EMPLOYMENT TRIBUNALS

Claimant: Mr Smith

Respondent: Chief Constable of Merseyside Police

Heard at: Liverpool by Cloud Video Platform **On:** 20 and 21 September 2021

Before: Employment Judge Evans (sitting alone)

Representation
Claimant: Mr Hughes, solicitor
Respondent: Mr Tinkler, counsel

This has been a remote hearing. The form of remote hearing was video by Cloud Video Platform ("CVP"). The remote hearing was hybrid hearing: the claimant and his representative were at the Tribunal, everyone else participated by video. A full face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

JUDGMENT

The claimant was not constructively dismissed. His claim of unfair dismissal therefore fails and is dismissed.

REASONS

Preamble

1. The claimant's employment terminated on 16 March 2020 following his resignation on notice on 30 December 2019. The claimant presented a claim form containing a single complaint of constructive unfair dismissal on 24 April 2020.

2. The hearing of the complaint took place on 20 and 21 September 2021 by CVP ("the Hearing"). At the beginning of the Hearing the representatives confirmed to me that, subject to a further document that the claimant wished to have admitted, all the necessary documents were contained in two bundles. First, there was the main bundle running to 348 pages ("MB"). This was contained in a pdf file running to 399 pages, additional documents with sub-numbering having been added in. Secondly, there was a

small supplementary bundle ("SB") containing occupational health records running to 64 pages. Indexes to each bundle were contained in separate pdf files.

3. The claimant applied on the first day for one additional document to be admitted. This was a letter dated 21 July 2021 from the respondent to a MP. The respondent did not object and so the letter was admitted.

4. The parties had produced a separate bundle running to 24 pages which contained the witness statements of the claimant, Mr Hodgson, a UNISON representative who gave evidence on behalf of the claimant, Mr Barr, a retired Assistant Chief Constable of the respondent, Mr Webster, a detective superintendent of the respondent, and Mr O'Mahoney, a civil claims manager of the respondent. Each of the witnesses gave oral evidence during which they were cross-examined.

5. After the witnesses had given their evidence, the representatives made brief oral submissions. When these had concluded, I reserved my decision.

Matters raised by the claimant at the beginning of the first day

6. Mr Hughes explained at the beginning of the Hearing that he did not use email, indeed had never done so in 30 years as a practising solicitor. The Hearing had been listed as an in person hearing at the beginning of September but then, just the previous week, a revised notice had been sent out listing the Hearing as a CVP hearing. Mr Hughes had faxed a letter to the respondent's representative addressed to the Tribunal on 15 September 2021 raising various issues in relation to this and asking the respondent to forward the letter by email to the Tribunal. The respondent's representative had done as requested. The letter asked why the listing had been changed from attended to CVP. It then explained that Mr Hughes and his client would "find it difficult to participate remotely".

7. Mr Hughes explained to me that he wanted to know why the Hearing had been changed from attended to CVP. He had been given no clear explanation of that. I replied that I did not know why it had been changed and queried whether there was a reason why we could not proceed by hybrid hearing, given that the Tribunal had made arrangements for Mr Hughes and his client to participate in the Hearing from the Tribunal building using the Tribunal's equipment.

8. Mr Hughes indicated that he was not "happy with a situation where we are having a hybrid hearing" and noted that there was no bundle of documents or witness statements in the Tribunal hearing room for use by witnesses. At this point the respondent offered to have a further copy of the various bundles delivered to the Tribunal. I asked Mr Hughes whether he wished to make an application for an adjournment so that the Hearing could take place as an attended hearing. He indicated, in effect, that he wanted to know why the Hearing had been converted to a CVP hearing before deciding whether to make an application. At this point (10.55am) I adjourned the Hearing so that I could try and find out why the Hearing had been converted to be a CVP hearing whilst we waited for the further copy of the bundles to be delivered.

9. At 11.15am, having made enquiries of the Tribunal's administrative staff, I informed Mr Hughes that I had been told that the Hearing had been listed in error as an attended hearing on 2 September 2021 and that listing it subsequently as a CVP hearing was in response to this error. I explained that Mr Hughes' letter of 15 September 2021 had been referred to the Regional Employment Judge. A letter had then been sent to the parties on 17 September 2021 as follows:

I refer to the recent correspondence sent by the respondents, which has been placed on the file.

Regional Employment Judge Franey has directed to convert the hearing into a hybrid hearing. The claimant and claimant's representative can attend at Liverpool Employment Tribunal, and The Employment Judge and the respondents will attend by CVP (Cloud Video Platform). A clerk will be available at Liverpool Employment Tribunal to assist the claimant and the claimant's representative.

The Judge has directed the claimant to provide a list of attendees for the hearing, as soon as possible.

10. As to why the Regional Employment Judge had replied to Mr Hughes' letter of 15 September 2021, I said that I had not spoken to him but I imagined it was because he considered that this dealt with what appeared to be the main concern of Mr Hughes: that he and the claimant would have difficulty participating in a CVP hearing as a result of a lack of the necessary equipment.

11. Mr Hughes indicated that his instructions were not to make an application to adjourn so that the Hearing could take place as an attended hearing. The Hearing therefore proceeded with a discussion of the issues to be decided.

12. I should note, however, that Mr Hughes revisited the issue of the Hearing taking place by CVP at the beginning of the second day. He noted that one of the witnesses had given evidence from the Cayman Islands and wanted to know whether the change from an attended Hearing to a CVP hearing was in some way related to this. He did not, however, either at that point or subsequently make any application in relation to this issue. I was unable to obtain quickly a more detailed explanation of the reason for the change than that which I had obtained on the previous morning. However, so far as I could ascertain, the underlying reason for the change to the listing was that at the moment the Tribunal simply does not have the necessary physical hearing rooms and clerks for all hearings to be held with all parties, witnesses and representatives physically present. This is as a result of both the pandemic and increased case numbers.

The issues

13. The parties had not managed to agree a list of issues prior to the Hearing. At the beginning of the Hearing, the following were agreed as being the issues that I would deal with initially (there would be further remedy issues in the event that the claim succeeded):

    1. Was the claimant dismissed? The Tribunal will need to consider:

    1.1 What was the most recent act (or omission) on the part of the respondent which the claimant says caused or triggered their resignation?

    1.2 Has the claimant affirmed the contract since that act? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive

    1.3 If not, was that act (or omission) by itself a breach of the implied term of trust and confidence?

1.4 If not, was it nevertheless a part of a course of conduct comprising several acts or omissions which, viewed cumulatively, amounts to a breach of the implied term of trust and confidence?

1.5 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

1.6 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

In deciding whether the respondent breach the implied term of trust and confidence? The Tribunal will need to decide:

- *whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and*

- *whether it had reasonable and proper cause for doing so.*

2. If the claimant was dismissed, what was the reason or principal reason for dismissal, i.e., what was the reason for the breach of contract?

3. Was it a potentially fair reason?

4. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

<u>Remedy issues to be dealt with at same time as liability</u>

5. Polkey: Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much?

6. If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

7. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

14. This list of issues does not set out the details of the factual matters relied upon by the claimant in support of his contention that he had been constructively dismissed. I asked Mr Hughes which document set out the factual matters relied upon and he answered the claimant's witness statement. I asked him to confirm that all factual matters relied upon were set out in the witness statement and Mr Hughes answered that they were.

15. I should note that Mr Hughes requested and was granted a ten-minute adjournment to discuss the list of issues with the claimant before agreeing them.

<u>The Law</u>

16. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") gives an employee the right not to be unfairly dismissed.

17. To bring a claim of unfair dismissal, the employee must show that they have been dismissed. The circumstances in which an employee is dismissed are set out in section 95 of the 1996 Act. The burden of proof to show a dismissal has taken place is on the employee.

18. Section 95(1)(c) of the 1996 Act provides that an employee is dismissed when he terminates the contract with or without notice in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct. When the employee does this there is a constructive dismissal.

19. For there to be a constructive dismissal there must be a fundamental breach of contract by the employer. That is to say a significant breach going to the root of the contract or which shows that the employer no longer intends to be bound by one or more essential terms of the contract (Western Excavating (ECC) Ltd v Sharp [1978] ICR 221).

20. For an employee to show that they have been constructively dismissed, they must show that:

    20.1. There was a fundamental breach of contract by the employer;
    20.2. The employer's breach of contract caused them to resign;
    20.3. The employee did not waive any breach.

21. If as in this case the employee relies on a breach of the implied term of trust and confidence, this is a term 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. The test is an objective one.

22. The implied term of trust and confidence is a broad one and many different acts (or failures to act) by an employer may cause it to be breached. Because the implied term of trust and confidence is fundamental, any breach of it is likely to be repudiatory (Morrow v Safeway Stores plc [2002] IRLR 35).

23. A single act or omission by the employer may of course comprise a fundamental breach of contract. However, a course of conduct can also cumulatively amount to a breach of the implied term of trust and confidence entitling an employee to resign and claim constructive dismissal after a "last straw" incident, even though the last straw alone does not amount to a breach of contract and may not in itself be blameworthy or unreasonable. However, the last straw must contribute something to the breach and be more than utterly trivial. The approach in such cases has been perhaps most clearly set out in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978. That approach is reflected in the issues set out above.

24. Whether a repudiatory breach has occurred is a question of fact for the Tribunal and the objectively assessed intention of the employer towards the employee is of paramount importance (Tullet Prebon Plc and others v BGC Broker LP [2011] EWCA Civ 131).

25. So far as the link between the repudiatory breach of contract and the employee's resignation is concerned, it is not necessary for the employee to show that the breach of contract was the only cause of the resignation. However, the resignation must be at least in part in response to the breach (Nottingham County Council v Meikle [2004] EWCA Civ 859).

26. Turning to the issue of the employee affirming their contract or waiving the breach, there is no fixed period of time within which an employee must make up their mind.

Submissions

27. The oral submissions of Mr Tinkler for the Respondent may reasonably be summarised as follows

Most recent act

27.1. The claimant's representative had expressly agreed that the most recent act relied upon was the revelation of the identity of the leaker. However, the claimant was by the time that occurred already pursuing the possibility of redundancy.

Affirmation

27.2. The revelation was on 25 November 2019 and yet the claimant's employment had not terminated until 16 March 2020. He had affirmed his contract.

Whether most recent act a repudiatory breach

27.3. It was not. Giving information that had been requested could never be a repudiatory breach. If the claimant was instead arguing that the leak itself had been the breach it could not be a repudiatory breach because it had been an unapproved leak by a colleague who was not a manager. In these circumstances the issue would be whether the respondent had dealt appropriately with the leak. Clearly it had because the leaker had been dismissed in 2013. Alternatively, if the claimant was arguing that the breach was the delay in telling him the identity of the leaker – and this was not how he had put his case – the fact was that he had not pursued the matter between 2012 and 2019 and so he had delayed unreasonably in pursuing the matter and affirmed his contract. The claimant had of course been aware for a number of years that someone had been dismissed – probably since around 2013.

If not a repudiatory breach, was it part of a course of conduct cumulatively breaching the implied term of trust and confidence.

27.4. The earlier matters that he sought to "revive" by relying on the revelation of the leaker were (1) the improper use of information in the original investigation of him in 2011; and (2) the leaking of information about him in 2011. As to the first, the unchallenged evidence of Mr Barr had been that information had not been improperly used. The matter had been raised at the time, an explanation had been provided and no appeal had been pursued. The claimant had worked on for 7 years without complaint. The investigation was plainly not a breach that could be revived. As to the second, as already noted, the leak was unauthorised and by a colleague who was not in a managerial position and who had been dismissed. The claimant had not sought further information about the person disciplined between 2013 and 2019.

27.5. Overall, the conduct was not cumulatively capable of being a repudiatory breach. Further, it could not be said to be a "course of conduct", the period of time covered by the three matters relied upon – 8 years – was simply too long for that. Equally, there was no common theme of a particular employee being involved: there were complaints about the original investigating officer, the leaker and Mr Mahoney.

27.6. Mr Tinkler made no submissions in relation to the fairness of the dismissal: he accepted that the claimant would have been unfairly dismissed if he proved that he had been constructively dismissed. Turning to Polkey, the claimant had already evinced an interest in voluntary redundancy and would have resigned around the time he had resigned in any event. Mr Tinkler said he had no submissions to make in relation to contribution or any reduction to the basic award.

28. The submissions of Mr Hughes for the claimant may reasonably be summarised as follows:

The most recent act, affirmation, and whether the most recent act was a breach of the implied term of trust and confidence

28.1. The respondent had conceded that it was Mr O'Mahoney who revealed the identity of the leaker to the claimant.

28.2. There was no merit in the submission that a delay between 25 November 2019 when the information was revealed and the end of December 2019 when the claimant resigned constituted affirmation of the contract. The claimant was a long-serving employee and that was a reasonable period for him to take to consider what had occurred.

28.3. The reason that the revelation of the identity of the leaker amounted to a repudiatory breach of contract was as set out in [22] of the claimant's witness statement: he had not previously known that the leaker was a fellow CSI Officer. He thought it had been someone less closely connected to him. Further, he believed the person had been prosecuted because he had been asked to provide a victim impact statement. Further, there was at least one investigation that he was not involved in and he was suspicious that the leaker had not acted alone. This was all information a good employer would have provided when asked.

28.4. It was also to be noted that the claimant had not had a leaving interview. The respondent would have known from its occupational health records that he had serious occupational health issues. The respondent knew it was dealing with someone who had had a substantial mental health problem from 2011 to 2013. Mr Hughes referred in particular to the medical report at SB page 47. Mr Hughes submitted that this was all relevant because, he submitted, I "had to decide if his reaction in resigning objectively reasonable".

28.5. When I said that I was not convinced that that was the test that would need to be applied, Mr Hughes stated that the respondent as a large employer had breached the implied term of trust and confidence by not telling the claimant something that could have assisted him. Further, when they had provided information in November 2019, they had only provided the name of the leaker. The claimant's concerns in this respect were set out at [22] of his witness statement.

28.6. Further, whilst Mr Barr's explanation to the Tribunal of why RIPA did not apply in relation to the original investigation had been "very good", it was clear from the evidence of Mr Hodgson that it was not what he had said back in 2011. His explanation for the paucity of the notes from the disciplinary hearing was unconvincing. There was a course of conduct of giving the claimant no or misleading information.

28.7. Mr Hughes submitted that Mr Webster had been a poor witness, unable to explain why he had recorded some things but not others. His credibility was damaged by his failure to report onwards the financial difficulties which he claimed the claimant had explained to him. Mr Hughes submitted that Mr O'Mahoney had been a "pitiful" witness. He had not made notes. He had tried to give anecdotal evidence. There were possibly documents relating to the Liverpool Echo which had not been disclosed. The identity that the claimant had been given – the identity of the leaker – did not help when there was other information he had not been given. The claimant did not know what information had not been provided in relation to the

leaker and so was unaware of his motives and whether he had been paid by the Liverpool Echo.

28.8. Overall, there had been a serious breach of the duty of good faith because of the limited nature of what was told to the claimant in November 2019.

Course of conduct

28.9. The timescales meant that this case was unusual. It was not so much that the straw had broken the camel's back as that the camel had not had any information for a long time. He should not be criticised for not seeking information that he was not aware of – although Mr Hughes accepted, when I asked him, that the claimant was aware that someone had been dismissed for leaking the information going back a number of years.

Other issues

28.10. Turning to issue 1.6, Mr Hughes submitted that the claimant had resigned because of what Mr O'Mahoney had told him. The respondent could and should have told him that information earlier. It would have helped him. Even Mr O'Mahoney had left a number of things dangling.

28.11. The claimant had not contributed to his dismissal. Turning to Polkey, he had not wanted to leave. He had been seeking redress for wages lost back in 2013. He had a well-paid job. He would not have given it up lightly. He resigned because he felt strongly about things. He would not otherwise have resigned.

Findings of fact

29. The claimant was employed by the respondent as a Crime Scene Investigator in August 1999. In 2002 he was promoted to Senior Crime Scene Investigator.

The disciplinary proceedings in 2010-2011 ("the Disciplinary Proceedings")

30. In December 2010 a misconduct investigation was begun into the claimant because DCI Hesketh believed: (1) the claimant was using for private purposes a "fast tag" (a tunnel pass) held by the CSI team for operational purposes; and (2) the claimant was arriving at work late and leaving early. The allegations were initially classed as "gross misconduct/criminal" in December 2010 but were reassessed in March 2011 as "misconduct".

31. A disciplinary hearing chaired by Mr Barr took placed on 20 July 2011. The claimant was represented by his union representative, Mr Hodgson. The claimant raised in particular the issue of how the information used at the hearing had been obtained by the respondent, so raising the issue of unlawful surveillance. At the conclusion of the hearing, Mr Barr:

31.1. Concluded that the claimant had used the fast tag inappropriately "but not through any issue of Honesty or Integrity". He noted a lack of internal policy or processes and of clear guidance. However, the misuse stemmed from April 2002 and the claimant had shown "no personal responsibility". This was "discreditable conduct";

31.2. Concluded that the claimant has failed to work his contracted hours. The allegations were "proven on the balance of probability from the data available and the lack of other information of record keeping by you". "These are breaches of misconduct in relation to working and responsibilities".

32. The decision stressed that "the findings do not find any misconduct proven in relation to Honesty or Integrity. There is also no reflection on your professional ability as a CSI or ability to perform the role". The claimant was given a final written warning to remain on his record for two years.

33. The claimant initially appealed this dismissal but subsequently chose not to pursue that appeal. He then reported sick with stress in October 2011. He remained off work sick until he returned to work in March 2013. During this absence his pay was reduced.

34. The claimant raised three points in relation to the fairness of the Disciplinary Proceedings in his original appeal letter in August 2011 (MB page 264). The first and third points are vague and were not developed in either the claimant's witness statement or the submissions of Mr Hughes to any significant extent. In light of the documents contained in MB in relation to the disciplinary process, and the contents of Mr Hodgson's witness statement, I find that the claimant has failed to prove that those two criticisms of the process are well-founded.

35. The claimant confirmed in answer to questions asked in cross examination that the real issue he raised in relation to the Disciplinary Proceedings was that they relied upon information improperly or unlawfully obtained (this was covered by the second of the three points raised in the appeal letter). Indeed, the focus of the claimant's criticism of the Disciplinary Proceedings in his witness statement was the use of electronic data arising from the use of the fast tags ("the Data"). The claimant alleged that its use was unlawful because: (1) the Regulation of Investigatory Powers Act 2000 ("RIPA") applied to such use; (2) consequently the respondent had needed to obtain "direct surveillance authority"; (3) the respondent had failed to do this. What had been said about this at the disciplinary hearing on 20 July 2011 was also the only matter in respect of which Mr Hughes asked Mr Barr a significant number of questions in cross-examination.

36. Mr Barr's evidence at the Hearing was that the use of the Data was not a RIPA issue. This was because the Data was backward (rather than forward) looking: the investigation that was carried out into the claimant used the Data but that had *already* been collected for other purposes as part of the respondent's normal operations. RIPA was forward looking: a direct surveillance authority was required if it was decided to gather data as part of an investigation and for the purpose of the investigation.

37. Mr Hughes did not suggest to Mr Barr that this was an incorrect understanding of RIPA but rather suggested to him that it was not what he had said on 20 July 2011. Mr Barr said that it was. It was agreed that the notes of the hearing on 20 July 2011 were not verbatim but the relevant paragraph stated as follows (MB page 254)

> *A brief discussion took place in respect of RIPA. Dec. Ch. Supt Barr confirmed that all information in the file is owned by the organisation on behalf of the organisation. Kath Halpin advise that the information obtained via ANPR supports the information gather in relation to the use of the fast tag.*

38. In his oral evidence Mr Barr was adamant that he had said that there was no RIPA issue. This was an area that he was very familiar with. In answer to questions asked in re-examination the claimant said "I can't remember" when asked if he had ever been told that no authority was needed for RIPA purposes before July 2021. In his oral evidence, Mr Hodgson confirmed that the paragraph quoted above from MB page 254 was a "suitable representation" of what had been said. In his witness statement he stated "DCS Barr stated that the information was owned by the organisation and said something along the lines that he had authorised its use".

39. Taking the evidence in the round, I find that at the hearing on 20 July 2011 Mr Barr told the claimant that RIPA did not apply, that no authorisation of the use of the Data was needed for RIPA purposes, and that the respondent was entitled to use the Data because it owned it. I so find for the following reasons:

    39.1. Mr Barr's recollection of the issue was clear and he had a good reason for it to be clear: the point was legally obvious to him, because he dealt with RIPA issues constantly in his work;

    39.2. His recollection is consistent with the paragraph from MB page 254 quote above;

    39.3. Mr Hodgson did not either in his written statement or in his oral evidence specifically deny that Mr Barr had said that RIPA authorisation was not necessary.

40. Overall, I find that the use of the Data in the investigation in the Disciplinary Proceedings was not unlawful and that Mr Barr explained to the claimant why that was the case during the hearing on 20 July 2011. Further, I find that the Disciplinary Proceedings were generally carried out in a fair and reasonable manner. The claimant's criticisms of them, made at a distance of nearly ten years, lack substance.

The leak to the Liverpool Echo

41. In July 2011 the Liverpool Echo contacted the respondent having received a tip off that the claimant was facing disciplinary charges as a result of allegedly misusing fast tags. The Liverpool Echo contacted the respondent on at least one other occasion about this but did not in the end publish a story.

42. The claimant was warned about the interest of the Liverpool Echo. This caused him considerable and understandable upset and stress. However, I find that the respondent acted appropriately at the time by notifying the claimant promptly and on a number of occasions about the interest of the Liverpool Echo: clearly it was sensible to forewarn him of the possibility of a story being published, however upsetting that might be to the claimant.

43. The claimant was aware that there had been a tip off as early as July 2011. In answers to question asked in cross examination he said that he had been told that the anti-corruption team was doing an investigation, that he expected to be part of the investigation and that he had given a victim impact statement (MB page 283a, apparently prepared on 26 July 2012).

44. The respondent carried out an investigation into the tip off to the Liverpool Echo. As a result of the investigation a CSI, Mr Aindow, was dismissed in 2013. I find that the respondent's approach to the leak was in principle reasonable and appropriate: they recognised the leak should not have happened, they identified the leaker and they took the strongest possible disciplinary action against him by dismissing him.

45. The claimant did not pursue the question of what had happened to the leaker (or of their identity) following his return to work in 2013. However, as he noted in his letter to Mr Webster on 21 October 2019, the head of PSD did keep him informed of the investigation to some extent. The claimant said he had been told that "an officer from Merseyside police had been arrested for this offence. This officer had sold this story to a news reporter. He was summarily charged and dismissed for the unlawful selling and release of my personal information to an external organisation, namely the Liverpool

Echo" (its fifth paragraph, MB page 324). The date on which the claimant was told these things is unclear.

46. The first time that the claimant pursued the question of the identity of the leaker to any significant extent following his return to work in 2013 was in the autumn of 2019. The claimant said in answer to a question asked in cross-examination that the first "official notification" he was given about this was when he received the email from Mr O'Mahoney at MB page 328 dated 14 November 2019 which stated, "Records indicate that the person responsible for the inappropriate disclosure was dismissed from the Force on 27/6/13 (CM 79/13)". However, in light of the contents of the claimant's own later dated 21 October 2019, he had clearly learnt about the leaker's dismissal before this date, but perhaps not by "official notification".

47. So far as the actual identity of the leaker was concerned, the first time the claimant learnt that it was Mr Aindow was in a conversation with Mr O'Mahoney on 25 November 2019. He said in his oral evidence that in fact it had been the meeting with Mr Webster on 17 September 2019 which had given him "impetus to ask more questions".

48. I find that prior to 25 November 2019 the claimant did not know the identity of the leaker. I also find that the claimant was not involved in the anti-corruption investigation relating to the leak, was not provided with information about the motivation of the leaker, and was not told if anyone other than the leaker had been involved. Further, the claimant was not informed of what had (or had not happened) in relation to the possible prosecution of the leaker. The findings in this paragraph are made because the respondent's representative conceded these points in the context of a possible application for further disclosure of the file with reference 79/13 by the claimant, which in the end was not pursued.

Events from September 2019

49. On 12 September 2019 the claimant emailed Mr Webster. He said (MB page 322):

> *Are there any plans to re-structure SSD within the next twelve months, if so I would like to explore my voluntary redundancy opportunities please. Can you let me know if there are any plans Sir as I have discussed this with my line manager who is aware of the reasons for my request.*

50. The claimant said in oral evidence that this was because his own manager had suggested to him the previous day that he might like to apply for a training post. The claimant did not wish to but he believed that the fact that he was "offered" the post meant that there might be a restructure and so redundancy might be a possibility.

51. Mr Webster replied on the following day (MB page 321) suggesting they "chat", saying that he did not think redundancies were likely to occur but that "there are and will be other opportunities for valued senior CSI's like you should you wish to consider them in time…".

52. Mr Webster and the claimant then met on 17 September 2019. Mr Webster's account of that meeting (his statement [8] to [12]) is that the claimant said he was in debt as a result of an absence from work some years before and that he had suggested to the claimant that he might retire, pay off his debts with part of his pension, and then gain further employment outside the police service. The conversation was informal. Afterwards he asked the claimant's line manager, Mr Stewart, to refer the claimant to the occupational health department.

53. The claimant's account of the meeting is at [10] of his statement. He says:

I mentioned to Det Superintendent Webster a vetting meeting I had had where I was interviewed over the state of my finances in 2018. I told DS Webster that this all related back to the 2010 disciplinary issues and all of the salary I had lost. I explained to Mr Webster how the health and financial impact of my absences from work due to work related stress had effected me. Mr Webster was sympathetic and he advised me to take legal advice in relation to the whole incident involving the Liverpool Echo and the effect it had on me. But he said in very clear terms Merseyside Police would fight it all the way.

54. Mr Hughes challenged Mr Webster's account in cross examination that there had been a discussion of financial difficulties of the claimant at this meeting. He raised a number of "credibility" points, including the lack of any contemporaneous note of the meeting, the lack of a notification to another department that the claimant was in financial difficulties, and the lack of a written communication to Mr Stewart.

55. I find that in fact there was a discussion of the claimant's financial difficulties at the meeting on 17 September 2019. This is for the following reasons:

    55.1. The claimant's account of the meeting at [10] of his statement suggests that such a discussion would have been quite likely;

    55.2. The claimant's resignation letter itself (MB page 340) hints at a conversation to the effect that retiring and taking another role might have eased any financial difficulties when it says "To be questioned regarding my age and advised to retire enabling me to take this role is against employment law";

    55.3. Mr Webster's answers to the credibility points were convincing. These included that it was an informal meeting, not one at which he would take notes, that the informality and the nature of the financial concerns raised did not cause him to believe he should refer the claimant to the Professional Standards department, that he spoke to Mr Stewart a number of times a day and so it was unsurprising that he had not specifically written to him about the claimant;

    55.4. There was, I find, no obvious reason for Mr Webster to fabricate such an account. Further, the way the claimant had approached Mr Webster – looking for a voluntary redundancy exit – is evidence in and of itself that the claimant was hoping to leave the respondent's employment with a payment.

56. After the meeting the claimant sent Mr Webster the letter dated 21 October 2019 which is at MB page 323. The letter revisited events going back to 2010. It is a rambling document but the following points emerge:

    56.1. The claimant was "reviewing my possible actions regarding clearing my name" in relation to the Disciplinary Proceedings;

    56.2. The claimant requested a "copy of the RIPA" and information relating to it because "this information will assist my solicitor researching my case";

    56.3. The claimant blamed his period of ill-health absence and consequent financial loss on the leaking of information about him to the Liverpool Echo, not on the Disciplinary Proceedings;

    56.4. The claimant had taken legal advice and been advised to request he be reimbursed the salary lost during his period of ill-health absent. He asked for this

because he was "directly affected by the actions of an employee of Merseyside Police". The claimant asked Mr Webster to make representations on behalf of the claimant in support of such a payment being made;

56.5. He had trouble coming to terms with the lack of an apology to him for the unlawful release of his personal data.

57. Mr Webster's witness statement said that he understood that the claimant was "seeking to bring civil proceedings against the force" and therefore he emailed the letter to the civil claims manager, Mr O'Mahoney. I find that this was an unsurprising and entirely reasonable response by Mr Webster. The tenor of the letter and the references to the claimant's solicitor and to "legal advice" suggest that the claimant was indeed contemplating legal action if not reimbursed the lost pay to which he refers.

58. Mr O'Mahoney emailed the claimant on 14 November 2019 (MB page 327-329). The email set out various factual matters including the dismissal of the leaker. The email then explained that if the claimant proposed to pursue a civil claim against the respondent he should follow the relevant pre-action protocol. The email explained what any letter sent should include and advised the claimant to seek independent legal advice. It noted that limitation might pose a difficulty and said, "in terms of the reimbursement of salary this is a matter for HR to consider the same". Finally, it suggested that the claimant might discuss the matter with Mr Webster "in terms of the current impact of these issues on your wellbeing". I find that in all the circumstances this was a reasonable and appropriate response.

59. The claimant replied to Mr O'Mahoney by a letter received on 22 November 2019 (MB pages 330-334). The claimant expanded on various primarily historical factual matters touched on by Mr O'Mahoney's email of 14 November 2019. It then said:

> *I do not require a financial settlement, my salary is already within the forces domain, and I am not asking for a pay-out but only what I should have been entitled to for an injury at work. The calculation is six months half pay and four months no pay. Seven months in total…*
>
> *I do not wish to bring any case against my employers but seek a resolution and closure which I listed in my letter.*

60. Mr O'Mahoney wrote to the claimant by email on 25 November 2019. The email is at MB pages 326 to 327. Mr O'Mahoney said that the issues raised by the claimant were not within his remit as he dealt only with civil claims. He said, "I believe you need to communicate directly with your Line Manager, HR and the Freedom of Information Team if you require further disclosure of documentation". Again, given that the claimant had indicated that he did not wish to bring a case against the respondent, I find that this was a reasonable and appropriate response for Mr O'Mahoney to send.

61. On the same day the claimant emailed Mr O'Mahoney thanking him for his response and said it would be fine for him to forward it to Mr Webster "and HR and PSD". He went on to refer to a meeting with his solicitor and referred again to his view on the use of the Data and the leaking of the story to the Liverpool Echo in 2011. He did not express any dissatisfaction with Mr O'Mahoney's response. Mr O'Mahoney forwarded the email to Mr Webster and others (MB page 326). He had no further contact with the claimant.

62. I should note at this point that Mr Hughes attacked the evidence of Mr O'Mahoney: he had not made a note of a conversation with Mr Hesketh, he had not established whether or not RIPA authority had been necessary or told the claimant what the position was, he

had not told the claimant that he had spoken to Mr Hesketh. The purpose of these points being made appeared to be that I should attach little weight to Mr O'Mahoney's evidence and/or conclude that he had been keeping information from the claimant. I reject these contentions. I find that it was reasonable and appropriate for Mr O'Mahoney to communicate with the claimant, an employee, as he did. As I have found above, the claimant's letter of 21 October 2019 was a rambling document and Mr O'Mahoney's response was, in effect, an attempt to bring some order to the issues raised by it. This was also a sensible approach given the claimant was raising concerns about matters which had mainly taken place (by then) 8 to 9 years earlier.

63. On 16 December 2019, the claimant's solicitor, Mr Hughes, wrote to the respondent (MB page 338). He refers to the claimant's letter of 21 October 2019 and states "matters effectively go back to disciplinary proceedings my client was I [*sic*] subjected to in 2010". It refers to illegal surveillance of the claimant and the release of "confidential and misleading information to a local newspaper". It refers to "reasonable requests" contained in the letter of 21 October 2019 not having been "acceded to". It concludes by stating "Can you confirm that the matters raised in this correspondence and let me have the disclosure of documents requested by my client in his letter of 21st October 2019".

64. The claimant resigned before the respondent had replied to this letter. His letter is at MB page 340. The reasons given for resigning may reasonably be summarised as follows:

    64.1. He had raised "very serious personal concerns" about how the respondent had treated him regarding significant issues raised with it;

    64.2. He had sought a meeting but had been "brushed off", in particular by Mr O'Mahoney. Correspondence had been ignored;

    64.3. He had suffered loss and distress as a result of the dishonest behaviour of a fellow employee (presumably Mr Aindow). He had not been paid during his sickness absence whereas the fellow employee had been suspended for over a year receiving full pay;

    64.4. There was "much more" the respondent could have done. The claimant did not believe it had acted honestly with him at the time of the events complained about or at the time of writing. It had obstructed him in his attempts to get to the bottom of what had happened;

    64.5. He raised an issue in relation to being offered a post which if he had accepted would have caused "great financial loss".

65. It is notable that the claimant does not refer in the letter to his recent discovery that it was Mr Aindow who leaked the story to the Liverpool Echo. The letter does not suggest that this discovery was relevant to his decision to resign.

Conclusions

66. I return now to the issues which the parties agreed at the beginning of the Hearing that I would need to decide in order to determine whether the claimant was unfairly constructively dismissed.

What was the most recent act (or omission) on the part of the respondent which the claimant says caused or triggered their resignation?

67. At the end of the first day of the Hearing, I asked Mr Hughes whether the most recent act relied upon was the claimant's discovery of the identity of the leaker. Mr Hughes replied that it was indeed the claimant's discovery of the identity of the leaker "plus the effect of that on [the claimant]".

68. I asked Mr Hughes this at the end of the first day because the claimant's witness statement was not clear in relation to this issue but by this point the claimant had given his oral evidence. During his oral evidence, when asked what had prompted him to resign, the claimant had said:

> *Because I found out who the person was, it was bittersweet. Bitter because it was a colleague. I was surprised and stunned that I hadn't been told about that by line managers.*

69. I then asked him why it was that finding out about this in 2019 caused him to resign (given he had known of the leak since 2011), and the claimant further clarified matters as follows:

> *In 2011 I found out that it was someone working for the police. What was important in 2019 was that I found out that I had been betrayed by a colleague in the force. I was shocked that nobody had told me that. I felt betrayed, I had a bit of a relapse.*

70. I therefore find that the most recent act which the claimant says caused or triggered his resignation was his discovery on 25 November 2019 that it was Mr Aindow who was responsible for the leak to the Liverpool Echo and the very considerable upset that he says this caused him.

Has the claimant affirmed the contract since that act? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive

71. I conclude that the claimant did not affirm his contract after that act. It was only a few weeks later that he handed in his notice. In light of the length of his employment he made up his mind to resign within a reasonable period. The definition of a dismissal in section 95(1)(c) of the 1996 Act of course permits the possibility of an employee who has worked his notice period being constructively dismissed.

If not, was that act (or omission) by itself a breach of the implied term of trust and confidence?

72. The act was telling the claimant the identity of the leaker. The fact that this may have caused great upset to the claimant was not part of the act but rather a consequence that flowed from it.

73. The claimant had known for years that it was another employee who had leaked the information. The employee whose identity was revealed to him had left the employment of the respondent some six years before. The claimant had not previously pursued the identity of the leaker but now that he was asking for it he had been given it. I conclude in light of these matters that in all the circumstances of the case this was not an act which was calculated or likely to destroy or seriously damage the relationship of trust and confidence.

74. I should note at this point that the nature of the claimant's case because somewhat blurred as a result of what Mr Hughes sought to argue in his closing submissions. These

were to the effect that the final act as agreed above should be taken together with events which both preceded and succeeded it in the period September to December 2019.

75. I say "somewhat blurred" because Mr Hughes had confirmed at the outset, in the absence of any clear pleading, that **all** the factual matters relied upon by the claimant were as set out in his witness statement and yet this does not really refer to any events in the period September to December 2019 as matters relied upon as contributing to the alleged breach of the implied term of trust and confidence. Indeed, the witness statement does not touch upon that period other than briefly, particularly at paragraphs 10 and 11.

76. However, in light of my factual findings above in relation to the events of 2019, I conclude that the respondent's conduct towards the claimant cumulatively between the beginning of September 2019 and when he resigned did not amount to a breach of the implied term of trust and confidence. In particular, Mr Webster and Mr O'Mahoney dealt with the claimant in an entirely reasonable way given that what he was in reality trying to do was obtain severance terms from the respondent (whether by voluntary redundancy or otherwise) in reliance on events which had happened up to eight years earlier. They engaged reasonably with what he said rather than brushing him off.

If not, was it nevertheless a part of a course of conduct comprising several acts or omissions which, viewed cumulatively, amounts to a breach of the implied term of trust and confidence?

77. The course of conduct put forward by the claimant as set out in his witness statement - which was accepted as the factual pleading by Mr Hughes following the agreement of the list of legal issues – may reasonably be summarised as follows: (1) the Disciplinary Proceedings and the leak to the Liverpool Echo in 2011 (although these may, viewed generously, be regarded as extending to 2013 given that the claimant attributes his ill-health absence from 2011 to March 2013 to the leak to the Liverpool Echo); (2) possibly, the non-disclosure of the identity of the leaker between 2011 and 2019 (the claimant notes at [22] of his witness statement "My employers should and could have told me his identity a lot longer ago than November 2019"); and (3) the events of September to December 2019. (Of course, point (3) does not so much arise as a result of the claimant's witness statement but rather from what was agreed as the final act at the end of the first day and what was subsequently said by Mr Hughes in his oral submissions.)

78. It should be noted that the claimant makes no complaint of any significance about the respondent's actions between 2013 and 2019 (other than that throughout this period the respondent continued not to identify the leaker to him). It should also be noted, however, that the claimant did not contend that he had pursued the issue of the identity of the leaker in the period 2013 to 2019. When asked about this in cross-examination he said that pursuing that matter in that period would have caused him to "regress". He said that he needed to be mentally prepared to pursue the issue. He said that it was after the meeting with Mr Webster that he had "decided to get answers to questions".

79. I turn first to whether these events were cumulatively capable of being a "course of conduct". I find that they were not. The leak to the Liverpool Echo was an unauthorised act by an employee of the respondent – for which he was subsequently dismissed. Whilst obviously connected in one sense to the Disciplinary Proceedings, it was not an act or omission of the respondent (or one for which the respondent would have been vicariously liable). Further, the non-disclosure of the identity of the leaker for the period 2013 to 2019 was not realistically an omission throughout the period 2013 to 2019. The claimant took a decision not to ask for the name of the leaker in 2013 when he returned to work and in those circumstances it is wholly unrealistic to regard the respondent not providing him with the name for the period 2013 to 2019 as an ongoing act or omission.

This is underlined by the fact that the claimant was promptly provided with the name when he asked for it in November 2019. The evidence does not on balance indicate that the respondent was seeking to withhold the name from the claimant. Finally, the events of September to December 2019 of which the claimant complains involved different employees. At best, what one has is two events for which the respondent was responsible in 2011-2013 (the Disciplinary Proceedings and not identifying the leaker), followed by a gap of 6 years, followed by the events of September to December 2019 involving different employees of the respondent. There are insufficient connections between these various events for which the respondent is responsible and the gap between 2013 and 2019 too long for them to be a "course of conduct".

80. However, in case I am wrong about that, and the events complained of are capable of being a course of conduct, I consider now whether viewed cumulatively they amount to a breach of the implied term of trust and confidence. I conclude that they do not for the following reasons. First, I have concluded at [40] above that the Disciplinary Proceedings were generally carried out in a fair and reasonable manner and that the Data was not used unlawfully in them. Secondly, I have concluded at [44] above, that the respondent's approach to the leaker was in principle reasonable and appropriate. Thirdly, the claimant was not pursuing the identity of the leaker during the period 2013 and 2019 and, in light of his oral evidence, I find that in any event until he asked for the identity of the leaker in 2019 the respondent could reasonably assume (in light of his ill-health absence and the fact that he was not asking for the identity of the leaker) that this was not information which he was actively seeking and, indeed, might be information that he did not want to receive. Fourthly, even if the earlier events had been such that they could have been regarded cumulatively as building towards (or being) a breach of the implied term of trust and confidence, I find that the events of September to December 2019, in addition to not being blameworthy or unreasonable, did not contribute even something relatively insignificant to any breach. The respondent's conduct towards the claimant during that period was entirely reasonable and appropriate.

81. There was, therefore, no course of conduct comprising several acts or omissions which, viewed cumulatively, amounted to a breach of the implied term of trust and confidence.

82. Finally, in case I am wrong about the events of 2011 to 2013, and there was a course of conduct in that period which amounted to a breach of the implied term of trust and confidence, I have reached the following conclusion in relation to whether the claimant can rely on that course of conduct in light of my conclusion that the events of September to December 2019 contributed nothing to any breach. I find that he cannot: the claimant clearly affirmed his contract by remaining in the respondent's employment between 2013 and 2019 and, indeed, not pursuing the matters of which he now complains during that period.

83. I therefore conclude that the there was no breach of the implied term of trust and confidence by the respondent. In light of this conclusion, it is not therefore necessary for me to consider the remaining issues set out above. The claimant's claim of unfair dismissal therefore fails and is dismissed because he was not constructively dismissed.

Employment Judge Evans

Date: 18 October 2021

JUDGMENT SENT TO THE PARTIES ON

28 October 2021

FOR THE TRIBUNAL OFFICE