



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. R.A. Evans

**Respondent:** Vision Express (UK) Ltd

**HELD AT:** Mold **ON:** 3<sup>rd</sup> & 4<sup>th</sup> September 2019 and  
11<sup>th</sup> & 15<sup>th</sup> October 2019 in  
chambers

**BEFORE:** Employment Judge T. Vincent Ryan

## REPRESENTATION:

**Claimant:** Litigant in person

**Respondent:** Mr. G. Miller, Solicitor

# RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant resigned his employment with the respondent on 8<sup>th</sup> November 2018. He was not dismissed. The claimant's claim that he was unfairly, constructively, dismissed fails and is dismissed.

# REASONS

## 1. The Issues:

1.1. In a situation where the claimant was employed by the respondent as a manager, who resigned immediately following an unsuccessful grievance appeal and immediately before a disciplinary hearing and he claims that he was constructively unfairly dismissed, the following issues arose (as agreed with the parties at the outset of the hearing, reiterated during the hearing and prior to submissions):

1.1.1. Did the respondent fundamentally breach the implied contractual term of trust and confidence in the following alleged ways (where the respondent denies that there was any breach of contract):

- 1.1.1.1. by providing insufficient support via the claimant's line manager in a new position in relation to working practices;
- 1.1.1.2. dismissing and insufficiently listening to the claimant's concerns around staff behaviour and performance of individuals over a period;
- 1.1.1.3. undermining him as a manager by privately meeting with individuals and asking his staff about his performance;
- 1.1.1.4. inadequately supporting him to manage performance of individuals himself and resolve the conflict with them;
- 1.1.1.5. arranging a transfer to another store without his consent and telling him that the respondent wanted to put a strong manager in place of him;
- 1.1.1.6. by not referring him to an occupational health advisor despite the claimant stating he had work related stress;
- 1.1.1.7. by not affording him dignity and respect in relation to the above matters;
- 1.1.1.8. by starting formal disciplinary investigation before he was aware of the allegations;
- 1.1.1.9. by suspending him from work because he asked to be temporarily moved pending the investigation or to take special;
- 1.1.1.10. by refusing to inform him as to who had made the allegations thus making it impossible for him to answer questions during the investigation;
- 1.1.1.11. by the investigator stating that he had proof of the allegations making the claimant feel that he had been convicted without a fair investigation;
- 1.1.1.12. by the investigator saying that the matter would definitely proceed to a disciplinary hearing prior to completion of the investigation in circumstances where the investigating officer ought not make a recommendation about disciplinary meetings but should only investigate facts;
- 1.1.1.13. by the investigator asking rhetorical questions of witnesses and making remarks that he agreed with comments made by them;
- 1.1.1.14. by the investigator speaking to the witnesses before the investigation giving them prior knowledge and promoting bias;
- 1.1.1.15. by the note-taker asking questions and using rhetorical questions which was not his role and so framing the claimant;

1.1.1.16. by refusing to provide the claimant with emails pertaining to events relevant to preparation for the grievance and disciplinary hearings;

1.1.2. Did the claimant resign because of the alleged breach(es) of the implied term of trust and confidence (where the respondent maintains that the claimant resigned to avoid disciplinary proceedings and possible sanction);

1.1.3. Did the claimants waive any breach of contract and act in such a way as to affirm the contract following any breach as alleged?

## 2. The Facts:

2.1. The claimant commenced a period of continuous employment on 28 August 2007 as Optician's Manager in a large store (Tesco), and his employment transferred to the respondent in December 2017. He resigned from his employment with the respondent on 8 November 2018 by letter dated that day but drafted on the previous day, which appears in the trial bundle at pages 145 to 148, (and all following page references refer to the trial bundle unless otherwise stated). The claimant was an experienced manager having managed opticians' premises since 1988. He was a trained but unregistered dispenser.

2.2. The respondent is a large employer. It has a professional HR Department. It operates with many documented policies and procedures including written contracts of employment, disciplinary policy, equality diversity and dignity at work policy and a grievance policy. Its employees' performance is appraised and monitored through what is called Progress Commitment Review (PCR). It offers support and assistance to its staff through various tools including referral and self-referral to HR and to occupational health advisers. It provided training to its staff, Continued Education and Training (CET). These various tools were accessible through the respondent's intranet.

2.3. Mr McGhee, who gave evidence to the tribunal, was appointed the claimant's Regional Manager, and therefore line manager, in May 2018. The claimant told him at their introductory meeting that he had issues with certain colleagues especially over granting them leave; he held to a rule that 6-weeks' notice must be given and that two particular members of staff could not be absent on leave at the same time. Those rules were unpopular and caused serious issues. He was very open with Mr McGhee about his difficulties in his role. He asked for Mr McGhee to visit his store regularly and frequently, including to keep an eye on matters and to deal with staff during his absences on holiday. Mr McGhee, in his capacity as Regional Manager, visited stores in his region routinely including with a HR Business Partner such as Melissa Faxon. He provided the claimant with support, listened to his concerns and advised and counselled as he considered appropriate during routine visits and the visits that he made on the claimant's requests. In the claimant's absence he would deal with the staff listening to their concerns, providing advice and assistance as he considered appropriate.

- 2.4. The claimant believed, during the period from at least February 2018 until his resignation, that there was a conspiracy amongst his colleagues to oust him from his post and employment. He suggested in evidence that this was because at the age of 52 he was older than the colleagues he referred to as his “opponents” who he thought were aged 18, some in their 20s and possibly one or more in their 30s. In part he felt that he did not fit in because of his attitudes and practices, including on occasions his use of language, and he felt that “the youngsters were having a go at me because they were not getting their own way” especially in relation to requests for leave. His evidence is that any conspiracy pre-dated Mr McGhee’s appointment as Regional Manager and his dealings with the claimant. He believed that “his opponents” “spun a yarn” to the regional manager who “fell for it” and that he was therefore generally undermined; he felt unsupported by his line management. Although there was no corroborating evidence to support the claimant’s conspiracy theory I accept his evidence that he genuinely felt that he was being targeted by at least some of his subordinate staff. He also however accepted in cross examination that at the time of his grievance, grievance appeal and immediately prior to the disciplinary hearing (at which time he resigned) his judgement was poor and he was both stressed and indecisive. I heard no evidence from the alleged “opponents” but I found no evidence to support any suggestion that Mr McGhee was a conspirator; he may have been spun a yarn and he may have been taken-in but I find that he was provided with credible information by way of reports and grievances, coupled with his own observations, to give him grounds to investigate the claimant’s practice as manager.
- 2.5. The claimant identified three colleagues as his main “opponents” namely AS (with whom he had worked for over two years, TH (with whom he had worked since November 2017) and VD (with whom he had worked since 2007). He refers to them as “opponents” from February 2018.
- 2.6. AS: AS is an optometrist; she did not give evidence to the tribunal and I do not know how she associates with regards ethnicity or her nationality however she was referred to by the claimant during his evidence as “a young Asian girl”. I understand from all the evidence I heard that AS is British of South Asian ethnic origin and a Muslim. The claimant had formed the view that she was not a practising Muslim and he was therefore not prepared to look favourably on a request that she made for leave for Eid when her leave request was made with what the claimant considered to be short notice; he did not believe the reason that she gave for her request. The claimant and AS had an ongoing dispute over the length of notice that was required for a leave request, with the claimant initially insisting that leave requests required six weeks’ notice. The claimant was on friendly terms with her uncle and on one occasion, according to his evidence, he said to AS that he could “drop her in the shit” if he told her family about his suspicions about her personal life, and he considered that this was another reason that she took against him.
- 2.7. TH/VD: these colleagues were in a personal relationship; the claimant considered such relationships between colleagues to be problematic. They would ask for leave dates to coincide with each other. The claimant would

refuse their requests and said in evidence that he “deliberately did not give the holidays”.

- 2.8. Reports reached the respondent’s management, which the claimant did not wholly deny, that on occasion he left work to watch sport on television, walk his dog or visit the bank and do personal errands. This was a bone of contention with his colleagues albeit the claimant said in evidence that he ensured he had done his duties and would in any event have made up the time one way or another before or after absenting himself from the store.
- 2.9. The claimant was witnessed on at least one occasion by his line manager shouting at a subordinate colleague, and the respondent also received a complaint from a customer about the claimant’s raising his voice at a colleague or colleagues.
- 2.10. The claimant’s colleagues also voiced concerns about comments the claimant made not only in respect of AS’ religious observance but also comments they considered to be homophobic. The claimant denied being homophobic although somewhat remarkably said in evidence that his own daughter accused him of the same thing and that he had to explain that he was not, however he would refer to people using language that is now considered “taboo” when they were just names that he commonly used when he was younger; he denied actual name-calling at work.
- 2.11. There was a difficult working environment in the store in the light of all the above and issues that arose following the transition of systems from Tesco to the respondent. The claimant felt that he was working under some stress. He did not however avail himself of the available help and support via HR and occupational health and he did not find the available training useful to him; it was reported to his line manager that he had been disruptive during training and his line manager was told that he had made remarks to the trainer along the lines “you can’t teach me”, “I’ve been doing this for decades”, and “there is nothing you can teaching”.
- 2.12. The claimant did however tell his line manager that he was stressed. He said he would welcome regular weekly visits from Mr McGee and he asked for a temporary transfer to another store (a smaller one and outside of Wrexham) to assist with his stress and for him to assimilate the respondent’s policies and procedures.
- 2.13. Mr McGhee provided the regular weekly supportive management visits. He made arrangements for the claimant’s temporary transfer to an appropriate other store. By way of compromise he sought to grant the problematic leave requests and clarify the situation regarding notice and reasonable reasons for refusal, counselling the claimant, as to how he approached AS’ requests in respect of dates of religious observance. He considered the claimant’s training needs and the use by him of the Progressive Commitment Review. He referred the claimant to HR’s supportive tools.

- 2.14. In June 2018 the respondent received the above-mentioned customer complaint about the claimant and for reasons which were unexplained in evidence that emailed complaint seems to have been deleted such that no further action can be taken at the time.
- 2.15. The claimant went away on annual leave in mid-August 2018. As promised Mr McGhee visited the store. On one visit at least (13.08.18) he was accompanied by Melissa Faxon (HRBP) as part of their routine visits to stores in the region. They spoke to staff generally and staff members raised their concerns over the claimant's practice as manager.
- 2.16. On 13 August 2018 TH raised a formal grievance about the claimant's conduct (pp 61-65). Bearing in mind their conversation that day Mr McGhee was surprised that TH was pursuing the matters raised formally. Mr McGhee met with TH on 20 August 2018. On 17 August 2018 AS raised a formal grievance against the claimant (pp 69 – 70) and met with Mr McGhee on 24 August 2018.
- 2.17. On 21<sup>st</sup> August whilst at the store Mr McGhee witnessed the claimant, as he believed, shouting at a subordinate colleague HE. He raised this with the claimant and referred to TH's formal grievance but without identifying TH. By this date he had not met with AS and therefore did not raise her grievance in any detail. Mr McGhee considered all such matters serious enough to warrant suspending the claimant pending investigation. The suspension was confirmed in a letter from Mr McGhee to the claimant dated 21<sup>st</sup> August (page 81). Mr McGhee's investigation included the grievance hearing of Friday, 24 August 2018 in respect of AS grievance. Mr McGhee was assisted by an HR advisor taking notes who also asked questions for clarification albeit he was not the investigator nor did he make any relevant decisions about the procedure. Melissa Faxon provided advice and support as required. Interviews were held with HP and another colleague KB. Mr McGhee explained to the claimant that he would make a recommendation as to further action (not sanction) or in-action following the investigation and that there was evidence that he felt merited consideration at a disciplinary hearing. He did not say that the case was proved or that the claimant would be dismissed. His role finished with his investigation and recommendation to HR for formal hearing or no further action; the claimant misunderstood the explanation believing the worse of his line manager in his conspiracy mind-set.
- 2.18. Upon receipt of staff grievances against the claimant specifically that of TH Mr McGhee commenced an investigation into that grievance. Subsequently on receipt of a further grievance from AS he looked into that. What Mr McGhee heard from the claimant and TH and observed himself led him to form the view that it would be appropriate to suspend the claimant pending a formal investigation. He sought to investigate also the grievance raised by AS. He felt that he could not fully investigate matters with the claimant until he had better investigated the matters raised by TH and AS them. The reason that the claimant was suspended was to assist in the investigation as Mr McGhee felt that it would have been inappropriate for him to be on site during an investigation into alleged bullying of subordinate colleagues. The claimant repeatedly described his own demeanour as being

“emotive”; I believe he meant by this that he was emotional but this is consistent with how he described himself generally at the time. I accept his evidence that he was emotional and reacted in that way and I find that in all probability he therefore misconstrued what was said to him and the way it was said, viewing it through his prism with a confirmed opinion that there was a conspiracy to oust him. There was no such conspiracy at management level.

- 2.19. The claimant presented a formal grievance on 31 August 2018 (pp 93 to 97) to the respondent. In his letter he describes the issues that appear above accusing AS of inciting staff members to act against him and accusing Mr McGhee of having convicted him without a full investigation. A substantial part of the grievance letter relates to the claimant’s working relationship with Mr McGhee, in terms of his line management and the way he conducted the disciplinary investigation. The respondent’s divisional director to whom that grievance was addressed formally acknowledged it by letter dated 4 September 2018 and efforts were made to arrange a hearing on Friday, 7 September 2018 which was then deferred to 13 September 2018 and the formal invitations are in the trial bundle at pages 100 and 101. I did not hear evidence from the grievance officer but her outcome letter is at pages 103 to 106 and it appears to address the claimant’s principal grievances. The grievance was rejected.
- 2.20. In the light of the respondent’s investigations into the claimant’s conduct a disciplinary hearing was arranged and a formal invitation letter sent to the claimant on the 28 September 2018 which appears at page 107 to 108. Many specific allegations were set out in that letter concerning specific issues raised by colleagues, alleged neglect of duties and deficiencies in management some or all of which could amount to gross misconduct potentially leading to summary dismissal. The claimant was reminded of his right to be accompanied at the hearing and he was provided with a considerable amount of documentation all of which is listed at page 108.
- 2.21. On the same date as the disciplinary invitation the claimant wrote a letter of appeal in respect of the grievance that appears at pages 109 to 112. It was agreed, following some to and fro correspondence, that the respondent would deal with the claimant’s grievance appeal on 8 November 2018 and the parties would immediately go into a disciplinary hearing following the grievance hearing. The appeal and disciplinary hearings were to be conducted by the regional manager Mr Philip Hyde.
- 2.22. I heard evidence from the claimant, Mr McGhee and Mr Hyde. I found the witnesses to be generally sincere and conscientious in giving their evidence. The claimant’s credibility was damaged however by unsubstantiated and uncorroborated references to a conspiracy and to a concerted effort to remove him from his post which has led him to make allegations where evidence points to the contrary (in relation to Mr McGhee, Ms Faxon and Mr Hyde). It is evident that some of the claimant’s colleagues had taken against him and may not have been sorry to see him disciplined and possibly dismissed. I find however that the respondent’s management witnesses were credible, cogent, consistent and clear in giving their evidence

to the effect that they had genuine concerns and they followed due process. Similarly, when the claimant raised a grievance and then appealed its unsuccessful outcome Mr Hyde gave credible evidence that he followed due process conscientiously. Overall wherever there is a conflict between the evidence given by the claimant that given by the respondent's witnesses I preferred the respondent's evidence for these reasons.

2.23. General findings:

2.23.1. Mr McGhee did not seek to undermine the claimant. He resolved personnel management issues relating to leave requests from aggrieved colleagues in a way he felt was fair and reasonable having considered that the claimant's stance had been neither. He did so diplomatically. He did so to resolve issues in the workplace and acting within his authority. He did not seek to undermine the claimant.

2.23.2. The respondent's management listened to the concerns raised by the claimant about staff behaviour and performance and the concerns raised by staff about the claimant's behaviour and performance. The reason that formal disciplinary proceedings were taken against the claimant alone was that there was sufficient information to base a disciplinary investigation and the investigation discovered sufficient evidence to suggest that it was appropriate to commence a formal disciplinary procedure against the claimant for all the reasons stated in the invitation letter at 107 - 108. Mr McGhee attempted to manage a difficult situation in the Wrexham store and did not dismiss anyone's concerns that were raised to him, including those of the claimant.

2.23.3. The claimant felt undermined by the fact that Mr McGhee met with some of his subordinate colleagues however he did so in accordance with his managerial duties and in part as a supportive regional manager visiting the store on a weekly basis which the claimant requested. When matters were raised with him either by the claimant or the claimant's colleagues he listened. There is no evidence of untoward or surreptitious meetings aimed to undermine the claimant.

2.23.4. The claimant was encouraged by his managers to engage in appropriate training and was supported to manage in accordance with the respondent's policies and procedures. By his own admission he was struggling with the new systems and his colleagues. Insofar as he was unable to manage matters to his own satisfaction his senior managers stepped in but no further.

2.23.5. Mr McGhee arranged for the claimant be transferred on full-time hours on a temporary basis to a smaller out-of-town store in accordance with the claimant's request. The claimant genuinely misunderstood Mr McGhee's reference to "full-time" as meaning permanently. There had been consideration as to whether any temporary relocation would be on a part-time hours basis or full-time hours basis. In accordance with the request made to him Mr McGhee arranged for the claimant to be relocated to a store of his choosing on a temporary full-time basis.



2.23.6. The respondent's managers made repeated references to the claimant that he could avail of all available support through the respondent's policies and procedures and specifically the HR Department and employee support schemes. It did not make a formal reference to an occupational health advisor at the initial stages of the claimant's concerns and its concerns about him. The claimant did not ask to be referred to an occupational health advisor and did not avail of any of these support mechanisms in place. He told Mr McGhee that he was coping with stress in his own way and with assistance from his GP. Believing the claimant therefore did not want OH involvement there was a delay on the part of the respondent in making such a referral. A referral was however made by the respondent's management to occupational health when it appeared appropriate despite the fact the claimant has still not asked for it. Specific reference is made to a referral in Mr Hyde's letter to the claim to 3 October 2018 (page 113).

2.23.7. The investigation was thorough and detailed as set out in the documentation provided to the claimant for his preparation in advance of the disciplinary hearing. Appropriate witnesses were spoken to by Mr McGhee. There is no evidence to support the assertion that he was aggressive, dismissive and intolerant or that he asked leading questions showing bias and so preparing the witnesses to give evidence in a way that was prejudicial to the claimant; he was not and did not. Mr McGhee made it clear that the outcome of the investigation could either be that there would be no further action or it could lead to disciplinary action of some form. At the conclusion of the investigation Mr McGhee recommended to HR that the matter should proceed by way of disciplinary action; it was not his ultimate decision for there to be a disciplinary summons. HR business partners took a view on the recommendation an investigation of Mr McGhee and advise the regional manager Mr Hyde who was the signatory to the invitation to disciplinary hearing of the 28 September 2018 (page 107 – 108).

2.23.8. The claimant asked for sight of emails including a complaint against him and an email about a stock take. Those emails were not found. It appears from the evidence I have heard that had those emails been found they can only have been evidence contrary to the best interests of the claimant's continued employment; I accept Mr McGhee's evidence that probably the loss of the emails was beneficial to the claimant. The claimant's view is that the email correspondence showed he was being set up. From what he described however the logical suggestion would have been for the respondent, if it was conspiring to oust the claimant, to have located prejudicial emails and rely upon them; that was the opinion formed by Mr McGhee who discounted them and I accept his evidence on that point.

2.24. The minutes of the grievance appeal and disciplinary meeting are at pages 131 to 143. The claimant was accompanied by a family member. The meeting started at 11 am and concluded just before 2:15 pm with the outcome being reserved for Mr Hyde to give matters further consideration.

Towards the end of the meeting he confirmed to the claimant that no decision had been reached on the grievance appeal. Mr Hyde however made it clear that his intention was then to continue the disciplinary hearing when he would hear all the claimant had to say about what he considered to be wrong with the investigation. At that point the claimant said he was not prepared to go ahead but that he was resigning with immediate effect that he felt that he had been constructively dismissed; he handed over his letter of resignation dated 8 November 2018 (pages 145 2148). He was asked whether his decision was certain; the claimant said he was certain and he was not “going through that again”. The meeting closed at 1415. The claimant had drafted his letter of resignation on the previous day, 7 November 2018. Although the claimant said in evidence that he wanted to see how the grievance appeal went before deciding whether or not to appeal I find that his mind was made up, that he was not prepared to await the grievance appeal outcome, that he was not prepared to embark on the disciplinary hearing and that he sought to avoid commencement of the disciplinary hearing. The claimant referred in his evidence under cross-examination to potential reputational damage as the world of optometry is relatively small. For those reasons the claimant wished to leave on his terms and timing whilst both the grievance and disciplinary matters were still hanging in the air.

- 2.25. By letter dated 28 November 2018 (pages 149 2153 Mr Hyde delivered the appeal outcome. The appeal outcome letter appears to be a thorough consideration of the appeal points with a rationale for Mr Hyde’s conclusions. The final decision concluding the internal appeals process was to uphold the original rejection of the claimant’s grievance, however this was not instrumental in the claimant’s decision to resign as it post-dated resignation by nearly 3 weeks.

### **3. The Law:**

- 3.1. S.94 Employment Rights Act 1996 (ERA) establishes an employee’s right not to be unfairly dismissed. S.95 ERA sets out the circumstances in which an employee is dismissed which includes where an employee terminates the contract of employment (with or without notice) in circumstances in which he or she is entitled to terminate it without notice by reason of the employer’s conduct (a constructive dismissal).
- 3.2. It is well established that for there to be a constructive dismissal the employer must breach the contract in a fundamental particular, the employee must resign because of that breach (or where that breach is influential in effecting the resignation), and the employee must not delay too long after the breach, where “too long” is not just a matter of strict chronology but where the circumstances of the delay are such that the employee can be said to have waived any right to rely on the respondent’s behaviour to base resignation and a claim of dismissal.
- 3.3. The breach relied upon by an employee may be of a fundamental express term or the implied term of trust and confidence and any such breach must be repudiatory; a breach of the implied term will be repudiatory meaning that the behaviour complained of seriously damaged or destroyed the essential relationship of trust and confidence. Objective consideration of the

employer's intention in behaving as it did cannot be avoided but motive is not the determinative consideration. Whether or not there has been a repudiatory breach of contract by the employer is a question of facts for the tribunal. The test is contractual and not one importing principles of reasonableness; a breach cannot be cured and it is a matter for the employee whether to accept the breach as one leading to termination of the contract or to waive it and to work on freely (that is not under genuine protest or in a position that merely and genuinely reserves the employee's position pro tempore).

3.4. As to whether a claimant has resigned because of a breach of contract it is established that where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, rather than attempting to determine which one of the potential reasons is the effective cause of the resignation.

3.5. Even if an employee establishes that there has been a dismissal the fairness or otherwise of that dismissal still falls to be determined, subject to the principles of s.98 ERA. That said it will only be in exceptional circumstances that a constructive dismissal based on a repudiatory breach of the implied term will ever be considered fair.

3.6. In **Kaur v Leeds Teaching Hosp [2018] EWCA Civ 978** Underhill LJ stated: at paragraph 55: "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part ... of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the ... term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?"

#### 4. Application of Law to Facts:

4.1. The claimant has made many allegations of breaches of the implied term of trust and confidence as set out in the issues above which quoted from the claimant's claim form. In large part his allegations are based on his unsubstantiated view that there was a management conspiracy to undermine and oust him. I find no evidence to support that overall view. Without having heard evidence from the claimant's subordinate colleagues, I can only have a suspicion that they were together content with the claimant been subject to

disciplinary action and would not have been necessarily upset if he was dismissed. There was a breakdown in the relationship between claimant as manager and those colleagues who reported into him. The grievances cited above make this clear as does the claimant's own witness evidence. Those colleagues however were not the claimant's employer. They were entitled also to raise their concerns as he was entitled to raise his concerns about them.

- 4.2. Either way the respondent was then obliged to look into the matter at least initially informally and at an appropriate juncture formally.
- 4.3. In the above circumstances the respondent received complaints about serious matters and obtained evidence supportive of formal disciplinary charges against the claimant. The respondent received formal grievance letters that required investigation and at the appropriate stage would have led to grievance hearings. They received a grievance from the claimant, looked into it and followed it through the formal procedure to a hearing with a reasoned outcome. The claimant was entitled to and did appeal against that outcome. The appeal hearing was set up in accordance with the applicable policies and an independent appeals manager appointed. The claimant was given the opportunity to attend a grievance appeal hearing accompanied, which he did. The respondent was then charged, through its appeals manager, to consider all that the claimant said in respect of his appeal and reach a conclusion. The claimant resigned before Mr Hyde had done so and after Mr Hyde had orally reassured the claimant that he had not come to a decision. The decision followed the claimant's resignation by some three weeks and therefore the actual contents of the appeal outcome letter of 28 November 2018 had no bearing on the claimant's decision to resign.
- 4.4. I have found as a fact that the claimant made his mind up his mind to resign on 7 November 2018, that is in advance even of the appeal hearing with a view to avoiding the disciplinary hearing and risk of sanction. If that is correct then the conduct of the appeal hearing cannot have had a bearing on the claimant's resignation. This would mean that the last act relied upon by the claimant as a breach of contract related to the claimant's complaints about being told that there would be a disciplinary hearing during the investigatory procedure.
- 4.5. If I am wrong, and the claimant had merely prepared a draft resignation letter to use at an appropriate time if and when he concluded that he wished to resign, and that he only did so at the conclusion of the grievance appeal hearing because of the way in which it was conducted, then the last alleged breach of contract must relate to Mr Hyde's conduct of the grievance appeal meeting. The claimant has not alleged a breach of contract by Mr Hyde. The 17 allegations of breach of contract divide into two categories the first 7 of which are critical of Mr McGhee as his line manager and the final 10 of which are critical of Mr McGhee and the conduct of the disciplinary procedure. There is no specific allegation relating to the grievance procedure. It would therefore appear that the last act or omission upon which the claimant relies was being informed of the disciplinary meeting.

4.6. *What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*

4.6.1. Being told of the disciplinary hearing. The claimant was told of the disciplinary hearing IN Mr Hyde's letter of 28 September 2018 (page 107 – 108); prior to that he had been told of the possibility of the disciplinary hearing by Mr McGhee during the investigation but Mr McGhee also made clear that it was not a certainty; it was his recommendation. Neither Mr McGhee's explanation nor Mr Hyde's formal letter were calculated to or was likely to have seriously damaged or destroyed the relationship of trust and confidence.

4.6.2. I understand the claimant's concern that if he had been told during investigation that he would certainly be disciplined and/or dismissed that this would undermine the investigation and hearing procedure, and so destroy the relationship; that did not happen.

4.7. *Has he or she affirmed the contract since that act?*

4.7.1. Yes, by attending his grievance appeal hearing. The grievance appeal hearing was convened before the disciplinary hearing. The claimant was dissatisfied with the outcome of his grievance and by appealing it and attending the appeal hearing he indicated to the respondent that the relationship had not been destroyed and that he was prepared to give the respondent an opportunity to rectify matters to his satisfaction or that he would compromise subject to the terms of the outcome of the appeal; he cannot have been dissatisfied with the appeal outcome because he resigned before it and he makes no claim about the appeal hearing itself, even that it was the last straw short of a breach of contract in itself.

4.7.2. Alternatively, if the claimant's resignation decision was made on 7 November and the question is whether he affirmed the contract after being told of the disciplinary hearing but before 8 November 2018 then again, he has affirmed it and waived any breach by lodging his grievance appeal on 28 September, the same day that the formal invitation to disciplinary hearing was sent to him. The claimant was dissatisfied about many things and he lodged a grievance in accordance with his contract, policies and procedures indicating to the respondent that the relationship had not been destroyed or seriously damaged and that he was prepared to give the respondent an opportunity to rectify matters or that he would compromise subject to the outcome of the grievance.

4.8. *If not, was that act (or omission) by itself a repudiatory breach of contract?*

4.8.1. If I am wrong about attendance at the grievance appeal hearing amounting to affirmation, the claimant being invited to a disciplinary hearing does not amount to a fundamental breach of contract in circumstances where it was done in accordance with the respondent's disciplinary policy in the light of an accumulation of evidence where there was on the face of it a case for him to answer in relation to his conduct.

4.8.2. I have found as a fact that Mr McGhee did not tell the claimant during the investigation that there would necessarily be a disciplinary hearing. The claimant was not informed that there was to be a disciplinary hearing until Mr Hyde's letter to him dated 28 September 2018. That letter was not a breach of contract. The allegations are clearly set out in it. The claimant is informed of the time date and venue of the disciplinary meeting that had been arranged in accordance with the disciplinary procedure copy of which was provided to him. He was forewarned of the possibility of finding of gross misconduct which could result in summary dismissal. He was reminded of his statutory rights to be accompanied. He was invited to request any adjustment or support that he may need. He was sent an extensive file of investigatory and related papers to assist in his preparation. He was invited to submit documentation for consideration at the hearing and to provide witnesses at the hearing. He was invited to raise any queries if clarification was required.

4.8.3. As the letter was emailed to him he will have received it on 28 September and he had a week to prepare. In the event the meeting did not take place on 4 October 2018 as originally planned but was re-scheduled to go ahead on 8 November 2018 such that the claimant was granted further time. In the meantime, the respondent wrote to the claimant 3 October 2018 offering support and referral to occupational health advisers whilst deferring the disciplinary hearing.

4.8.4. In all the circumstances there was nothing untoward about the disciplinary invitation, however much the claimant disapproved of it. He had every opportunity to defend the allegations and make submissions or put forward mitigating circumstances. The invitation letter does not amount to conduct on the part the respondent designed or likely to destroy or seriously damage the relationship between the parties, acting in effect as if there was no contractual relationship. The respondent was honouring the contractual relationship. It was acting on complaints, grievances and concerns that were legitimate matters for investigation and disciplinary proceedings (which were not prejudged).

4.9. *If not, was it nevertheless a part ... of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the ... term? (If it was, there is no need for any separate consideration of a possible previous affirmation.....):*

4.9.1. The claimant has failed to prove any of his allegations of breach of contract. He has made several allegations of conduct comprising several acts and omissions which when viewed cumulatively amounted in his mind to a grand conspiracy against him. If he had proved those matters his claim may have succeeded; I appreciate it is difficult for one to prove a conspiracy. In fact, it would appear that some of his subordinate colleagues had taken against him because of his conduct and they raised these issues both informally and formally through grievance procedures with Mr McGhee who was the appropriate person. Mr McGhee sought to manage the claimant and his team. He was supportive of the claimant when he could be and he managed the situation better than the claimant

when the claimant had aggravated circumstances either by his use of language or what management thought were his unreasonable refusals of reasonable requests for annual leave.

4.9.2. The claimant's conduct as manager was questionable and there was evidence to support each of the allegations set out in the invitation to disciplinary hearing letter of 28<sup>th</sup> of September (pages 107 – 108). There was reason for the respondent to suspect a course of conduct comprising several acts and omissions by the claimant which viewed cumulatively amounted to a breach of contract by him or at very least breaches of the disciplinary policy. The respondent was entitled to investigate and prosecute on those matters. At the time of the claimant's resignation it had not come to any conclusion and indeed had yet to hear, and was willing to hear and consider, the claimant's defence and mitigating circumstances. There was at least a case for him to answer. I have found that the allegations set out in the disciplinary invitation letter were not trivial, or obviously spurious and trumped up such that they could be ignored without infringing the contracts of the complaining subordinate colleagues.

4.10. *Did the employee resign in response (or partly in response) to that breach?"* The claimant resigned because he did not wish to face the risk of disciplinary sanction following a hearing. Serious allegations were made against him. He said that he lived in a small professional world and he feared for his reputation whatever the outcome of the disciplinary hearing, although he suspected he would be dismissed. He did not wish the respondent's contractual provisions, policies and procedures to run their course.

4.11. I have found that the respondent did not breach the claimant's contract. I find furthermore that the claimant resigned rather than face a disciplinary hearing because he did not wish to take the risk to his reputation. He anticipated the worst possible outcome yet there is no evidence before me to suggest that the outcome was predetermined or that the claimant would have necessarily been dismissed. In the light of the allegations against him and the evidence that was sent to him with the invitation letter he would have had an uphill struggle in defending all the allegations but that is not to say he could not do so, or that he could not put forward mitigating circumstances which may have saved his employment. The fact that he might struggle to exonerate himself does not mean that the respondent has breached the implied term of trust and confidence when it has acted properly throughout.

Employment Judge T.V. Ryan  
Date: 15.10.19

JUDGMENT SENT TO THE PARTIES ON

20 October 2019

FOR THE TRIBUNAL OFFICE