



EMPLOYMENT TRIBUNALS

Claimant: Mr Nathan Hills

Respondent: South East Coast Ambulance Service NHS Foundation Trust

HELD AT: London South (by CVP)

ON: 1 and 2 August 2022

BEFORE: Employment Judge Hart

REPRESENTATION:

Claimant: Mr Hills, in person

Respondent: Mr Proffitt, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

The claim for unfair (constructive) dismissal does not succeed and is dismissed.

REASONS

Introduction

This is a claim for constructive dismissal arising out of the manner in which the respondent conducted grievance and disciplinary investigations concerning the claimant.

1. ACAS Early Conciliation was begun on 12 September 2022, the certificate was issued on 27 September 2022. The claimant's claim form was presented to the Tribunal on the 14 November 2022. The respondent's response form was submitted to the Tribunal on the 22 December 2022.
2. On 31 March 2022 Employment Judge Nash dismissed the respondent's counterclaim for £7,045.78, due to lack of jurisdiction because the claimant had not brought a breach of contract claim.

The hearing

3. At the beginning of the hearing, the Tribunal was provided with the following documentation:
 - 4.1 Hearing bundle of documents of 774 pages. The references to page numbers in this judgment are to the pages in this bundle.
 - 4.2 Respondent's chronology.
 - 4.3 An agreed cast list.
 - 4.4 Witness statements for those witnesses called on behalf of the claimant and the respondent .
4. The issues to be determined were agreed with the parties at the outset. The parties confirmed that no adjustments were required for the hearing.
5. The claimant and Mr Mark Tilley, GMB Assistant Branch Secretary, gave evidence on behalf of the claimant. Mr Luke Nebbett, Operating Unit Manager, and Ms Dawn Chilcott, Head of HRBPs and ER, Human Resources Directorate, gave evidence on behalf of the respondent. By prior agreement, the parties had agreed for the respondent to go first due to witness availability.
6. Following the completion of the evidence both parties provided written submissions and made oral submissions.

7. Judgment on liability was reserved, and a provisional date for a remedy hearing was listed for 6 January 2023 (1 day), and directions issued for the claimant to provide a revised schedule of loss by 24 November and the respondent to provide a counter schedule by 9 December 2022.

Claims and issues

8. The following issues were agreed with the parties:

Unfair (constructive) dismissal

1. Was the claimant dismissed or did he resign?
2. Did the respondent breach an express term of contract by:
 - a. Failing to hold a grievance meeting within 28 days?
 - b. Failing to give 7 days' notice of the disciplinary hearing on 23 August 2021?
 - c. Using an out-of-date disciplinary policy?
3. Alternatively, did the respondent breach the implied term of trust and confidence?
4. Was the breach a fundamental one?
5. Did the claimant resign in response to the breach?
6. Did the claimant affirm the contract before resigning?
7. If the claimant was dismissed, what was the reason or principal reason for the breach of contract, misconduct or 'some other substantial reason'?
8. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?
9. If the claimant was unfairly dismissed, what if any adjustments should be made to any compensation:
 - a. Was there a chance that the claimant would have been fairly dismissed shortly after the disciplinary hearing on the 23 January 2022 either due to working whilst off sick and / or lying about it?
 - b. Did the claimant cause or contribute to his dismissal by any blameworthy conduct?
 - c. Was there a failure by the claimant to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures due to not attending the disciplinary hearing and / or not raising a grievance sooner?

- d. Was there a failure by the respondent to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures due to unreasonable delay in conducting the investigation, holding a meeting and making a decision?

In relation to issue 9(a), this is the subject matter of an ongoing investigation and the respondent confirmed that the Tribunal was only being asked to consider this matter in so far as it is necessary to consider what would have happened post 23 January 2022. In relation to issue 9(b), this was subsequently deferred to the remedy hearing, since it was dependent on the liability findings.

Factual findings on liability

9. The Tribunal has only made findings of fact which are relevant to the issues to be determined. The claim concerns the conduct of the various investigations not the subject matter of the complaints being investigated, therefore the Tribunal has not made any findings in relation to the complaints themselves at this stage.
10. The respondent was a publicly funded NHS organisation which provided emergency response to 999 calls from the public and urgent calls from health professionals and NHS services in the South East region. The claimant was employed by the respondent as a Resource Dispatcher between 25 April 2016 and until his resignation on 11 September 2021.
11. The respondent had a Bullying and Harassment Policy, a Disciplinary Policy and Procedure and a Grievance Policy and Procedure. The claimant relied on the following terms:
 - 12.1 The Disciplinary Policy (version 6) clause 14.1.2 which provided that ‘the panel chair will advise the employee, in writing, providing at least seven days’ notice that they are required to attend a disciplinary hearing....’ (p. 189).
 - 12.2 The Grievance Policy table of timescales which included the following provisions:

- an internal or external hearing manager should be appointed within 21 days or 28 days respectively of receipt of a formal grievance;
- a formal acknowledgement should be sent to the complainant within 21/28 days of receipt of a formal grievance;
- the investigation to be conducted normally within 28 days of receipt of the formal grievance;
- the person subjected to a complaint to be given the opportunity to respond to the allegations 'normally' within 28 calendar days of receipt of the formal grievance;
- the grievance hearing arrangements and invite should be sent 'within 28 days from completion of investigation' (p. 151-153).

The Tribunal notes that there is no express term specifying that the grievance hearing itself must take place 'within 28 days'.

12. The Tribunal notes that the disciplinary policy in the bundle was issued on 1 February 2022. The Tribunal accepts Ms Chilcott's evidence that the previous version 5 was in operation at all material times, and that the only significant change to the policy was the inclusion of a panel review process.

13. The Tribunal received evidence of the significant impact of the COVID-19 epidemic on the respondent's service. From around March 2020 and into 2021, a Resource Escalation Action Plan (REAP) Level 4 was declared, which is the highest level, and signalled that the respondent was under 'extreme pressure'. Formal disciplinary and grievance processes had to be paused to enable managers to assist frontline staff. The army was called in to provide support. Over this period the length of time to complete an investigation significantly increased. In 2019 the average length was 253 days, in 2020 it was 346 days, in 2021 it was 463 days. On 22 February 2022 the CQC conducted an inspection and rated the Trust leadership as 'inadequate' (p. 717-774). The report is wide-ranging but the Tribunal notes that one of the concerns raised was the length of time taken to investigate grievances and that this was leading to staff frustration.

14. On 7 April 2020 Ms Joanna Evans, a resource dispatcher working with the claimant, submitted a complaint in relation to the claimant's conduct on the 30 March 2020 (**p 230**). She asked to remain anonymous, and as a result no action was taken at that time.
15. On 1 June 2020, Ms Evans by email stated that she was no longer seeking anonymity. Within a couple of days, authorisation was received to proceed with the investigation (**p 243**), Mr Nebbett appointed Ms Pippa Macey, Emergency Operational Track Manager, to be the investigator.
16. The claimant was first informed that he was under investigation by letter on 12 June 2020 (**p. 256-257**). He should have been provided with welfare support over the weekend, but this was only available to him the following week. Between 12 June 2020 and 13 July 2020 the claimant was off work sick with stress.
17. On 30 June 2020, the claimant emailed Mr Nebbett complaining that no investigation meeting had yet been arranged (**p. 274**). On 3 July 2020, having still not been provided with any date for an investigation meeting, the claimant emailed Mr John O'Sullivan, Associate Director of Integrated Care, to make a formal complaint about poor management of the investigation process (**p. 312-313**). There is a letter in the bundle of the same date, inviting the claimant to attend an investigation meeting on 13 July 2020 (**p. 275-276**). It appears to the Tribunal that the claimant was unaware of this letter when he sent the email to Mr O'Sullivan.
18. On 7 July 2020, Ms Macey conducted investigation interviews with Ms Evans and Mr Asa Granger, a paramedic (**p. 285-287; 288-290**). The meeting arranged for the claimant had to be rescheduled due to the HR representative not being invited.
19. On 15 July 2020 Mr O'Sullivan sent the claimant a holding email in response to his complaint, stating that he would need to discuss it with HR. From the hearing bundle it appears there was a discussion with HR that same day (**p. 291-294**). On 15 August 2020 the claimant sent Mr O'Sullivan a reminder having still not received any substantive response to his complaint. Mr O'Sullivan emailed Mr Nebbett, in response to his comments on the claimant's email stating 'I am sure that you have

behaved impeccably' (p. 310). There is no evidence in the bundle that Mr O'Sullivan provided a substantive response to the claimant at any point in relation to this complaint.

20. On 6 August 2020 the claimant attended an Investigation Meeting with Ms Macey. He was accompanied by Mr Mark Tilley, his trade union representative. Ms Michelle Churcher, HR Advisor, took notes. (p. 303-307).
21. On 19 September 2020 Mr Granger made a formal complaint against the claimant in relation to the same incident that Ms Evans had complained of (p. 322-324). His grievance was rejected on the basis that it was already under investigation (p. 327).
22. Around this time, Mr Nebbett became aware that Mr Crawford Paton, another paramedic, had made a complaint on the 4 March 2020 in relation to the claimant's conduct on that date. Nothing had been done to action this complaint. Mr Nebbett appointed Ms Hannah Sutch, Emergency Operations Track Manager, to conduct a separate investigation.
23. On 7 October 2020 the claimant complained about the conduct of Ms Kenyon, a Despatch Team Leader, towards him, accusing her of bullying him. The claimant copied this complaint to seven persons including Mr Nebbett, Mr Tilley and Ms Rosanne Harvey (p. 347). On 13 October 2020 the claimant stated that he preferred to have the matter dealt with informally (p. 342-345). On 17 October 2020 Ms Harvey forwarded the claimant's email to Ms Kenyon (p. 346).
24. On 22 October 2020 Ms Churcher sent the claimant the minutes of the August investigatory meeting for his comments (p. 362). The Tribunal accepts the respondent's evidence that the delay was in part due to Ms Churcher being off sick with COVID-19 and in part due to a change in the IT system, which resulted in the notes being deleted and having to be retrieved. The Tribunal does not accept the claimant's evidence that the lost notes were recreated by Ms Churcher from memory. Not only is this an unlikely explanation but Ms Chilcott gave evidence that she specifically remembered conversations with Ms Churcher about obtaining assistance from IT to recover the notes. However the Tribunal considers this to be

only a partial explanation, because on 30 September 2020 there is evidence that Ms Churcher was in a position to send Mr Granger the notes of his meeting in July, which had been recovered by IT (p. 366). The respondent has not explained why there was a further 3 week delay in sending the claimant the notes of his August meeting.

25. On 26 October 2020, Ms Kenyon submitted a formal grievance against the claimant in relation to the complaints that he had made in his email of the 7 October 2020 (p.373-379). Mr Nebbett appointed Ms Tracy Dale, Operations Manager, to investigate this complaint.

26. On 6 November 2020, Ms Macey conducted an investigation meeting with Ms Kenyon in relation to the complaint by Ms Evans (p. 384-387). No explanation has been provided as to why this interview did not take place in the summer of 2020 at the same time that Ms Evans, Mr Granger and the claimant were interviewed.

27. On 25 November 2020, Ms Sutch conducted an investigation meeting with Mr Paton in relation to his complaint (p. 388-393). On the same day Ms Dale wrote to Ms Kenyon to arrange a grievance meeting in relation to her complaint (p.394-395).

28. On 3 December 2020 the claimant was informed of a further (unspecified) complaint against him and that this would be investigated under the disciplinary procedure (p. 396-397). This was the complaint by Ms Kenyon, but the claimant was not informed of the identity of the complainant at this point.

29. On 8 December 2020, Ms Sutch conducted an investigation meeting with Mr Jordan in relation to Mr Paton's complaint (p. 401-402).

30. On 11 December Ms Macey provided Mr Nebbett with her draft report on Ms Evans' complaint (p. 403-406, 413). Having considered her report Mr Nebbett concluded that there was sufficient evidence to support the holding of a formal hearing.

31. On 15 December 2020, Ms Dale conducted an investigation meeting with Ms Kenyon in relation to her complaint (p. **407-411**).
32. On 27 January 2020 the claimant was invited to attend a meeting on 5 February 2020 in relation to Ms Kenyon's complaint (p. **429-430**).
33. On 1 February 2020 the claimant submitted a formal grievance regarding the respondent's failure to investigate his complaint against Ms Kenyon (p. **436-438**). He stated he felt 'victimised and forgotten about and pushed aside'.
34. On 4 February 2021 Mr Granger submitted a formal bullying and harassment complaint in relation to a previous incident on the 27 February 2020 (p. **441-443**). His reasons for submitting a formal complaint was due to the delay in the respondent dealing with his previous complaint.
35. On 5 February the claimant attended the investigation meeting with Ms Dale in relation to Ms Kenyon's complaint. He was accompanied by Mr Tilley (p. **449-456**).
36. Due to the number of investigations involving the claimant, on 25 February 2021 Mr Nebbett, in consultation with Ms Dawn Chilcott, appointed Ms Karen Wise, an external investigator, to investigate all four complaints against the claimant and his counter complaint against Ms Kenyon. The Tribunal considers that this was a reasonable decision and one that was to the claimant's advantage rather than disadvantage. It potentially reduced the amount of time and stress on the claimant since he was dealing with one investigation rather than five.
37. Ms Wise conducted further interviews and produced five separate investigation reports (p. **476-494; 495-507; 508-520; 522-535; 536-550**). The report on Mr Paton included a complaint made by Ms Julie Hart, paramedic, on 11 April 2021 in relation to the 4 March 2020 incident (p. **578-580**). The Tribunal finds that the Wise reports were completed towards the end of April 2021, since there is evidence that investigation interviews were still being conducted on the 15 and 23 April 2021 (p. **584-589, 590-593 and 602-605**). The claimant confirmed in evidence that he was '100% happy' with the Wise investigation in terms of timescale and communication.

Ms Wise found some, albeit not all, of the allegations against the claimant to be substantiated. She found the claimant's allegation against Ms Kenyon to be unsubstantiated. The claimant has not challenged the findings of Ms Wise before this Tribunal.

38. Around this time the Claimant was referred to Occupational Health. The subsequent report dated 5 May 2021 confirmed that the claimant was experiencing symptoms of stress and anxiety due to the ongoing investigation and recommended that the investigation be completed imminently (**p. 606-607**).
39. On the 11 May 2021 the claimant was invited to attend a meeting with Mr Nebbett to take place on the 18 May 2021. At the meeting Mr Nebbett informed the claimant of the outcome of the investigation and that the matters would now be put before a disciplinary hearing (**p. 610-611**). The claimant accepted in evidence that the delay between Mr Nebbett's receipt of Ms Wise's reports and this meeting was reasonable.
40. On 21 May 2021 the claimant was signed off sick with anxiety, stress and depression. He did not return to work.
41. On 29 May 2021 the claimant stated by email that he wished to appeal the investigation decision in relation to his complaint against Ms Kenyon and her complaint against him (**p. 623**).
42. On the 2 and 8 June 2021 Mr Logan, Staff Welfare Officer, emailed Mr Nebbett informing him that the claimant was desperate for the complaints process to come to a conclusion (**p. 612 and 614**). A referral to Occupational Health was made for an opinion as to whether the claimant was fit to attend a disciplinary hearing, marked as high priority (**p. 621**). The claimant confirmed in evidence that he was not complaining about the delay caused by this referral.
43. On 17 June 2021 the claimant was informed that he had no right of appeal, but that he could raise his concerns at the disciplinary formal meeting (**p. 638**).

44. In a report dated 30 June 2021 Occupational Health confirmed that the claimant was fit to attend a disciplinary hearing and again stated that the stress that the claimant was experiencing was linked to the prolonged investigation process (p. 631-633). The report was forwarded by Mr Logan to Mr Nebbett on the 14 July 2021 (p. 642). In the accompanying email, Mr Logan stated that the delay was because he wished to discuss the content of the report with the claimant first and get his consent. The claimant accepted in evidence that a hearing could only be arranged once this report was received.
45. On 25 July 2021 the claimant sought an update as to the progress of the investigation (p. 644). He referred to the length that the investigation was taking as being 'way too long' causing him stress and feeling 'ignored and pushed aside'.
46. On 26 July 2021 the claimant was informed that he would shortly receive the disciplinary packs for a disciplinary hearing on the 12 and 13 August 2021 (p.643). The claimant responded stating that he was unable to attend a hearing that week due to pre-existing leave. The meeting was rearranged for the 23 and 25 August 2021.
47. On the same date the claimant raised a complaint with Mr David Astley, Chairman of the respondent in relation to the delay and lack of progress (p.652-653). This was forwarded via Mr Astle, Chief Executive Officer, to Mr O'Sullivan to draft a response. Mr O'Sullivan, in an internal email, commented that the claimant raised some valid points and that 'our ER investigations in this Trust do appear to take an inordinate amount of time.....' (p. 650). On 29 July 2021, Mr Astle provided the claimant with a bland response confirming that dates for the hearing had now been arranged and that the respondent would reflect and learn about how its processes could be improved (p. 659).
48. On 5 August 2021 the respondent received an anonymous report that the claimant had been working for another employer whilst signed off sick. The matter was referred to the Local Counter Fraud Specialist to investigate. Ms Chilcott informed Mr Tilley, unofficially, that the claimant was under investigation. Both Mr Tilley and

the claimant deny that Mr Tilley made the claimant aware of this conversation prior to his resignation.

49. On 14 August 2021 the claimant resigned with 4 weeks' notice (p. 664-665). In his letter of resignation the claimant gave the following reasons for his resignation (in summary):

50.1 The claimant referred to 'last 17 months', 'lack of care', 'compassion', 'organisation skills the senior management have for its staff' and being 'let down so many times' by the respondent.

50.2 Being 'bullied', 'harassed', 'victimised' and 'pushed under the carpet'. The claimant referred to a bullying culture where managers have their favourites.

50.3 The disciplinary hearing not being able to go ahead 'due to another mess up of my union rep not being given the correct information and information being lost'.

50.4 No invitation letters being sent and a reference to a promise that the claimant would be given 14 days to prepare not being followed through.

In evidence the claimant stated that when he and his union rep queried the incomplete pack they were told that half of the pack had been left at the printer. The claimant claims that this was a breach of confidentiality. The Tribunal finds that this conversation must have post-dated his resignation, since it is not referred to in his resignation letter, but is referred to in the claim form.

50. On 16 August 2021, Mr Nebbett and Ms Chilcott had a meeting with the claimant and Mr Tilley over Teams. A brief summary of the discussion was recorded in an email dated 19 August 2021 from Mr Nebbett to the claimant, copied to Mr Tilley and Ms Chilcott (p.670). Ms Chilcott responded to the email thanking Mr Nebbett for 'capturing the notes from our conversation' (p. 669). The email recorded:

51.1 That the respondent apologised for the late invitation letter and Mr Tilley's incomplete pack, both of which had been resolved, and thanked the claimant and his union representative for agreeing to waive the 7 days' notice and proceed with the hearing.

51.2 That the claimant stated that he had found alternative employment and that he was leaving in order to start working for them, and that he had not been working anywhere else whilst claiming sick pay from the Trust.

The claimant disputes this record stating that the question he was asked was whether he was leaving due to secondary employment and that he responded that he was leaving for the reasons set out in his resignation letter. In evidence, Mr Tilley recalled that the claimant had been asked if he was working elsewhere and had responded that he had 'not been doing anything wrong'. The Tribunal notes that Mr Talley's evidence is more consistent with the respondent's recollection than with the claimant's. The Tribunal finds that the conversation was as recorded by Mr Nebbett in his email, which was a contemporaneous document, sent to the claimant and Mr Tilley, and that the claimant did not dispute at the time.

51. In evidence the claimant was specifically asked what was the final trigger for his resignation? His response was 'it was my union representative not getting the information pack, the mis-worded letter for the final hearing and the cancelled meeting in July'. Under cross examination the claimant accepted that that receipt of the incomplete pack and mis-worded letter post-dated his resignation letter, and stated that he had got confused as to his dates. He went on to clarify that it was the cancelled meeting in July that was the 'final nail in the coffin'. However on being further cross examined the claimant admitted that there was no evidence that a meeting had been arranged for July 2021. He then stated that the trigger was the delay between the production of Ms Wise's reports in April 2021 and 25 July 2021. The Tribunal notes that this was contrary to the claimant's previous concession in evidence that these delays had been reasonable.

52. On 16 August 2021 the claimant was invited to attend a disciplinary on the 23 and 25 August 2021 (p.666-668). The letter set out the allegations that Ms Wise had determined were substantiated or partially substantiated and stated in relation to each whether they were 'upheld' or 'partially upheld'. The letter referred to the investigation pack being provided separately. The claimant received this letter on the 20 August 2021.

53. The disciplinary hearing on the 23 August 2021 was postponed due to the wording of the invitation letter suggesting that the allegations had been upheld or partially upheld. The hearing was rearranged to take place on 28 January 2022. The claimant did not attend, Mr Tilley was in attendance on the claimant's behalf. The

outcome was that only Ms Kenyon's complaint of bullying and harassment was upheld. All the other complaints of bullying were dismissed; however the disciplinary panel did find that there were concerns in relation to the way that the claimant communicated with colleagues, concerns about him working outside professional competencies and his integrity (p. 710-715). The claimant was issued with a 12-month final written warning.

54. The claimant's last day at work was 11 September 2021. The claimant commenced new employment on the 20 September 2021.

The law

55. Section 95(1)(c) of the Employment Rights Act 1996 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.

56. In the leading Court of Appeal case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**, at 226A-B, Lord Denning stated that:

'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.'

57. In **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1**, paragraph 55, the Court of Appeal (Underhill LJ) provided the following guidance to tribunals of the questions to ask in a normal case of constructive dismissal:

- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- (2) Has he or she affirmed the contract since that act?
- (3) If not, was that act (or omission) by itself a repudiatory breach of contract?

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

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

Thus if there is a genuine last straw that forms part of a cumulative breach of the implied term of trust and confidence, there is no need for any separate consideration of a possible previous affirmation because the effect of the final act is to revive the right to resign.

58. The approach to be applied to a final straw cases is set out in the Court of Appeal case of **Omilaju v Waltham Forest LBC [2005] ICR 489**, at paragraphs 19-22. In particular, Dyson LJ noted that the last act need not itself be a breach of contract, it need not be unreasonable or blameworthy, nor does it need to be of the same character as the earlier acts. However it did need to add something to the breach even if what it added was relatively insignificant. Dyson LJ went on to state that:

'21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

22. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test

of whether the employee's trust and confidence has been undermined is objective....'.

59. Where the act that tips the employee into resigning is entirely innocuous, a constructive dismissal claim can still succeed, if there was earlier conduct amounting to a fundamental breach, that had not been affirmed and the employee resigned at least partly in response to it, **Williams v The Governing Body of Alderman Davies Church in Wales Primary School [2020] IRLR 589**.

60. The implied term of trust and confidence has been defined as the implied 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: see, for example, **Malik v BCCI [1998] AC 20**. This requires tribunals to consider (1) 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 (2) whether it had reasonable and proper cause for doing so.

Conclusions

What was the most recent act / omission by the employer that the claimant says caused / triggered his resignation?

61. The claimant's evidence is that the final trigger for his resignation was his union representative being provided with an incomplete information pack, the misworded invite letter sent on the 16 August and received on the 20 August 2021, and the cancellation of the disciplinary meeting in July 2021.

62. In relation to the incomplete information pack, the respondent has not disputed that there were pages missing. In evidence the Claimant accepted that this error post-dated his resignation, however the Tribunal finds that it must have pre-dated it since it is referred to in his resignation letter and at the meeting with Mr Nebbett on the 16 August 2021.

63. In relation to the mis-worded invite letter, the Tribunal finds that it could not have triggered the claimant's resignation since it was dated 16 August 2021 and received on the 20 August 2021, therefore it post-dated the claimant's resignation.

64. In relation to the cancelled meeting in July 2021, the Tribunal finds that this could not have triggered the claimant's resignation since it did not occur. The Tribunal has seen no document proposing to hold a meeting in July, and no document cancelling such a meeting. This was not referred to in the claimant's resignation letter, his claim form, or his witness statement and the claimant accepted in cross examination that there had been no meeting arranged for July.

Has the claimant affirmed the contract since that act?

65. Putting aside whether the act of providing the union representative with an incomplete bundle was the cause of the claimant's resignation, the Tribunal finds that the claimant did not affirm his contract since that act. The mere fact that he waived the 7 days' notice of the disciplinary hearing and attended the disciplinary hearing scheduled for the 23 August 2021 does not amount to a waiver.

Was the act by itself a repudiatory breach of contract?

66. The Tribunal does not find that the provision of an incomplete information pack to a union representative amounts to a repudiatory breach of contract. It does not breach any of the express terms relied on by the claimant. Nor does it breach the implied term of trust and confidence since on any view it is not conduct by the employer calculated or likely to destroy or seriously damage the relationship of trust and confidence. On it being identified that Mr Tilley's pack was incomplete, the error was rectified.

Was the act part of a course of conduct which viewed cumulatively amounted to a (repudiatory) breach of contract?

67. The Tribunal has carefully considered whether the single identified trigger act of providing a union representative with an incomplete information pack could cumulatively with any earlier acts or omissions amount to a repudiatory breach of contract. The Tribunal reminds itself that the most recent act need not itself amount to a breach of contract, need not be unreasonable or blameworthy, and could be

relatively insignificant. Nor does it need to be of the same character. However it must be, viewed objectively, capable of adding to the breach.

68. The Tribunal considers that objectively this was an innocuous administrative error by the respondent that did not add anything to the breach. The claimant had received a complete pack, the error did not impact on the disciplinary process since it was quickly remedied and there is no evidence that either the claimant or Mr Tilley suffered any disadvantage because of this error. It is therefore not capable of amounting to a final straw. The tribunal dismisses the claimant's claim that it breached his confidentiality since the Tribunal has found that he would not have been aware of this at the time that he submitted his resignation.

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

69. Given that the Tribunal has concluded that there was no final straw, it is not necessary for the Tribunal to consider whether the claimant resigned wholly or partly because of the sending of an incomplete pack to his union representative. The conflicting accounts provided by the claimant suggests that this was not in fact the reason, or one of the reasons, which triggered his resignation. In his resignation letter the claimant states that the error would cause further delay, whereas in the claim form the claimant states that it was a breach of confidentiality. In evidence he was unclear as to whether the receipt of the incomplete pack pre or post-dated his resignation. The Tribunal considers that had this been a material reason then it is likely he would have been clearer as to why it was a final straw.

If there was no final straw, was there conduct prior to this point which amounted to a fundamental breach of the contract, which had not been affirmed, and had materially contributed to the decision to resign?

70. The Tribunal considered that in this case it was necessary to consider whether any prior act (singularly or cumulatively) could constitute a fundamental breach of contract entitling the claimant to resign.

71. The tribunal does not accept that there was a relevant breach of any of the three express terms relied on by the claimant. In particular:

72.1 Failing to hold a grievance meeting within 28 days: The Tribunal has found that there was no express term specifically requiring the respondent to hold a grievance meeting within 28 days, the table of timescales merely state that arrangements and the invite should be sent within 28 days.

72.2 Failure to give 7 days' notice of the disciplinary hearing on 23 August 2021: At the point that the claimant resigned on the 14 August 2021 the disciplinary hearing was scheduled for 23 August 2021 (9 days later), therefore as a matter of logic there was no failure to give 7 days' notice.

72.3 Using an out of date disciplinary policy: The Tribunal does not accept that the policy used was out of date; it accepts Ms Chilcott's evidence that version 5 continued to operate until replaced by version 6 in February 2022.

Further, the Tribunal notes that none of these matters were specifically referred to in the claimant's resignation letter nor were they specifically pleaded.

72. The Tribunal went on to consider whether there had been a prior breach of the implied term of trust and confidence, focusing on those matters identified by the claimant in his resignation letter, and therefore formed part of his reason for resigning.

73. The claimant referred to being subjected to non-specific bullying, harassment and victimisation. In the claim form the claimant referred to the conduct of Ms Kenyon towards him. This had been the subject matter of his formal complaint against Ms Kenyon, was considered by Ms Wise as part of her investigation and found to be unsubstantiated. The claimant confirmed before this Tribunal that he was not challenging the findings of Ms Wise's investigation and has not pursued his claim that his resignation was due to bullying and harassment. In the absence of a positive case the Tribunal does not find that this was a breach of the implied term of trust and confidence.

74. In his resignation letter the claimant also referred in general terms to the 17-month investigation, lack of care toward him, and feeling let down by senior management. The only recent acts referred to was the provision of the incomplete information pack (dealt with above) and the failure to send invitation letters with the 'promised 14 days in advance of the hearing'. This latter act was not relied upon as a trigger

reason and not referred to in the claim form or his evidence. Nevertheless, in terms of the length of the process, the Tribunal accepts that the process was too long, that avoidable mistakes were made that contributed to the length of the process, and that at times communication with the claimant was poor. However, there is no evidence that the manner in which the investigation was conducted was calculated to destroy or seriously damage the relationship of trust and confidence. The length of time was equivalent to other investigations and the errors were administrative and not personal to the claimant. Further the errors were not, individually or cumulatively, sufficiently serious to amount to a conclusion that they were likely to destroy or seriously damage the relationship of trust and confidence. The Tribunal notes that 'destroy or seriously damage' are strong words and create a threshold of seriousness, so that not every mistake or poor communication, even those that are avoidable, will breach the implied term of trust and confidence.

75. In any event, the conduct by the respondent has to be 'without reasonable and proper cause'. This is an objective test, and therefore not based on what the claimant or respondent considers was reasonable and proper. The Tribunal finds that part of the reason for the delay was caused by the additional pressures caused by the COVID-19 epidemic. This meant that management resources were allocated to supporting frontline staff, and inevitably things took longer, mistakes were made, and there was less time for communicating. Further, the complexity of the investigation added to the delay and confusion, both in terms of the number of complaints made against the claimant, and the fact that further complaints and the claimant's counter complaint were made during the period of the investigation, resulting in parallel and expanding investigations. The decision to merge all the investigations and employ an external investigator was a reasonable one, which probably reduced rather than increased the length of the overall process. The Tribunal accepts the claimant's submission that 'not everything is down to COVID', and agrees that some of the delays are not explained and communication with the claimant throughout the process could have been better managed. However, taking into account all the circumstances the Tribunal has concluded that the respondent's conduct has not breached the implied term of trust and confidence.

76. Even if the respondent's conduct had been sufficiently serious to breach the implied term of trust and confidence, the Tribunal notes that the failures complained about by the claimant largely pre-date the investigation by Ms Wise. Despite the claimant's frustration with the mistakes and the delay he soldiered on and in so doing affirmed the breach/es. In the absence of any final straw which was capable of resurrecting any prior breaches, the tribunal concludes there was no constructive dismissal.

77. Having found that there was no final straw, nor was there any prior fundamental breach that had not been affirmed, it is not necessary for the Tribunal to determine whether the claimant resigned as a result of any fundamental breach or resigned because he wished to avoid being dismissed or wished to avoid a further investigation into any secondary employment. Nor is it necessary for the Tribunal to go on to consider whether the claimant would have been dismissed in any event following the conclusion of the investigation in to secondary employment.

Employment Judge Hart

Date: 31 August 2022

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