



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Fletcher

**Respondent:** Bury Council

**HELD AT:** Manchester

**ON:** 13 December 2022

**BEFORE:** Employment Judge Porter (sitting alone)

## **REPRESENTATION:**

**Claimant:** Miss R Thorpe, friend

**Respondent:** Not in attendance, no Response having been received

**JUDGMENT** having been sent to the parties and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## **REASONS**

### **Issues to be determined**

1. At the outset it was confirmed by the claimant that the only claim pursued was one of constructive unfair dismissal. It was noted that the first issue was whether the claimant can prove that there was a dismissal. The issue was:

1.1. Whether the respondent breached its duty of care to the claimant;

- 1.2. Whether the respondent breached the implied term of trust and confidence. Did the respondent have reasonable and proper cause for its actions or omissions, and if not, did the respondent behave in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.
- 1.3. Was the breach a fundamental one? Was the breach so serious that the claimant was entitled to treat the contract as being at an end.
- 1.4. Was the fundamental breach of contract a reason for the claimant's resignation.
- 1.5. Did the claimant affirm the contract before resigning, by delay or otherwise?

2. It was noted by EJ Porter that the Schedule of Loss relied upon by the claimant included a claim for compensation for financial loss and personal injury arising from the alleged breach of the duty of care. EJ Porter noted that as this was only a claim of unfair dismissal the tribunal had no jurisdiction to award compensation in relation to an alleged breach of the duty of care. Any such claim would have to be pursued in a different jurisdiction. EJ Porter noted that the compensation for a successful claim of unfair dismissal comprised a basic award and a compensatory award, which included any claim for loss of earnings and loss of statutory rights. The claimant confirmed that he did not make any claim for loss of earnings. He did not pursue any other claim.

### **Orders**

3. A number of orders were made for the conduct and good management of the proceedings during the course of the Hearing. In making the orders the tribunal considered the overriding objective and the Employment Tribunals Rules of Procedure 2013. Orders included the following.

4. The hearing was held by CVP. No party raised any objection to this. The tribunal was satisfied that the respondent had been notified by the tribunal of the hearing date and the fact that it would be held remotely.

5. As the respondent had not entered a Response, EJ Porter sought to establish that the respondent, the claimant's former employer, had been correctly identified and served with the proceedings. The claimant made reference to an e-mail exchange between himself and Ben Waite, Senior HR Business Partner (Operations and BGI). These emails were not included in the bundle of documents provided by the claimant for the purpose of this hearing. There was a short adjournment to allow for the claimant and representative to find the relevant e-mails and provide copies for the tribunal. The claimant provided copies of this e-mail exchange, which the tribunal considered as part of the evidence. In that e-mail exchange the

claimant provided Mr Waite with a photocopy of part of the letter from the tribunal whereby the tribunal had ordered the parties to comply with the duty to disclose relevant documents. From this exchange the tribunal was satisfied that the respondent was aware of these proceedings but had chosen not to take part in the proceedings and had failed to comply with the Order for disclosure.

6. After considering the documents on the tribunal file and the exchange of emails between the claimant and Ben Waite, the tribunal was satisfied and found that the respondent was correctly named as Bury Council and the respondent has received notice of the proceedings and this hearing. Its failure to enter a Response, its failure to attend the hearing, was not a bar to the hearing and determination of the claim.

### **Submissions**

7. The claimant made a number of oral submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

- 7.1. The respondent had failed in its duty of care, in the grievance process, and over a period of 2 years failed the claimant in the redeployment process;
- 7.2. The respondent was aware that the claimant was suffering from depression but did not provide any support during his absence;
- 7.3. The respondent, without any proper explanation, refused to allow the claimant to return to his original job from which he had been unfairly dismissed. He was reinstated on full pay but suspended pending an investigation which took far too long;
- 7.4. The claimant could not afford to resign from his position until he had found alternative employment. He had a mortgage to pay and a family to provide for.
- 7.5. As compensation, it was reasonable to award one year's salary to compensate the claimant for the injury to feelings and ill-health which had been caused by the respondent's breach of duty.

### **Evidence**

8. The claimant gave evidence. He provided his evidence from a written witness statement. The tribunal asked questions.

9. A bundle of documents was not presented. The claimant relied upon his claim form, witness statement and Schedule of Loss. He asserted that he did not have access to any of the relevant documentation. For this reason he had made to the respondent a Subject Access Request for documents relevant to his period of employment. The respondent had failed to reply to that Request. A copy of the email exchange relating to the Subject Access Request was presented during the course of the Hearing, in accordance with the Order outlined above.

## Facts

10. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

11. The claimant commenced employment with the respondent on 21 January 2019 as a site manager. His place of work at the relevant time was St Margaret's Primary school .

12. On 18 November 2019 the claimant was called into the office when his line manager, Paul Morris, summarily dismissed the claimant. No formal disciplinary procedure was followed. The claimant was not given warning of any disciplinary charge, was not given the opportunity to answer the allegations.

13. On 20 November 2019 the claimant was reinstated to his position by Paul Morris. However, he was informed that he was being suspended on full pay pending an investigation. He was told to keep away from his workplace and have no contact with work colleagues.

14. The claimant was represented by his trade union representative at this time.

15. Over the next 9 months the respondent's HR team invited the claimant to attend various disciplinary hearings, all of which were cancelled by the respondent. During this time the claimant's line manager made no contact at all with the claimant. The claimant was offered no support during this lengthy suspension and was provided with no reason for the delays.

16. The claimant began to suffer from mental illness during the course of his suspension. In December 2019 he was prescribed sleeping tablets by his GP.

17. In November 2020 the claimant started having suicidal thoughts, his marriage was collapsing due to his stress and depression regarding the uncertainty of his job. The claimant and his wife made the decision to sell their house as there was a possibility that the events of being sacked without warning could happen again.

18. On 15 September 2021 the claimant attended a disciplinary hearing held with Neil Long (Chair – Director of operations), Adam Peluch (Senior HR business partner), Julie Lynch (HR business partner), Leanne Dooley (leisure facilities development officer) and the claimant's union representative, John Thomson. The outcome was a declaration by the disciplinary panel that there was no case to answer and that no further action would be taken against the claimant. Neil Long offered an apology to

the claimant for the way he had been treated but the claimant did not regard this as being sincere. The claimant was advised by Neil Long to go off sick as, it was of the disciplinary panel's opinion that the claimant was visibly physically and mentally unwell. This meeting also confirmed that the claimant was not going to be able to return to his original place of work.

19. On 16 January 2022 the claimant returned to work after a lengthy sickness absence. He was told by Paul Morris and Ursula Skinner, HR manager in a return to work meeting that he had 12 weeks to find a job within the respondent or face disciplinary action. He was not provided with any work. No explanation was given as to why the claimant could not return to his job, which at that time remained vacant. The claimant was told that re-deployment opportunities that matched his skill set would be sent out to him every Tuesday. This did not happen. The claimant was provided on an irregular basis with details of numerous jobs that did not match his skill set, such as a life guard or a head teacher. The claimant was provided with no assistance in finding alternative work.

20. The claimant was under threat of further disciplinary action if he did not secure an alternative role within the respondent Council and he was not being given any assistance in finding another role. The claimant could not afford to resign from the respondent's employment and therefore he looked for employment elsewhere.

21. On or around 7 March 2022 the claimant was offered a job at a different primary school.

22. On or around 9 March 2022 the job offer was withdrawn. The claimant was told that this was because of a bad reference from Bury Council.

23. On 16 March 2022 the claimant raised a grievance regarding his complaint that the respondent had sabotaged his chance of a new start away from Bury council and provided 'bad reference'.

24. On or around 7 April 2022 the claimant received a letter from the head of HR at Bury Council stating that the grievance process had begun and that process should take 14 days. No further action was taken in relation to the grievance. The claimant was not invited to any meeting, was not advised of any investigation taking place.

25. On 5 June 2022 the claimant resigned from Bury Council after finding alternative employment with a third party. He resigned because of the actions and inactions of the respondent since his dismissal without notice in November 2019, the failure of the respondent to follow its own disciplinary process, the significant delay in holding the disciplinary hearing, at which there was no case to answer, the failure of the respondent to make any welfare contact with him during his suspension and sickness absence, the failure of the respondent to allow him to return to his original post without any satisfactory explanation, the failure of the respondent to provide help in seeking an alternative role, the failure of the respondent to consider the

claimant's grievance, and the threat of further disciplinary proceedings if he did not find an alternative role within the Council.

26. At the date of termination of employment the claimant's weekly pay was £429.49 gross.

### The Law

27. The tribunal has referred to section 95(1)(c), section 136(1)(c) Employment Rights Act 1996 ("ERA"), **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221** and the summary of the principles of law which apply in claims of constructive dismissal as set out by the Court of Appeal in **London Borough of Waltham Forest v Omilaju 2005 IRLR 35**. The first question is whether the employer committed a fundamental breach of the terms, express or implied of the claimant's contract of employment. A Tribunal must decide in each case whether a breach of contract is sufficiently serious to enable the innocent party to repudiate the contract. This is a question of fact and degree.

28. There are a number of implied duties placed on an employer including the duty of care, the duty to provide reasonable support, the duty of mutual trust and confidence.

29. In relation to the duty to provide reasonable support, the question is whether the employer took such steps as were reasonable to support the employee in the performance of his duties. **Wigan Borough Council v Davies 1979 ICR 411**.

30. In **Malik and anor v Bank of Credit and Commerce International SA 1997 ICR 606** the House of Lords held that a term is to be implied into all contracts of employment stating that an employer will not, without reasonable or proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. A breach of the implied term of trust and confidence is "inevitably" fundamental. **Morrow v Safeway Stores plc 2002 IRLR 9**. Brown Wilkinson J in **Woods v WM Car Services (Peterborough) Limited [1981] ICR 666 EAT** described how a breach of this implied term might arise: "To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

31. The tribunal notes that a course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident even though the "last straw" by itself does not amount to a breach of contract. In **Lewis v Motor World Garages Limited 1985 IRLR 465** Neill LJ said that "the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps

quite trivial, which cumulatively amount to a repudiatory breach of the implied term “of trust and confidence.” Glidewell LJ said “(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so.... The question is, does the cumulative series of acts taken together amount to a breach of the implied term?”

32. The employers’ repudiatory breach must be the effective cause of the employee’s resignation but it does not have to be the sole cause. **Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493 EAT**. It is not necessary for an employee, in order to prove that a resignation was caused by a breach of contract, to inform the employer immediately of the reasons for his or her resignation. It is for the Tribunal in each case to determine, as a matter of fact, whether or not the employee resigned in response to the employers’ breach rather than for some other reason. **Weathersfield Ltd t/a Van and Truck Rentals v Sargent 1999 IRLR 94**.

33. In the majority of successful unfair dismissal claims the remedy will be an award of monetary compensation made up — ordinarily — of a basic award and a compensatory award s118 (1)(a) and (b) ERA 1996. The basic award is calculated in accordance with the statutory formula.

34. The compensatory award is intended to reflect the actual losses that the employee suffers as a consequence of being unfairly dismissed. Employment tribunals are directed by statute to award ‘such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer’ s123(1) ERA 1996.

35. The case of **Norton Tool Ltd v Tewson 1972 ICR 501** clarified the kinds of loss which the compensatory award should include. These are:

- immediate loss of earnings — i.e. loss between the dismissal and the hearing at which the tribunal decides on compensation
- future loss of earnings — i.e. estimated loss after the hearing
- expenses incurred as a consequence of the dismissal
- loss of statutory employment protection rights — this covers, for example, the fact that an unfairly dismissed employee will be unable to bring another unfair dismissal claim until he or she has had two years’ continuous employment in a new job •
- loss of pension rights .

36. The principle that the purpose of the compensatory award is confined to compensating only proven financial loss and is not in any sense to be used

to penalise the employer was confirmed by the EAT in **Morgans v Alpha Plus Security Ltd 2005 ICR 525**. In **Dunnachie v Kingston upon Hull City Council 2004 ICR 1052** the House of Lords held that compensation under s123 ERA 1996 is not recoverable in respect of non-economic losses such as injury to feelings.

37.S207A Trade Union and Labour Relations (Consolidation) Act 1992 provides:

If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

### **Determination of the Issues**

38.This includes, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence.

39.The first issue is whether the respondent committed a fundamental breach of contract entitling the claimant to resign.

40.The tribunal has considered all the circumstances of the case including the following:-

40.1. On 18 November 2019 the respondent summarily dismissed the claimant without following any disciplinary procedures, without giving the claimant the opportunity to defend the allegation against him;

40.2. although the claimant was reinstated a few days later, he was immediately suspended on full pay pending investigation of the allegations;

40.3. the claimant was not invited to any investigation meeting;

40.4. no satisfactory explanation was given to the claimant for the considerable delay;

40.5. during the lengthy suspension the respondent failed to communicate with the claimant, failed to provide any support;

40.6. When the respondent found that there was no case to answer the respondent failed to reinstate the claimant to his position and failed to provide a satisfactory explanation for this decision;

40.7. At the disciplinary hearing on 15 September 2021 the respondent recognised that the claimant was not well and advised him to take sickness absence;



- 40.8. During that sickness absence the respondent failed to provide any support, failed to contact the claimant;
- 40.9. On his return to work in January 2022 it was confirmed that the claimant could not return to his original position, but no alternative position was provided, no satisfactory explanation was given for this decision. Instead, the claimant was told that he would face disciplinary action unless he himself found alternative work within the respondent council;
- 40.10. the respondent then failed to provide appropriate support to enable or facilitate the claimant to find alternative work

41. In all the circumstances the tribunal finds that the respondent was in breach of its duty of care towards the claimant, was in breach of its duty to support the claimant. The respondent did, without reasonable or proper cause, conduct its business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. The respondent's conduct as a whole was such that its effect, judged reasonably and sensibly, the claimant could not be expected to put up with it. The cumulative series of acts taken together amount to a breach of the implied duties of care and trust and confidence.

42. The claimant did not delay too long in resigning. He was hopeful that, following the completion of the disciplinary process he would be reinstated to his job. He was then too ill to attend work. The final straw for the claimant was the declaration that he could not return to his position, a position that was still vacant, the continuing failure of the respondent to assist him in the redeployment process.

43. The claimant did resign in response to the fundamental breach. He was unable to terminate his contract of employment before he found alternative work because of his financial commitments.

44. The claimant was dismissed and the effective date of termination was 5 June 2022.

45. The respondent has failed to provide a reason for its conduct.

46. The claimant was unfairly dismissed.

47. The claimant does not seek reinstatement or re-engagement.

48. The claimant is entitled to a Basic Award in the sum of £1,288.47 calculated on the basis that at the effective date of termination the claimant had 3 complete years of service, was 35 years old, earning £429.49 gross per week.

49. The claimant makes no claim for loss of earnings or loss of pension rights. He obtained a new job, earning no less than his earnings with the respondent on 6 June 2022.

50. The claimant has made the following claims for compensation:

- 50.1. the cost of prescription fees arising from his GP's prescriptions for sleeping tablets and anti-depressants. The claimant pursues this claim as compensation for the failure of duty of care.
- 50.2. £1400 estate agent fees arising from the claimant's decision to sell his house;
- 50.3. £900 solicitor fees arising from the sale of the house;
- 50.4. £90 –for an Adidas bag which the claimant left at work and was misplaced by the respondent;
- 50.5. £20 – for a vacuum flask left at work and misplaced by the respondent;
- 50.6. Compensation for injury to feelings in the sum of £20,615.64

51. These sums are not recoverable as compensation under a Compensatory Award.

52. The tribunal awards the sum of £500.00 for loss of statutory rights.

53. The respondent failed to follow any disciplinary procedure in dismissing the claimant, failed to follow a fair disciplinary procedure when the claimant was on suspension, failed to consider the claimant's grievance in a timely fashion. It is therefore appropriate to increase the Compensatory Award by 25%.

Employment Judge Porter  
Date: 6 February 2023

WRITTEN REASONS SENT TO THE PARTIES ON

9 February 2023

FOR THE TRIBUNAL OFFICE