Case No: 2303575/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**
sitting alone

BETWEEN:

Mr D Abbott

Claimant

and

Sainsbury's Supermarket Ltd

Respondent

ON: **15 October 2018**

Appearances:
For the Claimant: **In person**
For the Respondent: **Mr R Kohanzad, Counsel**

JUDGMENT

The claimant was not constructively dismissed, fairly or otherwise.

The remedy hearing provisionally listed for 25 January 2019 is vacated.

REASONS

1. In this matter the claimant complains that he was unfairly, constructively dismissed. He confirmed at the outset of the hearing that the sections in his witness statement headed 'The handling of my case' and 'Grievance' set out the breaches of contract he alleges by the respondent that he says led to his decision to resign. They can be summarised as mishandling of the disciplinary process and two months of bullying and harassment by Mr Ryan, the then deputy store manager.

Evidence

2. I heard evidence from the claimant and his mother, Mrs L Clark. For the respondent, I heard from Mr D Curness, former store manager. The respondent also submitted an unsigned witness statement of Mr G Beers, department manager, but he did not attend. Therefore although I read Mr Beers's statement I accorded it appropriate weight to reflect that it was not signed and he was not present to attest to its truth or be questioned about it.

3. The evidence concluded by 4pm. The parties agreed to send in their written submissions and I reserved Judgment. The submissions were in due course received and have been fully considered (however the claimant's assertions in his submissions that he has been discriminated against were not considered as there is no claim of discrimination before me).

Relevant Law

4. In order to bring a complaint of unfair dismissal it is first necessary to establish that the claimant has in fact been dismissed.

5. If there is no express dismissal then the claimant needs to establish a constructive dismissal. Section 95(1) of the Employment Rights Act 1996 ('the 1996 Act') states than an employee is dismissed by his or her employer for the purposes of claiming unfair dismissal 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."

6. Case law has established that to succeed in such a claim the employee must establish that:
    a) there was a fundamental breach of contract on the part of the employer;
    b) the employee resigned in response; and
    c) the employee did not affirm the contract before resigning.

7. In Western Excavating (ECC) Limited v Sharpe ([1978] ICR 221)**,** the Court of Appeal confirmed that the correct approach when considering whether there has been a constructive dismissal is as follows:

> "if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct, he is constructively dismissed."

8. Those terms of the contract include not only the express terms set out in writing or orally but also the term of mutual trust and confidence that is implied into every contract of employment and which, if breached, is capable of constituting a fundamental breach.

9. Whether there has been a fundamental breach is a question of fact for the Tribunal. The House of Lords in Malik v BCCI SA (in liquidation) ([1997] IRLR 462) (as corrected by Baldwin v Brighton & Hove CC [2007] ICR 680) confirmed that the employee needs to show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them. This conduct is to be objectively assessed by the Tribunal rather than by reference to whether the employer's conduct fell within the band of reasonable responses. That conduct must be assessed as a whole and the employer's subjective intention is irrelevant (Woods v W M Car [198]1 ICR 666 and Leeds Dental Team Ltd v Rose ([2014] IRLR 8).

10. Furthermore, individual actions taken by an employer which may not in themselves constitute fundamental breaches of any contractual term may have a cumulative effect of undermining trust and confidence thereby entitling the employee to resign and claim constructive dismissal. These are often referred to as 'last straw' cases. The last straw complained of must contribute to the breach even if relatively insignificantly. It need not in itself be a breach but nor can it be entirely innocuous. The case of London Borough of Walton Forest v Omilaju ([2005] IRLR 35) gives guidance to Tribunals of the correct approach to take.

11. If an employee has been dismissed, constructively or actually, then it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2) of the 1996 Act. If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

Findings of Fact

12. Having assessed all the evidence, both oral and written, I find on the balance of probabilities the following to be the relevant facts.

13. The respondent is a well-known, large employer. The claimant commenced employment with them on 31 May 1989. At the time of his resignation he was employed as a bakery assistant at the Redhill store. At the relevant time Mr Fitzgerald was the bakery manager, Mr Beers was the department manager, Mr J Ryan was the deputy store manager and Mr Curness was the store manager. Mr Ryan has since left the employment of the respondent.

14. The respondent has a series of well-established internal policies which applied to the claimant; in particular, grievance (known internally as fair treatment), attendance, disciplinary, appeals and inclusion policies. All contained the sort of provisions one expects to see in the policies of a large, well-organised employer.

15. Specific provisions in the attendance policy were:

> 'No matter what the reason, if you can't come into work you must follow these absence reporting procedures:
>
> If you work in our supermarkets…you should:
> - Call your store a minimum of one hour before you're due to start work
> - Inform the manager you speak to of the reason for your absence
> - Inform the manager you speak to of your expected return date.

and under 'Do I have to call in every day that I am sick?' it says:

> 'When you contact us we will ask you to provide an expected date of return, which will be the date we expect you to come back to work. If you are still unwell then you must call us again using the above procedures.
>
> If you have a fit note saying that you are not fit to return to work we would expect you to return when that fit note end date has passed…'

16. It also sets out that the occupational health advisers (OH) are specialists in workplace health and help the respondent better to understand the impact of employees' health on their ability to do their job. It makes it clear that employees are not required to participate in OH referrals or to give consent to the disclosure of reports but that in the absence of that, the line manager will have to make any decisions about fitness to work based on the information available.

17. On 27 June 2017 Mr Fitzgerald interviewed a colleague of the claimant, LC. She alleged that the claimant had made comments of a sexual nature to her, specifically that she:

> 'must be saying something to get day off, something sexual'

and when she was asked if he had said anything else, she replied:

> 'blow job, laying on back'

and that these comments had been made the previous week and she had told a colleague about it on the Thursday. When asked how she felt LC said 'horrible', that she 'tried to humour it' and repeated that the claimant had made reference to sexual favours and blow jobs. When asked whether this was 'out of order' she replied:

> 'Yes. Says I'm having an affair. Shouldn't joke back, did it to shut him up. I don't want people to think that.'

18. Mr Fitzgerald also interviewed another colleague, Mr Sims, on 27 June who said that the claimant was quite aggressive and had been playing about with tins saying, 'I'm going to hit you'. When he was asked if the claimant had threatened him, Mr Sims said no but that the claimant had threatened to break his legs before but he had not taken offence and not asked him to stop.

19. Mr Fitzgerald interviewed the claimant on 10 July on his return from leave. He informed the claimant that it was a fact-finding interview and that it was about what he may or may not have said. The claimant was told that it had been alleged he had been making obscene comments to staff, 'mainly' LC. The alleged comments were put to the claimant who said that he never said anything like that. He also said that he had a laugh with her but never talked about blow jobs. He confirmed that he had asked her why she got Saturdays off but that he would not say 'something like that'. He said he has a joke and she laughs along with him.

20. Mr Fitzgerald also interviewed Mr Sims again on 10 July. Mr Sims confirmed that when LC was not in on a Saturday he had heard the claimant say 'Oh you lying on your back for Joe' and that 'she was sucking off Joe the Saturdays off' (sic).

21. Later on 10 July Mr Fitzgerald and Mr Ryan met the claimant. Mr Ryan informed him that he was being suspended on full pay for gross misconduct namely making 'sexual references'. The notes of the meeting confirm that Mr Ryan would escort the claimant off the premises which would be very normal in such circumstances. The suspension was confirmed in writing to the claimant by Mr Ryan in a letter which specified the alleged gross misconduct was a breach of the respondent's fair treatment and equality, diversity and inclusion policies in that on a number of occasions, he had made inappropriate comments of a sexual nature to his colleague. The letter also notified the claimant that he must be available to attend all meetings that he was invited to.

22. In a second letter on 10 July Mr Beers wrote to the claimant asking him to attend a disciplinary investigation meeting with him on 15 July, subsequently changed to 17 July.

23. In the meantime, on 14 July, Mr Fitzgerald had a fact-finding interview with another colleague of the claimant, Ms Sewell. She said that she had not heard the claimant use any inappropriate or offensive language but that LC had brought it up with her and had said it had gone on for weeks. He also interviewed Mr Morton, another colleague, who said he had not heard anything that was offensive, had never seen anyone take offence and that he had not heard anything sexual said to female members of staff by the claimant. Ms Owen was also interviewed on the same day. She confirmed that she had only heard the claimant say inappropriate comments to Mr Sims but that LC had told her that the claimant had asked her why she was getting Friday and Saturdays off and asked if she was having an affair with the manager.

24. At the investigation meeting on 17 July the claimant was accompanied by his union representative. Handwritten notes of the meeting were made. The claimant confirmed that he had received copies of the statements obtained by the respondent.

25. The conclusion of that meeting was that Mr Beers considered he needed more information and adjourned it to the following day. In the event, Mr

Beers was able to have a discussion shortly thereafter with Mr Sims who wrote a statement where he confirmed that he had heard the claimant say to LC:

'…how do you get Saturdays off are you lying on your back for Joe'

and that he:

'also implied that she gives blow jobs for a Saturday off and as I heard it it sounded like he meant it seriously. This isn't the first time I've heard him say this he has gone on about it 4 or 5 times.'

26. Mr Beers was able to reconvene the investigatory meeting the same day and read Mr Sims's statement to the claimant. In response the claimant said that there were inconsistencies between the statements given by Mr Sims. In one he had said the claimant had said LC was 'sucking off' Joe whereas in the second statement he said she was giving 'blow jobs' but that in any event he did not say what was alleged and he did not say things like that. Later he said that he did not remember ever saying something like that to LC and that he was not that kind of guy. The respondent says that these comments suggest that the claimant was admitting making the comments. In the face of clear denials by him elsewhere, I do not share that view – overall it is clear from the evidence that the claimant has denied making the comments throughout.

27. Mr Beers again said that he needed more information before he made a decision as there appeared to be a stalemate. He confirmed that he would remain impartial and follow process.

28. The claimant says that in these meetings on 17 July Mr Beers did not listen to him, did not allow him to present his case, interrupted him when he tried to do so and implied that if he admitted making the comments it would go easier for him. Mr Beers's statement denies these allegations but, as noted above, it is unsigned. The claimant confirmed however that his union representative did not intervene on his behalf to protest Mr Beers's alleged behaviour in either meeting which I would expect would have happened if the behaviour was as described by the claimant (especially after they had the opportunity to discuss the situation during the break between the two meetings). The notes of the meetings, made by a third party, suggest a fair and balanced approach. I find that there was nothing inappropriate about the handling of the meetings on 17 July.

29. Mr Beers referred the matter to Mr Ryan who invited the claimant to a disciplinary meeting on 20 July. The invite letter repeated the alleged gross misconduct, informed the claimant of his right to be accompanied, enclosed copies of relevant additional documents and warned that if the allegation was upheld it could result in summary dismissal. At the claimant's request the meeting was re-arranged and a new date set for 21 July.

30. In the meantime, on 19 July, the claimant went to see his doctor and was signed off until 5 August due to stress (later fit notes extended this to 28 August). The claimant's evidence was that he also telephoned the store

that day to request a postponement of the disciplinary meeting. In his detailed ET1 the claimant said that he spoke to Mr Ryan. His statement said that he spoke first of all to Mr Curness who said he would inform Mr Ryan, who had the day off, and ask him to call the claimant back which Mr Ryan did. In his oral evidence he said that he made it clear to both Mr Ryan and Mr Curness on 19 July that he was off sick and the fact that Mr Ryan went ahead with the disciplinary meeting in any event on 21 July, as described below, is evidence of his unreasonable and bizarre behaviour towards him. Mr Curness's evidence was silent on this point but it was put to the claimant in cross-examination that it was more likely that he did not speak to either Mr Curness or Mr Ryan on 19 July.

31. On balance, I find that there was no conversation between the claimant and Mr Curness or Mr Ryan on that day. In particular it is notable that in neither the note made by Mr Beers of the conversation with Mrs Clark on 23 July nor in Mrs Clark's letter of the same date, both described below, is there any reference to the claimant himself having spoken to Mr Curness and Mr Ryan on 19 July. Further, in the claimant's later complaint dated 31 July he did not refer to any conversation on 19 July.

32. The claimant's wife dropped off a copy of the fit note into the HR office's inbox the following day. This was not compliant with the attendance policy which required management in the store to be informed of sickness. There would inevitably be some delay in the fit note being passed from HR to line management.

33. Mr Ryan convened the disciplinary meeting on Friday 21 July, the fit note not having come to his attention. The notes of the meeting record that the claimant did not attend, that they waited 10 minutes, adjourned and sought advice from HR who confirmed that the meeting should be rescheduled.

34. Mr Ryan then telephoned the claimant and accused him of deliberately not showing up for the meeting and told him he was in breach of the absence and suspension policies as he had not phoned in when sick. This is in keeping with Mr Ryan being unaware at that stage of the fit note.

35. Mr Ryan wrote to the claimant that day inviting him to attend a rearranged disciplinary meeting on Monday 24 July. The letter stated that failure to attend without prior notification and/or satisfactory reason may result in the decision being made in his absence.

36. Receipt of this letter prompted Mrs Clark to telephone the store on Sunday 23 July and, she says, she spoke to Mr Beers. A handwritten note of a telephone conversation with a lady who said she was ringing up on behalf of the claimant was in the bundle. It is undated and unsigned but I find it is more likely than not that it was written by Mr Beers and is his account of that conversation with Mrs Clark. That note records Mrs Clark asking why a meeting was being arranged when the claimant was off sick and that a fit note had been handed in and he was signed off until 5 August. She also said that the HR department knew about the fit note and she asked to be called back to confirm if they had it.

37. Mrs Clark also wrote to Mr Ryan that day in which she repeated those concerns and that she had requested the disciplinary meeting be postponed and rearranged for when the claimant was fit to attend. She enclosed a copy of the fit note.

38. The next call between the claimant and Mr Ryan was on 24 July, after Mrs Clark's' letter had been received, and it was in that call that Mr Ryan said he had now found the fit note. Referral to OH was discussed and consented to by the claimant. The claimant must also have been told in that call that the planned disciplinary meeting that day would not proceed.

39. There is no evidence before me from Mr Ryan nor any contemporaneous documentary evidence as to these alleged phone calls. The claimant's evidence about them was not challenged save in respect of 19 July. I find that at some point in these exchanges, Mr Ryan said stress was not an illness. I have no reason to disbelieve the claimant's evidence on that. As to the general tone with which Mr Ryan spoke to the claimant, Mr Curness said in his statement that he had been present 'during many' of their conversations and that Mr Ryan was not disrespectful in any way. In his oral evidence he clarified that he had listened in, at Mr Ryan's request, to only two conversations he could recall – one about a referral to OH and one about the response to the letter dated 31 July. The claimant's evidence was that Mr Ryan called him on numerous occasions and his tone was unacceptable – he variously described it as angry, incensed and furious.

40. I accept Mr Curness's evidence that on the two occasions he witnessed the calls Mr Ryan was not disrespectful. If he was not disrespectful then, I find it more likely than not that he was not disrespectful on the other calls (especially as he had asked Mr Curness to witness the calls suggesting that he was aware of the way in which they should be conducted). I accept that Mr Ryan probably was frustrated with the behaviour of the claimant and let that frustration show but I stop short of agreeing with the claimant's descriptions of him.

41. Mr Ryan then referred the claimant to OH, asking for advice on a timeframe for an initial return to work and fitness of the claimant to participate in a disciplinary process.

42. It appears there was then a misunderstanding between the claimant and OH. His evidence was that he had consented to the referral and was happy to participate but OH reported to the respondent on 26 July that the claimant had told them he was unaware he had been referred and therefore they could not take the matter further. Mr Ryan telephoned the claimant about this on the same day. Again I find that Mr Ryan was frustrated, let that show and said something to the effect of the claimant not cooperating with OH.

43. On 31 July the claimant wrote to Mr Ryan, copied to HR, complaining about the handling of the disciplinary allegations saying that the investigation had been both substantively and procedurally unfair and that it felt as though Mr Ryan was pursuing a vendetta. He stated that he did not feel Mr Ryan could be sufficiently independent to continue to carry out an independent and

unbiased investigation. He referred to the fact that his wife had delivered the fit note on 20 July and that they had spoken on 24 July when he gave his consent to contact OH even though he had only been signed off for two weeks.

44. There was no written response by the respondent to that letter despite it being copied to HR. Clearly that is unsatisfactory as it raised serious issues and was in substance a grievance. There was however a telephone conversation between the claimant and Mr Ryan about it on 7 August. The claimant's evidence, which I accept, is that the focus of our conversation was the referral to OH and it was the claimant who brought up the issue of the letter.

45. The letter did however prompt the taking of further witness statements by Mr Beers from two more (male) colleagues of the claimant. One said that he had not heard any use of inappropriate sexual remarks by the claimant and the other said that he had heard him refer to LC's 'tits' on one occasion.

46. The claimant says that there was then a number of further conversations between him and Mr Ryan regarding the OH referral in which Mr Ryan was angry and again told him that he was in breach of policy. I accept that there were conversations between them in this period about OH as it does appear that for some reason the referral process stalled on a number of occasions. I again find that it is more likely than not that Mr Ryan was frustrated and allowed that frustration to show and they did discuss what Mr Ryan saw as breach of policy by the claimant. I do not find however, based on Mr Curness's later investigations, that Mr Ryan went so far as to threaten the claimant with further disciplinary proceedings in that respect.

47. The OH appointment took place on 11 August but the claimant withheld authorisation for the report to be released to the respondent until his grievances were properly addressed.

48. On 14 August the claimant handed a letter to Mr Curness, copied to HR, which referred to his unanswered letter of 31 July and the phone call of 7 August. The claimant alleged that in that call Mr Ryan had threatened to raise an additional case of misconduct for breach of the attendance policy. He also called for the disciplinary process to be halted pending the outcome of his complaint and that the investigation was unsound. He said that the way he was being treated after 28 years loyal and blemish free service was deplorable and that he had been advised he had a good case of constructive dismissal. He said it was an intolerable situation and urged a speedy response in writing so that the way forward could be ascertained.

49. Mr Curness did a very prompt investigation of the issues raised in the claimant's letter. He reviewed the relevant documentation and spoke to Mr Ryan, Ms Wray of HR and Mr Beers. He replied in writing to the claimant on the same day. His evidence, which I found compelling, was that the complaint boiled down to 3 points which he was able to deal with to the claimant's benefit and he was anxious to get a reply to the claimant as soon as possible bearing in mind that the claimant was off work due to stress.

50. In that reply Mr Curness confirmed that any concerns about the investigation were proper to be dealt with at the disciplinary meeting. He also said that Mr Ryan's comments about sick leave had been advisory to ensure he followed policy and that there was no separate disciplinary action in that regard. Also that in light of the claimant's concerns about Mr Ryan, the disciplinary meeting would be dealt with by an impartial manager from outside the store. Finally, that the disciplinary meeting would only proceed when the claimant was fit and well to return to work. He noted that Mr Ryan had already sent the claimant information about support available to him and said that his line manager would be arranging a well-being meeting to see how they could further support a successful return to work. He was invited to contact either Mr Curness or Ms Wray if he had any further queries.

51. It is clear that the respondent did not treat the claimant's letters dated 31 July and 14 August as grievances which they should have done.

52. On 18 August the claimant wrote his letter of resignation to Mr Curness which was hand delivered by his wife. He said that he felt he had been left with no choice but to resign in light of his recent experiences regarding fundamental breach of contract and breach of trust and confidence. He disagreed with Mr Curness's statements about Mr Ryan and repeated his concerns about the failure to deal with his complaint of 31 July. He repeated that he found the approach to the investigation to be one-sided and did not accept that his complaint about the mishandling of the disciplinary process could be dealt with at the same time as the disciplinary hearing.

53. Ms Wray replied to that letter on the same day inviting him to attend a meeting on 25 August (or any other date that he was fit enough to attend) to discuss his complaints and decide how they could best be resolved and asked him to reconsider his resignation. She advised him that he would be entitled to be accompanied at that meeting. The claimant queried who would be at the meeting and whether it was formal. Ms Wray replied that it would be to hear his complaint and that she would have a notetaker and that he could have representation if he wished. The claimant replied on 23 August saying he had spoken to his solicitor who had advised him not to attend the meeting and that the action she was asking for was too late and that he had resigned.

Conclusions

54. In concluding whether the conduct complained of by the claimant amounted to a fundamental breach I remind myself that to be such conduct it must, when objectively assessed, be calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. As such, merely unreasonable or inadvisable behaviour on the part of the respondent is not necessarily sufficient.

55. The claimant relies first upon what he says was the mishandling of the disciplinary process and lack of support from management. I conclude that there was no significant mishandling of the process. It is correct that the

claimant was escorted from the premises when he was suspended but that is entirely normal, although no doubt unpleasant, in those circumstances and the claimant did not challenge the fact of suspension. Indeed he agreed during his evidence that allegations of this nature have to be investigated although he has resiled from that position somewhat in his submissions. My conclusion is that given the allegations made, it was completely reasonable for the respondent to suspend and investigate.

56. The investigation carried out by Mr Fitzgerald and Mr Beers was not unreasonable. Yes there were some inconsistencies in the statements that had been obtained but they would be explored at the disciplinary hearing. That is the whole point of the process and the process was not concluded. Therefore the respondent did not come to a determination as to whether the allegations were true or not and I am certainly not in a position to make any such finding - nor do I need to when considering if the claimant was constructively dismissed.

57. As far as the disciplinary process was concerned the claimant was properly advised at all stages of the position and his rights and was provided with all relevant information and documents. I also conclude that there was no overwhelming lack of support. Mr Curness certainly offered some and he referred to support given earlier by Mr Ryan.

58. I do not conclude that there was any hidden agenda or predetermined outcome. Mr Curness reassured the claimant about that prior to his resignation by confirming that the process would continue with a new manager from outside the area.

59. The claimant also says that he was bullied and harassed by Mr Ryan. I have found that Mr Ryan did become frustrated with the claimant and let that frustration show. He did not however become disrespectful and did not become furious/angry/incensed with the claimant as has been alleged. I also conclude that Mr Ryan did not make an oppressive number of calls to the claimant. He called him when it was appropriate to do so.

60. The claimant has specifically complained that Mr Ryan accused him of not reporting in sick as required, deliberately not attending a disciplinary hearing and breaching policy. I have found that these were said on 21 July at which time Mr Ryan believed them to be true as he had not seen the fit note. In later conversation(s) Mr Ryan raised the issue of breach of policy but did not do so as a threat but as advice. Even if the claimant misunderstood that, Mr Curness made it very clear in his letter of 14 August that further action of that nature was not going to happen.

61. The claimant further says that Mr Ryan accused him of refusing to cooperate with OH and I have found that this was likely to have been said and in a way which showed frustration. I have also found that Mr Ryan said at some stage to the claimant that stress was not an illness. Such comments were clearly inadvisable.

62. The respondent was certainly in breach of its own grievance policy in not properly replying to the claimant's letter dated 31 July and, when Mr Curness did deal with the substantive issues it raised, not treating it as a grievance and offering a second stage. Mr Curness clearly did engage with its substance however and he largely resolved the issues to the claimant's benefit.

63. Overall, although Mr Ryan did on some occasions show his frustration to the claimant and make some inadvisable comments, and the respondent breached its own grievance policy, I conclude that when looked at objectively in all the circumstances, these matters both individually and cumulatively were not calculated or likely to destroy or seriously damage the relationship of confidence and trust. The claimant was not therefore constructively dismissed, fairly or otherwise and his claim fails.

64. The remedy hearing provisionally listed for 25 January 2019 is vacated.

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Employment Judge K Andrews
Date: 9 November 2018