EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr M Jasim	and	LHR Airports Limited

Heard at Reading on: 24, 25, 26, 27 May 2021 (hearing)
28 May 2021 (in chambers)

Appearances:
For the Claimant Mr P O'Callaghan, counsel
For the Respondent Mr J French-Williams, solicitor

Employment Judge Vowles **Members** Ms F Betts
Ms C Anderson

RESERVED UNANIMOUS JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties and determined as follows.

Protected Disclosure Detriment – section 47B Employment Rights Act 1996

2. The Claimant was not subject to any detriment on the ground that he had made a protected disclosure. This complaint fails and is dismissed.

Trade Union Detriment – section 146 Trade Union and Labour Relations (Consolidation) Act 1992

3. The Claimant was not subject to any detriment on the ground of trade union membership or activities. This complaint fails and is dismissed.

Unfair Constructive Dismissal – sections 95(1)(c) and 98 Employment Rights Act 1996

4. The Claimant was not constructively dismissed. This complaint fails and is dismissed.

Reasons

5. This judgment was reserved and written reasons are attached.

Public Access to Employment Tribunal Judgments

6. The parties are informed that all judgments and reasons for judgments are published, in full, online at *www.gov.uk/employment-Tribunal-decisions* shortly after a copy has been sent to the Claimant and Respondent.

REASONS

SUBMISSIONS

1. On 12 December 2018 and 25 June 2019 the Claimant presented claim forms to the Tribunal with complaints of detriments as a result of making a protected disclosure contrary to s.48(1) Employment Rights Act 1996 and/or as a result of his trade union membership or activities contrary to s.146 Trade Union and Labour Relations (Consolidation) Act 1992. The latter claim was for Unfair Constructive Dismissal.

2. On 22 February 2019 and 16 September 2019 the Respondent presented responses and denied all the claims.

3. The claims were clarified at a case management preliminary hearing on 7 April 2020. The Claimant provided further and better particulars of the claims on 14 October 2020. The parties thereafter agreed a list of issues on 4 November 2020. That agreed list of issues sets out the matters which the Tribunal considered at this full merits hearing.

EVIDENCE

4. The Tribunal heard evidence on oath on behalf of the Claimant as follows:

   (1) Mr Muhammad Jasim (Claimant - Passenger Experience Manager Terminal 5)

   (2) Ms Tracy Coxhill (colleague of the Claimant)

5. The Tribunal also heard evidence on oath on behalf of the Respondent as follows:

   (1) Mr Richard Tierney (Future Airports Operations Lead – Investigation and Discipline Officer)

   (2) Mr Dean O'Boyle (Service Delivery Manager – Claimant's Line Manager during his absence on sick leave)

   (3) Mr Tim Parker (Security Operations Leader – Grievance Officer)

   (4) Mr Craig Austin (Employee Relations Manager)

   (5) Ms Fiona Hobbs (Head Employee Relations and Engagement)

6. The Tribunal also read a chronology and cast list produced by the parties.

7. The Tribunal also read documents in a bundle consisting of 693 pages.

FINDINGS OF FACT

8. The Respondent is the operator of London Heathrow Airport. The Claimant was employed as a Passenger Experience Manager from 31 March 2006 until his resignation on 5 April 2019, a total of 13 years.

9. The Claimant was a Unite Shop Steward Representative and also a Unite Health and Safety and Equality Representative.

10. On 6 December 2017 the Claimant sent an email to his Line Manager, Ms Helen Waugh with a request for time off in order to undertake his Trade Union duties. The email referred to time off on 8, 13, 19 and 31 December 2017. The email was signed off at the end with the following:

> "Lisa Armstrong
>
> T5 Unite Secretary"

11. Ms Waugh forwarded the email to Mr Jason Matthews who replied to Ms Waugh as follows:

> "Hi Helen, Can I please ask that you don't authorise any of these dates until we have spoken. But if I can ask who did this email actually get sent from regarding these dates? I know it says Lisa at the bottom of the email, but did she actually send it or did Mo"

12. On 11 January 2018 a fact-finding interview took place conducted by Mr Matthew Mileham (Passenger Service Manager – Operations) regarding the email which the Claimant had sent on 6 December 2017. The Claimant was asked why Lisa Armstrong's email signature was at the bottom of his email. The Claimant replied:

> "Typing error. I put it in the right format and copied and pasted it from the previous month. I had not noticed it. I am unsure why it is there. It is the first time I've seen it and must be an error. I copied and pasted it."

13. At the end of the interview the Claimant was suspended pending further investigation.

14. On 15 January 2018 the Respondent sent a letter regarding the Claimant's suspension to a third party. The Claimant was informed on 23 January 2018 that this had been done and that it was done in error. Mr Mileham apologised for the error and said that it was caused by another individual on record having the same name as the Claimant.

15. The Claimant replied:

> "I accept your apology for the delay and for sending my suspension letter to another employee of Heathrow Airport Limited."

16. The Claimant requested further information regarding the suspension letter having been sent in error to a third party.

17. On 30 April 2018 the Respondent wrote to the Claimant to inform him that his period of suspension had been concluded but that the investigation into his conduct was still ongoing and that he may be required to attend future meetings. The Claimant had been suspended from duties for 15 weeks at this point. On the same date, 30 April 2018, the Claimant commenced a period of sick leave and did not return to work thereafter.

18. On 24 May 2018 the Claimant raised a grievance regarding the conduct of Mr Mileham towards him. The Respondent rejected the grievance on the basis that the Respondent's Grievance Policy stated that any grievance had to be raised within 28 days but the Claimant was offered mediation between himself and Mr Mileham.

19. On 6 August 2018 Mr Mackie concluded the investigation officer's report. On 3 September 2018 Mr Tierney wrote to the Claimant to inform him that there was no case to answer. The letter included the following:

> "Dear Muhammad,
>
> Thank you for meeting with Jason Mackie on 31 July 2018 to discuss the allegations of –
>
> - Deliberately making a false statement or dishonest conduct in relation to the company.
>
> - Following receipt of the investigating officer's report in my capacity as case owner after giving careful consideration to all the information and evidence available to me, I have concluded that there is no case to answer.
>
> Given this outcome I have, in line with policy, instructed that all notes be destroyed and for a letter to this effect to be placed on your file.
>
> I would like to take this opportunity to thank you for attending the meeting and your cooperation throughout this process."

20. The letter also dealt briefly with questions which the Claimant had queried about his suspension and the conduct of the investigation against him.

21. On 28 September 2018 the Claimant sent a grievance to Mr Austin which he rejected on 1 October 2018 on the basis that the grievance contained matters previously raised in the earlier grievance which was ruled out of time. The grievance was not therefore progressed by the Respondent.

22. On 2 November 2018 Mr O'Boyle held an Absence Review discussion with the Claimant the content of which he confirmed in a letter dated 19 December 2018. So far as attempts to return to work were concerned the relevant part of the letter read as follows:

> "We went through your OH Report and I noted that there is no mention of your depression, the matter hinges on your discontent with the company with regard to the disciplinary. I explained it is now resolved and there is no further discussion to be had.

My objective as your Duty of Care Manager is to facilitate your recovery and return to work, not to discuss the disciplinary as this was not a matter I was involved in. You have had an outcome from Richard giving you answers to the questions you had and there will be nothing further to add to this.

I asked you what you see as a solution to enabling you to return and what is blocking you. You stated again that you are not satisfied with the process around the disciplinary, your interactions with Craig Austen and the general handling of the case.

I asked you what you think is a reasonable adjustment plan to allow you back into the working environment? You repeated that you will not return until the questions you have posed are answered around what changed while you was suspended to have the suspension lifted. I reminded you that in the course of the investigation and interviews, information would have come light to help the business determine that you could return.

I explained that I need to see a plan in place for your return to work as so far nothing substantial has been presented that demonstrates to me that a return to work plan is foreseeable. I explained that as the process has now been exhausted you are unable to fulfil your role.

I reiterated we can offer help, I have offered phased return, I offered you to come in for a coffee morning to get reacquainted with people, I offered you a temporary or permanent business unit move and also Employee Assistance Programme. You stated that you would not return to work until you were satisfied that you do not feel at risk which you said that you currently do.

We went through your OH Report in detail and I explained that it is there to help us get people back to work without putting them at risk. I explained that OH give us specialised information as they understand the airport environment.

In summary I have offered everything that I can to enable a return to work, you have asked questions of me about the disciplinary process which I have explained are not part of my remit, as my objective is to get you back to work. The company is satisfied that it has provided satisfactory outcomes to the process and as such no further communication will be given on this matter. I asked you when do you think is enough is enough we have exhausted the process and as explained I can see no plan in place to help you return. It is therefore my decision to refer you for an Employment Review for incapability to carry out your role as a Passenger Experience Manager."

23. On 22 November 2018 the Respondent's Payroll Department sent a letter to the Claimant stating that should he not return to work by 28 December 2018 he would have exhausted his entitlement to paid sick leave and would therefore stop receiving any pay as of that date.

24. On 23 November 2018 the Claimant raised seven grievances against:

    (1) Adam Collins

    (2) Jason Mackie

    (3) Richard Tierney

    (4) Lisa Armstrong

(5) Craig Austen

(6) Helen Waugh, and

(7) Jason Matthews

25. On 11 December 2018 the Claimant raised a grievance against Scott Connolly. On 3 January 2019 he raised a grievance against Dean O'Boyle.

26. Mr Parker was appointed as the grievance manager who investigated the grievances as far as possible but did not provide outcomes to the nine grievances referred to above until 30 July 2019. None of the grievances were upheld.

27. On 16 January 2019 the Claimant attended a meeting with Ms Hobbs and Sally Westward to look at the possibility of facilitating the Claimant's return to work. On 21 March 2019 the Respondent's HR Department wrote to the Claimant and confirmed that if he did not return to work until after 10 April 2019 he would have exhausted his sick pay entitlement. This letter was sent in error.

28. On 5 April 2019 the Claimant wrote a formal letter of resignation to Mr Chris Garden (Chief Operations Officer). The letter was dated 28 March 2019 but not sent until 5 April 2019. The letter contained complaints about his treatment by the Respondent and the delay in dealing with his grievances.

29. On 8 April 2019 Ms Sally Westward wrote to the Claimant setting out a brief response to his complaints in his resignation letter and offered him a short period to reconsider his decision. The resignation was not withdrawn and was effective to terminate the Claimant's employment on 5 April 2019.

DECISION

Protected Disclosure Detriments - sections 43B and 47B Employment Rights Act 1996

30. Employment Rights Act 1996

    Section 43A - Meaning of protected disclosure

    In this Act a protected disclosure means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

    Section 43B - Disclosures qualifying for protection

    (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

Section 47B - Protected disclosures

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker (W) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done -

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

Section 48 - Complaints to employment tribunals

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(2) On a complaint under subsection …. (1A) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

31. The Tribunal took account of the requirement for a reasonable belief in the public interest in making a disclosure and referred to the case of Chesterton Global Ltd v Nurmohamed [2018] ICR 731 in which it was said:

"The question whether a disclosure is in the public interest depends on the character of the interests served by it rather than simply on the number of people sharing it. CG Limited went too far in suggesting that multiplicity of persons sharing the same interest can never by itself convert a personal interest into a public one. The statutory criterion of what is in the public interest does not lend itself to absolute rules and the Court of Appeal was not prepared to discount the possibility that the disclosure of a breach of a worker's contract of the Parkins v Sodexho kind may nevertheless be in

the public interest or reasonably be so regarded if a sufficiently large number of employees share the same interest. Tribunals should however be cautious about reaching such a conclusion. The broad intent behind the 2013 statutory amendment is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers even where more than one worker is involved."

32. The Court of Appeal went on to hold that where the disclosure relates to a breach of the worker's own contract of employment, or some other matter where the interest in question is personal in character, there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker.

33. There were then four factors which it was suggested might be relevant:

    1.1 First of all the numbers in the group whose interests the disclosure served.

    1.2 Second, the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed.

    1.3 Third, the nature of the wrongdoing disclosed.

    1.4 Fourth, the identity of the alleged wrongdoer.

Disclosures

34. The disclosures which the Claimant alleged were qualifying disclosures within the meaning of s.43B Employment Rights Act 1996 were contained within the Claimant's grievance letter dated 20 September 2018 (but actually sent to the Respondent on 28 September 2018) as follows:

- On top of the above my suspension letter was sent to another employee of the company and I was getting lots of calls and texts from all over the business asking why I had been suspended. This caused me an enormous amount of stress. My request under Freedom of Information Act to see which address my letter was sent to was also declined.

- I believe I am being victimised for being a TU Rep as in December I was told to chose my audience carefully by one of the PSMO when highlighting an urgent Critical Resourcing issue sent to the Management Group email, one of the PSMO instead of addressing the issue told me off as the senior managers were on the group who must have read it including Richard Tierney. I have had a very detailed phone conversation with Richard about this however, no feedback was given to me by Richard as to what actions him and his management team took to rectify my concerns. Surprisingly as a result no union facility time was approved for me in the month of December 2017 despite me chasing my line manager up twice."

35. The Claimant claimed that these parts of the grievance included information which tended to show that the Respondent was in breach of its legal obligations in respect of the Data Protection Act 2018 and the Trade Union

and Labour Relations (Consolidation) Act 1992. The Claimant said that the disclosures were qualifying within the meaning of s.43B (1)(b) Employment Rights Act 1996. The Claimant claimed that he had a reasonable belief as to these disclosures being in breach of a legal obligation and that also they amounted to trade union detriment/victimisation. He claimed that the disclosures were also in the public interest as the public have a legitimate interest in data controller's protecting personal data particularly where such data is sensitive including allegations of dishonesty. He went on to say that parliament has recognised that there is a legitimate public interest in the protection of Trade Union Representatives from detriment and that protection is enshrined in primary legislation.

36. The Tribunal found that the matters referred to above in the Claimant's grievance did amount to the disclosure of information and that the Claimant had a reasonable belief there had been a breach of a legal obligation involving the disclosure of his personal data and an allegation of being victimised for being a Trade Union Representative.

37. The Respondent disputed that the Claimant could have had a reasonable belief that the disclosures were in the public interest because they were of purely personal interest to him.

38. The Tribunal took account of the guidance in the Chesterton case quoted above and found that the Claimant could not have had a reasonable belief that the disclosures had been made in the public interest. The disclosures were regarding matters which were purely personal in nature to the Claimant. Only the Claimant's interests were affected, and not those of any wider group. The Claimant may have subjectively believed his disclosures were in the public interest but that belief was not objectively reasonable.

39. Accordingly, the Tribunal found that the test of a reasonable belief in a public interest in s.43B Employment Rights Act 1996 was not satisfied. It found that viewed objectively, the disclosures did not fall within the definition of qualifying disclosures and were not therefore protected under section 43A and 43B of the Act.

40. Accordingly, the claims of protected disclosure detriment under s.47B and 48 of the Act therefore fail.

Trade Union Membership/Activities detriment – s.146(1)(b) Trade Union and Labour Relations (Consolidation) Act 1992

41. Section 146. Detriment on grounds related to trade union membership or activities.

(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of –

(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,

(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,

(c) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or …

42. In Ministry of Defence v Jeremiah [1980] ICR 13, the Court of Appeal said that "detriment" meant simply "putting under a disadvantage" and that a detriment exists if a reasonable worker would or might take the view that the action of the employer was in all the circumstances to his detriment. What matters is that, compared with other workers (hypothetical or real) the complainant is shown to have suffered a disadvantage of some kind. Someone who is treated no differently than other workers, even if the reason for an employer's treatment is perceived to arise from, or be connected to, the act of making a protected disclosure, will find it difficult to show that he or she has suffered a detriment.

43. Set out below, in **bold**, are the alleged Trade Union related detriments which were set out in the agreed list of issues:

(i) The initiation of a disciplinary investigation that was ultimately not pursued dated 11 January 2018.

44. The Tribunal found this was factually proved.

45. The Claimant claimed that it amounted to a detriment within the meaning of s.146(1)(b) of the Act. There was no prima facie case of dishonesty. The Respondent's approach to this disproportionate and oppressive and brought with it severe damage to the Claimant's reputation and credentials.

46. The Respondent denied that this was a detriment and that the Respondent had reasonable and proper cause for investigating it as a potential deliberate false statement or dishonest behaviour.

47. The Tribunal found that the Claimant had been treated no differently than the other worker would have been treated in the same circumstances. Although the questioned email of 6 December 2017 related to trade union matters, the investigation was not because of the Claimant's union membership or for the main or sole purpose of penalising the Claimant for his trade union membership and activities. There was a serious allegation which on the face of it might have amounted to a false statement and/or dishonesty. It was a serious allegation and was deserving of investigation.

48. There was no evidence from which the Tribunal could find or infer a causal link between initiation of the disciplinary investigation and the Claimant's

trade union membership and activities. The Tribunal found that this was not a trade union related detriment.

(ii) The imposition of a period of suspension for 15 weeks 11 January 2018 to 30 April 2018

49. The Tribunal found this was factually proved.

50. In his submission the Claimant concentrated on the length of the suspension amounting to 15 weeks.

51. The Tribunal found that it was reasonable to suspend the Claimant in the first place and that the suspension in itself was not a detriment. However, the length of the suspension was capable of amounting to a detriment. It was likely that another employee is the same circumstances would have been suspended but the length of suspension was excessive and amounted to a detriment.

52. The Claimant said that he was prevented from standing for re-election as a trade union representative by reason of being suspended but there was no evidence that that was the purpose of the extended suspension.

53. Mr Tierney explained that there were good reasons for at least part of the delay and it was subsequently found that there was no case to answer. The suspension was lifted on 30 April 2018 at a formal meeting with the Claimant. Mr Tierney explained that the Claimant was absent on leave for a good part of the investigation, there was a change of investigator and once the new investigation officer concluded the initial stages of the investigation process he determined that suspension was no longer necessary and it was removed.

54. Crucially, the Tribunal could find no evidence upon which it could find or infer a causal link between the suspension, the length of suspension, and the Claimant's trade union membership or activities. Indeed, it was not put to Mr Tierney in cross examination that the suspension or the length of it was for the purpose of penalising trade union membership or activities. The Tribunal found that although the length of the suspension amounted to a detriment there was no causal link with trade union membership or activities.

(iii) The Respondent's failure and/or refusal to hold a satisfactory grievance hearing amidst a suggestion that the grievance was "out of time" as if there was a statutory limitation on grievances dated 2 October 2018

55. The Tribunal found this was factually proved.

56. The Respondent accepted that the grievances of 24 May 2018 and 20 September 2018 had been rejected because they were out of time in accordance with the Respondent's Grievance Policy which requires a limit of 28 calendar days. Mr Austin said in cross examination that the 28-day

rule was applied consistently throughout the Respondent's business although he provided no evidence of other examples.

57. The Tribunal found that there is a fundamental implied term in a contract of employment that an employer will reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance they may have,

58. The Tribunal found that the refusal to deal with the grievances would amount to a detriment but once again, it could find no evidence that the refusal was done to penalise the Claimant's trade union membership or activities.

(iv) A GDPR breach following the deliberate dissemination of a disciplinary letter to a third party dated 11-15 January 2018.

59. The Tribunal found this was factually proved.

60. It was admitted by the Respondent. It was clearly a detriment but was also clearly an error. As referred to above, the Respondent informed the Claimant that this had taken place and apologised for it. Indeed, at the time the Claimant said that he accepted the apology. There was no evidence whatsoever that the sending of the disciplinary letter to a third party was a deliberate act. As the Respondent stated, it was a simple unfortunate administrative error which was acknowledged and an apology was issued. The Respondent also pointed out that the letter was not sent in error to another employee but rather to an external contact of some years ago.

61. The Tribunal found no causal link between the conduct of the Respondent in this respect and the Claimant's trade union membership and activities.

(v) The alleged destruction of documents related to the Claimant's grievance and his response / defence to the disciplinary matter dated 29 September 2018.

62. This matter relates to Mr Tierney's letter dated 3 September 2018 which is quoted above in which he said that he had *"instructed that all notes be destroyed and for a letter to this effect to be placed on your file."*

63. The Respondent pointed to the Disciplinary Policy which states:

> "If the outcome of the meeting is that no further action is to be taken all notes will be destroyed and a letter confirming this will be placed on the employee's file."

64. The Tribunal found that in fact, notwithstanding Mr Tierney's instruction, the documents had not been destroyed and that was clearly to the Claimant's benefit as he would be able to obtain copies to assist with his grievances.

65. The Tribunal found that this was not a detriment. Mr Tierney's statement was in accordance with the Respondent's polices and it is clear that any other employee in the same circumstances would have been so informed.

66. There was no causal link to be found between Mr Tierney's conduct and the Claimant's trade union membership and activities.

(vi) Receipt of a letter relating to sick pay exhaustion dated 21 March 2019

67. The Tribunal found this was factually proved.

68. The Respondent accepted that a letter was sent to the Claimant on 21 March 2019 (referred to above) which incorrectly advised him that his sick pay was due to expire but that this was sent in error. As the Respondent stated, the Tribunal accepted that the Claimant must have realised that this letter was sent in error because his sick pay had in fact expired well before that date.

69. Ms Hobbs gave an explanation how the payroll process operates. She said it was an automated letter and this amounted to an administrative error. The Tribunal found that this was not a detriment. There was no loss of pay and it was clearly an error by the Human Resources/payroll Departments.

70. There was nothing to suggest any connection between this letter and the Claimant's trade union membership and/or activities.

(vii) The Respondent's failure to pay the Claimant for approve holiday taken between 1-4 March 2019.

71. The Respondent accepted that this was a pay error and was due to the Claimant showing on the payroll system as being on sick leave which automatically overrides a holiday payment unless there is a manual override. The situation was rectified as soon as possible after the Claimant had raised the issue in his resignation letter and he was eventually paid.

72. Again, this was an error which no connection with the Claimant's trade union membership or activities. There was no evidence whatsoever of any causal link.

73. All the events above found factually proved (that is found to have actually happened) were shown to have occurred for non-discriminatory reasons.

74. It follows from the above that all the claims of trade union membership / activity detriment must fail.

Unfair Constructive Dismissal – sections 95(1)(c) and 98 Employment Rights Act 1996

75. Section 95 Employment Rights Act 1996 sets out the circumstances in which an employee is dismissed. Constructive dismissal is defined as follows:

    (1) For the purposes of this part an employee is dismissed by his employer if –

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

76. Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27 - 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 the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. … He must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

77. Hilton v Shiner Limited [2001] IRLR 727 - The implied term of trust and confidence is qualified by the requirement that the conduct of the employer about which complaint is made must be engaged in without reasonable and proper cause. Thus in order to determine whether there has been a breach of the implied term two matters have to be determined. The first is whether ignoring their cause there have been acts which are likely on their face to seriously damage or destroy the relationship of trust and confidence between employer and employee. The second is whether there is no reasonable and proper cause for those acts. For example, any employer who proposes to suspend or discipline an employee for lack of capability or misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence, yet it could never be argued that the employer was in breach of the term of trust and confidence if he had reasonable and proper cause for taking the disciplinary action.

78. London Borough of Waltham Forest v Omilaju [2005] IRLR 35 - In order to result in a breach of the implied term of trust and confidence, a "final straw", not itself a breach of contract, must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. Thus, if an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence but the employee does not resign and affirms the contract, he cannot subsequently rely on those acts to justify a constructive dismissal if the final straw is entirely innocuous and not capable of contributing to that series of earlier acts. The final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. Thus, the mere fact that the alleged final straw is reasonable conduct does not necessarily mean that it is not capable of being a final straw, although it will be an unusual case where conduct which has been judged objectively to be reasonable

and justifiable satisfied the final straw test. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

79. Kaur v Leeds Teaching Hospital NHS Trust [2018] CA – The point being made in Omilaju was that if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the implied term. To hold otherwise would mean that, by failing to object at the first moment that the conduct reached the threshold for breaching the implied term of trust and confidence, the employee lost the right ever to rely on all conduct up to that point. Such a situation would be both unfair and unworkable. Underhill LJ disagreed with the view expressed by HHJ Hand QC in Vairea: provided the last straw forms part of the series (as explained in Omilaju) it does not 'land in an empty scale'. He recommended that Tribunals put Vairea to one side and continue to draw from the pure well of the Omilaju judgment, which contains all that they are likely to need.

80. The claim of Unfair Constructive Dismissal was set out in the list of issues as follows. The Claimant claimed that he resigned in response to the matters claimed above as being trade union detriments and that the alleged detriment **(vii)** was the last straw which caused him to resign.

81. The Tribunal found that items **(i), (ii) and (v)** amounted to conduct for which the Respondent had reasonable and proper cause. The Respondent's disciplinary policy provided a power to suspend in such circumstances. Although the length of suspension was excessive, the suspension, initiation of disciplinary investigation, the finding that there was no case to answer and informing the Claimant that the Respondent had instructed documents to be destroyed (thought they were not in fact destroyed) could not be considered objectively to be breaches of trust and confidence.

82. So far as item **(iii)** was concerned the Tribunal found that in accordance with the EAT decision in WA Goold (Pearmak) Limited v McConnell [1995] IRLR 516 the Claimant had been denied a reasonable opportunity to obtain redress of a grievance and the Tribunal found that it was a breach of trust and confidence.

83. So far as item **(iv)** was concerned, this breach of GDPR by disclosing the Claimant's personal data to a third party was not a breach of trust and confidence. Viewed objectively it was clearly an error and the Claimant accepted that fact. There was an immediate apology and the Claimant accepted that apology. The Tribunal found that this was not a breach of trust and confidence. There was no evidence of any damage to the Claimant's reputation.

84. So far as items **(vi) and (vii)** were concerned, these were also errors which would have been obvious to the Claimant and did not amount to breaches of trust and confidence.

85. Item **(vii)** was obviously an innocuous payroll error and that should have been obvious to the Claimant. It was not an act which in itself was a breach of trust and confidence nor would it contribute to any earlier breach of trust and confidence. It was not capable of amounting to a final straw.

86. Accordingly, the only breach of trust and confidence found by the Tribunal was item **(iii)** above. But after this event the Claimant waited over six months before he resigned. The Tribunal found that that being so, the length of the delay showed an intention to remain in employment and amounted to a waiver of the breach and an affirmation of the contract of employment. Although the Claimant had submitted multiple grievances (24 May 2018, 28 September 2018, 23 November 2018, 11 December 2018 and 3 January 2019), he did not resign until 5 April 2019. He continued to accept sick pay until its expiry and at meetings considered, though rejected, attempts to facilitate his return to work.

87. The Tribunal was not satisfied that, viewed objectively, there were fundamental breaches of contract which entitled him to resign without notice on 5 April 2019. There was no constructive dismissal.

88. The complaint of unfair constructive dismissal therefore fails.

89. All claims fail.

I confirm that this is the Reserved Unanimous Judgment in the case of Mr M Jasim v LHR Airports Limited case no. 3335322/2018 and 3320062/2019 and that I have dated and signed by electronic signature.

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Employment Judge Vowles
Date*: 14 July 2021*

Sent to the parties on:
19th July 2021

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THY

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For the Tribunals Office