EMPLOYMENT TRIBUNALS

Claimant: Mr T Barnes

Respondent: Royal Mail Group Limited

Heard at: Watford Employment Tribunal (in public; by video)

On: **22, 23, 26, 27, 28 April 2021**

Before: Employment Judge Quill (Sitting Alone)

Appearances
For the Claimant: In Person
For the respondent: Mr I Hartley, solicitor

JUDGMENT having been sent to the parties on 14 May 2021, and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This was a hearing conducted fully remotely by video over 5 days. There were no significant technical issues. I had an agreed bundle of documents of approximately 257 pages for the liability phase of the hearing and, at the start of day 2, a further 60-page document was added. On the claimant's side there were two witnesses, that is himself and Mr Ling and on the respondent's side there were five witnesses, namely Mr Bennett, Mr Conquest, Ms Ellis-Crease, Mr Stepney and Mr Yeo. Each of the witnesses had prepared a written witness statement and each of them attended the video hearing and answered questions on oath from the other side and from me. A list of issues had been prepared. That was agreed at a preliminary hearing before Employment Judge Hawksworth on 28 January 2021. At the outset of the hearing both parties agreed that the list of issues which starts on page 34 of the bundle, was still correct as far as each of them were concerned.

2. The only complaint in this case is one of unfair dismissal. The allegation is that there was a constructive dismissal, in other words the claimant alleges that he resigned in circumstances such that he was entitled to treat himself as having been dismissed.

3. The claimant had been employed by the respondent since 1990 and had spent approximately 20 of those years as a manager. He was well thought

of by the respondent. In the most recent period, he had been a Traffic Office Manager and he tended to work early shifts. At the relevant time, his immediate line manager was Steve Conquest, the Lead Distribution Manager.

4. In late 2018, Mr Conquest had some sick leave and then a period of working from home in order to recover following an accident. Mr Conquest's line Manager was Gary Yeo at the time, the Area Distribution Manager. At Mr Yeo's suggestion the claimant acted up into Mr Conquest's role during Mr Conquest's temporary absence and the claimant performed very well in the role. It was the opinion of Mr Yeo that the claimant had the potential to be promoted further within the respondent's organisation. It was also Mr Yeo's opinion that in order to maximise the opportunity for promotion it would be advisable for the claimant to move to the late shift. In other words, this was doing the same job but at a busier and more eventful time of day.

5. At around the same time - but for unconnected reasons - Mr Yeo became aware that another manager, Ms Ellis-Crease, was seeking a move from another site to the site at which the claimant worked. Mr Yeo believed it would be possible to kill two birds with one stone and to have Ms Ellie-Crease move into the claimant's early shift and for the claimant to move to the late shift. He discussed this with his own line Manager, Rebecca Mantic, and she agreed. Because Mr Yeo was not available to speak to Mr Conquest about this directly on the day in question, it was Ms Mantic who spoke to Mr Conquest. As a result, Mr Conquest gained the impression that the instruction was coming directly from Ms Mantic herself: that is from his line manager's, line manager, rather than from his immediate line manager.

6. Mr Conquest asked to speak to the claimant, and they went for a walk together to a local sandwich shop. In itself, this was not unusual. During the walk, Mr Conquest raised with the claimant the possibility of the claimant's moving to the later shift and told him it was to gain more experience. For whatever reason, the claimant did not regard the suggestion as being made in order to allow him to gain useful experience and the claimant formed the opinion that he was being potentially pushed out of his shift in order to give it to Ms Ellis-Crease. The claimant was upset and ultimately, he rejected the proposal. He had two lengthy conversations with Mr Yeo about it; one by phone and one in person. Mr Yeo's reasons for wanting to speak to the claimant were not that he wanted the claimant to be moved out of the shift in order to give it to Ms Ellis-Crease, but rather Mr Yeo was aware that the claimant had become upset by the suggestion and Mr Yeo wanted to reassure the claimant that the suggestion had been made by him (Mr Yeo) and had been made in order to assist the claimant. Mr Yeo was more senior than the claimant, but they knew each other, having done the same university course together some time previously.

7. Mr Yeo did not believe that he was putting any pressure on the claimant by these two conversations. He believed, and he hoped, that by having the conversations with the claimant, the claimant would accept Mr Yeo's reassurance that there had been no ulterior motive behind the proposal. Once the claimant had told the respondent that he did not wish to change shifts, that was the end of the matter as far as the respondent was concerned.

8. In January 2019, a trail of emails came to the attention of Mr Conquest. They were sent to Mr Conquest by a manager, Mr Barfoot. Mr Barfoot had received them from a union representative, Mr Sartori. It is not necessary for me to comment in full detail about all the words in the emails or the events described in those emails. Suffice it to say that I accept the claimant's account that he, the claimant, had been seeking to have constructive discussions with relevant colleagues about how the working practices at the site could be improved. The claimant, did not think it necessary that management as senior as Mr Conquest, needed to be involved in these discussions and he also did not want the discussions to involve particular junior individuals who might, in the claimant's opinion, be disruptive to what the claimant was seeking to achieve. However, for whatever reason, some people seemed to have got the wrong end of the stick. Certain comments in the email trail were very exaggerated, in my opinion, and used unnecessarily flowery language. In the email trail it was suggested by others that the claimant had wanted to topple Mr Conquest's leadership and it was likened to a gunpowder plot.

9. Rather than simply ignore the email trail as being somewhat silly and rather than get the claimant's side of the story, Mr Conquest decided to raise it with Mr Yeo in an email dated 5 January 2019 as alleged bullying and harassment.

10. The respondent decided that there should be a fact-finding exercise in accordance with the respondent's disciplinary process. Mr Stepney was the person appointed to carry that out.

11. On 8 January 2019, after initial discussion with the claimant, the claimant was relocated by Mr Stepney to work at a different site. There then followed a fact-finding interview on 17 January 2019. Mr Stepney sent the notes of that meeting to the claimant for the claimant to make any suggested corrections. The claimant did email back some suggested corrections. Mr Stepney in fact accepted the changes but he did not specifically write back to the claimant to say that the changes had been agreed.

12. Mr Stepney finished his fact-finding exercise and at the end of it he decided that there was no case to answer. So that is the context in which the agreed notes were not emailed back to the claimant. In other words, Mr Stepney was not proposing that there be further action at which the precise details of exactly what was said on 17 January might need to be explored further.

13. Mr Stepney arranged for Hayley Starbuck to inform the claimant that there was to be no further action. She did this on 6 February. The reason Mr Stepney asked Ms Starbuck to do it was simply one of convenience and travel time. It was easier for Ms Starbuck to pass the information to the claimant in person than it was for Mr Stepney to travel and meet face to face.

14. Ms Starbuck informed the claimant on 6 February that his temporary relocation would end and, as a result of this, the following day, 7 February, he returned to his normal work location and his normal shift. The claimant did not get written confirmation that there was no case to answer.

15. The claimant was at the other location – PRDC - between approximately 9 January and 6 February. The decision to move the claimant to that location was Mr Stepney's decision and Mr Stepney had not been asked to move the claimant in order to make room for Ms Ellie-Crease or for any other reason. While it is true that Ms Ellie-Crease covered the claimant's shift while he was temporarily absent, the reason for the temporary absence was not in order to create such an opportunity for Ms Ellis-Crease.

16. Following the claimant's return to his normal location in February 2019 and during the remainder of 2019, the relationship between Mr Conquest and the claimant was professional rather than friendly.

17. In discussions about career progression Mr Conquest mentioned to the claimant more than once that the claimant had been at the same location and in the same job for a considerable period of time and if seeking career progression, it might be necessary for him, the claimant, to move. Mr Conquest did not make these comments because he was seeking to allocate the claimant's shift to Ms Ellis-Crease or to get rid of the claimant. Mr Conquest made these suggestions simply because they were his genuine opinions about what the claimant might need to do in order to maximise his opportunities for promotion.

18. Starting around September 2019 and continuing until around February 2020, Mr Conquest acted up as Area manager in order to cover a sickness absence. In turn, Ms Ellis-Crease covered Mr Conquest's substantive role.

19. During this time it was necessary for the claimant to seek to speak to a particular colleague because the claimant was investigating a road traffic incident involving that colleague. When he went to find him, the claimant was unable to find the colleague and the claimant formed the opinion that the colleague had left his shift without permission and had done so perhaps five hours earlier than he should have done. The claimant mentioned this to Ms Ellis-Crease at the time.

20. Not long after this, Ms Ellie-Crease was contacted by Mr Sartori, the union representative and the email is in the bundle at page 128. It was sent at 13:36 on 11 December. It was headed Formal Grievance on the Misapplication of the Conduct Code. Within the email it was stated that Mr Sartori had been informed by one of his members that on 30 November 2019, the claimant had left his overtime shift early in order to referee a football match but had recorded his time as if he had done the full shift up until 12 midday. It is clear from the email that the main subject matter of Mr Sartori's email is the fact that according to Mr Sartori the claimant had wrongfully instigated conduct action against Mr Sartori's member, the person whom the Claimant thought had left early without permission. It is also notable in the email that according to Mr Sartori, that member's absence from work was quite above board and was with permission. My finding is that the purpose of referring to what the claimant had allegedly done on 30 November was to compare it to what the member was accused of, and to criticise, the claimant, and to suggest that his actions in relation to Mr Sartori's member had been improper in some way. The email said specifically that the claimant had asked another member of

staff to come in early so as to allow the claimant to leave early and that person was named in the email as Mr T Walker. Mr Sartori's email concluded by saying that the grievance that he was raising by his email of 11 December was something that should be dealt with first and that any conduct action against his member should be put on pause while the grievance was resolved.

21. Mr Sartori's email was copied to Mr Conquest as well as to Ms Ellis-Crease. Shortly afterwards, three minutes afterwards in fact, Mr Conquest replied to Ms Ellis-Crease, copying in Mr Sartori and asked her to look into the matter.

22. Ms Ellis-Crease sought advice from Human Resources, especially in relation to whether the claimant should continue to investigate the conduct issues about Mr Sartori's member. The advice came back from HR that because the allegation against the claimant was a serious one, which, if found, could result in a dismissal, then a precautionary suspension should be considered. The HR advice also correctly pointed out that the next stage should merely be fact finding and the Respondent should not move straight to the formal notification of disciplinary action.

23. Unfortunately, some of the items sent to the claimant subsequent to this are not correctly signed and not correctly dated. The allegation was raised with her, Ms Ellis-Crease on 11 December, but was not brought to the claimant's attention on 11 December. It is common ground that on 12 December Mr Ellis-Crease met the claimant and told him that he was suspended. It is also common ground that this was a short meeting and that the claimant asked for details of who had made the report about his allegedly leaving early on 30 November.

24. I am not persuaded on the evidence that the claimant specifically used the word "grassed" in this particular meeting and it does not matter for present purposes whether he said "fucking" (using that word while uttering some phrase similar to "fucking grassed") or not.

25. The claimant alleges - relying on the Royal Mail Conduct Agreement of August 2015 - that the suspension should not have taken place the same day. He says what should have happened on 12 December is that he should have been sent home from his shift and only suspended, if at all, the following day following a meeting to which he had formally been invited.

26. Although in the list of issues there is an allegation of lack of thinking time, the specific argument I have just described is not raised in the ET1 or the list of issues and nor is it raised in the claimant's witness statements, either his own or Mr Ling's. The conduct agreement document dated August 2015 was only submitted by the claimant after both of his witnesses had finished their evidence. The only one of the respondent's witnesses who was asked about it was Ms Ellis-Crease. I accept her evidence that she was not aware of any requirement to only do a formal suspension on Day 2, having sent the person home less formally on Day 1. I accept her evidence that Human Resources advised her that she could go ahead and do the precautionary suspension on 12 December.

27. I accept that the Conduct Policy in the bundle which starts on page 37, states that if there is a disagreement between that policy and the Conduct Agreement then the Conduct Agreement should take precedence.

28. Therefore, my finding is that on 12 December the respondent jumped a step and went straight to suspension that day rather than doing it the following day. The claimant was not aware of this until, in the course of this hearing he did an internet search after Mr Ling's evidence (because Mr Ling had mentioned that it was his belief that suspension should not be on same day as telling the employee about the allegations). This alleged failure was not part of the claimant's reason for resigning. Furthermore, on page 41 of the Conduct Agreement, the sequence that is envisaged is that the employee would be sent home during the shift once the matter came to a manager's attention and that, after sending home the employee, the manager should consult with Human Resources to discuss matters further before having a meeting the following day which would potentially result in a more formal precautionary suspension. Ms Ellis-Crease did not omit that particular step; she did indeed speak to Human Resources before having the meeting with the claimant at which he was suspended.

29. Following his suspension, the claimant was called to attend a fact-finding meeting with Ms Ellis-Crease on 17 December and he did attend that meeting with his union advisor, Mr Minden. The meeting was very short. According to the notes it started at 11:53 and finished at 11:58. While Ms Ellis-Crease was asking her preliminary questions, Mr Minden said "let's cut to the chase" and he made a statement on behalf of the claimant to the effect that the claimant had been asked, he had been asked on the Thursday (so 28 November) to referee a football game and the football game had been starting at 12 on the Saturday (30 November) and that that was the reason the claimant had asked Mr Walker to come in early on 30 November. Mr Minden said that it had simply been an error that the claimant had written 12 o clock leaving time on the relevant form. I should mention at this stage that the leaving time information on the form for 30 November is handwritten, and it is accepted that it was the claimant who wrote the leaving time, though he does not recall exactly when he wrote it.

30. Mr Minden also added that it would be possible for Ms Ellis-Crease, or for the respondent, to look through the previous forms, called 552 forms, and that looking through the previous 552s would show that the claimant did not habitually overclaim for overtime and this was simply a one-off error. At this point Ms Ellis-Crease said that she had been told by another manager that there had been two other occasions when the claimant had not stayed on after another manager had arrived on site. The claimant asked for details and he denied the first alleged occasion which was put to him. At this stage, his union representative intervened and stated that if there were any new allegations other than 30 November then they needed to be put to the claimant in writing before the meeting could continue.

31. On the day, 17 December, it was proposed that the fact-finding meeting would resume the following Monday but, in fact, Ms Ellis-Crease wrote to the

claimant to say that there would need to be a delay because she had been too busy to look through the other 552s. In due course, an undated letter was sent to the claimant inviting him to attend a resumed meeting with Ms Ellis-Crease on 14 January 2020 and that letter mentioned discrepancies on other particular dates which would be discussed at the fact-finding meeting.

32. In the bundle there is a statement from Mr Walker at page 154. The precise date on which he wrote this document is unclear. Given the contents of Mr Sartori's email which is dated 11 December, I am satisfied that Mr Walker's statement could not have been written any earlier than 11 December. The date which is on the document is 12 November 2019 and so that is clearly inaccurate. One suggestion that was made during the course of the hearing is that potentially this was an older document which had been reused, in other words a document originally dated Thursday 12 November 2019 and then when reused Mr Walker had simply forgotten to change the date. I reject that as a possible explanation because 12 November 2019 was not a Thursday. 12 December 2019 was indeed a Thursday. It was Ms Ellis-Crease's assumption that the correct date on the letter should therefore be Thursday 12 December. It is possible that she is correct about that.

33. Mr Conquest's evidence is that he was in Bristol on the day that the claimant was suspended, in other words 12 December 2019. It is his evidence that he was however on site on the date when Mr Walker's written statement was to be handed in because he recalls having a conversation with Mr Walker in the kitchen at which Mr Walker asked what to do with the statement and he, Mr Conquest, told him to give it to Ms Ellis-Crease. Therefore, what seems to have happened is that Mr Walker produced his statement on 12 December and signed it on that date, but he actually handed it to Ms Ellis-Crease sometime after 12 December and none of the witnesses know what the specific date was on which the statement was handed to her.

34. There is a document (which I assume is dated correctly) on page 155 of the bundle, which is a statement from Ms Ellis-Crease's husband, David. This is dated 13 December 2019. This contains an allegation about the claimant (or at least, on one reading of it, it contains an allegation about the claimant). It refers to events of 7 December 2019 and states that Mr David Ellis-Crease was asked to come in early that day because the claimant was going to referee a football match. It says that Mr Ellie-Crease arrived at 20 past 10, did a hand over with the claimant and then the claimant left. He does not say what time the claimant left. Furthermore, I accept the claimant's evidence that even if he left the office room/building, that does not mean he left site or that his shift ended. He could have been doing relevant duties elsewhere.

35. At the fact-finding meeting on 17 December, Ms Ellis-Crease made no particular reference to the letter from her husband (and presumably she had received it already by that date). There is not necessarily anything suspicious about this given the fact that the union representative called a halt to the meeting and asked for any further allegations to be put in writing.

36. On 13 January 2020, which is the day before the proposed fact-finding meeting continuation with Ms Ellis-Crease, Ms Ellis-Crease wrote to the

claimant and to his union representative stating that the meeting would have to be postponed. This was because, as she said in the email, that she had spoken to HR and they had advised her that because her husband had given a statement it could potentially be a conflict of interest for her to hold the meeting and, therefore, a new investigating manager was to be appointed and who would invite the claimant to a fact-finding meeting.

37. Later the same day (although the letter is undated), a letter was sent to the claimant which referred back to the email from earlier that day and this letter told the claimant the name of the new manager who had been appointed to do the fact-finding, Andy Bennett. This letter did not repeat the reasons for the change in manager, but those reasons had been supplied to the claimant and his representative in writing earlier that day and there was no need for them to be repeated. The new manager, Mr Bennett, did in fact meet the claimant and the claimant's union representative for a fact-finding meeting. The meeting took place on 27 January 2020.

38. Following the meeting, there was an exchange of correspondence between the claimant and Mr Bennett in relation to the contents of the notes that had been produced from that meeting. As far as the claimant is concerned (and he also directs me to an email to him from his union representative, Mr Bradley), the notes contain serious inaccuracies and omissions. Mr Bennett accepts some of the claimant's proposed changes, but he strongly believes that the other proposed amendments were not actually said by the claimant.

39. My finding is that the two attendees who gave evidence, the claimant and Mr Bennett, has each acted in good faith in their evidence. There was no verbatim record taken during the meeting. Each of them is relying on their recollection of what was said. Neither Mr Bennett nor the respondent is seeking to deliberately twist or ignore things that the claimant said during the meeting.

40. During the meeting with Mr Bennett it was clarified to the claimant which specific additional dates were under discussion. Ms Ellis-Crease's letter had identified the week of each alleged discrepancy in leaving times, but had got the specific dates wrong. Further, an additional day around December 2018 was also mentioned for the first time, not having been included in Ms Ellis-Crease's allegations.

41. There is a dispute between the parties about whether or not the claimant specifically referred by name to a manager whom I will call TF. I am persuaded by the claimant's evidence that he is certain that he did not actually speak the name of that particular person out loud during the meeting but I am also satisfied it does not particularly matter that the name was not uttered, because I am satisfied by Mr Bennett's evidence that it was quite clear during the meeting - from the claimant's comments and from the relevant documents - which specific manager the claimant was referring to. Mr Bennet's opinion was that the claimant was suggesting that if he was under investigation then the other manager should also be looked at, and judged by the same standards.

42. After the meeting between the claimant and Mr Bennett and after the exchange of emails that I have just mentioned, Mr Bennett wrote to the claimant to say that the decision was that there was a case to answer and the case would go to the next stage of the process and he had referred the matter to his manager. That letter is dated 17 February 2020 and is in the bundle at page 226. The letter mentioned that the manager, Ms Surgay, was on annual leave but she would contact the claimant in the week commencing 24 February 2020.

43. The claimant resigned by letter the next day and his letter, in the bundle at page 227, is dated 20 February. The resignation letter gave no specific reasons for the resignation but asked for an acknowledgment. The claimant's resignation was with notice and his letter dated 20 February 2020 stated that his last working day would be Friday 20 March 2020.

44. Following the claimant's resignation Ms Surgay contacted Mr Conquest and informed Mr Conquest that TF should be suspended and investigated based on the contents of the 552s and the comments that the claimant had made during his meeting with Mr Bennett, and the contents of Mr Bennett's recommendations. That was done. In other words, TF was suspended.

45. The allegation against TF, which Mr Conquest investigated was an allegation of dishonesty around the claiming of additional hours. However, having conducted the fact-find, Mr Conquest decided that that particular allegation was not proven. It was not proven for example, that TF had falsely claimed overtime for periods when he, TF, had not actually been on site. What was proven was a slightly different allegation, namely that TF had authorised his own overtime which, on several occasions, had fallen either side of the overtime of another manager. The allegation, in other words, was that TF had only claimed overtime for times on which he had indeed been on site, but had approved the additional time for himself without seeking prior authority from a more senior manager to extend the shifts. This is different to the allegations against the Claimant, which were that the shift itself was fully authorised, but the Claimant had not actually worked until the end of the time which had been authorised and paid for.

46. Mr Conquest's outcome letter to TF is in the bundle on page 233. It is dated 31 March 2020 and the decision was to give a two-year serious warning running from 14 February 2020. The letter contains some comments about the claimant which the claimant disputes. In particular, the letter notes that TF alleged that TF's actions were because he felt obliged to comply with requests made to him by the claimant. I note that in the letter Mr Conquest expressly mentions that it has not been possible to discuss the points with the claimant and I treat that as an acknowledgment by Mr Conquest that the claimant might not necessarily agree with TF's comments. However, given that this was disciplinary action against TF rather than the claimant, I do not treat the outcome letter to TF as a finding of wrongdoing by the claimant made by Mr Conquest. Furthermore, and in any event, this was after the date on which the claimant had already submitted his resignation.

The law

47. In order to show that he was dismissed, the Claimant relies on 95(1) the Employment Rights Act 1996 in particular. This reads:

> For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only 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.

48. Section 95(1) (c) is colloquially referred to as constructive dismissal. In order to prove constructive dismissal, an employee must prove that:
    48.1 The employer has committed a breach of contract
    48.2 which is sufficiently serious,
    48.3 that the employee left because of the breach (or at least in part because of the breach, it does not have to be the only reason)
    48.4 and the employee must prove that they have not waived the breach by affirming the contract.

49. In London Borough of Waltham Forest v Folu Omilaju [2004] EWCA Civ 1493, the Court of Appeal gave the following summary:

    1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761* .

    2. It is an implied term of any contract of employment that 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: see, for example, *Malik v Bank of Credit and Commerce International SA [1998] AC 20* , 34H–35D (Lord Nicholls) and 45C–46E (Lord Steyn). I shall refer to this as “the implied term of trust and confidence”.

    3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666* , 672A. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship (emphasis added).

    4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must “impinge on the relationship in the sense that, looked at objectively , it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer” (emphasis added).

    5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. The Court of Appeal quoted from para [480] of Harvey on Industrial Relations and Employment Law:

> "[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."

50. At para 15 of Omilaju, the court added that that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence and referred to Lewis v Motorworld Garages Ltd [1986] ICR 157, for the principle that:

> "In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term…This is the "last straw" situation."

51. Then, at para 16 of Omilaju the court added:

> "16.. Although the final straw may be relatively insignificant, it must not be utterly trivial:

And at 22

> 22.. 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 his employer. The test of whether the employee's trust and confidence has been undermined is objective (see the fourth proposition in para 14 above)..

52. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**,** The Court of Appeal clarified the analysis in Omilaju and added to it. The court reiterated that the "last straw doctrine" is relevant only to cases where the repudiation relied on by the employee takes the form of a cumulative breach. It does not, have any application to a case where the repudiation consists of a one-off serious breach of contract.

53. The Court of Appeal also made clear that – in a last straw case – the fact that the employee might have affirmed the contract after some of the earlier conduct does not mean that it is not possible for the claimant to rely on that earlier conduct as part of a cumulative breach argument.

54. At paragraph 55, it summarised the correct approach which it had set out in more detail in the preceding paragraphs:

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

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

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation ...)

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

55. Where the answer to question 4 is "no" (eg the act that triggered the resignation was entirely innocuous), it is necessary to consider whether any earlier breach has been affirmed. See: Williams v Governing Body of Alderman Davies Church in Wales Primary School EAT 0108/19

56. On the facts of Chadwick v Sainsbury's Supermarkets Ltd EAT 0052/18, the EAT overturned a tribunal's finding that a threat of disciplinary action was entirely innocuous.

57. In relation to affirmation, it is necessary to consider all the circumstances. Because of the wording of section 95(1)(c) for unfair dismissal, the mere fact alone that an employee resigns by giving notice does not mean that the employee should be treated as having affirmed the contract. The time delay between the act relied on and the resignation is a significant factor, but by no means the only one. It is necessary to consider the employee's reasons for the delay. The fact that the employee had sought clarification from the employer, or challenged the employer's decision, or made clear that they disagreed with it and were seeking the decision to be overturned and/or were considering resigning might all be relevant. It is also relevant to consider whether the employee was attending work and working normally during the period of the delay or whether instead they were absent for any reason, such as sickness, suspension or holiday.

Analysis and conclusions

58. The first question as per Kaur is, what was the most recent act or omission on the part of the employer which the employee says caused or triggered the resignation? In this case, as per the list of issues and the evidence the claimant relies on, it is the receipt of the letter dated 17 February 2020.

59. The next question is whether the claimant has affirmed the contract since that act and my answer is "no". The claimant resigned on 20 February, a very short time later. He resigned with notice but that is not fatal. Furthermore, he was suspended during the period of his notice and he subsequently submitted sick notes. He was not attending work during he period. So, in all the circumstances, my finding is that there was no affirmation of the contract between 17 February and the end of employment.

60. The next question is, was that act or omission by itself a repudiatory breach of contract? My answer to that is “no”, it was not.

61. I refer now to the list of issues on page 35 (1.4, letter O). I will read it in full:

> “The respondent passing the investigation to another manager Ms Surgay which would have meant the claimant having to attend another interview. The claimant says this was the last straw which caused him to resign.”

62. So, there are a number of separate elements to that. Taking each point in turn:
    62.1 the fact that the employer said that the matter would be taken further is not innocuous. However, there were proper grounds for that decision, and it was appropriately communicated to the claimant. The fact that the matter was to be taken further does not of course imply that what would follow would be an unfair process or an unreasonable process or that it would take too long to complete. Simply telling the claimant it was being referred to Ms Surgay and that she would contact him after 24 February was not, in itself, in any way an unreasonable action on the part of the respondent. It, on the face of it at least, conveyed to the claimant that the respondent was intending to follow its own procedures. The claimant had the benefit of advice and assistance from his union in connection with those procedures and would have been able, had he thought it appropriate or had his representative thought it appropriate, to draw to the respondent’s attention any potential breaches.
    62.2 The second point mentioned is the fact that Ms Surgay was to be involved. I discussed this with the claimant during his submissions and he is not suggesting that in and of itself the fact that Ms Surgay was to become aware of the allegations was something that he was relying on. He accepts that it is not improper in itself for the respondent internally to refer the allegations to Ms Surgay.
    62.3 The other point mentioned is the need for another interview. Mr Bennett’s evidence had been that Ms Surgay could have passed the matter back to him, Mr Bennett, and even if that was the case, there would need to be another interview. So, in other words, the fact that there needed to be another interview was simply a result of the fact that Mr Bennett’s decision was that the matter would go to the next stage. It was irrelevant whether or not Mr Bennett passed it to Ms Surgay or did something else with it. Again, it is no unreasonable for the respondent to have suggested that there needed to be another interview. It is not a repudiatory breach of contract.
    62.4 The other point I raised with the claimant in submissions is whether or not it was his argument that he simply should have been acquitted without it necessarily going further. That is not his argument. Rather, it is the claimant’s argument that the ultimate outcome should have been that he, the claimant, had simply made a mistake and any sanction that was applied to him (and he was not saying that there should be no sanction), should be a punishment to fit the crime (ie proportionate to an honest mistake). He was saying that the decision to impose such a sanction should have happened promptly after 12 December and that in a worst-

case scenario, if there was going to be some formal sanction, it should have been imposed by Mr Conquest, or someone at that level.

63. However, I do not find there was a repudiatory breach by the respondent in the fact that it took until February 2020 for the fact-finding to be concluded and referred to Ms Surgay.

64. The claimant has made criticisms of both Mr Bennett and Mr Conquest. Therefore, even if either of them had been the person to deal with the matter, then the claimant could potentially have complained about the Respondent's conduct in allowing them to be the decision-maker. Furthermore, while the eventual outcome of the process might have been to accept that the claimant had made an honest mistake on 30 November 2019 (and that there were no other issues that needed to be addressed, such as leaving time on other dates) that is not the only possible outcome. Other matters had been raised, in particular 7 December (as per Ms Ellis-Crease's statement). Therefore, the fact that the respondent decided that a more formal process was needed, rather than a quick informal reprimand or light sanction applied by Mr Conquest is not a repudiatory breach. It is not unreasonable for an employer to investigate time keeping issues (or alleged dishonest claims for payment) before deciding what the outcome will be.

65. That therefore leads me to the fourth question suggested by Kaur. In other words, if not by itself a repudiatory breach of contract, was it nevertheless, (applying the approach explained in Omilaju) part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a repudiatory breach of the Malik term. To analyse this, I turn then to the items mentioned in the list of issues. I will go through them roughly in the order that they are mentioned although I will group some of them together.

    65.1 As per 1.1, was the claimant put under pressure by Mr Conquest and Mr Yeo to move to another shift. I discussed this in my findings of fact. This was innocuous conduct in that although for whatever reason the claimant got the wrong end of the stick (and that might not have been entirely his fault), he was reassured by Mr Yeo that there had been no improper motive and, in fact, the claimant did not change shifts.

    65.2 As per 1.5, again, as per my findings of fact, here was no conspiracy between any of the respondent, Ms Ellis-Crease, Mr Conquest, Mr Bennett, Mr Yeo or any one else, in order to force the claimant out of his shift or out of his job. They were not colluding with each other in order to allocate his shift to Ms Ellis-Crease. There had been a proposal towards the end of 2018 for the claimant to move shifts and for Ms Ellis-Crease to move into it, but that was not the cause of, or connected to, any of the subsequent events.

    65.3 As per 1.2 in the list of issues, that deals with the first disciplinary procedure, the first fact-finding carried out by Mr Stepney as a result of the emails which Mr Conquest had received. It is true, as per 1.2(a), that he did not get anything further in writing, but the claimant was told by Ms Starbuck on 6 February that the matter was at an end. It would have been

better practice in my opinion for that to be put in writing but the fact that is was not put in writing is not unreasonable conduct in all of the circumstances. The claimant's comments on the notes were not dealt with, he says. I do not accept that they were not dealt with. I accept Mr Stepney's evidence that they were. Again, I accept the claimant did not receive formal confirmation of that but there was no need for him to have formal confirmation of it in these particular circumstances, namely that the matter was not going further. I have dealt with item (c), the written notice of the outcome, and item (d), the fact that it took too long. I do not think it took too long. I think Mr Stepney proceeded at a reasonable pace. I do not necessarily think it was necessary for the claimant to have been moved to another site during the investigation. His relocation was a factor that should have led the respondent to proceed as quickly as it reasonably could. However, in all the circumstances, I think that the one-month period at which the claimant was working at the other site was not excessive and it could not have been done much quicker by the respondent.

65.4 In relation to 1.3, I do not accept that the claimant was treated unreasonably by Mr Conquest in the period between February 2019 (the claimant's return to his own site) and the remainder of the claimant's employment (in particular, up to September 2019 when Mr Conquest started acting up in another role). As per my findings of fact the reasons for those comments were discussions about the claimant's potential future career progression. The claimant himself was potentially interested in career progression and Mr Conquest was doing no more than stating his own genuine opinion that it might be in the claimant's best interest to look around and consider other shifts or other sites.

66. At 1.4, has several items all in relation to the conduct procedure in December 2019.

66.1 Item (a). As discussed above, it is correct based on the documents which the claimant submitted on day two of the hearing that the correct procedure in the Conduct Agreement would have been for him to have been informed about the allegation on 12 December and sent home on that day and then suspended potentially the following day. However, as I mentioned, while that is a breach of the procedure it was not a deliberate intention on Ms Ellis-Crease's behalf to ignore the procedure in any way. She did what she thought was appropriate and she based her decision on advice from HR and HR advised her that she could suspend and that is what she did. The claimant has potentially been disadvantaged to some extent by not having the opportunity of gathering his thoughts and coming back and making comments the following day. However, it does have to be put in the context of two things. First, that one reason, in my judgment, for sending the employee home and then having the suspension meeting the following day is to allow the manager time to get advice from Human Resources and since Ms Ellis-Crease had done that in this case anyway, it was not necessary from that point of view to delay the suspension. The second reason is to give the employee and opportunity to comment promptly on the allegations against him and the claimant did have that opportunity on 17 December as opposed to 13 December. So, although

there is a four-day gap, I do not find that to be excessive in all of the circumstances.

66.2 Item (b), the suspension decision. In itself suspending the claimant was not unreasonable conduct. I think it is possible that a different employer might have decided to do it differently, and it is not necessarily the case that the claimant would have been disruptive or destroying evidence had he been at work. But, the advice of Human Resources was that because of the nature of the allegation, and because such allegations of dishonesty are always treated seriously by the respondent (because of the access that they have to private property of the respondent's customers), suspension was appropriate in this particular case and that is what the respondent did. I also accept, as per Ms Ellis-Crease's evidence, that she is aware of other employees being suspended and ultimately dismissed for over claiming their overtime entitlement.

66.3 Item (c). The respondent, during the course of this hearing, accepts that it was not best practice that Ms Ellis-Crease sent undated letters to the claimant and I agree with that as well. However, there is not actually any dispute from the claimant that he received the letters. The claimant would know the date on which he received them. It is not good practice; it could potentially in a different case, cause arguments and disagreements either in the course of the internal proceedings or later on in the course of litigation. However, on the facts of this particular case there has been no particular disadvantage to the claimant by the fact that the letters were undated even though they should have been.

66.4 Item (d). It is mentioned that the letters were not signed. Although the respondent's representative potentially accepts that that is also poor practice, by myself, I would not necessarily have reached that decision. I do not think it always matters whether letters are signed or not. Of course, if the letters were being posted or hand delivered then it would have been better for them to be signed. But again, in a different case where letters were sent by email then lack of a signature would not be particularly significant (in my opinion). In any event, more importantly, even if it is poor practice on the respondent's part - and the respondent accepts it was - it has not disadvantaged the claimant.

66.5 Item (e). In relation to Ms Ellis-Crease speaking to the Union Representative without the claimant's express permission, it is not necessary, in my opinion, for the respondent to get the claimant's express permission to speak to the union representative . If the Respondent contacts the union representative about the case, and the rep believes they do not have permission their member's permission to discuss it, then it is up to the rep, as agent for the claimant to say that. In any case, it is fairly standard employment practice for an employer where there is a representative involved to liaise with that particular representative. Bypassing the appointed rep and going straight to the employee is at least as likely to lead to criticism.

66.6 Item (f) is raising other allegations part way through the process, adding more dates. The claimant describes this as moving the goal posts. However, this is a normal thing that happens in investigations. Particularly allegations which are similar to this in which an employee has been accused of specific wrongdoing, or specific dishonesty, on a particular occasion and an issue arises as to whether it was a one-off error, or whether similar things have happened on other occasions. It is quite often necessary to look at previous occasions in order to judge the argument of an alleged honest one-off mistake and, in any event, the respondent was specifically asked to do that in this case. I do think that some other employers might not have added some of these new allegations to the fact-finding investigation, given that most of the respondent's witnesses accepted that there was nothing necessarily wrong with the fact that there was an overlap between the end time of one manager's shift, and the start time of another manager's. That being said, they were added at the fact-finding stage and the claimant was going to have the opportunity to comment on those earlier matters both at the fact-finding stage and, if they became part of a formal process, as part of that formal process as well. In short, it was not moving the goal posts and was not unreasonable.

66.7 Item (g) is that the claimant says the allegations against him were unfounded. That might well be true. The respondent did not find him guilty of misconduct and the claimant resigned before it reached the stage of the employer making a decision one way or the other. It is my finding that it was not unreasonable for the matters to be referred to a further stage by Mr Bennett when he did so. But, in any case, the claimant in submissions did not necessarily suggest that there should have been no sanction whatsoever against him. His argument is that he made an honest error as opposed to any dishonest claiming of time that he was not entitled to.

66.8 Item (h) is Ms Ellis-Crease passing the matter to Mr Bennett and the allegation that she failed to include that in the formal notification to the claimant of the change of manager. That is simply not the case. It is putting form before substance. There were two different communications sent to the claimant about the matter. In the first of these Ms Ellis-Crease told the claimant and his representative the reason for a change of a manager. She sent this - quite appropriately because the meeting the following day had to be urgently cancelled – before knowing who the new manager would be. Later on, she wrote a separate letter to give the name of the new manager. It was not wrong for her to do it in two separate letters and it is in no way unreasonable that the second letter failed to repeat everything contained in the earlier communication.

66.9 Item (i) is Ms Ellis-Crease and her husband working on the same site. That is a matter for the respondent. It is not a matter for me, and it is not relevant to these proceedings. It is not unreasonable conduct and it is not a breach (or a contributing factor to any breach) of the claimant's employment contract with the respondent.

66.10 Item (j) is Ms Ellis-Crease writing to the claimant after the matter had been handed over to Mr Bennett. This was not unreasonable conduct at

all. Ms Ellis-Crease, as the claimant knew from the written communications, was no longer the officer dealing with the fact-finding, but it was not unreasonable for her to send some pro forma letters to the claimant: in one case, it was on Mr Bennett's instructions and on another case, it was in relation to the suspension, not the investigation.

66.11 Item (k) and (l). The claimant alleges that Mr Bennett's notes were incorrect or not complete and accurate. My finding of fact was that it was an honest difference of opinion between the two of them. This difference of opinion, if relevant, could have been dealt with by whichever manager was appointed to deal with the disciplinary. Mr Bennett was open in his report about what the claimant suggested amendments were and anybody who was picking up the matter after Mr Bennett would have been able to judge or make their own decisions if relevant about what had been said to Mr Bennett.

66.12 Item (m), if it is suggested that Mr Bennett was dishonestly trying to change the notes to record what he claimant said then I have rejected that in my findings of fact. I do not accept that Mr Bennet was dishonest.

66.13 Item (n), I will not repeat everything I said earlier. There is nothing wrong with the respondent contacting the claimant's union representative.

66.14 Item (o), I have dealt with already and I do not need to say anything more about it.

67. So, taking all of those things together, my analysis of all of the matters raised by the claimant is that there is no cumulative breach of the claimant's contract of employment. The so-called <u>Malik</u> term has not been breached. The respondent did not, without reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the claimant and the respondent. For those reasons the claimant has not satisfied me that he has been dismissed in accordance with section 95(1)(c) of the Employment Rights Act and for that reason it is not necessary to go on to consider whether or not there was a potentially fair reason for any such alleged dismissal.

____

Employment Judge Quill

Date: 12 July 2021

Sent to the parties on: ...

....
For the Tribunal Office