



EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant	and	Respondent
Mr M Dolby		Hope House School Ltd

At a Final Hearing

Held at: Nottingham On: 1 – 3 April 2019.

Before: Employment Judge Clark
Miss C D Munton
Mr Z Sher

REPRESENTATION

For the Claimant:	In Person
For the Respondent:	Ms J Wilson-Theaker of Counsel

JUDGMENT

The unanimous judgment of the tribunal is that the claim of unfair dismissal **fails and is dismissed.**

REASONS

1. Introduction

1.1 This claim relates to the Claimant's resignation with immediate effect on 1 January 2018. There were associated claims of discrimination relating to various protected characteristics and also a deduction from wages claim, all of which have been dismissed upon withdrawal previously.

2. Preliminary matters

2.1 We had two preliminary matters to address. The first was the constitution of the tribunal. Following the dismissal of the equality act claims, the matter had been listed as a judge sitting alone and the respondent had prepared bundles accordingly. However, today's hearing had been arranged with non-legal members. Having considered the case, I was inclined to retain the members participation on the basis that there appeared to be significant disputes of fact to be determined and the full tribunal would be conducive to that determination. I explored it with the parties and both agreed. As the situation had arisen due to the tribunals administration of the claim, I ordered the additional 2 bundles to be copied by the administration.

2.2 The second was that it was necessary for us to satisfy ourselves, with the parties' help, of the actual issues arising in the claim. The issues were not straight forward because the ET1 and subsequent correspondence has not clearly particularised the basis of the breach of contract essential to the claim for constructive dismissal. The matter had been considered in some detail and at some length by Employment Judge Britton on 13 June 2018. The parties agreed that what was said at that hearing was accurately reflected in the note of that hearing. As a result, the matters set out at paragraphs 9, 11, 12 and 13 of that note of hearing summarise the Claimant's claim. In brief, the breach is said to arise in the following way:-

- a) there was a background of the Claimant being put under pressure by the Respondent generally, but more particularly by Mrs Westmoreland, to either keep his mouth shut or otherwise to support her in respect of an investigation by the Charity Commissioners, in the context of it being said that they were "in it together".
- b) During his sickness absence from August 2017 he says there was pressure to keep quiet or to cover up wrongdoing. In that respect, it is said that Mrs Westmoreland used her emotional skills to persuade the Claimant to retract an earlier resignation.
- c) The last straw is said to be in two parts. One is that in December 2017, Mrs Westmoreland refused his request to repay a loan of £1,250 that had been made to her by the Claimant and, secondly, in a meeting in a car park that she again put pressure on him to keep quiet, particularly by reference to the fact that he held her future in his hands.

3. Issues

3.1 Against that case, the legal issues are the familiar issues arising in a claim of constructive unfair dismissal. The burden is first of all on the Claimant to establish a dismissal in law. The term said to be breached is that of the implied term of trust and confidence. The questions for us is :-

- a) Did the Respondent act in a manner likely to seriously undermine trust and confidence?

- b) If it did, did it have reasonable and proper cause for so acting?
- c) If not, such that there was a fundamental breach, did the Claimant resign in response to that such as to amount to a dismissal in law under s.95(1)(c) of the Employment Rights Act 1996. (the Respondent does not take a point on affirmation or delay following the alleged last straws)
- d) can the respondent establish a potentially fair reason for its actions?
- e) If it can, does the evidence show it was reasonable in all the circumstances to act in that manner?

4. Evidence

4.1 For the Claimant, we heard from Mr Dolby. He also called Mr Daniel Lovatt, an ex-colleague who spoke to his own issues about his own pay dispute with the respondent nearly two years earlier. He called Mr Steven Sellors, a parent of a child who was a pupil at the respondent's school but who now contracts with the claimant's new befriending support business.

4.2 The claimant also produced statements from witnesses who were not in attendance which were accepted as hearsay on the understanding we would give such weight to their evidence as we felt appropriate in the circumstances. They were Mrs Kate Ford Hewitt, an ex-colleague who resigned and reported her concerns about the respondent, and indeed the claimant being made a director, to the charity commission; Mr Martin McIlvaney, who spoke to his own experiences working at the respondent's school; Miss Katie Davis, an ex-colleague who spoke of her own experiences of Mrs Westmoreland; Miss Sadie Rose, an ex-colleague who spoke to the claimant's positive support to her in his role as manager; and Mrs Michelle Beaumont, an ex-colleague who spoke to her own efforts to organise a collection for another colleague who had learnt money to the claimant and had not been repaid in an effort to support her financially through the Christmas period as. She also spoke to how in January 2018, there was a meeting at which the Claimant's HIV status was mentioned

4.3 For the Respondent, we heard from Mrs Terrina Westmorland, the principal of the respondent school; Mrs Jenifer Deacon, a director of the respondent; Mr Michael Deacon a director of the respondent and Ms Kerry Kerriages, an ex-colleague who spoke to the claimant's handling of cash received from parents. The respondent also produced a statement from Mr Matthew Evans, an ex colleague of the claimant who had supported him during his financial and other difficulties. He was not in attendance and we treated his evidence in the same way as the claimant's absent witnesses.

4.4 We received a bundle running to 309 pages and we considered those pages we were directed to. We also received a further supplementary, unpaginated bundle from the claimant of around 200 pages which we took into account.

4.5 Both parties made closing submissions.

5. Facts

5.1 It is not our function to resolve each and every last dispute of fact between the parties. We seek to focus on those matters necessary to answer the issues and to place them in their proper context. On that basis, and on the balance of probabilities, we make the following findings of fact.

5.2 The Claimant was employed from 1 April 2014 until his resignation on 1 January 2018. We find the Respondent is a small charity providing education and vacation facilities to children between the ages of 5 and 19 who have an autism spectrum disorder.

5.3 The Directors at the material time were Terri Westmoreland (the Principal and founder of the charity), Jennifer Deakin, Michael Deakin and, from 1 June 2016, the Claimant was at all times a Director. I say at all times, there was a short period when he stood down from his position whilst an application to a financial institution was being presented as there was some concern that his own poor financial history may not be conducive to the success of the Company's application. Other Directors have subsequently been appointed, including a Matt Evans.

5.4 We find that for some time the pressures of managing the charity had been carried on the shoulders of Mrs Westmoreland, even though she remained, for almost all of her involvement, a volunteer. She was in charge and trying to discharge the duties of her post as best she could. We find the numbers of staff employed varied, but was in the order of around 45.

5.5 Many small charities are run by individuals with a genuine and selfless desire to help provide a service to those who need it. Such people are often touched by the issue the charity seeks to support within their own families and it is that driving force which leads them to their involvement. Consequently, they do not always have experience of corporate governance, management or financial controls. This charity seems to us to be little different to that stereotype. Its systems of financial and corporate governance appear to have been relatively simplistic.

5.6 We need to say something about the relationship between the Claimant and Mrs Westmoreland. They had an extremely positive relationship indeed. The Claimant was very well regarded by her and his own ADHD diagnosis seems to have given him something of an insight into the issues that the pupils at this School faced. He demonstrated an affinity with their world which meant he worked well with them. His skills and enthusiasm was noted. We accept how Mrs Westmoreland began to see him as a potential successor to her as Principal. He was promoted from his initial post of Learning Support Assistant and took up the post of Clubs and Befriending Manager from September 2016. This was a job attracting a salary of £29,000 per annum.

5.7 However, it seems that his skills and competencies were not without limits and it is his further invitation to become a Director of the Respondent Company which seems to be one of

a number of sources of substantial pressure and anxiety for the Claimant. We are not satisfied he had any real idea of the statutory nature of the role and the fiduciary obligation and responsibilities he was taking on. He accepts he could have declined the role but we find he felt flattered by the invitation, perhaps understandably. He was given information about the role but did not take up any further research on his own account as to what his role entailed and seemed not to appreciate his independent obligations as a director, instead deferring to Mrs Westmoreland in every respect.

5.8 Between October 2016 and May 2017 at least one, if not two, anonymous referrals were made to the Charity Commission about the Respondent. One of them was by a Kate Ford-Hewitt who the claimant had intended to call as a witness.

5.9 The Charity Commission set up an investigation into the Respondent's financial affairs, which in due course would require contact with the Board of Directors including the Claimant. It is not entirely clear what lay behind Kate Ford-Hewitt's concerns, but some of them were expressed in her witness statement as concerns about the Claimant himself and his competence to act as a Director. Whatever her views of him professionally, she nevertheless seems to have expended some energy influencing his thinking about the organisation and it seems to us this planted a particular opinion in the claimant's mind which remained with him thereafter.

5.10 The Respondent set about preparing for the Charity Commission investigation by reviewing its accounting practices. It showed they had been adopting practices which required some organising or regularising, particularly in respect of filing receipts. As with all Directors, the Claimant was involved in this retrospective work to put the disorganised filing in some sort of order. All agree his contribution to this process was helpful. Everyone involved also agree that this was the start of a stressful and anxious time for all Directors, not just the claimant.

5.11 There is an allegation permeating this period that the Claimant was put under more particular pressure by Mrs Westmoreland to cover up alleged wrongdoing. That is said to manifest in her requiring him to lie to the Charity Commissioners; on other occasions it is said that she required him not to engage with the Charity Commissioners at all. This is a serious allegation that we do not see emerging from the contemporary correspondence and it is not supported by the weight of evidence before us now. This serious allegation was categorically denied by Mrs Westmoreland we reject it as a fact. We turn to the events of 2017 in more detail later on.

5.12 We find it more likely than not that a number of other life stresses that the Claimant was facing, together with his own fragile mental health at the time and the fact that he was struggling with the role of Director, meant he was more likely to misconstrue the implications of the collective and individual responsibility for corporate governance that he was responsible for. As he himself would say in evidence, sometimes he had no idea what was going on.

5.13 A theme which we do find permeates the last year or so of employment is the Claimant's own inability to budget and manage his personal finances and this forms a significant aspect of the surrounding context of this case. It first emerges in the evidence with the Claimant seeking an advance of wages in order to settle a deposit on a new rental property. This occurred somewhere around the turn of 2016 / 2017. In isolation, there is nothing to be concerned about in that but the months that followed, the requests for advances of money in various forms would become a regular feature.

5.14 The Respondent did support him with the requested advance of wages. In fact, we find this response from the Respondent was in line with its constant and supportive approach to its staff generally, and the Claimant in particular. There are numerous reference points in the chronology where we have seen practical, pastoral support and other measures offered to the Claimant to help him with the various events happening in his private life. In fact, frankly we were sometimes surprised at the extent of the benevolent and supportive response this employer took towards Mr Dolby, and particularly Mrs Westmoreland and her husband who himself was only a volunteer. It is abundantly clear to us they were very fond of him and willingly provided a great deal of help as he struggled through those significant life events. It went well beyond what we might ordinarily expect from the employer/employee relationship, even in view of the grave significance of some of the life events he faced, and particularly when at times he seemed to be metaphorically biting the hand that was feeding him.

5.15 In April 2017, the Claimant was diagnosed as being HIV positive. He disclosed this to Mrs Westmoreland. We find, and the Claimant fairly agrees, that the Respondent's response to that was very supportive. The initial response included advice and emotional support. Mrs Westmoreland suggested keeping things to themselves initially, at least until perhaps he had come to terms with the diagnosis himself. We find he did not keep it to himself. It is clear to us that he shared the news with other members of staff in addition to Mrs Westmoreland. He accepts two others but we find it more likely there were many more. Of course, he was perfectly entitled to decide whether to share that matter or not. It was a matter for him and whatever he did either way carries no criticism from us. There may well have been good reason to share it with other colleagues with whom he also had a good relationship and they may well also have been in a position to offer him support. We mention it only because there is an issue raised by the Claimant that this was disclosed by Mrs Westmoreland against his wishes. We are not satisfied that she did that. Indeed, she went to seek authority from the trustees to support the Claimant practically in respect of paying for him to undergo a series of psychotherapy sessions.

5.16 The issue that arose in that respect was whether, when the other Directors gave their consent to that support, there must have been an inherent disclosure. Each of the other Directors giving evidence denied that and said that it was put forward in respect of his attitude, ADHD and anxiety. In view of the financial governance and systems in place at the time and Mrs Westmoreland's desire to do the right thing, we are satisfied this has a ring of truth and the Claimant received the therapeutic support at the Respondent's expense without the other directors knowing the reason at that time.

5.17 Mrs Westmoreland and the employer held a level of knowledge about the Claimant and his wider social background which he had voluntarily disclosed and which was something of a troubled background. This included problems with debt and use of alcohol and possibly also recreational drugs. His background involved insolvency arrangements short of bankruptcy and it is that which we have referred to already that led to a decision, with the Claimant's agreement, for him to temporarily step down from his position as Director whilst a particular transaction was taking place with the bank.

5.18 There was a period of sickness absence following the HIV diagnosis. His initial time off sick was on full pay. The contract of employment does not provide for sick pay save for a period of up to 2 weeks' discretionary contractual sick pay once an employee has 2 years' continuous service. Otherwise the contract adopts the statutory sick pay regime.

5.19 We find that, save for any of the initial discretionary sick pay paid at full pay, the remaining periods of sickness absence entitled the Claimant to statutory sick pay only and that is in accordance with the statutory sick pay rules that engage the certification process, provision of fit notes and the initial 3 day waiting period in any period of absence. Any extensive period of sickness absence would consequently have a significant effect on his income.

5.20 When the Claimant first returned to work during the middle part of 2017, we find his attendance and timekeeping was variable. He was not working full hours and that was all in the context of dealing with the other issues in his life. To its credit, we find the Respondent afforded a great deal of leniency towards him.

5.21 Those other life issues increased in their significance and included a relationship that seems at times to have been a damaging one, there was clearly also further deterioration in his personal finances and issues over misuse of alcohol and drugs, to which we will return.

5.22 From mid-August 2017, the Claimant was off sick again. In fact, he would not return to work with the Respondent from that date. We find his regular and frequent contact with Mrs Westmoreland took on a regular theme of increasingly enquiring about pay, advances of pay and the prospects of borrowing money. There are a large number of such exchanges in the bundle. We say at the outset that on some occasions, whilst they appear to be texts, it is not entirely clear whether they are text messages, private messages, emails or other such messaging networks but we are satisfied on balance that these are the messages exchanged between the parties. They have a consistent theme; are consistent with other contemporaneous documents and we reject the Claimant's contention that he has not written some of these messages and we particularly reject the necessary implication that these messages have been created by the Respondent to support its defence.

5.23 There are times when these messages become erratic and concerning to Mrs Westmoreland. The Claimant's engagement with the Respondent, particularly about the provision of fit notes and attending meetings itself became problematic. The Claimant was told numerous times that if he did not submit a fit note, he could lose his SSP and we find Mrs

Westmoreland even then was going out of her way on occasion to drive some distance to visit the Claimant to collect fit notes in order to preserve his entitlement to pay.

5.24 There are a lot of messages between the parties and we need to review, as briefly as we reasonable can, in an extensive history of correspondence between August and December 2017. It seems to us that this sets out the true tone and nature of the relationship and shows the lengths that the Respondent, more particularly Mrs Westmoreland, went to to support the Claimant and we take the view these messages provide a reliable foundation for the chronology that then follows.

5.25 They start with the final period of sickness absence [58]. There are some planned arrangements for a return to work. The Claimant expressed worry at this stage with the Charity Commission investigation.

5.26 The response from Mrs Westmoreland [60] reassures him that he had no reason to be worried. The texts continue on 11 September [62]. The Claimant apologises, feeling as though he has not been supportive as he should be, did not think things would mentally become so challenging and he was still one million per cent behind Hope House School, he says he would remain a supportive team player and he proposes some reduction in his role as a means of facilitating a return to work.

5.27 On 12 September, he enquires about his sick pay entitlement.

5.28 On 15 September [66] he refers to issues with a new partner (Nathan), that partner would feature later in the case. He was worried about taking on the full role again and he had applied for a loan of £2,500 in order to pay back Michael.

5.29 Pausing there, we find that is a reference to a portion of a significant sum of money that had been loaned to him. By this time, it seems many of the days absences had been unauthorised because of a failure to provide fit notes and we find that the scrutiny of the Charity Commission investigation was one factor which meant that there was understandable reluctance on the part of the employer to do anything that might be seen as stepping outside its clear policies or contractual obligation.

5.30 The parties planned a meeting to discuss the Claimant's proposal for changing his role. He did not attend the meeting with directors and instead chose to go to a music festival. Mrs Westmoreland contacted him on Sunday 17 September expressing her dismay; that she had seen on Facebook that he was "off to the V Festival whatever the consequences". He accepts that is what he did whilst he was off sick and at a time when he should have been attending that meeting and he accepts that any employer would be justified in being very critical of him for his actions. Nevertheless, there was no disciplinary response from the School but it was clearly one of a number of such events that would, over time, begin to aggravate the Directors in terms of his engagement with his responsibilities and begin to wear down the exceptional levels of support they were otherwise providing to him.

5.31 His response at the time was not particularly apologetic [72]. He still seemed to be focussed about his own needs without regard to those of the employer. He did not attend work on the following Monday. There is no notice or explanation and no sick notes provided.

5.32 The Respondent then had to request it [73] and in that request, notice is given to him that in the absence of a sick note, his pay would stop as at the previous Wednesday.

5.33 There are then a series of messages claiming he had posted a fit note which we find was not received by the School. He restates through this period how much he wants to stay in work.

5.34 There is a further lengthy message on 19 September [75] setting out how he acted impulsively; he had never been sure of anything more than he needed Hope House School and his job. On the same day, the Respondent replied through Mrs Westmoreland, despite the background to date they had arranged another meeting with Directors on Monday 25th at which further discussion could take place about advice and support for the claimant's return. The Claimant was grateful; his response recognised he "had been an idiot, not proud of himself" and it seems he had enough insight in that message to recognise that much of his anxiety was caused by himself.

5.35 On Monday 25th, the meeting was planned for discussion with the Directors but the Claimant texted to say he would not be attending as he had a sickness bug. There was no sick note provided and pay was again affected and the Claimant was told as much. The Respondent sent a detailed message back giving an explanation for the position with the fit notes and the effect it has on payment, particularly whilst they are in the spotlight of the Charity Commissioners. That was itself a reason for the need to meet with them on that Monday.

5.36 On 26 September [83], the Claimant sent a lengthy message in a tone of complaint for stopping his wages. It seems despite the absence of fit notes that the Claimant was expecting not only statutory sick pay but his full contractual pay.

5.37 On the same date [85], he messaged explaining how he could not afford the house he was in; he was moving house but would be homeless from Friday. He accepted that that was not the Respondent's fault and made reference to Kate being treated better than him.

5.38 On 28 September, he messaged with a more conciliatory tone, this time seeking to borrow money, which he promised to pay back. There are a number of people who he refers to as owing money to and he appears to be in trouble paying those people. He says: "*I am going to be in trouble if I don't pay these people and as a friend I wonder if you could help me*". Those people are later described by the Claimant as being people that have supplied drugs to him on credit. We put it in those terms because we want to come back specifically to our findings on the allegations of the claimant being a drug user and having drug debts.

5.39 Despite where we have got to already in the chronology, that is mid to late September, the Respondent is still extremely supportive. There was a 'phone call with Mrs Westmoreland

in which she offered him accommodation in one of the School's units, which he declined. She relayed an offer from another colleague (Matt Evans) to stay with him and his wife, which he also declined. Her husband (Michael Westmoreland) does lend him more money, another £800, against a background of the claimant threatening self-harm. That was not repaid and eventually he would have to resort to threatening County Court action.

5.40 By 16 October, Mrs Westmoreland is again chasing the Claimant for a chance to meet up. They need to meet to clarify various matters. We should stress that these meetings are not an employer insisting that an employee comes into work for a formal meeting whilst off sick, these are fellow Directors, and more to the point individuals who have a very sympathetic supportive outlook for the Claimant, being prepared to meet with him at any location and at any time of the day. Most of the meetings, if not all, seem to have taken place at cafes or restaurants or other places convenient to the Claimant, sometimes with Mrs Westmoreland travelling to a location near to where he was living at the time. Indeed, we say living at the time because there was a number of house moves during the course of this chronology.

5.41 By the end of October, the Claimant is having to move again [94]. He does invite Mrs Westmoreland to "*stop worrying about him going with Alison and Kate, it will never happen*", which we understand to be a reference to him not leaving Hope House School.

5.42 The two eventually arrange to meet on Wednesday 1 November. On that date, as with the previous meeting with Directors, the Claimant did not attend, instead he sent a message the day before that he was unwell and could not attend.

5.43 The significance of that planned meeting was not just the continued support for his wellbeing but the fact that the organisation itself needed his input as a Director to become a signatory on a new bank account. The Mrs Westmoreland chased that on Wednesday 1 November and did not receive a response. She chased again on Thursday 2 November and did not receive a response. At 20 minutes past midnight on 3 November, the Claimant sent an email in which he set out his resignation with a reason at that time being loss of trust in all at Hope House School.

5.44 It seems he almost immediately had second thoughts. On 4 November, he text to say "*I am unsure if I have made a mistake or not, I'm so poorly Terr*". She invited him to ring her. He emailed on again on 5 November in the course of which he sought to rescind his resignation. He said he was very unwell and impulsive with his decision and he had made the wrong decision. The Respondent agreed to him rescinding his unilateral act of bringing his contract of employment to an end. The contract therefore continued as before by that agreement.

5.45 There were two factors leading to the respondent's favourable decision to allow him to retract his notice. The first factor is that Mr Westmoreland was still very much a supportive manager and we find she was very concerned about the Claimant's wellbeing. She agreed to meet to discuss it with him at the café at Asda at Grantham for the Claimant's convenience,

him by then living with his partner, Nathan, in that area. That relationship seemed to be recognised by both as having a negative influence on the Claimant. There is nothing that we could see about the arrangements for that meeting that could be said to put him under pressure. Everything that the Respondent was doing was to support him. The second factor leading to the agreement to rescind the notice, and of significance, was because we find he told Mrs Westmoreland that *“he was off his head on vodka and cocaine at the time”*. She allows it to be rescinded and the Claimant is understandably grateful and expresses as much in further texts. She says, *“let’s get you better and you will be back”*. He says, *“Thank you for your support, it means a lot I just feel so shit for fucking everyone around”*.

5.46 We do not accept that anywhere in those exchanges can be seen anything to support the contention that the Claimant was being told a lie or to cover up or mislead the Charity Commissioners at their investigations.

5.47 The Claimant’s personal financial mismanagement continued through November 2017 as did the difficulties with his relationship and it is clear to us that throughout this period Mrs Westmoreland continued to offer genuine practical support. The Claimant was assisted to move house. He began to make noises in his messages with Mrs Westmoreland about returning to work in early November. We find that it is around this time that the Claimant made contact with the Charity Commission [108]. The significance of this email is that it was sent a matter of minutes after his ill thought out resignation at 30 minutes past midnight on 3 November. It is also significant that it is clear from its contents that there had not until then been any contact between him and the Charity Commission.

5.48 The involvement of the Charity Commission takes some time to actually have any affect. There were emails as a result of the Claimant’s contact between him and a Mr Jonathan Jack. It is clear that from 6 November we see a text from the Claimant to Mrs Westmoreland saying he has had an email from Jonathan Jack. It does not say that he is the one that made contact but he suggests to Mrs Westmoreland *“In your meeting tonight may be need to discuss what I am to say to him when I call him so we are on the same page. I’ll call him back tomorrow”*.

5.49 We do not accept this is her instruction to him to lie but we are satisfied that the Claimant was feeling pressure about the Charity Commission’s involvement. We are equally satisfied that the School was not directing him in any inappropriate way. All the input from the School seems to be an attempt to support him.

5.50 On 7 November the claimant and Mrs Westmoreland met. The outcome of that meeting again seems to be some financial support and exploring the payment of accrued holiday pay. [127] In those exchanges, the claimant sets out a long list of indebtedness to various individuals and entities. One of those is a figure of approximately £4,500 to boss man. We find “boss man” is Michael Westmoreland and is a nickname applied by the Claimant to him in the same way as he referred to Mrs Westmoreland as boss lady. We find this is his list written by him and it has not been doctored by anybody. It is indicative and demonstrative of

the extent of the personal financial support that had been provided to help the Claimant by Mr Westmoreland over the time of their relationship.

5.51 What he needed at this time was £100; he needed it urgently. Amongst all the debts that he had, it was this £100 that was the most pressing. He needed it for Friday and he explained it as being so urgent because *“he’s been this morning and posted a note saying he is back in the morning and needs his money I’m never doing that stuff again”*. We find that that debt was being portrayed by the Claimant as a drug debt. There were also various debts to colleagues which were described only as friends in that list but it later transpired that many of those the Claimant had worked with had themselves lent money to him to support him and they did not see it again.

5.52 Again, this deterioration in the situation only seemed to prick further at the sympathetic inclinations of this particular Respondent and the proposal that he simply be paid his accrued holiday pay was accepted. To be clear, there was nothing in that payment of accrued leave about his employment ending, it was purely a device to get some money in his hands to which he was, loosely, entitled. Mrs Westmoreland initially encouraged him to think about alternatives, which he said were not alternatives and he was just going to have to *“take what is coming as we any just run because he’ll go to Nathan’s family for payment lucky he doesn’t know mine”*. [137]

5.53 He followed it up on 10 November with a simple comment that *“I’m shitting it boss sure we can’t find £100 somewhere I’m out of options I just need to pay him”*.

5.54 At the time he was asking Mrs Westmoreland for this money, he was also in contact with a colleague, Darren, and he set out in more graphic terms the explanation of his predicament. This also included a statement to Darren that he was getting full pay at the end of the month, which he must have by that time known was not the case. The account given to Darren explaining the urgent need for money was: *“I am in a spot of bother and need help. Like a twat I got a tick off a Grantham dealer last Friday and got off my face big mistake. I have to pay him £200 by midnight else he’s going to fuck me up. I have raised £100 of it but need another £100 can you help me”*.

5.55 We had something of what can only be described as a bizarre account by the Claimant in his evidence to explain his apparent drug use, which was that all of these references made to his colleagues and to his employer were lies and done for dramatic effect. Whether or not we believe Mr Dolby was actually using illegal drugs, and we would stress we do not think we need to make a specific finding of fact on this, what we do find, and he accepts, is that he was telling his employer information that would reasonably lead them to believe that he was. The fact he now says he was lying to his employer and others for dramatic effect, however, does fundamental damage to his credibility generally. Even in that respect, we have directed our fact finding by reference to a direction borrowed from the criminal jurisdiction as to how to deal with lies (**R v Lucas [1981] QB 720**) to the effect that a conclusion a witness has lied about one matter, does not mean he has lied about everything and there may be many reasons for a lie, for example out of shame, humiliation, misplaced loyalty, panic, fear,

distress, confusion and emotional pressure. Even giving consideration to the underlying factors to what may have driven an individual to lie, It is hard to understand why the claimant felt it was necessary to lie and we are still left with a conclusion that credibility is lost. He had a sympathetic and supportive employer and the colleague to whom he is said to have lied was only in contact with him out of his own sense of wanting to check if he was ok and if there was anything he needed. If there was no need to lie, it tends towards the conclusion the contents were true.

5.56 By late November, there seems to be some improvement in the Claimant's frame of mind and his attitude to work. He seemed to be trying to sort out his relationship issues and trying to find somewhere else to live. There are more exchanges between him and Mrs Westmoreland of a polite and friendly nature and it culminates on 24 or 25 November [150] with a long message setting out a desire to get back to work and to continue his journey as a Director. He sets out various proposals for the hours of work that he could manage and he gets a short response from Mrs Westmoreland. She was away at that time. She contacted him the next day. We accept her evidence that she was not able to deal with things unilaterally by late November. The other Directors had got to the point where they were now increasingly concerned and aggravated by Mr Dolby's lack of engagement and needed to have these matters explored and discussed with him.

5.57 Mrs Westmoreland contacted him again on the morning of Sunday 26 November. She said she needed to see him. They arrange to meet in the Harvester in 30 minutes. She agreed she could get there. We suspect the circumstances of the arrangement was because of the Claimant needing to find a reason to leave the house where he was living with Nathan. In any event, the meeting took place.

5.58 Mrs Westmoreland says, and she maintained during cross-examination, that she was not in a position to decide for herself about his proposals. More to the point, she needed the other Directors' input and it was those other Directors who had put to her their concerns about the Claimant's conduct during his absence. She says how the Claimant was aggressive and wanted the meeting cut short and she was therefore not able to put all of the concerns of the Directors to him. We find the meeting was short, in the order of 15 minutes. She denied saying what he attributes to her at that meeting.

5.59 In his evidence, Mr Dolby says simply that during the meeting Mrs Westmoreland said that "*You do know you could bury me don't you*" and there is little context about that or why it was said. There is little surrounding evidence of this meeting, save for the texts and the emails that Mr Dolby sent to Mrs Westmoreland and the Charity Commission respectively. In that regard, we have seen in his supplementary bundle how he emailed the Charity Commission on 8 December (about a week or so after that meeting) and in that he described a meeting with Terri on Sunday last week. He says that "*she asked me am I ready for a telling off from the other Directors for not supporting [Terri] through this. I then explained to her that if they were honest people they wouldn't be in this mess how is it my fault*".

5.60 Shortly after that meeting was aborted, he had texted Mrs Westmoreland to say *“People should be looking out for me and the School instead they’re trying to save your ass. What they fail to understand is that I haven’t done what Kate has and wouldn’t ever so really my support hasn’t stopped ever but I have been mentally unwell. I will not take a bollocking, a dirty look or anything from anyone. Please let them know that I am not in the wrong you guys are”*.

5.61 We find that that meeting did not contain threats from Mrs Westmoreland to the Claimant of any nature, whether that is about ending up in prison, about lying to the Charity Commission, about covering things up or about not speaking to the Charity Commission, none of the allegations made by the claimant are supported by the circumstances. We note that those wider allegations are not relied on by the Claimant in that particular meeting but nor do we find the words *“You know you could bury me don’t you”* were said.

5.62 We do find that there were concerns by the Directors about the Claimant and that this was put to the Claimant by Mrs Westmoreland and received as a personal criticism. Indeed, as it was a personal criticism. That explains his later reference in the text to not taking a bollocking and indeed his account to the Charity Commission. We find the concern that the organisation had in this fellow Director was not just his extended absence from work but more likely to be the whole picture of his failure to attend meetings, the reasons given for failure to attend meetings, the statements being made about drug use and his focus on his own financial advances rather than the pressures they all agree they were all under in dealing with the Charity Commission enquiries.

5.63 To be fair to the Claimant, we think his response also has to be seen in context of his own particular sense of anxiety generally and his anxiety about the investigation on top of all the other life stresses that he was facing in 2017.

5.64 By the following Monday, he was back to his normal self so far as that manifested in him making enquiries of Mrs Westmoreland about his pay entitlement or when pay was going to be due [155]. He texted her saying *“thank you and sorry for my abrupt message yesterday. I was angry but I do get it.”* The phrase *“I do get it”* we find was a recognition that the other Directors were entitled to be concerned about his engagement with the process.

5.65 The dust settled from this particular event. Throughout the days that followed the Respondent was still supportive and by the end of November Mrs Westmoreland is messaging him back, in the course of the conversation expressing how it would be good to be back to normal. This is a reference to him and his accommodation and generally looking forward to getting him back to work.

5.66 On 4 December, the pair arranged to meet in anticipation of the Claimant returning to work. There is clearly an objective at this stage of supporting the Claimant as before, a suggestion is made of meeting Matt Evans as a necessary bridge building exercise to build a positive working relationship when he does go back to work. The arrangement was to meet at the Asda café. Once again, the Claimant says he could not make it. He sends a text

[162]. It is a most abrupt message, again containing allegations of cover up, expressing his lack of trust. It has the hallmarks of a letter one would expect to see with a resignation but stops short of explicitly resigning and the respondent does not treat it as such.

5.67 It concludes with two demands. One is that he asked for payment of £1,250 that he is owed and secondly, he asked for a glowing reference “*that I have worked very hard for*”. He concludes with saying he wants no part in Hope House School from this day forward.

5.68 Mrs Westmoreland replies principally wanting to know what the £1,250 is said to be in respect of. The response came on Tuesday 5 December [169], Mr Dolby wrote: “*£1,250 is a tiny part of what I should get due to loss of earnings*”. Nowhere is there any mention of any loan repayment. The Claimant then repeats what is now a threat of resignation [170].

5.69 We need to say a little bit more about this loan matter. The case advanced by the Claimant and noted by Employment Judge Britton, was that he had lent Mrs Westmoreland £1,250 apparently for use in the Charity sometime around December 2016 and that she had refused to pay him in December 2017 when he had asked for it. That is one of the two aspects said to be the last straw leading to resignation.

5.70 We entirely reject that as a fact. It was not the case. We find that the Claimant had not lent any money to the School or Mrs Westmoreland. We find it was highly unlikely that in December 2016 he had had £1,250 available to him and disposable to be able to make such a loan in the first place. Even if he did have such money available to him, it is entirely inconsistent with the events through 2017 when he was faced with desperate financial hardship at numerous points, seeking advances or loans or other access to finances, including directly from Mrs Westmoreland to whom he is said to have made this loan and he simply could not explain why he did not simply ask her to return the money he had lent to her. Moreover, this was not only not referred to in his resignation but, as I have just read out, the figure of £1,250 was positively attributed to other factors, including the hours that he had worked.

5.71 Put simply, the Claimant was not being truthful and that must have dawned on him because during his own cross-examination he resiled from that as the basis of his complaint and confirmed that it did not feature in his decision to resign.

5.72 By 6 December, the Respondent was still struggling to understand what the £1,250 was supposed to be for. The Claimant threatened to resign and go to court if the money was not paid and the reference was not provided. Mrs Westmoreland responded by saying that the situation was all of his own doing and that they had been nothing but supportive and he had thrown that back in their faces. That text, to all intents and purposes, seems to end the personal informal contact between the two.

5.73 There is then no contact until 1 January 2018 when the Claimant resigned with immediate effect by email. The stated reason was set out as follows: “*Unfortunately the thought of coming back and working with a team I cannot trust is overwhelming. This is my*

resignation. I really would appreciate a reference sending to this email address. I have worked very very hard for Hope House and resigning is something I have been forced into. Anything you need to forward on to me to abide by employment law. Thank you Matthew Dolby”.

5.74 The resignation was accepted by Mrs Westmoreland the same day in which she expressed her own disappointment about the state of affairs.

5.75 Before he resigned, two other things happened in December. The first is that it became more widely known that the Claimant was in debt to a number of colleagues, one in particular was owed a large sum of money which had apparently been set aside to fund her family's Christmas that had not been repaid as promised. The staff at the school had a whip-round to raise £200 to contribute towards her having some spending money for Christmas. She was one of a number of individuals who would later either take out or threaten County Court action against the Claimant for the recovery of money.

5.76 The other thing that happened before the resignation was that Mrs Westmoreland received a telephone call from someone who described themselves as being Nathan and was believed to be the Claimant's partner, or ex-partner, telling her how the Claimant was a drug user. That he was concerned about him working with autistic children; that he was using cannabis and cocaine and he was terrified of the Charity Commission enquiry and had decided to contact them to make allegations against the School. He invited Mrs Westmoreland not to believe anything the Claimant said as the drugs were making him paranoid.

5.77 We record that fact and we also again repeat that we do not need to make findings that are not necessary to determine the issues before us. Whether or not the Claimant was in fact a drug user is such a matter. There are matters in the evidence before us, such as the fact that Nathan wanted to cause trouble for the Claimant in his career; the fact that he chose to do it by reference not only to drug misuse but to the types of drugs that the Claimant himself had made reference to in the course of discussion would have been something likely to support the Respondent's belief that they had in any event already formed as to the drug use.

5.78 That takes us to the date of the resignation. There has been a lot of evidence before us that we do not need to do any more than reference at this stage as to what happened thereafter. None of these matters can have influenced the claimant's decision to resign. The first thing we record is that there was increasing concern about the Claimant's drug use or the Respondent's belief in the Claimant's drug use and a report was made to the Local Authority Designated Officer, that is the LADO, a senior officer within each local authority children's services department with individual with responsibility for safeguarding. That report we explicitly find was in respect of drug use and not about either his indebtedness or his HIV status.

5.79 The second thing was that there was additional concern growing about the Claimant's handling of club money paid by parents in cash and the concern being that this had not been

banked or accounted for within the School systems. That was reported to the police, the police were interviewed and there was no further action was taken.

5.80 The third thing that happened is the Claimant set up a company called “Colourful Hands Dolby”. That is his new business supporting through a befriending scheme, children in similar to those using the Respondent’s services. This is now a successful business employing 10 people. It was incorporated early in 2018. The time spent on developing that business it seems to us commenced on the day of his resignation on 1 January 2018.

5.81 The final thing is that it does seem that in January there was a discussion with staff in the School and within the course of that discussion, the Claimant HIV status was discussed or raised. It is not clear to us beyond that what the context or purpose or meaning was. What we can say is that it was not done by Mrs Westmoreland and it seems In line with our earlier findings, though it was discussed, was not likely to be something that was heard for the first time by most, if indeed any, of those participants.

6. Discussion

6.1 This is a case where the findings of fact directly answer the issues before us. Our discussion of those matters leading to our ultimate conclusions is therefore, necessarily brief.

6.2 The first matter is whether there is was breach of a fundamental term of the contract. The implied term of trust and confidence is relied on. That was described in **Malik v BCCI [1997] UKHL 23** that the employer shall not: ‘without reasonable and proper cause, conduct itself in a manner . . likely to destroy or serious damage the relationship of confidence and trust between employer and employee. As this case is put as a last straw case the starting point is therefore to consider those last straw events themselves to see if, in themselves, they amount to a breach of that term. If they do, we need to go no further into the background. We rely on **Kaur v Leeds Teaching Hospital [2018] EWCA 978** as a recent restatement of the approach to last straw constructive dismissal claims. If they do not, then we need to consider whether they nevertheless add something to the totality of the earlier alleged actions amounted to alleged breach.

6.3 We would also note this by way of introduction to our analysis that affirmation is not a live issue in terms of the way the claim has been put and it would not arise in any event until we decided whether there had in fact been a breach. But, in setting out the case in context, we cannot ignore of course that any breaches that are said to have occurred before 5 November were unequivocally affirmed by the Claimant in the most unequivocal manner when he requested the employer to allow him to rescind his unilateral resignation terminating employment. It follows that this is indeed a last straw case and in order for the claim to succeed there must be something occurring between 5 November and 31 December, some act by the employer which either amounts to a fundamental breach in its own right or is of sufficient nature and weight to combine with any earlier acts before the resignation was rescinded so as to add together and collectively amount to a breach of that implied term.

6.4 There are two matters relied on as occurring within this period. The first is the non-repayment of the loan. As we have indicated to already, this part of the claim, and in particular the manner in which the Claimant's own evidence unfolded, became fatal to his credibility. To that we add the fact that much of the accounts given in communication with the Respondent explained the need for seeking advances was accepted by the Claimant as being a lie. So, we had two significant aspects in the evidence where the claimants accounts had to be viewed with extreme caution. The fundamental issue about the loan is the fact that faced with his collapsing case, he had to abandoned it as a factor influencing his decision to resign. Irrespective of that concession, this was rejected as a fact. There was a stark absence of any reference to it during times when any person who was in such dire financial straits as the Claimant was during 2017 who had a legitimate advance of money to another party which, on his account, must have been repayable on demand, would have simply asked for it back. He did not and, as we have found, there was no such loan, no such request for repayment and, so far as the legal analysis is concerned, there is no act by the employer in that regard which can either amount to a breach of the implied term or contribute to it.

6.5 The second matter is the allegation of being put under impermissible pressure by the respondent in the face of the Charity Commission Investigation. We have expanded the claimant's case as far as is permissible under the summary given by Employment Judge Britton. We interpret the allegation as being either that he was being put under pressure to lie or being put under pressure to cover something up, or put under pressure to say nothing at all.

6.6 We do accept during the relevant period that the Claimant was under pressure generally. In fact, we accept all Directors were under pressure and any external regulatory investigation is going to be a source of more pressure but we are entirely satisfied as we made clear in our findings of fact, that there was no improper pressure being applied by Mrs Westmoreland or anyone else who could bind the respondent.

6.7 It may well be that, in situations such as this, it is appropriate for a Board of Directors to discuss things, to express a number of views, they may reflect on the pressure they are all under, that may seek to develop a collective plan as to how to respond as a Board, they may reflect on the risks and the robustness of their own systems of corporate governance and the reputation risk to their own charity. All of those matters seem to us to be entirely natural. We do not accept the claimant was placed under improper pressure but if anything he felt arose from anything in the nature of such appropriate acts, we are entirely satisfied they would fall within the category of reasonable and proper cause.

6.8 It may well be, and perhaps this is the better analysis, that the Claimant's ignorance of the role of Director and his inexperience generally, particularly coupled with some very significant life stresses, meant that he has genuinely viewed the world around him in a way that led him to believe that he was being required to act dishonestly. He has an impulsive nature which he readily accepts. There has been reference to various occasions when his lifestyle meant he may well be putting himself in a position where he became more paranoid

about how he interpreted situations. The reality is, however, the evidence does not support that he was being asked to act in any way approaching dishonestly and there is simply no basis of the breach relied upon actually occurring.

6.9 There is no last straw made out in the relevant period and the effect of the earlier unequivocal affirmation means that there is no actionable breach of the implied term. However, for completeness, we would also add that we are not satisfied that there is anything in the earlier periods before November 2017 which could be said to have amounted to such pressure to act dishonestly or otherwise.

6.10 It follows from those conclusions that there is no breach of the implied term and there cannot therefore be a dismissal in any event, whatever the reason for the Claimant's resignation.

6.11 In the circumstances of the case, it is not necessary for us to consider further the analysis of the reason for the resignation or whether the Respondent's alternative defence of fairness is made out. It is enough that it was a resignation in the absence of any breach of contract and, as such, the claim fails and is dismissed.

EMPLOYMENT JUDGE R Clark

DATE 4 May 2019

JUDGMENT SENT TO THE PARTIES ON

.....

AND ENTERED IN THE REGISTER

.....

FOR SECRETARY OF THE TRIBUNALS