

RM



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Laurel Blake  
**Respondent:** Post Office Ltd.  
**Heard at:** East London Hearing Centre (via Cloud Video Platform)  
**On:** 13 and 14 October 2021  
**Before:** Employment Judge A Frazer  
**Representation:**  
**Claimant:** Mr R Holland (Lay Representative)  
**Respondent:** Miss H Platt (Counsel)

## JUDGMENT

**The Claimant's claims for unfair (constructive) dismissal and unpaid wages are dismissed.**

## REASONS

### The Claim

1. The Claimant brought a claim for unfair (constructive) dismissal by way of his claim form dated 29<sup>th</sup> April 2021. An early conciliation certificate was issued on 10<sup>th</sup> March 2021. He was employed by the Respondent as a CHD Crew Member from 23<sup>rd</sup> January 2006 to 28<sup>th</sup> March 2021. In the claim form he also ticked the box for other payments which were '*back pay of pay rise effective from 1<sup>st</sup> April 2021 and lump sum pay off*'. 'A lump sum pay off' is not a claim in law but appears to be a request for a compensation settlement. In his evidence the Claimant claimed that he was owed £900 in his final payslip because he would have benefited from the pay rise which was decided upon in February. This was disputed by the Respondent.

## **The Hearing**

2. I had a bundle of documents running to 252 pages with the addition of page 253 which was added during the proceedings. I heard evidence from the Claimant himself and his witness Mr Eugene Frederick. Mr Frederick confirmed that his witness statement was true and there were no questions for him. I heard evidence from three witnesses for the Respondent – Chris Thorpe, Regional Operations Performance Manager for the South; Janene Mellor, Senior Employee Relations Manager and Nick Trowler, Head of Cash Valuables in Transit Operations. I heard closing submissions from Miss Platt and Mr Holland and received written submissions from them both and a chronology from Miss Platt.

## **The Issues**

3. At the outset the I timetabled the hearing and the issues were identified as follows:
  - 1) Whether there was a breach of the implied term of trust and confidence as set out in paragraph 23 of the Claimant's particulars of claim and
  - 2) Whether the Claimant waived any breach by affirming the contract. The Claimant's position was that he did resign in response to the breach and did not delay. This is disputed by the Respondent.

## **Findings of Fact**

4. The Claimant was employed within the Cash Values in Transit Division of the Respondent. The function of this operation is to transport high value items including cash, euros, stocks and other valuables between post office branches, CVIT units and cash centres. There are prescribed routes which are determined at service level and these are subject to revision. In London the routes are revised frequently. After each revision there is a determination of which crew members will be assigned to which routes where the most senior unit will choose first. In London there is also a High Value Mail Service which involves the collection of high value items such as jewellery and watches from places such as Hatton Garden. Owing to the nature of the items collected, they tend to be lighter than items on the general CVIT routes.
5. The Claimant had been working on the High Value Mail routes since 2017. He submitted a sick note from his GP in 2017 which suggested that he avoided heavy lifting and longer hours of work. Shortly prior to this on 21<sup>st</sup> April 2017 the Respondent had obtained an occupational health report relating to the Claimant's kidney problem. His assignment to the High Value Mail route was an adjustment to accommodate the advice given by his GP that he should avoid heavy lifting.
6. On 24<sup>th</sup> September 2019 the Claimant raised a written grievance complaining about an incident that had taken place at work on 18<sup>th</sup> September (p.57). In it he stated that while he was at the yard on that day he was contacted by Mr Rob

Jones, union representative, who referred to his medical certificate as 'dodgy' in front of other staff. He said that his workmates were now calling him dodgy sicknote. He said that this had been said in front of his colleague Asif and that he had discussed the incident with his line manager. Asif had corroborated what was said. The Claimant complained of feeling victimised and discriminated at work. He reported the matter to his immediate line manager, Mr Kwaku Afrifa.

7. The Claimant was deeply upset by the comment and took it as a slight on his integrity. He subsequently went off sick. I don't doubt in any way that this has been a very difficult time for him and I have fully taken into account his evidence on how this period in his life affected him together with the statement from Mr Frederick.
8. After the Claimant had lodged his grievance Mr Thorpe spoke to him to see if the matter could be resolved informally. The Claimant wanted it progressed to a formal grievance.
9. On 28<sup>th</sup> October 2019 Mr Thorpe invited the Claimant to a meeting at the CVIT depot to discuss his grievance. The Claimant told Mr Thorpe that on the day in question Mr Jones was in the yard when he had called the Claimant over to talk to him about the resign. He told the Claimant that he had to make an appointment with occupational health. The Claimant went on to say that Asif was to the side of him at the time and he asked him if he could make the appointment but he had to speak to his immediate line manager, Kwaku. Then the medical certificate was discussed which was when Mr Jones said it was dodgy. At that point the Claimant walked off.
10. At the meeting the Claimant was asked what he wanted from the grievance process and he replied '*I don't know I'm just going through the process at the moment*'. During that meeting Mr Thorpe put to the Claimant that from his own knowledge Mr Jones had spoken to Paul Norris about his doctor's note and about ringfencing his HVM duty on the resign. Via further clarification by the Respondent sent by letter on 5<sup>th</sup> November 2019 he said that the use of the comment dodgy implied to him that the medical certificate was not bona fide and could be interpreted as fraudulent. The Claimant also took issue with what Mr Thorpe had put to him about the conversation between Mr Norris and Mr Jones and said that the motive for speaking to him was irrelevant.
11. On 7<sup>th</sup> November Mr Thorpe interviewed Mr Jones. Mr Jones said that he had previously asked the Claimant to get an OH referral to protect his position in respect of the imminent resigns. On the day in question he had asked Mr Blake if he had done anything to get a referral to OH. Mr Blake had thought that having a medical certificate was sufficient. It was put to Mr Jones did he say that the sick note was dodgy and he said '*no never the thought never crossed my mind*'.
12. On 12<sup>th</sup> November Mr Thorpe interviewed Albert Donker, Crew Member. Mr Donker was not a direct witness but the Claimant came over to him afterwards to say that Mr Jones had said that his sick note was dodgy. He said that his demeanour was upset. Mr Thorpe also interviewed Asif Nimry, AOS Manager. He said that he had overheard Mr Blake starting to talk to Mr Jones about the

OH referral and as it was personal he walked away. He came back and heard Mr Jones telling the Claimant to resubmit his certificate and the words 'dodgy certificate' but he couldn't hear the context as he was a couple of feet away and was not listening to the conversation plus there was a vehicle with an engine running nearby. Mr Thorpe then interviewed Mr Norris who said that he had discussed the Claimant with Mr Jones on 19<sup>th</sup> September and Mr Jones had mentioned he needed to consider what to do with the Claimant prior to the resign and that he had said he had advised the Claimant to get an OH referral. There was an interview with Mr Afifa. He said that he had advised the Claimant to resolve the matter informally with Mr Jones but the Claimant had said that he wanted to make it official.

13. A 'stage one decision letter' was issued to the Claimant on 18<sup>th</sup> November 2019. The conclusion of Mr Thorpe was that Mr Jones was acting in the Claimant's best interests by recommending that he request/ consent to an occupational health referral for HNV or retail in the pending route revision. He said that Mr Jones had vehemently denied using the word dodgy or couldn't recall. He was satisfied that even if Mr Jones did use the word dodgy it was not with malicious intent. Mr Thorpe has also conducted an investigation of whether the Claimant was called dodgy sick note but had not been able to obtain any evidence of this. He did not uphold the Claimant's grievance but recommended that the Claimant and Mr Jones met informally to resolve matters or via the grievance procedure.
14. On 20<sup>th</sup> November 2019 the Claimant put in a further written grievance about the matter on the Respondent's pro forma. In it he was asked what practical steps he would like to see to resolve the matter. He said it was not for him to say but he wanted the matter thoroughly investigated. He also wrote directly to Mr Thorpe expressing dissatisfaction with his conclusion. He took issue with the conflict between the corroborative statement of Mr Nimry that Mr Jones had said the word dodgy and the inconsistency in Mr Jones saying he couldn't recall saying the word and also vehemently denying it. He denied that Mr Jones had been acting in his best interests and requested a stage 2 consideration.
15. On 13<sup>th</sup> December 2019 Kath Pitman (Area CVIT Manager West) invited him to a grievance meeting on 23<sup>rd</sup> December 2019. At the meeting the first question that was asked was what did he want in order to help him move forward. He was asked whether he wanted conduct against Mr Jones and he said *'yes he's lying and my witness said those words and I want something done about it and he shouldn't be allowed to get away with it'*. Mrs Pitman offered mediation and the Claimant said *'no that's passed, I'm not interested in that the man's a liar'*. Mrs Pitman then asked; *'do you want compensation from the PO is that what you're looking for?'* and he said *'not sure what you mean by that but this is nothing to do with the PO, they have been great to me they have given me my lifestyle, I want to make it clear that this is nothing to do with the PO, this is Rob Jones and the CWU that are in the wrong, Rob Jones should not be allowed to do his job in the CWU as he is a liar.'* Further on he said *'I will not stop until this is dealt with by the conduct code I will not have lying about me or my doctors'*.

16. Mrs Pitman delivered her outcome to the Claimant on 17<sup>th</sup> January 2020. She accepted that the incident had upset the Claimant but concluded that it arose from a pure misunderstanding of words and that it should be resolved at the unit by a meeting between Mr Jones and the Claimant. She did not believe that there was sufficient evidence for a conduct investigation against Mr Jones. She said that her decision was final.
17. On 30<sup>th</sup> January 2020 the Claimant requested an appeal. His submission was that context was irrelevant as Mr Jones had insinuated that his certificate was fraudulent. Mrs Pitman then wrote to say that her decision was final.
18. On 13<sup>th</sup> February the Claimant wrote to say that he was not given the impression that the decision was final.
19. It transpired that the Claimant was not informed of the change of policy in grievance processes during the procedure and was not told by Mrs Pitman that there had been a change in policy or that he was at stage 3 or the final stage of the grievance. Ms Mellor and Mr Trowler discussed matters and it was determined that the Claimant should be afforded another tier as the final stage. On the basis that Mr Trowler was the next senior manager up the appeal was referred to him.
20. Mr Trowler suggested that the Claimant and he met on Teams on 1<sup>st</sup> April 2020 owing to the unfolding pandemic. The Claimant requested a postponement. The meeting was ultimately postponed to be heard in person on 11<sup>th</sup> June 2020 after government guidance regarding the pandemic changed. Shortly after commencing that interview Mr Trowler asked the Claimant to clarify that Mr Nimry had been a witness but was not able to give context. The Claimant then took objection with the focus on context and went no comment but the interview ultimately proceeded in a question and answer way.
21. The basis on which the Claimant was appealing was that Mr Jones was accusing him of fraud, that Mr Jones was accusing his doctor of malpractice and that Mr Jones was guilty of serious misconduct.
22. After the meeting Mr Trowler conducted interviews by way of email questions with Kath Pitman, Mr Thorpe, Mr Nimry, Ms Mellor and Mr Jones. He sent the records to the Claimant on 9<sup>th</sup> July to comment on and respond by 15<sup>th</sup> July. The Claimant responded on 14<sup>th</sup> July asking for an extension to 27<sup>th</sup> July. Mr Trowler agreed to an extension of one week to 23<sup>rd</sup> July. On 21<sup>st</sup> July the Claimant wrote saying that he needed more time to analyse the information. Mr Trowler declined as he was of the view the Claimant had been given sufficient time. Mr Trowler was also going on holiday and wanted to finalise the report. Mr Trowler disagreed with the Claimant's view that the context was irrelevant as it would inform how the matter was dealt with. He had explored the Claimant's previous relationship with Mr Jones and took into account that Mr Jones had spoken to Mr Norris about ringfencing his lighter duties as part of the revision. He concluded that it was more likely than not that Mr Jones had used the word dodgy but that he had been seeking to act in the Claimant's best interests. He was of the view that although it was not the best choice of words

it was intended from a caring place. He struggled to understand what Mr Jones' motive would be or what would be gained in using the term dodgy otherwise. He found that the Claimant could not give any reason why Mr Jones would act in bad faith. There was corroborating evidence he took into account that Mr Jones was helping the Claimant by advising him to get an up to date sick note. Mr Trowler accepted the Claimant had been upset but did not consider that disciplinary action would solve anything. On the facts as found he did not consider that the word used was sufficiently serious to found a disciplinary. He recommended the following: mediation, to share lessons learnt with Kath Pitman about post office policies and for Employee Relations to provide informal feedback to Mr Jones about lessons to be learnt from the incident.

23. On 13<sup>th</sup> August the Claimant wrote to Mr Trowler expressing his dissatisfaction with the decision. He wrote again on 3<sup>rd</sup> October raising points about why he was dissatisfied and requesting an independent investigator. On 7<sup>th</sup> October Mr Trowler responded to say that the appeal was his final decision. On 7<sup>th</sup> October the Claimant wrote to Mr Hancock to request the appointment of an independent investigator. Mr Hancock replied on 12<sup>th</sup> October to say that there was no further right of appeal and the case was now closed. The Claimant's response to this is dated 14<sup>th</sup> October and he says *'I am in receipt of your letter of 12<sup>th</sup> October, I have in previous correspondence reserved to take the matter further. I wish to inform you that such a time has come and I shall pursue this case outside the post office.'*
24. Between that point in time and the Claimant's resignation on 28<sup>th</sup> February 2021 the Claimant raised correspondence with the union (but not with the Respondent) whose recommendation was also mediation. Throughout that correspondence he reiterated his intention to take matters outside the post office. However he continued working and did not resign. There was nothing further in the way of communication between him and the Respondent between 14<sup>th</sup> October and the date of his resignation. Significantly there is no last straw relied on in this case between these points in time such as would have caused the Claimant to resign when he did.
25. I have considered the contents of the Claimant's resignation letter. The genesis of his resignation is the complaint regarding the comment made by Mr Jones and the Respondent's failure in its duty of care or to do right by him.

### The Law

26. Section 95(1)(c) of the ERA 1996 says; *'for the purposes of this Part, an employee is dismissed by his employer if 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 his employer's conduct'*.
27. Section 95(1) was considered by the Court of Appeal in **Western Excavating v. Sharp [1978] 1 All ER** in which the principles of a constructive dismissal were expounded. The key principles are that there must be a fundamental breach of contract or a breach going to the root of the contract, that the Claimant must resign in response to the breach (not for some other reason) and that he

or she must not delay or it will be said that he or she will have been taken to have affirmed the contract and waived the breach. My function is to consider this question objectively.

### Submissions

28. On behalf of the Respondent it was submitted that there was no fundamental breach in the way alleged at paragraph 23 of the particulars of claim, as set out in the written submissions; that the Respondent had acted with just cause; that there was a significant delay in him resigning and alternatively that it would have SOSR to dismiss him on the basis that he had refused to engage in mediation or be explicit about what he wanted to achieve through the process.
29. On behalf of the Claimant it was submitted that he ought to have received an apology from management and that the system let him down in that the Respondent failed to grasp what the issue was. He wanted to clear his name. He was in a trusted role and his character has been besmirched so it was on the Respondent to rectify this which it has not. Mrs Pitman's and Mr Trowler's roles are to be criticised as set out in the written submissions. The Claimant did not waive the breach but made it clear he remained unhappy to Mr Hancock and to the union and his reason for resigning was the breach as this was clearly set out in his resignation letter.

### Conclusions

30. The term relied on is the implied term of trust and confidence the breach of which will necessarily be a fundamental breach of contract (**Malik v BCCI [1997] IRLR 462**). The particulars are at paragraph 23 of the claim form. I have addressed considered this in the round, also focusing on the individual points raised in paragraph 23.
31. In my finding there was no fundamental breach of contract by the Respondent. The use of the term 'dodgy' was by a Mr Jones and in itself this would not amount to a breach of contract on its own. It is in my view incumbent on an employer acting reasonably to conduct a full investigation of the situation rather than take the word at face value and make an interpretation without more. In fact if an employer had done this it would leave them open to a consideration that they had not fully investigated a grievance, which may itself have been a breach of contract. The Respondent did conduct a full investigation via Mr Thorpe and lastly via Mr Trowler. Mrs Pitman conducted what was effectively a review of Mr Thorpe's decision but the Claimant was given the opportunity to have another tier of appeal in the circumstances and Mr Trowler re-interviewed witnesses and came to his own independent conclusions. It could be said that Mrs Pitman's approach was cursory but this was remedied by Mr Trowler. Insofar as there were any discrepancies in the findings between individual grievance officers or any measure of disagreement that in fact shows that there was some level of independence between tiers as opposed to bias. What matters is that the Respondent conducted a full, independent and objective investigation. This means that it should assess the evidence it receives rather

than taking it at face value for example. When assessing whether this was done I considered that there was a holistic approach taken particularly by the last officer, who effectively decided to re-hear the case. He considered the previous relationship between the Claimant and Mr Jones, the background of why Mr Jones was discussing the medical certificate and the witness evidence of those who observed parts of the conversation or spoke to the Claimant afterwards. This was entirely appropriate. It was open to Mr Trowler to make the finding that there was no malice intended. This would make a difference. I did not consider that there was any evidence of bias or a management-friendly approach. Indeed it seemed that the findings were objective and went some way to supporting the Claimant in moving forwards. The decision was in my finding well-reasoned and showed a considered and objective approach.

32. Mr Trowler found on the balance of probabilities that Mr Jones did say the word dodgy but found it was used in the context of seeking to protect the Claimant's position, so with the best interests of the Claimant at heart. On the evidence before him that was a conclusion that was reasonably open to him. The Claimant may well have taken the comment to have been an insinuation but the point was that the finding was that Mr Jones was looking for better evidence to support the Claimant rather than to intentionally sully his character. It was open to the Respondent to decide not to go down a disciplinary route having made those findings about the use of the word by Mr Jones.
33. The key here is that it is how the Respondent dealt with the Claimant's complaint primarily via the grievance which informs the assessment as to whether there has been a breach of trust and confidence. The Respondent sought to repair the relationship on a number of occasions by offering mediation. As part of its enquiry it investigated what it would take for the Claimant to move forwards. The Claimant was upset as Mr Jones had not been forthcoming about saying the word and had both denied and failed to recollect saying it. For those reasons a mediated process may not have worked but Mr Jones did offer to learn any lessons. The next point is whether the Respondent ought to have disciplined Mr Jones but in my finding it was open to Mr Trowler to conclude that it was not said in a malicious way.
34. I do not consider that there was any breach of the term of trust and confidence in Mr Trowler not giving the Claimant the whole of the time requested to prepare his comments on the evidence. He had been given an extension of a week which was reasonable. Overall he had had a fair opportunity to put his case and comment on the evidence. He had had the opportunity to go before three grievance officers albeit only two conducted full hearings. There was no evidence that he was prejudiced in his ability to put his case by the refusal.
35. I do not consider that the decision not to appoint an external independent investigator was unreasonable. The Claimant had gone through three tiers of the appeal. The Respondent had investigated the matter and made findings and recommendations. It was not clear what else it could have done. There had to be some finality to the situation. I do not find that that refusal was a breach of the implied term of trust and confidence.



36. I did consider whether mediation would have been effective by the time that the matter had got to Mr Trowler. The Claimant took the view that Mr Jones had been lying and owing to the fact that he did not accept he said the comment there was no apology forthcoming. However Mr Trowler made recommendations for there to be the provision of informal feedback about lessons learnt to Mr Jones which was short of disciplinary but was an action proposed to be taken up with Mr Jones about the matter. There was an invitation by Mr Holland that there should be a formal apology by management but that was never put on the table at the time and in any event there was no finding by management that the comment meant that the Claimant was fraudulent. The Respondent has never perceived the Claimant's integrity as in question and he has continued working in a trusted role until his resignation.
37. Therefore I conclude that there has been no fundamental breach of contract.
38. Even if I were wrong on that point however I find that on 14<sup>th</sup> October the Claimant indicated that he was going to take the matter outside of the Post Office after the Respondent had informed him the case was closed. The Claimant continued working and did not resign until 28<sup>th</sup> February. While he referred back to the incident in September 2019 in his letter of resignation (so, in my finding, that was the reason for his resignation) he worked for the Respondent for four months after the correspondence of 14<sup>th</sup> October before he resigned. In my finding therefore he did delay in resigning and has to be taken to have affirmed the contract and waived the breach.
39. As for the unpaid wages claim the Respondent's written policy in terms of the pay award that was negotiated with the union was explicit in saying that it applied only to those in employment and who were not under notice on 31<sup>st</sup> March. Unfortunately while there may have been a decision made on this in February the Claimant was not eligible as per the policy and therefore he is not owed any money by the Respondent in this regard.

**Employment Judge Frazer**

**18<sup>th</sup> October 2021**