EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110357/2021

Held via Cloud Video Platform on 10, 11 and 12 January 2022

Employment Judge M Brewer

Mr H R Gresham	**Claimant** **In person**
Animal and Plant Health Agency	**Respondent** **Represented by** **Ms S Monan,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant's claim for constructive unfair dismissal fails and is dismissed.

REASONS

Introduction

1. This case was listed for a three-day hearing to determine the claimant's claim for constructive unfair dismissal.

2. The claimant represented himself and gave evidence on his own behalf. The respondent was represented by Ms Monan who called two witnesses, Mr A Shearlaw the claimant's line manager and Ms N Bettesworth, HR Director of the Department for Environment, Food and Rural Affairs (DEFRA).

3. I had an agreed bundle of productions running to 327 pages and I heard and have considered the submissions of the parties.

Issues

4. The issues, which were agreed as part of a case management hearing which took place on 5 November 2021, are as follows:

    a. Was the claimant dismissed?
        i. Did the respondent:
            1. fail to provide the claimant with accurate and proper pay slips/payroll records;
            2. fail to deal with the claimant's repeated complaints;
            3. fail to withdraw the debt collection agency from pursuing the claimant and rectify his credit rating;
            4. fail to deal with the claimant's concerns timeously?
        ii. Did that breach the implied term of trust and confidence?
        iii. Was the breach a fundamental one?
        iv. Did the claimant resign in response to the breach?
        v. Did the claimant affirm the contract?
    b. If the claimant was dismissed what was the reason for the breach of contract?
    c. What remedy should the tribunal award, if any?

5. I note for the sake of completeness that in her submissions to me at the end of the hearing Ms Monan submitted that I was required to determine what the reason was for dismissal were I to find that the claimant was dismissed, but not in circumstances where he resigned as a consequence of a fundamental breach of contract. However, as is pointed out in the note of the preliminary hearing, the respondent did not plead an alternative case, that is to say they did not suggest that if the claimant was dismissed his dismissal was fair, they simply deny that there was a dismissal, and in

those circumstances, it seems to me that if I find that the claimant was dismissed, but not constructively dismissed, as things stand that would be an unfair dismissal simply on the basis that the respondent has not pleaded any potentially fair reason for dismissal and has given no evidence of any reason for dismissal.

Law

6. The claimant claimed that he had been constructively dismissed. He resigned following, he says, a series of acts, faults and omissions by the respondent which, he says, amounted to a breach in the implied term of trust and confidence. The relevant law is as follows.

7. The implied term of trust and confidence is set out in **Malik v BCCI; Mahmud v BCCI** 1997 1 IRLR 462 where Lord Steyn said that an 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."*

8. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. That is commonly called constructive dismissal.

9. In the leading case in this area, **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, CA, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed"*

10. To successfully claim constructive dismissal, the employee must establish that:

    a. there was a fundamental breach of contract on the part of the employer;
    b. the employer's breach caused the employee to resign;
    c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

11. I note that a constructive dismissal is not necessarily an unfair one — **Savoia v Chiltern Herb Farms Ltd 1982** IRLR 166, CA.

12. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident even though the last straw by itself does not amount to a breach of contract — **Lewis v Motorworld Garages Ltd** 1986 ICR 157, CA. However, an employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably. This was confirmed in **Bournemouth University Higher Education Corporation v Buckland** 2010 ICR 908, CA, where the Court upheld the decision of the EAT that the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal.

13. There is no need for there to be 'proximity in time or in nature' between the last straw and the previous act of the employer — **Logan v Customs and Excise Commissioners** 2004 ICR 1, CA.

14. In **Omilaju v Waltham Forest London Borough Council** 2005 ICR 481, CA, the Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, nor need it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. 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 or her trust and confidence in the employer. The test of

whether the employee's trust and confidence has been undermined is objective. And while it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the last straw test. In that context, in **Chadwick v Sainsbury's Supermarkets Ltd** EAT 0052/18 the EAT rejected a tribunal's finding that a threat of disciplinary action was 'an entirely innocuous act' that could not constitute a last straw.

15. In terms of causation, that is the reason for the resignation, a tribunal must determine whether the employer's repudiatory breach was 'an' effective cause of the resignation. However, the breach need not be 'the' effective cause — **Wright v North Ayrshire Council** 2014 ICR 77, EAT. As Mr Justice Elias, then President of the EAT, stated in **Abbycars (West Horndon) Ltd v Ford** EAT 0472/07,

> *"the crucial question is 'whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon"*

16. Where an employee has mixed reasons for resigning their resignation will constitute a constructive dismissal provided that the repudiatory breach relied on was at least a substantial part of those reasons (see **Meikle v Nottinghamshire County Council** [2004] EWCA Civ 859, [2005] ICR 1).

17. Thus, where an employee leaves a job because of a number of actions by the employer, not all of which amounted to a breach of contract, they can nevertheless claim constructive dismissal provided the resignation is partly in response to a fundamental breach.

18. If the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract resulting in the loss of the right to claim constructive dismissal. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, CA, the employee

> *"must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged"*

19. This was emphasised again by the Court of Appeal in **Bournemouth University Higher Education Corporation v Buckland** 2010 ICR 908, CA, although Lord Justice Jacob did point out that, given the pressure on the employee in these circumstances, the law looks very carefully at the facts before deciding whether there really has been an affirmation. An employee's absence from work during the time he or she was alleged to have affirmed the contract may be a pointer against a genuine affirmation.

20. The Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust** 2019 ICR 1, CA, held that, in last straw cases, if the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign.

21. If one party commits a repudiatory breach of the contract, the other party can elect to either affirm the contract and insist on its further performance or accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses. If they affirm the contract, even once, they will have waived their right to accept the repudiation.

22. As to any delay in making such a decision, the employee must make up their mind soon after the conduct of which they complain. If the employee continues for any length of time without leaving, they will be regarded as having elected to affirm the contract and will lose their right to be treated as dismissed.

23. Tribunals must take a '*reasonably robust*' approach to waiver; a wronged employee cannot ordinarily expect to continue with the contract for very long without losing the option of termination (see, e.g., **Buckland v Bournemouth University Higher Education Corporation** [2010] EWCA Civ 121, [44], per Sedley LJ).

24. In relation to whether the contract has been affirmed, or the breach waived by the claimant, the Court of Appeal in **Kaur** (above) offered guidance to tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:

    a. 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?
    b. has he or she affirmed the contract since that act?
    c. if not, was that act (or omission) by itself a repudiatory breach of contract?
    d. if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?
    e. did the employee resign in response (or partly in response) to that breach?

25. Finally, the burden of proving the absence of reasonable and proper cause lies on the party seeking to rely on such absence — **RDF Media Group plc and anor v Clements** 2008 IRLR 207, QBD. As it was in that case, this will usually be the employee.

Findings in fact

26. I make the following findings in fact. References to page numbers are to pages in the agreed bundle.

27. The respondent is in fact an agency of DEFRA and is part of what is known as the DEFRA Group. The claimant worked for the respondent which is responsible for the health of animals and plants and works on behalf of DEFRA, the Welsh and Scottish governments.

28. The claimant is an experienced veterinary surgeon. He worked for the respondent as a contractor before becoming employed on a fixed term basis in October 2016. His continuous service commenced in October 2018.

29. The claimant had a somewhat unusual contractual arrangement with the respondent in that, although he was employed continuously, he only

worked for six months of the year and was paid only during those six months. For the other six months he was unpaid unless for example he went on holiday, in which case he received holiday pay, or because he had been called in to work, for example to do emergency work, in which case, he would be paid for that as well.

30. DEFRA Group, and therefore the respondent, outsources its payroll service to a third-party provider, Shared Services Connected Limited (SSCL). Because of the claimant's working arrangements, it was necessary for his line manager to tell SSCL when the claimant was going into, and prior to his going into his nil pay period which effectively meant that he needed to do that before SSCL ran the following month's payroll. If he failed to advise SSCL in time, the claimant would be paid in error and the overpayment would be recovered from subsequent pay received by the claimant in his next paid work period.

31. It would appear that the claimant had been overpaid every year and had repaid the overpayments as required. The claimant was again overpaid in early 2020.

32. In 2019 the claimant was overpaid by the sum of £1841.03. This overpayment was recovered from the claimant's January 2020 pay [68]. Despite that, in July 2020, SSCL, on behalf of the respondent, issued the claimant with an invoice for the overpayment of salary in the sum of £1841.03. The claimant knew that he did not owe this sum because he had already repaid it and in any event for reasons which remain unclear that invoice does not appear to have been received by the claimant until a copy was sent to him much later on.

33. Although the sum referred to in the invoice was not in fact owed by the claimant, reminders for repayment were sent out each month thereafter. See for example pages 76, 77, 78, and 79 of the bundle.

34. On 13 October 2020 the claimant received a further request for payment this time from an unnamed person simply referred to as a debt recovery officer [80].

35. On 27 October 2020 a further request for payment was made but in this case the request included a threat to pass the matter to SSCL's legal department for collection.

36. This was followed by further standard requests for payment each month up to and including February 2021.

37. As well as the above incorrect request for repayment of an overpayment which had in fact already been repaid, on 14 September 2020 SSCL told the claimant that for the year 2020 he had been overpaid by the sum of £6405.76 [86]. This itself appears to have been a reduction from an earlier request for overpayment for a sum just over £9000 [85] as some of that had already been recovered [180].

38. Perhaps somewhat confusingly the claimant was underpaid in October 2020, and he agreed with the respondent that rather than the respondent paying him the outstanding pay, that money be used to offset the overpayment which he had been notified about on 14 September 2020.

39. It was important for the claimant to have an accurate record of his pay because he supplemented his employment income by drawing down pension payments and he wished to ensure each year that his total income, that is to say the combination of employment income and pension was not such as to push him into a higher tax bracket.

40. There was correspondence between the claimant and SSCL during October 2020 and on 13 October 2020 the claimant said that he was considering raising concerns over the performance of SSCL as a formal grievance [98].

41. On 2 November 2020 in an email to his line manager the claimant asked for advice on "*how I can proceed with raising a formal grievance over this matter which I consider to be bullying and harassment"* [100]. However, the claimant did not raise a formal grievance until he resigned from his employment.

42. The claimant asked SSCL for their complaints procedure and he was given an email address to which to refer his complaints. As well as raising a complaint with SSCL, the claimant also asked his line manager to

become involved. In his email to Mr Shearlaw of 2 November 2020 the claimant states "*however as the matter is now urgent I need someone within APHA to assist in this".*

43. Mr Shearlaw escalated the matter to his line manager's line manager Ms Wallace. The matter was also being dealt with directly by DEFRA through the involvement of Simon Taylor from the Pay and Reward section of DEFRA. In his email to the claimant of 9 November 2020 [107] Mr Taylor states that the claimant would appear to be being treated as a third party by SSCL in relation to the purported overpayment of salary and he states that "*this is one of the things that we are seeking an explanation from SSCL about".* He also states in this email that "*the assurances I have already given to you stand. Your credit status will not be impacted, the matter will not be referred to lawyers and SSCL have been told not to contact you again until we have cleared all this up - if they do then please refer them to me".* It is of course correct that despite this assurance of no contact, the claimant continued to receive the invoices I have referred to above.

44. As well as the involvement of Mr Taylor from DEFRA, Mr Kris Brown, HR Business Partner for the respondent at DEFRA became involved and he also involved the DEFRA HR Pay and Reward Team as well as the team who managed the relationship between DEFRA and SSCL [112]. Alongside those involved so far, others also became involved including Jill Moray, Senior HR Business Partner for DEFRA Group and ultimately Ms N Bettesworth who was at the time Chief Operating Officer at DEFRA Group.

45. By 15 December 2020 the claimant and the respondent had agreed repayment of the overpayment of salary which the claimant had received during 2020 [120]. At this point the claimant was able to log into the online HR system so that he could see his pay details and in his email of 15 December 2020 to Simon Taylor the claimant says "*therefore I am happy to accept the terms of the repayment, on the understanding that SSCL are accepting the responsibility for June payment being made as there remains no response to the question of why the third party payment was processed"* [121]. In other words, at this point the claimant accepted he

had been overpaid in 2020, he accepted that the overpayment had to be repaid and he agreed a plan for repayment. He had been told that, in relation to the invoice issued in July 2020, no further action was being taken about that and in particular it was not being referred for legal action and that in effect he should ignore it. What the claimant did not have was an explanation as to how that invoice was generated, or indeed why, but on any proper reading of the evidence it appears simply to have been an error.

46. In his evidence the claimant asserted that he had been told not to contact SSCL and he suggested that this prevented him from resolving his issues. I find as a fact that this was not the case and that he was able to and did contact SSCL and indeed SSCL encouraged him to contact them should he have any queries or concerns around resolving his complaint [163].

47. By 23 December 2020 it appears that the overpayment issue was resolved although the invoices continued to be sent to the claimant. The claimant's complaints about the service provided by SSCL in relation to what he refers to as issues around "*payment, tax and the threatening communication"* were not resolved to his satisfaction. The claimant's position was that he was "*happy to wait till after the new year"* to pick up those issues as he did not "*wish to engage during my holiday period"* [182]. These comments were in response to an email from Ann Prosser, Customer Complaints and Feedback Operations Lead for SSCL [182]. Ms Prosser apologised to the claimant for any actions SSCL had taken to cause him any distress.

48. On 27 December 2021 the claimant emailed Stuart Shearlaw and his line manager, Gordon Clark [188/189]. In his email he confirms that having seen the original invoice in relation to the alleged overpayment from early 2020 *"this has confirmed, as I have maintained all along, that this overpayment was corrected by deduction from pay in January 2020, some 4 months before the invoice for this amount dated 19 June 2020 was raised".* The claimant also demanded written confirmation that the actual overpayment of salary in 2020 had been recovered in full from the claimant's pay during October to December 2020 and what he refers to as "*evidence of the recent salary deductions, a proper record for salary for*

October and November 2020 and confirmation that all overpayments have been corrected by return. I assume I will now receive a closing statement with a zero balance".

49. The claimant's independent financial advisor sent an email to the claimant on 28 January 2021 which appears at [185]. This raised a new concern which is that the respondent may have been applying a tax code to the claimant which was "*considerably less than the normal tax code used for someone with a personal allowance of £12,500".* The email states that " *in order to maximise tax efficiency within your pension… we need accurate information from your employer by the first week of March at the latest".*

50. In response to the above email, on the same date, 28 January 2021 the claimant stated *"thank you for the information and spotting the tax anomaly once again. I do not intend to allow this to lead to further losses to net income this year. I do not need any alterations to my pension drawings currently as I will either have this ratified or finalised with a P45 for 1 March as clearly the current situation is untenable…"*

51. There was a telephone conversation on 29 January between the claimant and Ms Wallace. This is apparent from the email from Ms Wallace to the claimant of 29 January 2021 which is at [196]. In the email it was confirmed that the matter has been escalated to DEFRA's Chief Executive and that Ms Wallace would pick the matter up the following Monday, 1 February 2021. In his email responding to that, the claimant says as follows:

> *"my apologies for keeping you so long. I think in conclusion that if you are happy with the notice from the 6th February for finish date of the 28th of February then this should allow at least confirmed retraction of the ongoing threatening demands for monies previously paid".*

52. In the event SSCL, amongst other things, promised the claimant that they would produce, by Friday 5 February 2021, a statement of earnings and an earlier year update for the claimant. Unfortunately, SSCL was not able to produce these documents the apparent reason being that the person

that had been charged with producing them was working from home on a laptop whereas the documents were on a server to which he did not have access via his laptop. The claimant was made aware of this by Ann Prosser on 5 February 2021 [221].

53. On 8 February 2021 the claimant resigned [231]. Along with his resignation the claimant raised a grievance although the resignation letter is unclear as to the nature of the grievance. The claimant resigned giving notice and the original intention was clearly to work until 28 February 2021 although for reasons which remain unclear the claimant's employment did not terminate until 12 March 2021 which is the effective date of termination.

54. The claimant commenced early conciliation on 31 May 2021, and he received his early conciliation certificate on 17 June 2021. The claimant's claim was presented on 8 July 2021.

Observations on the evidence

55. So far as the respondent's witnesses were concerned, I found them to be entirely credible. Mr Shearlaw readily accepted his responsibility for creating the overpayments of salary through his failure to properly notify SSCL about the claimant going into periods of nil pay. For her part, Ms Bettesworth was candid about the poor performance of SSCL and confirmed that DEFRA Group had agreed an improvement plan with them.

56. The claimant's evidence was slightly more problematic. Whilst much of what he said was consistent with the documentation, he was somewhat unclear as to his reasons for resigning and what the last straw was. When asked by me why he resigned on 8 February 2021, and not some other date, he said that he had sent a letter asking for the outstanding issues to be concluded and to have his tax code sorted out. He had also asked for confirmation that everything that he owed by way of overpayment had been paid back. He confirmed that he was claiming breach of trust and confidence on the basis of the matters set out in the preliminary hearing. But the claimant also said that he resigned with a grievance in the hope that first his P45 would give him the clarity he needed around his earnings in order that his pension drawdown would be accurate, and, second, he

hoped that by raising a grievance the matter would be resolved during the notice period and therefore he could rescind his notice.

57. The claimant said that the last straw was the failure by SSCL to provide the documents setting out earnings details they had promised to provide by 5 February 2021. I note at this stage that the claimant's intention to resign was made clear on 29 January 2021 in his telephone conversation with Ms Wallace. I shall return to this matter in the discussion below.

Respondent's submissions

58. The respondent's submissions amounted to a rehearsal of the key case law which I have set out above and I do not need to repeat it here. It was submitted that the respondent did all that it could given the outsourced payroll system operated by DEFRA which the respondent was subject to.

59. In relation to the four issues raised by the claimant as amounting to the straws constituting the breach of trust and confidence, it was submitted that by 5 February 2021 the claimant had received all of his pay slips and therefore he was aware of precisely what he had earned and what would have been deducted, including by way of recovery of overpayments. It was submitted that the complaints he raised had been dealt with at the highest level by his employer and indeed by SSCL, and that the matter was taken seriously. It was submitted that in particular the outstanding overpayment issue was dealt with in December 2020.

60. It was further submitted that the claimant had not been referred for legal action by a debt collector, there was no adverse impact on him or his credit rating. In general, it was submitted that the straws were not sufficient, separately or together, to amount to a breach of the implied term of trust and confidence.

61. In relation to causation, the respondent's submission was that the claimant did not resign consequent upon a fundamental breach of contract but rather he resigned in order to obtain a P45 to give him what he thought of as certainty in relation to his pay situation, and that he really wanted the matters to be resolved through a grievance process. In short given that the claimant's stated position was that he wished to continue to work for

the respondent, this is inconsistent with an allegation that he could no longer work for his employer because his employer had breached trust and confidence.

Claimant's submissions

62. The claimant submitted that he had not received all of his pay slips by 5 February 2021 because there was no pay slip for November 2020, although he accepted that that would show there were no earnings or deductions and therefore having that pay slip would have had no impact on the information he had about his earnings.

63. What the claimant did say in his submissions was that the final straw was that SSCL would not give him what he referred to as "*proper information*" and he resigned to "*draw a line under this*". He confirmed that he still wanted to get the matters resolved through the grievance process at the date he resigned. The claimant also confirmed that *"my employer tried to solve the problems as best they could".*

Decision

64. Before I set out the decision I have made in this matter I set out again the matters raised by the claimant as amounting to the straws of his last straw breach of trust and confidence claim. These are that the respondent:

a. failed to provide the claimant with accurate and proper pay slips/payroll records;
b. failed to deal with the claimant's repeated complaints;
c. failed to withdraw the debt collection agency from pursuing the claimant and rectify his credit rating;
d. failed to deal with the claimant's concerns timeously.

65. It is also useful to set out here the questions I should respond to as determined in the case of **Kaur** (see above). Those questions are:

a. 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?
b. has he or she affirmed the contract since that act?

c. if not, was that act (or omission) by itself a repudiatory breach of contract?
d. if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?
e. did the employee resign in response (or partly in response) to that breach?

66. In answer to the first question, the claimant says that the trigger for his resignation was the respondent's/SSCL's failure to provide him with documents he had asked for by 5 February 2021, the date by which SSCL had promised to provide them.

67. Given that 5 February 2021 was a Friday and the claimant tendered his resignation the following Monday, 8 February 2021, in answer to the second question I find that the claimant did not affirm the contract after the purported last straw.

68. In relation to the third question, I find that the failure to provide the documents requested by the claimant and promised by SSCL did not in and of itself amount to a repudiatory breach of contract. Leaving aside all that happened before this point, the reason given for the inability to provide the documents by 5 February 2021 was not challenged by the claimant and there is no evidence to suggest that the respondent was being anything other than honest when it transpired that the person charged with providing the documentation could not do so because he was forced to work from home and did not have access to the relevant server.

69. That brings me to the fourth question which is whether nevertheless that final straw was part of a course of conduct comprising acts and omission which viewed cumulatively amounted to a repudiatory breach of trust and confidence.

70. To answer the fourth question, it is necessary to consider each of the straws relied upon by the claimant.

71. The first matter relied upon by the claimant is that the respondent failed to provide the claimant with accurate and proper pay slips/payroll records.

72. An employee is entitled to receive three documents which detail their pay. These are pay slips, an end of year P60 and if relevant, a P45. The claimant makes no complaint about anything other than pay slips. However, it is entirely clear from the correspondence that by the end of 2020 the claimant had received all available pay slips and the only one missing, for November 2020, would have shown nothing because there was no pay and no deductions during November 2020 because that was a period of non-work for the claimant. That is not to say that what occurred during 2020 was not incredibly irritating for the claimant, but his complaint is not that he was irritated or even angered by the respondent's failure, merely that they had failed. But the only failure was initially missing pay slips for October and November, there being no evidence that any other pay slips were missing and, as I have said, other than for November 2020, the matter was rectified by December 2020. In other words, within considerably less than a month after the November pay slip should have been provided and a few weeks after the October pay slip should have been provided the matter was rectified. I find that strictly speaking the respondent did fail, at the appropriate time, to provide pay slips, but given the speed with which this was remedied and given that the November 2020 pay slip added nothing to the information which the claimant needed, this failure falls into the category of minor.

73. The second matter relied upon by the claimant was the failure to deal with the claimant's repeated complaints.

74. This begs the question of course, what does the claimant mean by a failure to 'deal with' his complaints. If he means resolve his complaints, then that requires consideration of precisely what his complaints were because it is quite apparent from the plethora of emails that all of the concerns which he raised either with his employer or with SSCL directly were being dealt with albeit that this took a significant amount of time. If however 'deal with' simply means 'being dealt with' then self-evidently they were being dealt with.

75. In his evidence it is clear that the claimant's principal concern was that he needed clarity around his earnings from his employment in order to facilitate drawing down correct pension payments. His independent

financial advisor was clear that this information was not required until the first week of March 2021. In relation to his earnings for 2020 the claimant had clarity upon receipt of his pay slips all of which he had, save for November 2020, by January 2021 and, as I have said above, the November 2020 pay slip would have been of no assistance to the claimant because as he has always known it would have showed nothing paid and nothing deducted. The further concern raised by the independent financial advisor was around the claimant's tax code, but that was only a matter which might have affected the claimant's tax position and his potential pension drawings. But that matter was only raised on 28 January 2021, and it is clear from my findings above that the claimant evinced an intention to resign on 29 January 2021, thus in his mind he had decided to resign even before he required the respondent to provide him with the further payroll information, the failure to provide which he relies on as a straw and indeed as the last straw in this case.

76. It is always difficult for an employer in the circumstances in which this respondent found itself, to resolve matters being dealt with by a third party provider where the respondent is not the direct client of that provider. The difficulty in this case can be seen by the fact that it was necessary to involve the most senior people in DEFRA and there is a limited extent to which the respondent could impact on SSCL's service provision. On any reading of the evidence and indeed by the claimant's own acceptance. his employer was doing all it could to try to assist him in resolving the issues he had with SSCL, and I find that the respondent in and of itself did not fail to deal with the claimants' complaints. That leaves an interesting question as to whether SSCL's failure to deal with and or resolve the claimant's complaints to them could fix the respondent with liability for that failure. The answer to that question is difficult to ascertain from the evidence before me. However, looking at the evidence in the round, given the number of people involved in trying to resolve the claimant's concerns, given their seniority, and given what was in fact achieved, I find that the claimant's complaints were dealt with. That is to say by January 2021 the claimant knew that he did not owe the respondent any money for the overpayment set out in the invoice which had been served on him repeatedly, and I point out again that this simply confirmed what he had

always known, that this was a mistake and referred to an overpayment which had already been dealt with in January 2020. Whilst therefore he was still receiving the invoices, because presumably they were being churned out by a computer programme which nobody had switched off, that was at best an irritant given that the claimant knew it to be a mistake. It is also the case that by January 2021 the claimant had all of the pay slips he needed to determine what he had been paid in 2020. He may have said that he did not trust the information in the pay slips, but the reality is that that information came from the payroll system and it is difficult to understand what further information he could possibly have received which would have given him better information than the information contained in his pay slips. In the end the source material, the payroll system is used to produce pay slips and so demanding further information based on the same source information would have achieved nothing.

77. In his oral evidence, the claimant agreed that his complaints were those set out by Ms Prosser in her email of 23 December 2020 [205/206]. Those complaints were:

a. receipt of the invoice/statement re: overpayment in June/July 2020;
b. being unable to get a copy of that invoice;
c. receiving the demand for payment;
d. receiving a further demand for payment;
e. use by SSCL of APHA headed paper;
f. out of hours correspondence;
g. direct line numbers that default to a switchboard;
h. failure of individuals to identify themselves;
i. refusal to provide a complaints procedure;
j. misleading or incomplete email addresses.

78. The claimant did not give evidence on all of these matters and in respect of some there is no evidence in the documentation. From the evidence I did hear it is apparent that:

a. the claimant had been told by year end that he could ignore the invoices and in any event, he knew they related to a matter which had already been resolved;
b. he had received a copy of the relevant invoice before the end of January 2021;
c. he had been assured that the purported debt would not be pursued and it never was;
d. as a and b above;
e. he knew that SSCL was acting for his employer, so it is unclear why he pursued this as a complaint;
f. he seemed unaware that people can respond to emails when they are not in the office;
g. the numbers were defaulting to a switchboard as staff were working from home because of the Covid restrictions;
h. the claimant had been given access to an SSCL complaints procedure because his complaint had been given to a named person to deal with who had communicated with the claimant and had been given a case number.

79. In my judgment the vast majority of the claimant's complaints had been dealt with by the end of January 2021 and in most cases well before that.

80. The third straw was that the respondent failed to withdraw the debt collection agency from pursuing the claimant and rectify his credit rating. But as I have found, that is exactly what occurred. The matter was never pursued and there is no evidence of any impact on the claimant's credit rating.

81. The final straw was that the respondent failed to deal with the claimant's concerns timeously?

82. I have to a large degree covered this in my findings in relation to the second straw. Given the nature of the relationship between the respondent, DEFRA and SSCL, in my judgment the respondent acted as quickly as it could to deal with the claimant's complaints. Whether DEFRA itself and SSCL acted in good time is more problematic for the reasons set out above. However, given that the claimant's own independent

financial advisor did not require correct payroll information until the first week of March 2021, and given that by that date, indeed considerably earlier than that, all relevant pay information was available and almost all of the claimant's complaints had been addressed, I find that the respondent did deal with the claimant's concerns timeously.

83. So, was there then a course of conduct comprising acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

84. I find that viewed objectively, although there were a number of matters which were irritating to the claimant, given his state of knowledge about his earnings and the assurances given by his employer, the respondent, in particular about the June invoice and debt collection, there was not a course of conduct which can be said to have cumulatively amounted to a repudiatory breach of trust and confidence.

85. Even if I'm wrong about that, and I do not consider that I am, the claimant's claim would fail on the question of causation. The claimant was very clear that the last straw occurred on 5 February 2021 when SSCL failed to provide him with the payroll information he required of them and which indeed they had promised to provide by that date. That is a matter which falls within the first straw relied upon by the claimant. But as I have found, in conversation with the respondent on 28 January 2021 the claimant had already evinced an intention to resign, that is to say he had decided to resign by giving notice on 6 February 2021, to end on 28 February 2021, before the purported last straw which he says caused the breach of trust and confidence, and the last straw did not therefore operate to create cumulatively with other matters a fundamental breach of contract or, if it did, that did not cause the claimant to resign, he had already decided to do so. In other words, the claimant had decided to resign before he says there was a fundamental breach of the implied term of trust and confidence and therefore the breach of the implied term of trusted confidence, if there was one, and I have found of course there was not, did not cause the resignation and to be clear, it was not any cause of the resignation.

86. For those reasons the claimant's claim fails and is dismissed.

Employment Judge: **M Brewer**
Date of Judgment: **13 January 2022**
Date sent to parties: **13 January 2022**