EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Robert Meade	**v**	University Hospitals Bristol NHS Foundation Trust

Heard at: **Bristol Employment Tribunal** **On: 4-7 December 2017**

Before: **Employment Judge O'Rourke**

Appearances
For the Claimant: Mr C Murray - Counsel
For the Respondent: Ms S Omeri - Counsel

REASONS

(having been requested subject to Rule 62(3) of the Employment Tribunal's Rules of Procedure)

Background and Issues

1. The Claimant was employed by the Respondent as a technical manager, responsible for the day-to-day management of a systems development team in their Information Management and Technology Department. He had been in the Respondent's employment since 2002 and in his then position since 2012. He resigned with immediate effect on 8 September 2016 and has brought a claim of constructive unfair dismissal.

2. Issues. The issues are as follows:

   2.1. Had the Claimant resigned because of an act or omission, or series of acts or omissions of the Respondent? The various acts or omissions of which the Claimant complained are set out in a 'list of issues' prepared by Ms Omeri and which was followed by both parties throughout the hearing.

   2.2. Were such acts or omissions fundamental breaches of contract? The Claimant asserts a 'final straw' act, relating to an appeal outcome, triggering his resignation.

   2.3. Did the Claimant affirm the breach?

2.4. If constructively dismissed was such dismissal, in any event, potentially fair, in all the circumstances of the case?

2.5. Both **Polkey** and contributory fault was relied upon by the Respondent, as to reducing any compensatory award.

The Law

3. Section 95.(1)(c) of the Employment Rights Act 1996 states that:

For the purposes of this Part an employee is dismissed by his employer if

(c)the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

4. The case of **Omilaju v Waltham Forest London Borough Council [2004] EWCA Civ 1493** sets out the now well-known test as to what constitutes a 'last or final straw' in cases of constructive dismissal. Repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. The last action of the employer which leads to the employee leaving need not itself be a breach of contract, but '*while the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (de minimis non curat lex) is of general application'.* In **Omilaju** the final straw was the employer's refusal to pay Mr Omilaju while he was attending at the employment tribunal, as he was, at the time, absent from work without leave. The headnote of the judgment also states that '*the final straw … when viewed in isolation, might not always be unreasonable, still less blameworthy, but its essential quality was that it was an act in a series whose cumulative effect was to amount to a breach of the implied term; that while it did not have to be of the same character as the earlier acts, it had to contribute something to that breach, even if what it added might be relatively insignificant …* It went on to say *per curiam* that '*an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective.'*

5. I remind myself that the burden of proof rests on the Claimant in this matter.

The Facts

6. I heard evidence from the Claimant and, on behalf of the Respondent, from the following witnesses:

6.1. Mr Chris Berrington – a technical solutions manager and the Claimant's line manager.

6.2. Mr Andrew Hooper – head of the information management and technology department, with managerial oversight regarding day to day HR issues (although not strictly Mr Berrington's line manager).

6.3. Ms Lisa Balmforth – an HR business partner, who advised during the earlier stages of this matter.

6.4. Ms Sarah Nadin – associate director of business planning, who dealt with a grievance from the Claimant.

6.5. Ms Kate Parraman – deputy director of finance, who dealt with the Claimant's appeal against the grievance outcome.

7. General Summary of Events. I set out here a general summary of events, by way of chronology, which should be uncontentious:

7.1. Late November 2014 – a member of the Claimant's team, a Mr Simon or 'Si' Geach approached Mr Berrington to raise concerns of bullying and/or harassment by the Claimant towards him. The Claimant had previously informed Mr Berrington as to concerns he had had with Mr Geach's timekeeping and also that the Claimant had disputed with him as to how he should be addressed ('Si' rather than 'Simon'). It was agreed evidence that all parties were aware that Mr Geach suffered from Autism, although the severity of that condition was never clarified, with the Claimant stating that Mr Geach had told him it was 'mild Autism'. The implication of him having this condition was that it may have potentially affected his social skills and ability to interact appropriately, or render his responses to such interactions disproportionate.

7.2. 2 December 2014 – the Claimant met with Messrs Berrington and Hooper and they informed him of the complaint.

7.3. 8 January 2015 – Mr Geach walked out of a one-to-one meeting with the Claimant and went sick, not returning until 26 January.

7.4. 24 February – the Claimant was invited to an arbitration meeting, to take place on 3 March, but declined.

7.5. 23 March – a meeting took place, involving the Claimant, to discuss potential 'reasonable adjustments' to support Mr Geach, to the concept of which adjustments the Claimant objected.

7.6. Over this period the Claimant had emailed the Respondent complaining of Mr Geach's behaviour in the office, namely refusing to acknowledge or communicate with the Claimant.

7.7. At a meeting on 10 April, the Claimant was told that Mr Geach did not wish a formal investigation to be instigated in respect of his complaints, to which the Claimant objected, considering that one should be conducted, to 'clear his name'.

7.8. Mid-May – the Claimant's team was questioned as to any concerns they may have had about his management style (an approach he himself had earlier suggested) and they had none.

7.9. 29 May – the Claimant wrote to the Respondent setting out the mental distress this process was causing him, stating that he was considering the possibility of resigning.

7.10. 1 June – the Claimant went on sick leave and remained on such until his resignation fifteen months later.

7.11. 19 February 2016 – the Claimant submitted a grievance.

7.12. 15 June 2016 – grievance outcome.

7.13. 23 June 2016 – appeal against that outcome.

7.14. 6 September 2016 – appeal outcome.

7.15. 8 September 2016 – resignation.

8. Alleged Acts or Omissions of the Respondent. Referring to Ms Omeri's list of issues, I find, using their lettering, as follows:

8.1. (a) (b) (c) (e)(f) and (h). I group these complaints together as encompassing the failure to implement a timely formal investigation into Mr Geach's complaints, or otherwise resolve the situation, over the period December 2014 to November 2015. The latter date is chosen because the Claimant had been formally notified by letter of 5 November [209] that the discussions with his team had raised no concerns about his management or anything to substantiate Mr Geach's allegations and no investigation would take place, because there was no basis for an investigation and that Mr Geach had confirmed he didn't wish to pursue his concerns any further. It was concluded by the Respondent that there was no case to answer and mention was also made that Mr Geach had recently resigned, with immediate effect. There had been reference to these points (less Mr Geach's resignation) being discussed with the Claimant in a meeting in late May, but nothing had been put in writing at the time. Clearly, therefore, it had taken eleven months to get to this point. I am in no doubt that the Respondent found itself in a difficult position in this case, with an autistic complainant making serious allegations under the bullying and harassment policy, but not wishing to formalise those complaints, or have them investigated, but with the Claimant considering that he had them hanging over him and potentially damaging his reputation with his team. It was sensible, as the Respondent did, to obtain occupational health advice on Mr Geach's condition and how it might best be managed, but that advice was not provided until 10 March 2015 [104], some three months after the initial complaint. Until then, the Respondent argued, it felt itself effectively unable to deal firmly with the issue: however I don't accept that. Autism is a well-known condition with generic advice relatively easily obtainable from open sources (or even within the Trust itself) and frankly the letter from OH

contained little more than such generic advice. I also don't accept that it could not have been obtained with more urgency. While OH is a separate entity from the Respondent, it is contracted to it and I am in no doubt that had managers escalated, or gripped the issue, a prompter response could have been obtained. The result of this delay was that the Claimant was left managing Mr Geach, but who was, it was not disputed, effectively ignoring him and having walked out of a one-to-one meeting, thus undermining the Claimant's position as a manager, both in respect of Mr Geach and the rest of the team. This was, as was acknowledged by Mr Berrington, '*crap*' [93] and by Ms Balmforth as '*not acceptable'* [114]. However, nobody spoke directly to Mr Geach to say that regardless of his Autism, such behaviour would not be tolerated and that if it continued, he would be disciplined. That was the only appropriate response by Mr Berrington to those reports by the Claimant, but it was not done and at that point, indicated a serious lack of support to him. The Respondent's ability to deal with this matter was, however, hampered by the stance the Claimant himself took in respect of it. It was simply unreasonable of him to demand that the allegations made by Mr Geach be investigated to 'clear his name', when Mr Geach did not want them to be and indeed said that his condition would worsen if they were. The Claimant also, however, refused to engage in any form of round-table or more formal mediation process with Mr Geach. He himself said in his statement that he '*appreciated that this could be interpreted as being uncommunicative or difficult'* and indeed I do interpret it as precisely that. He complained subsequently of allegedly being told by Ms Balmforth to '*take it on the chin and be the bigger person'*, but that is entirely a sentiment with which I concur. While the term may be unfashionable, managers are 'leaders' and can be expected, within reason, to put the interests of their employer and their team first, over their own. If necessary that may involve swallowing some pride to reach a mutually beneficial goal. However, from the outset, the Claimant took what he no doubt considered to be a position on the high moral ground, rendering it considerably more difficult to quickly resolve the issue. As I stated in the hearing, this was a situation crying out for a prompt round-table discussion, with the Claimant, Mr Geach, Mr Berrington and perhaps also Ms Balmforth, who was clearly able to provide pragmatic and sensible advice. I accept Mr Murray's submission that the chances of this process being engaged in and being successful were stronger earlier in the chain of events, perhaps even before Christmas 2014, but that did not excuse the Claimant's subsequent refusal to engage. I canvassed with him what he thought the outcomes of such a meeting might have been and he agreed with me that there were three possible outcomes: firstly, Mr Geach may have proved difficult, intransigent or even badly-behaved at the meeting (as in his 1-2-1 in January), thus strengthening the Respondent's hand in dealing effectively with him, perhaps justifying his suspension until more formal processes could be undertaken; secondly, he might have apologised, explained that his actions were symptoms of his Autism, withdrawn his allegations and some way forward may have been agreed; thirdly, following both sides having stated their case, there might have been no meeting of minds and the status quo would have continued, with the exception that the Claimant would have shown a willingness to resolve the situation and some flexibility on his part. Subsequent failure by the Respondent to then resolve the problem in a prompt fashion would have

been all the more blameworthy and undoubtedly in breach of the implied term. When it was put to him that these scenarios were 'win-wins' for him, he said it '*was just how I felt. I didn't think it would be dealt with. I was conscious I could be seen as negative.'* I repeat the phrase I used in the hearing – this situation was a 'two-way street': it was not enough for the Claimant to take what he perceived to be a high moral position and simply leave it to the Respondent to resolve the conundrum. He was a manager and should have reacted in a more robust and resilient fashion, assisting his employer to reach a resolution of the issue. Instead, they found themselves between 'a rock and a hard place' and while their inordinate delay and involvement of too many managers and HR advisors, with nobody taking a firm grip of the situation is entirely blameworthy (as perfectly illustrated by the Claimant's email setting out the range of often contradictory advice he'd been given [142]), I don't find, objectively, on balance that the Claimant was entitled to consider, taking his own behaviour into account that the implied term of trust and confidence had been breached.

8.2. (d)(g) and (i). Complaints about delays in or non-referral of the Claimant to OH: the first complaint is that in March 2015, OH failed to respond to the Claimant's requests for assistance. OH is a separate entity to the Respondent and therefore the latter cannot be held responsible for any such failure to respond to the Claimant, although, as stated above, I don't believe that the Respondent would not have been able to apply pressure to OH to respond to the Claimant, or do so more quickly. Certainly, the Respondent was clearly in breach of its own policies in not referring the Claimant to OH once he went sick, particularly as he complained of anxiety and depression. Several witnesses referred to these policies as only '*for guidance'*, implying that they didn't really have to be followed to the letter, or even at all, but I am entirely confident that had the Claimant been accused of serious misconduct under the disciplinary policy, considerably less flexibility on managers' part would have been apparent. I note that the Claimant had himself been disparaging about the benefits of OH and clearly his co-operation would have been needed for any referral, but it should have been at least attempted earlier. The Claimant was eventually referred to OH and did not complain of such failures at the time. I doubt, based on his earlier scepticism and specifically in October 2015 stating that his recent meeting with OH '*had been a waste of time'* [201] that he really felt at the time that his non-referral to OH was something that damaged his trust and confidence in the Respondent, but rather, latterly, provided him with a point on which to criticise them.

8.3. (j) to (o). I group these complaints together as relating to an alleged failure by the Respondent to properly manage the Claimant while on sick leave. It is clear that the record of communication with the Claimant by Messrs Berrington and Hooper was patchy, with missed deadlines for contact. Clearly, both managers, although no doubt busy men, should have made more consistent effort to keep in touch with the Claimant. It can be the case in these situations that an employer is 'damned if they do and damned if they don't', in that not contacting a sick employee is neglectful, or over-contacting him is seen as harassing. I note also that the relationship between these three men was not simply that of line manager and member

of staff, but that they had known each other for up to fourteen years and clearly, at least prior to the conclusion of these events, liked and respected each other. They seemingly routinely exchanged frank text messages, with the Claimant being open about his feelings and those feelings being reciprocated, with the offer by one or other manager of a '*chat over a beer'* and I find they had genuine sympathy for his situation. I am therefore entirely confident that had the Claimant wished to speak more often to either manager, he would have signaled that wish and it would have been reciprocated. However, by this point (late 2015/early 2016), the Claimant was at least preparing to embark on a grievance procedure from which, it is clear to me, he expected no outcome but his eventual resignation (more of which below). He was shutting down avenues of communication and I don't think particularly cared whether or not contact was made with him. In respect of the failure to provide him with his pay-slips, I don't see that individually that amounted to any breach of the implied term in its own right and as should be clear from my findings so far, made no real cumulative contribution to any repudiatory breach. The Claimant voiced considerable criticism of the sickness review or wellbeing meeting that took place on 21 October 2015. Firstly, he was not informed accurately as to the meeting's purpose or description. The Respondent accepted that it had mistitled the meeting as 'wellbeing' (not a recognised term of the Respondent's) when it was, more accurately, to review his sick leave. Further, he had not been informed until the day before of his right to bring a companion to the meeting and was unable to do so at short notice and finally, he strenuously disputed the written record of the meeting on numerous points. It is entirely possible that before that meeting he felt anxious as to what the consequences of it might be for him and his continued employment, hence his insistence on knowing its purpose. However, as a manager and clearly somebody well-versed in the various policies, as he had access to them almost throughout this process and has heavily relied upon them in this claim, he can't have been entirely surprised to discover that the meeting was to discuss his sickness and explore whether there were steps that could be taken to assist him back to work. This would be an entirely routine step to take in such a case. Following the meeting, any anxiety he may have had about his continued employment must have been allayed, as the letter recording the meeting [195] simply spoke of a further review or action plan in due course and he was of course to continue on sick leave, without challenge, for almost another year. It's clear from the letter and the Claimant's subsequent voluminous correspondence in respect of its contents [200-226] that the bulk of the discussion was not so much about his sickness, but the dispute with Mr Geach and the Respondent's handling of it and confirming the Claimant's previous stance on the issue; the clearing of his name, without which there could be no progress. There was considerable dispute as to the record of the meeting, with the Claimant proposing many amendments to the record. Mr Berrington said that he had not intended to take precise minutes of the meeting, treating his letter as an overview of what had been discussed. The Claimant, however, disagreed, wishing to set the record straight, from his perspective. I query, given the detail and length of his criticisms of the record and that he was unaccompanied at the meeting and there is no mention of him taking notes, how he was able to recall such varied and detailed matters and I accept, as Mr Berrington stated that he thought there

was an element of the Claimant considering, with the benefit of hindsight, additions to what he may actually have said at the meeting. In the end, agreement could not be reached as to a final version (although Mr Berrington did agree to some amendments proposed by the Claimant) and the entirely sensible approach was taken that both parties' accounts would be retained on the file, for any future reference. And that brings me on the point of all of this to-ing and fro-ing. I find that the Claimant was entrenching himself into a confrontation with his employer that could only, to my mind, have one outcome, his resignation. The purpose, therefore, of his detailed, even forensic examination of the record of the meeting was, I consider, with precisely the prospect of this litigation in mind, rather than in any genuine effort to resolve the situation, or get back to work. This is, I consider, perfectly illustrated by his failure to react positively to the letter of November, confirming the withdrawal of the allegations, that he had no case to answer, his team supported him and that Mr Geach had left. This was his moment, if not perhaps immediately, due to being ill, but certainly not too long afterwards, to return to work, perhaps even part-time initially, if he didn't feel up to full-time work. Instead, his response was to file a grievance a month or two later and at the same time, 3 February 2016, to clear his desk. I note that he said he did so because he had personal items he wished to secure, but just as an employer telling an employee to 'clear his desk', or doing it for him, sends a very strong message that the employee is no longer required, an employee doing so of his own volition, sends a similarly strong message to his employer.

8.4. That therefore takes me to (p) onwards, to the conclusion of the list of issues, which I group together as the handling of and outcomes of the Claimant's grievance and appeal. I preface this consideration with the finding, which should be apparent from what I have said before that I consider that by early 2016, the Claimant had decided that he was never going to return to work and that therefore the taking of the grievance and the appeal was simply aimed at putting the Respondent under pressure to perhaps come to some financial arrangement with him, or potentially, through repeated procedural failures or inevitable delay by the Respondent (certainly likely, based on past performance), to provide him with further ammunition to pursue an eventual claim to this tribunal. I find this for the following reasons:

8.4.1. There is no dispute that the Claimant and Respondent had been in 'without prejudice' discussions, since October 2015, some aspects of which had been instigated by him, as to the termination of his employment. He criticised the Respondent's reference to a redundancy scheme (MARS) which did not in fact apply to his situation, but that reference had only been made when he had opened up the conversation on that basis.

8.4.2. He failed to suggest any outcome to his grievance that might resolve his concerns and get him back to work, strengthening my view that the taking of the grievance was a tactical decision and not really a serious attempt to resolve the problem. He could have, for example, said that he had been forced to go on sick leave due to the

Respondent's mishandling of the matters of the previous year, but that if they acknowledged their (or individual managers') failures in that respect, apologised for them and recompensed him for any loss of earnings he had incurred, he would return to work, but he didn't. Such an outcome, which I think, in view of the Respondent's subsequent relatively frank admission of its failures and its clear desire to get him back to work, was entirely possible. It would have entirely vindicated his position and allowed him to return to work with his head held high, but that was not the route he was pursing.

8.4.3. Instead, the nature of his grievance was voluminous (33 pages – commencing at [282]) and predominantly petty in nature, clearly designed to put the Respondent to as much difficulty as possible in responding to it and ensuring inevitably that due to the multiplicity of complaints, some would fall between the cracks, providing more scope for criticism. It is frankly ludicrous for the Claimant to then seek to criticise the Respondent for delay in dealing with a grievance of this complexity.

8.4.4. Crucially, also, he did not attend the hearing of either his grievance, or his appeal, indicating the tactical nature of his approach to them. If he really felt these processes could rectify the situation and get him back to work and he wanted the Respondent to know and acknowledge the depth of his feelings about their treatment of him, then he would have attended. While he has stated that he was unable to attend due to illness, I note that there is no independent medical evidence indicating that he physically or psychologically could not do so and his illness did not prevent him from engaging in voluminous correspondence and preparing very detailed submissions, with or without the assistance of his advisor, over the period of a year.

8.5. Having found, therefore that certainly from January or February 2016, the Claimant had no intention of returning to work, his reaction to the grievance was entirely predictable, which was to appeal it, again in some detail, effectively requiring the Respondent to review the entire grievance procedure. I reiterate my previous comments as to the Claimant's criticisms of delay by the Respondent in handling the appeal. Both Ms Nadin and Ms Parraman conducted extremely thorough and fair processes, despite being hampered by the Claimant's non-attendance. I am confident, however that whatever conclusion they may have come to, it would not have satisfied the Claimant, or dissuaded him from his eventual resignation.

9. <u>The Act or Omission in respect of which the Claimant resigned</u>. I find that 'the die had been cast' in this respect, probably as early as the Claimant's departure on sick leave in June 2016, due to the Respondent's failure to resolve the issue with Mr Geach and which was when he first threatened resignation. That failure, I have found, could potentially have amounted to a fundamental breach of the implied term, were it not for the necessity of seeing the failure through the prism of the Claimant's lack of co-operation and inflexibility at the time. The Claimant's stance was then confirmed by his failure to react favourably to the November

letter and either return to work, or indicate that he potentially would, once physically or mentally better. Everything that arose thereafter had no effect whatsoever on that decision of his in late 2015 or early 2016. It did not contribute in any way to his eventual resignation, as that was pre-ordained and it was simply a question of him either coming to some financial settlement with the Respondent, as they could no longer sustain his barrage of complaints and the management time being taken up in dealing with them, or, in the alternative, if they were willing to see the process through, then he would wait until that was finalised, before formally tendering his resignation.

10. Conclusion. There was, therefore, no fundamental breach of contract by the Respondent, upon which any further acts or omissions could individually or cumulatively contribute to, or any 'last straw', either arising from the appeal outcome, or otherwise. Accordingly, the Claimant's claim of constructive unfair dismissal fails and is dismissed.

Employment Judge O'Rourke

Dated: 26 March 2018

REASONS SENT TO THE PARTIES ON

13th April 2018

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FOR THE TRIBUNAL OFFICE