



EMPLOYMENT TRIBUNALS

Claimants: Mr P Boyton and Mrs S Burn

Respondent: The Parochial Church Council of the Ecclesiastical
Parish of Holy Trinity Barnes

Heard at: London South Employment Tribunal (by CVP) On: 6 and 7
October 2022

Before: Employment Judge T Perry

Representation

Claimants: Mr Boyton (In person and on behalf of Mrs Burn)

Respondent: Mr D Flood (Counsel)

JUDGMENT

1. Mr Boyton's claims of unfair dismissal and wrongful dismissal are well founded and succeed.
2. Mrs Burn's claims of unfair dismissal and wrongful dismissal fail and are dismissed.

REASONS

Claim and issues

1. The Claimants bring claims of constructive unfair dismissal and wrongful dismissal.
2. The issues for the Tribunal to decide are as set out in the record of Preliminary Hearing before Employment Judge Robinson held on 25 May 2022. The issues were reconfirmed at the start of this hearing.
3. For Mr Boyton there are six acts or omissions said to amount to a breach of the implied term of trust and confidence. For Mrs Burn there are four acts said to breach the same term. One alleged act relates to both Claimants, the others are different for each. The Tribunal has to determine whether those acts took place and whether (individually or collectively) they amounted to a breach of the implied term of trust and confidence. That is to say, whether the Respondent by those act(s) behaved without reasonable

and proper cause in a manner calculated or likely to destroy or seriously damages the relationship of trust and confidence that must exist between employer and employee. If so, the enquiry turns to whether the Claimants resigned at least in part in response to any such breach without having previously affirmed their contracts (for example by excessive delay).

4. If there was/were (a) dismissal(s) there are further stages that may be required under section 98 Employment Rights Act 1996 (the Act) to ask whether the Respondent has shown its reason for such a dismissal and that that reason is a potentially fair one under the Act, and (on a neutral burden of proof) whether the dismissal was fair in all the circumstances of the case including the size and administrative resources of the employer. In this case, the Respondent, pragmatically, is not seeking to advance a potentially fair reason and accepts that any dismissal will necessarily be unfair.
5. Equally, as to wrongful dismissal, the finding as to whether there was a dismissal will be determinative of any claim for notice pay.
6. There is an ancillary dispute of fact regarding the date on which Mrs Burn's employment started. This was only relevant to quantum.

Evidence

7. The Tribunal was provided with an agreed final hearing bundle running to 630 pages and a voice recording of a telephone call between Mr Boyton and Reverend David Cooke, which the Tribunal listened to during a break in the evidence.
8. Mr Boyton and Mrs Burn gave evidence from witness statements.
9. For the Respondent, Reverend Cooke, Mrs Lisa Jones (church warden), and Mrs Rachel Cooke gave evidence from witness statements.
10. In the time allotted for the case, the Tribunal was able to complete the oral evidence. Carefully drafted submissions in writing from both parties followed, for which the Tribunal is grateful..

Findings of fact

11. It is convenient in this case to make certain findings of fact under the headings of the nine alleged acts of breach. Whilst the findings of fact will be nearly all in chronological order, there are a few exceptions to this in order to group relevant findings together.
12. The Respondent is the Parochial Church Council (PCC) of an Anglican church in

Castelnau, Barnes in South West London. The PCC consists of a vicar (Reverend Cooke), two church wardens (of whom Mrs Jones is currently one), a treasurer and possibly other members depending on the size of the electoral roll. There is a standing committee of the PCC comprised of the church wardens, treasurer, Reverend Cooke.

13. Mr Boyton was the Respondent's Operations Manager from 11 December 2012. Mr Boyton was also secretary to the PCC and Standing Committee.
14. Mrs Burn commenced employment as Operations Assistant in early 2015. Initially this was as maternity cover for Mrs Rachel Cooke (who is married to Reverend Cooke), then as a job share and, from January 2017, in the role permanently on her own. For much of the period in question, Mrs Burn's husband was a church warden.

Issue 1.3 dealing with a grievance complaint made against Mr Boyton in November 2018 incorrectly and in a way that humiliated him in front of his colleagues and was not recorded on any HR File

15. In 2018 a colleague of Mr Boyton complained about him excluding her. Reverend Cooke stated and, on the balance of probabilities, I accept that the complaint included an allegation that this had been because of race.
16. It was accepted in cross examination by Reverend Cooke that he spoke with two of Mr Boyton's colleagues regarding his behaviour. Mr Boyton said Reverend Cooke instructed them not to speak to Mr Boyton but that they did in any event. Exactly what Reverend Cooke said to these staff is unclear but it appears that Reverend Cooke did not make these colleagues aware of the race element of the complaint because Mr Boyton was unaware of that aspect himself until these proceedings.
17. Reverend Cooke then met with Mr Boyton regarding the colleague. Mr Boyton says he did not have the complaint explained to him (and he raised this concern at the time) but it is accepted that he was told that the colleague had felt excluded.
18. Reverend Cooke arranged a meeting between Mr Boyton and the colleague to attempt to mediate the situation. At this meeting Mr Boyton and the colleagues apologised to each other. Whilst the colleague resigned as an employee, she did not want to pursue a formal grievance. The reasons stated for the resignation appear to have been family reasons rather than anything specifically referring to Mr Boyton.
19. Reverend Cooke did not keep records of any of the above beyond a few text messages.

Issue 2.1 Mismanagement of an issue raised by the Second Claimant in relation to the provision of children's services work in January 2020 of which then became a grievance against the Respondent by the Second Claimant, which was again deal with incorrectly.

20. Mrs Burn has a background and significant experience in early years education. Before the start of and separate to her employment, Mrs Burn had been involved as a volunteer in establishing and running a mid-week group for toddlers and carers at the church, called "the Well". Mrs Burn also organised the planning and resourcing of activities for children on Sundays and led this group.
21. At the start of 2020 a new Youth and Children's Pastor, Caroline Dyer, was appointed with responsibility for the Well and Sunday provision for children. Ms Dyer also had a background in children's education and her role included being the Respondent's safeguarding officer. A number of these functions appear to have been relinquished by the outgoing Assistant Vicar with whom Mrs Burn had worked to establish the Well.
22. During January 2020 Reverend Cooke appears to have become aware of some tensions between Mrs Burn and Ms Dyer and he attended the Well on 22 January 2022. After a difference of opinion over the use of a microphone, Mrs Burn left the Well in tears. That same day Reverend and Mrs Cooke met with Mrs Burn regarding the Well and Mrs Burn raised concerns over continuity of staffing, lack of team feeling and a lack of dialogue. Mrs Burn wanted equal roles with Ms Dyer as safeguarding officer and access to the safeguarding box. Mrs Burn was keen to point out this was not just an issue of personality.
23. On 26 January 2020 Reverend and Mrs Cooke met with Rebecca Stewart, a member of the congregation with HR experience. The options discussed included having both Mrs Burn and Ms Dyer no longer involved in providing these services.
24. On 27 January 2020 Reverend and Mrs Cooke met with Ms Dyer, who made some fairly blunt accusations against Mrs Burn that included not responding to Ms Dyer, being a "control freak" and making the children's services "the Siobhan Show".
25. On 27 January 2020 Reverent Cooke sent emails to both Mrs Burn and Ms Dyer to seek to arrange a meeting between them for the following day. Mrs Burn was unable to attend that meeting due to a prior commitment.
26. On 28 January 2020 Reverent Cooke emailed the church wardens and treasurer to inform them off the issue stating that there had been a "relational/ministry issue" that had "escalated last week outside of my control." It referred to Mrs Burn's inability to attend the meeting as "unfortunate" (without specifically naming her) and said "the two

people involved are no longer communicating”. Overall this email was an accurate and measured description of the situation.

27. The same day Reverend Cooke sought advice from his mentor (a vicar at another church) about the matter.
28. On 2 February 2020 Ms Stewart proposed some details for a “team day after Easter” which I accept shows that Reverend Cooke’s proposal was to try to build stronger bonds within the team via an away day.
29. On 3 February 2020 Reverend and Mrs Cooke met with Ms Dyer and Mrs Burn. At this meeting it was suggested that there was a need to mend relationships and clarify roles to achieve working together. It was explained that Reverend and Mrs Cooke would take the lead on the Well and that Mrs Cooke would help Mrs Burn with Sunday provision going forward. It was intimated that Rebecca Stewart would be reviewing job roles going forward. The contents of this meeting were confirmed in emails on 6 February 2020, which referred to “a seismic relational breakdown between” Mrs Burn and Ms Dyer. Whilst this language was somewhat overstating matters, it was not doing so to a great degree. These emails stated that “Looking ahead, it is my hope that things might be restored between you – professionally, and if possible, personally as well. In the kingdom, the route towards achieving this is always mutual repentance and the application of the gospel anew to both of your hearts.”
30. On 10 February 2020 Mr Boyton spoke to Reverend Cooke to accuse him of dealing with the situation “disgracefully” and suggested the emails sent were “full of nonsense about repentance and gospel mumbo-jumbo” and stating that he was “going to ensure that Jonathan was very angry with [him]” and that “[Mrs Burn] would likely resign unless she is given control of Little Stars.” Mrs Cooke witnessed this meeting and recorded it in notes at the time. The content of this meeting was not substantially challenged in cross examination and is consistent with emails sent by Reverend Cooke at the time.
31. The notes of the PCC meeting on 12 February 2020 record the team day was being planned.
32. On 4 March 2020 Reverend Cooke contacted the church wardens regarding a proposed clear the air meeting and suggesting a follow up chat with the wardens, one of whom was Mr Burn.
33. On 20 March 2020 Reverend Cooke contacted Mrs Burn about a meeting to discuss the Well. On 23 March 2020 the UK went into lockdown. On 30 April 2020 Reverend Cooke contacted Mrs Burn to state that an in person meeting regarding the Well would

have to wait until gatherings were allowed but that he would be happy to discuss it remotely before then.

34. On 2 May 2020 Mrs Burn stated she would not be prepared to discuss the Well other than in person. Mrs Burn described her dissatisfaction with what she characterised as the “mismanagement of this and other issues” which had caused her pain, upset and distress.
35. On 4 May 2020 Reverend Cooke replied apologising for the pain caused and offered to meet together with one of the church wardens. As to mismanagement, Reverend Cooke stated that he was happy to be held accountable for and review the process followed. Mrs Burn called Reverend Cooke that day and left him a voicemail. However, Reverend Cooke did not pick up this message until on 10 May 2020 Mrs Burn emailed him to complain that she had not had a response to that message.
36. On 13 May 2020 Reverend Cooke met with Mrs Burn and Di Home, one of the church wardens. Mrs Burn elaborated on how she considered the process to have been mismanaged citing lack of communication and a cold and business like approach to matters. Mrs Burn complained that an email had been sent to her husband whilst in Australia regarding the matter and complained that she felt that she had done something wrong and felt undermined. Mrs Burn stated that the issue relating to the Well was not a personal one between her and Ms Dyer. Mrs Burn also complained about a failure to work as a team regrading pastoral needs during lockdown. In response Reverend Cooke stated that it was clear he needed to say sorry and that matters had not been well communicated but that the way the matter had been dealt with was not intended to cause pain. Mrs Burn stated that she accepted Reverend Cooke’s apology.
37. On 14 May 2020 Mrs Burn messaged Ms Dyer to confirm that she would no longer be part of the Well team.
38. On 28 May 2020 Reverend Cooke emailed Ms Dyer and Mrs Burn to state that the PCC standing committee had recommended that they all meet to conclude matters regarding the Well.
39. Reverend Cooke and Mrs Burn met in person on 8 June 2020 to discuss Reverend Cooke’s handling of the issue regarding the Well. I heard little evidence regarding this meeting although Mrs Burn appears to have still had concerns about how the matter had been handled. I see no evidence that she either asked for a formal grievance meeting or any other kind of formal process.

Issue 1.1 Remove significant sections of Mr Boyton's job role relating to communication and website by an email to the entire staff on 21 March 2020

40. Mr Boyton's job description contained in the bundle set out that he was responsible for the efficient and effective operation of the church. He had a wide ranging set of responsibilities. As at February 2020 this included managing the church's website and sending out communications. His duties also included recording and making available online an audio recording of a weekly sermon given by Reverend Cooke. The church had Facebook, Instagram and Twitter accounts which Mr Boyton did not manage. As a former police officer, Mr Boyton did not have social media accounts.
41. Once it became clear that a national lockdown was coming towards the end of March 2020, the staff at the church began to make preparations to provide church services remotely. The Worship Pastor, Tom Milner, and Assistant Vicar, Steven Copsey, recorded and edited Reverend Cooke giving a Sunday service.
42. On 18 March 2020, Reverend Cooke expressed his intention to write a daily blog although ultimately this did not happen. A video was made of Reverend and Mrs Cooke giving a message to the church. This was put on the church's Facebook page but had limited views.
43. On 20 March 2020, Mr Boyton indicated he was thinking of emailing this video to the church community the following day. At 10:41 on 21 March 2020 Reverend Cooke wrote to state that Mr Milner and Mr Copsey had been working on the Sunday service. Reverend Cooke stated that he wanted to ensure consistency across all communications as to design and branding. Commenting that he was aware that Mr Boyton could not be on any social media platform, Reverend Cooke stated that he had asked Mr Copsey to be "the focal point for all our communications" and that all decisions about printed materials, online materials, church all emails should go via Mr Copsey. Mr Boyton replied ten minutes later stating that he had just sent his email. Reverend Cooke replied that Mr Boyton should not worry but that this was "precisely what I want to avoid in the future which is why [Mr Copsey] is now the lead person on all future communications."
44. Mr Boyton was unhappy about this email stating in messages to Mr Copsey "His email is for me probably a final straw. I'm tired of "making allowances" for him. Mr Boyton went on to say "I've just had 7 years of the way he works. A year ago I nearly left after he dealt with me terribly over a staffing issue. There's ongoing stuff with Shiv which he's just not dealt with."

Issue 2.3 Ignore pastoral needs raised by Mrs Burn or respond with irritation when those needs were raised from March 2020 until her effective date of termination

45. In March 2020 at the time of the lockdown Mrs Burn created an excel spreadsheet with details of members of the congregation possibly in need of pastoral support. It appears that Reverend Cooke took a somewhat different approach to addressing pastoral issues. On 28 March 2020 he messaged Mrs Burn “Just ringing to see if you think anyway [anyone] particularly needs a Vicar call. Just text any names as we go along.”
46. On 30 April 2020 Reverend Cooke emailed Mrs Burn asking “would it be helpful to speak at some point early next week? I am aware that you have been very busy both with Foodbank and pastorally with people, and I have been preoccupied with taking church on-line, a full preaching load, meetings and funerals.” Reverend Cooke mentioned being engaged with “quite a few” members of the congregation on pastoral matters.
47. There were ongoing pastoral issues with several members of the congregation including a family with an abusive alcoholic neighbour and another church member who left citing lack of contact from Reverend Cooke as the reason.
48. Reverend Cooke stated in evidence, and I accept, that he took steps to seek to address pastoral issues raised with him including the specific examples raised before the Tribunal. He stated that he may not have fed back to Mrs Burn how he had sought to deal with these matters.

Issue 2.2 Exclude and side-line Mrs Burn from meetings she would normally be involved in

49. From around July 2020 Reverend Cooke began to consider preparations for reopening the church as the end of the UK’s lockdown was anticipated.
50. On 9 July 2020 Reverend Cooke emailed Mr Boyton, Mr Copsey and Ms Dyer asking to meet to discuss tasks, timelines and logistics needed to reopen the church in September 2020. This meeting took place on 15 July 2020. Mrs Burn did not attend this meeting.
51. On 30 July 2020 Reverend Cooke emailed Mr Boyton, Mr Copsey and Ms Dyer asking to meet again. Mr Boyton asked if he should enquire about Mrs Burn’s availability. Reverend Cooke replied “as we’re feeding back from our last meeting, I’d like to keep the same format. Anything new or unresolved, you can then each communicate/work through details with Shiv, Tom and AM in your different ministry areas.” This meeting

took place in early August 2020.

52. On 1 September 2020 Reverend Cooke invited Mr Boyton and Mrs Burn to meet via zoom the next day but they were not available to attend.

Issue 1.4 Discuss aspects of finance management/software and put forward proposals for significant change without Mr Boyton's involvement despite this being his core job role

53. Mr Boyton's job description does not contain much regarding finance. It does require him to have basic book keeping skills and requires him to handle invoices and payments. Mr Boyton's evidence was that finance was a bigger part of his role than set out in the job description and I accept this as correct.

54. On 24 June 2020 Reverend Cooke emailed the PCC Treasurer, David Hewitt, to ask for his view on alternatives to the current finance software, which Reverend Cooke recorded Mr Boyton as saying that the external financial examiner, John Helm, considered outdated. Reverend Cooke stated that he did not understand why the church relied solely on cheques rather than online banking.

55. On 23 October 2020 Reverend Cooke emailed the incoming church wardens and treasurer and stated (amongst other points) "I have discussed with David the need to look at this with some urgency. Covid revealed that not having online banking and a spread of access/knowledge over our finances leaves us vulnerable."

56. On 9 November 2020 Reverend Cooke emailed the incoming church wardens and treasurer again stating that he had spoken to several churches all of whom bank online.

57. At a PCC standing committee meeting on 18 November 2020, which Mr Boyton attended, it was agreed that the Treasurer should present a proposal to switch to online banking together with a revised list of signatories.

58. On 21 November 2020 Reverend Cooke emailed the incoming treasurer to put him in touch with Mr Helm.

59. On 23 November 2020 Reverend Cooke emailed the Treasurer including Mr Boyton (possibly in error) making reference to updating the finance software. Mr Boyton replied by email on the same day to state that whilst the standing committee had agreed to change to online banking and the treasurer had been in touch with him, there now appeared to be a discussion about changing the entire finance software. Mr Boyton mentioned that this had not been discussed with him and asked when the

standing committee was proposing to ask his views on the matter.

Issues 1.2 and 2.4 Report the disposal of property to church wardens in an undeclared, secret standing committee meeting on 9th November 2020 without any investigation or explanation asked for, a result of which was an option to immediately dismiss Mr Boyton for gross misconduct was considered

60. On or before 8 February 2020 a vulnerable woman in her sixties left some bags at the church with Reverend Cooke, who made Mr Boyton aware by email.
61. Reverend Cooke says that in February 2020, during a discussion with Mr Boyton, Reverend Cooke made it clear that the bags were not to be thrown out. Mr Boyton's version of events is that on 12 February 2020 Reverend Cooke told him angrily that he would deal with them (the bags) before slamming an office door. On either version of events, Reverend Cooke did not give Mr Boyton permission to throw the bags out or tell him they had been abandoned.
62. Over the following months, the bags were moved to the shed and then to the garage. They were in a very poor condition and smelled.
63. The owner of the bags contacted Reverend Cooke on several occasions about coming to collect the bags but repeatedly failed to turn up.
64. In September 2020 Mr Boyton and Mrs Burn discussed the bags and reached the conclusion that they had been abandoned and should be thrown away. Neither spoke to Reverend Cooke about this decision. The bags were the thrown away by Mrs Burn.
65. In early November 2020 the owner of the bags had been in touch with Reverend Cooke about coming to collect them. Reverend Cooke asked Mr Boyton where the bags were and was informed they had been disposed of. Mr Boyton recalls Reverend Cooke stating "we will deal with this later" and slamming his door, which I accept happened. Reverend Cooke messaged the owner of the bags to inform her that the bags had been thrown away and arranged for replacement items from a local charity.
66. Around early November 2020 the new members of the PCC were looking to meet. They met on 9 November 2020. At this meeting, amongst a number of other matters, Reverend Cooke raised the matter of the disposal of the bags and expressed his dissatisfaction that these items had been thrown away.
67. On the following day, Reverend Cooke sent an email to the new church wardens and treasurer stating "we need to make a record of what has taken place and I have had no explanation or apology so far. Also, we have all acknowledged this now urgently

needs more than just me included in the issues we discussed and this is a possible route.” The email went on to set out a brief summary of the events from Reverend Cooke’s point of view and concluded “[There is a final paragraph as yet unwritten.]” The email did not set out how the matter would be dealt with.

68. Later that day, Lisa Jones, a new church warden, responded to Reverend Cooke stating that there needed to be an emergency PCC meeting to update on the situation with staff. The email went on to state “We then have three legal options to vote on – put them on Furlough, dismiss them pending an enquiry on the grounds of gross misconduct, review roles and skill sets via staff review. We clearly need some external HR support and ideally this could be Rebecca as it is free or we appoint someone else. It will need to be handled carefully and legally but we need to raise this as it is already too damaging. It seems to me we can do little without the support of the PCCs so we have to go three.”
69. At around the date it was sent, Mr Boyton saw this email. Mr Boyton maintains that work emails were not private and initially said in response to cross examination that he came across the email when “dip sampling” emails as part of his activities as systems administrator. This initial answer quickly changed to an acceptance that he read this email whilst looking through Reverend Cooke’s account due to suspicions that “something was going on”. I heard evidence that Reverend Cooke had been aware in 2017 that Mr Boyton had accessed a colleague’s email account and had told him not to do this. I accept, for reasons set out below, that Mr Boyton knew he was not meant to read such emails.
70. Mr Boyton read or showed the content of the email to Mrs Burn at around this time.
71. There were extensive communications between Reverend Cooke and the church wardens and treasurer by WhatsApp. These were not seen by either Claimant before termination of employment.

Issue 1.6 Say on a telephone call on 24 November 2020 that the working relationship was no longer tenable.

72. On 24 November 2020 Mr Boyton and Reverend Cooke spoke on the telephone. Mr Boyton covertly recorded the conversation. During the call Mr Boyton asked whether the incident with the bags had been discussed with the standing committee and was told that it had been. Reverend Cooke told Mr Boyton that whilst the incident had really impacted him, he had “let it go. ... I’ve resolved everything, so that’s fine.”

Issue 1.5 Fail to communicate a new church vision devised independently by David Cooke and his wife without any staff involvement which all staff were then excluded from the initial discussions about implementation

73. Reverend Cooke first raised the possibility of a role and occupational review at the PCC meeting on 20 November 2019. The PCC asked for a scope of the review to be written up.
74. A strategic review scoping document was completed in June 2020 which included stages around redefining strategy, planning for the future, reviewing existing roles, consulting with staff, defining new job descriptions and structures and implementing the new team structure.
75. This document was reviewed by at the PCC meeting on 17 June 2020 at which it was agreed only to progress with stage 1 redefining strategy. As has been mentioned, Tom Milner's work on recording sermons was recognised and his role made full time before the rest of the strategic review.
76. Following the election of new church wardens in October 2020, Reverend Cooke sent an email to them on 23 October 2020 which reopened the possibility of taking forward steps in the strategic review beyond redefining strategy, which he described as a key decision for the newly formed PCC.
77. At the PCC standing committee meeting on 18 November 2020, Reverend Cooke circulated a draft of a review of the current strategy.
78. At the PCC meeting on 25 November 2020 Reverend Cooke presented on his new vision of the church and Mrs Jones briefly addressed the question of resourcing the vision. Mrs Jones asked all staff (including the Claimants and Reverend Cooke) to leave to allow an open forum discussion on the basis that the conclusions of this would be fed back at a staff meeting.
79. On 28 November 2020 Reverend Cooke emailed the staff to explain that the church wardens were working with the PCC to plan and resource a response to the vision and that the wardens would feedback that Wednesday and advise on next steps.
80. The Claimant's submitted subject access requests the following day and resigned on 30 November 2020.
81. Mr Boyton's resignation letter cited removal of significant sections of his job, the reporting of the bag issue to the wardens and, as a last straw, a number of mismanaged incidences compounded by lack of communication.

82. Mrs Burn's resignation letter cited mismanagement of the issues regarding the Well and failure to follow the grievance procedure, exclusion from meetings, failure to address pastoral concerns and, as a last straw, approaching the wardens regarding the bag issue.

The Law

83. Section 95 of the Act provides so far as relevant:

"(1) For the purposes of this Part an employee is dismissed by his employer if (and, ..., only if):... "

"(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

84. Section 98 of the Act requires any dismissal to be for a potentially fair reason and, if it is, for fairness to be determined in accordance with the equity and substantial merits of the case (having regard to the size and administrative resources of the employer).

85. The approach to constructive dismissal is set out by Lord Denning in **Western Excavating (ECC) Ltd v Sharp** [1978]1 All ER 713, [1978] QB 761, 119781 2 WLR 344, CA in which he defined constructive dismissal as follows:

"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."

86. The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in **Malik v Bank of Credit and Commerce International SA** [1997] ICR 606 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."

87. A breach can be actual or anticipatory, if the employer states it is going to do something that breaches trust and confidence.

88. In relation to last straw cases, in **Omilaju v Waltham Forest London BC** [2005] 1 All ER 75 Dyson LJ said at paragraph 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.”

89. A fundamental breach must play a part in resignation but need not be the only effective cause **Wright v North Ayrshire Council** [2014] IRLR 4.

90. Underhill LJ in the Court of Appeal in **Kaur v Leeds Teaching Hospital NHS Trust** [2019] ICR 1 gave the following guidance:

'I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

- (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 *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para [45] above.)
- (5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them

in the circumstances of a particular case may not be easy.'

91. HHJ Auerbach in the EAT in **Williams v Governing Body of Alderman Davies Church in Wales Primary School** [2020] IRLR 589 added an important extra stage to the five questions in *Kaur* at para 33

“As I understand it the parenthetical 'if it was' following question four, conveys that it is an affirmative answer to that question that will also take the Tribunal to question five. However, what if the answer to question four is 'no'? That is the scenario with which this ground of appeal in the present case is concerned. The answer is, that if the most recent conduct was not capable of contributing something to a breach of the Malik term, then the Tribunal may need to go on to consider whether the earlier conduct itself entailed a breach of the Malik term, has not since been affirmed, and contributed to the decision to resign.”

Conclusions

Issue 1.1 Remove significant sections of Mr Boyton’s job role relating to communication and website by an email to the entire staff on 21 March 2020

92. The email sent at 10:41 on 21 March 2020 did remove part of Mr Boyton’s job role relating to communication and the website as all decisions regarding communications were stated as having to go via Mr Copsey. Communications were particularly highlighted under the “job purpose” section of Mr Boyton’s job description and I do not accept that this was simply one of a number of responsibilities. It was a more important duty than that. Although Reverend Cooke was Mr Boyton’s line manager there was no express contractual right for Reverend Cooke to change Mr Boyton’s duties although Mr Boyton accepted in cross examination that his duties had changed since the job description attached to his contract had been drafted.
93. At the same time, the amount of work needed for communications for the church was undoubtedly expanding in March 2020. The work Mr Copsey and Mr Milner were doing to record and edit videos of sermons had never been part of Mr Boyton’s job and it was technical work that Mr Boyton appears not to have been able to do and did not object to others doing. Mr Boyton himself in June 2020 recognised the “huge amount of time” that Mr Milner had spent working on online presence and that this had been a success. Mr Boyton felt Mr Milner should be in a full time role given the amount of work he was doing.
94. There is a difference here between removing the coordinating and supervision of

communications from the preparation of the video sermons. I do not consider that instructing Mr Copsey and Mr Milner to do the work of preparation of the video sermons was capable of amounting to a breach of trust and confidence. However, in moving overall communications responsibility to Mr Copsey Reverend Cooke's email of 21 March 2020 was an act that was likely to seriously damage the underlying relationship of trust and confidence with Mr Boyton. The question then becomes whether Reverend Cooke had reasonable and proper cause to make that change in the way that he did (by email to a number of people and without discussing it with Mr Boyton first). Even, in the circumstances of the closure of the church during lockdown and the increased importance of communications in the life of the church, which I accept, I am still not satisfied that Reverend Cooke did have reasonable and proper cause to act in this way. The matter should have been discussed with Mr Boyton first before being included in an email to all staff. Even though he did not personally have social media accounts, Mr Boyton could have retained his role coordinating communications even if much of the underlying work was done by others.

Issues 1.2 and 2.4 Report the disposal of property to church wardens in an undeclared, secret standing committee meeting on 9th November 2020 without any investigation or explanation asked for, a result of which was an option to immediately dismiss Mr Boyton for gross misconduct was considered

95. The Claimants are insistent that the meeting on 9 November 2020 was an undeclared, secret standing committee meeting. It is fair to say that the Respondent's position on this has been somewhat inconsistent. However, I am not persuaded that the legal status of the meeting is particularly important here.
96. The Claimants suggest that it was a breach of trust and confidence for Reverend Cooke to approach the church wardens and treasurer without having either conducted an investigation or having asked for an explanation. I do not accept that this is correct. There is nothing wrong with Reverend Cooke seeking counsel on the matter based on his initial views. Indeed, it is hard to see what further investigation would have been needed and Mr Boyton was unable to articulate this clearly in response to questioning. Clearly, had a formal investigation or disciplinary process been commenced, the Claimants would have been entitled to respond formally to the allegations but matters never reached this stage.
97. The Claimants suggest that it was a breach of trust and confidence that one option considered was dismissal for gross misconduct. This allegation relates principally to Mrs Jones' email of 10 November 2020. However, I am not satisfied that that email amounts to a breach of trust and confidence (either actual or anticipatory) for a number

of reasons. First, in circumstances where someone else's property had been thrown away without express permission and where the line manager recalled giving instructions not to throw it away, it was acting with reasonable and proper cause to consider disciplinary action with sanctions up to and including dismissal for gross misconduct. Second, Mrs Jones was not stating what would happen but setting out one of three options and caveating all three by saying further advice would need to be taken and matters dealt with carefully and legally and with PCC approval. It is clear that no decision had been taken. Third, by the time of the Claimants' resignations, Reverend Cooke had told Mr Boyton that the matter had been taken to the wardens and treasurer but "let go". No action had been taken to start towards an investigation or disciplinary hearing and Mr Boyton had been told there would not be any. Finally, Mrs Jones' email was private. It was not intended for Mr Boyton to read and, despite his protestations, as an employee he simply should not have been reading it. In failing to say during the call on 24 November 2020 that he had read the email in question, Mr Boyton was implicitly acknowledging in my view that he knew he was not meant to be surveilling his line manager's emails. Even if the contents of the email were likely to seriously damage trust and confidence, it is right that employers should be able to take advice and discuss matters (including the possibility of dismissing staff) and at times speaking bluntly without that all being read by the employees in question. Mrs Jones had reasonable and proper cause to express herself in the way she did, given she did not expect the email to be read by the Claimants at the time.

Issue 1.3 dealing with a grievance complaint made against Mr Boyton in November 2018 incorrectly and in a way that humiliated him in front of his colleagues and was not recorded on any HR File

98. I do not accept that Reverend Cooke handled the complaint in 2018 incorrectly in any material way or that his actions were capable of destroying or seriously damaging trust and confidence. Once a complaint was received by a colleague it was appropriate for Reverend Cooke to conduct some investigation of this including speaking to colleagues about how Mr Boyton interacted with them or others. It may have been better for Reverend Cooke to speak to Mr Boyton first but I consider this only a minor failing and I do not accept that this amounted to humiliating him in front of his colleagues. I can see no evidence that confidential information was relayed to these colleagues, who certainly appear to have been unaware of the allegation that race played a factor in the complaint. It is unclear if they even know of a complaint.
99. In deciding to seek to resolve this matter informally, Reverend Cooke had reasonable and proper cause. He acted in accordance with the ACAS Code of Practice on

Grievance and Disciplinary procedures which states:

“Many potential disciplinary or grievance issues can be resolved informally. A quiet word is often all that is required to resolve an issue. However, where an issue cannot be resolved informally then it may be pursued formally.”

100. In matter of fact, although the colleague resigned, the informal resolution of the complaint appears to have been largely successful, which is to the credit of all involved including both Mr Boyton and Reverend Cooke.

101. Whilst the ACAS Code states that employers would be well advised to keep written records, it would be unusual to see a matter such as this recorded on an HR file as no warning was issued and there would be no obvious reason to retain notes for such a long period of time. In any event, the existence or otherwise of notes was not something that Mr Boyton was aware of as at the date of his resignation. Therefore, it cannot have played any part in his decision to resign.

Issue 1.4 Discuss aspects of finance management/software and put forward proposals for significant change without Mr Boyton’s involvement despite this being his core job role

102. It is accepted on both sides that by June 2020 there was a difference of opinion between Reverend Cooke and Mr Boyton regarding the use of online banking. The incoming church wardens and treasurer elected in October 2020 clearly agreed with the proposal to use online banking. It appears that the idea of alternative arrangements for both online banking and the finance systems had been mentioned to Reverend Cooke by Mr Helm, the external financial examiner (either directly or referred to by Mr Boyton). The switch to online banking was approved by the standing committee of the PCC. Whilst there was no specific authorisation of the change of software at the same time there is a clear overlap between the two topics.

103. Mr Boyton accepted in cross examination that Reverend Cooke was entitled to have discussions around changes to the finance system without including Mr Boyton, although he described this as “strange.” I accept that having such discussions without Mr Boyton’s involvement could be said to damage trust and confidence to a degree. However, I do not consider that being excluded from discussions of changes to systems was sufficiently damaging to trust and confidence in itself to amount to an act likely to “seriously damage or destroy” trust and confidence. Moreover, in circumstances where Mr Boyton’s feelings on the subject were well known and opposed to change, I consider that Reverend Cooke and the other PCC members had reasonable and proper cause to exclude Mr Boyton from discussions about this topic.

It might have been different if matters had progressed to the point of purchasing and installing new software without his involvement. However, that was not the case here.

104. Whilst I do not consider that this allegation could amount to a breach of trust and confidence, in the context of the March 2021 email regarding changes to Mr Boyton's duties, I do not find that it was entirely innocuous. Therefore it is capable of contributing to a series of acts amounting to a breach of trust and confidence. In short, it could be a valid "last straw".

Issue 1.5 Fail to communicate a new church vision devised independently by David Cooke and his wife without any staff involvement which all staff were then excluded from the initial discussions about implementation

105. Matters regarding vision for the church were inherently within Reverend Cooke's purview as Vicar. The PCC had expressly authorised him to produce the first stage of the review relating to redefining strategy. Mr Boyton's job description specifically stated that his role was to allow others to focus on teaching, evangelism, prayer and pastoral care. In producing the vision document without input from employees Reverend Cooke was in no way acting in a manner calculated or likely to destroy or seriously damage trust and confidence.

106. The decision to exclude staff from initial discussions about implementation was taken by the PCC to enable members of the PCC to speak openly without having to worry about members of staff, who would necessarily be affected by the decisions, being present. The June 2020 review scope document provided for later steps including consultation with staff. Indeed, immediately before the Claimants resigned a staff meeting to discuss the feedback from the discussion at the PCC was scheduled. In choosing to have a discussion without staff at an early stage at the PCC meeting, the Respondent was in no way acting in a manner calculated or likely to destroy or seriously damage trust and confidence.

Issue 1.6 Say on a telephone call on 24 November 2020 that the working relationship was no longer tenable.

107. Mr Boyton says that during this call Reverend Cooke avoided straight answers about the working relationship. Having listened to the recording, there are points at which Reverend Cooke does either take a long time to answer certain questions or gives clearly guarded answers.

108. However, I do not consider this to amount to a breach of trust and confidence. There are two important points of context to make. The first is that the overwhelming

impression taken away from listening to the recording is that Mr Boyton was fairly aggressively cross-examining Reverend Cooke during the call. The tone is not one of a casual conversation and it is natural that Reverend Cooke would have been defensive in response to such questioning.

109. The second point is that Reverend Cooke claimed in cross examination, and I accept, that he believed Mr Boyton had been reading his emails and was asking questions having seen supposedly private correspondence. This again would understandably make someone's answers guarded.

110. It is notable that Reverend Cooke did not say that the working relationship was no longer tenable. What he actually said, was that "we're at a point clearly where... um where things are not good, between you and I." This was something that Mr Boyton did not dispute. This comment was neither calculated or likely to destroy or seriously undermine trust and confidence, it simply reflected the reality of a deteriorating relationship.

Summary for Mr Boyton

111. Applying the legal tests set out in **Kaur** to the current facts, the most recent act that triggered or caused Mr Boyton to resign was issue 1.5, failing to include him in the role out of the vision for the church. Mr Boyton had not affirmed the contract since that act. That act was not itself a repudiatory breach as set out above. Considering the test in **Omilaju**, it was not an act in a series whose cumulative effect was to amount to a breach of the implied term of trust and confidence as it could not be said to have contributed anything to such a series. Looking as I must per **Williams** at possible earlier breaches of the implied term and final straws, I do not accept that issues 1.2, 1.3, or 1.6 were in any way capable of forming part of a series of acts amounting to a breach of trust and confidence. Issue 1.1 as set out above, I consider was itself a breach of the implied term of trust and confidence, albeit one that had been initially waived by Mr Boyton who, in not resigning at the time, affirmed the contract. I find that issue 1.4 was capable of forming an act in a series with issue 1.1 as both related to Mr Boyton's role and removal or variation of his duties or how he did them. Issue 1.4 was capable of contributing something to breach of the implied term because how Mr Boyton undertook his role appeared to be being changed without his involvement. Taken together issues 1.1 and 1.4 were a breach of the implied term. I find that Mr Boyton did resign at least in part in response to issues 1.1 and 1.4. Removal of duties in March 2021 was directly referenced in the resignation letter and I consider that the reference to "a number of mismanaged incidences compounded by a lack of communication" included a reference to the discussions regarding the change to the

finance software which Mr Boyton found out about on 23 November 2020. Mr Boyton had not affirmed the contract since becoming aware of this matter on 23 November 2020. Accordingly, Mr Boyton was dismissed. As the Respondent is not seeking to advance any potentially fair reason for dismissal, such dismissal is unfair and Mr Boyton's claims for unfair dismissal and notice pay succeed.

112. In the context of next steps, the Tribunal would bring to the parties' attention paragraph 32 of the EAT's decision in **Wright v North Ayrshire Council** [2014] IRLR 4, which would seem to have some applicability in this case.

Issue 2.1 Mismanagement of an issue raised by the Second Claimant in relation to the provision of children's services work in January 2020 of which then became a grievance against the Respondent by the Second Claimant, which was again deal with incorrectly.

113. The suggestion is made on behalf of Mrs Burn effectively that Reverend Cooke made more of the issue with Ms Dyer than was necessary. I do not accept this criticism of Reverend Cooke's actions. It is clear that there was a significant issue between Mrs Burn and Ms Dyer. Whilst this undoubtedly had its roots in a difference of opinion on how to provide services rather than anything inherently personal, it had led Mrs Burn to be in tears at the Well on at least one occasion and it had led Ms Dyer to raise serious criticisms of Mrs Burn's behaviour. This was patently a serious matter that needed addressing.

114. I do not accept that this serious matter was mismanaged. Reverend Cooke sought advice on how to deal with the matter and opted to take over personally with his wife certain parts of the provision for children. At the same time he sought to mediate a resolution to the issue between Mrs Burn and Ms Dyer including the meeting on 3 February and by seeking to arrange a teambuilding day. The arrival of lockdown in March 2020 meant provision of services at the Well and attempts to improve the relationship via teambuilding was effectively on hold whilst in person meetings were no longer possible.

115. I do not find that Reverend Cooke acted in a way that could destroy or seriously damage trust and confidence. His handling of this matter was appropriate. Moreover, given the serious issues that had arisen between Mrs Burn and Ms Dyer I consider that he had reasonable and proper cause to deal with this matter in the way that he did.

116. The second allegation contained under this heading is that Mrs Burn raised a grievance, which was dealt with incorrectly. It is clear that Mrs Burn expressed

dissatisfaction with how Reverend Cooke resolved matters regarding the Well. At no point before issuing the current proceedings does Mrs Burn appear to have referred to her complaints of mismanagement as a grievance although I accept that as a matter of law she does not have to do so to bring a grievance. In any event, having regard to the same section of the ACAS Code referred to at paragraph 99 above, the manner with which this matter was dealt with was appropriate and at least somewhat effective. Mrs Burn was able to raise the matters she was unhappy about at the meeting on 13 May 2020. Reverend Cooke denied having intended to cause hurt and apologised, which apology was accepted. If she felt that this resolution was insufficient, Mrs Burn could have raised a formal grievance at that stage or asked for the matter to be dealt with differently than it was. However, she did neither.

117. I do not find that Reverend Cooke either acted in a way that destroyed or seriously damaged trust and confidence. Moreover, I consider that, in seeking to resolve matters informally in conjunction with the wardens, he had reasonable and proper cause to deal with this matter in the way that he did given it was at no point expressed as a formal grievance.

Issue 2.2 Exclude and side-line Mrs Burn from meetings she would normally be involved in

118. There were two meetings to which Mrs Burn was not invited in July and August 2020. These were meetings of the heads of ministry. Mr Boyton was invited to this meeting as Mrs Burn's manager. The reports of the other attendees were not invited to either meeting. It may, in fact, be that Mrs Burn was the only one of the three reports who could have physically attended the meeting. However, I do not find that in not inviting Mrs Burn to these meetings Reverend Cooke acted in a manner calculated or likely to destroy or seriously damage trust and confidence. Moreover, he had reasonable and proper cause to invite Mr Boyton and to have him relay any instructions needed to Mrs Burn as this was a sensible and appropriate way to approach this meeting. On the Claimant's side, apart from her own evidence, the highest point of her case in terms of documentation is the 2017 reference written by Mr Kotonou that stated that the Claimant had been employed for 15 years as an Accountant's Assistant. This suggests both intention to create legal relations and that the Claimant had been providing consideration in the form of work since 2002.

Issue 2.3 Ignore pastoral needs raised by Mrs Burn or respond with irritation when those needs were raised from March 2020 until her effective date of termination

119. Whilst there is evidence that some members of the congregation felt individual

pastoral issues were not resolved satisfactorily or even addressed, I have found that Reverend Cooke did try to address such issues but that he did not always feed this back to Mrs Burn. I am not satisfied that Reverend Cooke either ignored pastoral needs raised by Mrs Burn or showed irritation when those needs were raised. Indeed there was evidence of Reverend Cooke seeking Mrs Burn's input on which pastoral matters to address and no evidence before me of responses showing irritation. I do not find any conduct amounting to a breach of the implied term of trust and confidence.

Issue 2.4 see 1.2 above.

Summary for Mrs Burn

120. Applying the legal tests set out in **Kaur** to the current facts, the most recent act that triggered or caused Mrs Burn to resign was issue 2.4, reporting the bag issue to the Church Wardens. Mrs Burn had not affirmed the contract since that act. That act was not itself a repudiatory breach. Considering the test in **Omilaju**, it was not an act in a series whose cumulative effect was to amount to a breach of the implied term of trust and confidence as it could not be said to have contributed anything to such a series. Looking at possible earlier breaches of the implied term per **Williams**, I do not find that any of issues 2.1, 2.2 or 2.3 formed a series of acts amounting to a breach of trust and confidence for the reasons set out above. Accordingly, Mrs Burn was not dismissed and her claims for unfair dismissal and notice pay fail and are dismissed.

Employment Judge T Perry
Date 2 December 2022