EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Oxley	**v**	Change, Grow, Live

Heard at: Birmingham Employment Tribunal **On**: 26, 27, 28 February 2020

Before: Employment Judge Johnson

Appearances
For the First Claimant: In person
For the Respondent: Mr Maxwell (counsel)

JUDGMENT

1. The complaint of constructive unfair dismissal is not well founded and is dismissed. This means that the claimant was not constructively dismissed by the respondent.

2. The complaint of breach of contract is not well founded and is dismissed.

3. The complaint of non-payment of annual leave is not well founded and is dismissed.

REASONS

Background

1. The claimant was employed by the respondent as a recovery coordinator from 1 April 2015 until 21 August 2018 when he resigned.

2. A complaint of constructive unfair dismissal, breach of contract (wrongful dismissal) and non-payment of annual leave entitlement was presented to the Tribunal following a period of early conciliation from 15 November 2018 until 15 December 2018 on 14 January 2019.

3. A response was presented on 12 February 2019. The respondent denied that it was in breach of the claimant's contract of employment, that he was not entitled to resign.

Additionally, they asserted that had the claimant not resigned, the disciplinary process that he was subject to at that time would have resulted in his dismissal for the potentially fair reason of conduct. For these reasons, they also argued that the other presented complaints must also fail.

4. The case was subject to limited case management. The ET2-UDL plus letter sent to the parties on 17 January 2019 provided standard case management orders. The hearing which was originally listed to take place on 16 and 17 September 2019 was postponed and re-listed to 26, 27 and 28 February 2020 at the request of the parties in order that there would be sufficient time in which to hear the case. This was appropriate, although there was unfortunately insufficient time available to me during this 3 day listing to provide an oral judgment.

The Evidence Used in the Hearing

5. For the claimant, I heard evidence from Mr Oxley alone. He did not call any other witnesses to give evidence. It was recognised that the claimant was un-represented, and I took into account the principles of the overriding objective under Rule 2 of the Employment Tribunals Rules of Procedure. This meant that I allowed him regular breaks when he required them, and gave him additional time to collect his thoughts when giving evidence and preparing his questions for cross examination and final submissions. The claimant also explained that he had suffered from several mental health issues including generalised anxiety disorder and post traumatic stress disorder (PTSD). I took these issues into account in accordance with the principles set out in the Equal Treatment Bench Book. In particular, I recognised that he may have felt vulnerable at the hearing and I made allowances for the way in which he answered the questions put to him by way of cross examination.

6. For the respondent, I heard from Anji Burford (First Investigating Officer), Kerry Trinder (Head of Service and First Disciplinary Hearing Officer), Liz Mack (Director for London & South Region – First Appeal Hearing Officer), Matthew Rosser (HR & Operations Partnership Lead – Second Investigating Officer) and Lisa Collier (Services Manager – Manchester, Second Disciplinary Hearing Officer).

7. This was a case where two lever arch files had been prepared by the respondent and which contained documents relied upon by both parties. Little additional documentation was added during the proceedings. The claimant did seek to provide additional documentation by email following the conclusion of the hearing on 29 February 2020 and which he asked me to consider before reaching my judgment. However, I asked the

Tribunal administration to contact him and explain that I could not accept this evidence as the parties had given their witness evidence and it would not be in accordance with the overriding objective for me to allow additional documentary evidence at this late stage. For the avoidance of doubt, these additional documents have not been included as part of my decision making and consideration of the evidence.

The Issues

Constructive Unfair Dismissal

8. Was there a breach of the claimant's contract of employment by the respondent?

9. Was that breach serious and going to the root of the contract?

10. Did the claimant resign in response to that breach and not for other reasons?

11. Did the claimant affirm the contract by delay or otherwise?

12. If the claimant was dismissed, what was the principal reason for the dismissal and was it a potentially fair one in accordance with the Employment Rights Act section 98(4) and did the respondent act in all respects within the so-called 'band of reasonable responses'?

Breach of Contract

13. To how much notice was the claimant entitled?

Unpaid annual leave

14. When the claimant's employment came to an end, was he paid all of the compensation he was entitled to under regulation 14 of the Working Time Regulations 1998?

Findings of fact

15. The respondent is a provider of drug and alcohol rehabilitation services to vulnerable service users throughout England and Wales. These are services are provided through contracts which it enters with local authorities and commissioners of primary health care. It is understood that as the respondent is a registered charity, it is a company limited by guarantee and is not required to include the word 'Limited' after its name.

16. The claimant was employed by the respondent as a recovery worker at the respondent's Birmingham 'project'.

Relationships between employees and service users

17. It became clear to me during this case that the service users whom the respondent supported would come from a range of backgrounds. However, it is fair to say that the majority of those whom it supported had a tendency to have chaotic and problematic lifestyles. While these lifestyles could have been caused by many external factors, there can be no doubt that they were vulnerable and would sometimes struggle with making the right choices which were best for them and with those whom they came into contact with. Some were or had been involved with criminal activities, were close to people involved in these activities. It is far to say that many were vulnerable adults and that agencies who dealt with them had to recognise that safeguarding issues were a major concern. Safeguarding concerns could also apply to employees, especially when working alone or when encountering service users when not at work.

18. The respondent recognised the importance of good boundaries between its employees and service users and the hearing bundle contained evidence of 'Boundaries' training which was provided to employees and which the claimant confirmed he attended. The respondent's code of conduct which applied to all staff made clear that they: *'Must be particularly careful about the nature of their relationship with residents or clients, and must never have a relationship of a sexual nature with a service user'.* An '*Awareness of power balance'* between employees and service users was also emphasised.

19. It is also noted that the Job Description for Recovery Coordinator at section 5.3 and entitled '*Boundaries and Behaviours'* stated that an employee's commitment to the respondent was *'Observing professional integrity in relationships with service users, peers and other relevant professionals'.*

20. The summary of the staff Code of Conduct stated that all staff; *'…must be particularly careful about the nature of their relationships with residents or clients, and must never have a relationship of a sexual relationship with a service user;'.*

21. The claimant appeared evasive in his answers when questioned by Mr Maxwell regarding his training. However, I am satisfied on a balance of probabilities that he was aware that he had to exercise care in managing his relationship with service users. He was also aware that there was a balance of power exercised by employees in supporting service users and staff needed to consider the risk of misusing that power when working with

them. He was aware of the respondent's Lone Working Policy and the risk assessments to be considered when being approached by service users when he was not on shift or outside of working hours. This included avoiding unnecessary contact with service users outside of work. I also find on balance of probabilities that in circumstances where he met service users outside of his working relationship with them, the correct practice was to request that service user contact them during working hours and that these incidents should be reported to managers. The claimant identified his familiarity and use of the Lone Working Policy in his Review documentation contained within the bundle.

The claimant's relationship with 'service user A'

22. On 19 April 2017, the claimant attended an investigation meeting under the respondent's Disciplinary Policy with Tanya McGougan. This was as a result of a complaint made by a third party who said that he was at the home of 'SG' and that SG had told her that: *'her drugs worker 'Steffan'…often, calls round with Subutex and money'.* I understood that SG was a service user of the respondent. The claimant strongly disputed that this allegation was correct. He confirmed that when SG was completing her 'detox' and he had visited her, but that he had not provided her with any 'illicit' drugs or medicine. What was important however, was that 'SG' was also a service user known by the respondent as 'service user A' and with whom the claimant had struck a relationship outside of the workplace.

23. There was some confusion as to when this informal relationship began and for how long it took place. An email sent by the claimant on 27 March 2018, suggested that he met service user A at a Narcotics Anonymous Meeting in March 2017. He said that he had called himself '*Tom for anonymity'*. This date would clearly have presented a problem for the claimant as the note of the investigation meeting on 19 April 2017 suggests that he did not disclose his friendship with service user A to Ms McGougan.

24. The claimant suggests in subsequent documents (including answers given to questions raised by Ms Collier at the second disciplinary hearing), that he first met service user A at a later date during May 2017. The claimant did say during cross examination, that he had difficulty in remembering dates. However, I find that on balance of probability, his earlier email of 27 March 2018 gives the correct date when he first met service user A at the Narcotics Anonymous meeting. His recollection at this earlier time would have in all probability have been more accurate than later on. However, even if I am wrong in reaching this conclusion and he had not met service user A until May 2017, his meeting with Ms McGougan on 19 April 2017 remains relevant.

This means that he would have been placed on notice of the risks involved in having relationships with service users outside of work. This should have given him 'an advanced warning', that engaging with service user A or any other service users while alone and off duty, was not a good idea.

25. On 16 August 2017, Debbie Walsh who was an Administrator with the respondent, emailed Ms McGougan to say that the she had just taken a call from the sister of service user A complaining about one of their workers who '*goes under the alias of Tom'*. She claimed that he had taken service user A off to live with him, had taken her phone, was injecting her with heroin and writing 'scripts' (which I understood to mean prescriptions) for the medicine Subutex.

26. That same day the claimant called the respondent to ask for emergency sick leave as it had taken him too long to see his GP that morning. However, the next day he called Nicola McAlistair his manager, to say that he wasn't coming into work because '*people were after him'*. He did not mention his contact with service user A. It was not until 18 August 2017 when Ms McAlistair was able to properly talk with him. The record of the conversation states that the claimant told Mrs McAlistair that he was frightened of a man who was accusing him of '*seeing girls, drugging them and having sex with them'.* Ms McAlistair was understandably concerned. However, when she asked him to tell her whose these people were, he would not do so. He was also recorded as having said *'My morale* (sic) *is not to go to the police.'* He also denied that he was in a relationship with a service user, despite the allegation having been made.

27. While I recognised that the claimant found this line of cross examination difficult, I find on balance of probabilities that between 16 and 18 August 2017, he had become aware that his friendship with service user A had become incompatible with his job. He called in sick to work because he knew a call would be made by the complainant. He was avoiding engaging with work and he did not want to name anyone to the Ms McAlistair or the Police because he knew that he would have to reveal his friendship with service user A since March or May 2017. He knew that this had taken place contrary to the respondent's policies, his training and without him having alerted his management to the meeting at Narcotics Anonymous.

<u>The suspension of the claimant</u>

28. The claimant did speak with Sian Warmer and Frankie Holden by phone on 21 August 2017 to discuss the complaint which had arisen. During this conversation, the claimant confirmed that he had met service user A at Narcotics Anonymous, that she was '*having a hard time'* and that there

was '*nothing sexual going on'*. He referred to her boyfriend who had been released from prison under licence and he '*intent on ruining my life'.*

29. Following this conversation, Ms Warmer called the claimant again to explain following a discussion with the respondent's Human Resources ('HR') team, it was necessary for him to be suspended from work during an investigation into the allegations made against him. Joe Mottershead, the respondent's HR advisor sent a letter to the claimant on 25 August 2017 entitled 'Precautionary Suspension'. It identified allegations of:

- *You have been in an inappropriate relationship with a service user;*
- *You have been providing illicit drugs to a service user;*
- *You are absent without leave and failing to maintain contact with your manager;*
- *Failure to provide up to date contact details when asked by management'*

He was specifically reminded that for the period of the suspension he should refrain from contacting service users.

<u>The investigation by Ms Burford</u>

30. Ms McAlistair wrote to the claimant on 24 August 2017 and asked him to call her as she was concerned about the absence of communication from him. A conversation subsequently took place with the appointed investigating officer Anji Burford on 6 September 2017 where he explained to her that he was unable to attend a planned investigation meeting. On 22 September 2017, she wrote to him and suggested a telephone interview instead, or alternatively asked him to provide answers to an attached list of questions by 28 September 2017.

31. The claimant replied to Ms Burford on 28 September 2017. In his reply to question 11 of Ms Burford's list, he said that he had worked with service user A for a number of months and when he met her again at the Narcotics Anonymous meeting '*a couple of months ago'*. He said

'Service user A wanted us to stay in contact as we got on well. I advised her that I would need to check policy to see if I am allowed to be friends with a service user, especially because I had once been her worker, although this was a number of months earlier. I looked through the policies and saw no mention about not being ok to be friends with a service user so I took it to mean it must be ok so we have spent time as friends since.'

32. He also said that:

'*I am allowed to be friends with a service user and did not feel that I should stop being friends just because a jealous ex is going to dictate to me who I can or cannot be friends with and threaten me about it. I have asked repeatedly for clarification on the policy of being friends and have not been sent a policy that states it is not within the cgl [respondent's] rules.'*

33. The claimant was at pains to suggest that his training only led him to believe that a 'relationship' with a service user was only inappropriate where it related to a *sexual* relationship. I find that the claimant did not *genuinely* believe he could distinguish the respondent's policy in this way. The respondent was at pains to ensure staff knew about the imbalance of power between a service user and an employee. The claimant asserts in his witness statement and his reply to Ms Burford that he called the respondent's HR concerning his meeting with service user A at Narcotics Anonymous. However, I was not shown any documentary evidence confirming that such an approach took place. The claimant was not able to provide a name of the HR officer with whom he would have spoken to when he made the alleged call to HR to discuss the appropriateness of this relationship, platonic or otherwise. I therefore find that on balance of probabilities, the claimant did not make such an approach to the respondent's HR. Instead, he decided to interpret the respondent's policies in such a way which confirmed his belief that he was not doing anything wrong in having a relationship with service user A away from work.

34. On 9 October 2017, Ms Burford arranged a meeting with the claimant away from the respondent's workplace at a branch of Costa Coffee in Bearwood, Birmingham. In her letter to him dated dated 31 October 2017, she enclosed two copies of the minutes which she took at the meeting and requested that the claimant sign and return one copy. A note taker was not available to attend the meeting which meant that the 'minute' was compiled from Ms Burford's own notes. In these notes the claimant argued that the respondent's policy did not set out that every sort of relationship with a service user should be disclosed to managers and instead claimed that it only related to a '*physical, sexual relationship'.*

35. The claimant was very clear during the hearing of the way in which he saw his relationship with service user A. He told me that she *'…was my friend in her hour of need, I did what needed to be done'*. He suggested that Ms Burford had told him that '*…of course you could be friends',* despite this statement not being in the minutes. He seemed to contradict himself during this meeting and unlike his earlier telephone call with Ms McAlistair, downplayed the threats that he said had been made against him. He also said that he could not share his concerns with his colleagues at the respondent because he could not trust them. Strangely, during cross examination he described Ms Burford as '*a sneak',* although he did

not elaborate upon what he meant by this statement. Ms Burford did give witness evidence during the hearing and I found her to be credible and reliable. The claimant challenged the notes which she produced of their 'Bearwood meeting' in his email to Ms Burford on 1 November 2017. However, having heard the evidence of the two witnesses, I find that Ms Burford's note was a fair reflection of what was discussed during the meeting. In challenging her notes, the claimant was attempting to change the record of what was said to make his responses to her questions appear less prejudicial towards him.

36. Ms Burford interviewed service user A on 16 November 2017. While it is not suggested that the (what can only be described as incredible), allegations which she made against the claimant were true, the interview record does illustrate that she did stay at his home address. The claimant accepted that service user A did stay at his home and that this took place in October 2017. This would of course have taken place after he had been warned about his relationship with service user A *and while he was suspended*, (my emphasis). Perhaps most importantly, Ms Burford's interview with service user A illustrated perfectly the real risks that persons working in drug's rehabilitation face when they develop a friendship with a service user outside of work and the reason why the respondent's policies were so important.

37. Ms Burford continued with her investigation following her meetings with the claimant and service user A. While the claimant was subject to welfare checks while suspended, he felt that they were not being met at the correct times and he raised a grievance on 13 December 2017.

<u>The delay to Ms Burford's investigation report</u>

38. The case was referred to the Birmingham City Council Local Authority Designated Officer ('LADO') who deals with safeguarding matters. Until this matter was resolved, the disciplinary investigation could not proceed. No further action was required against the claimant following the referral to the LADO and on 6 March 2018, Ms Burford was able to complete her investigation report which identified the following allegations against him:

- *'Allegation 1:….there is no factual evidence to state that there is a sexual relationship between [the claimant] and Service User A. However…there has been a friendship and it concerns me that [the claimant] felt following the first allegation that was made in January 2017 that [the claimant] felt there was no need for him to change his behaviour or disclose his friendship with Service User A'*
- *'Allegation 2: You have been providing illicit drugs to a service user. …there is nothing that factually proves the allegation.*

- *'Allegation 3 and 4: You are absent without leave and failing to make contact with your manager. Failure to provide up to date contact details when asked by management.'*

Ms Burford's recommendation was that the claimant should be subject to a disciplinary hearing in respect of Allegations 1, 3 and 4.

The first disciplinary hearing

39. On 8 March 2018, the claimant was invited to a disciplinary hearing on 13 March 2018 by a letter sent by Kerry Trinder who was a Head of Services. A copy of Ms Burford's report was sent to him together with all the appendices containing the investigation documentation to which she referred. However, on 12 March 2018, the claimant emailed the respondent to say that his GP had signed him off work for 4 weeks and recommended that he should not take part in the disciplinary process. Mr Mottershead from HR then wrote to the claimant on 21 March 2018 and agreed to postpone the hearing while the claimant recovered. There then followed a series of emails between the claimant and the respondent concerning adjustments that could be made to support him at the disciplinary hearing.

40. The eventual outcome of this correspondence was an agreement that the claimant would not need to attend the disciplinary hearing and the chair of disciplinary panel would write to the claimant with questions that he or she wanted to him to answer. At the request of Mr Mottershead, the claimant provided a statement before the hearing took place on 27 March 2018, for the chair to consider.

41. Ms Trinder chaired the hearing and in the meeting note dated 27 March 2018, she confirmed that she had read the claimant's statement. She also heard from Ms Burford, who as investigating officer presented the findings of her investigation report. She noted that the claimant was advised not to have contact with service user A and yet continued to do so. Ms Trinder was taken to texts sent to service user A by the claimant. Reference was also made to texts which were copied from the claimant's phone and which had not been disclosed until shortly before the hearing. The meeting appeared to be very thorough. Upon its conclusion, Ms Trinder confirmed that she would ask the claimant to answer a list of 39 questions which she had arising from the disciplinary hearing and these were sent to him on 6 April 2018. One of the questions raised by Ms Trinder referred to the claimant's email of 27 March 2018 where he states that he met service user A at Narcotics Anonymous in March 2017. She noted that the respondent's records suggested that the claimant was service user A's keyworker for 12 to 18 months until 2 February 2017 and sought

clarification as to the length of time between the keyworker relationship ending and the start of the personal relationship.

42. The claimant replied on 11 April 2018. His reply was lengthy and some 13 pages in length. The claimant informed Ms Trinder that he and met service user A at a Northfield Narcotics Anonymous meeting in March 2017 which was several months after he had ceased to be her recovery coordinator. It is noticeable that within this reply, he maintained his argument that the training documentation did not give advice…'*about what to do if you are friends with someone who is in treatment. It did not give any advice around reporting procedures or policies we should be aware of regarding people we know or do not directly work with'.* During cross examination, the claimant initially denied that he had taken advantage of his position as recovery coordinator for service user A. However, he ultimately argued that the situation was unfair and did not allow him to be friends with people whom he met. I took this to mean that the claimant accepted that what he did was contrary to the respondent's policy on relationships with service users and instead, he wanted to assert that the policy itself, was not fair.

43. Ms Trinder conducted a telephone conversation with the claimant on 26 April 2018. She explained that her decision was to dismiss the claimant with immediate effect and she offered him a right of appeal. She explained that her decision had been based upon the information which the claimant had provided confirming an inappropriate relationship between him and service user A. Her decision was confirmed in a dismissal letter dated 30 April 2018. The key finding within this letter related to 'allegation one', which was the inappropriate relationship between the claimant and a service user. Ms Trinder was particularly concerned that the claimant had left her with concerns regarding his ability to maintain healthy boundaries and appropriate relationships with service users both for his own safety and for the safety of those around him.

44. She set out the evidence upon which she had reached this decision. She found that the claimant had asked service user A to stay at his home address, provided an inconsistent timeline concerning his friendship with service user A, failed to seek advice from management concerning service his friendship with user A and placed himself and other employees at risk. It was the claimant's inability to distinguish what was an appropriate friendship, which appeared to be a particular concern for Ms Trinder. She acknowledged that the respondent's policy did not specifically state that employees could not be friends with service users. However, she believed that where one person in a friendship is accessing services for addiction and the other person has had a professional relationship with them, it will be by its very nature, an unbalanced and inappropriate friendship. She referred to the respondent's code of conduct and she was satisfied that it

was sufficiently clear in saying that employees must be careful about the nature of their relationships with residents or service users and that they must never allow themselves to be compromised by their relationship with service users. Her finding that the claimant continued to maintain his friendship with service user A and did not seek support from his colleagues, suggested there was no reflection or awareness on his part. As a consequence, Ms Trinder believed that dismissal was a reasonable sanction and was unable to replace this decision with a final written warning.

The first appeal

45. The claimant presented an appeal against the decision to dismiss him by letter. The reasons for his appeal were that the investigation and disciplinary hearing were not conducted properly or in accordance with the ACAS code of practice. He also felt that the time taken to complete the investigation and disciplinary process had been unreasonable and that the decision to dismiss was not fair. The appeal letter was lengthy and contained a lot of detail. Despite the claimant's evidence that his English was not particularly good, the letters which he produced suggested that he was sufficiently articulate and intelligent to consider the issues which were being put to him during the disciplinary process.

46. The appeal hearing took place on 22 May 2018. The appeal was heard by Ms Mack. She had been appointed to chair the appeal hearing because she was based in London and was therefore not connected with the respondent's West Midlands area. On 21 May 2018, the claimant advised that while he wished to attend the appeal, he was currently too unwell to attend. It was initially agreed that the claimant could speak to Ms Mack by telephone instead. However, he then emailed to say that he was too unwell to do so and instead he was asked to provide answers to a list of questions which she had prepared concerning his disciplinary process. The claimant complied with this request and provided detailed answers.

47. Ms Mack produced her decision letter on 1 June 2018 which dealt with the claimant's grounds of appeal. She confirmed that there was a delay in the investigation process being concluded and the disciplinary hearing taking place. She mentioned that the original allegation was made on 16 August 2017 and that the claimant was contacted on 17 and 18 August 2017 with concerns being raised about his welfare. A finding of fact meeting took place on 21 August and which was carried out by telephone because the claimant did not feel fit enough to attend work. What this did do however, was ensure that the claimant was informed of the allegation as quickly as possible and allowed to give his version of events to the respondent within a few days of it being made.

48. Ms Mack acknowledged that there was a delay due to the police becoming involved with the case. This involved the police attempting to make contact with the claimant and followed by a requirement to notify the LADO. She explained that the LADO only confirmed that the respondent could reinstate the HR processes taking place on 17 February 2018.

49. Ms Mack also explained that it was clear from the terms of the suspension communicated to the claimant that while he could not speak with colleagues, he could contact his welfare manager or investigation manager. In terms of welfare, she considered his allegation that it was inadequate and listed the log of welfare contacts by the initial manager who was appointed, Nicola McAlistair during September and October 2017. She noted that Ms McAlistair was subsequently absent due to sickness and annual leave. However, Paul Dempster had since been appointed, whose log she had not received at the time of the report. While it is unfortunate to have a change in the welfare point of contact during the suspension, I did note that Ms McAlistair's log indicated that it was her contacting the claimant and he was not chasing her for a reply. It certainly did not appear to be the case that the respondent made it difficult for welfare contact to take place.

50. Ms Mack did decide that while there was evidence of gross misconduct on the part of the claimant, it was appropriate for the disciplinary process to be re-investigated and re-heard. This was because she concerned that the claimant did not have the specific allegations put to him concerning his understanding of what was an inappropriate relationship. in making this decision however, she did caution the claimant that it was not unreasonable for the respondent to assume an understanding of appropriate boundaries by staff. Nonetheless, she decided that it was appropriate for the allegations will be re-investigated on the following basis, (I paraphrase):

    a) He had been in an inappropriate relationship with a service user;
    b) He allowed himself and his position to be compromised by his relationship with a service user;
    c) There was a serious contravention of boundaries by him in this matter;
    d) That he failed to disclose his relationship with a service user to the respondent, which potentially caused a detriment to the service user and the respondent and which constituted a breach of trust and confidence and a failure to safeguard service users; and,
    e) That he breached the respondent's information governance framework by accessing the 'CRIIS' records inappropriately.

51. Ms Mack said in her letter that she was satisfied that the respondent properly considered the impact of investigation on the claimant's mental health and supported in the reasonable adjustments were put in place.

In relation to the ground of appeal concerning the fairness of the decision to dismiss the claimant, Ms Mark noted that the claimant's friendship with service user A was something which could amount to gross misconduct. While the claimant was reinstated, Ms Mack determined that the claimant would be suspended on full pay. Accordingly, while her decision meant that it was as if the claimant had not been dismissed at the first disciplinary hearing, the disciplinary process was still continuing and so was the suspension.

The second disciplinary investigation

52. The respondent then appointed Matthew Rossor as the investigating officer. He was also based in the respondent's London area and was not connected with its Birmingham office. He sent a letter to the claimant on 20 June 2018 confirming that he wished to meet with the claimant on 6 July 2080 at the respondent's Birmingham premises. He confirmed that the claimant remained suspended on full pay. Mr Rossor then wrote to the claimant on 4 July 2018 as he had not received a reply to his original letter. The claimant contacted Mr Rossor on 5 July 2018 and explained that he was having difficulty with stress and anxiety. He therefore asked if he could communicate with Mr Rosser in writing.

53. Mr Rosser emailed the claimant on 10 July 2018 confirming that he would be willing to investigate the matter by way of writing and provided him with nine questions which he required the claimant to answer.

54. The provided answers to the nine questions in his reply on 12 July 2018. Mr Rosser then returned to him with further questions which sought further clarification to his answers on 19 July 2018 and Mr Oxley replied on 23 July 2080. Mr Rosser was then able to complete a disciplinary investigation report on 31 July 2018 and this was shared with the claimant. The report identified training which claimant had received and the case should proceed to a disciplinary hearing concerning all five allegations. Mr Rosser's conclusion was that he felt there was enough evidence available to support the allegations. He went on to identify areas of concern regarding the claimant's understanding of appropriate boundaries and the replies and mitigation that the claimant had provided.

Second disciplinary hearing and aftermath

55. The claimant was invited to a disciplinary hearing on 21 August 2018 in a letter dated 14 August 2018. The letter set out the allegations and confirmed that the hearing officer would be Louise Baker who was a Head of Service from the respondent's Manchester office and not familiar with the Birmingham office.

56. The claimant initially confirmed that he could attend the hearing on 20 August 2018. However, he then sent an email before the hearing took place on 21 August 2018 (dated 20 August 2018), which informed the respondent that he was resigning from his employment and that he would not attend the hearing. Ms Collier was already travelling to the appeal hearing in Manchester and due to the seriousness of the issues being considered, she felt it was necessary to hear the disciplinary case in any event.

57. The claimant's letter of resignation was lengthy but in summary, he stated that he felt his relationship with the respondent had *'…broken down to a point where all trust and confidence has gone and I feel that I can no longer work for CGL.'* He went on to say that '*I consider my resignation as being constructively dismissed and will make a claim to the employment tribunal.'* His letter explained that the length of his suspension was too long, that he genuinely didn't know that being friends with service users *'…could be seen as inappropriate',* that the allegations about not reporting the matter to the respondent was *'ridiculous'* and that his position had *'not been compromised whatsoever'*. He went on to say that *'[a]s far as learning from this experience, and insight. [sic] I maintain that I followed advice from management and there is very little to learn'.* In summary, the claimant declined to acknowledge any failings on his part and digressed into lengthy discussions as to why his behaviour in relation to service user A was reasonable.

58. Ms Collier decided that she could not conclude her decision making at the second disciplinary hearing without having first given the claimant the opportunity to answer a number of questions relating to his friendship with service user A and the way in which he accessed the respondent's CRIIS records concerning service user A. The claimant replied by 31 August 2018 as requested by Ms Collier. He disputed that he had *'…contravened the Code of Conduct about boundaries as there are no details in the policy that outline boundaries.'*

59. He also explained that *'I did disclose my friendship with SUA to management when the allegations came to light and was told it was ok by everyone I asked including HR.'*

60. He argued that he *'…did not breach data protection by accessing SUA's records as I have always been told that staff can access files on a "Need to know basis".* He informed Ms Collier that he was simply looking up an appointment time for the claimant and argued that other staff had do this *…umpteen times'.* He did not seem to be able to distinguish between enquiries made by other staff for a *'client'* of the respondent in the context of a professional relationship with a service user, rather than his circumstances which was as a friend.

61. What was clear in this reply was that the claimant did not feel that he was doing anything inappropriate and failed to acknowledge that he should have behaved differently upon reflection. He acknowledged his friendship with service user A, did not distinguish between the different relationship that existed between a friend and a client and the potential for a conflict of interest. Finally, he did not dispute that he accessed the CRIIS system as a favour for a friend.

62. She sent a letter to the claimant on 7 September 2018 confirming the disciplinary hearing outcome. Her conclusion was that the claimant had been involved in an inappropriate relationship with a service user and in doing so, had committed a serious contravention of boundaries, (see allegations (a) and (c) in paragraph 50 above). She noted that the claimant did not understand the difference between being friendly and being friends and that he failed to see that he was doing anything wrong.

63. She found that the claimant had allowed himself and his position to be compromised by his relationship with a service user (allegation (b) above). She also upheld the allegation that he failed to disclose risks identified to a service user, thus potentially risking detriment to a service user and the respondent, (allegation (d) above).

64. Ms Collier also found that the claimant had accessed service user A's records on the respondents CRIIS system inappropriately, (allegation (e) above). In relation to this final allegation, she noted that the claimant had accessed service user A's CRIIS records on eight separate occasions between 19 June 2017 and 17 August 2017. Some of these entries were made very late in the evening or shortly after midnight and Ms Collier found that these would have taken place at home. She also noted that when making these entries, the claimant had not made a record that he had accessed service user A's notes explaining the reason for the entry.

65. As a consequence, she determined that all five allegations against the claimant were proven. She recognised that the claimant had already resigned prior to the second disciplinary hearing taking place. However, had the claimant not resigned, she confirmed that the claimant would have been dismissed in any event due to gross misconduct. and decided that the claim should be dismissed. Although this letter offered the claimant the opportunity of an appeal, he decided not to take matters any further.

66. A further incident took place on 10 September 2018, when the respondent's HR replied to an emailed query from the claimant. The email refers to the claimant's question where he said that he had met someone who was being treated by the respondent and where he queried whether it was appropriate for the relationship to take place.

Louise Baker who was the HR officer who replied to the claimant, explained that his line manager would need to know which service was being accessed by the service user, how the claimant met this person and possibly other relevant matters. She reminded him of his duty to advise a line manager of any personal relationships in order that appropriate safeguards and information security processes could be followed. Ms Baker concluded that as the claimant was currently subject to a disciplinary process concerning '*service user relationships'*, he discuss his queries with Ms Collier as chair of the second disciplinary hearing and his welfare officer, Shaun Kennedy.

67. The claimant raised this request on 3 September 2018. Although the claimant had resigned the previous month, Ms Collier's letter had been sent a few days earlier and it is likely that HR were still treating the claimant as an employee, especially given the nature of his query and the possibility that he might still bring an appeal. It seems likely that the claimant raised this email in attempt to 'catch out' HR and obtain a response that was inconsistent with the respondent's asserted position. I did not hear any evidence to suggest that the claimant had actually met a service user following his resignation and it is unlikely that this was a genuine enquiry. While it is not clear why the claimant decided to make this enquiry, in this instance, HR's reply to the claimant was both appropriate and consistent with its asserted policies in relation to relationships with service users.

68. I did not hear any specific evidence from the claimant concerning his complaints of breach of contract or unpaid annual leave. However, in considering this case, I assumed that these claims may become relevant in the event that a finding of constructive unfair dismissal was successful and at the point when it became necessary to determine remedy.

The Law

Constructive unfair dismissal

69. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

70. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:

(i) ***that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign***,

(ii) ***that the breach caused the employee to resign – or the last in a series of events which was the last straw;***

(iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

71. All contracts of employment contain an implied term that there will exist mutual confidence and trust between employer and employee: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores plc [2002] IRLR 9.

72. In Aberdeen City Council v McNeill [2010] IRLR 375 the Employment Appeal Tribunal held that the implied term of trust and confidence was mutual; neither the employer nor the employee would, without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The Employment Appeal Tribunal ruled that if the employee was, at the time he resigned, in breach of that implied term, he is in repudiatory breach and not entitled to terminate the contract on the basis that the employer had itself breached that implied term. This case was determined by reference to Scottish law and the decision of the Employment Appeal Tribunal was overturned by the Inner House of the Court of Session; [2013] CSIH 102.

73. In Croft v Consignia plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.

74. It is open for an employer to argue that, despite a constructive dismissal being established by the employee, that the dismissal was nevertheless fair. The employer will have to show a potentially fair reason for the dismissal and that will be the reason why the employer breached the employee's contract of employment; see Berriman v Delabole Slate Ltd 1985 ICR 546 CA. The employer will also have to show that it acted reasonably. If an employer does not attempt to show a potentially fair reason in a constructive dismissal case, a Tribunal is under no obligation

to investigate the reason for the dismissal or its reasonableness; see Derby City Council v Marshall 1979 ICR 731 EAT.

Discussion and Analysis

Was there a breach of the claimant's contract of employment by the respondent?

75. The claimant's decision to resign was communicated in his letter dated 20 August 2018 (and sent on 21 August 2018). It was a lengthy letter and made clear that not only was he resigning, but that he was intending to present a complaint to the Employment Tribunal and would be claiming constructive unfair dismissal.

76. The claimant argued that both the investigations had resulted in him being suspended for over a year which he felt was too long. He also felt that the second investigation was a complete set up with the allegations being varied so that it would be easier for the respondent to prove them. He argued that the respondent's policies did not say that employees could not be friends with service users and used this omission as a means of dismissing employees 'at will'.

77. The claimant's decision to resign from his employment with the respondent took place during a lengthy disciplinary process arising from his relationship with service user A. The decision to subject the claimant to a disciplinary investigation was in itself reasonable. There was a clear allegation of a relationship between the claimant and service user A and the claimant accepted that a relationship existed. The issue primarily involved the way in which the claimant interpreted the respondent's policies concerning relationships with service users and his belief that restrictions were only placed upon sexual relationships.

78. As this investigation related to a matter which had involved questions of safeguarding and the claimant's unwillingness to acknowledge any failure of judgment on his part, it is understandable and indeed reasonable for the respondent to suspend the claimant while the investigation took place. The claimant was unwell during the suspension, but he also failed to acknowledge that he had done anything wrong and taking into the safeguarding issues involved, it was reasonable for the suspension to continue.

79. In broad terms, it appears that a fair and proper disciplinary process took place. There was a decision to suspend, the claimant was informed of the reasons for the suspension and he was then allowed to participate in a disciplinary investigation. Due to health concerns and anxieties raised by the claimant, Ms Burford was willing to interview him in a venue which he felt was not connected with work. While the use of a branch of Costa Coffee for a sensitive meeting of this nature might not seem to be the best

choice of venue, I acknowledged that Ms Burford was attempting to be flexible and accommodate the claimant. Indeed, she was willing to conduct the meeting without her colleague who was designated as a note taker and it did appear that she was trying to ensure that any delay was minimised in this case.

80. There was a disciplinary hearing arranged and the claimant could have attended this meeting, but did not feel sufficiently well to attend. Instead, the hearing officer Kerry Trinder was willing to conduct the hearing with the claimant providing a statement and answers to questions that she sent to him. While the claimant had initially asked for the hearing to be postponed until such time as he was fit enough to attend, the disciplinary process had been in progress since August 2017 and the disciplinary hearing did not take place until March 2018. It was understandable that the respondent wished to resolve this matter without further delay and it was reasonable to do so given that the claimant remained suspended from work.

81. The claimant was given an opportunity to appeal the decision and the respondent behaved reasonably in allowing the claimant to set out his grounds of appeal and for the hearing to be heard by Ms Mack who worked for the respondent at another location. The respondent was clearly aware of the need for the appeal to heard by someone independent of the disciplinary process which had already taken place.

82. The appeal took place shortly after the disciplinary hearing in May 2018, but due to the claimant's continued ill health, it was not possible for him to attend the appeal hearing. Ms Mack adopted the approach used by Ms Trinder at the original disciplinary hearing and provided the claimant with written questions for him to answer in order that the appeal could proceed. The claimant was able to provide detailed replies and it enabled Ms Mack to assess the appeal and provide a lengthy decision by 1 June 2018.

83. Ms Mack noted that the claimant had received the pack of evidence to be used at the disciplinary hearing and provided considerable detail in her decision explaining the welfare support that he had been provided with. She was very reasonable in how she approached the appeal and perhaps went further than she might need to have done by giving the claimant in her words: *'the benefit of the doubt',* with regard to way in which he was questioned by Ms Trinder on the appropriateness of relationships. She then went on to order a fresh disciplinary process considering revised allegations. This did add delay to the process, but it also allowed the claimant a second chance to put forward his case. It could perhaps be argued that the respondent was simply trying to ensure it corrected mistakes which it had made in its process. However, the first disciplinary process appeared to be carried out in a fair and reasonable way and even the claimant's inability to attend the hearing was dealt with in a

proportionate way. It did not appear to be a complete 'set up' as the claimant suggested in his resignation letter. The claimant was in effect being given a second opportunity to convince the respondent that he understood its policy concerning relationships with service users and that he had not behaved inappropriately with regards to how he interpreted it.

84. This second disciplinary process was progressed in a swift and reasonable way with Mr Rossor and Ms Collier being appointed from outside of the Birmingham office. The investigation and hearing took into account the claimant's difficulties in attending meetings and the second disciplinary hearing was arranged relatively quickly and was due to take place on 21 August 2018, when the claimant decided to resign.

85. The claimant was correct in saying that the disciplinary process had involved considerable delay and he had been suspended for a year when he decided to resign. However, the claimant experienced sickness during this suspension and it was difficult to contact the claimant from August 2017 onwards. There was a delay in the claimant being able to meet with Ms Burford. Welfare officers were appointed and attempts were made on a regular basis to contact the claimant. The respondent's HR and managers attempted to ensure that disciplinary process progressed quickly and this included the imaginative solution of relying upon written questions being sent to the claimant in order that he could participate in the disciplinary and appeal hearings without him attending.

86. There was a significant delay caused by the reference of the case to the LADO. While delay is problematic in a disciplinary process, there can be no doubt that safeguarding was a matter of paramount importance and a reference was unavoidable. Multi agency meetings inevitably involve delay as they require the attendance of a range of specialists from across the public sector and this was a failing on the part of the respondent. This resulted in a delay from November 2017 to February 2018

87. While it was undoubtedly a stressful time for the claimant, I do not accept that the respondent's conduct in the disciplinary process or specifically, the delay in the disciplinary process amounted to a fundamental breach by the respondent to the claimant's contract of employment. In his witness statement, the claimant felt that he had lost all trust and confidence in the government. He may have had concerns that his suspension would have impacted upon his credibility in the workplace, but the suspension was appropriate taking into account the safeguarding issues involved and the claimant's unwillingness to accept that he had behaved inappropriately. Moreover, his decision to contact service user A while suspended and to allow her to stay at his home, demonstrated that he could not return to work until the disciplinary process was resolved. The claimant did allude to health concerns, but it was clear that the respondent tried to ensure that

the claimant had access to a welfare support officer at all times during the process. He also mentioned that the respondent was putting his health and safety at risk, but during cross examination was unable to provide details of what this risk was and how the respondent failed in its duty. It was certainly clear that the claimant's managers had been concerned about the claimant from August 2017 once concerns about the situation concerning service user A had been raised.

88. Accordingly, I find that there was not breach of contract by the respondent and the claimant was not entitled to resign based upon the concerns that he raised in his resignation letter and the additional witness evidence which he gave on this matter. This is the case even if he had a genuine belief that these were concerns which were fundamental breaches of contract and which he believed entitled him to resign.

89. While it is not significant given my findings above, I do however, accept that claimant did not wait too long before resigning. This was because the concerns which gave rise to his decision to resign were ongoing at the point where he resigned and the second disciplinary process was yet to conclude

<u>If the claimant was dismissed, what was the principle reason and was it a potentially fair one?</u>

90. This is a case which involves a disciplinary process and where the claimant had been dismissed for gross misconduct following the first disciplinary hearing on 30 April 2018. He was reinstated, but following the second disciplinary hearing before Ms Collier on 21 August 2018, he was dismissed for the second time due to gross misconduct. This hearing took place on the same day as he resigned and was heard in his absence.

91. As a consequence, the respondent can demonstrate that even if the claimant did not resign, it is likely that he would have been dismissed in any event had he decided to participate in the disciplinary hearing. Ms Collier's letter of 7 September 2018 explained that the claimant had been dismissed due to gross misconduct and conduct is of course a potentially fair reason for dismissal.

92. I am also satisfied that the decision to dismiss the claimant was reasonable and in accordance with section 98(4) of the Employment Rights Act 1996. The second investigation involved a fresh and thorough investigation by Mr Rossor. Although Ms Collier conducted the disciplinary hearing in the claimant's absence, she identified a number of questions that she felt needed answering and wrote to the claimant for his answers before she reached her decision. This was even though she knew that the claimant had given notice of his resignation.

The claimant was allowed to reply to these questions and it was only at this point that Ms Collier reached her decision to dismiss him.

93. In terms of the decision to dismiss as a sanction, I am satisfied that dismissal fell within the range of reasonable responses available to Ms Collier. The disciplinary action concerned an inappropriate relationship between an employee of the respondent and a service user A. This demonstrated a lack of professional judgment and placed not only himself, but others at risk. Indeed, the issues arose during 2017 were evidence of this. However, in addition to the decision to enter into a relationship outside of work, the claimant failed to acknowledge that he was doing anything wrong and instead blamed the respondent and accused it of behaving unreasonably. Additionally, the claimant's decision to make unauthorised use of the CRIIS system in relation to service user A exacerbated a number of other serious conduct issues. Ms Collier's evidence that the breaches were so serious and the lack of insight on the part of the claimant into the seriousness of the safeguarding issues and risks involved, demonstrate that dismissal would have been within the range of reasonable responses had the claimant not resigned.

Breach of Contract and Unpaid Annual Leave

94. In the absence of the claimant providing any evidence concerning this complaint, I am not satisfied that this claim is well founded. Had the claim of constructive unfair dismissal been successful, it may have been capable of being considered as part of a remedy hearing, given that it related to notice and accrued annual leave during that period. However, this is not a relevant consideration given the above finding concerning that particular complaint

Conclusion

95. The claimant's complaint of constructive unfair dismissal is not well founded and is dismissed. This means that the claimant was not constructively dismissed

96. The claimant's complaint of breach of contract is not well founded and is dismissed.

97. The claimant's complaint of a failure to pay annual leave entitlement is not well founded and is dismissed.

Employment Judge Johnson
20 April 2020