells' letter then recorded how he had advised the Claimant that in view of the length of his absence and its impact on service delivery, a formal attendance management hearing would be arranged. The Claimant says that whilst he understood the Attendance Management Procedure was being applied, he could not understand why. Ms Elder says, and I accept as uncontroversial, that anyone whose absence impacts on the Respondent, whatever the reason for the absence, is ultimately liable to action under the Procedure. In fact, two other employees who were also absent in consequence of concerns about Mr Francis' return, Dale Holmes and Keith Shelton, were also subject to formal action under the Procedure. Mr Holmes returned to work in October 2016 on a phased return, leaving the Respondent's employment in May 2017, whilst Mr Shelton returned two weeks later and remains employed. Mr Twells concluded his letter by emphasising his primary concern for the Claimant's well-being, stating that all reasonable support had been provided to facilitate a return to work, and asking the Claimant to let him know if further support would assist.

30. The Claimant attended the next occupational health appointment on 28th September 2016, with Dr Sampson. The resulting report is at page 433. The heart of the report was that the Claimant's medical prospects were good but a return to work would "depend very much on the work situation being resolved and this is more a matter between him and management than a medical one". Moving out of the Depot may improve the prospects of a return, but Dr Sampson thought it was too early to recommend "medical redeployment" as the Claimant was waiting for counselling. The Claimant says (in his statement at paragraph 57) that whilst he accepted the advice he could not see how the situation would be resolved, his having been off for almost 6 months; he accepts however that he did not raise with the Respondent at any point that he disagreed with Dr Sampson's assessment. Counselling, paid for by the Respondent, began in late October, and took place weekly, up to Christmas. Mr Twells accepts it should have started sooner, explaining that with the changeover from Mr Billam, the paperwork got overlooked.

31. Mr Twells sent another standard letter to the Claimant on 10th October 2016 (page 439) to arrange a review meeting for 20th October. Three days later (pages 440 to 441), he wrote to the Claimant to advise him of the details of the formal hearing under the Attendance Management Procedure. The letter highlighted management's concern regarding the Claimant's "capability to fulfil the duties of [his] role", stated that the meeting would take place on 2nd November, explained who the hearing panel would be (chaired by John Hughes, a Group Manager), and outlined what would take place at the hearing, namely that Mr Twells would outline the Department's position as to the impact of the Claimant's absence and the support he had been offered, with the Claimant then being given an opportunity to state his case in response. The letter stated that a possible outcome of the hearing was that the Claimant would be issued with a final written warning "with a review period" and that "should there be no sustained improvement in your level of absence then a further hearing may be convened" and result in an ill health dismissal.

32. On 20th October 2016, the Claimant's daughter emailed Mr Twells (pages 449 to 450) "having read [Mr Twells'] proposed statement" which I take to be the Respondent's statement of case for the formal hearing at pages 452 to 454. That statement recited some of the history I have outlined above. It asserted that "Attendance Management procedures have been followed correctly" and "all appropriate support" offered, and stated that the cost of the Claimant's absence

was £34,000. Mr Twells says that this figure was made up of agency cover wages (including overtime, national insurance and pension) and agency fees, as well as temporary increases given to other staff for cover responsibilities. The statement concluded that the Claimant's absence was having a significant impact on the Depot's performance in terms of pressure on colleagues and the cost of agency cover, such that it could not be sustained, and stated that in the absence of an imminent return to work a warning was required. Mr Twells does not accept that his primary concern was financial. I agree – it is clear having heard him that his primary concern was to get the Claimant back to work, saying that his absence left a significant gap in terms of experience, with the agency worker having to pick up multiple responsibilities and someone having to be moved from the shop-floor to assist.

33. The Claimant's statement of case is at pages 457 to 461. Again, it set out much of the history I have already recounted, and so it is sufficient to note that it:

> 33.1. reiterated the Claimant's view that he always felt his employment would be jeopardised by his involvement in Mr Francis' disciplinary case;
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> 33.2. stated that his "mental health conditions [were] well known" to the Respondent;
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> 33.3. referred to Mr Hundal stating at the 6th April meeting that "managers would have to come up with" the support they required, but the Claimant and his colleagues were not aware "of the types of measures that could be put in place";
>
> 33.4. referred to the delay in the Claimant being contacted after he went off sick and the delays in referrals to occupational health and counselling.

34. The hearing took place on 2nd November 2016, with both statements of case being available to the panel. John Hughes wrote to the Claimant with the outcome of the meeting on the same day (pages 471 to 472). He referred to the occupational health report of 28th September, specifically the statement that it was too early to recommend medical redeployment and went on to say "When asked whether you felt that redeployment would support you back to work, you indicated that this could be an option you may want to consider". The letter then recited that several concerns raised by the Claimant had been outside the remit of the hearing, drawing his attention to the Respondent's grievance procedure. It concluded that the panel had decided to issue a final written warning, which would last for 12 months and also recommended re-referral to occupational health to explore reasonable adjustments to facilitate a return to work and whether the Claimant met the criteria for ill-health redeployment. Mr Hughes concluded by saying that the situation would be reviewed in 8 weeks when a further hearing might be convened in the event of there being no return to work by that stage, which could result in dismissal. The Claimant's right of appeal against the warning was also confirmed. The Claimant asked at the hearing for a breakdown of the figure of £34,000. Mr Twells says, and I accept as unchallenged, that he gave the information to Ms Martin and assumed she'd sent it; he accepts that the information should have been provided and that it is his responsibility that it was not; he was still trying to get to grips with the Respondent's policies and ways of working.

35. An appeal was duly lodged on 8th November 2016 (pages 473 to 475) on the grounds first that the decision "failed to take into consideration the root cause of

[the Claimant's] illness", namely the situation at the Depot, and secondly that there had been significant delays by the Respondent in managing the Claimant's absence, which if they had been avoided may have resulted in the Claimant returning sooner or being redeployed. The appeal was acknowledged on 14th November by the relevant Service Director (page 477) and a more detailed letter was sent by Ms Martin on 22nd November (pages 485 to 486), convening an appeal hearing for 21st December. It informed the Claimant who would be on the appeal panel and that Mr Hughes would present the management case, inviting the Claimant to submit his own statement of case by 7th December.

36. Mr Hughes' statement of case is at pages 490 to 492. Referring to the original panel hearing it stated that the Claimant had repeatedly raised "issues around working relationships", and that if a grievance had been submitted the panel may have deferred the hearing. The panel's decision was said to be based on the absence of any indication of a pending return to work, the only other options being taking no further action or issuing a caution and requiring further monitoring and review.

37. On 14th December 2016 (page 502) the Claimant emailed Ms Martin and Mr Twells thanking them for providing Mr Hughes' statement of case but stating that it had been provided late and asking for the appeal hearing to be rearranged. Mr Twells says, and I accept as unchallenged, that his unfamiliarity with the Respondent's ways of working led to him providing the document later than the policy required. By a letter from Charlotte Martin of 16th December 2016 (page 505) the appeal was rearranged, to Wednesday 17th January 2017 – though in fact 17th January was a Tuesday. The Claimant says he cannot recall receiving the 16th December letter. I return to this below.

38. Whilst all of this was going on, Mr Twells wrote again to the Claimant (on 18th November 2016 – page 479) seeking another review meeting on 1st December 2016, though this was cancelled by Mr Twells and arranged for a week later (page 493). Also around that time, Mr Twells prepared another occupational health referral (pages 480 to 484) briefly reiterating the background and asking occupational health, "Can we also find out how I can resolve Richard's issue and help him return to work what does he want from me as his manager and would he consider redeployment". On 30th November 2016, a letter was sent to the Claimant (page 487) convening an occupational health appointment for 24th January 2017. Mr Twells explained that occupational health diaries can get very full, and that whilst a two-month delay in getting an appointment is long, he has seen others take 6 weeks.

Grievance

39. On 5th December 2016 (pages 494 to 499) the Claimant lodged a detailed grievance against the Respondent generally, and Mr Hundal and Mr Twells specifically, citing "their previous and continued failure to take steps to ensure [his] health, safety and welfare" and asserting that they should have made adjustments to enable him to perform his role. Again, it is not necessary for me to record the details of the grievance as much of the history it referred to is outlined above. The key points were:

> 39.1. the Claimant had relied on reassurances that those investigated in 2015 would be dismissed or redeployed;
>
> 39.2. he did not object to the members' decision to reinstate Mr Francis

and noted that this cannot be challenged, however as the Respondent is a large organisation Mr Francis should have been redeployed;

39.3. the reinstatement conveyed that gross misconduct "will be tolerated" which had "caused a breakdown of trust" between the Claimant and the Respondent. The Claimant felt it was "unlikely that any actions or behaviours aimed at him by any employee, including Mr Francis, [would] be dealt with properly";

39.4. the Respondent had delayed in managing his absence, including the initial referral to occupational health;

39.5. his pay had been reduced;

39.6. sensitive correspondence had been sent to the wrong address;

39.7. the original panel prevented him detailing relevant background, i.e. the 2015 investigation;

39.8. Mr Hundal had failed to suggest adequate support and should have been accompanied by someone from HR;

39.9. Mr Twells had repeatedly asked the Claimant what should be done when the onus was on the Respondent to decide what was needed;

39.10. Mr Twells' only interest at the 2nd November hearing was the financial implications of the Claimant's absence, not his wellbeing.

40. Ms Elder acknowledged the grievance by email on 8th December (page 501). On 15th December (page 504) she emailed Mr Hundal and Mr Twells forwarding the grievance and setting out how it would be dealt with. In that email she said, "you may read the grievance as a precursor to a constructive dismissal claim". Her evidence, which I accept as obvious, is that it was part of her role to give advice of this nature. I certainly do not take it as some form of admission that the Claimant had in fact been constructively dismissed.

41. Ms Elder wrote to the Claimant again on 16th December (pages 507 to 508) with more detail of the grievance hearing, stating who would chair it (another Service Director) and that Mr Hundal would present the management response. She said that unfortunately Mr Hundal had pre-booked leave from 29th December 2016 to 24th January 2017 and therefore the hearing would be delayed. This was because Mr Hundal was going to India to visit family, and it is the Respondent's normal procedure for the hearing manager to see both parties together. Other than the delay caused by Mr Hundal's absence, Ms Elder's evidence, unchallenged and therefore accepted, is that the Respondent followed normal procedure in seeking to progress the grievance. On the question of redeployment, which the Claimant had referred to in his grievance conclusion, Ms Elder said "we would consider supporting a redeployment search if that is an avenue you wish to pursue … please contact me if this is something you wish to progress".

Final correspondence

42. The next welfare meeting took place on 22nd December 2016, at which Ms Martin was also present. The Claimant says that Mr Twells pushed him to return

to work and on what he would like to be done to facilitate it. Mr Twells denies this, though he was clear in evidence that the Claimant was a valued member of staff and he was keen to have him back. Mr Twells' follow-up letter is at page 511. On the question of support to facilitate a return, Mr Twells recorded the Claimant's daughter's comment that this was for the Respondent to suggest. As for "guarantees" that Mr Francis would not intimidate him, Mr Twells said, "Charlotte tried to reassure you that the ways of working have changed significantly since I have been at County Supplies and that any reports of inappropriately (sic) will be taken seriously and action will be taken against any individual". The Claimant accepts Mr Twells said this at the meeting, but says that he did not know whether it was correct. Mr Twells went on to record that Ms Greensmith had wanted to discuss someone else's grievance (see below) but the focus of the meeting was intended to be the Claimant's health and wellbeing. Mr Twells noted that the Claimant reported having spoken to colleagues, who indicated nothing had changed, and that he "advised [he had] lost all faith" in the Respondent.

43. Mr Twells' letter also referred to redeployment, as the Claimant had indicated he wanted to return to work. It said "if occupational health advise that redeployment is suitable a 12-week redeployment search will take place". Ms Elder says that this is unfortunate phraseology, as the Respondent's practice is to refer employees to occupational health to see if there is any medical issue preventing redeployment. Mr Twells' letter said that they had asked what roles the Claimant would consider but he had replied it was for the Respondent to say what was suitable. The Claimant says that he was interested in anything that matched his skillset, though he cannot recall if he said that to the Respondent; it is clear to me that he did not. He also says (paragraph 81 of his statement) that it was "unlikely that there would be a like for like role in which [he] would be suitable". For her part, Ms Elder was unable to say why redeployment was not raised earlier but says that opportunities for redeployment for employees such as the Claimant had reduced in recent years because of the outsourcing of several services to independent companies.

44. On 16th January 2017, Mr Twells called the Claimant, at the request of HR, to ask about his attendance at the next day's appeal hearing. The Claimant says, and I accept, that he had never been called about a meeting before. He also says he was not aware of the hearing being scheduled for that date and that when he told Mr Twells this during the call and expressed concern about whether his daughter or a union representative would be able to accompany him, Mr Twells told him the hearing would go ahead in his absence. I note that none of the many other meetings had proceeded without the Claimant, nor had Mr Twells suggested anything of that nature before. More tellingly, this is not mentioned in the Claimant's email following that call (page 513) which says, "a date should have been included in the letter you handed me relating to appeal … on the 22nd". This can only be the letter of 16th December (page 505) which the Claimant says he did not receive or does not recall receiving. Mr Twells strongly denies saying that the meeting would proceed without the Claimant, saying that it is his normal practice to give staff at least one postponement before going ahead without them. I conclude, particularly given that this was not mentioned by the Claimant in the contemporaneous email and given his evident uncertainty and confusion about whether he had received the 16th December letter, that he is mistaken in this regard and that Mr Twells did not say that the hearing would go ahead without him. I also conclude, notwithstanding the error in the day and date specified for the reconvened appeal hearing, that the Claimant had been handed the 16th December letter at the meeting with Mr Twells and Ms Martin on the 22nd

for the simple reason that the Claimant refers in his email at page 513 to having been handed a letter on 22nd December and no other letter has been suggested as having been provided.

45. The Claimant's email also asked for a copy of the 16th December letter, minutes of the hearing on 2nd November, and other information. He did not receive a response to these requests. On 19th January 2017, Ms Martin wrote to the Claimant (pages 514 to 515) to say that the appeal hearing would take place on 9th February. The Claimant says he took this as a tool to get him nearer to zero pay so as to force him back to work but accepts that he did not get it until after he had sent his resignation. The same is therefore true of the letter dated 20th January 2017 fixing his next occupational health appointment for 27th January (page 516) and the letter of 20th January 2017 (page 518) fixing his grievance hearing for 17th February. Nevertheless, as to the former, the Claimant says this was another delaying tactic to pressurise him to return to work, as now he was to see someone other than Dr Sampson and so would be starting the process again, making it even more certain that he would end up on zero pay.

46. The Claimant says that being told his appeal hearing would go ahead in his absence was the "straw which resulted in [him] resigning". His resignation letter was dated 20th January 2017 and is at page 519. It communicates his resignation with immediate effect, saying "I feel that I have been left with no choice" in view of the Respondent's "recent unreasonable behaviour and continued lack of concern for my health and wellbeing which has caused a complete breakdown in trust and confidence". He referred to the Respondent leaving him in "an untenable and unmanageable position" as a result of Mr Francis' reinstatement, adding "I have repeatedly raised my concerns regarding the situation, the delays caused and the errors made by [the Respondent] and believe that the lack of response has caused a fundamental breach of my employment contract on your part". He says he could not see any end to the issues he was facing with the Respondent and "needed to pay [his] bills". He therefore had to resign, to avoid being on zero pay and secure new work elsewhere.

Ian Wood

47. The Claimant accepted in evidence that he did not in fact suffer any repercussions as a result of Mr Francis' reinstatement. He drew to my attention however that sometime after his return, Mr Francis complained about the conduct of a colleague, Ian Wood, who he alleged had shown colleagues CCTV related to the 2015 disciplinary investigation. In the course of being interviewed as part of an investigation (pages 302, 304) Mr Francis referred to a petition he said the Claimant had tried to persuade colleagues to sign against his return and (page 305) that the Claimant had tried to sell him counterfeit videos. The Claimant denies both assertions, saying in relation to the former that he was approached by colleagues and did not coerce anyone into signing anything. Ms Elder confirms that an investigation into these matters was intended, though this did not get underway because of the Claimant's sickness absence.

48. The report into Mr Francis' complaint about Mr Wood was dated 9th September 2016 and says (page 278) that the interviews that had been undertaken revealed a "deeply divided and dysfunctional workplace", one group of staff giving evidence of "a long running culture of bullying and harassment", adding "It would appear that many of grievances (sic) have been raised and investigated on a number of occasions but not resolved to the satisfaction of all

parties". Ms Elder accepted that this could be read as meaning that complaints had not been properly dealt with.

49. At page 306 is the first page of one of the interviews, with Mr K Mortimer, in which he: expresses concern for his own and his family's safety if it were found he were assisting with the investigation; says that he had sent Mr Hundal a list of "incidents and concerns regarding bullying and harassment … over an extended period"; and that as a result of sticking up for others he had been assaulted at work and suffered attacks at home. It seems clear from the document overall that these comments were not directed at Mr Francis, but Ms Elder unhesitatingly accepts that these were serious concerns. She says that anyone feeling threatened would be supported in reporting the matter to the police and offered reassurance that the Respondent's policies could be utilised to investigate any concerns raised. Mr Wood's own statement included (at page 342) his comment that he felt bullied by Mr Francis and that he had been advised to stay away from the warehouse or if he needed to visit it others would keep Mr Francis busy. At page 343 Mr Wood states that on 16th May Mr Francis called him a "cunt". Ms Elder says that no disciplinary action was taken on the basis that this was a frequently used word at the Depot and that Mr Francis could not be singled out for disciplinary action as a result. The Claimant also says at paragraph 95 of his statement that he heard about a month after his resignation that Mr Francis said he would have stabbed him had he returned. Mr Twells says, and I accept, that he was told that no-one around Mr Francis at the time heard that comment, though it is agreed he had said something about the Claimant. Mr Twells says, and again I accept as unchallenged, that Mr Francis was called to Mr Twells' office and told that any more negative comments about colleagues would not be tolerated. The Claimant only found out about the investigation regarding Mr Wood, and the matters referred to in that investigation, in the course of these proceedings.

50. The Claimant summarises his reasons for resigning as follows (paragraph 100 of his statement): "I had completely lost faith in the Council both in their ability to deal with my complaints and also to provide me with a safe working environment. They had failed to even look into potentially redeploying me. By reducing my wages to 50% and refusing to offer alternative employment, and essentially leaving me in limbo for a number of months, I believed that I had no choice but to hand in my notice … I had no faith or confidence that they would protect me from Mr Francis or find me suitable alternative accommodation (sic)". Ms Elder (in her statement at paragraph 19) describes the situation as a "total impasse" with the Claimant unwilling to return whilst Mr Francis remained in post, whilst "it would have been wholly inappropriate to move Mr Francis, the Claimant as a manager had the full support of our policies and the HR Service" and Mr Francis had been advised of the expectations of the Respondent regarding his behaviour. The Claimant was unable in his evidence to suggest what support the Respondent could have offered apart from Mr Francis' or his own redeployment. He briefly said in oral evidence that Mr Francis could have been searched when going into work. He did not trust the Respondent's offers of support in any event because of his past experiences of being the subject of complaints even though he had been told they would be dealt with. Ms Elder's evidence is that managers often have complaints made against them and it is part of their role to manage those situations. No-one, she says, can be given an exemption in this regard, though they can be reassured of the support of their line manager, and referred to occupational health and for counselling if appropriate. Mr Twells is not aware of Mr Francis having raised any grievances since Mr Twells was appointed. Mr Woods remains employed. Mr Twells has informed him there is no case to

answer in respect of Mr Francis' grievance, though he does not believe this has been confirmed to Mr Woods in writing.

Law

51. Section 95(1)(c) Employment Rights Act 1996 ("ERA") provides that an employee is dismissed for unfair dismissal purposes if "the employee terminates the contract … (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct". Widely known as "constructive dismissal", the test for establishing dismissal in these circumstances is that given in ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221***. It is not necessary to refer to this and subsequent approving authorities in detail. It is sufficient to say that they make clear that in order to establish constructive dismissal there must be a repudiatory breach of contract by the Respondent – in other words, conduct going to the root of the contract or which shows that the Respondent no longer intends to be bound by it; the Claimant must have resigned in response to that breach; and if the Claimant has affirmed the contract after the breach, which may for example arise as a result of delay in resigning, constructive dismissal will not be made out. Ms Williams referred to a recent decision of the Employment Appeal Tribunal in ***Conry v Worcestershire Hospital Acute NHS Trust [2017] UKEAT/0093***, in which these core principles were reiterated.

52. The Claimant relies not on any express terms having been breached by the Respondent, but on the key implied term of trust and confidence. The term is, more precisely, a term implied into every contract of employment to the effect that an employer will not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties (***Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, Malik v BCCI SA (in liquidation) [1997] ICR 606***).

53. The Claimant argues that there was a series of issues which taken together destroyed his trust and confidence in the Respondent. Any breach of the trust and confidence term is fundamental and repudiatory (***Morrow v Safeway Stores plc [2002] IRLR 9***). Whether there has been a breach has to be judged objectively: in the ***Woods*** case, it was said that Tribunals must "look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is that the employee cannot be expected to put up with it". It is not relevant in doing so to consider whether the employer intended any repudiation of the contract – ***Woods*** as confirmed in ***The Leeds Dental Team Ltd v Rose [2014] ICR 94.*** A Tribunal's focus must be on what the employer did, assessed cumulatively and overall, and assessed objectively. Mr Beever referred to the EAT's decision in ***Blackburn v Aldi Stores [2013] UKEAT/0185/12*** in which it was noted that an employer's failure to adhere to its procedures (a grievance procedure in that case) could amount or contribute to a breach of the implied term, depending of course on the nature of the failure – not meeting a timetable will not necessarily contribute to a breach of the implied term, but a wholesale failure to respond to a grievance is likely of itself to be such a breach.

54. It is also well-established that the matter which finally results in the employee deciding to resign (usually referred to as "the final straw"), does not have to be of itself a fundamental breach of contract, and in fact does not even have to be blameworthy behaviour by the employer at all. It must nevertheless be an act in

a series whose cumulative effect is to breach the implied term, and must contribute something to that breach, however slight, although what it adds may be relatively insignificant. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Where an employee soldiers on and affirms the contract, he cannot subsequently rely on those earlier acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. An entirely innocuous act will not be sufficient (***Omilaju v Waltham Forest London BC [2005] ICR 481***).

55. As noted, if a repudiatory breach of contract has been established, it must be considered whether the Claimant accepted that repudiation by treating the contract of employment as at an end. He must have resigned in response to that breach, though that need not be the only reason for the resignation: it is sufficient that the repudiatory breach played a part in the resignation - ***Abbey Cars (West Horndon) Ltd v Ford [2008] UKEAT/0472*** and ***Wright v North Ayrshire Council [2014] ICR 77***.

56. It must also be considered whether the Claimant has affirmed the contract after any breach, because if he has done so, any right to accept the Respondent's repudiation of the contract by resigning and claiming to have been constructively dismissed is lost in relation to that breach. Affirmation can be express, or it can be implied from the Claimant's conduct, where he acts in a way which is only consistent with the continued existence of the contract. Delay can be evidence of affirmation, but in ***W E Cox Toner (International Ltd) v Crook [1981] ICR 823,*** the EAT held that mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; though if it is prolonged it may be evidence of an implied affirmation. It was also said in ***W E Cox Toner*** that if the employee does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract, unless he further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach. The authority of ***W E Cox Toner*** was recently affirmed by the EAT, alongside a review of other authorities, in a case referred to by Mr Beevers, ***Colomar Mari v Reuters Ltd [2015] UKEAT/0539/13.***

57. As already noted, the Respondent does not contend that if the Claimant was dismissed the dismissal was fair. It is therefore unnecessary to say anything about section 98 ERA. The Respondent does however contest the Claimant's case that the reason or principal reason for any dismissal was the Claimant's protected disclosure. I drew the parties' attention at the start of the hearing to the decision of the EAT in ***Salisbury NHS Foundation Trust v Wyeth [2015] UKEAT/0061*** in which Eady J set out the approach to be taken when addressing whether a protected disclosure was the reason for dismissal in a constructive dismissal case. She said at paragraph 31, "… the ET will have identified the fundamental breaches of contract that caused the employee to resign in circumstances in which she was entitled to claim to have been constructively dismissed. Where no reason capable of being fair [under section 98] has been established by the employer, that constructive dismissal will be unfair. Where however, the reason remains in issue because there is a dispute as to whether it was such as to render the dismissal automatically unfair, the ET then has to task what was the reason why the Respondent behaved in the way that gave rise to the fundamental breaches of contract? The Claimant's perception, although

relevant to the issue why she left her employment … does not answer that question". In dealing with the particular case before her, Eady J put the test in other ways – "what was the reason, or principal reason, in the Respondent's mind for [its] conduct … the ET had to maintain focus on the reason for the dismissal, not simply the context; the question could not be answered by simply applying a 'but for' analysis … it was fundamental that [the ET] engaged with the Respondent's explanation for why it had acted as it had and made clear findings as to whether that explanation was accepted or rejected and, if rejected, why".

Analysis

58. The first question, namely whether the Claimant resigned at least in part as a result of acts or omissions of the Respondent. can be answered very briefly. The Claimant's evidence was, in short, that he could not see any end to the issues he was facing with the Respondent, needed to pay his bills and therefore had to resign, to secure new work elsewhere and thus avoid being on zero pay, when his sick pay ran out. That might be said to be a mixture of reasons for resigning, but it is clear from that evidence, and from the Claimant's case overall, that at least in part he resigned because of the acts or omissions of the Respondent.

59. Much less capable of brief analysis is the question of whether the Respondent's acts or omissions amounted to a fundamental breach of contract. The Claimant relies on the implied term of trust and confidence as outlined above. It is important first of all to make clear what matters I can properly take into account in analysing whether that term was breached.

60. It is of course for the Claimant to say what the specifics of the alleged breach were, rather than me seeking to ascertain them from amongst the many criticisms he levels at the Respondent in his Claim Form, witness statement and elsewhere. Ms Williams submitted that the breach was twofold. First, she cited lack of support of the Claimant both before and after his sickness absence. She relied on a number of matters in that regard – not tackling a dysfunctional workplace; expecting the Claimant to manage Mr Francis without proper support; instigating the wrong procedure, namely the Attendance Management Procedure; issuing a final warning and not arranging an appeal; and not engaging with the Claimant's grievance. The second specific of the alleged breach was said to be failing to manage the Claimant's absence in line with the Respondent's procedures. Ms Williams' analysis broadly reflects the Claimant's resignation letter which cited as the grounds for his departure Mr Francis' reinstatement, delays by the Respondent, errors by the Respondent and a lack of response to his concerns.

61. It is not entirely clear precisely what is meant by the first matter Ms Williams referred to, namely "not tackling a dysfunctional workplace". If by that she intended to refer to the history of complaints against the Claimant, and the fact that those complaints continued after his return to work from sick leave in 2008 despite reassurance that any more vexatious complaints would be dealt with swiftly and seriously, whilst that may be relevant background I do not see how it can form part of the Claimant's case for breach of the implied term, given the very obvious fact that he continued to work for the Respondent in the same environment from 2008 until 2016, thereby clearly affirming the contract. Her closing submissions suggested however that she was referring to the fact that the culture at the Depot remained unchanged during the Claimant's sickness absence. She referred to Mr Francis' swearing at Mr Woods, which led to Mr Woods being advised to avoid the warehouse, and to the comments made by Mr

Francis about the Claimant a month after the Claimant resigned. As challenging an environment as the Depot appears to have been, it is plain as Mr Beever pointed out, that I cannot take those matters into account as the Claimant did not come to know of them until in one case a month after his resignation and in another only during the course of these proceedings. They cannot therefore have contributed to his decision to leave, however much he might have felt when he heard about them that they vindicated his assessment of the workplace. For the same reason, I cannot take into account the Claimant finding out that his appeal hearing would not take place until 9th February 2017, the next occupational health appointment until 27th January or his grievance hearing until 17th February. All those matters were only known to the Claimant after his resignation had been submitted.

62. The first matter that can properly be taken into account therefore from Ms Williams' list is the expectation that the Claimant should return to work and manage Mr Francis without – as he saw it – proper support. Although Ms Williams did not break this down further as such, it seems to me from the Claimant's evidence that it comprises the fact of Mr Francis' reinstatement, the Claimant's fears as to the consequences of having to return to work and manage Mr Francis, and the discussions around support for him to do so, as well as the question of redeployment.

63. As to the fact of Mr Francis' reinstatement, the Claimant made clear in his evidence that he did not object to the reinstatement per se. It was thus the consequences of reinstatement for his work at the Depot which were of concern to him. On that basis, and given that in any event there was no evidence before me which enables analysis of what lay behind the decision to reinstate other than Ms Elder's brief comment that members concluded there was insufficient evidence to incriminate Mr Francis, I do not see how the simple fact of reinstatement could itself be said to contribute objectively speaking to a breach of trust and confidence. The Claimant may have disagreed with the decision – and quite properly from the Respondent's point of view he too was not in possession of the detailed reasons for it – but there is nothing I have seen to suggest the decision was in some way improper. Mr Billam assured the Claimant, understandably but with hindsight ill-advisedly, that none of the three employees would remain in the workplace, but when objectively assessed that does not render the appeal decision a contributing factor to a breach of the implied term. Mr Francis was entitled to appeal, the Respondent was bound to consider it, and for the reasons I have given I must assume that due process was followed. Even if it could be said to undermine trust and confidence in the light of Mr Billam's reassurances, the circumstances in which reinstatement came about mean that the Respondent's actions were not without reasonable and proper cause.

64. As to the consequences of having to manage Mr Francis should he return to work, it is clear that the Claimant's principal concern was that Mr Francis would make complaints about him and that this would lead eventually to his dismissal. Whilst I have no doubt that this is what the Claimant felt, and he was by no means alone in expressing concerns about Mr Francis' return, the focus of my analysis must be an objective and sensible assessment of the Respondent's actions. What I must consider therefore is whether the attempt to return the Claimant to work, entailing the need to manage Mr Francis, and the way in which the Respondent dealt with that, was capable of contributing to a breach of trust and confidence.

65. As Mr Hundal and others recognised, it was never going to be easy

reintroducing Mr Francis to the Depot. I note first however Ms Elder's judicious comment that the Claimant could not be made exempt from the possibility of complaints by the staff he was responsible for managing. It was clearly part of his role, as he accepted, to manage staff, including taking disciplinary action where needed. It can sensibly be said therefore that by asking him to return with responsibility for Mr Francis the Respondent was asking him to do no more than fulfil the duties of his contract. It must also be said, on an objective assessment, that what the Claimant relies on in this regard is the concerns he had about what might have happened, not what in fact happened. Of itself that is not something which can be said to be an act or omission of the Respondent contributing to a breach of trust and confidence. As Mr Hundal put it in his letter after the 6th April 2016 meeting, he could not put a stop on Mr Francis' reinstatement based on "potential concerns". Moreover, accepting that the Claimant could not be made exempt from complaints, the Respondent's track record – which had resulted in his repeated vindication – rather suggested that any complaints which did arise would be properly dealt with.

66. As for the support offered by the Respondent, I agree with Mr Beever that the Claimant's not being persuaded that the Respondent would do what it said does not bear on my analysis of the Respondent's conduct. Mr Billam and the more senior Mr Hundal met with the Claimant (Mr Hundal on 6th April with the wider workforce) fairly immediately after it was announced that Mr Francis would be returning to work; both men – the former a trusted colleague of the Claimant – clearly listened to and acknowledged the validity of the concerns being raised; and Mr Hundal made clear (see his letter of 7th April) that Mr Francis had been spoken to about the expected standards of behaviour on his return. In the same letter Mr Hundal also made clear that bullying and harassment would be investigated and addressed, a message that was repeated several times by Mr Twells who was at pains to say – at the meetings on 16th August, 13th September and 16th December 2016 – that the workplace culture at the Depot had changed, outlining some of the steps that had been taken. A not dissimilar message was communicated by the perhaps more trusted Mr Billam at the meeting back on 29th June 2016. The Claimant was offered referrals to occupational health for appropriate advice, counselling was provided, and a willingness to explore redeployment was expressed. The Respondent was in addition willing to hear whatever the Claimant had to suggest by way of further reassurances he was seeking. I will return below to the occupational health referrals, counselling, redeployment and the invitation to the Claimant to make suggestions, but the point to make here is that taking all of this together it is difficult to see that the Respondent could have done a great deal more in seeking to support the Claimant's effective return. As Mr Beever pointed out, it is supportive of that conclusion that even with the benefit of several months of reflection in the course of these proceedings, the Claimant remains unable to suggest what else the Respondent might have done, other than his or Mr Francis' redeployment. He was only able to say repeatedly that it was not for him to make suggestions. During oral evidence he suggested the Respondent might have offered to search Mr Francis each day before he entered work, but I attach very little weight to that suggestion given that it had never been raised either during his employment or in these proceedings until that point. The fact that Mr Holmes and Mr Shelton returned to work successfully, prior to the Claimant's resignation, is also noteworthy, indicating the effectiveness of the measures the Respondent had taken – Mr Shelton in fact remaining employed (as does Mr Francis) to this day.

67. As for redeployment, the Respondent's position, expressed by Ms Elder, is that in view of the decision to reinstate this was not a viable option in respect of

Mr Francis. Even if not redeploying Mr Francis undermined the Claimant's trust and confidence, the Respondent could not be said to be acting without reasonable and proper cause in that regard given my analysis of the decision to reinstate set out above. As for redeployment of the Claimant, it is right to note that this was not raised until just over 5 months into the Claimant's sickness absence – it could have been raised sooner. It must also be said however that the Attendance Management Procedure does not require it to be raised at any particular point, and that it would be natural to raise it only after an employee has been absent for some considerable time and at a point when it appears that returning to their existing post may not be viable. I cannot see that there was any reluctance on the Respondent's part to raise redeployment as a topic for discussion, even with the limited possibilities there might have been given the Claimant's role. It was raised at the meeting with Mr Twells on 13th September, occupational health advised (because counselling had not begun and consistent with my analysis) that it was too early to consider it on 28th September, the hearing panel on 2nd November recommended that it be considered, Mr Twells raised it with occupational health in November, Ms Elder raised it in her letter to the Claimant of 16th December, and it was raised again by Mr Twells in his letter of 22nd December. The last of these may have inaccurately suggested that there would be some delay in it being considered, but it is clear that it was on the Respondent's agenda. One must also put the Respondent's actions in the context of the Claimant's own comments on the subject. At the hearing on 2nd November for example he said no more than that he might be prepared to consider it, and he also agreed in oral evidence that he did not make clear to the Respondent that he was willing to consider anything that matched his skillset. He did not take up Ms Elder's suggestion to discuss the matter with her. Assessed overall therefore and noting that it was not suggested in evidence that the Claimant missed out on an actual suitable opportunity, I conclude that the Respondent's handling of the question of redeployment was not such that it could be said to contribute to a breach of the implied term.

68. I turn therefore to the argument that the Respondent instigated the wrong procedure. This was not pursued in closing submissions, but in short it is difficult to see the force of the argument. Given that the Claimant was off sick, it is plain that the Respondent was entitled to activate its Attendance Management Procedure. Whether it did so correctly is another plank of the Claimant's case, including the question of issuing the final warning, to which I turn next.

69. The Claimant's case is that issuing the final warning and not arranging an appeal was a contributing factor to the breach of trust and confidence he relies upon. As to the warning, paragraph 6.3 of the Attendance Management Procedure unsurprisingly says that the Respondent's managers are entitled to conclude that they are no longer able to accommodate an employee's absence. The Procedure thus expressly envisages steps being taken towards termination of employment in those circumstances. Mr Twells explained to the panel chaired by Mr Hughes as well as to this Tribunal that the Claimant's absence had a practical and financial impact on the operation of the Depot, thus justifying in my judgment the convening of a formal hearing. As for the hearing itself, the focus of Mr Hughes' panel was perfectly properly, and in accordance with the Respondent's policy, on the length of the Claimant's absence, management's interventions to that point, and the impact the absence was having on colleagues and the service. The panel might have reached a different decision, but the length of absence, its impact and the fact that it did not appear imminently about to end mean that the Respondent cannot objectively be said to have behaved improperly in issuing a final warning. It is also relevant to note that neither Mr

Twells nor the panel were set on dismissal come what may, hence the further referral to occupational health for consideration of redeployment, which reflected paragraph 6.9.2 of the Procedure. In the light of the Procedure as a whole, I do not read that paragraph as meaning that a hearing can only be convened and a warning given if redeployment is refused. Refusal of redeployment is just one of the circumstances in which a hearing to consider a warning or dismissal might be convened, as paragraph 6.3 makes clear. As for the Performance Management Policy and Procedure, it simply sets out how the hearing should be conducted; if that is Ms Williams' argument as to the application of the wrong policy, I reject it; it concerns only the conduct of the hearing and not the management of absence overall.

70. I also note that Mr Holmes and Mr Shelton were warned with regard to their absence, which whilst of itself not conclusive does support the assessment that the Respondent was acting in accordance with policy and for objectively sound reasons in warning the Claimant also. As to the appeal against the warning, the Respondent clearly did arrange a hearing, which was rearranged at the Claimant's request. I return to the last straw point (that it was said the appeal would proceed in his absence) below.

71. Turning to the Claimant's grievance, it is said the Respondent did not engage with it. As indicated in ***Blackburn***, ignoring a grievance could at the very least contribute to a breach of the implied term and may be sufficient of itself to be such a breach. The facts demonstrate however that the Respondent's conduct was far from that kind of case. The grievance procedure had been provided to the Claimant in early August 2016, within a few days of him requesting it; the panel which issued the final written warning on 2nd November 2016 expressly drew his attention to the right to make a complaint under the procedure; this was not an employer seeking to avoid its obligations in this regard. Once the grievance was lodged in early December 2016, it was acknowledged within a few days, and within 10 days detailed arrangements had been made for a hearing. Admittedly there was to be a delay, but as Mr Beever pointed out this was for the reasonable and proper cause of Mr Hundal's absence on planned leave abroad. The Respondent could have varied its policy and met with the Claimant without Mr Hundal, but it was not obliged to do so and on any objective assessment was not in breach of the implied term or otherwise acting improperly by following the normal course, with the delay that this regrettably entailed.

72. It is also said that the Respondent failed to manage the Claimant's sickness absence in line with its procedures. It is true that it was unhelpful, and a breach of the Respondent's policy, that Mr Billam did not contact the Claimant from his first day of absence on 7th April 2016 until he wrote to him on 15th June 2016, just over two months later. The mis-posting of sensitive correspondence was also highly regrettable and understandably of concern to the Claimant. There were also a couple of instances when the Respondent did not provide information to the Claimant such as in response to his email of 16th January 2017, but this was not mentioned by Ms Williams in her outline of the alleged breaches of the implied term nor in her submissions. Looking at the matter overall however I note that: Mr Hundal wrote to the Claimant on the first day of his absence, albeit the letter may well have been composed before, offering a referral to occupational health; the first referral took place in line with policy; there were regular further referrals thereafter; the last was somewhat delayed, but I accept Mr Twells' evidence that it was not particularly out of the ordinary, as frustrating as it might have been for the Claimant; there were regular welfare visits from 29th June onwards. As for counselling, this was raised as a possibility at the meeting of

29th June 2016, Mr Twells sent forms to the Claimant on 16th August, agreed at their meeting on 13th September to arrange it, and finally got it set up to start towards the end of October, some or all of the delay between late June and late October being accounted for by the handover from Mr Billam to Mr Twells. Although not expressly mentioned by Ms Williams, there is also the question of the Claimant's sick pay. It is clear to me that the Respondent was entitled to conclude, and properly concluded, that he did not meet the criteria for pay to be extended. The Claimant of course had a particular view as to the causes of his absence but given what lay at the heart of it – namely Mr Francis' return to work – it was clear that extending sick pay was not going to change that situation and so facilitate his return. The occupational health report at pages 414 to 416 said as much. The Respondent acted within the terms of its policy in so concluding.

73. The Claimant criticises the Respondent's conduct in many and varied respects. In my judgment, an overall and objective analysis of what the Respondent actually did yields justifiable criticism of its conduct in a limited number of respects: Mr Billam's reassurances that Mr Francis and his colleagues would not return to the workplace were in part unfulfilled; Mr Billam did not contact the Claimant within the four weeks mandated by the Respondent's policy – there was a six week delay; sensitive correspondence was sent to the wrong address; and there was something of a delay in arranging for the Claimant to start counselling. I have already explained that the first of these was not without reasonable and proper cause. That therefore leaves the delay in initial contact, the mis-posting of correspondence and a delay in arranging counselling. Of course, I should not take these matters in isolation, but as part of the overall course of events. Even when looked at by themselves however, whilst the first two in particular were avoidable and regrettable they do not in my judgment amount to conduct likely to destroy trust and confidence. Management of sickness absence would in an ideal world be in accordance with the textbook, but that is certainly not the test against which the Respondent's conduct is to be assessed. The errors the Respondent made in this case do not cross the threshold of repudiatory conduct. When put into the overall picture, that conclusion is further reinforced.

74. It will thus be clear that I find that there was no breach of the implied term and thus no fundamental breach of contract. Even if there had been however, the Claimant's case that he was dismissed would have failed on the question of the last straw. As I have made clear in my findings of fact and for the reasons there given, I conclude that Mr Twells did not say or otherwise indicate on 16th January 2017 that the appeal hearing would proceed in the Claimant's absence. The final straw must be an act in a series whose cumulative effect is to breach the implied trust and confidence term, and must contribute something to that breach, however slight. In this case however, whatever Mr Twells said on 16th January, it was completely innocuous.

75. It is not necessary for me to deal with the remaining issues in the case, but I will say something briefly about the reason for dismissal, had the Claimant been able to establish that he was in fact dismissed. As already noted, the Respondent does not argue that there was a fair reason for dismissal and neither does it contest that the Claimant made a protected disclosure. It does contest however that the protected disclosure was the reason or principal reason for dismissal. It is absolutely clear that the Claimant did not establish his case in this regard. The factual matrix was against him, in that it is clear the Respondent had no difficulty with the fact that he had made a protected disclosure: the employees in respect of whom he made the protected disclosure were dismissed; he

continued in his employment for some considerable time thereafter without apparent difficulty; and when he went off sick, the Respondent wanted him back at work – Ms Williams said as much in her submissions. Furthermore, the Respondent's explanations for its conduct emerge clearly from the facts as I have found them and do not relate to the fact of the protected disclosure. Equally fundamentally, the Claimant's case that the Respondent acted as it did because or principally because of the protected disclosure was at no point put to the Respondent's witnesses, nor was such a case put in the Claimant's witness statement, or in Ms Williams' submissions. The case she put on the Claimant's behalf in this regard amounted to no more than that the protected disclosure was the context for the Claimant's eventual departure, in other words but for the Claimant making the protected disclosure, he would not have reached the position of eventually resigning. That may be so, but as the EAT in ***Wyeth*** made clear, that is far from enough.

76. In summary, for all of the reasons given above, I find that the Respondent was not in fundamental breach of contract. Accordingly, the Claimant was not dismissed and his complaint of unfair dismissal was not well-founded. Of course, if he has paid any employment tribunal fees to bring this matter to hearing he is entitled to seek to recover them from the government following the abolition of fees in the Summer of 2017.

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Employment Judge Faulkner

Date: 9th March 2018

JUDGMENT SENT TO THE PARTIES ON

15 March 2018

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FOR THE TRIBUNAL OFFICE