Case number 2300678/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr G Langfield

Respondent: Social Enterprises Kent

Heard at: Ashford, Kent **On: 8, 9, 10, 11, 14 (in chambers) and 15 May 2018**

Before: Employment Judge Wallis

Representation
Claimant: In person
Respondent: Mr M Singh, counsel

JUDGMENT

1. The Claimant was not unfairly constructively dismissed by the Respondent;
2. That claim failed and was dismissed;
3. The claim for notice pay was dismissed upon withdrawal by the Claimant;
4. The Respondent's costs application was dismissed.

REASONS

The conclusions were announced to the parties at the end of the hearing by way of a summary judgment, with these written reasons to follow.

Issues

1. At a case management discussion on 21 June 2017 the issues were agreed by the parties and recorded as follows:-

Unfair Constructive Dismissal – sections 95(1)(c) and 98 Employment Rights Act 1996

2. The Claimant resigned his employment by a letter dated 13 January 2017. The Claimant asserts that he was constructively dismissed and relies upon the following alleged repudiatory breaches of the implied term of mutual trust and confidence:

3. (8.1 in original list) The CEO, Claudia Sykes, acted in a bullying and aggressive way towards the Claimant during 2016. The Claimant refers to the matters set out in paragraphs 4-10 of his witness statement. By way of summary, it is alleged that Ms Sykes undermined the Claimant and criticised him unnecessarily. This behaviour occurred in board meetings during 2016 and during impromptu board meetings in 2016. Ms Sykes was also aggressive in her emails to the Claimant;

4. (8.2) Claudia Sykes informed the Claimant that he was being made redundant during meetings on 25 and 29 November 2016. The Claimant contends that his role was not truly redundant (for example, the Respondent had obtained a new contract which the Claimant could have worked on and the Respondent was actively recruiting personnel in November and December 2016). The Claimant also contends that there was no consultation in respect of redundancy, that the Respondent failed to identify an appropriate pool in respect of the redundancy, that the redundancy could have been avoided and that it was presented to him during the meetings as a concluded outcome rather than as an option, which the Respondent was considering;

5. (8.3) The Respondent failed to consider the Claimant's grievance appropriately. The following allegations are made:

6. (8.3.1) That the Respondent did not consider the grievance in accordance with its policy on bullying and harassment.

7. (8.3.2) That the Claimant was not informed of his right (under the policy) to be accompanied to grievance meetings.

8. (8.3.3) That the investigation meeting was cut short because the investigator, Rebecca Smith, wished to attend to a personal commitment.
9. (8.3.4) That there was a failure to interview a key member of staff, Nicholas Holmes.

10. (8.3.5) That Ms Smith was biased against the Claimant because she had been bullied by Ms Sykes.

11. (8.3.6) That Ms Smith's investigation report contained statements under the heading 'Established Facts' which were false (see page 15 of Investigation report).

12. (8.3.7) That the Respondent acted outside of the policy when appointing a person to hear the Claimant's grievance. The Respondent appointed an individual from outside the Respondent's organisation despite there being individuals from within the Respondent organisation who could have determined the grievance (for example, senior managers such as Kirsty Hawkins).

13. (8.4) The Respondent failed to pay the Claimant contractual sick pay from 11 - 13 January 2017;

14. (8.5) The Respondent arranged the grievance hearing for 13 January 2017, by which date, the parties were still part way through a mediation process designed to achieve a compromise of the issues.

15. (9) Do any of the above allegations, if made out on the facts, amount to a repudiatory breach of contract?

16. (10) If so, did the Claimant resign in response to the Respondent's repudiatory breach of contract?

17. (11) Did the Claimant expressly or impliedly affirm the contract by actions and / or material delay, indicating an intention to continue to be bound by it subsequent to the breach such that he 'waived' the breach and treated the contract as continuing? The Respondent's arguments on this matter are contained in paragraphs 34 - 41 of the ET3 narrative. In particular, the Respondent relies upon the Claimant pronouncing in his grievance dated 30 November 2016 that he had been 'unfairly dismissed' but that the Claimant continued to work beyond that date and, that following the Claimant's letter of resignation, he sought to exercise his rights under the contract to contractual sick pay and PILON.

18. (12) If the Claimant was dismissed, what was the reason for dismissal and was the dismissal fair in all the circumstances?

19. (13) If not, would the Claimant's employment have been fairly terminated in any event and if so, when (Polkey)?

20. (14) Did the Claimant cause or contribute to his dismissal by reason of his conduct? If so, what reductions should be made to any award to which the Claimant may be entitled?

21. (15) If the Claimant is found to have been unfairly constructively dismissed, what compensation is he entitled to? Has the Claimant

adequately mitigated his loss and what, if any, increases / reductions should be made for the Respondent's / Claimant's alleged failure to comply with the ACAS Code?

Notice pay

22. (17) Was the Claimant entitled to notice pay?

23. (18) If so, how much?

Documents & Evidence

24. There was an agreed bundle prepared by the Respondent, and a bundle prepared by the Claimant. I had written statements from the witnesses who gave evidence, and a statement from Mrs Margaret Pau, for the Respondent, who did not attend the hearing. I explained to the Claimant that if there was a dispute about what she said, then her statement would carry little weight as she was not present to be questioned. He objected to the statement being read. I read the other statements and took the view that Mrs Pau played a very small part in the case and that I would read her statement. Having done so, I noted that it did not add anything of significance to the evidence before me.

25. For the costs application at the end of the hearing the Respondent produced a small bundle of without prejudice correspondence, written submissions with authorities, a schedule of offers made, and two costs invoices.

26. I heard evidence from the Claimant himself Mr Grant Langfield. I then heard from the Respondent's witnesses Ms Claudia Sykes, the CEO; Ms Kirsty Hawkins, the Director of Learning & Skills; Mr Brian Boyton, IT manager; and Ms Rebecca Smith, Community Enterprise Director.

27. The Claimant was representing himself. I noted that the case management order recorded that he had indicated that he did not need any particular adjustments for his condition of depression and anxiety, but nevertheless a number of breaks were granted throughout the hearing in order to assist him to re-focus and complete his preparations.

Findings of Fact

28. The Respondent is an organisation that bids for training budgets from the Government Agency in charge of training and apprenticeships. If successful, the Respondent then organises training through tutors, teachers, sub-contractors and so on. The training is carried out at the trainee's workplace, or the Respondent's premises, or at other sites. It is a relatively small organisation of 20 employees, with a Board of four directors. The Claimant was a director, together with Ms Sykes; Ms Hawkins; and Ms Smith. Ms Sykes is the CEO; the Claimant was the deputy CEO.

29. When the Government criteria changed in 2010 for eligibility for making applications for funding, the Respondent joined with a number of other organisations in order to be able to present a large enough bid to qualify for the funding. When they were successful, in 2011, they sub-contracted a number of the training schemes to those organisations. This was referred to as the consortium. This funding was due to expire on 30 April 2017.

30. The Claimant's job description shows his responsibilities in some detail. In summary, he was responsible for managing the consortium contracts, together with the IT function, finance, day to day training and so on. There was no dispute that although the consortium ended in April 2017, there were some learners within the programme finishing their training after that date, and that there was still a requirement for the other aspects of the Claimant's role to be carried out.

31. There was no dispute that the Claimant had a good working relationship with Ms Sykes until, he claimed, some point in 2016 (this is disputed), and that she had promoted him on two occasions during his employment with the Respondent. In December 2013 he became director of Enterprise and in July 2015 deputy CEO.

32. There was no dispute that in December 2015 the Claimant was having domestic difficulties, and he confided in Ms Smith and Ms Sykes, becoming emotional when he did so. He was emotional at the Tribunal hearing when recalling this difficult period of his life; it was clearly still having an impact on him. The Claimant had no complaint about the support given to him at that time. His evidence was that he had a good relationship with Ms Sykes and his colleagues. His case was that Ms Sykes had then bullied him throughout 2016. There was no evidence to indicate any reason for such a change, if that had happened.

33. In July 2016 the Claimant told Ms Smith that Ms Sykes was 'giving him a hard time'. I found that this conversation did not indicate that bullying had taken place. I considered that it was a relatively normal complaint about office life. I noted that Ms Smith accepted in evidence that she would occasionally grumble about Ms Sykes' decisions. There was no dispute that the Claimant worked in a different office from Ms Sykes, and they would meet about once a fortnight. The Claimant suggested that Ms Smith had also been bullied by Ms Sykes, which Ms Smith and Ms Sykes denied. I found no evidence to support the Claimant's assertion about that.

34. In support of his claim that Ms Sykes had been aggressive and bullied him, he referred in his witness statement to a number of emails in the bundle, although he did not question Ms Sykes about them. Having considered the contents of each of those emails, which were put to the Claimant in cross-examination, I found that none of them, either individually or taken together, showed that he was being bullied. I noted that the Claimant said that it was the tone and the context, but tone can be difficult to discern in an email, and in fact the emails that I was shown appeared quite innocuous. It was correct that one of them requests an

explanation for an incident by ending 'please explain'. It was correct that in another email where the Claimant had responded to a request for a report, Ms Sykes responded with 'thank you' and nothing else. In another, she responded to a report with 'Thanks Grant, that is helpful'. The other witnesses agreed that she could be blunt and direct, but they had never seen any aggression or bullying. I have not commented on all the emails here, but some are outlined below. None of them supported the claim of bullying.

35. At a Board meeting in May 2016 Ms Sykes had asked the Claimant to produce some information; he said that it would take a few days. Ms Sykes said that she could do it in a few hours. I accepted her explanation that she had said that and indicated that she could do so because as a chartered accountant she had set up the spreadsheets and she knew what was required. Given that it was the Claimant's position that he 'was not technical', I could not agree that this offer of help, albeit in blunt terms, would undermine him as he suggested.

36. On 29 July 2016 Ms Sykes held a regular 1:1 meeting with the Claimant. Her notes were disputed by the Claimant at the Tribunal hearing, but not at the time. I was satisfied that as a contemporaneous note they were accurate. They discussed various work issues and then the Claimant explained that he had been to his GP and been given anti-depressants. Although his doctor had offered to sign him off work, he wanted to carry on. Although the Claimant disputed that he was offered help, I accepted that the notes record accurately the support offered by Ms Sykes, including stepping back from his role and taking time off. The Claimant did not want to do either. It was agreed that he could have time off to attend CBT counselling. At the hearing the Claimant suggested that occupational health should have been consulted; there is a reference to this in the Respondent's stress management policy. I accepted that the Respondent's position, which was that as the Claimant continued to attend work, and was to receive counselling, they wanted to see how things went, was not unreasonable.

37. At that meeting the Claimant suggested to Ms Sykes that she 'could give him a hard time'. In response she said that she was 'quite direct with all directors, and would be clear about what was needed, but was the same with all of them…' I found that this indicated that the Claimant felt able to raise this concern with Ms Sykes; he was after all her deputy and the second most senior person within the organisation. That did not indicate a bullying relationship, in fact in indicated that they were able to converse as equals.

38. The following day Ms Sykes sent the Claimant an email, attaching the notes of their meeting, and thanking him for the 'discussion and your honesty'. She said 'I think it will be very positive in making sure that I can support you and we can have better communication on any issues. Please remember that you can call or email me at any time, which you used to do frequently and which I am fine with. We have always had a good working relationship and I have every confidence in you, although I do need you to communicate with me where there are concerns or

problems'. She requested any questions or concerns about the action plan that they had agreed. The Claimant raised none. I found that this email indicated that there was a good working relationship; the contents did not suggest that there had been any bullying.

39. The Claimant complained that he went to the GP on 29 July 2016 and Ms Sykes emailed him to criticise him for being out of the office. He accepted in evidence that he had not said that he was going to the GP, because all directors worked from various sites so were often not in the office. Having read that email, I found that it was not critical, but simply emphasised the need to be in the office as much as possible, and confirming that flexibility was available for issues such as child care. In fact, on 1 December 2016 she agreed to flexible hours to accommodate the Claimant's child care responsibilities.

40. On 2 December 2016 Ms Sykes commented in an email to the Claimant, following emails shared with others, that he should not be spending time reading CQC reports as that was not his area of expertise. The Claimant replied 'I know' and went on to explain why he had done it, albeit he agreed with Ms Sykes that he should not spend time on that work, and that he had involved her in the emails to 'get your thoughts'. I found that the Claimant was seeking guidance from Ms Sykes, and that was provided. I found it difficult to see that as bullying.

41. Having considered all of that evidence, I found that there was no evidence to support the Claimant's assertion that he had been bullied by Ms Sykes in 2016, either by email or in person.

42. The Claimant accepted in evidence that he had been seeking other employment during 2016; the date that he had started this search was unclear. He suggested that a text to him from Ms Smith, who he accepted was a close colleague, drawing his attention to two job vacancies locally in July 2016, and another in October 2016, showed that there was a move to dispense with his services. Ms Smith's evidence was that she was aware that he had been looking for jobs for some months because he had discussed them with her, so she was trying to be helpful. Her evidence was not challenged by the Claimant. I accepted her evidence. I found that no inference could be drawn from her texts, as the Claimant suggested, that there was an underlying motive for the Claimant to leave; indeed, one of the texts says that she did not want him to leave.

43. At a Board meeting on 15 November 2016, attended by the four directors including the Claimant, there was a discussion about the financial situation. The Respondent had made a loss in 2015-2016, and was predicting another loss. It was therefore necessary to review the financial forecasts and consider what action was necessary. With regard to the commercial enterprise department, which was part of the Claimant's area, the minutes record that the Board reviewed the forecast and 'considered that cost savings including redundancies might need to be considered in this department if the BBO bid was not successful.' It went on 'If the bid was not successful, then redundancies would need to

be considered within this team. The Board debated how some of the existing staff might be redeployed if this were to happen.'

44. I found that it was clear to all the directors present at that meeting, including the Claimant, that this was a very early discussion about possible ways to make savings which could have included redundancies in the future. No decisions were made.

45. A supervision meeting was held between Ms Sykes and the Claimant on 25 November 2016. There was a significant dispute about the contents of that meeting, which formed one of planks of the Claimant's case.

46. I noted that Ms Sykes had taken notes of the meeting, and these were sent to the Claimant. Having heard from the Claimant and Ms Sykes, I found that the contents of the note was accurate and was supported by subsequent correspondence.

47. The note records that they discussed various business issues and then the Claimant asked about his own position in the company. I accepted that Ms Sykes told him that this was a potential area to consider, and that all directors were being asked for ideas for savings. I accepted that she reiterated that no decision had been made and that this was 'an early conversation'. She also told the Claimant that when the consortium came to an end, his job description would need to be updated. I accepted that this caused some concern for the Claimant, but there was no evidence to support his assertion that he had been told that he would be leaving in February or March. It was strenuously denied by Ms Sykes. I found that this was not said in the terms suggested by the Claimant.

48. At this time the Respondent was continuing to recruit staff for the areas in which they had received funding. It was also of note that on 25 November 2016 Mr Holmes, who was involved in consortium work, had resigned, having found another job.

49. Ms Sykes had noted that the Claimant had been upset during their discussion and reported the conversation to Ms Smith so that she could monitor him. The Claimant spoke to Ms Smith on 28 November 2016 about keeping his laptop as part of a redundancy package, and as he was upset she took him to a meeting room and reiterated that no decisions had been made. She confirmed that they could remain friends, and would still meet at cricket (a shared hobby). I could not agree with the Claimant that this indicated that he would be leaving. I found that this was said to reassure the Claimant about his position should Ms Smith be called upon to commence a redundancy process, given that part of her role was HR.

50. On 29 November 2016 the Claimant asked to meet Ms Sykes. She made a note of their discussion, the contents of which the Claimant disputed. Having heard from both parties, I accepted that the notes were contemporaneous and accurate. Ms Sykes recorded that he was quite agitated and wanted to know if he was to be made redundant. It was the

Claimant's case that either on 25 November or 29 November Ms Sykes had confirmed that he would be redundant and would be leaving in February or March. I noted that when giving evidence he was not sure which day this had allegedly been said. I acknowledged that hearing about redundancy, even as a possibility, is stressful, and over the years I have heard many claimants explain how they had not absorbed the contents of such a meeting because of the shock and stress caused by hearing the word redundancy. Here, in addition to that potential concern, the Claimant was also experiencing personal difficulties and was taking medication. There was no dispute that he cried during the meeting, which demonstrated that he was under a great deal of stress and I considered that perhaps he had not taken full note of what was being said.

51. I found that Ms Sykes tried to reassure him that it was only a possibility at that stage. They discussed his notice period; she thought it was one month, but he reminded her that it was three months. I found that the Claimant asked about the procedure that would be followed, and that Ms Sykes did her best to explain, although she had no detailed knowledge of that because the situation was at such an early stage. She explained that as the consortium was to end in March 2017 then any redundancies were likely to happen at that time. I found that this is where the reference to 'February or March' originated.

52. In an effort to encourage the Claimant, Ms Sykes referred to his previous experience and suggested he consider his CV to see whether he had other skills to offer the Respondent. The note records that they discussed other possible roles within the organisation. The Claimant suggested that she had also told him to discuss his financial position with his wife. This was not in the note and Ms Sykes could not recall saying it; I found that even if it was said, it was in the context of encouraging the Claimant to review his options, and would have been a natural part of the discussion. The meeting ended on an amicable note.

53. On the same day Ms Sykes wrote to the Claimant to confirm that the Respondent was 'in the difficult position of potentially having to consider implementing a redundancy programme as a result of this change (in funding). At this early stage, we are uncertain as to the number of potential redundancies, however we know at this point that some redundancies are likely and every avenue is being explored to minimise these.' The letter explained that suggestions or proposals should be sent to Ms Smith by 6 December 2016. There was no dispute that this was a standard letter used in previous redundancy situations, slightly amended for the Claimant, and that it was not sent to any other staff. I accepted that it could have been worded in such a way as to provide additional reassurance to the Claimant that his post was not at that time viewed as redundant, but I found that it did not indicate that his post was the subject of any scrutiny about redundancy, and it reiterated that the process was at an early stage.

54. On 30 November 2016 Ms Smith wrote to all staff to confirm that the Respondent would be closed over Christmas. The Claimant complained

in evidence that he was not consulted about this, and he suggested that this showed that he was no longer viewed as part of the team. However, he accepted that the previous year he had suggested that there should be a Christmas closure and Ms Smith said in evidence that she had spoken to the Claimant about it before issuing her email. I found that he was part of the discussion before a decision was made.

55. On 30 November 2016 the Claimant presented a formal grievance letter. In the letter he suggested that Ms Sykes had told him on 25 November that it was a possibility that his post would be redundant, and that this was repeated on 29 November when she said that he could find other work and that nobody else was redundant. He suggested that 'you are unfairly dismissing me from my post'. Pausing there, the Claimant was asked at the hearing why he had resigned if he thought that he had been dismissed. He was not very clear about this; he said that he thought in November 2016 that he would be leaving, but had not reached the date of termination. When asked whether he was therefore working his notice, he said 'I guess. I tried to get clarity but it was evident that I was leaving. The Respondent then backtracked. There was a lack of support. I didn't have an end date, just February/March'. I accepted that there was a possibility that the Claimant thought that he was working his notice at that point, although clearly he was mistaken about that as there had been no dismissal. It was noticeable that he was confused about what had occurred.

56. Returning to the grievance letter, he also complained that there was no redundancy situation and pointed to the recruitment that was happening and the fact that he had other duties; he referred to Ms Sykes' 'aggressive behaviour over the last six months' (which contradicted his assertion in his claim that he had been bullied for the whole of 2016); he said that he had been singled out; he referred to breaches of the redundancy procedure.

57. As director of community enterprise, one of Ms Smith's responsibilities was human resources, so it fell to her to conduct an investigation of the grievance. She began the investigation promptly on 1 December 2016. She sent the Claimant a copy of the grievance procedure. She interviewed people who may have witnessed the alleged bullying, namely Mr Ixer the finance manager; Mr Holmes who worked with the Claimant; Ms Snipp who reported to the Claimant as the admin assistant; Ms Pau who took the Board minutes and who worked in the office; Mr Relph the sales manager who reported to the Claimant; Ms Hawkins; and Mr Boyton the IT manager who also reported to the Claimant. None of them had seen any behaviour that could be described as bullying.

58. Ms Sykes wrote to the Claimant on 1 December 2016 to confirm that no decisions about redundancies had been taken, and that she was waiting for his ideas for avoiding redundancies and improving the financial situation. She enclosed the notes from the meeting on 25 November. She set out her understanding of their discussion on 29 November 2016. She reiterated that she had not said that he was redundant. She

questioned the part of the grievance that suggested that their working relationship had deteriorated and referred to their five years of working together amicably; she also referred to her understanding that she had agreed to his requests and that she had been very supportive. I found that this letter was reasonable and should have reassured the Claimant. However, it did not.

59. The Claimant questioned why Ms Smith was the investigator. I found that she was the appropriate person. She was responsible for HR matters, and she, like the Claimant, reported to Ms Sykes, so was at the same level as he was in the organisation.

60. On 1 December Ms Sykes wrote a general email to say that Mr Holmes would be leaving and was to 'work with (Ms Hawkins) over the next few weeks to ensure a smooth transfer of his consortium work before he leaves.' The Claimant sent an email to Ms Sykes complaining that this undermined him as Mr Holmes could have worked with him on the handover, and this showed that he (the Claimant) had been dismissed. Ms Sykes replied promptly to explain that Mr Holmes had told her that he was working with Ms Hawkins. She noted that she was simply reassuring staff that the work would be covered. She reiterated that no decision had been made about potential redundancies.

61. In his bundle of documents, the Claimant produced an email exchange with Mr Holmes on 6 January 2017 in which he asked Mr Holmes whether he had told Ms Sykes he was handing over to Ms Hawkins, and Mr Holmes replied 'no'. Mr Holmes also wrote that he had not discussed any handover with Ms Hawkins. The Claimant relied on this to suggest that Ms Sykes was lying. As Mr Holmes did not give evidence, and as the email exchange was some weeks after the event, I preferred the evidence of Ms Sykes that she had relied on what Mr Holmes had told her when she wrote her email to staff. I accepted that she had presumed, possibly incorrectly, that Mr Holmes had already told the Claimant about his proposal. I also noted, in coming to that view, that Ms Sykes' email was sent to all staff; that there was no evidence to suggest that Mr Holmes had complained at the time that the contents were incorrect or misleading; and the Claimant did not question Ms Hawkins about the handover.

62. Also on 1 December, the Claimant complained by email to Ms Sykes that her request for financial information to Ms Hawkins again undermined him and showed that he had been dismissed. Ms Sykes responded that Ms Hawkins was best placed to provide the particular information required, and that the Claimant was not undermined, nor was he dismissed.

63. Ms Smith interviewed Ms Sykes on 5 December 2016. On the same day the Claimant went on sick leave and in fact never returned. His certificate referred to 'stress at work'.

64. On 5 December Ms Smith sent the Claimant a letter inviting him to an investigation meeting on 6 December. She set out in some detail her

understanding of his grievance. She explained the procedure to be followed and that there was no right to be accompanied. The Claimant said in evidence that the procedure refers to the right to be accompanied 'at any grievance meeting'. He is correct about that, and it may be that the wording should be amended to 'any grievance *hearing*'. However, I considered that it was ambiguous, and that in the context of a reference to 'any meeting or subsequent appeal', it was not unreasonable for the Respondent to read the procedure as relating to accompaniment at the hearing and any appeal only. There is of course no statutory right to be accompanied at an investigation meeting.

65. Ms Smith also sent a letter arranging the grievance hearing on 9 December 2016, to be chaired by Ms Tetley who was an independent HR consultant. She confirmed the right to be accompanied to that meeting. She also notified the Claimant that she had arranged a mediation meeting on 12 December with an independent mediator. I accepted that these dates did not permit a great deal of time for preparation, but in fact they did not go ahead as the Claimant wrote to say that he was too unwell to attend.

66. The Claimant responded to Ms Sykes' letter, which he considered was 'duplicitous' and suggested again that he was 'being unfairly dismissed', and that he could not attend the meetings.

67. Ms Smith wrote to the Claimant on 6 December confirming that she had 'put the grievance on hold at your request'. The Claimant contested at the hearing that he had requested this; I was satisfied that this was simply a reference to the fact that it had been delayed as he was unable to attend. She said that if he did not return to work by 20 December 'it might be prudent to investigate in your absence' although she did not wish to do so. Ms Sykes also wrote to the Claimant noting that they disagreed on what had been said, and reiterating the offer of mediation, as she said she would 'very much like to work towards resolving these differences'. Again, I found that this was a further indication that this was not a situation where there was bullying taking place.

68. On 7 December the Claimant declined to attend mediation. Ms Smith invited him to an investigation meeting on 14 December. He confirmed that he would attend, but questioned why an independent HR consultant was to chair the grievance hearing. Ms Smith explained this in her letter of 8 December 2016. I accepted that the grievance policy says that the grievance would be heard by the line manager. The Claimant's line manager was Ms Sykes. The grievance was against Ms Sykes. There was no other more senior person in the organisation. I found it entirely appropriate, and indeed common practice in such situations, that an independent person was brought in. I noted the Claimant's suggestion that the remaining director, Ms Hawkins, could have heard the grievance. That would have been possible, but she reported to the Claimant and so I was satisfied that that suggestion was not appropriate.

69. The Claimant continued to raise this matter in correspondence, despite the clear explanations given by Ms Smith. In evidence he suggested that

Ms Tetley was not an appropriate person because she had been involved in a company with which the Respondent had a dispute and in which the Claimant had been involved. I accepted Ms Smith's evidence, which was not challenged by the Claimant, that Ms Tetley was simply a virtual tenant in the building run by the other company, had no knowledge of the dispute, and had confirmed to Ms Smith, when approached to undertake the grievance hearing, that she had never heard of the Claimant.

70. In a letter of 10 December, the Claimant suggested that 'there has been a fundamental breach of my contract and I would be entitled to bring a claim for constructive dismissal'. He referred to section 95 (1) of the Employment Rights Act 1996 and he agreed to a without prejudice meeting. It was not clear how this suggestion of constructive dismissal sat with his contention that he had been dismissed.

71. The investigation meeting took place. Ms Smith had allowed three hours as she had a commitment to attend later. The Claimant suggested that he had been rushed. However, the notes show that all of his points were explored. He did not take up the offer of a further meeting. I also noted that the Claimant was asked whether he wanted to have interviewed anyone other than the members of staff already interviewed, or to be interviewed, and he did not. There was a general agreement that Ms Smith would have re-interviewed Mr Holmes about the handover if possible, but it was not possible because of annual leave, and the Claimant accepted this at the Tribunal hearing. I noted that had he been re-interviewed there may have been some additional clarity on the question of what he had or had not told Ms Sykes about the handover.

72. By letter of 16 December Ms Smith sent the Claimant the notes of the meeting for comment. She notified him of the new date for the grievance hearing, 6 January 2017, and reiterated the previous arrangements.

73. Ms Smith interviewed Ms Hawkins on 19 December; she had not seen any bullying. She described Ms Sykes as 'firm but fair', and said that both she and the Claimant could be 'blunt'.

74. The Claimant sent his comments on the minutes on 22 December. Ms Smith replied that she would check them with the note taker Ms Pau when she returned from leave on 3 January. Ms Smith's report and all the associated documents were delivered to the Claimant by hand on 3 January 2017.

75. I was satisfied that the report was thorough and detailed. It addressed all of the points raised by the Claimant. He complained that under the heading 'facts established' Ms Smith had accepted that 'potential' redundancies had been discussed, when in his view he had been told that he was redundant. However, some of the Claimant's own correspondence appeared to contradict his understanding of the situation, as he referred to 'possible' redundancies. I found that it was open to Ms Smith, having completed her investigation, to consider that certain matters had been established.

76. On 4 January the Claimant requested a postponement 'of one week' in view of the amount of information received. He wrote that 'additionally, this will allow for the grievance procedure to follow through naturally given that there is a mediation meeting on 9 January'.

77. This was agreed by Ms Smith, who wrote 'as you have requested, we can look to reschedule the grievance meeting after the mediation has taken place, as appropriate'. The grievance was re-arranged for 13 January but the Claimant was not told that in terms until later. I noted that the Respondent assumed that he would know the date as he had asked for one week's delay. I considered that this demonstrated the need to be clear about dates in correspondence.

78. It was by letter of 10 January, sent by email, that Ms Smith confirmed that the grievance hearing would take place on 13 January. The letter notified the Claimant that as the hearing had been postponed twice, it might have to proceed in his absence if necessary. She also sent an email to explain that his contractual sick pay had expired and that he would revert to SSP.

79. The mediation took place on 9 January 2017 and was unsuccessful. The mediator notified the Respondent by email on 12 January that the Claimant would like to continue with mediation. The Respondent did not agree, so Ms Smith sent an email to the Claimant on 12 January confirming that the grievance hearing would proceed. The Claimant replied that day to say that the mediation was ongoing and 'as agreed' the grievance should take place after the mediation. Ms Smith replied promptly to say that the mediation was not ongoing and the grievance hearing would proceed.

80. In response, the Claimant sent a letter dated 13 January referring to the late notice of the grievance hearing and presenting his resignation because of a breakdown of trust. He complained that the Respondent had not exercised its discretion to extend his contractual sick pay to three months. He said that he would return company property. He did not say whether he was resigning with or without notice.

81. The grievance hearing took place in the absence of the Claimant.

82. Ms Smith acknowledged the resignation letter on 16 January, expressing regret. She set out in detail the history of the matter. With regard to company property, she 'assumed this is on the basis that you envisage that you will remain unable to attend at work, or work from home, during your notice period due to sickness'. The Claimant did not contradict her or say that he had resigned without notice.

83. On 17 January the Respondent offered to pay the Claimant's notice pay in a lump sum, namely three months of SSP, referring to a PILON term in his contract. The Claimant accepted the offer, but wanted full pay. He sought to raise two further grievances about the grievance procedure and about the sick pay. In the sick pay letter he referred to being signed

off sick 'during my notice period'. Ms Smith delivered his personal belongings to him at home, at his request, and he gave her a sick certificate for the next four weeks. He did not mention the two grievances that he sent once she left his home. I found that there was a clear indication from the Claimant at this stage that he had resigned with notice.

84. There was then some correspondence in which the Claimant sought to withdraw his sick certificate because he was well enough, he said, to look for other work, and only sick if he had to attend the Respondent's premises. He continued to refer to is notice period. In view of his contention that he was well, but not attending work, the Respondent withdrew the offer of PILON.

85. By letter of 23 January 2017 the Claimant wrote 'I would like to make clear that I resigned on 13 January with immediate effect. My understanding is that this negates you invoking PILON. I recognise you will not be paying me in lieu of notice and if a payment is made in arrears I shall return this to you.' I asked the Claimant whether this meant that he was not pursuing his claim for notice pay, and he agreed that he was not. I found that the Claimant had resigned on 13 January and indicated in subsequent correspondence, and by providing a sick certificate, that he was working his notice period. He then resigned without notice by letter of 23 January 2017. This was in effect a second resignation. There was no new breach relied upon in respect of that second resignation.

86. The grievance outcome was sent to the Claimant on 24 January 2017. The grievance was not upheld; the letter set out the detailed consideration that had taken place. The Claimant continued to question various matters in a number of letters, to which the Respondent responded in detail and with patience, despite the repetition of various themes.

87. Despite complaining about the grievance procedure, the Claimant did not appeal. He suggested that the person identified by the Respondent as an independent person to hear the appeal was not independent and had close links with Ms Sykes. There was no evidence to support that suggestion. In her letter of reply, Ms Smith pointed out that the person that had been suggested was 'the CEO of a well-respected organisation within Kent. She has only one contract that relates to (the Respondent), and that is a very small part of their overall turnover. She is not reliant on (the Respondent's) relationship or funding.' Nevertheless, Ms Smith offered to appoint a different person, an independent HR consultant, and extended the time limit for the Claimant to appeal. The Claimant did not appeal.

88. Part of the Claimant's evidence was that although he had obtained new and similar employment, in a similar organisation, during what would have been his notice period, this had come to an end because of the Respondent, although he did not give details. He said that he had resigned from his new post, although he did not say why and it was not

necessary at that point to pursue that as it had no bearing on the issues. However, once again the documentary evidence contradicted the Claimant, as far as it went, because once in his new post he had contacted the Respondent's office on a number of occasions with requests that made staff feel uncomfortable, and Ms Sykes had asked the new employer, in an email of 28 March 2017, for this to be curtailed. Having explained her understanding of his new employment, she wrote 'As you are no doubt aware, there is ongoing litigation since Grant resigned from (the Respondent) after making unfounded allegations. I will not be so unprofessional as to go into any details, but we have taken legal advice throughout the situation and are satisfied with the actions taken. He has made many staff extremely uncomfortable and ongoing correspondence or contact from him may be perceived as harassment and/or potentially prejudicial to the current litigation. We will only therefore respond to any necessary emails or phone calls from yourself or NC until 30 April when the service level agreement ends.'

89. Ms Sykes re-sent the email, with a covering email, on 4 April 2017 because she said that the Claimant had tried to contact Ms Hawkins on that day. She reiterated that they would not take his calls.

90. The new employer replied 'Please accept my apologies for this. I did inform Grant under no circumstances to contact anyone at (the Respondent). I will reiterate this again to him.'

91. The claim did not progress to remedy and so this situation was not the subject of any detailed questions. I had no evidence about why the Claimant resigned from his new job. I have mentioned it here as it was another example of the documentary evidence contradicting the Claimant's recollection of the fairness of what had occurred; I was satisfied that the Respondent's emails about contact were not unreasonable given the context of the matter.

Submissions

92. On behalf of the Respondent, Mr Singh had prepared a skeleton argument which he presented with the relevant authorities. He supplemented that with oral submissions in which he referred to the law, the evidence and suggested a number of matters to assist in resolving the many disputes between the parties.

93. After an adjournment to prepare, the Claimant submitted that he had been truthful and he believed that he had been constructively dismissed. He suggested that the redundancy process stopped because he presented a grievance, which was not dealt with properly.

94. He considered that he had received no support for his mental health difficulties, and had no option but to resign.

A Brief Summary of The Law

95. In a claim of unfair constructive dismissal, an employee resigns in response to a fundamental breach of a term of their contract of employment by the Respondent. The Claimant must show that there had been a fundamental breach of an express or implied term of that contract. The test is whether or not the conduct of the "guilty" party is sufficiently serious to repudiate the contract of employment. In **Western Excavating (ECC) Limited v Sharp [1978] ICR 221**, Lord Denning said

"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 intended 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 employers conduct. He is constructively dismissed."

96. In the case of **Woods v WM Car Services (Peterborough) Limited [1981] IRLR 347**, the Employment Appeal Tribunal said that it was clearly established that there was implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

97. That test was confirmed in the case of **Malik v BCCI [1997] IRLR 462**, by the House of Lords.

98. It is recognised that individual actions taken by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust and confidence, thereby entitling the employee to resign and claim constructive dismissal (see **Lewis v Motor World Garages Limited [1985] IRLR 465**).

99. In the case of **London Borough of Waltham Forest v Omilaju 2005 IRLR 35**, the Court of Appeal held that a final straw, if it is to be relied upon by the employee as the basis for a constructive dismissal claim, should be an act in a series whose cumulative effect amounts to a breach of trust and confidence. The act does not have to be of the same character as the earlier acts, and nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the final straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be the final straw, even if the employee genuinely, but mistakenly, interprets it as hurtful and destructive of his trust and

confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

100. In the case of **Kaur v Leeds Teaching Hospitals NHS Trust 2018 EWCA Civ** 978 the Court of Appeal confirmed that an employee who carries on in the face of conduct by his employer that breaches trust and confidence cannot subsequently rely on that conduct to justify a constructive dismissal unless he can point to a later act that enables him to do so.

101. In the case of **Bournemouth University v Buckland (EAT0492/08)**, the EAT confirmed the test in the case of **Malik v BCCI,** that to prove an alleged breach of the implied term of mutual trust and confidence, the employee must 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 mutual trust and confidence. The Court of Appeal in that case endorsed the four-stage test offered by the EAT, as follows;-

(i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the 'unvarnished' Malik test should apply;
(ii) if, applying the principles in Sharp, acceptance of that breach entitled the employee to leave, he has been constructively dismissed;
(iii) it is open to the employer to show that such dismissal was for a potentially fair reason;
(iv) if he does so, it will then be for the tribunal to decide whether dismissal for that reason, both substantively and procedurally, fell within the band of reasonable responses and was fair.

102. Once a fundamental breach has been proved, the next consideration is causation - whether the breach was the cause of the resignation. The employee will be regarded as having accepted the employer's repudiation only if the resignation has been caused by the breach of contract in issue. If there is an underlying or ulterior reason for the resignation, such that he would have left the employment in any event, irrespective of the employer's conduct, then there has not been a constructive dismissal. Where there are mixed motives, the Tribunal must decide whether the breach was *an* effective cause of the resignation; it does not have to be *the* effective cause.

103. The third part of the test is whether there was any delay between any breach that the Tribunal has identified, and the resignation. Delay can be fatal to a claim because it may indicate that the breach has been waived and the contract affirmed. An employee may continue to perform the contract under protest for a period without being taken to have affirmed it, but there comes a point when delay will indicate affirmation.

104. If it has been established that there was a constructive dismissal, the last part of the test is whether it was fair or unfair in all the circumstances. A constructive dismissal may be fair in some cases.

105. Rule 76(1) of the 2013 Rules provides that a Tribunal shall consider making a costs order against a paying party where, in the opinion of the Tribunal, the paying party has in bringing or conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the claim or response had no reasonable prospect of success.

106. Rule 76(2) provides that a Tribunal may make a costs order against a party who has not complied with an order or practice direction.

107. Rule 78 sets out the provisions in respect of the amount of a costs order that may be made. There is a limit on the specific sum of £20,000. Alternatively, the parties may agree on a sum to be paid by the paying party or the Tribunal may order the whole or a specified part of the costs be determined by way of detailed assessment, either by the county court or an Employment Judge.

108. Rule 84 provides that the Tribunal may have regard to the paying party's ability to pay when considering whether it shall make a costs order or how much that order should be.

109. Costs are compensatory and not punitive.

110. Once grounds for making an order have been identified, the Tribunal must consider whether to exercise its discretion to make a costs order. The Court of Appeal reiterated in **Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420** that costs in the employment tribunal are still the exception rather than the rule.

111. Factors to take into account might include, where relevant, whether the paying party was represented (although being unrepresented is not a bar to an order); whether they had taken legal advice; whether offers of settlement were unreasonably rejected and the paying party had been 'intransigent'; the nature of the evidence available and the nature of the claim.

Conclusions

112. Having made the findings of fact set out above, and having considered the relevant law, I returned to the issues in order to draw these conclusions. I have used the original numbering of the issues, as set out in the case management order.

113. The first issue to decide was whether Ms Sykes had acted in a bullying and aggressive way towards the Claimant during 2016. The Claimant had pointed to various emails and the content of three meetings in front of Ms Hawkins and Ms Smith. He did not supply any clear details of the alleged bullying in terms of what was said in those meetings that he relied upon as bullying. Having considered the emails, I concluded that none of them supported the Claimant's case. I noted the evidence of Ms Hawkins and Ms Smith that they could not recall any bullying; and I noted that there had been a good relationship between the Claimant and Ms Sykes until, he said, 2016. I concluded that the

weight of evidence was against the Claimant here. He had made assertions about the treatment that he had received, but did not produce any evidence that supported those assertions. I concluded that the Respondent's evidence showed that he had not been treated in the way that he had described; he had made enquiries about the possibility of his post becoming redundant, and that had been discussed as a possibility. I concluded that the evidence was clear that the Claimant had been repeatedly reassured that no decision about any redundancies had been made.

114. For the avoidance of doubt, I did not accept that Mr Holmes' email to the Claimant in which he states that he did not tell Ms Sykes about the handover, was sufficient to damage the credibility of Ms Sykes and the other witnesses for the Respondent.

115. The second issue was whether Ms Sykes had informed the Claimant on 25 and 29 November 2016 that he was being made redundant. I have set out my findings about those meetings. I concluded that the weight of evidence was against the Claimant. The contemporaneous notes of the meetings, the subsequent correspondence, and the reassurance offered by Ms Sykes and Ms Smith in conversations with the Claimant that no decision had been made about redundancies; indeed, his own knowledge as a Board member that no decisions had been made, demonstrated he was incorrect about that and had misunderstood or misinterpreted what he had been told. Whether he deliberately misunderstood, as suggested by the Respondent, I was unable to say. I concluded that he had persuaded himself that he was correct, and once he had taken that position he refused to budge. His reason for doing so was not clear to me.

116. The second issue referred in the narrative to the Claimant's contention that his role was not redundant. I should perhaps comment on this. I noted that the consortium was about to end, but that there was evidence from the Respondent that some late arrivals were still being trained under that umbrella. There was no dispute that the Claimant carried out various other duties in addition to his consortium duties. I also noted the evidence that two large contracts were awarded after the Respondent's Board began discussing savings. Ms Sykes said in evidence that the Claimant had not been replaced. Having considered those factors I concluded that in November 2016 it was not certain whether savings could be made without redundancies. It was not unreasonable for the Respondent to start to look at the financial situation and consider where savings could be made. The Claimant's role and indeed any other roles may have been identified as redundant further down the line; it was not possible for me to re-create what might have happened. I concluded that there was no evidence of a redundancy situation involving his post, or any other post, in November 2016 or indeed until he resigned.

117. The second issue also referred in the narrative to a failure to follow a redundancy procedure. As there was no redundancy situation and no

decision to make redundancies, there was no obligation to follow any procedure and thus no failure to do so.

118. The third issue related to the grievance procedure and was divided into seven points. The first point was whether the Respondent considered the grievance in accordance with the bullying and harassment policy. My attention was drawn to both policies; Ms Smith mentioned both policies in her investigation report and said in evidence that she had considered both policies. The Claimant referred to the provision in the bullying and harassment policy that permits the complainant to be accompanied by a work colleague or union representative at all interviews. At the investigation meeting the Claimant raised the fact that he had been told that he could not be accompanied at the investigation meeting. The position was confirmed by Ms Smith and he was happy to proceed with the meeting.

119. I noted Ms Smith's evidence that the grievance raised matters that were not bullying and harassment, in addition to those that fell within that definition. She therefore tried to refer to both policies. It might be helpful in the future, should this arise, to be clear with the complainant at an early stage how each policy had been applied and why any decision about being accompanied was made, but given that the Claimant was prepared to continue with the meeting without a representative, it was difficult to describe what had occurred as a failure in the procedure. There was no dispute that it was made clear to the Claimant that he could be accompanied at the grievance hearing itself. When asked about the procedures and what difference it would have made if the bullying and harassment policy had been followed instead of the grievance procedure, the Claimant was unable to point to anything significant.

120. The other failure contended by the Claimant was that an independent HR person was appointed to hear the grievance, and he pointed out that there is nothing in the policy about this. This is referred to in point seven below.

121. The second point was about being accompanied to an investigation meeting. This overlaps with my conclusions referred to above, and there is nothing more to say about them.

122. The third point was a complaint that the investigation meeting was cut short as Ms Smith had a personal commitment. The evidence was that she had allowed three hours for the meeting. The Claimant arrived with a large bundle of paperwork that he wanted to go through. Ms Smith did not tell him at the start of the meeting that they had three hours, but this was raised after a couple of hours. The notes record that all of his points were explored, some more quickly than others. He said at the end of the meeting that he had felt rushed, but when offered a further date, he declined. I concluded that this scenario did not indicate that there had been any breach of fairness at the investigation meeting such that would lead to a breach of trust and confidence.

123. The fourth point was that there was a failure to interview Mr Holmes. Mr Holmes had been interviewed by Ms Smith. When the Claimant raised whether Ms Sykes had had a conversation with Mr Holmes about the handover to Ms Hawkins, Ms Smith said that she would re-interview him about that. In the event she did not. The Claimant accepted at the Tribunal hearing that she was unable to do so because of annual leave. I concluded that failing to re-interview Mr Holmes could not be described as a breach of trust and confidence given that he had already been interviewed about the substantive issue of bullying. I noted that the Claimant referred to him as a 'key member of staff' but the point in issue (the handover) was a relatively small one in the case, and I concluded that it was unlikely to assist the Claimant in any significant way, particularly as there was no evidence that Mr Holmes himself had not challenged Ms Sykes' email to all staff that he would be working with Ms Hawkins to transfer his consortium work before he left.

124. The fifth point was that Ms Smith was biased against the Claimant because she had been bullied by Ms Sykes. Both Ms Smith and Ms Sykes denied that Ms Smith had been bullied. There was no other evidence that it had happened, apart from the Claimant's assertion that it had happened at some unspecified time. I found nothing in the grievance investigation report to indicate any bias. I concluded that the weight of evidence was against the Claimant in respect of this assertion.

125. The sixth point was that Ms Smith's report contained false statements under the heading 'Established Facts'. I concluded that she had carried out a detailed investigation and she was entitled, on the evidence that she had collated, to draw certain conclusions. Those conclusions could not be described as 'false', however much the Claimant disagreed with them.

126. The seventh point was that the Respondent had acted outside the grievance policy by appointing Ms Tetley to conduct the hearing. As I have set out in my findings, it would not have been appropriate for any other member of staff to hear a grievance by the deputy CEO against the CEO. Ms Tetley was an independent HR consultant. I concluded that there was no breach of policy here.

127. The fourth issue was whether the Respondent had failed to pay the Claimant contractual sick pay from 11 to 13 January 2017. The contract was clear, that salaried staff were allowed a maximum of four weeks sick leave on full pay in a rolling 12 month period, after which SSP was paid. It went on 'On completing two years' service from the date of confirmation, staff may be allowed a maximum of three calendar months on full pay, where the bulk of that time is for one instance of certified illness and on the condition that an Executive Director has approved this additional allowance.'

128. The Respondent's evidence was that the discretion to pay more than four weeks contractual sick pay had never been exercised. The Claimant pointed to one member of staff who had received it; the Respondent's response was that the person in question had a different

contract provision about sick pay; she had transferred to the Respondent's employment under TUPE and her terms of employment were honoured. The Claimant did not challenge this evidence and had put forward no other examples of when the discretion had been exercised. I concluded that the way in which sick pay was paid did not amount to a breach of contract. The Respondent had followed their normal procedure.

129. The fifth issue was whether the grievance hearing was arranged part way through mediation. I concluded from the facts that this had not happened. Mediation had ended, although the Claimant was keen for it to continue. In addition, the Claimant had asked for the date of the grievance hearing to be postponed from 6 January for one week; that meant that it was re-arranged for 13 January, one week later. Whilst it may have been helpful to tell the Claimant this date in terms immediately, the failure to do so could not be described as a breach of trust and confidence, particularly when the date had been arranged in accordance with the Claimant's own wishes. The Claimant had been in possession of the investigation report since 3 January and so had been given adequate time to prepare.

130. Issue nine asks the question whether the allegations, if made out on the facts, amount to a repudiatory breach of contract. A number of the facts were not made out; those that were made out did not amount to such a breach. I have reminded myself that a Claimant claiming constructive dismissal must show that there has been a repudiatory breach. It is not necessary for each matter relied upon to amount to a breach; in some cases there may be a course of conduct that, taken together, amounts to a repudiatory breach of trust and confidence. Having analysed the evidence and made my findings, I must look at the matters relied on not only as individual incidents that might be breaches, but also consider the bigger picture.

131. In this case the picture that emerged was not one of an employer who had acted in such a way as to breach the implied term of trust and confidence. It was a picture of the Claimant becoming stressed, possibly because of work pressures but also, and quite clearly, because of family troubles. He had decided to continue working although, as he told Ms Sykes, his doctor had suggested some time off. In that condition he misunderstood or misinterpreted what was said to him, and having convinced himself that he was correct, he refused to accept the many reassurances offered by his colleagues, despite the fact that he had worked well with them for five years and had felt able to confide in Ms Sykes and Ms Smith about his personal difficulties.

132. I have identified a small number of points where the Respondent may wish to improve on the way grievances are dealt with, but none of those, looked at individually or cumulatively, is so significant as to amount to a breach of trust and confidence. As was said in the case of Croft v Consignia plc 2002 IRLR851, 'the implied term of trust and confidence is only breached by acts or omissions which seriously damage or destroy the necessary trust and confidence. Both sides are

expected to absorb lesser blows. The gravity of the suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury'.

133. I considered that failing to notify the Claimant immediately about the re-arranged date for the grievance hearing, albeit to a date that he had suggested, and failing to re-interview Mr Holmes, amounted to the 'lesser blows' envisaged in that case, and were not so serious as to constitute a breach of contract. Having a manager who is blunt and direct might, I accepted, be uncomfortable on occasions, but that in itself is not a breach of the implied term. The main thrust of the claim was that the Claimant had been bullied, that he had been told that he was redundant and that his grievance was not dealt with properly. However, the Claimant was unable to produce any compelling evidence to support his case about those matters. In contrast, the evidence produced by the Respondent was credible and weighed heavily against his assertions.

134. In the light of all of the evidence I concluded that there had been no repudiatory breaches by the Respondent.

135. As there was no repudiatory breach, I have not found it necessary to address the issues in 10, 11, 12, 13, 14 and 15. The claim of unfair constructive dismissal was unsuccessful and it is dismissed.

136. With regard to the claim for notice pay, the Claimant himself said, when we discussed this, that he was not pursuing it. He had been sent his notice pay by the Respondent, and he had returned it, as he said he would in his letter of 23 January 2017. For the avoidance of doubt, arguably there may have been some notice pay owed for the period between 13 January and 23 January, except that the Claimant had said that he was well enough to work but not well enough to work for the Respondent. I concluded that a statement that he was well enough to work would contradict any entitlement to SSP, and so he was right to withdraw that claim, and it was dismissed.

Costs Application

137. Having announced my decision, the Respondent made a costs application and produced the documents referred to in the Documents & Evidence part of this decision. I adjourned to allow the Claimant time to prepare his response.

138. On behalf of the Respondent, Mr Singh submitted that the Respondent's costs were £28,239.17 and so in view of the limit in the Rules his application was for a contribution towards costs. He applied on the grounds that there had been unreasonable conduct and that the claim had no reasonable prospect of success.

139. He suggested that if the Claimant had lied about matters in the case, that would be unreasonable conduct. In any event, it was unreasonable to make unsupported allegations. He also submitted that it was unreasonable conduct to refuse the reasonable offers to settle put

by the Respondent, and to make exaggerated counter offers. He referred to the various offers that had been made, as set out in the schedule of offers.

140. Mr Singh drew my attention to the costs warning letter sent to the Claimant on 4 April 2017. Although the Claimant suggested that he read it as relating to the claim of discrimination, which he had not pursued, as clarified at the case management discussion, I noted that the letter was clear that it related to any discrimination claim *and* to the constructive dismissal claim.

141. Mr Singh also submitted that the Claimant's conduct was vexatious and that a wide approach should be taken in assessing this aspect. He submitted that a number of paragraphs in the Claimant's witness statement had focused on peripheral issues such as disclosure, and that the Claimant had referred to very few documents in his bundle of documents.

142. Mr Singh also relied upon the submission that the claim had no reasonable prospect of success, and referred to the judgment. The documents did not support the Claimant's case.

143. Mr Singh suggested that I might want to consider the Claimant's means and his health if we got to the point of deciding whether to exercise the discretion. He accepted that there was a degree of sadness that the Claimant had felt it necessary to bring a claim, and a certain amount of sympathy for the Claimant's family problems, but the Respondent was a small organisation and had been in financial difficulties. The Claimant should have assessed his claim with more objectivity and not simply expect the Respondent to foot the bill.

144. In response, the Claimant submitted that he had not lied. He noted that he had not produced sufficient evidence and realised that he was not as good at representing himself as he had hoped. He said that he thought the mediation was to proceed after 9 January. He considered that both he and Ms Sykes were good negotiators and so when he put forward offers to settle he thought that they would 'meet in the middle'. He reiterated that he not 'made up' his claim.

145. The Claimant suggested that he had been unfairly treated by the Respondent. He contended that his stress had been caused by work and not family problems, which were now, he said, worse than they were while working for the Respondent, and which had caused much of his distress at the Tribunal hearing. He was now living with his parents and lived on a small income from part-time bar work.

146. In reply, Mr Singh noted the Claimant's distress, but suggested that the Respondent's witnesses had also been upset by the proceedings. He suggested that it may be helpful to order the Claimant to produce documentation about his income and any savings.

147. I adjourned to consider my decision. I considered firstly whether there were grounds for making a costs order. I noted that the Claimant was a litigant in person and that he lacked objectivity and a knowledge of law and practice. He could not be judged by the high standards of a professional representative. That would not preclude a costs order, but was a factor to be considered.

148. I considered whether the Claimant had acted unreasonably in refusing offers and making large counter offers. I noted that the Claimant's expectations were unrealistic, although not as unrealistic as many that we see in the Tribunal. The history of the offers and counter offers did not appear to me to be unreasonable; such offers and rejections are common in Tribunal proceedings.

149. I considered whether the Claimant had made unreasonable allegations. I had found that he had misconstrued or misunderstood what had been said to him, but that the different versions of events had been tested in the hearing and it could not be said that such a hearing was unnecessary. I found it unfortunate that the Claimant had accused the Respondent's witnesses of lying, but in any event that had not unduly extended the length of the hearing and we had completed the proceedings on day 6 of 8.

150. I considered whether the Claimant had acted vexatiously. I had found that he had persuaded himself that he was correct, and refused to alter his position despite the documentary evidence. There was nothing to suggest that in taking such a misguided view he was acting vexatiously; it could equally have been stubbornness or a complete misunderstanding of the nature of his claim.

151. I concluded that I could not say that there had been unreasonable conduct.

152. I then turned to whether the claim had no reasonable prospect of success. Having now heard all of the witness evidence and seen the documentary evidence it was clear that the claim had no reasonable prospect of success when looked at objectively. The Claimant may not have made up his claim, as he submitted, and indeed I have not found that he deliberately lied, but he had very little evidence to support his claim and he should have realised that if he had stood back and taken an objective view.

153. I concluded that there were grounds for making a costs order as the claim had no reasonable prospect of success.

154. I considered whether to exercise the discretion to make an order. I noted that costs remain the exception rather than the rule, and that costs are compensatory and not punitive. I made allowances for the fact that the Claimant was a litigant in person. He appeared not to have taken advice, although he said that he had used the CAB website and he had entered into Acas early conciliation.

155. The Claimant had candidly accepted that although he had thought that he had understood the law and procedure, quite clearly he had not.

156. I noted that the Respondent is a small organisation with a relatively limited budget. They had decided to instruct counsel, for which I do not criticise them, but that decision had added significantly to their costs.

157. Finally, I noted that although there was no documentary evidence about the Claimant's means, it was apparent from his demeanour and that of his father, who had accompanied him throughout the hearing, that he had little income and was now living with his parents.

158. Having weighed up all of these factors, I concluded that this was not a case where the discretion should be exercised and a costs order made. The application was accordingly refused.

Employment Judge **Wallis**
Date: 16 May 2018