EMPLOYMENT TRIBUNALS

Claimant: **Mr P Matthews**

Respondent: **Royal Mail Group Ltd**

Heard at: **Leeds** **On:** **5, 6, 7, 8 October 2020**

With deliberations on 12 October 2020

Before: **Employment Judge T R Smith**

Representation

Claimant: Mr Matthews in person supported by Mrs Matthews
Respondent: Ms Linford, Solicitor

RESERVED JUDGMENT

The Claimant was not constructively dismissed by the Respondent

REASONS

The Evidence

1. The Tribunal had before it a bundle consisting of 568 pages.
2. A reference to a number in brackets is a reference to a document in the agreed bundle.
3. The Tribunal had before it statements, and heard oral evidence from: –
   - The Claimant, Mr Matthews
   - Mr Nigel Gee, Northern Regional General Manager
   - Mr David Kirk, Shift manager
   - Mr George Coster, Head of Solutions
   - Mr Lee Porter, Unit Manager

4. The Tribunal considered all the evidence in the round, even if it is not specifically referred to every dispute or every document. The Tribunal confined its findings to those required to address the agreed issues.

The Agreed Issues.

5. The agreed issues between the parties were recorded by Employment Judge Davies at a preliminary hearing held on 15 March 2019. There are they are set out as below.

"Did the Respondent do the following things:-

- *Failing to deal with the Claimant's grievance as notified to HR on or about 29 November 2018, because it tried to use the bullying and harassment policy instead, and then did not deal with it at all.*
- *Misleading the Claimant by allowing him to believe that the grievance was being investigated alongside the disciplinary process.*
- *Failing to allocate an impartial grievance manager to investigate the Claimant's grievance.*
- *Not taking the Claimants bullying and harassment complaint submitted on 6 December 2018 seriously.*
- *Not completing a fact-finding interview on the day of the alleged misconduct (9 October 2018) or within two working days of it*
- *Not passing the case up to Lee Porter within three days of the fact-finding interview on 24 October 2018.*
- *Not providing the Claimant with any evidence relied on in the disciplinary process until after the conduct hearing.*
- *Not ensuring that an impartial manager who was not implicated in the Claimant's bullying and harassment complaint dealt with the conduct case*
- *Changing the content of a letter to use in the disciplinary process. The Claimant says that the Respondent wrote to him on 12 December 2018 referred to the date it had received a letter from him about sickness absence as being 5 December 2018. The Claimant says that when he received from the Respondent a further copy of that letter that was being relied on in the appeal hearing, reference to the date his letter was received be deleted. That meant the appeal manager could say that the Claimant had gone off sick as soon he was told case had been passed up, when in fact it was the other way round.*
- *Saying repeatedly that the Claimant had refused to see occupational health, when he had only refused counselling*
- *Failing to refer the Claimant to occupational health from the time he returned to work after two days absence on 8 and 9 November 2018 until 1 March 2019*
- *Not re referring him to occupational health six weeks after that*

If so, did those things breach the implied term of mutual trust and confidence or the duty to provide a safe system of work and a safe workplace

If so, was this so seriously breach of the Claimant's contract of employment that he was entitled to treat the contract as being at an end

If so, did he resign in response

If so, did he do so without affirming the contract

6. This Tribunal would add one clarification to the above agreed issues. If it was established by the Claimant there was a fundamental breach of contract by the Respondent that did not have to be the sole reason why he resigned.
7. For ease of reference the Tribunal has adopted the wording of the agreed issues when discussing its conclusions.
8. The Tribunal agreed with the parties, at the start of the hearing, that due to the time spent reading into the voluminous documents, and a number of initial technical problems with CVP, that the Tribunal would address liability only and then, if there was time, move on to the issue of remedy, if appropriate.

Findings of fact

Background

9. The Claimant was employed at Respondent's sorting office located in Leeds.
10. His employment commenced on 15 March 2012 and his effective date of termination was 06 June 2019.
11. He was employed as a driver, working full-time. He started at 4 am and finished at 11:36 am. There was no contractual obligation to undertake overtime.
12. The Respondent operates in a regulated industry. It is required to ensure the post is delivered properly and punctually.
13. If a driver completed his or her round the driver was entitled to leave early but still received full pay.
14. If a driver did not complete his or her round then any work undertaken over and above base hours was paid at overtime rates. Drivers however were not required to work overtime unless they chose to do so.
15. The Claimant regularly worked overtime up to approximately the end of 2016.
16. Prior to 2017 the Tribunal found the Claimant had raised informal concerns with Mr Cocker as to what he perceived to be an unfair allocation of work. He also, on occasions, made mention to Mr MacKenzie that he thought the work allocation was unfair. He had never raised a formal grievance .

Management structure.

17. The Claimant's supervisor was technically Mr Steve Cocker, but from about 2016 he had no direct responsibility for the Claimant and in reality, the Claimant reported to Andrew Mackenzie and David Kirk. The Claimant reported to both Mr MacKenzie and Mr Kirk because his shift straddled their respective start and finish times. Mr MacKenzie would be present when the Claimant started work and Mr Kirk when the Claimant finished his shift.
18. Mr McKenzie and Mr Kirk in turn reported to Mr Lee Porter the unit/depot manager.

The Policies

19. The Respondent has separate and distinct policies for bullying and harassment and for grievances. Examples are given as to what amounts to bullying and harassment in that policy. It is clear that the policies are mutually exclusive (409). This is further emphasised by the fact that the Respondent has two separate and distinct

departments, case management/gateway team which dealt with bullying and harassment, and HR which, amongst other matters deals with grievances.

20. The grievance policy assumes that where the employee's local management are the subject of the grievance the employee should speak to HR to register a grievance (444)

21. There are also two conduct policies. One is a national agreement between the Respondent and trade unions and used by managers and the second policy is what was described as a simplified version. Both were available to employees on an intranet. To support the national agreement are a number of conduct guides. .Given the simplified version was a product of the national agreement the Tribunal regarded the national agreement as being the applicable policy. This was also the most favourable to the Claimant.

22. The conduct policy sets out the levels of authority of various managers. For the purpose of these proceedings only Mr Porter could deal with the conduct matters referred to herein.

23. There is an attendance policy which governs, amongst other matters, non-attendance and sets out an employee's rights, subject to complying with certain requirements, to generous contractual sick pay.

24. The Tribunal found the conduct, bullying and harassment and grievance procedures were not contractual. There were elements of the Respondents attendance policy, particularly in respect of the right to contractual sick pay, that was in the Tribunal's judgement contractual.

The 2017 Incident.

25. On 23 February 2017 the Claimant received what was termed as a *"two-year serious warning"* for wilful delay in delivering mail, which could have been delivered during his normal working hours (116).

26. Wilful delay, sometimes called intentional delay, in the Respondents disciplinary policy is given as an example of potential gross misconduct (470).

27. The offence was admitted at the time by the Claimant. The determining officer accepted that the Claimant genuinely felt stressed when he had particularly busy days and was hard-working. Although the indicative penalty was dismissal he considered, given the very prompt admission made by the Claimant, coupled with his previous good record and his apology this justified a lesser penalty (116).

28. The Claimant did not appeal the penalty.

29. Although the Claimant contended before the Tribunal that the disciplinary notes were not accurate the Tribunal rejected that contention. Firstly, the Tribunal was satisfied that the notes were reasonably contemporaneous (108 to 110), secondly the Claimant did not point to specific errors and thirdly the lack of challenge by the Claimant at the time. On any objective reading the Claimant was dealt with in a fair measured manner.

30. Relevant to subsequent events was the fact that the disciplinary notes circulated to the Claimant emphasised that the Claimant would never be subject to complaint from local management if he returned mail, provided, he made every effort to deliver all he could during his scheduled hours. It was accepted the Claimants route could be particularly busy but management had no control as to where deliveries had to take place.

31. The Tribunal was satisfied that thereafter the Claimant was handled by local management in the way promised.

32. Thereafter the Claimant simply delivered what he could in his contractual hours. He no longer sought overtime. On occasions he returned with parcels that he had been unable to deliver in the time allocated. No action was taken.

33. No action was taken as regards the Claimant's unwillingness to accept overtime that was on offer.

34. At no time was the Claimant told he had to remain on his route until he delivered all his parcels, if that took him past his contractual finish time.

Workload.

35. The Claimant contended before the Tribunal that he was still working his full hours whereas some others were allowed to leave early because they had lighter work allocations. However, in cross examination the Claimant accepted that it was *"regular that I went home early"* The Tribunal had insufficient evidence before it to reach its own determination on work allocation and in any event was not required to do so as it was not one of the issues identified by Employment Judge Davies.

09 October 2018

36. On 09 October 2018 the Claimant was challenged by Mr MacKenzie that he had wilfully delayed the mail in relation to completing a collection at Lacewood primary school.

37. The Claimant had returned to the depot at 10.45, well before his contractual finish time of 11.36. At the time of the alleged offence the Claimant was still subject to the 2017 warning. Thus, if proven the Claimant was at a real risk of dismissal.

38. The Claimant had not on 09 October 2018 utilised his mobile phone to inform depot management that there was any particular difficulty with the completion of his round or to request permission to finish his round early.

39. The Claimant told Mr MacKenzie that he had worked through his lunch. The Tribunal was satisfied that the Claimant had been told he could not work through his lunch due to the appropriate driving regulations. This was supported by the fact that each day the Claimant was given a work schedule which had designated time allocated for a lunch break (e.g. 288).

40. The Tribunal found that the Claimant was argumentative and confrontational with Mr MacKenzie. The Claimant accepted he said *"if you want to do me bring it on".* That was also consistent with the contemporaneous unchallenged documentation (280).

41. In the circumstances on the same day, 09 October 2018 Mr MacKenzie wrote to the Claimant seeking an explanation for his conduct (280). There was a dispute between the parties as to when the Claimant received the letter, with the Claimant contending it was not until 12 October 2018. It is not necessary to resolve this evidential dispute.

42. In any event whenever the letter was received, the Claimant did not respond.

43. The concerns as to the Claimants apparent behaviour on 09 October 2018 were passed to Mr Kirk by Mr MacKenzie.

Fact Finding.

44. Mr Kirk could not immediately deal with matters as he was on annual leave between 08 and Thursday 18 October 2018. It was appropriate that Mr Kirk dealt with matters

given, if the case was *"passed up"* the Mr Porter would be expected to deal with it given the seriousness of the allegation.

45. Mr Kirk spoke briefly to the Claimant on Friday 19 October 2018 and gave the Claimant a letter dated the same day (281) which was invitation to a fact-finding meeting arranged for Wednesday 24 October 2018**.** The Respondent breached its own procedures as it should have arranged a meeting either the day of the incident or within two working days to discuss the matter with the Claimant (478) before any fact-finding meeting.

46. The invitation letter set out clearly the matters to be discussed and the Claimant's right of representation. The Claimant was signposted to the "Feeling First Class Support Service" which provided independent support to employees. Throughout proceedings between the Respondent and the Claimant the Tribunal found he was frequently signposted to independent areas of support, none of which he contacted

47. The Claimant attended a fact-finding meeting with Mr Kirk on 24 October 2018 and was given an opportunity to explain his position. The notes recorded (282) and the Claimant did not dispute, that he had not sought permission to leave early and he had said he wanted to get home to look after his puppy. He contended he worked through his break and was claiming it as over time.

48. The Claimant was specifically asked by Mr Kirk at the fact find whether there was anything further he wanted to put forward that could be relevant, particularly by way of mitigation to which he responded *"no, not now I will keep my powder dry"* (282). The Claimant was sent the fact find notes to check sign and return.

First Period of Sickness

49. The Claimant was absent on 8 and 9 November, returning on 12 November. Under the Respondents procedures a return to work should always take place on the first day of return of the employee. Mr Kirk did not conduct the return to work until 14 November 2018 (350 to 352), two days outside the timetable set out in the Respondent's own procedures. The Tribunal did not find, from a practical aspect, the delay was serious. All the appropriate steps that should have been undertaken at the return to work were undertaken. In any event the delay was not a factor relied upon by the Claimant as a reason for his resignation.

50. At the meeting the Claimant accepted he had been in touch with his GP. The Claimant was signposted to the HELP service which was independent of the Respondent and the telephone number was provided. The Claimant did not pursue the matter.

51. Mr Kirk asked the Claimant where there is anything further could do to assist the Claimant in a return to work to which the Claimant answered in the negative.

Chasing the Fact Find Notes and Hand Up.

52. Mr Kirk chased the Claimant to countersign the fact-find notes on 19 November 2018 but the Claimant said he had not had time to read them and was chased again on 27 November 2018 with no success.

53. The Claimant was informed by an undated letter that the matter had now been passed up to Mr Porter for consideration, as Mr Kirk considered the potential penalty was outside his level of authority. Mr Kirk contended he handed the letter to the Claimant on 28 November 2018 but the Claimant asserted he did not receive it until 12 December 2018.

54. As the question of delay forms part of the reason why the Claimant contended, he resigned is appropriate to the Tribunal addresses this dispute.

55. On this point the Tribunal considered the Claimant's evidence was more reliable than Mr Kirk. Whilst Mr Kirk had marked on the letter *"letter given to Phil 28/11"* he accepted that on that day the Claimant was absent due to ill-health. He could not recall visiting the Claimant at home. He could not be sure he posted it, and in any event that did not tally with his handwritten note. The Tribunal also noted in cross examination Mr Kirk said on 28 November 2018 he had *"not written everything up"* That pointed away from the papers being passed up to Mr Porter on 28 November 2018.The Tribunal found Mr Kirk's evidence that the Claimant received the letter on 28 November to be unreliable and riddled with contradictions.

56. The Tribunal was satisfied there was a delay in the passing up of matters from Mr Kirk to Mr Porter. Whilst it may have been reasonable to allow the Claimant a little time to approve the notes of the fact find, the matter went on too long.

The Second Sickness Period.

57. On 28 November 2018 the Claimant once again reported sick and was never to return to work.

58. In accordance with the Respondents sickness policy the Claimant forwarded GP notes. He also rang in once a week simply to say he was sick. He was not prepared to discuss when he would return to work, any details of his illness, what he was being prescribed and would not engage in any discussion as to support, even when the Respondents offered him counselling via occupational health. The Tribunal accepted that on occasions Mr Porter told the Claimant of the importance of cooperating with the Respondents sickness policy as failure to do so could impact upon the payment of contractual sick pay.

The First Bullying and Harassment Grievance.

59. On 29 November 2018 the Claimant spoke to case management. The nature of his concerns are not recorded but the relevant entry shows *"stage I grievance status completed".* In the Respondent's policy stage, I is informal discussion with the manager. The Tribunal concluded that what this note meant was the matter had to proceed formally. There were no documents .

60. The following day, 30 November 2018 the Claimant spoke to case management and what was described as a stage II grievance was recorded.

61. The Claimant then lodged what he described as a bullying and harassment grievance on 30 November 2018 (119).

62. Although during part of the Claimant's evidence he suggested that on 29 November he had not lodged a bullying and harassment concern but was raising a completely different grievance as regards evidence he found that there was an unfair allocation of work, the Tribunal rejected that evidence. It did so because whilst the word "grievance" was used in the log, it was clear, looking at the log, that the document lodged on 30 November 2018 was what the Claimant was complaining about, hence the reference to stage II. If it had been an entirely separate concern it would have been logged differently.

63. At this point the Claimant was advised that his allegations did not activate the Respondents bullying and harassment procedure. He was advised they appeared to be related to the ongoing conduct matters and were best addressed in those proceedings.

Absence from Work Meeting.

64. On 04 December 2018 the Claimant was invited to an absence from work meeting (355) arranged for 07 December 2018. The purpose of the meeting was to explore why the Claimant could not attend work and what support he could be offered. The Claimant declined to attend.

The H1

65. On 06 December 2018 the Claimant completed an H1(a form issued by the Respondents to pursue a bullying and harassment complaint) and made general reference to being overworked and bullied which had led to him making an error. The Tribunal concluded this was a reference to the Claimant leaving his round early on 09 October 2018. There was no reference the Claimant's concerns in the H1 being any different from what he apparently raised by telephone on 29 October and in his letter 30 October 2018.Indeed, the Claimant attached to the H1 his letter of 30 October 2018; the bullying and harassment complaint.

66. It is clear from an internal case management log dated 11 December 2018 (120) that after the Claimant was asked questions in relation to his assertions of bullying and harassment by case management and he was told that the issues he was raising either related to the conduct process or sickness absence and his concerns should be dealt with in the ongoing processes .The Claimant was told there was no bullying or harassment made out and therefore his complaint would be returned .Effectively on 11 December 2018 the Claimant had been told that the Respondents did not regard his concerns as amounting to bullying and harassment. That was a conclusion the Respondent was entitled to come to on the information presented to it. The decision of case management was confirmed in a letter dated 12 December 2018 (123).

Occupational Health Referral.

67. By letter dated 07 December 2018 Mr MacKenzie wrote to the Claimant. Mr MacKenzie explained that, given the Claimant had a four-week sick note, the Respondent wish to refer him to occupational health and arranged a sickness meeting for 12 December 2018 (359).

68. The Claimant agreed to cooperate with occupational health and to complete a stress risk assessment. The Claimant never completed the stress risk assessment form

69. An occupational health consent form was only sent to the Claimant on 01 March 2019. The occupational health consent form was returned 06 March**.** Mr Porter claimed that during the weekly health update conversations the Claimant didn't want to go to occupational health. The Tribunal considered there was some reluctance on the Claimant's part. The Tribunal considered this was supported by the evidence, firstly the failure to return the stress risk assessment and secondly because Mr Gee raised with the Claimant, at a meeting with him on 17 January 2019, that it be wise to get occupational health advice, but the Claimant contended his doctor knew better (405).

70. The Claimant was contacted by occupational health and asked to attend a telephone consultation on 22 March 2019. The Claimant did not agree to the consultation because firstly he wanted a face-to-face meeting and secondly, he wanted to see the management referral.

71. The Claimant was advised in writing that the first consultation was normally by telephone and it was a matter for the clinician to make a decision whether a face-to-

face meeting was required. He was told by occupational health his symptoms did not meet the criteria for a face-to-face consultation.

72. The Claimant had a telephone discussion with occupational health of 29 March 2019. Occupational health noted the Claimant was being supported by his GP. He was due to start counselling 09 April 2019. The Claimant was displaying symptoms of significant stress and anxiety and was not fit for work. The report stated that it would benefit management if a further referral was made in six weeks' time in order to review the Claimants progress. There was not a review within six weeks but the Tribunal regarded the explanation for the delay given as credible. Occupational health were concerned that the Claimant's stress and anxiety was linked to work related issues. Mr Porter was advised by HR (429) that it would be better to wait for the conclusion of the grievance proceedings before re-referring as those proceedings might assist encouraging a return to work. It was clear that following the grievance outcome, steps were taken on or about 30 May 2019 to re-refer the Claimant to occupational health but that was then cancelled because of the Claimant's subsequent resignation.

73. However, this is leaping ahead of the chronology and the Tribunal returned to this matter later in his judgement.

The Conduct Hearing.

74. The Claimant attended a formal conduct meeting on 14 December 2018 conducted by Mr Porter.

75. Prior to that date, probably in early December, Mr Porter was aware that he had been named in a bullying and harassment allegation made by the Claimant on 30 November 2018 (119). There were no specific allegations against Mr Porter. At its highest the Claimant said he had been bullied and harassed which caused him to be put in *"the position of having to defend myself from a possible dismissal"*. At this stage, and on the basis of the lack of detail, the Tribunal accepted that given only Mr Porter could have dealt with the disciplinary hearing in the depot, he was entitled to adjudicate upon the allegation.

76. Notes were kept (286 to 287). Mr Porter apologised for the excessive delay in setting up the hearing which he attributed mainly to the Claimant delaying returning documentation in relation to the fact find.

77. The Claimant contended he had not set out any response to the fact find because he had been advised by HR not to hand over any evidence. There was no credible supporting evidence in this regard and the Tribunal considered it inherently unlikely the Claimant would have received such advice. The Tribunal concluded that, given the undisputed reference to the Claimant keeping his powder dry, that he decided not to engage in the process deliberately.

78. Although there was reference to various route planning documents in the notes of the hearing there was nothing to establish the were actually shown to the Claimant for his input, although the information they contained was directly put to him. The Tribunal found that the documents were not physically placed before the Claimant. This produced an element of unfairness, but not a weighty one, because the Tribunal was satisfied the Claimant was given a chance to respond to the documents, and in any event had sight of the same before his subsequent appeal.

79. The Claimant was subsequently invited to a decision hearing held on 18 December 2018 during which the Claimant was told that his existing warning would be extended

for a period of two years and he had a right of appeal. The letter set out in detail the decision-making rationale Mr Porter (299 to 301). The Tribunal found the letter to be considered and on the weight of the evidence it was a decision that Mr Porter could reasonably come too.

80. The Tribunal found it fanciful that there was some form of conspiracy by the local depot management to target the Claimant for disciplinary proceedings. If Mr Porter really wanted to, he could have constructed a case for the Claimant's dismissal, given the offence concerned had an indicative penalty of gross misconduct and the Claimant was already subject to a warning for the same offence.

The Appeal and the Second Allegation of Bullying and Harassment.

81. The Claimant lodged grounds of appeal dated 19 December (302 to 304). In essence the Claimant said he worked through his lunch, although there was a gap in deliveries this was not when he was taking lunch, but when he was stuck in traffic. He had not been shown the route map referred to by Mr Porter. He explained he not cooperated with Mr Kirk or Mr MacKenzie because he did not trust them.

82. The appeal was dealt with by Mr Nigel Gee who had no involvement in the depot management at which the Claimant was based. Mr Gee, however he did have management responsibilities for Mr Porter. The Respondent's own conduct policy states that an appeal should be *"normally held out of line"*. In other words, it should not be the line manager of the decision-maker. The Tribunal accepted Mr Gee had some concerns and spoke to HR and was told, given the shortage of managers and it was not a dismissal, he could deal with the matter. In the Tribunal's judgement it would have been desirable, having regard to the wording of the Respondents policy, that the manager had been completely independent. In any event this did not form a ground upon which the Claimant relied as a reason for his resignation.

83. The Tribunal also considered whether Mr Gee was impartial because he considered that the Claimant had only reported sick after he had been told that his case had been handed up from Mr Kirk to Mr Porter. That is an easy mistake to make given the handwritten script on the letter from Mr Kirk suggesting the Claimant was told of the decision on 28 November 2018. However, for reasons the Tribunal has already set out, it found that the Claimant reported sick before he knew his case had been handed up to Mr Porter for disciplinary proceedings and if all the letters that were before the Tribunal had been disclosed to Mr Gee, he may well have reached the same conclusion. The Tribunal gave careful consideration as to whether Mr Gee therefore had a predetermined view that the Claimant was seeking to manipulate matters. It concluded he did not have regard to the totality of the evidence which the Tribunal will refer to in due course.

84. By letter dated 02 January 2019 Mr Gee invited the Claimant to an appeal hearing, arranged for 17 January 2019 (305 to 306).

85. By letter dated 05 January 2019 the Claimant contended he was being bullied and harassed because he had been set up to fail subject to unfair treatment along with other matters which fell within the definition of bullying harassment in the Respondent's policy (124 to 134)

86. The decision was that the matters referred to were already should be considered as part of the conduct appeal and the Claimant had an appeal arranged 17 January 2019 when matters could be considered. Any matters not connected with the conduct process could be discussed with the manager handling the Claimant sickness absence process and any concerns should be discussed directly with his manager

(193). Other matters were historical. The case management note recorded that when the above was explained to the Claimant he was satisfied with this response. The Claimant contended that entry was untrue. The Tribunal considered it unlikely that an error would have been made by case management on such an important matter. Case management had no connection whatsoever with the Claimant's local depot management. The same note recorded that the outcome the Claimant was seeking from raising his concerns was to avoid being dismissed (122). In the Tribunal's judgement this was telling in that the concerns the Claimant were raising were inextricably linked with the disciplinary process.

87. The Tribunal concluded that to the extent the letter of 05 January 2019 was a new grievance the Claimant agreed to withdraw it having discussed it with case management.

88. It is important to emphasise that, other than the historical matters, case management was not saying the Claimant could not raise his concerns but they should be raised in the ongoing proceedings. A forum therefore was being provided to the Claimant to air his concerns.

89. Case management returned to the Claimant all his papers on 10 January 2019. As the Claimant received his original papers back the Tribunal considered that thereafter the Respondents would have no electronic access to any previous documents lodged by the Claimant. The Respondents were dependent upon the documents supplied by the Claimant to them. This was potentially significant to subsequent events.

90. Before the appeal hearing of the 17 January 2019 the Claimant was invited to a further sickness review meeting on 14 January 2019 but declined. He declined an offer of counselling for occupational health. He did not ask for, or chase, any referral to occupational health.

91. The appeal hearing on 17 January 2019 was by way of a complete rehearing.

92. Having regard to the evidence of Mr Gee and the contemporaneous notes, that Tribunal found Mr Gee approach matters impartially and asked appropriate questions. The Claimant was to criticise Mr Gee for not looking at a file he had. The matter has to be looked at in context. Mr Gee asked the Claimant about his previous two-year warning to which he responded *"it's all in here"* pointing to a file. He did not produce any documents to Mr Gee that he wanted him to consider.

93. The Claimant did say that he had a HR reference number and Mr Gee asked for a copy. Mr Gee subsequently made enquiries and that reference number related to a bullying and harassment concern that case management had determined did not fit the Respondents criteria and therefore had returned the documents to the Claimant.

94. On 12 February 2019 Mr Gee rejected the Claimant's appeal and gave detailed reasons for his decision (333 to 338) He addressed the matters raised in the Claimant's grounds of appeal. He specifically made enquiries as regards to workload and was satisfied it was fairly allocated(337). He also discovered that in respect of 27 November 2018; a work allocation issue raised by the Claimant; the two drivers the Claimant was concerned about that had left early had good reason, one was part-time and the second had pre-booked an early leave time because he had to attend an appointment with his disabled child.

95. The Claimant's appeal against sanction concluded on 12 February 2019.

The Grievance.

96. On 19 February 2019 the Respondents records suggested the Claimant had submitted a further grievance, (195). Looking at the correspondence it appears the letter of 19 February was the Claimant contending he submitted a grievance and had not receive an acknowledgement and wanted to know what was happening That grievance was formally opened on the Respondents system on 26 February 2019. Although the papers suggested the matter was allocated to Mr Porter the Tribunal was satisfied that his name was on the records simply as the manager. The Respondent's HR department was seeking an independent manager to deal with the grievance. Mr Porter had no involvement in the grievance. The delay that followed was not attributable to Mr Porter, although of course, the Respondent bears responsibility as the employer

97. The Respondent did not commence an investigation into the Claimants grievance until 21 March 2019**.** The independent investigator was Mr Darin Craigs.

98. The Claimant was invited to a meeting by Mr Craigs on 29 March 2019 (198)

99. On 04 April 2019 Mr Craigs met the Claimant to discuss his grievance.

100. In summary at the core of the grievance were

101. One, issues as to the start time of the various duties at the delivery office and the sharing of workload

102. Two, the doctoring of letters given to him prior to the appeal and the accuracy of the meeting notes which he refused to sign

103. Three, verbal abuse and bullying from Mr Cocker who principally assigned work to him

104. Four, communication with the Claimant during his sickness absence

105. The Claimant accepted Mr Craigs dealt with all his concerns save for his concerns of work allocation on 27 November 2018. (This was the matter that had already been dealt with by Mr Gee)

The Grievance Appeal.

106. Mr Craigs partly upheld the first issue in the sense he accepted the Claimant had been raising concerns as regards workload allocation and received responses and accepted that there may have been some historical issues as regards Mr Cocker's language but rejected the other issues.

107. The Claimant appealed the outcome of his grievance and set out his grounds of appeal on 14 May 2019 (235 to 236).

108. The appeal was allocated to Mr George Coster who was independent of the Claimant's local management.

109. In addition to hearing evidence from the Claimant, Mr Coster carried out his own enquiries with Mr MacKenzie and Mr Porter and the Claimant accepted that Mr Coster put his concerns to them to obtain their account. The result of those enquiries were shared with the Claimant (265).

110. At the appeal Mr Coster discussed possible solutions including independent mediation and relocation. Although the Claimant contended, he was happy to work for the Respondent the Tribunal found his reasons for rejecting relocation,

particularly when one job was close to his home to be unconvincing. The Tribunal considered that the reality was the Claimant had already decided before the appeal that he wanted to leave and wanted a settlement.

111. On 04 June 2019 Mr Coster rejected the Claimant's appeal.

112. Mr Coster provided a detailed letter setting out his reasoning (268 to 276).

Resignation.

113. The Claimant tendered his letter of resignation on 06 June 2019 with immediate effect.

114. In the letter (98 to 99) the Claimant complained of the fact that firstly the Respondent had breached timescales for the handling of his grievance complaint, had not followed agreed disciplinary appeal procedures, had created a false document to support a manager's full statement, had not resolved his bullying and harassment grievance had not followed the agreed absence procedure timescales and withheld occupational health referrals. Although the Claimants grievance had been concluded it had taken some six months.

Submissions.

115. Both Mrs Matthews and Ms Linford made oral submissions. Neither made any reference to any case law and simply sought to argue on how various pieces of evidence should be interpreted. The Tribunal means no disrespect to either party by failing to set out in detail those submissions. Where appropriate the Tribunal is picked up on any particular issues in its conclusion.

The Law the Tribunal Applied.

116. Section 95 (1) of the Employment Rights Act 1996 defines dismissal as follows: –

"(1) for the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) …

(c) the employee terminated the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

117. For an employee to succeed in a claim of constructive dismissal the employee must satisfy the following four conditions on the balance of probabilities.

- One, there must be a breach of contract by the employer. This may be either an actual or anticipatory breach.
- Two, that breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justifies the employee leaving.
- Three, the employee must leave in response to the breach, that is, it must have played a part in the employee's decision, and not some other unconnected reason.
- Four, the employee must not delay too long in terminating the contract in response to the employer's breach, otherwise the employee may be deemed as waived the breach and agreed to vary the contract.

118. There is implied into every contract of employment a term of trust and confidence as finally affirmed by the Supreme Court in **Malik -v- Bank of Credit and Commercial International SA 1997 IRLR 62** in which the term was defined as follows: –

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated (or) *likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".*

119. The correct approach to determine whether there has been a breach of the term of trust and confidence, according to the Court of Appeal in **Eminence Property Developments Ltd-v-Heaney 2010 EWCA Civ 1168** is as follows: –

120. *"Whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract"*

121. There can be a constructive dismissal if there are a series of events that occur over time which, when considered together, show that there has been a repudiatory breach of contract. In such a case the last action of the employer which leads to the employee resigning need not in itself be a breach of contract. The question the Tribunal must answer is, does the cumulative series of acts taken together amount to a repudiatory breach of the contract, see **Lewis -v- Motorworld Garages Ltd 1986 ICR 157?**

122. This has been further explained by the Court of Appeal in **Omilaju -v- Waltham Forest London Borough Council 2005 ICR 481** where it was held that a relatively minor act may be sufficient to entitle the employee to resign and leave the employment if it is the last straw in a series of incidents.

123. A repudiatory breach, once complete cannot be "cured" see **Bournemouth University -v-Buckland 2010 ICR 908 CA.**

124. In **WA Goold (Pearmak) Ltd v McConnell and anor 1995 IRLR 516,** the EAT upheld an Employment Tribunal's decision that an employer is under an implied duty to *'reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have'.*

125. The law was recently summarised by the Court of Appeal in **Kaur -v- Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978** in the following terms:

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

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

(3) If not, was that act or omission by itself a repudiate 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 and omissions which, viewed cumulatively, amounted to a repudiatory breach of the **Malik** term?

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

126. Whether an employee has waived the breach, or what is sometimes described as affirming the contract, is fact sensitive. There is no fixed time within which the employee must make up his or her mind. Factors that may be relevant include

the nature of the breach, whether the employee has protested and what steps, if any, the employee has taken after the alleged breach to show an intention still to be bound by the contract.

Discussion

127. *Failing to deal with the Claimant's grievance as notified to HR on or about 29 November 2018, because it tried to use the bullying and harassment policy instead, and then did not deal with it at all.*

128. The Claimant contacted case management on 29 November 2018 by telephone and lodged a written concern with the Respondents dated 30 November 2018 (119). It is clear from that document, drafted by the Claimant, that he was making complaints of bullying and harassment. He was not seeking to utilise the Respondents grievance policy.

129. The Respondent sent the Claimant form H1, the appropriate form to be utilised under the Respondent's procedures to pursue a bullying and harassment complaint. The Claimant completed the H1 and attached to it his letter of 30 November 2018.

130. It is clear that case management did not regard the documentation when read together as amounting to a bullying and harassment concern. On reviewing the definition of bullying and harassment in the Respondent's own policy (88) the Tribunal determined that was a sound conclusion. The bullying and harassment complaint was therefore rejected on 11 December 2018 (120) following a discussion with the Claimant. He was advised that his concerns could be raised as part of the ongoing conduct or sickness process.

131. The Respondent did deal with the bullying and harassment complaint because what the Claimant was alleging did not amount to bullying and harassment under the Respondent's policies and procedures. The Claimant then sought to lodge further information on 05 January 2019 and again it did not meet the Respondent's definition of bullying and harassment. The Claimant accepted that determination and the papers were returned to him.

132. Thus, it was not the Respondent who sought to make the Claimant use the bullying and harassment procedure. It was the Claimant himself who chose that procedure. Neither did the Respondent unreasonably delay in explaining to the Claimant why his concerns were not bullying and harassment. The Respondent did not seek to ignore the concerns given it indicated that they could be raised as part of the ongoing process. The major factor for the Claimant was work allocation and as can be seen from the conduct documentation and evidence the Tribunal received, that was addressed.

133. There was no fundamental breach of any express or implied term of the Claimant's contract of employment.

134. *Misleading the Claimant by allowing him to believe that the grievance was being investigated alongside the disciplinary process.*

135. There was no grievance before the Respondent whilst processing the conduct issue. The Claimant was advised that the issues of workload and working hours and holiday could be raised in the course of the conduct proceedings. The Claimant did so in his meeting with Mr Porter on 14 December and at his appeal with Mr Gee on 17 January 2019. In particular Mr Gee carried out further investigations into the Claimant's concerns and set out his determination

particularly in relation to workload in the outcome letter(see 336 and 337). The Claimant could see from the correspondence he received from the Respondents that the principal issue of his concerns were being addressed as part of other proceedings. Whether that was adequate or not is not the point, as that does not form part of the reason given by the Respondent for his resignation.

136. The Respondent did not mislead the Claimant. He knew he didn't not have a complaint that fell within the Respondents bullying and harassment procedure. He did not lodge a formal concern under the grievance procedure until 19 February 2019. That was investigated albeit it was subject to delay. However, the Respondent does not say that it was delay, under this ground, that was a factor in his resignation.

137. There was no fundamental breach of any express or implied term of the Claimant's contract of employment.

138. *Failing to allocate an impartial grievance manager to investigate the Claimant's grievance.*

139. The Claimant's formal grievance was lodged on 19 February 2019 and acknowledged on the 26th (196). By this stage the bullying and harassment allegations had been rejected.

140. The grievance was investigated firstly by Mr Craigs and then by Mr Coster. Both were independent of the depot in which the Claimant worked.

141. No specific challenge was made during the course of the proceedings to the independence of Mr Craigs or Mr Coster by the Claimant.

142. The Tribunal concluded that both Mr Craigs and Mr Coster were independent grievance managers.

143. There was no fundamental breach of any express or implied term of the Claimant's contract of employment.

144. *Not taking the Claimants bullying and harassment complaint submitted on 6 December 2018 seriously.*

145. The Tribunal found the evidence pointed to the fact that the H1 (that is the bullying and harassment grievance incorporating the letter of 30 November 2018) was taken seriously in that it was referred to the Respondent's specialist department, case management. That team who were independent of the depot at which the Claimant worked and analysed the documents, discussed matters with the Claimant and rejected the documentation as amounting to bullying and harassment complaint because it did not fall within the definition of bullying and harassment under the Respondent's internal procedures. The reasons for rejection was explained to the Claimant. When it was renewed on 06 January 2019 it was again rejected and the documentation demonstrated the Claimant accepted that decision. The mere fact a concern or concerns were rejected did not mean they were not considered seriously.

146. There was no fundamental breach of any express or implied term of the Claimant's contract of employment.

147. *Not completing a fact-finding interview on the day of the alleged misconduct (9 October 2018) or within two working days of it*

148. The Respondent did fail to complete a fact find on 09 October 2018. The Respondents conduct handbook, which was not contractual, provided that fact

finds should be completed on the day of the incident if possible and *"within two working days of the matter coming to light"* (478). Ms Linford was right that the context was important. It was common ground that had been a confrontation between Mr MacKenzie and the Claimant, who used words to the effect that Mr MacKenzie was to *"bring it on"*. In those circumstances it was understandable why Mr McKenzie did not pursue his enquiry at the time. Further discussion was unlikely to be productive and thus Mr MacKenzie wrote to the Claimant by letter dated 09 October 2018 asking for an explanation (280). Mr MacKenzie never completed on 09 October 2018. Mr Porter could not deal with the matter as if there was a disciplinary, he would have to deal with the matter, and under the Respondent's policies the Respondent seeks to provide a separation between fact-finding and decision-making. The only other manager available was Mr Kirk and he was on annual leave returning on 18 October but with no formal meeting until 24 October.

149. The Claimant was right that the spirit of the Respondents policy was broken. However the policy was not contractual and a fact-finding procedure was undertaken.

150. There was no fundamental breach of any express or implied term of the Claimant's contract of employment. If there was it was not sufficiently serious to justify in isolation regarding the Respondent as being fundamental breach of contract

151. If the Tribunal was wrong on this point the Claimant by continuing to engage with the Respondents affirmed any breach.

152. The conduct handbook was not contractual. There was a breach in respect of the provisions in relation to a fact find.

153. *Not passing the case up to Lee Porter within three days of the fact-finding interview on 24 October 2018.*

154. The Tribunal found as a fact Mr Kirk did not pass up the papers to Mr Porter within three days of the fact-finding interview on 24 October 2018.

155. There is no express provision in the Respondent's conduct policy that the passing up must take place within three days (479). The only reference to 3 days is found at page 478 under which the fact-finding manager must send out the notes of the meeting explained to the employee they have three working days to respond to any changes they wish to make.

156. Irrespective of any time-limit the Tribunal found that there was a delay in passing up the papers from 24 October 2018 until approximately 12 December.

157. That was a lengthy delay and merely because Ms Linford suggested Mr Kirk was trying to be reasonable to the Claimant does not mean there cannot be a breach of contract.

158. The Tribunal concluded that this was not a fundamental breach of an express or implied term of the Claimant's contract of employment. It did so because any breach there was of the implied duty of trust and confidence was not so serious in isolation to justify resignation. If the Tribunal was wrong on that point the Claimant affirmed the contract because he remained bound by the contract and continued to engage with the Respondents for some seven months thereafter claiming contractual benefits including contractual sick pay.

159. *Not providing the Claimant with any evidence relied on in the disciplinary process until after the conduct hearing.*

160. The Claimant knew the case he had to meet before the conduct hearing he had been given an opportunity to set out his own position at the fact-finding meeting conducted by Mr Kirk .The invitation to the conduct meeting complied with the ACAS code of practice. .The real issue was whether some documents (found at 288 to 296) ,which Mr Porter had at the conduct hearing, were given to the Claimant. The documentation was in the Tribunal's judgement discussed with the Claimant. This was not a case where documents were deliberately withheld. The documents were supplied to the Claimant a few days after the conduct hearing and he certainly had them for his appeal. Ms Linford suggested this therefore *"cured"* any unfairness. With respect to her fairness or otherwise does not come into the equation at this stage. The question was whether there was a fundamental breach of contract.

161. The Tribunal was not persuaded that in isolation on the basis of its above findings of fact that there is a fundamental breach of any express or implied term of the Claimant's contract of employment.

162. If the Tribunal was wrong on that point the Claimant affirmed the contract because he remained bound by the contract and continued to engage with the Respondents for some seven months thereafter claiming contractual benefits including contractual sick pay.

163. *Not ensuring that an impartial manager who was not implicated in the Claimant's bullying and harassment complaint dealt with the conduct case*

164. It was Mr Porter who imposed a disciplinary penalty on the Claimant on the 18 December 2018 and that was after the Respondent was aware that the Claimant appeared to had made a bullying and harassment allegation against all managers at his depot. The Tribunal noted the allegation was vague and there were no specific assertions against Mr Porter. By the time of the conduct hearing that initial bullying and harassment concern had been held by case management not to fall within the Respondents procedures. At the time Mr Porter made his decision there was no complaint against him so there could be no partiality concerns. Even if the Tribunal was wrong on this point, whilst each case is fact sensitive, the Tribunal does not accept, as a general proposition that a vague concern raised against all managers necessarily excludes those managers from handling any concerns, involving an employee. A mere allegation by the Claimant does not mean that Mr Porter was consciously or subconsciously biased against the Claimant. As Mr Gee found he considered Mr Porter's penalty to be lenient given that the offence itself was one that was potentially gross misconduct and at the time of the offence the Claimant was subject to a warning for the same issue.

165. The Tribunal was not persuaded that in isolation on the basis of its above findings of fact that there is a fundamental breach of any express or implied term of the Claimant's contract of employment.

166. In any event the Claimant affirmed the contract because he appealed to Mr Gee , person who he had not raised a bullying harassment concern against and Mr Gee upheld the decision of Mr Porter.

167. The Tribunal is not satisfied this was a fundamental breach of contract.

168. *Changing the content of a letter to use in the disciplinary process. The Claimant says that the Respondent wrote to him on 12 December 2018 referred to the date it had received a letter from him about sickness absence as being 5 December 2018. The Claimant says that when he received from the Respondent a further copy of that letter that was being relied on in the appeal hearing, reference to the date his letter was received be deleted. That meant the appeal manager could say that the Claimant had gone off sick as soon he was told case had been passed up, when in fact it was the other way round.*

169. The Tribunal found as a fact that there were two copies of the same letter. Mr Gee was given a copy, and on the basis of the evidence before him, concluded that the Claimant reported sick after he had been informed that his conduct case was to be handed up to Mr Porter. The Tribunal found that actually the sequence of events was that the Claimant reported sick before he knew of that decision. Mr Gee was not being dishonest but merely reported what appeared on the face of the documents to be correct. Mr Gee made an honest mistake. The Tribunal carefully examined whether the fact Mr Gee considered the Claimant had reported sick after his case was handed up had in some way, influenced his decision. The Tribunal studied the thought processes of Mr Gee set out in his decision letter. Mr Gee reached a decision that was perfectly reasonable on the evidence before him. He was not biased against the Claimant because he thought he reported sick after the conduct case was handed up to Mr Porter.

170. *Saying repeatedly that the Claimant had refused to see occupational health, when he had only refused counselling*

171. The Tribunal found that whilst, for his own reasons, the Claimant was reluctant to cooperate in respect of counselling via occupational health, at no stage had he ever categorically refused to see occupational health. It was wrong to equate refusal to see occupational health for counselling with refusal to see occupational health for an assessment. Whilst the Claimant may have shown a marked lack of enthusiasm for occupational health, for example by refusing to return the stress risk assessment and seeking to impose his own conditions before he would attend, that is not the same as a refusal. Mr MacKenzie assumed that the refusal to attend the counselling was one of the same which explains his letter of 08 January 2019 which Ms Linford relied upon

172. The Claimant did not have a contractual right to see occupational health. He made it abundantly clear to the Respondent that he was very happy with the treatment he was receiving from his GP.

173. The Tribunal was troubled by the fact that occupational health appeared to be first raised with the Claimant on 12 December 2018. He did not categorically refuse although he certainly wasn't seeking to chase a referral. While the Respondent referred to the fact the Claimant did not return the consent form until 06 March 2019 it appears it wasn't sent to him until early March.

174. In the Tribunal's judgement this gap is something the Claimant latched onto late in the day as one of these reasons why he resigned. This was not a case of the Claimant was desperately asking for a referral to occupational health. The Tribunal concluded that the Claimant had little interest in occupational health and was only prepared to cooperate because he was told that if you did not do so it might impact upon the payment of contractual sick pay.

175. The Tribunal did not regard any delay in a referral as being a fundamental breach of the Claimant's contract of employment. An employee has no express or implied contractual right to be referred to occupational health. The purpose of occupational health is to provide a service to the Respondent to assist it in managing its employees' health. The Claimant was already receiving appropriate treatment from his GP which he said on a number of occasions he was more than satisfied with.

176. *Failing to refer the Claimant to occupational health from the time he returned to work after two days absence on 8 and 9 November 2018 until 1 March 2019*

177. There was no breach of contract in failing to refer the Claimant to occupational health after two days absence on 8 and 9 November 2018. The Respondent had a published attendance policy. Looking at the policy it would appear that a manager would normally only consider a referral to occupational health if it was considered there was an underlying health condition affecting the employee's ability to do their job (78) or a likely long-term absence. Neither were applicable here. Whilst it is true the Claimant said in the return to work interview on 14 November 2018 that he was stressed due to management, that was perhaps unsurprising given he was subject to disciplinary proceedings. The Claimant was receiving support from his own GP. The Claimant did not ask for a referral to occupational health. He did not wish to use the helpline and when asked whether there was anything that could be done to help maintain attendance he answered in the negative (350 to 352).

178. In all the circumstances the Tribunal does not criticise Mr Kirk for failing to refer the Claimant to occupational health.

179. The Tribunal concluded that this was not a fundamental breach of an express or implied term of the Claimant's contract of employment.

180. *Not re referring him to occupational health six weeks after that*

181. The occupational health report dated 29 March 2019 (399) contained a recommendation for a review after six weeks. A review was not held after six weeks.

182. A recommendation from occupational health is simply that, a recommendation. It does not impose a contractual obligation upon an employer. It simply provides advice to an employer to better assist it in managing health issues in the workplace. The documentary evidence points to the fact that there was a discussion with HR (429) after about six weeks, and given the previous diagnosis had been the Claimant would not improve until his work-related problems were resolved, the advice given to local management was to await the outcome of the grievance appeal. Whilst Mrs Matthews was to criticise that because she said, fairly, HR were not medically qualified, having regard to the original recommendation the action taken is understandable. The Tribunal noted that a review was booked by email on 31 May 2019 (403) but then cancelled as on 06 June 2019 as the Claimant resigned with his grievance outcome sent on 04 June 2019.

Conclusion

183. *If so, did those things breach the implied term of mutual trust and confidence or the duty to provide a safe system of work and a safe workplace*

184. *If so, was this so seriously breach of the Claimant's contract of employment that he was entitled to treat the contract as being at an end*

185. *If so, did he resign in response*

186. *If so, did he do so without affirming the contract*

187. Having made findings of fact in respect of the alleged breaches of contract the Tribunal I then stood back and looked at those issues, where it found the Claimant had justifiable concerns, whether taken together, even though they were not individually fundamental breaches, whether they could amount to a fundamental breach.

188. The Tribunal found they did not, so no express or implied terms of the Claimants contract were broken by the Respondent.

189. The Tribunal concluded the principle reason the Claimant resigned was he thought he was doing more work than others . Even if that was right the Claimant was never asked to do more than his own contractual duties for which he was paid. If there was too much work, he could leave it with no penalty. He wanted a settlement agreement and principally resigned because he no longer wanted to work for the respondent not due to any breach of contract

190. If the Tribunal was wrong on that point it then considered that the Claimant had affirmed the contract. He continued to remain in employment, engaging with the Respondent and receiving contractual sick pay after the incidents occurred. He demonstrated by his behaviour is still regarded himself as bound by the contract.

191. The Tribunal had sympathy for the Claimant. The Tribunal found it surprising that such a large organisation as the Respondent would have difficulty following its own policies and procedures and indeed had differing policies on the same subjects {for example conduct). There were aspects of the Claimant's treatment that were not well handled.

192. However, the Tribunal must apply the law and reminded itself that a fundamental breach is a high hurdle for a Claimant to cross, the burden being on the Claimant, to demonstrate that an act or omission is so serious that the Claimant can no longer be expect to be bound by the contract. While the Claimant may genuinely have believed there were issues with work allocation and is local managers objectively that belief was not well-founded.

193. In the circumstances as a matter of law the Tribunal must dismiss the Claimant's complaint.

Employment Judge T R Smith

Date 15 October 2020