



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Hussain

**Respondent:** Commissioners for HM Revenue and Customs

**Heard at:** London Central

**On:** 27, 28 & 29 July  
2020

**Before:** Employment Judge H Grewal

## Representation

Claimant: Ms H Platt, Counsel

Respondent: Mr J P Waite, Counsel

# JUDGMENT

The complaint of unfair dismissal is well-founded.

# REASONS

1 In a claim form presented on 22 December 2018 the Claimant complained of unfair dismissal. Early Conciliation ("EC") was commenced on 21 September 2018 and the EC certificate was granted on 12 October 2018.

## The Issues

2 It was agreed at the outset that the issues that I had to determine were as follows.

2.1 Whether the matters set out at paragraph 4 (i) – (vii) of the particulars of claim occurred as alleged by the Claimant;

2.2 If any of them did, whether they individually or cumulatively amounted to a fundamental breach of the implied term of trust and confidence;

2.3 If they did, whether the Claimant affirmed any breach;

2.4 Whether the Claimant resigned in response to any such breach. The Claimant's case was that the "last straw" was Mrs Lattimore's letter dated 16 August 2018 which he received on 20 September 2018;

2.5 If the Claimant was dismissed, whether the dismissal was fair.

### **The Law**

3 Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed if the employee terminates his contract of employment (with or without notice) in circumstances in which he is entitled to do so without notice because of the employer's conduct. The basic propositions of law to be derived from the case law are as follows. An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of contract (**Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27**). It is an implied term of any contract of an employment that an employer shall not without reasonable or proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. A breach of the implied term only arises if the conduct of the employer objectively viewed is such that it is likely to cause damage to the employer/employee relationship (**Malik v BCCI [1997] IRLR 462**). The breach of the implied term of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term although each individual incident may not do so. The "final straw" need not itself be a breach of contract but must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term. It must add something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial (**London Borough of Waltham Forest v Omilaju [2005] IRLR 35**).

### **The Evidence**

4 The Claimant gave evidence in support of his claim. The following witnesses gave evidence on behalf of the Respondent (their job titles are as they were at the relevant time) – Ruth Lattimore (Senior Business Manager, Forensic Support Hub), Triumph Okojie (Forensic Support Manager), Clint Gibson (Civil Investigator, Internal Governance Civil Investigations) and Tom Parkinson (Internal Governance Criminal Investigations). Having considered all the oral and documentary evidence, I made the following findings of facts.

### **Findings of Fact**

5 The Claimant commenced employment with the Respondent on 15 May 1995. He worked for the Respondent for 23 years and was 57 years old when his employment terminated on 21 September 2018.

6 From 2009 onwards he was employed as an Administrative Officer in the Forensic Management Unit in the Fraud Investigation Service ("FIS"). He was a conscientious and diligent employee and had never been the subject of any disciplinary action. Ruth Lattimore was his manager for many years and she had never had any reason

to question his honesty or integrity.

7 The Claimant had caring responsibilities for his mother and older sister, both of whom had mental and physical disabilities. In October 2015 he was off work with stress for six weeks as a result of having to juggle work with his caring responsibilities. In March 2016, on his manager's advice, the Claimant obtained a "Carer's Passport". That is a document produced by a Civil Servants' charity and is designed to provide employees who have caring responsibilities and their line managers with information about their needs in the workplace and to identify possible solutions to those needs.

8 In February 2018 Triumph Okojie was promoted to Forensic Support Manger and became the Claimant's line manager. He had not managed staff before. He reported to Ms Lattimore.

9 On 10 April 2018 electricians working in the basement of Custom House (the building where the Claimant worked) found £10,000 cash concealed in the basement. There was £700 in £20 notes and £9,300 in £50 notes. Lucy Inman, Assistant Director in FIS who was the senior manager responsible for the building, was informed of this. She arranged for the money to be removed and photographed and placed in a secure lock up. The Claimant overheard the photographers talking about the money that had been found. By that time Mr Okojie had already left the office.

10 The following morning the Claimant asked to speak to Mr Okojie. He told him that he had hidden his money in the basement and that it had been found there the previous day. He said that several years before then he had withdrawn £6,700 from the bank because he had wanted to buy land in Sri Lanka. However, the deal had fallen through but he had not returned the money to the bank because there had been a burglary at his house shortly after he withdrew the cash and he had suspected that someone at the bank had been connected with the burglary. He had kept the cash at home. He had since added more money to that and it had increased to £10,000. As he was selling his house at that time and the estate agent had access to his house, he had decided to remove the money from his house and had brought it to Custom House and hidden it in the basement for safekeeping. Mr Okojie told him that he would need to produce evidence that it was his money in order for it to be released to him.

11 Mr Okojie informed Ms Lattimore of this conversation the same morning. Ms Lattimore passed the information on to Lucy Inman. Ms Inman sent an email to John Ingle in Internal Governance, Criminal Investigations team, about the discovery of the money and the account given by the Claimant and sought his guidance on how to progress the matter. Ms Lattimore advised Mr Okojie that the matter could not be taken further until she had heard from Ms Inman.

12 Internal Governance ("IG") in FIS (as in other parts of the Respondent) is divided into two teams – Civil Investigations and Criminal Investigations. Under the Respondent's disciplinary procedure managers assess the level of seriousness of any suspected misconduct and complete the "discipline checklist – manager's review" immediately. If the misconduct is potentially criminal or could amount to gross misconduct, the manager has to refer the case immediately to IG Civil Investigations and send them the "discipline checklist – manager's review". IG Civil Investigation will then manage all aspects of the investigation including consideration of suspension.

At the end of the investigation, it will produce a written report for the decision manager setting out the suggested allegations and indicating whether the investigator believes that there is a case to answer or not. The appointed decision manager then takes the disciplinary case forward, supported by Civil Service HR.

13 The IG Criminal Investigations team deals with allegations of criminal behaviour that arise in the course of work of the Respondent's staff.

14 On 12 April 2019 Ms Lattimore, on instructions from IG via Ms Inman, asked Mr Okojie to conduct a fact-finding interview with the Claimant and to record what he said. This was a formal meeting and what was said in the meeting was used subsequently in proceedings in the magistrates' courts and in order to institute disciplinary proceedings. The Claimant was not given any notice of the meeting, was not advised of what the outcome might be and was not given the opportunity to be accompanied.

15 Mr Okojie met with the Claimant on 12 April and asked him again to give his account of the money that had been found in the basement and asked him questions about it. The Claimant explained that he intended to use the £10,000 towards the purchase of a retirement flat. The bulk of the rest of the money required for the purchase of the flat would come from his share of the sale of the former matrimonial home. He had brought the £10,000 to the Custom House because he felt that it was not safe to leave it at his house as the estate agent had the keys to his house and was showing it to prospective buyers. The Claimant explained that he had obtained a mortgage advance of £20,000 secured against his home, and that he had withdrawn £6,700 of that from his account in January 2012 to take to Sri Lanka to buy land there. However, the deal had fallen through. He had not returned the cash to the bank because in February 2012 his house had been burgled and he strongly believed that someone from the bank had informed the burglars of the cash that he had withdrawn. He showed Mr Okojie where he had hidden the cash and described the wrapping around it. He said that he had not put it in his lockable storage space as he did not lock it because others might have needed to access documents in it when he was not in the office. He had not thought that it was important to inform his managers that he had stored the cash in Custom House. He said that a fingerprint analysis of the cash would show that he had handled it. He provided the following original documents to prove that the cash belonged to him:

- A Halifax bank statement in his name from showing that on 23 January 2012 £6,700 had been withdrawn from an account containing £16,020.56.
- A Halifax bank statement in his name showing cash withdrawals of £1,000 and £520 on 18 and 23 July 2012 respectively.
- A Halifax bank statement in his name showing a cash withdrawal £500 on 12 August 2013.
- A Halifax bank statement in his name showing a cash withdrawal £300 on 16 November 2016.
- A customer withdrawal receipt from the Royal Bank of Scotland showing a cash withdrawal of £1,000 on 17 November 2016.
- A letter from the Metropolitan Police dated 2 February 2012 confirming that the Claimant had reported a burglary.

Mr Okojie examined the originals and took photocopies of the documents. He asked the Claimant to provide documents to confirm the mortgage advance. The Claimant said that he was feeling stressed as a result of this incident and that he might have to

see his doctor if it got worse.

16 Mr Okojie set out the discussion in a document headed “Incident fact find report”, and on the same day sent the report and the supporting documents provided by the Claimant to Lucy Inman. He said that the Claimant believed that the documents were sufficient to prove that the cash belonged to him. Ms Inman informally referred the matter and forwarded Mr Okojie’s report and the documents to IG Criminal Investigations.

17 On the same day Kevin Atherton in the IG Criminal Investigations team filled in a form called “RDT Internal Governance Referral Form.” In the form he referred to having received as supporting documents “*the explanations and documents received from the jobholder.*” In the section where he was asked to give a brief description of the referral, he said that the Claimant had “*provided unconvincing explanations regarding the source of this cash and the reasons for concealing the cash there.*” He gave the reason for the request being made to IG Criminal as “*For further investigation as an intel development case*”. There was a section in the form which asked “*Potential Offence Committed if known*”. Mr Atherton filled in “*Tax evasion/fraud/theft/money-laundering*”.

18 On 16 April 2019 the Claimant provided Mr Okojie with a doctor’s note certifying that he was unfit for work for 21 days because of “*stress at work*” and a letter from Halifax dated 4 November 2011 offering the Claimant a mortgage advance of £21,000.

19 On 16 April Ms Inman made a formal referral to the IG Criminal Investigations team. The referral was passed to Adrian De Ath, Senior Investigation Officer.

20 On 20 April Mr Okojie sent the Claimant an email that Internal Governance wanted him to answer additional questions and to provide additional documents. They wanted him to provide bank statements showing the history of the sums of money that had been withdrawn, and to explain where he had kept the money before he brought it into Custom House and how he had physically managed to get the cash up into the electrical trunking in the basement.

21 The Claimant responded,

*“The internal governance request for further documents has exacerbated my current mental state. As you know my stress that led to me being currently off work was a direct consequence of you not trusting me, and suspecting that the money is illegitimate and asking to produce evidence of the source of funds. It is clear from this request that this is the case. As mentioned before, banks had a duty to complete SAR if they think the funds were illegitimate.*

*If you do not want to return the money just say so, but do not suspect me of being involved in fraud or any other illegitimate activity.”*

22 Mr Okojie sought Ms Lattimore’s advice on how to respond to it. Her advice was that it should be stressed that the Claimant was not suspected of anything untoward and that it was not an issue of trust. IG had an obligation to investigate and it was a normal part of any investigation to gather as much information as possible before reaching a conclusion/decision. Ms Lattimore’s evidence was that she believed the

Claimant and did not think that he was money-laundering or defrauding anyone. Mr Okojie's response to the Claimant was that, as far as her knew, nobody suspected him of being involved in any illegal activity or of having obtained the money through illegitimate means. If it is the case that the Claimant's managers did not suspect that he was involved in any criminal behaviour, it is difficult to understand why the matter was referred to the IG Criminal investigation team and on what basis Mr Atherton stated that the Claimant might potentially have committed a the offences he set out in the referral form. Mr Okojie's response to the Claimant was passed on to IG by Ms Inman.

23 On 26 April Mr De Ath passed the case to Tom Parkinson in his team for him to investigate it.

24 On 26 April Mr Okojie had a telephone conversation with the Claimant in accordance with the Respondent's policy which requires managers to keep in regular contact with employees who are absent sick. The Claimant said that he was "*feeling very bad.*" Mr Okojie asked whether there was anything that he could do to help and support the Claimant. The Claimant explained that he wanted mediation because there were two issues that needed to be resolved. The first related to the money and the second to the suspicion exhibited towards him by his managers and IG. Mr Okojie said that nobody suspected him of anything but that IG had a duty to investigate the matter as per the Respondent's procedures. It is not clear to what procedures he was referring. The Claimant asked how he could request mediation (he had previously instructed a barrister who had contacted the Respondent to discuss mediation but the Respondent's reaction had been that it had its own internal mediation process). Mr Okojie said that he would look into it and provide him with the information. At the Claimant's request, it was agreed that all future communication between him and Mr Okojie would be by email.

25 Later that day Mr Okojie sent the Claimant details about the Respondent's mediation process and said that he had filled in the HR form for a mediation referral. The Claimant asked who the mediators would be and whether he would have any choice in selecting the mediator. He also asked whether the cash was being treated as the "proceeds of crime" and he was being investigated for money laundering because he had not provided the additional documentation which they had requested. He said that he had requested the additional statements from Halifax and had been told that there would be a charge for each statement and he was reluctant to incur unnecessary expenditure. He said that the money in that account came only from the mortgage advance and his salary from the Respondent. There were no other deposits into that account. He said that the RBS account was one that he managed for his disabled sister who did not have the mental capacity to have her own account. She was in receipt of Employment Support and Disability Living Allowance and he had been appointed by the Court of Protection to manage her property and affairs. Mr Okojie passed that email on to his mangers and to Mr Parkinson in IG.

26 The Claimant was referred to Occupational Health ("OH"). In a report dated 27 April 2018 OH said that the Claimant had identified the trigger of his symptoms as the breakdown in the relationship with his manager. She advised that if mediation could occur it was likely to be helpful in facilitating a return to work.

27 Mr De Ath produced a "Case Adoption note" in respect of the matter on 27 April in

which he set out the options that he thought were open to them. These were (1) to accept the Claimant's account and to release the cash (2) to arrest the Claimant on suspicion of money laundering offences and to interview him under caution (3) to conduct a proportionate investigation using the Proceeds of Crimes Act ("POCA") powers and to proceed as required dependent on the results of the investigation process and to raise a parallel civil misconduct allegation and (4) take no action. His decision was to seize the cash under section 294 of the Proceeds of Crime Act 2002 and to apply to the magistrates' court to detain the cash in order to fully investigate the provenance and intended use of the money. Section 294 provides that an officer of HMRC may seize any cash if he has reasonable grounds for suspecting that it is "recoverable property" or intended by any person for use in unlawful conduct. "Recoverable property" is property which has been obtained through conduct which is unlawful under the criminal law. His rationale for doing so was that there were considerable gaps in the account provided by the Claimant. These included the following: the account given was implausible in a number of respects; there had to be certainty that the cash seized was the same cash that was withdrawn from the Claimant's accounts and not the proceeds of criminality; the length of time the cash was claimed to have been held outside the banking system was suspicious; the cash seemed to have left the jurisdiction on at least one occasion; it was highly unusual to retain cash for the stated length of time without it being used; the documentation provided was incomplete; the bulk of the cash was high denomination notes which was indicative of money laundering. He said that HMRC had no legal grounds to retain the cash in the absence of reasonable suspicion that it might be the proceeds of crime. However, seizure and detention using POCA powers would give them an opportunity to conduct an investigation. It is difficult to understand that logic because the same reasonable suspicion that it was the proceeds of crime was required in order to seize and detain the cash.

28 Mr Okojie responded to the Claimant's email on 27 April. He said,

*"At the moment, I can confirm that the cash is being treated as 'proceeds of crime.' An application to detain the funds will whilst further enquiries are carried out will be made at the Magistrates Court as part of the process."*

He said that he had passed the Claimant's contact details to IG and that he would receive direct communication from them about the matter. He also confirmed that he had filled out a mediation referral form on behalf of the Claimant.

29 On the same day IG informed the Claimant's managers that the cash had been detained under the provisions of POCA and that an application for the detention of the cash for a period of three months would be made at the magistrates' court the following Monday. They advised that mediation did not fit into the POCA process which had been commenced.

30 Shortly after 5 pm that day (which was a Friday) Mr Parkinson informed the Claimant that he would be applying to the magistrates' court on Monday morning for HMRC to retain the cash under the Proceeds of Crime Act 2002. He said that they were doing that to enable them to retain the money while he provided information to substantiate his claim. If he were able to provide information to satisfy them that the money was his and that it had legitimate origins, it would be returned to him. The hearing was to determine whether they could keep the money until he provided the information they required. He gave the Claimant details of when and where the

hearing was taking place in case he wished to attend.

31 On 30 April the Respondent applied to Westminster Magistrates' Court for the continued detention of the cash under section 295(4) of the Proceeds of Crime Act 2002. Section 295 provides an application for continued detention of seized cash may be made by the Commissioner of Customs and Excise if either of the following conditions is met:

- (a) There are reasonable grounds for suspecting that the cash is recoverable property and that its continued detention is justified while its derivation is further investigated; or
- (a) There are reasonable grounds for suspecting cash is intended to be used in unlawful conduct and its continued detention is justified while its intended use is further investigated.

In a witness statement Mr Parkinson set out his grounds for suspecting that part or all of the cash was either recoverable property or intended for use in unlawful conduct. They were as follows. As the money had been concealed amongst wiring in an unoccupied part of the building it was reasonable to suspect that it was to conceal criminal activity. The Claimant's account was not credible. It did not make sense to have cash earning nothing for six years when the Claimant was paying interest of 6.5% on the loan, the fact that he believed someone from Halifax to have been involved in the burglary had not deterred him from continuing to bank with them and to withdraw further case from them, hence his explanation for not returning the cash to Halifax was not credible. The fact that he had identified a number of withdrawals over several years that added up to £10,000 did not prove anything. Cash transactions were the norm within the criminal world.

32 The Claimant was represented at the hearing. However, due to the very short notice that he had had of the hearing, he would not have had the opportunity to secure the best representation or to brief his representative fully. The Claimant did not file a statement and did not give evidence. The Court made an order for the cash to be detained until 29 July 2018.

33 On 30 April the Claimant sent Mr Okojie an email that he was even more stressed having learnt that the cash was being treated as "proceeds of crime" and asked again whether he was being investigated for money laundering. He said that the mediation referral had now become urgent. Mr Okojie shared that email with his managers. Their view was that mediation was inappropriate as the cash was being investigated under the POCA process. Mr Okojie informed the Claimant that mediation was "*neither applicable nor relevant*" at that time as the money was being dealt with as "*per the civil proceeds of crime process*". The Claimant responded by asking again whether he was being investigated for money laundering and disagreed that mediation was no longer applicable or irrelevant.

34 On 4 May Mr Parkinson wrote to the Claimant asking him to provide bank statements from November 2011 to April 2018 for the two Halifax accounts from which he had withdrawn sums of money and for his sister's RBS account, bank statements or other documents that showed how he had made a payment of £10,000 to his ex-wife as ordered by the Court on 26 October 2012, and various other pieces of information.

35 On 8 May 2018 the Claimant was certified as unfit to work for a further one month because of "*stress at work*."



36 On 8 May IG Civil decided to adopt the case in conjunction with the POCA investigation as it was felt that hiding £10,000 in cash in Custom House raised an integrity and conduct issue.

37 Around about that time Mr Parkinson contacted the Bank of England to see whether it could assist with when each of the notes found had been printed.

38 On 16 May Mr Gibson, who worked in IG Civil Investigations, told Mr Parkinson that he did not think that that as things stood that they could pursue the matter through the disciplinary procedure. He said that the Claimant's explanation would ultimately be tested in court and they would take the matter further if the cash was confiscated.

39 By 1 June Mr Parkinson had received information from the Bank of England on when the notes found had been issued. It had been unable to identify when notes to the value of £1,670 had been issued. The issue dates for the remaining notes were as follows:

Before 22 January 2012 - £1,150

Between 2 February 2012 an 9 July 2012 - £2,650

Between 26 July 2012 and 2 August 2013 - £3,530

After 2 August 2013 - £1,000.

Mr Parkinson believed that that proved that the Claimant's account that the origin of £6,700 of the cash found was the withdrawal of that amount from his account on 22 January 2012 was false. That belief was not reasonable. The Claimant had explained the origins of the £10,000 cash, i.e. the source of the funds. He had never been asked, and had never said, that the notes found in Custom House were the same notes that he had withdrawn from his account in January 2012. He had said that he had withdrawn that money to take to Sri Lanka to buy land there but that he had not done so. It was, therefore, very likely that he had taken the cash to Sri Lanka. Mr De Ath had said in his note that the cash seemed to have left the jurisdiction on at least one occasion. If he had taken the cash there to buy land, it was very likely that he might have changed it into a different currency and then changed it again when he returned.

40 On 7 June the Claimant asked Mr Okojie what was happening to his request for a dispute resolution meeting. He said that it would help to resolve issues such as mistrust and suspicion about him being involved in criminal activity and referred him to the advice of the OH Advisor. Having sought advice from his managers Mr Okojie responded,

*"I re-iterate that you have not been accused of being involved in anything criminal/illegal. The ongoing investigation is part of HMRC's due process, and as such it cannot be circumvented."*

He repeated that the mediation process was not appropriate while the IG's investigation was still ongoing. Once the investigation was concluded, they could revisit the issue if it was still required.

41 On 8 June 2018 the Claimant was certified as unfit to work for another month for stress.

42 On the same day the Claimant responded to Mr Okojie's email to him. He said,

*“You seem to be living in another world. Mr Parkinson’s application to the magistrate’s court to detain the cash for a further 3 months clearly states that I am suspected of being involved in criminal activity.”*

43 On 11 June 2018 an employee of the Bank of England provided a witness statement giving details of the issue date of each of the notes found.

44 On 22 June 2018 Mr Okojie held a meeting with the Claimant under the Respondent’s Attendance Management Procedure. This was the first time that Mr Okojie discussed with the Claimant the OH report that had been received two months earlier. There was discussion about whether the Claimant could return to work if his workplace was changed. The Claimant’s view in essence was that he would not be able to return to work until the court process was concluded. He asked how long it would take.

45 After the meeting the Claimant continued to ask for mediation/dispute resolution to discuss his continued employment with the Respondent after the mistrust demonstrated by his managers.

46 On 28 June Mr Parkinson updated Mr Gibson. He said that the Claimant’s original account that he had withdrawn most of the cash in 2012 had been proved to be a lie as not enough of the bank notes were old enough. He said that they had not disclosed that to the Claimant but were in discussions with the Solicitor’s office regarding applying for forfeiture.

47 On 4 July Mr Okojie informed the Claimant that they were still looking into workplace adjustments. All he could say about the IG investigation was that it was still ongoing and that they would be in touch with him directly if they had anything to communicate to him. Following an inquiry from the Claimant about his request for a dispute resolution meeting, Mr Okojie set out what mediation entailed and what it could achieve and asked him to confirm whether, having understood that, he still wished to proceed with mediation.

48 By 3 July the Claimant had not provided Mr Parkinson with the information that he had requested on 4 May. Mr Parkinson asked him on 3 July whether he was going to provide the information. The Claimant responded that he had been advised by his solicitor that it could be discussed at the dispute resolution meeting that he had requested. Mr Parkinson responded that the Claimant had already been told that HMRC would not be dealing with the matter by way of a dispute resolution meeting and that it would be dealt with by the court.

49 On 8 July the Claimant responded to Mr Parkinson’s request on 4 May 2018. He said that he had already provided a letter from his ex-wife’s solicitor to confirm that he had paid £10,000 into their account. He said that he had already provided him with original bank statements of the withdrawals for the seized cash. Although Mr Parkinson had claimed that the withdrawals did not match, he had not provided any details of why he believed that they did not match. He confirmed that he had travelled to Sri Lanka in August 2012. He said that his immediate family lived there and went there every year to spend time with close relatives. He said that the withdrawal of £1,000 on 10 October from the RBS account was a regular withdrawal and was used for the maintenance and upkeep of his sister. He said that the benefits paid to her by DWP were for her living expenses and rather than withdrawing them very week he withdrew the money once a month. She lived with him and he confirmed that he had been appointed to manage her affairs due to her mental illness. He said,

*“How on earth can you expect me to continue employment with HMRC, whom you are representing, with such malicious allegations which are yet to be proved.”*

50 On 11 July the Claimant provided some of the documents that had been requested by Mr Parkinson (the original of the letter from the police, more pages of a letter from DWP and the original of the RBS withdrawal slip). He also said that he wanted to apply for the release of the detained cash and to submit a formal grievance against him. Mr Parkinson responded that the Claimant had not provided most of the documents that he had sought in his letter of 4 May.

51 On 16 July the Claimant was given a further medical certificate that he was unfit to work from 8 July to 7 August because of “*problems at work*”. On the same day the Claimant informed Mr Okojie that he had had chest pains and had been to the A & E Department of the hospital.

52 On 18 July Mr Okojie drew the Claimant’s attention to a potential role for which the Respondent was seeking Expressions of Interest. The Claimant responded that the role required an immediate start and because of his mental state and health at that time he would not be able to start immediately.

53 On 20 July Mr Okojie provided an update about the Claimant’s situation to Sarah Montague, who had recently become Ms Lattimore’s line manager. He identified four issues. These were the IG investigation, expression of mistrust, the Claimant’s sick absence and returning to work and mediation/dispute resolution. In respect of the expression of mistrust he said that the Claimant believed that Ms Lattimore and he had expressed a mistrust when they had found out about the incident, and had said that not working closely with them would make him feel less anxious and had expressed a willingness to work in another role. He said that they had explained to him that the investigation was part of HMRC’s due process and the results were the responsibility of IG. All the actions which they had take as his managers had been prescriptive. However, the Claimant had not accepted that.

54 On 23 July Mr Okojie sent the Claimant a copy of the grievance procedure and asked him whether he still wished to proceed with the mediation process.

55 On 24 July 2018 Mr Parkinson wrote to the Claimant that he had applied to Westminster Magistrates’ Court for the forfeiture of the £10,000 and enclosed a copy of his application. In support of the application Mr Parkinson repeated some of the grounds on which he had relied when he had originally applied to detain the cash but added some new ones. The new grounds that he added were as follows: The Claimant had given a false account by stating that most of the cash found was withdrawn from his account in 2012 when not enough of the notes were in existence at the time; it was believed that more than just £1,000 of the cash found had come from his sister’s account and that ‘gifting’ himself such a large quantity of his sister’s money, without the approval of the Court of Protection, was a fraud and a breach of his duties as a court appointed ‘deputy; the Claimant had not provided much of the information that he had been asked to provide, although he had been given time to do so and much of it would have been easily obtainable from his bank. He concluded,

*“HMRC believes it is reasonable to believe that his lies were to conceal the criminal origins of the cash obtained by fraud thereby laundering the proceeds of crime and that it is therefore recoverable property.”*

56 On the same day Mr Parkinson informed Mr Okojie and Mr Gibson of his application for forfeiture. Mr Gibson's response was that if the cash was forfeited, he would start the disciplinary process.

57 The Claimant was very distressed and upset when he read the application, the essence of which was that his employer, for whom he had worked over 20 years, believed that he was a liar, had stolen money from his sister and had obtained money from some form of criminal activity.

58 On 25 July Mr Parkinson provided some of the relevant documents in relation to the investigation to Mr Gibson. Mr Gibson asked him whether he could provide the Bank of England evidence as he felt that that would be first hand evidence that the Claimant had given a false account of the provenance of the initial £6,700 and had, therefore, breached the Respondent's honesty and integrity guidance. Mr Parkinson supplied that to Mr Gibson on 27 July.

59 On 25 July Ms Montague sought some clarification from IG as to whether it would be taking disciplinary action against the Claimant. On 30 July Mr De Ath suggested to Mr Gibson that a gross misconduct disciplinary process be put forward to the Claimant's management at that stage in advance of the cash forfeiture hearing in September. Mr Gibson's view was that in order to start a disciplinary process he would need to be able to use the Bank of England evidence as they did not have any other evidence of breach of honesty and integrity. On 9 August Mr Parkinson informed him that he could use the Bank of England statement.

60 On 3 August, in Mr Okojie's absence, Ms Lattimore made contact with the Claimant to keep in touch with and to support him during his sickness absence. She said that they appreciated his skills and experience and what he had to offer the Respondent and wanted to do what they could to help him return to work. She said that mediation was not applicable to the investigation but could be used to discuss his relationship with his manager(s) and that if he wished to pursue it for that purpose he should let her know.

61 The Claimant responded on 7 August that he was feeling very stressed after the IG investigation as he had been accused of fraud, and that he was seeing his doctor later that day to discuss his deteriorating health. On 8 August the Claimant was certified as unfit to work for one month because of "*stress at work*".

62 On 9 August Mr Gibson sent Ms Montague a partially completed "Discipline checklist – manager's review." That form is supposed to be completed by the manager at the outset of the process. Ms Montague's name was given as the name of the manager completing the review although she did not complete it and all the information on it had been entered by Mr Gibson. At section 2 of the form there was a question as to whether a manager had spoken to the employee about the alleged concern. The response said that it was attached – that was a reference to Mr Okojie's interview with the Claimant on 12 April 2018. The answer then went on to say,

*"Jobholder's assertion that £6700 of the cash came from a cash withdrawal he made from his bank on 23 January 2012 is false, based on the evidence provided by the Bank of England."*

There was a part in section 4 where the manager completing the review was supposed to provide a summary of any advice that he/she had received in completing the review. Mr Gibson had entered there,

*“I have spoken to Adrian De Ath (IG Criminal) and Clint Gibson (IG Civil) who have both advised that there is a serious reputational risk to HMRC in this case. IG Criminal are applying for forfeiture of the £10,000 cash under the Proceeds of Crime Act 2002. A hearing for this has been arranged for September.”*

He asked her to find a Decision Manager and to enter his/her details at section 4 of the form. Ms Montague appointed Ms Lattimore Decision Manager and passed the form to her to complete. Ms Lattimore added her details at section 4.

63 Mr Gibson drafted a letter to be given to the Claimant to inform him of the disciplinary investigation and advised Ms Lattimore that it had to be handed to the Claimant personally. Ms Lattimore indicated that she was happy with the wording and said that she would give it to Mr Okojie to deliver it to the Claimant when he (Mr Okojie) returned from leave.

64 The letter was dated 16 August and was from Ms Lattimore to the Claimant. In the letter she said that Clint Gibson from IG Civil Investigations had been appointed Investigation Manager to investigate a potentially false account that he had given to IG Criminal Investigations relating to the provenance of the £10,000 cash that he had hidden in the basement of Custom House. She said that the purpose of the investigation was to gather and present evidence and to determine whether there was a case to answer, and that any information that emerged from the investigation might be used in any misconduct proceedings against him. She said that as there was a possibility that the disciplinary process could lead to his dismissal, she needed to give him some information about the Cabinet Office Internal Fraud Hub (“IFH”). She said that the misconduct alleged against him appeared to fall within the Cabinet Office definition of internal fraud which was dishonest or fraudulent conduct, in the course of employment in the Civil Service, with a view to gain for the employee or another person. If as a result of the disciplinary process it was concluded that he was guilty of internal fraud and that dismissal as the appropriate sanction, his details would be sent to the Cabinet Office for inclusion on their IFH database. The effect of that would be that he would be banned from employment in the Civil Service for a period of five years. Furthermore, because the allegation related to internal fraud, were he to leave the Respondent before the conclusion of the disciplinary procedure, it would usually be continued and he would be notified of the outcome.

65 On 16 August Mr Okojie telephoned the Claimant and said that he had been instructed to personally deliver documents to him and that he would bring them to his home address. The Claimant said that he would come to Custom House the following day to collect them. The Claimant asked him later what the documents related to and Mr Okojie responded that they were related to the issue being looked into by IG.

66 The Claimant did not attend at Custom House the following day. Mr Okojie called him and the Claimant said that he would not be able to attend that day because of something to do with his sister. Mr Okojie, therefore, attended at his home address the next working day, which was 20 August. He knocked on the door but no one answered. He telephoned the Claimant again, and the Claimant asked why the

matter was so urgent and what the envelope contained. Mr Okojie responded that he did not know and after a while the Claimant hung up. Having sought Mr Gibson's advice, Mr Okojie dropped the envelope in through the letter box.

67 In a letter dated 20 August 2018 the Claimant informed Mr Okojie that the sale of his home had been completed on 17 August 2018 and that he was homeless and could not provide an address. He said that due to the seizure of his £10,000 he did not have enough money to purchase the flat that he had intended to buy. On the same day he sent Mr Okojie an email that he had spoken to his solicitor who had said that Mr Parkinson had told him that the document that the Respondent was trying to deliver to him did not relate to the cash seizure.

68 Having received the Claimant's letter of 20 August 2018 Mr Okojie telephoned the Claimant on 22 or 23 August. He asked the Claimant whether he had received the documents and the Claimant asked, "what documents?" Mr Okojie said that he had posted some documents through his letterbox and the Claimant said that he had stopped living at that address on 17 August. He said that he had not agreed for the Respondent to come to his home address and Mr Okojie said that due to the urgency and importance of the matter he had decided to deliver the letter to his home address. The Claimant asked why the matter was so urgent and what the documents contained and Mr Okojie said that he was unable to answer that. Mr Okojie asked whether he could give the Claimant's contact details to Mr Gibson, and the Claimant said that he did not know Mr Gibson and did not want to have direct communication with him. He said that Mr Gibson could forward any correspondence to his solicitor.

69 A copy of the letter of 16 August 2018 was sent to the Claimant's solicitor. On 10 September the Claimant's solicitor informed the Claimant that he had received a letter from IG.

70 On 5 September 2018 the Claimant was certified as unfit to work for one month because of stress at work. On 5 September Mr Okojie spoke to the Claimant to see how he was. The Claimant said that he had just had a hospital appointment and that he had been put on anti-depressants.

71 On 19 September the Claimant informed Mr Okojie that he was still stressed with anxiety and depression, was also suffering from IBS and had been asked to see a cardiologist on 24 September. He said that he had moved to his new flat and provided Mr Okojie with the address.

72 The Claimant collected the letter of 16 August from his solicitor on 20 September. On the following day he sent Mr Okojie his letter of resignation. He said that the content of the letter had further aggravated his illness, he was very distraught and at the way that he had been treated and was therefore resigning with immediate effect and would be making a claim for constructive unfair dismissal.

73 On 25 September Mr Okojie sent the Claimant an email to try and arrange a meeting with him to discuss his decision as he had been a valued member of the team for a long time. He spoke to the Claimant on the following day and the Claimant confirmed that he was sure that he wanted to resign.

74 Mr Gibson told HR that his investigation would continue as it was a Cabinet Office fraud case.

75 At a case management hearing at Westminster Magistrates' Court on 28 September the full hearing of the application for forfeiture was listed for 12 December 2018.

76 On 30 October 2018 the Claimant filed a statement to oppose the Respondent's application for forfeiture. In that statement he said that he visited his family in Sri Lanka every year (which was supported by photocopies of his passport) and that whenever he went he took the money that he had taken out from the bank with him, having changed it into US dollars, expecting to find a piece of land to purchase. On one occasion in 2015 he had put down a deposit of 5,000 US dollars. However, the sale had fallen through and the money had been changed back to sterling when he returned to UK. He also said that his money and his sister's money was kept in the same place and sometimes the notes got mixed up. He also said that as the "deputy" under the Court of Protection order he was entitled to make provision for anyone related to her to provide for her needs. Therefore, when his former matrimonial home, where his sister had lived with him, was sold he had to look for suitable accommodation for her elsewhere. He did not consider it unreasonable to use £1,000 of her money for the purpose of purchasing a property worth in excess of £100,000 to shelter her. If he had committed a fraud, as HMRC had suggested, why had they not referred him to the police for investigation and prosecution? He said that in order to get historic bank statements going back to 2011 he would be charged £5 per statement. He said that he had given HMRC permission to approach his bank and to obtain the information they needed. In any event HMRC had the power to apply directly to the magistrate' court and to obtain the statements from the bank through production orders.

77 The Claimant put in a further response to the application on 30 November 2018.

78 At the hearing on 12 December both the Claimant and HMRC were represented by counsel. At the hearing HMRC withdrew its application for forfeiture. The reason given for the withdrawal, as recorded on the court register was,

*"No strong evidence of unlawful conduct. HMRC reviewed the evidence and decided to withdraw the application to forfeit the money."*

It was noted that the money would be returned to the Claimant. The magistrates commented that having read the papers, they had come to the same conclusion, although they recognised that they had not heard the application or any evidence. They also commented that perhaps the case had not been dealt with in the most appropriate way. Whilst there had been concerns about the discovery of the cash, explanations had been provided.

79 On the same day Mr Parkison sent Mr Gibson a note in which he explained that as a result of legal advice they had withdrawn the application for forfeiture. He also said, *"There was a short hearing in which the magistrate said that having read the application he did not consider that forfeiture was the appropriate way of dealing with the matter."* His view, however, was that there was still a case to answer at a disciplinary hearing because the story of where the money came from still lacked credibility and the Claimant had clearly lied about the age of the banknotes, although he had now altered his account.

80 Mr Gibson sought advice from HR and their advice was that as no allegations had been laid prior to the Claimant's resignation the matter should be discontinued. On 13 December, having read Mr Parkinson's report, Mr Gibson's view was that the residual issues of honesty and integrity and misusing official premises to store cash did not constitute internal fraud as defined by the Cabinet Office. He said that he would advise Ms Lattimore that the case would be closed. He did so on 14 December. He told her that the application had been withdrawn and that the magistrate had been of the opinion that forfeiture was not appropriate.

81 On 20 December 2019 Ms Lattimore wrote to the Claimant that she had decided that there was no case to answer and no further action would be taken on the disciplinary investigation.

### **Conclusions**

82 The Claimant's case in essence was that the manner in which the Respondent dealt with him after the cash that he had concealed in Custom House was discovered amounted to a breach of the implied term of trust and confidence. He said in his claim form,

*"The implied term of trust and confidence was clearly broken: I was treated as if fraudulent or illegal behaviour on my part was a foregone conclusion."*

The last straw was the letter dated 16 August 2018 (four months after the discovery of the cash) instituting the disciplinary process against him on allegations of dishonest or fraudulent conduct and warning him that if they were substantiated it could lead to his dismissal and to his being banned from employment in the Civil Service for five years. He said in his claim form that he had no faith in HMRC to follow a fair process and to treat him fairly.

83 Everyone was agreed that the facts of this case are unusual. An employee keeping a large sum of money hidden in the workplace is unusual. Matters were further compounded in this case because the employer is a body that has powers to seize cash if it has reasonable grounds to believe that it was obtained from unlawful criminal activity or is intended to be used in unlawful conduct.

84 It was also not in dispute that when the cash was discovered the Claimant had been employed by the Respondent for twenty-three years, he had been a conscientious and diligent employee, Ms Lattimore had never had any reason to question his honesty or integrity, it was known by management that he had caring responsibilities for his disabled mother and sister and that these had led to him being off work with stress before.

85 It was clear very soon after the discovery of the cash that the Claimant was the person who had put the cash there and that it belonged to him. Under the Respondent's disciplinary procedure if his managers (Mr Okojie and Ms Lattimore) suspected any misconduct one of them should have assessed the seriousness of it and completed the "discipline checklist – manager's review" and, if the suspected misconduct was potentially criminal or gross misconduct, should have referred it to IG Civil Investigations. Neither of them completed that form. Ms Lattimore believed the Claimant and did not think that he was money laundering or defrauding anyone.



86 Instead the matter was escalated by Ms Inman to the IG Criminal Investigations team which deals with allegations of criminal behaviour that arise in the course of the work of the Respondent's staff. Mr Okojie was then instructed to conduct the formal fact-finding interview with the Claimant. It is clear from the form that Mr Atherton filled on 12 April that IG Criminal Investigations and Ms Inman had at that very early stage taken the view that the Claimant had potentially committed offences of tax evasion or fraud or theft or money laundering. The sole basis for coming to this view was that they did not regard the Claimant's explanations about the source of the cash and the reasons for concealing it in Custom House to be credible. It was not in dispute that the Claimant had been given a mortgage advance of £21,000 in November 2011 and that he had withdrawn £6,700 from that in January 2012. One can see why the Respondent found his explanations for not putting that money back into a bank account when the sale of land in Sri Lanka did not proceed and for keeping the cash at home for six years as not being very convincing. That is a matter it could have investigated further with him. That fact on its own, however, was not sufficient grounds to believe that he had committed criminal offences of theft, tax evasion, fraud or money laundering. The Respondent had at that stage no reasonable grounds on which to believe that the Claimant had committed any criminal offence or that the money was the proceeds of crime. Mr De Ath acknowledged that in his case adoption note when he said that in the absence of reasonable suspicion that it might be the proceeds of crime HMRC had no legal grounds to retain the cash.

87 Notwithstanding that, Mr De Ath decided to seize the cash and to apply for its detention under sections 294 and 295 of the Proceeds of Crime Act 2002. HMRC could only do those things if it had reasonable grounds to suspect that it had been obtained through unlawful criminal conduct or was intended to be used for unlawful conduct. Mr De Ath had acknowledged in his note that they did not have reasonable grounds to suspect that it was the proceeds of crime. Mr Okojie informed the Claimant on 27 April that the cash was being treated as the proceeds of crime. The Respondent did not have reasonable grounds to believe that and, therefore, had no basis for making that application. It is true that the magistrates' court made the order for the cash to be detained for three months. The Claimant was not given sufficient time to prepare for that hearing and did not put forward any evidence.

88 The approach adopted by IG Criminal Investigations and Mr Parkinson throughout was not that it had to demonstrate that it had reasonable grounds to believe that the money was the proceeds of crime but that the Claimant had to establish that it was not the proceeds of crime. Hence, the assumption was that it was the proceeds of the crime and the onus was on the Claimant to prove that it was not. Hence, Mr Parkinson asked him to provide seven years' bank statements for three different accounts.

89 On 16 May 2018 IG Civil Investigations took the view that on the evidence before it, it could not pursue the matter under the disciplinary procedure and that it would take the matter further if the court ordered forfeiture of the cash. That remained its position when Mr Parkinson informed Mr Gibson on 24 July of his application for forfeiture of the cash. Mr Gibson's response was that he would start the disciplinary process if the cash was forfeited.

90 Mr Parkinson applied for forfeiture on 24 July 2018. Mr Parkinson's investigation had turned up two additional matters on which he relied to apply for forfeiture. The first was the evidence from the Bank of England that £7,180 of the £10,000

recovered had been printed after 2 February 2012. On the basis of this Mr Parkinson alleged that the Claimant had given a false account when he had said that the origin of £6,700 of the cash was a withdrawal of that amount that he had made from his account in January 2012. The Claimant had said at the very outset that he had withdrawn that sum of money to take to Sri Lanka to buy land there. He had travelled to Sri Lanka in August 2012 (he confirmed that to Mr Parkinson on 8 July 2018). It was logical to assume that if he had withdrawn the money to take to Sri Lanka to buy land there that he would have taken it with him. Mr De Ath noted in his note on 27 April 2018 that the cash seemed to have left the jurisdiction on at least one occasion. It was also very likely that if the Claimant took the cash there he would have changed it into a different currency and changed it back to sterling when he returned. The Claimant had never been asked and had never said that the notes found in Custom House were the ones that he had withdrawn from the bank in January 2012. All the evidence indicated the contrary. Mr Parkinson's statement that this proved that the Claimant had given a false account was irrational, unreasonable and not supported by the evidence.

91 The second allegation was that he had acted fraudulently by "gifting" himself £1,000 from his sister's account. On the evidence available to Mr Parkinson, there was no evidence to support the allegation that the Claimant had acted fraudulently by stealing money from his disabled sister. It was a very hurtful and serious allegation to make in the absence of the evidence to support it.

92 The grounds relied upon by Mr Parkinson were not reasonable grounds for suspecting that the cash was the proceeds of crime, and the application for forfeiture should never have been made on those grounds. The fact that the application was misconceived was clear by the fact that the Respondent, on advice from their lawyers, withdrew the application at the hearing on 12 December and that the magistrate had also come to the conclusion that forfeiture was not appropriate. A decision was then made to return the cash to the Claimant. The only fair and reasonable course for the Respondent to have adopted at the end of July 2018 would have been to recognise that, having investigated the matter, there were no grounds for applying for forfeiture and that the money should be returned to the Claimant.

93 IG Civil Governance, having decided to wait for the outcome of the forfeiture application, was persuaded by Mr De Ath to institute the disciplinary process for gross misconduct in advance of the cash forfeiture hearing. It too relied on the Bank of England evidence to allege that the Claimant had given a false account of the provenance of some of the money. Mr Gibson acknowledged it was the only evidence that it had of the Claimant's breach of honesty and integrity. For the reasons stated above, the Respondent's conclusions about what that evidence showed were flawed and irrational. On 9 August 2018, nearly four months after the cash was found, IG Civil Investigations completed the "Discipline checklist – manager's review" and sent it to the Claimant's managers. That is the opposite of what the Respondent's disciplinary procedure provides.

94 On 16 August 2018 Ms Lattimore informed the Claimant that the Respondent was starting a disciplinary investigation into the allegation that he had given a false account about the provenance of the cash found in Customs House. The fact that the disciplinary process was abandoned, after the application for forfeiture was withdrawn, demonstrates that it should never have been instituted.

95 By this stage the Claimant had been absent sick with stress for four months. He said from the outset that his condition had been caused and exacerbated by the fact that his employers believed that he had been involved in unlawful criminal activity. He had informed his manager of the deterioration of his health – on 16 July he said that he had chest pains and had been to the A and E department of the hospital, on 5 September he said that he had been to the hospital and had been put on anti-depressants, on 19 September he said that he was suffering from anxiety and depression and IBS and had been asked to see a cardiologist on 24 September.

96 The OH report on 27 April had advised that mediation would assist in facilitating the Claimant's return to work. The Claimant's managers had started trying to set up mediation but put it on hold when the magistrates' court made an order on 30 April 2018 for the cash to be detained. On 3 August Ms Lattimore said that mediation could be used to discuss his relationship with his managers but not the matters that were the subject of the investigation. There is no reason why the Respondent could not have taken that stance on 30 April.

97 The Respondent also knew that the Claimant was the carer of his disabled sister who lived with him, that he was going through a divorce and that he had intended to use the £10,000 to acquire new accommodation for his sister and him. As a result of the Respondent detaining the cash and applying for forfeiture of the cash, he was not able to acquire the accommodation and he and his sister were temporarily homeless.

98 In short, the Respondent presumed at the outset that the cash was the proceeds of crime and that the Claimant had been engaged in unlawful criminal conduct, it seized, detained and applied for forfeiture of the cash in the magistrates' court and started disciplinary proceedings on that basis when it did not have reasonable grounds to do so and his manager of many years believed that he had not committed any criminal offence, it did not follow its disciplinary procedure, his managers were sidelined and the process was driven by Internal Governance, the process was protracted and the Respondent was aware that it had a detrimental effect on his health and well-being. I am satisfied that by dealing with the matter in that way between 10 April and 20 September 2020 the Respondent, without reasonable or proper cause conducted itself in a manner likely to seriously damage the relationship of trust and confidence between it and the Claimant. The Respondent acted in breach of the implied term of trust and confidence and the Claimant resigned in that response to that breach. Not surprisingly, in light of the way that the Respondent had behaved the Claimant had no faith that it would conduct the disciplinary process fairly.

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Employment Judge - Grewal

Date: 23/09/2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

23/09/2020..

FOR THE TRIBUNAL OFFICE