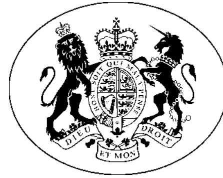
Case Number: 2204006/2022



EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
	v	
F Amedzo		Bidvest Noonan (UK) Limited

Heard at: London Central by CVP **On**: 30 November 2022 and 1 December 2022

Before: Employment Judge Anderson

Appearances
For the Claimant: In Person
For the Respondent: M Bignell (Counsel)

JUDGMENT

1. The claimant's claim of constructive unfair dismissal is dismissed.

REASONS

The claim

1. By way of a claim filed on 18 June 2020 the claimant, Franklin Amedzo, brought a claim of constructive unfair dismissal against the respondent, Bidvest Noonan (UK) Limited.

The Hearing

2. The claimant is a litigant in person. Mr Bignell of counsel represented the respondent. The claimant filed a witness statement and gave oral evidence. The respondent had two witnesses, Tim Hardy-Wallace and Dilwyn Evans, both of whom filed statements and attended to give oral evidence. In addition to the witness statements, I received an agreed bundle of documents, and a skeleton argument and authorities bundle from the respondent.

3. There has been no case management hearing for this case and there was no agreed list of issues. Mr Bignell said that the claimant had not clarified the nature of the breach of contract he relied upon and whether he relied

on a course of conduct. The claimant said that a flawed grievance process led to his resignation and the flawed grievance process amounted to a breach of trust and confidence. He relied on the respondent's conduct from 2019 in relation to his absences as amounting to a course of conduct ending with dismissal of his grievance appeal.

List of Issues

4. I explained to the claimant that the tribunal would need to decide the answers to the following questions in order to make a decision on his claim:
    a. What is the conduct complained of?
    b. Did that breach the implied term of trust and confidence? The Tribunal will need to decide:
        i. 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
        ii. whether it had reasonable and proper cause for doing so.

    c. Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

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

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

    f. Was the dismissal fair or unfair.

Findings of Fact

5. The claimant commenced employment with Axis Security Limited on 2 April 2002 as a security officer. His employment transferred under TUPE regulations to the respondent with effect from 1 August 2021. At the relevant time the claimant was a security officer assigned to the Crown Estate contract held by the respondent.

6. On 19 November 2019 the claimant was invited by the security contract manager, Gavin Gilbert, to attend an investigation meeting on 22 November 2019 to discuss absenteeism concerns.

7. There is no record of this meeting. The claimant states that minutes were taken. Mr Evans, a witness for the respondent, said that Mr Gilbert told him he thought there were minutes but due to the time elapsed he could not confirm.

8. The claimant said that at that meeting he requested Mr Gilbert to recuse himself as he had shown bad faith and procedural irregularity, also that he

made a subject access request at the meeting. Mr Gilbert was not a witness at the hearing and no evidence was heard to dispute the claimant's evidence of what happened at the meeting, which I accept.

9. The claimant said that he tried over the next nine months to find out what was happening with the investigation into his absence. There was no evidence of this before me. The claimant said that he called HR a number of times but was told only that investigations take time. The claimant said that as Mr Gilbert had recused himself, he told the claimant he could not give an update. The claimant said that calls to HR from the claimant are not evidenced in the Subject Access Request response, however, on the evidence of both parties, neither are there any records of what HR did in relation to the investigation itself, so I do not find that to be determinative. In submissions Mr Bignell questioned the reliability of the claimant's evidence and whilst many of the points he raised had merit, I did not read or hear anything that suggested to me that the claimant's evidence was other than the truth as he understood it to be. I accept that the claimant followed up the matter with HR and received no satisfactory response.

10. On 4 November 2020, Albert Bakole carried out a return to work meeting with the claimant following absences on 31 October 2020 and 1 November 2020. The claimant refused to sign the minutes of the meeting. This led to the claimant attending a second meeting with Mr Gilbert after Mr Gilbert wrote to him on 6 November 2020 providing company guidance on the absence process and advising him that he would undertake to provide the claimant with absence counselling.

11. There are no minutes of the meeting which the claimant says took place on 10 November 2020, but it is clear that the claimant raised with Mr Gilbert at that meeting that he was unhappy that the previous absence investigation had not been resolved, and Mr Gilbert agreed to look into it. Mr Gilbert emailed the claimant on 13 November 2020 stating as follows:

    As discussed, I revisited this with HR,

    To be put simply, this was not concluded or assigned to a senior manager for review. Insofar, the duration of time elapsed since the original meeting renders the investigation as defunct. Therefore, this investigation is officially closed, no further action.

12. It is this communication which was at the heart of a grievance raised by the claimant on 11 January 2022. It is the claimant's position that Mr Gilbert states in this email that HR decided to close the investigation. I do not agree. I find that the email is silent on who made the decision. In oral evidence the claimant admitted as much.

13. Further, it is the claimant's position that the email is evidence of gross misconduct by way of a false representation from Mr Gilbert. I find that as Mr Gilbert does not say in the email that HR made a decision to close the investigation, he has not made any representations on that matter, whether false or otherwise.

14. On 11 September 2021 the claimant was absent and because he had been absent on other occasions in the past 12 months the respondent invited him to an informal stage absence review meeting, in accordance with its sickness absence policy, to take place on 20 September 2021. The meeting was chaired by Joe Boyle. The claimant refused to participate in the meeting on the grounds that Mr Boyle, whose job title was Senior Mobile Supervisor, was not a manager, and that this did not accord with the respondent's absence policy.

15. On this matter the respondent's sickness absence policy confirms that a manager should carry out any meetings relating to the informal absence procedure. An organisational chart for the Crown Estate team was included in the bundle and it shows that Mr Boyle was senior to the claimant and in the next level up from the claimant in the line management chain. I find that Mr Boyle was a manager of the claimant for the purposes of the sickness absence policy and had authority to conduct an informal absence meeting under that policy.

16. Nevertheless, a second meeting was arranged to consider the claimant's sickness absence, this time with Mr Gilbert, on 21 September 2021. As the meeting was informal, no notes were taken. The claimant said that Mr Gilbert told him at that meeting that no further action would be taken in relation to his sickness absence. Mr Evans, the respondent's witness, said that he asked Mr Gilbert about this, and Mr Gilbert said that he did not give that assurance.

17. On 27 September 2021 Mr Gilbert wrote to the claimant and said that he had decided to issue him with an informal verbal warning for sickness periods that took place in 2021. In cross examination Mr Bignell put it to the claimant that Mr Gilbert had in fact said that there would be no action in relation to the 2020 absences, because he had only taken into account the 2021 absences, which would be logical where the claimant had accused him of double jeopardy in relation to 2020 absences (i.e. that these had already been under investigation where the 2019 investigation had not been concluded). This is speculation. Mr Gilbert did not attend the hearing and I have no reason to doubt the claimant's account. I find that Mr Gilbert did tell the claimant that there would be no further action.

18. The claimant made clear in an email to Mr Gilbert on 6 October 2021 that he disagreed with his decision and would be taking the matter further by contacting the HR director. He did not say that Mr Gilbert had told him he would not issue a warning. Mr Gilbert responded that there was no right of appeal against his decision as the warning was informal and included Waleed Eltayib, a key account director, and Mr Gilbert's line manager, in the email conversation. The claimant's response is that he did not accept that there was no right of appeal or that the process was informal.

19. Mr Eltayib met with the claimant on 11 October 2021. The claimant said that Mr Eltayib said in that meeting that the absence investigation in November 2019 was referred to him but due to other contractual

engagements he lost oversight of the matter. Mr Eltayib was not a witness at this hearing. The respondent has not questioned this evidence and I accept that Mr Eltayib said that to the claimant in the meeting. The relevance of the comment is that the claimant viewed this information as contradicting what Mr Gilbert had said in his email of 13 November 2020, which was that the matter had not been referred to a senior manager. The claimant did not raise a grievance at this point.

20. Mr Eltayib wrote to the claimant on 14 October 2021. He said that he had taken advice from HR and the advice was that an informal discussion should not be documented and as such no sanction should have been issued on 27 September 2021. He rescinded the informal verbal warning and apologised for the mistake.

21. On 4 and 5 January 2022 there was a disagreement between Mr Gilbert and the claimant over reasons for staff shortages. The disagreement was aired, initially by the claimant, in an email chain to which many other employees were copied.

22. The claimant raised a grievance against Mr Gilbert on 11 January 2022. He referred back to the absence investigation on 2019 and noted there had been no update on it from HR and no minutes of the 21 November meeting supplied to him. He said that in his email of 13 November 2020 Mr Gilbert had claimed that the decision to close the 2019 investigation emanated from HR and this was 'fraud in the form of false representation'. He referred to the informal verbal warning in September 2021 which was subsequently rescinded and the meeting with Mr Eltayib on 11 October 2021 who had told him that the 2019 investigation had been referred to him.

23. Tim Hardy-Wallace, a key account director outside of the claimant's line management chain, was appointed as grievance manager. Mr Hardy-Wallace did not know the claimant. A meeting with the claimant took place on 24 January 2022. The claimant had the opportunity to bring with him a representative but chose not to do so. He was given a copy of the meeting minutes for comment, and he did make comments.

24. During the meeting Mr Hardy-Wallace asked the claimant why he was using the language of fraud and misrepresentation. The claimant said that from the evidence he had that Mr Gilbert had committed fraud. During the meeting Mr Hardy-Wallace asked about the 2021 absence process and the claimant confirmed that he had received an apology. He did not say that he was looking for any further outcome in respect of that incident.

25. After the meeting Mr Hardy-Wallace tried to obtain policy documents relating to 2019 from the previous employer, Axis, he also reviewed the claimant's SAR response of 163 pages. He spoke to Mr Eltayib. He had told the claimant he would speak to Mr Gilbert, but he decided not to as he did not think this was necessary. He reached a conclusion and set out his findings in a letter dated 21 March 2022. He did not uphold the claimant's grievance. He confirmed his understanding that the claimant's grievance

was essentially that Mr Gilbert has made a fraudulent misrepresentation in his email of 13 November 2020 and noted that Mr Gilbert had made no gain from what he written and nor had there been a loss to the claimant, so the claim was unproven.

26. In oral evidence Mr Hardy-Wallace said that from the discussion he had with the claimant at the meeting on 24 January 2022 he had understood that the various matters laid out in his written grievance were all evidence that the claimant presented to show that the misrepresentation he claimed that Mr Gilbert had made in his email to the claimant of 13 November 2020 was intentional. The reason for this was that the claimant had been clear in the hearing that he was accusing Mr Gilbert of fraud through making a false representation. Mr Hardy-Wallace said that he had intended to speak to Mr Gilbert as part of his investigation but had decided that he did not need to, as he had the information needed to reach a conclusion on the very clear point that the claimant said was at the heart of his grievance, which was that Mr Gilbert was guilty of fraud. Mr Hardy Wallace, an ex-police officer, said that he had considered both the civil and the criminal standards of proof in relation to fraud by misrepresentation and the allegation did not meet either standard of proof.

27. The claimant exercised his right to appeal on 1 April 2022. He said that Mr Hardy-Wallace had failed to recognise that his complaint was that Mr Gilbert was guilty of gross misconduct, he had failed to establish whether his evidence supported a claim of gross misconduct, that Mr Hardy-Wallace had used the criminal standard of proof in reaching his decision and said that Mr Hardy-Wallace had lumped together two unrelated matters – the alleged misrepresentation and the apology from Mr Eltayib.

28. The appeal was heard on 5 May 2022 by Dilwyn Evans, a key account director outside of the claimant's line management claim. He did not know the claimant. Again the claimant had the opportunity to bring a companion but chose not to. Mr Evans said in his witness statement that he found the claimant's appeal to be unclear as to what he was seeking and describes how he clarified with the claimant at the hearing what his complaint was and what outcome he was seeking. The complaint as he understood it was that the proper processes had not been followed in dealing with the claimant's absences.

29. Mr Evans spoke to Mr Hardy-Wallace and Mr Gilbert before reaching a decision which he set out in a letter to the claimant dated 30 May 2022. He did not uphold the claimant's appeal.

30. It is the claimant's case that the grievance procedure was flawed for the following reasons: he was not given notes of responses collected by Mr Hardy-Wallace from Gavin Gilbert and Mr Eltayib; the decision of Mr Hardy-Wallace was based on the criminal standard of proof; Mr Hardy-Wallace ignored the SAR documents; Mr Evans did not supply him with notes of responses collected from Mr Gilbert and Mr Eltayib; he did not receive a copy of the minutes of the appeal hearing for comment; Mr Evans was junior to Mr Hardy-Wallace; Sarah Lawrence of HR

'superintended' the referral of his appeal process with bias and a lack of competency.

31. I will consider the evidence for each of these complaints:

    a. The complaint of not being given notes of responses collected from Mr Gilbert and Mr Eltayib by the process managers. I accept that he was not given notes of these conversations. There is no such requirement in the respondent's grievance policy. Furthermore, the claimant did not raise the alleged failure in this respect by Mr Hardy-Wallace as a factor in his appeal.

    b. The complaint that Mr Hardy Wallace applied the wrong standard of proof: There is no evidence that Mr Hardy-Wallace has applied an incorrect standard of proof in his decision making. He said to the claimant in the grievance hearing that proof in a grievance procedure was on the balance of probabilities. He does not refer to a standard of proof in his decision letter and simply concludes that as the grievance is on the basis of fraudulent misrepresentation and there is no evidence of gain on Mr Gilberts part this cannot be made out. In oral evidence he said that he considered both, as the claimant had put it to him that Mr Gilbert had committed a criminal act, and that the evidence did not meet either standard of proof.

    c. Mr Hardy-Wallace has confirmed that he read the SAR documents. I accept that he read them. It was for him to decide the relevance of those documents.

    d. The complaint that the claimant was not provided with a copy of the appeal hearing minutes before a decision was made by the appeal manager. I accept that he was not provided with the minutes before he was given the decision letter. There is no requirement in the respondent's policy that an appellant be provided with minutes for review. There is such a requirement in the initial grievance hearing stage, and I do not understand why this should apply to one stage and not another, however, I do not find that in the respondent not providing the minutes before issuing a decision the process is flawed. I note that that the claimant received the minutes on 30 May 2022. He did not raise then, or at any time, including in his ET1 or witness statement, until at this hearing in oral evidence that he did not accept that the minutes were a true reflection of the meeting.

    e. The complaint that Mr Evans was junior to Mr Hardy-Wallace. The respondent's policy is that a formal grievance is raised at the next level above line manager '*who will convene a meeting between the employee and an appropriate manager as soon as reasonably practicable'* and at the appeal stage the employee should appeal *'to the next level of management'* but is silent on who should conduct the appeal. Mr Hardy-Wallace and Mr Evans are both managers of a seniority four levels above the claimant. Neither of them knew the

claimant or Mr Gilbert. I find that they were both appropriate managers to hear the grievance and the appeal. I find that the fact that Mr Evans was more recently appointed to his role than Mr Hardy-Wallace is irrelevant to whether it was appropriate for him to conduct the appeal.

f. The complaint of Sarah Lawrence superintending the appeal referral. I neither saw nor heard any evidence about Ms Lawrence's involvement in the appeal other than the claimant claiming that she allocated the matter to Mr Evans. There was no evidence of bias or lack of competency.

32. The claimant resigned on 13 June 2022 citing his employer's failure to *'thoroughly investigate grievance whose outcome is fraught with procedural irregularity and bias farfetched from HR industry standards in practice in handling/managing grievance.*' He said he considered himself to be constructively dismissed.

33. The claimant alleged in his witness statement, dated 22 November 2022, and the hearing, a breach of the ACAS Code on Disciplinary and Grievance Procedures, also that the length of time taken to conclude the grievance was excessive. He did not specify which part of the code he said had been breached, there was no copy of the document in the bundle to which the claimant could take witnesses, and these allegations were not included in his particulars of claim. I make no findings on these matters.

Submissions

34. I have summarised the parties' closing submissions.

35. For the respondent Mr Bignell said there had been no breach of contract on the part of the respondent. Mr Bignell questioned the reliability of the claimant's evidence. He said that he had been evasive in cross examination, had refused to accept obvious points and queried the authenticity of notes. Mr Bignell relied on his written skeleton argument and highlighted the following matters. Mr Gilbert does not state in the email of 13 November 2020 that HR made a decision to close the 2019 investigation. The claimant accepted this in cross examination. He said that even if it had been a misrepresentation, the outcome for the claimant was that no further action was taken in relation to his sickness absences in 2019 and from the perspective of the reasonable person it could not be said that in this action it was the respondent's intention to abandon the contract. There is no evidence of flaws in the grievance process. Even if Mr Hardy-Wallace decision not to speak to Mr Gilbert was not best practice, it does not amount to a breach of the implied term of trust and confidence.

36. The claimant said that there was no reference to the 2019 investigation in the SAR response. He said that Mr Gilbert and Mr Eltayib were employed by the respondent until recently so it could have spoken to them to clarify matters around his complaint for the purposes of the tribunal hearing. The

claimant said that Mr Bignell had tried to paint him as a serial absentee, but he was not. Mr Gilbert should have been spoken to as part of the grievance process. The claimant said that he did not affirm his contract by continuing to work from October 2021 until he raised his grievance in January 2022. The rule of the game is evidence, and he raised a grievance after he had gathered enough evidence.

Law, conclusions, and reasons

37. The claimant claims constructive unfair dismissal under s95(1)(c) Employment Rights Act 1996 (ERA). The tribunal is concerned to decide whether there has been a dismissal in accordance with that section which states

    95 Circumstances in which an employee is dismissed

    1. *For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)….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 his employer's conduct.

38. This is what has become known as "constructive dismissal". The case of Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 makes it clear that the employer's conduct has to amount to a repudiatory breach. The employee must show a fundamental breach of contract that caused them to resign and that they did so without delay.

39. The claimant relies on a breach of the implied term of trust and confidence. Such a breach if proven will always be a repudiatory breach *(Morrow v Safeway Stores [2002] IRLR 9).*

40. In the case of *Malik v Bank of Credit and Commerce International SA (In Liquidation)[1997] ICR 606* the tribunal defined the implied terms of trust and confidence as follows: the employer must not, without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between itself and the employee. The test is objective.

41. The claimant relies on the events set out above, which took place in 2019, 2020, and 2021 as a course of conduct leading to his grievance in 2022 and finally his resignation once the grievance was concluded. The final act in a course of conduct, in this case the grievance, can revive a claimant's ability to rely on an earlier breach even where he did not resign in response to that breach at the time *(Kaur v Leeds teaching Hospitals NHS Trust [2019] ICR 1).*

42. The first step for the claimant in proving his claim is to show that the act or acts he complains of were breaches of his contract, specifically in this case, the implied term of trust and confidence.

43. The claimant relies on the respondent's failure to conclude the 2019 investigation in a timely manner as a breach. The claimant did not raise a

grievance in relation to this incident at the time. He says he followed up with HR but did not receive a satisfactory answer. He took no further action until the respondent initiated a new absence investigation in 2020. When he raised the matter with Mr Gilbert at this time it was immediately resolved with the respondent saying that no further action would be taken. While I understand that the claimant would have been unhappy at having such a process hanging over him without resolution, he was not so unhappy that he escalated the matter, and I do not accept that the failure of the respondent to conclude the investigation in a timely manner was a breach of trust and confidence.

44. If the claimant relies on the meeting with Joe Boyle on 20 September 2021 as a breach of trust and confidence, I do not accept that it is a breach. I have found that it was within the respondent's policy for Mr Boyle to conduct that meeting.

45. Insofar as the claimant relies on Mr Gilbert telling him on 21 September 2021 that he would not take action in response to the claimant's absences and then issuing an informal verbal warning as a breach of contract, I do not accept that this was a breach of trust and confidence. Mr Gilbert had discretion under the absence policy to issue an informal warning. The claimant complained about the warning. The matter was referred to a senior manager. The warning was rescinded, and the senior manager apologised. The claimant did not at that time raise with the respondent that part of his complaint was that he had been assured that no action would be taken. His complaint was only that in issuing the warning in writing and putting him under a six month review, the matter was formalised, and he should have a right of appeal. In essence, Mr Eltayib, and HR, agreed with the claimant and rescinded the warning. If Mr Gilbert had changed his mind, then best practice would have been for him to discuss this with the claimant, but his action, in issuing an informal absence warning, falls far short of an action calculated or likely to destroy or seriously damage the relationship of trust and confidence between the respondent and the employee, particularly as the complaint about the warning, as phrased by the claimant, was addressed, and remedied by the respondent immediately.

46. The claimant says that in October 2021 he discovered that the information provided to him by Mr Gilbert on 13 November 2020 about why the investigation into his absence in 2019 was not resolved, and consequently how the matter was then closed, was incorrect. He claims that the information provided by Mr Gilbert amounts to a fraudulent misrepresentation in that Mr Gilbert states that HR have decided to close the investigation, but in fact HR did not make that decision. In oral evidence the claimant admitted that the letter did not say this but I have considered the allegation in any event. I have found above that Mr Gilbert did not claim on 13 November 2020 that HR had decided to close the case. Taken at its highest, the only potentially incorrect part of the statement is that it was not assigned to a senior manager for review. The

evidence that this may not be correct is that on 11 October 2021 Mr Eltayib told the claimant that the matter had been referred to him, but he had been too busy to deal with it. I do not accept that Mr Gilbert potentially being in error over whether the investigation in 2019 was referred to a senior manager or not is a breach of trust and confidence.

47. The claimant said that the grievance process was fraught with procedural irregularity and bias. I have set out my findings on the conduct of the grievance process above. I have found no evidence of either procedural irregularity or bias. I do not find that there was any breach of trust and confidence in the way in which the grievance procedure was conducted.

48. As I have found that the respondent did not breach the implied term of trust and confidence, there is no need for me to go on to consider affirmation or whether the claimant resigned in response to the breaches he alleged.

49. The claimant's case of constructive unfair dismissal is dismissed.

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Employment Judge Anderson

Date: 16 December 2022

Sent to the parties on:
16/12/2022

For the Tribunal Office