



# EMPLOYMENT TRIBUNALS

**Claimant:**  
Mr J Smith

v

**Respondent:**  
Spelthorne Borough Council

**Heard at:** Reading

**On:** 3 and 4 February 2020

**Before:** Employment Judge Milner-Moore (sitting alone)

Observers (newly-appointed non-legal members):  
Ms F Potter  
Ms M Thorne  
Mr M Pilkington

**Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr G Burke of Counsel

## JUDGMENT

1. The claim of constructive unfair dismissal fails and is dismissed.

## REASONS

### CLAIMS AND ISSUES

1. The claimant brings a complaint of unfair dismissal and alleges that he was constructively dismissed. The following issues arise for determination:-
  - 1.1 Was the claimant dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996 (“the ERA”), i.e. did the claimant terminate the contract in circumstances in which “he was entitled to terminate it without notice by reason of the employer’s conduct”?
  - 1.2 Did the respondent act in fundamental breach of contract? The breaches of contract alleged are breaches of the implied term of mutual trust and confidence and the acts said to amount to a breach are as follows:-
    - (a) A failure in February 2017 following a review of the grade range for customer service officers (“CSOs”) to raise the claimant’s pay to spine point 22 at the start of scale 5.

- (b) A failure in April 2017 to send the claimant a letter advising of the regrading of his post to scale 3–5 when other CSOs had received their letter on 1 March 2017.
  - (c) A refusal to award the claimant a further spine point in his existing grade when other officers received a spine point in February 2017 and a further increment in April 2017.
  - (d) A failure to interview the claimant for the role of business support officer in February 2017 and a failure to carry his application forward when the role was re-advertised in July 2017.
  - (e) A threat by Mr Tilbury after the claimant had submitted a complaint to the chief executive that persons who complained don't last long in local government.
  - (f) Pressure by Mr Tilbury on or around 30 June on the claimant to withdraw his resignation.
  - (g) In or around July 2017, moving the claimant from the technical team and requesting him to work in the operational team call centre environment.
  - (h) Failure to appoint the claimant to the role of Senior Sundry Debts and Control Officer and this matter is relied on as a "last straw".
- 1.3 Did the respondent have reasonable and proper cause for its actions?
- 1.4 Were the respondent's actions calculated, or likely, to seriously damage the relationship of trust and confidence?
- 1.5 Did the claimant affirm the contract and waive any breaches?
- 1.6 Did the claimant resign in response to the breaches?
- 1.7 Should any compensatory or basic awards be reduced to reflect blameworthy conduct on the part of the claimant.

## **EVIDENCE**

2. I heard evidence from:

- The claimant
- Martin Forward (Customer Services at the respondent)
- Roy Tilbury (Head of Customer Services)
- Terry Collier (Deputy Chief Executive at the respondent)

3. I also received a bundle of documents of some 216 pages. In light of the evidence I have heard and the documents I have seen, I made the following factual findings.

#### **FINDINGS OF FACT**

4. The claimant began his employment on 1 October 2012, initially as an Assistant Customer Services Officer and then subsequently as a Customer Services Officer.

5. On 21 May 2014, he was offered the role of Customer Services Officer starting on 1 June 2014. The terms and conditions of employment are set out in an offer letter at page 71 of the bundle. The claimant's role is described as that of Customer Services Officer which is described as a grade 3-4 role. He was appointed on spinal point 17 with a right to receive annual increments each April. The contract provides that the respondent *"reserves the right to alter the duties required of you, provided that the changed duties are appropriate to your skills and the grade on which you are appointed"* and reference was made to a previously supplied job description. The job description in question appears at page 79 of the bundle and describes the function and general duties of a CSO role as:

*"To assist in all aspects of billing, collection and recovery of council tax, NNDR and sundry debt.*

*To have a working knowledge of the housing and council tax benefits system.*

*To act as an initial point of contact for customer enquiries and provide a high level of customer service when dealing with enquiries from the public via telephone, face to face and email."*

6. The customer services team was a single team with members performing different types of work. An organisational chart at page 83 of the bundle shows that, within the customer services framework, there were individuals working on recovery, on the technical area, and other matters. The claimant was one of six CSO's. The claimant has suggested that he was specifically employed as a technical CSO and that the respondent was therefore wrong to ask him to move to sit with the operational team and to perform some of the work of the operational team. However, the claimant's argument is not supported by his contract of employment or job description. Whilst the claimant may have worked in the technical team, his role as defined by the contract and his job description was broader, was not confined to the work of the technical team. He could be required to work anywhere within the customer services area, provided that the role and the work that he was given were appropriate to his grade and skills.
7. The claimant was one of six CSOs working in the technical team. The others had, by virtue of long service, reached the top spine point of grade 4 and so had become ineligible for further incremental increases. The claimant was differently situated because he was a more recent joiner and was lower

down the pay scale. He therefore continued to be eligible for annual increments.

8. Between October and December 2016, there was a process of consultation regarding the pay and grading of the CSOs. The claimant says that he was told by Linda Norman (at that time of head of the customer services team), and by Ian Buddery (his line manager), that he and the other CSOs would be receiving an increase in spine points in connection with a proposal to extend the grade range for CSOs to grade 5. I accept the claimant's evidence in this regard. It is consistent with comments subsequently made by Ian Buddery in emails and it is also consistent with the terms of the MAT report that was produced by Linda Norman subsequently.
9. On 31 January 2017, Linda Norman produced a report (the MAT report) relating to the CSO group. The MAT report made specific proposals about the CSO roles occupied by the claimant and his colleagues. It proposed that some of the more basic duties should be redistributed and some technical duties should be conferred on the CSOs. This would justify the extension of the CSO grade from 3-4 to 3-5 and a bar would be introduced at grade 4, so that CSO staff would have to demonstrate experience, performance and qualifications in order to progress to 5.
10. The MAT report explained this in the following way: *"Staff will not progress to SC5 until they can demonstrate a high level of proficiency and technical knowledge and provide a significant contribution to the team. This will be evaluated against a matrix of proficiency levels and will be part of each staff's individual development plans..."*. It went on to set out the proposed proficiency matrix including matters such as: satisfactory attendance, accuracy, the ability to deal with complicated and detailed customer enquiries, a good working knowledge of regulations, ability to coach staff, and so on.
11. Under the hearing "Recommendation", the MAT report stated: *"The CS officer post should be regraded to SC3-5 from 1 February 2017. CS staff will undertake a performance review during January 2017 and those that meet the proficiency criteria should move to spinal point 22 from 1 February 2017. Full consultation has taken place between October and December 2016."*
12. Under "Financial Implications", the MAT report records:  
  
*"There are currently six posts that would be affected of which five staff would qualify for the SC5 position under the new criteria. The last post is currently vacant and out to adverts so is unlikely to meet the top of grade criteria."*
13. It is clear that the intention was that there should be no automatic progression to the grade 5 spinal points; rather all of the staff would be assessed against a performance matrix and all staff who satisfied the criteria could expect to progress to the grade 5 spinal points, and this would have include not only those who were currently at the top of grade 4 but also the claimant. It is relevant to note that the MAT report was subject to formal

consultation with the union – Unison, and that the intent was that the recommendations would be put into effect from 1 February 2017.

14. Although the MAT report suggested that a performance review would occur during January 2017, there is no evidence that any such performance review ever took place. At around this time, Ms Norman left the respondent's employment and Mr Tilbury took over her role, initially acting up and then appointed permanently from April 2017. His evidence was that, before leaving, Ms Norman had told him that the four other CSOs should be progressed to grade 5 spine points in February 2017 but that the claimant should not progress. He understood that this was because the claimant was not at the top of the grade 4 scale and therefore it was not necessary for him to progress because he still had room to receive further incremental enhancements to pay. Mr Tilbury's evidence was that he simply implemented Linda Norman's decision to this effect.
  
15. However, this is not consistent with the other evidence. In the middle of February, Mr Tilbury emailed HR. He was supplied with a table showing where CSOs currently fell on the pay spine. The table confirmed that four were at the top of pay spine point for grade 4 and that the claimant was partway through the spine points. Mr Tilbury then instructed HR to move the 4 staff who were at the top of the grade 4 pay range on to the grade 5 range. This meant that they received an increase of one spine point on 1 February and would then receive a further increment of one spine point in line with the usual round of pay increases in April. It is clear from the emails that Mr Tilbury had not, at this time, seen the MAT report. A subsequent email from HR recounting a discussion with Mr Tilbury suggests that in fact Mr Tilbury was not entirely clear about what had been proposed. On 17 March 2017, Angela Tooth wrote to Terry Collier and others saying:  
  
*“Roy spoke to me about it when I called him earlier and it looks like in relation to the grade there may have been a miscommunication. Roy is looking back on Linda's report to see what was agreed and whether the post is regraded to 3-5 but with the bar at the end of 4 SCP21. James will shortly move to SCP20 so to move him from the beginning of scale 5 is two increments and Roy is not sure if that was what Linda intended to do or what was agreed with Matt.”*
  
16. On 17 February 2017, the claimant applied for a Business Rates Avoidance Officer post. However, the vacancy was subsequently withdrawn. Mr Tilbury's evidence was that it was withdrawn because a broader reevaluation was taking place which resulted in the role being reformulated. However, the claimant understood it was being withdrawn because he had been the sole applicant and the respondent operated a “rule of three” and required that at least three individuals must apply for a post. I find that there were probably some “Chinese whispers” about the reasons for the withdrawal of the post. I find that one of the reasons for withdrawal of the role was that Mr Tilbury, on taking up his new position, wished to reevaluate whether the role was needed and whether the scope or responsibilities of the role were appropriate. This much is consistent with the fact that when

the role was subsequently re-advertised, the duties had changed and the grade range was somewhat different.

17. Subsequently, the other CSOs were notified by letter of their regrading and pay increase. The claimant was not notified of his position and was not informed that, although his grade range would increase, there would be no immediate increase to his pay.
18. On 16 March 2017, the claimant wrote to the Chief Executive of the respondent complaining about various matters including: the failure to increase him to spine point 22, that the other CSOs would receive two pay incremental increases in that year whereas he would not; that the business rates role had been withdrawn and he suggested that he had not been appointed to the role because his mother oversaw the team in question.
19. It is alleged that, shortly after this complaint, Mr Tilbury and the claimant had a conversation in which Mr Tilbury made a comment to the effect that people who stick their head above the parapet don't last long in local government. When questioned, Mr Tilbury could not recall this comment. I find that he was annoyed that the claimant had gone over his head to the Chief Executive and that he considered that the claimant had not done enough to raise concerns with him first. I find that he is likely to have made his irritation to the claimant clear when they spoke and that he probably did use words along those lines.
20. The claimant's complaint of 16 March 2017 was referred to Mr Collier for consideration. Mr Collier conducted some fairly limited investigation of the matters raised. He asked for comments from Mr Tilbury and Mr Baddley and he looked at the MAT report. However, he does not appear to have recognised that the approach set out in the report did not appear to have been followed. He did not check whether the performance review envisaged by the report had been carried out or attempt to confirm with Linda Norman whether what she had intended had been implemented by Mr Tilbury.
21. Mr Buddery suggested, in order to alleviate the position, that because the other CSOs were receiving two incremental increases in 2017 – one in February and one in April – that the claimant could also be granted two spine point increases. There would still have been a pay differential but there would not have been widening gap between him and the CSOs. Giving evidence, Mr Collier accepted that this could have been done and that there was no particular formality around the processes for awarding additional spine point increases. He relied on the fact that Mr Buddery had not previously made such a recommendation in respect of the claimant but that is, in my view unsurprising, given that the pay arrangements for the CSO's more generally were under review.
22. On 3 April 2017, the claimant received the letter formally advising him of the regrading of his post to scale 3-5. The respondent accepts that there was a delay in issuing him with the letter but says that this was simply an unfortunate error and I accept that evidence.

23. On 6 April 2017, Mr Collier wrote to the claimant setting out his conclusions and his letter appears at page 149 of the bundle. He stated:

*“In relation to your grade, I understand that you have now received a letter from Human Resources dated 3 April confirming your post has now been regraded 3-5. In relation to your query regarding scale points, I understand that those staff on scale 4 are identified as moving on to scale 5. Your post has been extended so that you are able to move to scale 5 when you reach the top of scale 4. In relation to the vacancy in your application during the meeting on 5 April 2017, I confirm that Roy Tilbury, Deputy Group Head, has placed the vacancy on hold whilst he reviews the role within customer services. I have been advised by Roy that he wants to take the opportunity to review the duties of the role in line with the needs and demands of the service and may then re-advertise. I understand he has advised you that if the role is re-advertised, you do not need to re-apply. However, once the post is confirmed and you would like to add any further information to your application, please advise Human Resources. I would like to reassure you that we do not have a rule of three in relation to vacancies.”*

24. On receiving that letter, the claimant resigned, submitting a letter of resignation at one month’s notice and stating as follows:

*“It is with deep reluctance that I have made my decision to resign from my position. I have made my feelings clear in relation to my pay scale and recent job opportunities at Spelthorne Borough Council. In addition to my work and contributions being undervalued. I believe these concerns which were supported by my line manager, Ian Buddery, to have been largely ignored and so my hand has been forced. I feel that promises made within the department have been reneged on and the working atmosphere at Spelthorne Borough Council has become too strained and stressful for my work here to continue.”*

25. Subsequently, Mr Tilbury and the claimant spoke and this resulted in an agreement that the claimant’s resignation would be put on hold. This was on the basis that Mr Tilbury was going to be reviewing matters within the Customer Services team and hoped that, following that review, some of the claimant’s frustrations and concerns would be addressed. This review did not include any agreement to revisit the question of the claimant’s spine points.

26. On or around 20 April 2017, the claimant began a period of sickness absence related to stress. The claimant considers that his stress-related absence was connected with work but this is not reflected on the sick notes. A fit to work note dated 19 May 2017 stated that the claimant would be fit to resume some work on 19 May 2017 with altered hours and amended duties. The claimant has also suggested that an obligation to undertake telephone work was a cause of stress to him but again the doctor’s notes make no reference to any requirement to undertake telephony as a cause of stress and do not suggest that the claimant should avoid such work.

27. The claimant returned to work on or around 22 May 2017. By this point Mr Forward had begun working as a manager within the Customer Services team with responsibility for CSOs, including the claimant. Various discussions took place between Mr Tilbury, Mr Forward and the claimant and it was agreed that during the first week of the claimant's phased return, he would work three hours a day, then he would work five hours a day during the subsequent week, gradually increasing to full time working. The claimant returned to full time working by late June 2017 and Mr Tilbury and others spoke to him to ensure that he was coping with the increased hours. During those discussions, Mr Tilbury made him aware of the counselling offered to the respondent's staff and suggested that he might find it useful to undertake a stress risk assessment. In a conversation on 21 June 2017, he asked the claimant what his intentions were regarding his notice, which was still on hold. He confirmed that the claimant's pay was not going to be increased to scale 5 in his current role but that there might be opportunities for other roles. A week later the claimant and Mr Tilbury had a further discussion. By that time the claimant had retracted his resignation.
28. The claimant has suggested that he was pressured to do so by Mr Tilbury but there is no evidence that he placed the claimant under any undue pressure. The two had discussions and Mr Tilbury asked the claimant to confirm what his intentions were but that does not amount to placing the claimant under pressure to retract his resignation. It was natural and reasonable that the respondent wanted to know whether the claimant still intended to resign.
29. By 10 July 2017, the claimant was back working full time and at around this time Mr Forward raised with the claimant the possibility that he could spend part of his working day sitting amongst the operational team and engaging in some telephone work. Mr Forward considered that the operational team were under pressure at this time and were short-staffed; he therefore wanted the claimant to provide support to them in answering telephones. He considered that it would be beneficial for members of the operational team to have the claimant sitting alongside them given his experience and he thought it might benefit the claimant to be seated next to the operational team to broaden his own experience. This approach was also consistent with the respondent's management aspiration that staff should increasingly work flexibility across the various work areas within the customer service team, so that they could be deployed where business need arose and so that the team would be more resilient. However, it is also clear that Mr Forward was sensitive to the fact the claimant had recently been absent and completed a period of phased return. He therefore proposed that the claimant should only spend half of each day working with the operational team.
30. On 11 July 2017, there was a meeting between Mr Forward, the claimant and his mother in which concerns about the proposed move were raised. The claimant suggested that his role was specifically a technical role and that it was not legitimate to expect him to undertake this operational work.



He raised concerns about the way in which the decision on spine points had been reached. Mr Forward investigated these points and replied to him, and the notes of that meeting appear at page 160-162 of the bundle. Mr Forward's evidence which I accept, and which is consistent with the note at page 162, was that he made clear that he would revisit the claimant's working alongside the operational team if it was causing the claimant stress or difficulty.

31. On 17 July 2017, the claimant raised a concern that his application for the Business Rates role had not been carried forward from earlier in the year, contrary to the promises that had been made by Mr Collier. This was an error on the respondent's part. The claimant raised the issue fairly late in the appointment process but, when he did so, the respondent immediately made arrangements to add him to the list of interviewees. At that point, the claimant decided that he did not wish to apply for the role after all and he stated that he wished to focus on the forthcoming role of Sundry Senior Debts Officer instead.
32. On 25 July 2017, the claimant was interviewed for the Sundry Senior Debts role but was unsuccessful. There are two documents which summarise the reasons why the claimant was unsuccessful. The interviewers – Mr Forward and two others - considered that, although the claimant interviewed well and had good qualifications and expertise, his answers were lacking. They were focused on what he did in his current role rather than how he would operate in the Sundry Senior Debts role and his answers were shallow. The respondent's assessment was that the claimant simply had not provided sufficient evidence that he had the skills, in particular, to lead and manage staff and suggest innovative ways of working. No evidence was produced to suggest that this was not a fair or genuine assessment of the evidence that the claimant provided at interview.
33. On 25 July 2017, the claimant was informed that he had been unsuccessful. Feedback was offered but the claimant declined. He resigned orally that same day. On being informed that the claimant had resigned, Mr Tilbury asked Mr Buddery to go and speak to him to discuss with him whether he really wished to pursue his resignation and to make him aware that some other roles might be coming up which might be of interest to him. The claimant was resolute that he wished to resign and he submitted a written letter of resignation on 26 July 2017, a copy of that letter appears at page 194 of the bundle. The claimant again made reference to the decision that had been taken in relation to spine points and pay scales, said that he felt that this work and contributions were undervalued and complained that he had been removed from the work and the section of the department in which he felt most comfortable. The letter stated:

*"Promises made by management within the department have been reneged on and the working atmosphere at the respondent has become too strained and stressful for my work here to continue. I meant it when I handed in my resignation in April but was convinced by Roy Tilbury to give him a chance*

*as he would make everyone happy by the end of June. Evidently this has not transpired..."*

34. Mr Forward gave evidence that some months later he had a discussion with the claimant's mother during which she said that the claimant would be prepared to return if given a grade 5 position. The respondent relies on this to suggest that the relationship of trust and confidence had not really been undermined by previous events. I do not consider it would be appropriate to attach any weight to this because there is no evidence that the claimant's mother was saying this with this authority.

## LAW

35. The onus is on the claimant to show that his employer has engaged in conduct, whether that is a single act or omission, or a series of acts or omissions that amount to a fundamental breach of contract. Not all unreasonable conduct will amount to a fundamental breach and the test is that set out in Western Excavating v Sharp. A fundamental breach of contract occurs where an employer is guilty of conduct which is a significant breach going to the root of the employment contract or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The conduct has to be sufficiently serious to entitle an employee to leave at once. An employee must make up his mind soon after the conduct of which he complains, for if he continues in employment for any length of time without leaving, he may lose his right to treat himself as dismissed and may be regarded as having elected to affirm the contract.
36. The contractual term said to be breached here is the implied term of mutual trust and confidence. The test is that set out in the case of Malik v BCCI. Has the employer, without reasonable and proper cause, engaged in conduct which is calculated to, or likely to, destroy or seriously damage the relationship of trust and confidence. A breach of the implied term of trust and confidence will amount to a fundamental breach of contract. The test is an objective one and it is not sufficient that an employee experiences subjective feelings of hurt or indignation.
37. In this case, the claimant places reliance on the cumulative effect of a series of matters culminating in a final straw, which is said to be the decision not to appoint the claimant to the Senior Sundry Debts and Control Officer position. The position in relation to cases involving a final straw is summarised in the case of London Borough of Waltham Forest v Omilaju, a copy of which authority I provided to the parties at the start of the hearing. It is not necessary for any final straw to be a breach of contract in its own right, or for it to be a blameworthy act on the part of the employer, but it cannot be something that is innocuous or trivial. It must be something that is capable of contributing to the cumulative breach of the implied term.
38. The decision in Omilaju was considered in Kaur v London Hospitals NHS Trust, in which Underhill LJ suggests that a tribunal dealing with a constructive dismissal case involving a last straw should approach its task

by asking a series of 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 applying the approach explained in Omilaju of a course of conduct comprising several acts or omissions which viewed cumulatively amounted to a breach of the Malik term? If it was, there is no need for any separate consideration of a possible previous affirmation; and then finally, did the employee resign in response or partly in response to the breach?

39. One of the issues identified at the outset by the respondent was whether or not if the respondent succeeded there should be a reduction on grounds of contributory conduct. In the event the respondent made no submissions about that matter and have not therefore to deal with the point in my conclusions.

## **CONCLUSIONS**

### **What was the most recent act or omission on the part of the employer which caused or triggered resignation?**

40. It is clear that it was a refusal to appoint the claimant to the Senior Sundry Debt Collection Officer post.

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

41. The claimant did not take any steps to affirm the contract after being informed that he had been unsuccessful in his application for the post. He resigned immediately on receiving that news.

### **If not, was that act or omission by itself a repudiatory breach of contract?**

42. I do not consider that the failure to appoint the claimant to this position was a repudiatory breach of contract. I have found that the respondent acknowledged that aspects of his interview were good, but that the respondent genuinely considered that the claimant had not supplied sufficient evidence that he had the necessary skills for the position, particularly as these related to leading and managing and innovating and proposing new ways of working. There is no evidence to suggest that was an unreasonable assessment on the respondent's part. I therefore consider that the respondent had reasonable and proper cause not to appoint the claimant to the role.

### **If not, was it nevertheless a part applying the approach explained in Omilaju of a course of conduct comprising several acts or omissions which viewed cumulatively amount to a breach of the Malik term?**

43. I do not consider that, adopting the approach explained in Omilaju the failure to appoint the claimant to the Senior Sundry Debt Role was a matter that

could contribute anything to a cumulative breach of the implied term. I consider it to be an ordinary and reasonable management assessment. However, the claimant complains of a number of other matters which are said to amount to a breach of the implied term of trust and confidence and so I have considered whether such matters, in their cumulative effect, amount to a fundamental breach of contract.

### **Regrading and pay increase**

44. I consider that there was no reasonable and proper cause for the approach that the respondent adopted in relation to the claimant's regrading and pay increase. The MAT report set out a careful and detailed process about how the expansion of the grade range for the CSOs was to be dealt with and, in particular, how progression to grade 5 was to be assessed. That process was settled following consultation with the trade union and was a process that should have ensured fair and equal treatment amongst the CSOs. The process was not followed by the respondent and no evidence has been put forward to explain why this was so. Instead the respondent took the view that progression to grade 5 would only be available to those who were already on the top of the grade 4 pay scale. In doing so, it contravened the processes and approach that had been set out in the MAT report and communicated to its trade union and it reneged on the assurances given to the claimant.
45. It would have been potentially open to the respondent to follow the approach in the MAT report but to conclude (assuming that it had reasonable grounds for doing so) that the claimant did not meet the criteria for progression. Alternatively, it would have been open to the respondent to decide to depart from the MAT report process altogether, if it had reconsidered and concluded that there were reasonable grounds for adopting a different approach. However, it did neither of these things. It simply departed from the approach that it announced and provided no explanation of its reasons for doing so.
46. Whilst I recognise that Mr Tilbury was new to role at this time and may not fully have understood the relevant background, the fact is that even after the MAT report was drawn to his attention, and subsequently to the attention of Mr Collier, neither appeared to recognise that there had been a complete failure to follow the process set out in that report. They simply fell back on the mantra that the employees intended to benefit were those who were on the top of grade 4 (who had been ineligible previously for annual increments) rather than actually scrutinising the detail of the report and endeavouring to ensure that the process set out there had been followed.
47. It was suggested in submissions that Ms Norman must have undertaken some sort of informal process of assessment before she left and that this underpinned her instruction to Mr Tilbury. However, there was no evidence that any such assessment had taken place. Neither Mr Tilbury nor Mr Collier made any efforts to investigate whether this had occurred. I consider that once it was evident that there was an issue as to whether or not the

processes set out in the MAT report had been carried out properly that this was a matter that they ought to have enquired into.

48. I therefore consider that the respondent had no reasonable and proper grounds for its approach and so I need to go on to consider the second limb of the Malik test: was this a matter such as to seriously damage or undermine the relationship of trust and confidence? I consider that, viewed objectively, it was sufficient to do so. The respondent may not have intended to undermine trust and confidence but it failed to follow the processes announced in its own report and reneged on the expectations that the claimant had been given by Ms Norman. Its approach was unfair and left the claimant at a significant ongoing financial disadvantage when compared with the other CSOs. Even when this matter was drawn to its attention, it gave no real consideration to whether the claimant had been treated unfairly. It simply repeated the mantra that he was not disadvantaged because he was not at the top of the pay scale. It took no steps to verify with Ms Norman whether its approach was correct. Nor did it give any serious consideration to the suggestion that the claimant could also be granted two spine point increases which would have mitigated the impact on the claimant and would have been a reasonable potential compromise.

#### **Other matters**

49. The claimant also complains of delay in sending him the letter advising him of the regrading outcome. The respondent quite properly accepts that there was delay. There is no reasonable and proper cause for this but it is an administrative failing of a fairly routine sort and innocuous sort and not a matter such as would amount to a breach of contract or even contribute anything material to a cumulative breach.
50. The claimant also complains about the failure to consider him for the role of Business Support Officer and then the failure, subsequently, to carry forward his application when the role was re-advertised in July 2017. I have found that the claimant's application was not progressed when the role was first advertised because Mr Tilbury had taken a decision that he wanted to look at the roles and structures within the team more generally and to consider re-drawing the responsibilities of that role. That was something that was perfectly reasonable and proper for him to do as someone who was taking over responsibility for the customer services team.
51. The claimant also complains that Mr Tilbury warned him that people who stick their heads above the parapet don't last long in local government. I have found it likely that Mr Tilbury did express his irritation at the fact that the claimant had gone over his head to the chief executive and that he did say something of the sort. I do not consider such a comment to be a reasonable response to an employee raising a grievance and so consider that there was no reasonable and proper cause for such a comment. As an isolated and unwise comment, this would not necessarily be destructive of trust and confidence but I consider that combined with other matters it would be.

52. However, I do not consider that, however irritated Mr Tilbury was, he was in any way intent on managing the claimant out as has been suggested. Although he did not move the claimant to grade 5 and, although there were other aspects of management decision-making by Mr Tilbury, with which the claimant was unhappy, Mr Tilbury was in other respects supportive of the claimant. In particular, when the claimant resigned in April, he encouraged him to reconsider. He was supportive of the claimant's phased return, altering hours and duties to facilitate this. He took steps to ensure that the claimant's April resignation was not subsequently actioned by HR until the claimant had confirmed his intentions one way or another. This resulted in the claimant formally withdrawing his resignation on 30 June. When the claimant finally resigned for good on 25 July 2017, he took steps to ensure that the claimant really wished to go ahead with his resignation and he tried to make the claimant aware of other opportunities that might be to his benefit.
53. The claimant alleges that he was pressured to withdraw his resignation. I have found that the claimant was encouraged by Mr Tilbury to withdraw his resignation and that he agreed to put his resignation on hold in April until matters within the customer services team could be reviewed. I did not however find that the claimant was pressured to do so. He elected to put the resignation on hold in April 2017 and then, after a period of reflection and after he had been back at work for some time, decided to confirm that decision when he formally withdrew the resignation on 30 June 2017.
54. The claimant also complains of the request made in July 2017 that he should sit alongside the operational team and perform some telephony work. I have found that the claimant's role was not that specifically a technical CSO role and that the respondent was contractually entitled to ask him to perform any CSO work suitable to his grade and skills. The claimant had conducted work in the operational team before and it was work that was appropriate to his grade and skillset. Mr Forward had reasonable and proper cause for asking to the claimant to sit with the operational team in the mornings and to answer calls in the way that he did. The claimant had by this time finished his phased return. Although the claimant maintains that he found working on the phones to be a source of stress there was no medical evidence to suggest that he was not able to do this work. In addition, the claimant had previously done such work; he was not being asked to do it full time and there were good business reasons for the request. The respondent showed some sensitivity to the claimant's position and met with him on two occasions to discuss matters. Following those meetings the claimant had agreed to trial matters and to advise Mr Forward if the demands of performing that operational work and answering phones for part of the day proved too much for him. I consider that this was a reasonable and proper approach on the respondent's part.
55. When the role of Business Support Officer was re- advertised in July 2017 the respondent should have offered the claimant an interview on the basis that this was what had been promised by Mr Collier. The respondent failed

to do this but it is clear that this was an error. When the claimant raised a concern about this, the respondent immediately took steps to put the matter right. The claimant was added to the list of those to be interviewed.

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

56. I consider that the respondent had no reasonable and proper cause for its handling of the claimant's pay progression or for the manner in which it subsequently dealt with his complaint about those matters (including Mr Tilbury's comment to the claimant about those who stick their head above the parapet not lasting long in local government). I consider that these were matters which, viewed objectively, would seriously damage the relationship of trust and confidence between employer and employee. However, I consider that the claimant affirmed the contract on two occasions after those events. First, when he decided to put his resignation on hold on 7 April 2017 and again, when he decided to withdraw his resignation on 30 June 2017. By the time he withdrew the resignation on 30 June, it was entirely clear that he was not going to be permitted to move to the grade 5 pay point in his current role and that the decision on that matter was not going to be re-opened.
57. The respondent's counsel suggested that I should focus entirely on the refusal to appoint the claimant to the Senior Sundry Debts role and that if I considered that that was an innocuous decision, then that was the end of the matter because the claimant's last straw would have fallen away. I do not agree that this would be a correct approach. I considered that I needed to examine all of the matters that happened after the claimant's affirmation of the contract on 30 June to see whether those matters could contribute anything further to the fundamental breach of contract that I have found to have occurred earlier.
58. However, having done so, I have concluded that these subsequent matters do not contribute anything further to the earlier breach of contract. In the case of the instruction to sit with the operational team and do some telephone work and the decision not to appoint the claimant to the SSDR role, I consider that these matters were reasonable and proper exercises of management decision making. In the case of the failure to carry the claimant's application for the Business Support Officer role forward, I consider this an error of an innocuous sort, on the basis that management moved quickly to rectify matters once made aware of the mistake. Even if I am incorrect to characterise this as an error which contributed nothing to a cumulative breach of contract, I consider that the claimant reaffirmed the contract after this error occurred by deciding to abandon his application for that role and to remain employed pending the outcome of the Senior Sundry Debts role.
59. Finally, I should record that a jurisdictional issue was raised by the respondent in relation to whether or not the claimant had presented his ET1 within the relevant statutory time limits. I was somewhat taken by surprise that a jurisdictional issue should be raised in closing argument on the

second day of a hearing, and in a case in which there had already been a case management discussion. However, it seemed to me that were there a jurisdictional issue, it could not be skated over but would have to be dealt with and so I agreed with the parties that I would go away and consider for myself whether or not the claim had been filed out of time. Had it been filed out of time, it would have been necessary to recall the claimant to give evidence on whether compliance with the time limit had been reasonably practicable.

60. Happily, however, having reviewed section 207B(3) of the Employment Rights Act (“the ERA”), I have concluded that the claim was filed within the statutory time limit. The claimant’s effective date of termination was 18 August 2017 and so the ordinary time limit expired on 17 November 2017. The ACAS conciliation process began on 16 November 2017 and concluded on 16 December 2017. Because the ordinary time limit expired in the period between the start and end of ACAS conciliation, time is extended by section 207B(3) of the ERA by a further month from the date on which conciliation closed. The last day for filing an ET1 would have been 16 January 2018. The claimant filed his ET1 on 24 December 2017 and it was filed in time

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**Employment Judge Milner-Moore**

Date: 16 March 2020

Judgment and Reasons

Sent to the parties on: 20 April 2020

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For the Tribunal Office

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