



EMPLOYMENT TRIBUNALS

Claimant: Mr M Kane

Respondent: T. J. Morris Ltd

Heard at: Bristol Employment Tribunal

On: 28th – 30th March 2022

Before: Employment Judge Lambert

Representation:

Claimant: in person

Respondent: Mr Bryan, counsel

JUDGMENT

1. The complaint of constructive unfair dismissal is not well-founded and is dismissed.

REASONS

2. The Claimant, Mr Kane, lodged a Claim Form received on 3rd December 2020 complaining of constructive unfair dismissal arising out of his resignation, without notice, on 2nd November 2020. This was recorded under case number 1406363/2020.
3. The Claimant relies upon 9 specific allegations which he says either individually or cumulatively amount to a repudiatory breach of the implied term of trust and confidence entitling him to resign and complain of constructive unfair dismissal.
4. The Respondent entered a Response dated 18th January 2021 accepting that the Claimant was an employee but contending that his resignation was simply that, a resignation.

The Hearing

5. The hearing took place in person at Bristol CJC.
6. Mr Kane represented himself.
7. The Respondent was represented by counsel, Mr Bryan.
8. The parties had agreed a trial bundle consisting of some 378 pages, a substantial proportion of which was not referred to within the evidence. It also contained a number of duplicated documents, which with appropriate co-operation between the parties, could have been removed.
9. The page number referenced in this judgment are references to the pages set out in the trial bundle. I read the documents referred to within the statements and which I was directed to in cross examination of the witnesses.
10. The Claimant gave evidence himself and called 3 additional witnesses. He supplied a witness statement for himself (C1); Mr Sean Foster-Shaw (C2); Mr Nick Stiles (C3); and Mr Roy Morrissey (C4).
11. The Respondent called 4 witnesses: Mr Roger Nokes, Transport Manager (R1); Mr Barrie Thomas, HR Adviser (R2); Ms Katherine Fay, HR Adviser (R3); Mr Simon Murray, Transport Supervisor (R4).
12. The Respondent's Counsel also supplied a document called an "Introductory Note" which set out the law to be applied and formed the basis of the Respondent's closing submissions (R5).

The Issues

13. The issues were agreed at a Preliminary Hearing before EJ O'Rourke on 4th October 2021. The issues as set out in the Order from that Preliminary Hearing are:
 - 13.1 On 23rd January 2020, being threatened with disciplinary action, following an unfounded allegation of having caused damage to two trailers, to the value of £5,000;
 - 13.2 On 1st February 2020, being lied to by Mr Roger Nokes, the Transport Manager, and Ms Elle Ravenscroft, the Transport Supervisor, as to a requirement that he provide 24 hours' notice of an intention to return to work from sick leave. (The Respondent contends that its sickness absence policy requires such notice, in order that rota arrangements can be made (and which at the time the Claimant conceded) and that while, initially, it was considered that the Claimant may not be paid for the day on which he wished to return, he was subsequently granted such pay, at the Respondent's discretion);
 - 13.3 At some point in March 2020, becoming aware of the existence of a letter or statement provided by the Respondent in respect of a personal injury claim

of the Claimant, which contained falsehoods which he considers were made to spite him;

- 13.4 On 20th March 2020, being obliged to work by Mr Nokes, despite Mr Barry Thomas, a HR Advisor, being of the opinion that the Claimant was unfit to work;
 - 13.5 On 20th March 2020, Ms Ravenscroft falsely accused the Claimant of using the word "*fuck*" over the radio;
 - 13.6 On 23rd July 2020, being informed by Mr Nokes, by phone that without consultation, his shift pattern was to change. (The Respondent contends that the Claimant's shift was, following discussion, changed only marginally (16:00 to 04:00 to 17:00 to 05:00 to which he agreed);
 - 13.7 From this time onwards, the Claimant was constantly verbally bullied by another shunter, Danny Burr, stating that he was unfit for the job, threatening that he would do all he could to ensure the Claimant lost his job and threatening his personal safety and private vehicle;
 - 13.8 On 27th July 2020, the Claimant brought a grievance, but which, the Claimant discovered when informed by HR on 21st August 2020, was not to be progressed by the Respondent. (The Respondent contends that the Claimant's grievance was resolved to his satisfaction and that he failed to raise a formal grievance under the Respondent's Stage 2 procedure, despite being provided with this option, by letter;
 - 13.9 On 19th October 2020, when the Claimant informed the Respondent that he was going to take time off, to consider his future in the Company, he was threatened by Mr Thomas, in an email, stating that he "*had something else on [the Claimant]*".
- 14 It is asserted that the last of these alleged breaches was said to be the last straw in a series of breaches.

Relevant Law:

- 15 The Tribunal will need to decide (in accordance with the authorities of *Western Excavating (ECC) Ltd v Sharp [1978] ICR 221* and *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*):
- 15.1 Did the Respondent commit a repudiatory breach of the implied term of trust and confidence? To answer this question, the Tribunal will need to decide whether:
 - 15.1.1 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. This may incorporate a one-off act or be part of a course of conduct, which may be a breach when viewed cumulatively; and

- 15.1.2 whether the Respondent had reasonable and proper cause for doing so.
- 15.2 Did the Claimant resign because of the Respondent's breach(es) of contract?
- 15.3 Did the Claimant delay before resigning and as a consequence affirm the contract?
- 15.4 In the event that there was a constructive unfair dismissal, was the dismissal otherwise fair and reasonable within the meaning of Section 98(4) of the Employment Rights Act 1996?
- 16 I remind myself that the burden of proof rests with the Claimant to establish there has been one or more repudiatory breaches of contract. If he fails to do so, his claim ends there. If he can, then I will look at the other elements as set out above.
- 17 I will set out my judgment by reviewing each of the allegations in turn and decide whether individually they amount to a repudiatory breach of contract. After I have done so, I will then look at all of the allegations cumulatively to determine whether taken collectively they reach the threshold of a repudiatory breach of contract. I will deal with all other matters such as affirmation if required to do so at the end.

Findings of Fact

- 18 I make the following findings of fact based on the balance of probabilities.
- 19 The Claimant, Mr Kane, was employed by the Respondent, T.J. Morris Limited from 15th October 2015 until his resignation on 2nd November 2020 as a Yard Shunter.

Allegation 1

- 20 On 23rd January 2020 the Claimant reversed into a parked trailer. The Claimant accepted that he had done so and also accepted that he was at fault (p.128). In cross examination, he accepted that he had been "*negligent*".
- 21 The Claimant reported the matter to the Respondent although the Respondent suggests that the Claimant delayed in doing so for some 35 minutes. The Respondent's policy is that all collisions must be reported immediately.
- 22 Ms Ravenscroft, Transport Supervisor, reviewed the damage and some days later on 17th February 2020 made a report via an email to Mr Nokes, Transport Manager (p.134) reporting the damage as more serious than the Claimant contended. On 24th January 2020, the Claimant was informed that this matter would be dealt with at a disciplinary hearing.
- 23 The disciplinary hearing took place on 9th March 2020 and Mr Nokes sat as the Disciplinary Officer. The Claimant was represented by Mr Tomala, union representative. During the hearing, the CCTV of the collision was reviewed. It

was said during the hearing that around £5,000 worth of damage was caused as a consequence of this collision.

- 24 The Claimant felt that the speed of the vehicle he was driving at the time it collided with the trailer was around 2-3 mph and the damage, if any, would have been minimal. He disputed that it was around £5,000 as suggested by the Respondent's Mr Nokes or £2,800 as was later contended by the Respondent. The Claimant asked for various documents including the inspection notes for the vehicle prior to the incident and also the engineer's report confirming the damage and the costs for the repairs. The Respondent never provided these documents to the Claimant.
- 25 Pausing there: I would have thought that these documents could have easily been provided by the Respondent to the Claimant, or at least photographs of the damage. It appears this was not done and one can understand the Claimant's position in relation to this point, namely the cost of the damage.
- 26 The Claimant was ultimately issued with a Notice of Improvement, which, the Respondent suggested is an informal warning. This was unusual in itself because the Respondent would not normally issue such a sanction at a disciplinary hearing.
- 27 Looking at the Claimant's case, he states that it was a breach of the implied term of trust and confidence for the Respondent to threaten disciplinary action for an unfounded allegation that he had damaged two trailers to the value of £5,000.

Conclusion:

- 28 I consider that the Respondent had a reasonable and proper cause in pursuing disciplinary action because the collision occurred; the Claimant admitted this and on his own case accepted that he had been negligent and there may have been some damage, however minimal.

Allegation 2

- 29 On 30th January 2020, the Claimant became ill whilst at work. At or around 4am on 1st February 2020, the Claimant contacted Ms Ravenscroft, Transport Supervisor, to confirm that he would be fit to return to work that day, starting his shift at 4pm.
- 30 Ms Ravenscroft informed the Claimant that as he had not provided 24 hours' notice and the Respondent had already covered the shift, he was not required and should not attend. An email confirming the conversation appears at p.131.
- 31 The implication for the Claimant was that he would not receive payment if this applied and he contacted Mr Barrie Thomas, HR Advisor. Mr Thomas said he would look into the matter, but felt that the Claimant had given sufficient time. He relayed this information to Mr Nokes, who subsequently exercised his discretion and paid the Claimant, even though he had not worked.

- 32 The Respondent's Employee Handbook sets down detailed procedures for dealing with Absence From Work and at page **296** states, under the heading "Reporting Absence"

*"Before returning to work from a period of absence, even when a medical certificate has been submitted, you should contact your manager **the day before** to confirm your intention to attend work. If your manager is not aware of your intention to return, your work may be reallocated and you may be sent home without pay."*

- 33 The Respondent's case was that the information provided to the Claimant by Ms Ravenscroft was correct. The Claimant says that the rule is unfair because it can operate in a more favourable way for people working the day shift, who can provide less notice than someone working evenings, like the Claimant. That may well be the case but the law requires there to be a repudiatory breach of contract.
- 34 I am satisfied that this was the rule in place, even though it appears to have been misinterpreted by Ms Ravenscroft where she records it as 24 hours where the policy refers to "*the day before*". The Claimant did not notify the Respondent the day before and therefore, on the face of it, Ms Ravenscroft's response was consistent with the policy and cannot be said to be a breach of contract.
- 35 In any event, even if there was a breach (which I find there wasn't) the Respondent would have rectified the position because it actually exercised discretion to pay the Claimant.

Conclusion:

- 36 It follows that I do not consider this to be a breach of contract.

Allegation 3

- 37 On 3rd October 2019, the Claimant had an accident at work and suffered with a shoulder injury. This left him unable to work and he took a period of sick leave. He completed an Incident Report (p.**281-282**).
- 38 The Respondent does not offer any enhancement to statutory sick pay and the Claimant received SSP entitlement only. There was evidence from Mr Nokes that suggested that the Claimant was disgruntled by this as he felt that he should be paid. In response to the Claimant raising this issue with Mr Nokes, the Claimant stated that Mr Nokes informed him that he would have to sue the Respondent in order to obtain more than SSP. This is what the Claimant did by instructing a firm of solicitors to pursue a claim for him.
- 39 The Claimant received correspondence from his solicitors dated 17th December 2019 (p.**124**). Within this letter it records that the Respondent is admitting negligence and breach of duty of care, but not causation.
- 40 In or around March 2020, the Claimant became aware of additional comments being added to the Incident Report. This was completed by someone who appeared to have reviewed the CCTV which was available and commented that

the Claimant appeared to have missed the first step in exiting a Tug vehicle. This, the additional comment recorded, may have contributed towards the Claimant's injury.

- 41 The Claimant admitted that he was annoyed by this additional comment as he felt it was a deliberate sabotage of his personal injury complaint.
- 42 The Claimant referred to this as an "additional statement" and this forms the basis of this allegation.
- 43 The Claimant raised this as part of a grievance complaint which he lodged via email dated 27th July 2020 at pages **164 – 166**. This was treated as a Stage 1 grievance complaint.
- 44 Due to the fact that the Claimant was shielding, the Respondent proposed that the meeting take place remotely as set out in its letter to the Claimant on 28th July 2020 (p.**167**). This letter records that once the meeting has been concluded "*you may raise the matter more formally...*" and a copy of the grievance policy was included.
- 45 The Claimant sought clarification of certain points about the meeting, via email of 29th July 2020 (p.**169**), which the Respondent responded to the same day by email, which included a section confirming that if the Claimant is not satisfied with the outcome of the grievance at Stage 1, he can proceed to raise the issue at Stage 2 (p.**170**).
- 46 The grievance meeting was chaired by Mr Nokes via a telephone call on 3rd August 2020. The notes of the hearing appear at p.**185**. The Claimant was not shown these notes at any time prior to issuing these proceedings. He took issue with several points within them at the hearing.
- 47 However, the Claimant accepted that he referred to the additional comments in the document as "*a statement*" and specifically raised this with Mr Nokes during that conversation. Mr Nokes responded that he was not aware who would have completed "*a statement*" and forwarded it to the insurance company as the Claimant alleged.
- 48 In order to get to the bottom of this issue, the Claimant instructed a handwriting expert and that report was placed in the bundle at pages **259 – 280**. This was not a document that featured heavily in this case because Mr Nokes accepted that he had made the additional comments on the document which the Claimant was referring to "*a statement*". Mr Nokes claimed that he had not understood that it was these additional comments that the Claimant was referring to in the grievance complaint. Indeed, the Claimant's solicitors, who were instructed to act for the Claimant in his personal injury complaint, speculated that the additional comments had been made by Mr Nokes in a letter dated 22nd September 2021 at page **287**.
- 49 Mr Nokes explained that it was the Respondent's usual process for any incident report to be reviewed against any CCTV and additional comments made in the

manner that he did. There was nothing untoward in his actions and the issue with the Claimant over the statement was simply a misunderstanding of terminology.

Conclusion:

- 50 I can see the force of Mr Noke's submissions as it would be expected for someone in a management capacity to review the incident and include any additional comments. It is unfortunate that there was a misunderstanding of what was being referred to, but this action was not a breach of the implied term.
- 51 The Claimant raised a further point that he was not able to review the CCTV evidence and this was also detrimental to his claim.
- 52 It is difficult to accept this assertion because the Claimant was represented throughout by experienced personal injury solicitors and they would be aware of the Court process. If they had any concerns over discovery of documentation, these could have been dealt with as part of those proceedings. The Claimant accepted that he had settled the matter and had received legal advice before doing so. If there were issues over the CCTV they could have been raised at that point through the personal injury claim.
- 53 To my mind, I cannot see that this amounts to a breach of contract but even if it did, the comments as set out by Mr Nokes could easily have been tested in Court. There was a reasonable and proper cause for his actions.
- 54 It follows that I do not accept that this amount to a repudiatory breach of contract.

Allegation 4

- 55 On 20th March 2020, the Claimant approached Mr Thomas and had a discussion about being unwell. Mr Thomas commented that the Claimant looked unwell and contacted Mr Nokes. The evidence of Mr Thomas and Mr Nokes was that their discussion involved consideration of whether, if the Claimant went home, he would be paid. Mr Nokes said he would not as per the Respondent's SSP only policy.
- 56 Mr Nokes accepted in evidence that he did not discuss with the Claimant how he felt. The Claimant felt, as a manager, he should have done so. Mr Nokes felt that as HR was dealing with the matter he didn't need to; it was for the Claimant to determine whether he was fit enough to attend work or not. Mr Nokes answered the question posed of him and that was the end of the matter from his point of view.

Conclusion:

- 57 Looking at this in the round, I consider that Mr Nokes was questioned only about what pay the Claimant would receive if he left work. The Respondent's position is that it pays SSP only. Therefore, the Claimant wouldn't receive pay. This was simply an accurate statement of the position.
- 58 I have some sympathy for the Claimant's position that if someone is ill in work then an unintended outcome of the Respondent's policy is that the employee may be

encouraged to remain in work even if they are unwell, because they will not receive any wages. I did not hear any evidence of whether the Respondent allows discretion in these circumstances, although in relation to the earlier point about an employee providing late notice of returning from sick leave, it could be that Mr Nokes would be able to exercise such discretion.

- 59 Whatever the situation is, that is the Respondent's policy and it cannot be said that following that policy is a breach of the implied term of trust and confidence.

Allegation 5

- 60 The second event on 20th March 2020 involved an allegation that the Claimant swore over the radio. The Claimant says that the allegation was that he said "*fuck*" over the radio. He denies this and says it was "*bloody*".
- 61 Mr Nokes explained that the Respondent has an operating licence from Ofcom and needs to adhere to rules about what can be said on radio. His uncontested evidence was that other drivers who had sworn over the radio would be talked to by management and could face disciplinary action.
- 62 In this case, Ms Ravenscroft called the Claimant into the office and administered what I would call a note of concern or written evidence of an informal warning, counselling him not to swear over the radio again. The Claimant gave evidence that this was the 3rd draft of the document as he refused to sign earlier drafts until the words were amended.
- 63 I find that he agreed the wording in the statement, which he then signed (p.150). He acknowledges in that document that he swore over the radio and that he made a mistake.
- 64 The Claimant says that his actual complaint is that he was accused of saying "*fuck*", which he denies. He alleged that Mr Nokes spoke with him during the following shift and advised him that he had been told that the Claimant was said "*fuck*". The Claimant denied this and Mr Nokes followed up with Ms Ravenscroft and was happy to accept that the Claimant may not have said "*fuck*" but did swear.

Conclusion:

- 65 It seems to me that the Respondent has a policy of dealing with individuals who swear over the radio. In this case, an informal warning was issued. In these circumstances, I do not accept that this was, or could be, a breach of contract.

Allegation 6

- 66 The Claimant accepted that he attended a meeting on 22nd September 2020 with Dave Grummett, Transport Supervisor and Katherine Fay, HR Advisor, where the issue of his shift pattern was discussed. A Risk Assessment (p.195) was agreed which set out that he would return to work the following week and commence work at 17:00. This records that it will be reviewed after 4 shift patterns.

- 67 To his credit, the Claimant accepted that he was happy for this shift change because it meant that he could avoid the “*rush*” which happens when the staff from the warehouse leave at the end of their shift. This met his requirements and was welcomed by him.
- 68 The Claimant was also frank enough to accept that he could not recall the telephone call with Mr Nokes in July 2020.

Conclusion:

- 69 Even though his contract of employment confirms that he will be expected to start work at different times as subject to business needs, he accepted this change. Therefore, on the Claimant’s own evidence there cannot be a breach of contract because he has accepted it.

Allegation 7

- 70 The Claimant complains that he was subject to bullying and harassment from Mr Burr, a fellow shunter. Although the allegation states from “*this point onwards*” which seems to be a reference to Allegation 6 and 23 July 2020, the Claimant did not return to work until week commencing 28th September 2020. It is difficult to see how he could have been bullied before this date. I note that there is no reference to bullying in the Claimant’s grievance complaint of 27th July 2020 and I find that the allegation of bullying relates to one incident which occurred on 4th October 2020.
- 71 The evidence suggested that the bullying and harassment took place on 4th October 2020 (p.199). There was clearly an issue between the Claimant and Mr Burr.
- 72 The Claimant and the Respondent agreed that the Claimant had received re-training on the unit. This is a reference to a tractor unit for an HGV. The Claimant and Mr Burr preferred to use the Tug, which was a specific vehicle used to shunt trailers around the yard. Using a tractor unit was more difficult as different procedures had to be used and the coupling to a trailer was different. The view I formed was that using the unit was more work and harder than using the Tug.
- 73 The Respondent’s Mr Murray, Transport Supervisor, discussed matters with the Claimant and the Claimant suggested he would use the Tug that evening. Mr Murray thought that as the Claimant had received refresher training, he would use the unit. In response, the Claimant indicated that he had adjustments in place and should carry on in the Tug.
- 74 When Mr Burr became aware of this, he objected and became disgruntled. At some point in the evening an altercation followed. The Claimant says that he was subjected to bullying and harassing treatment at the hands of Mr Burr and went to see Mr Murray on that evening. He asked Mr Murray to make notes. Mr Murray says that the Claimant came to see him but he did not provide any specifics to the allegation other than a broad allegation of bullying. As the Claimant did not provide any details he did not take it that the Claimant was raising a complaint.

- 75 I find that the Claimant did make an informal complaint of bullying to Mr Murray. This is evidenced in Mr Murray's email to Mr Nokes of 4th October 2020. I also note that Mr Murray records having an issue with the Claimant because he felt that the Claimant had accused Mr Nokes of lying to him. In response, Mr Nokes makes it clear to Mr Murray that he expected the Claimant to take his turn using the unit.
- 76 The following day, 5th October 2020 Mr Burr sent an email to Mr Murray asking if he could come in early because he wanted to discuss a situation where he felt he was being bullied and harassed by the Claimant. He set out details of the allegation and noted that it was witnessed by "*5 other company drivers and 1 other shunter.*" (p.212-213).
- 77 The Claimant contacted Katherine Fay, HR Advisor, and set out the details of his complaint to her. Such was her concern, she approached Mr Nokes to discuss it and was informed by him that Mr Murray was investigating. She conceded in cross examination that she did not give thought to separating the Claimant from Mr Burr, although went on to explain that this was not an obvious solution because the shunters did not work together. They drove separate vehicles in a vast depot yard with some 100 or so bays. This was different to a situation where two employees were working alongside each other in the warehouse. That seems to me to a reasonable explanation and I consider it noteworthy that the Claimant does not appear to have raised this with management at the time.
- 78 Mr Murray was tasked with investigating matters by Mr Nokes. It appears this coincided with his shift pattern ending on 5th October 2020 and he then had 4 days off. He returned to work on 10th October 2020 and on 11th October 2020 interviewed Mr Burr. Notes of that meeting appear at p. **223 – 237**. Mr Murray identifies a number of witnesses he should speak to but there is no evidence that he did so.
- 79 Mr Murray was working 4 days on and 4 days off and therefore was not present in work at all times during this period because of his shift pattern, 4 on and 4 off. He had a further block of 4 days off between 14th and 18th October 2020 and worked on 19th – 22nd October 2020 before commencing annual leave on 22nd October 2020.
- 80 It appears from the evidence that the totality of Mr Murray's progress into the investigation is to send an email to Mr Lessey, a contractor who is alleged to be a witness on 22nd October 2020, from his own private email account asking Mr Lessey to provide a statement about Mr Kane about an incident on 5th October 2020 (p.243). There is no evidence to suggest that Mr Murray took any further steps. Although other witnesses were identified (including Sean Foster-Shaw and Nick Stiles), Mr Murray does not appear to have spoken to them.
- 81 On page **214** an undated document appears which was prepared by Mr Murray presumably some point after 22nd October 2020. He indicates that having spoken with Mr Burr and having the version of events corroborated by Mr Lessey, his next course of action would be to sit down with the Claimant to obtain his version of events and then suspend the Claimant for gross misconduct, pending a disciplinary hearing.

- 82 The Claimant rightly challenges this. The corroboration is inconsistent but there are still a number of witnesses that Mr Murray is aware of who have not been interviewed. Mr Murray had not spoken to the Claimant and was aware that the Claimant raised the matter with him on 4th October 2020.
- 83 Pausing there: this is a somewhat startling conclusion to draw. If this had progressed to a disciplinary on the basis of the investigation conducted at that stage, I would not be surprised if a Tribunal found that the investigation was not fair or reasonable.
- 84 It is possible that this would have been picked up by the Respondent prior to making any determination and that matter corrected. Indeed, Mr Thomas noted the report and advised Mr Murray to correct it, which he did. In fairness to Mr Murray, he explained that he had not received management training from the Respondent concerning handling grievances and investigations and this may be a matter for the Respondent to review.

Conclusion:

- 85 However, whilst that consideration maybe relevant for a claim of unfair dismissal, it is not for a claim of constructive unfair dismissal. Here the Tribunal is looking for whether there has been a repudiatory breach of contract. Whilst one can certainly see deficiencies in the way the Respondent managed this investigation, it was not concluded and there was opportunity for the Respondent to correct that position. Moreover, the Tribunal has seen no evidence that the documents referred to above were within the Claimant's knowledge at the time he resigned on 2nd November 2020.
- 86 As such there was no repudiatory breach but even if there was, this could not have been the reason for the Claimant's resignation.

Allegation 8

- 87 I have set out the various documents and where they appear in the bundle in dealing with Allegation 3 and I do not repeat that here.
- 88 The Claimant lodged a complaint via email on 27th July 2020. The Respondent acknowledged the complaint via letter dated 28th July 2020 attaching the grievance policy and explained the options available if the Claimant is not satisfied with the outcome of the Stage 1 meeting.
- 89 Mr Nokes sat to hear the grievance. The Respondent says that it invited the Claimant to attend a face to face meeting but he declined to do so. He was absent due to shielding at this point. The meeting proceeded via telephone call and was certainly a lengthy call with the Claimant estimating it took around 1.5 hours, and Mr Nokes estimating around 2 hours. I am satisfied that this was a discussion that considered all of the Claimant's complaints that he raised at the time.
- 90 Mr Nokes took notes of this call but these notes were not shared with the Claimant and he contested their accuracy. Ideally, Mr Nokes should have either sent out the notes for review or at least confirmed the discussion and the outstanding points to

the Claimant. He did not. That said, when dealing with each of the other complaints in cross examination, the Claimant's evidence was similar to that as recorded in the notes.

- 91 Mr Nokes did send the notes of the discussion to Mr Thomas and Mr Thomas followed up with the Claimant by email of 21st August 2020 (p.185). This responded to all of the issues raised including providing a response to the additional statement which was the substance of Allegation 3 above.

Conclusion:

- 92 The complaint is that the Respondent failed to progress this complaint to Stage 2. The Respondent's policy is clear that the onus is on the Claimant if he is unsatisfied to lodge his complaint formally. He failed to do so. He was made aware of the policy and had the opportunity to familiarise himself with it. Therefore, I find the reason why the matter did not progress was because of the Claimant's failure to take the appropriate step. This issue cannot be laid at the Respondent's door.
- 93 I do not consider that the Respondent has committed any breach of the implied term, let alone a fundamental one.

Allegation 9

- 94 The allegation is that in response to an email from the Claimant of 19th October 2020, setting out his intention to consider ending his employment, Mr Thomas responded by stating in an email that "*he had something else on the Claimant*". The email being referred to appears at p.251.

Conclusion:

- 95 There are two points to note about this email. Firstly, it does not contain the wording in the Claimant's allegation. It does confirm that there is an ongoing investigation being carried out by Mr Simon Murray, but this is simply a statement of fact. The Claimant knew, or at least suspected, that Mr Burr had put in a bullying complaint because he witnessed Mr Burr sitting in the office discussing matters with Mr Murray and writing out a statement. The Claimant said that Mr Burr was in the office for 3 hours, although this was denied by Mr Murray, who thought that it was much shorter. Irrespective of the length of time, I am satisfied that the Claimant was aware that Mr Burr was raising issues and, in the light of the events on 4th October 2020, that the Claimant was likely to be the subject matter of the issue.
- 96 Secondly, the email is dated after the Claimant's resignation. It cannot be said to have formed any part of the reason for the Claimant's resignation and must fail on that point alone. In any event, I do not consider that the reference to a factual matter could amount to a repudiatory breach of the implied term.

Is The Cumulative Effect Of The Respondent's Actions or Omissions Capable Of Amounting To A Repudiatory Breach?

- 97 Turning now to the cumulative effect: was the conduct part of a course of conduct comprising several acts and omissions which, viewed cumulatively amounted to a repudiatory breach of contract, as per Kaur v Leeds Teaching Hospitals NHS Trust.
- 98 I have reviewed all of the matters in totality and remind myself that a repudiatory breach is something so serious that it has seriously damaged or destroyed trust and confidence as per Western Excavating v Sharp and Kaur v Leeds Teaching Hospitals NHS Trust. This is a high threshold. For the reasons set out in response to each allegation individually and stepping back to consider those allegations in cumulatively, I do not consider that there is a cumulative breach.
- 99 It follows that I do not need to consider the remaining points of the Western Excavating v Sharp test relating to whether the Claimant resigned because of the alleged breaches, or due to waiver or affirmation, or the test of fairness in accordance with Section 98 of the ERA, because I have not found there has been a dismissal.
- 100 However, for completeness, I would not find that the Claimant had affirmed the contract in these circumstances, nor would I have found that the Claimant resigned in response to any alleged breaches. To my mind, there were a number of reasons why the Claimant left the Respondent's employment which commenced from his disgruntlement arising from his injury and the failure to pay him, leaving him with SSP.

Judgment

- 101 It follows that I find that the Claimant's complaint of unfair dismissal is not well-founded and fails. The Claimant's case is dismissed.

Employment Judge Lambert

Date 26th April 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
12 May 2022 By Mr J McCormick

FOR THE TRIBUNAL OFFICE