



EMPLOYMENT TRIBUNALS

Claimant: Mr Andrew John

Respondent: Secarma Limited

Heard at: Bristol Employment Tribunal **On:** 6 – 10 February 2023

Before: Employment Judge Millard,
Ms G A Meehan
Dr J Miller

Representation

Claimant: Fergus Currie (Counsel)
Respondent: Mr Vatcher (Counsel)

JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent (Constructive Unfair Dismissal).
2. The Respondent made an unlawful deduction from the Claimant's wages (Sick Pay).

REASONS

1. The Claimant was employed by the Respondent as their Chief Technical Officer.
2. He commenced employment on 12 November 2018 and his employment ended on 2 February 2021, when he resigned.
3. By way of a claim form dated the 20 April 2021, the Claimant brought a claim against the Respondent for constructive unfair dismissal and unlawful deduction of wages.

Hearing

4. The hearing was held in person at Bristol Employment Tribunal between 6 and 10 February 2023. The Claimant gave evidence and called Mr Matthew Craven as a witness. Mr Craven gave his evidence by CVP. Mr Craven was previously employed by the Respondent as Head of Products.

5. The Respondent called the following witnesses, Mr Joseph Ryland, Ms Holly Williams and Mr Jonathon Bowers. Ms Williams gave her evidence by CVP and both Mr Ryland and Mr Bowers attended the hearing in person.
6. Ms Williams was formally employed by the Respondent as Technical Director and later as Acting Managing Director.
7. Mr Ryland was employed by the Respondent at the material time as the Finance Director and acted as the Disciplinary Officer, during the disciplinary investigation into the Claimant.
8. Mr Bowers is a member of the Respondent's board and later became the CEO of the Respondent. Mr Bowers, investigated the Claimant during the disciplinary investigation.
9. The Tribunal had access to a bundle comprising 326 pages. The Tribunal were also provided with the following additional material,
 - a. Organisation chart for the Respondent,
 - b. Email of 2 February 2023,
 - c. Email of 21 April 2020,
 - d. Secarma profile for the Claimant,
 - e. Letter from the Claimant of 1 July 2019,
 - f. Email from Mr Ryland to the Claimant dated 9 July 2020.
10. Judgment was given orally by the Tribunal on Friday 10 February and these written reasons are provided at the request of the Respondent's counsel at the conclusion of the hearing.
11. At the conclusion of the hearing a remedy hearing was listed for Tuesday 4 April 2023 and directions were made in relation to that.

List of Issues

12. At a preliminary hearing on 10 January 2023, the Claimant set out the following alleged breaches by the Respondent:
 - a. Suspending the Claimant without first assessing the Claimant's response and reaction to the allegations; and
 - b. Suspending the Claimant without explaining the nature of the allegations against him; and
 - c. Dismissing the Claimant's direct reports by reason of redundancy on the day of his suspension without discussing this with the Claimant; and
 - d. Informing the Claimant's team members that their office was to close on the first day of the Claimant's suspension; and
 - e. Attempting to move the Claimant to a new company for that purpose after the Claimant had raised concerns; and
 - f. Ignoring concerns about Holly Grace Williams and promoting her to managing director after suspending the Claimant; and
 - g. Removing the Claimant's remaining direct reports and assigning these to Holly Grace Williams; and

- h. Informing the Claimant's direct reports that the Claimant would not be returning; and
- i. Failing appropriately to deal with the Claimant's grievance dated 16 July 2021 which included allegations of discrimination; and
- j. Actively seeking further complaints against the grievance from Holly Grace Williams in order to strengthen the reasons for the suspension; and
- k. Pre-determining the outcome of the grievance by way of arranging a meeting between the Respondent, its solicitor and the Claimant (without the Claimant's solicitor present) to discuss a termination agreement, which is improper conduct and therefore not within the ambit of section 111A of the Act; and
- l. Appointing an independent investigator to consider the complaints against the Claimant, but without investigating the complaints raised by the Claimant, despite agreement to the contrary; and
- m. The independent investigator initially refusing to consider the Claimant's grievance; and
- n. The independent investigator abandoning the investigation without informing the Claimant, believing that the Claimant had hacked her computer relying on representation to that effect by the Respondent; and the Respondent abandoning the external investigation and appointing the company officer to investigate the matter internally despite the fact that company officers involved in the allegation; and
- o. The Respondent dictating to the external investigator the response which it wished to give to the Claimant; and
- p. The Respondent agreeing that a fair investigation had not taken place and to reach out to the Claimant's witnesses, and agreeing that the grievance had not been investigated properly and agreeing to do so, but then reneging on that agreement; and
- q. Acting in breach of contract by failing to pay contractual sick pay due (the Claimant asserts that he was notified at the beginning of January 2021 that he would only receive SSP, which the respondent asserts was the appropriate payment under the relevant contract); and
- r. The Respondent issuing a final written warning to the claimant for the charges described as discrimination and harassment without conducting a hearing or interviewing any of the Claimant's witnesses; and
- s. The Respondent alleging that the claimant was "contemptuous" in the final written warning letter and categorising his explanations as "spurious" without ever having investigated them (This breach is said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

Findings of Fact

13. The Employment Tribunal made the following relevant findings of fact.

Employment of the Claimant

14. The Claimant was approached about joining the Respondent by Mr Lawrence Jones, the owner of the Respondent. The Claimant had reservations about

joining the Respondent, however, to reassure the Claimant, Mr Jones offered him a 2-year notice period and a position on the company board.

15. The Claimant accepted Mr Jones offer to join the Respondent as their Chief Technical Officer, a position the Claimant described as being the most senior position in the company other than the Chief Executive Officer (CEO). The Claimant understood that he had joined the company as an employed member of the Respondent's board.
16. This is confirmed by the letter of appointment from Mr Jones to the Claimant [p.45], which accompanied the contract of employment. [Pp.37-44].
17. In the letter of appointment Mr Jones states,

*"The role is to **join the board of directors** as CTO with the remit to build an office in Cheltenham along with inspiring the team and developing lots of exciting technology for us and our clients. By **joining the board** we remove the hurdle that you currently mentioned you face and we can prioritise the things that matter most.*

*I trust you can see from the package, that I value you as a senior leader and whilst I appreciate this is **your first board appointment**, I have every confidence that with the right mentoring from Neil Lathwood and my senior team at UKFast, you will do a tremendous job."*

[Emphasis Added]

18. It is quite clear from the three mentions in this letter that the understanding between the Claimant and Mr Jones, was that the Claimant was being appointed to the Respondent's board by Mr Jones. This was the Claimant's understanding throughout his employment with the Respondent.
19. Mr Bowers gave evidence to the Tribunal for the Respondent. He was appointed CEO of the Respondent on 14 July 2020. Prior to this date and at the time of the Claimant's appointment, he had been a member of the board, working part of his time for the Respondent, with the remainder being for another of Mr Jones' companies. Mr Bowers evidence to the Tribunal was that the Claimant was not and never had been a director of the Respondent, nor was he ever a board member of the Respondent company. However, at paragraph 4 of his witness statement, Mr Bowers acknowledges that the terms of the Claimant's appointment were set out in both the letter of appointment from Mr Jones and the contract of employment. The relevant section of the letter of appointment being set out above, regarding the Claimant being appointed to the board.
20. Mr Bowers was clearly honest in his evidence to the Tribunal that the Claimant was not a member of the board. However, from the letter of appointment it was clear that the intention of the owner Mr Jones was that the Claimant was to be appointed as a director and a member of the board. Mr Bowers' evidence was that the letter of appointment along with the contract of employment comprised the terms of the Claimant's appointment.

Events related to Ms Williams

21. On 6 February 2019, Ms Holly Williams joined the Respondent as a Principal Security Consultant in the Manchester office, reporting to her line manager Matthew Summers.
22. Mr Summers left the employment of the Respondent on 24 April 2019 and the Claimant became her Line Manager. Ms Williams gave evidence to the Tribunal that she felt that the Claimant was excluding her from the business, including holding frequent management meetings that she was neither informed about nor invited to. As a result of this she resigned to the Claimant on 22 May 2019.
23. The Claimant did not make the owner Mr Jones nor other board members aware of Ms Williams resignation.
24. A number of weeks later, Ms Williams informed the wider team at the Respondent that she had resigned. As a result, there was a meeting between Ms Williams, Mr Jones, Mrs Jones and Mr Bowers. At that time Mr Jones was CEO, his wife Gail Jones was a Non-Executive Director and Mr Bowers sat on the board providing HR support. The Claimant was not involved in nor aware of this meeting.
25. Ms Williams raised as a reason for her resignation that the Claimant had told her they were not filling the Director of Technical role that had been vacated by Matthew Summers resignation and which she had wished to be considered for.
26. Ms Williams was told at that meeting that the Claimant did not have the authority to make the decision not to fill the role and that he had acted inappropriately in not informing the Senior Management Team that she had resigned.
27. To avoid her resignation, Ms Williams was offered a promotion to Technical Director effective from 25 May 2019. She was told that her reporting line was changed so that she reported to Mr Jones and that she would be in charge of people and that the Claimant would be in charge of technology and technical innovation. However, this change in reporting line was never relayed to the Claimant.
28. Ms Williams said that the Claimant continued to exclude her from meetings and that he built walls around parts of the business to exclude her, which had a detrimental effect on her emotional state.
29. These actions by the Claimant are not inconsistent with his understanding of his role as a board member of the Respondent and that as Chief Technical Officer, second only to Mr Jones as CEO, he could decide whether the Technical Director post needed to be filled. The Tribunal would also not expect the CEO to be made aware of the departure of every subordinate team member.

30. On 26 June 2020, the Claimant was a party to an email to the owner Mr Jones from a group of employees identifying themselves as “The Core Management Team”. This was a title the group gave themselves and they were not a recognised management group within the Respondent. This email was sent by Mr Matthew Craven who was Head of Products under the Claimant. Mr Craven gave evidence to the Tribunal that the email was his attempt to avoid the repetition of a previous situation where many staff had left the Respondent because they were unhappy. The email followed a meeting with Mr Jones and the group, wherein they had raised their concerns about the direction the company was taking. The email suggested that Mr Jones appoint the Claimant to the vacant role of Managing Director, stating

“a position he is already fulfilling, in all but name and for which he has the unanimous support of the core management team. His long history of success in senior leadership roles at IRM, LogicallySecure and NCC, together with his clarity of vision and personal integrity, are the immeasurable qualities that give us the faith and confidence to follow him.”

“We do not believe that anyone else within, or outside of our business would be able to command this same level of trust and support...”

[Emphasis added]

31. Whilst the grouping was not recognised by the Respondent as a management group within the company, the email shows that a significant faction of employees within the business believed that the Claimant was in a position where he was effectively acting as the Managing Director already.

32. On the 6 July 2020, Ms Williams emailed Mr Ryland, the Finance Director to raise concerns about team cohesion, but she did not supply any personal concerns about the Claimant.

33. Subsequently, Ms Williams had a meeting with Mr Bowers on 9 July 2020 where she raised a verbal grievance about the Claimant. This culminated in an investigation meeting on 24 July 2020 [pp.98-110] between Ms Williams and Mr Bowers and a written complaint from Ms Williams on 27 July 2020 [p.118]. Reference has been made to a possible motive for the Claimant’s actions towards Ms Williams, that he maybe transphobic or misogynistic. Ms Williams was quite clear in her evidence to the Tribunal, that her concerns related to the Claimant’s behaviour which she perceived as bullying and harassment as opposed to any motivation the Claimant might have for such behaviour. She wanted the behaviours to stop. However, it is quite clear from the evidence that the Claimant was acting in a manner consistent with his understanding that he was a director of the Respondent. Whereas, Ms Williams believed that they were both at the same level. To Ms Williams, the actions of the Claimant to have meetings without her and to inform her that a role was not to be filled, would appear to be discriminatory. This view was only reinforced when she was told at the meeting with Mr Jones, Mrs Jones and Mr Bowers, that the Claimant did not have the authority to make these decisions. However, this is plainly counter to what Mr Jones had informed the Claimant in his letter of appointment. Therefore, the events with Ms

Williams stem directly from the failure of Mr Jones to inform others within the company that he had appointed the Claimant to the board as well as Mr Jones failure to in fact appoint the Claimant to the board, whilst allowing the Claimant to believe he was a member of the board.

34. On the 15 July 2020, a number of events took place, although the exact sequence is unclear. Firstly, Mr Bowers sent an email to all the Respondent's staff informing them that he was now the CEO and that he had appointed Ms Williams as acting Managing Director.
35. Secondly, Mr Bowers had a conversation with the Claimant informing him that he was being suspended on full pay. At 17:57hrs that day Mr Bowers sent the Claimant an email and an enclosed letter formally suspending the Claimant pending an investigation.
36. Thirdly, in her new role as acting Managing Director, Ms Williams informed employees that the Cheltenham office was being closed. The Respondent's evidence is that the Cheltenham office closed later in the November, however it is clear from the WhatsApp messages [Pp. 58-60] that by 20:21hrs on 15 July 2020, employees were discussing that they had been told by Ms Williams that the Cheltenham office was being closed and asking whether they should collect their personal belongings.
37. Fourthly, at 09:40hrs, Mr Fergus Crossley informs his colleagues in a WhatsApp group chat that he has been made redundant. At 10:24hrs, Nichola Desforges-Pothes also informs the group that they have also been made redundant. Both were signatories to the email of 26 June 2020 from the group identifying themselves as the 'Core Management Team.'
38. Just over a week later on 23 July 2020, Stephanie Skorge was also informed that they were being made redundant. Ms Skorge, was also a signatory to the email of 26 June 2020.
39. Following, Ms Williams complaints, Mr Bowers conducted an investigation, interviewing a number of members of staff including Mr Ryland [P.88-94], who would later become the disciplinary officer and decision maker for the investigation.
40. Following his suspension, the Claimant instructed solicitors and through his solicitors raised a formal grievance against Mr Bowers. The Claimant objected to Mr Bowers conducting the investigation and the parties agreed that an independent investigator would be appointed, with both subsequently agreeing on the appointment of TCM Group.
41. TCM Group conducted an investigation, speaking to various witnesses including those provided by the Claimant, who the Claimant had stated were unwilling to speak to the Respondent as part of the initial investigation conducted by Mr Bowers for fear of recriminations.
42. Unfortunately, the TCM investigator lost part of the investigation when transferring data to a new laptop. The TCM investigator asserted that she believed the Claimant was responsible for this and referred to him in correspondence as being a "highly paid hacker", and that it was more than a

- coincidence that the data was lost after receiving an email from the Claimant. The Respondent investigated the matter and found no evidence the laptop was hacked. However, TCM were unable to complete their investigation and the matter was handed back to the Respondent. TCM provided an incomplete report to the Respondent dated 14 November 2020 saying that they could not complete their report and suggesting either mediation or settlement to resolve the situation.
43. The Claimant was unaware that TCM were no longer investigating.
44. Mr Bowers appointed Mr Ryland to conduct the disciplinary meeting. Mr Ryland was the Finance Director. As stated above, as part of Mr Bowers initial investigation, he had interviewed Mr Ryland and this account was then provided to Mr Ryland in his new role as disciplinary officer. Mr Ryland was therefore both the decision maker and a witness to the same investigation.
45. Mr Ryland invited the Claimant to a disciplinary meeting which was later changed to 16 December 2020, to accommodate the Claimant's union representative. The Claimant attended this meeting.
46. Mr Ryland then wrote to the Claimant on 8 January 2021 to inform him of the outcome decision regarding Ms Williams complaint and that he was issuing the Claimant with a final written warning. Mr Ryland states that he had not determined the Claimant's grievance at this point, despite the Claimant saying that the grievances were related and should be determined together, and the Respondent having agreed to this approach.
47. Mr Ryland wrote to the Claimant on 20 January 2021 to provide full reasons for his decision and this letter also dealt with the Claimant's grievance.
48. The Claimant subsequently resigned with immediate effect on 1 February 2021.

The Law

Unlawful Deduction of Wages

49. The Claimant claims that the Respondent unlawfully deducted his wages, by paying him only statutory sick pay from 11 January 2021.
50. Sections 13(1) and 15(1) Employment Rights Act 1996 state that,

No deduction from a worker's wages may be made unless either:

- (a) It is required or permitted by a statutory or contractual provision; or*
(b) The worker has given his prior written consent to the deduction.

Constructive Unfair Dismissal

51. The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence.

52. Pursuant to sections 95(1)(c) and 98(4) of the Employment Rights Act 1996, in order to establish that they have been constructively dismissed, an employee must show the following,
- i) The employer has committed a repudiatory breach of contract. A repudiatory breach is a significant breach going to the root of the contract; and
 - ii) That they have left because of that breach; and
 - iii) They have not waived the breach and affirmed the contract.
53. A repudiatory breach is a significant breach going to the root of the contract (*Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221). It is not enough that the employer has behaved unreasonably.
54. In a case based on a breach of the implied term of mutual trust and confidence (*Malik v BCCI SA (in liq)* [1998] AC 20), it is not necessary for a tribunal to make a factual finding as to the employer's actual intention with regards to the contract, simply a finding as to whether objectively, the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence.
55. Every breach of the of the implied term of mutual trust and confidence is a repudiatory breach of contract (*Morrow v Safeway Stores* [2002] IRLR 9, *Ahmed v Amnesty International* [2009] ICR 1450).
56. In considering whether an employee has left because of the breach, it is an error of law for a tribunal to focus on the question of whether the repudiatory breach of contract was the main, predominant, or effective cause of the employee's resignation. The question is whether a repudiatory breach has played a part in the employee's resignation (*Wright v North Ayrshire Council* [2014] ICR 77).
57. An employee must not delay their resignation too long or do anything else which indicates acceptance of the changed basis of their employment.
58. In relying on a 'last straw' for resigning, this must contribute, however slightly, to the breach of trust and confidence (*Omilaju v Waltham Forest London Borough Council* [2004] EWCA Civ 1493). In *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA 978, Underhill LJ proposed that in an ordinary case of constructive dismissal tribunals should ask themselves the following questions:
- a. 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?
 - b. Has he or she affirmed the contract since that act?
 - c. If not, was that act (or omission) by itself a repudiatory breach of contract?
 - d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?
 - e. Did the employee resign in response (or partly in response) to that breach?

ACAS CODE

59. The ACAS Code sets out the following when an employer is deciding whether or not to suspend someone,

You should only consider suspension if you believe it's needed to protect any of the following:

- *the investigation – for example if you're concerned about someone damaging evidence or influencing witnesses*
- *the business – for example if there's a genuine risk to your customers, property or business interests*
- *other staff*
- *the person under investigation*

Once you have enough information, carefully consider what you've found to help decide whether suspension is a reasonable way of dealing with the situation. If it's not reasonable, there's a risk you could be breaking the employment contract, which could lead to legal action.

In all circumstances, you should check if there is an alternative to suspending someone.

60. These alternatives can include, changing shifts, working in a different part of the organisation, working from home, working from a different office, or to stop doing part of their job.

Conclusions

61. Applying the law to the findings of fact, the Tribunal came to the following conclusions on the list of issues for both the unlawful deduction from wages claim and the constructive dismissal claim.

The Claimant's Position Within the Company

62. The Respondent quite correctly raised in submissions that the Claimant has not pleaded as part of his reasons for concluding that there was a fundamental breach of trust and confidence, that he was never made a board member as per the agreement with Mr Jones. This is of course correct, as the Claimant was not aware of this until Mr Bowers gave oral evidence on oath to the Tribunal. Accordingly, whilst this could amount to a breach of trust and confidence, it cannot in this case, as the Claimant was unaware of it and it could not have formed part of his reasons for believing there was a fundamental breach of trust and confidence.

63. However, the actions of Mr Jones in not appointing the Claimant to the board as an employed director, are not without effect in this case. It is quite clear that the Claimant believed that he was a director of the Respondent and acted as such. That Mr Jones had not formalised the Claimant's appointment to the board, nor told others within the Respondent, such as Mr

Bowers upon his appointment as CEO that the Claimant was to be appointed as a member of the board, directly led to much of the tension that arose during the Claimant's employment.

64. The Claimant was recruited on the basis that he would be a director of the Respondent, however the Respondent failed to do that, yet allowed the Claimant to believe that this was in fact the case until the Tribunal hearing. This failure led the Claimant to believe and act as if he was a member of the board, because nothing was said to him to the contrary and indeed it is the express intention of both parties within the letter of appointment that he was to be a member of the board.
65. It is this failure which lies at the very heart of the Claimant's employment by the Respondent and leads to the subsequent events giving rise to his eventual resignation. It is the lens through which the events must be viewed and explains what subsequently transpired and the breakdown of the relationship. Whilst it cannot expressly be stated as the reason the Claimant resigned, the practical effects of the failure can and indeed are the events complained about by the Claimant. This failure's impact flavoured everything and cannot be extracted.
66. The Respondent submitted that the Claimant was in fact appointed to a technical board, subservient to the main board. We reject this submission, the letter of appointment makes no reference to, and we have been provided with no evidence of a technical board. The Respondent's organisation chart, shows only one board of directors and there is no subservient technical board. The letter of appointment refers only to '*the board*'. That is the board of the Respondent. That was the offer made by Mr Jones, accepted by the Claimant and the clear intention of both parties.
67. However, the question does arise as to how the Claimant could believe that he was a member of the board for almost two years, when this was not the correct position.
68. This appointment represented the Claimant's first board appointment, he was involved in weekly meetings with senior leaders at the Respondent and spoke regularly to the owner Mr Jones. The Claimant's inexperience as a board member was recognised by the owner Mr Jones, who in the appointment letter referred to the Claimant being provided with mentoring from others to assist him in adapting to this new role. The Claimant was naïve as to what the role entailed and did not have an understanding of what would constitute being a board member. Accordingly, it was reasonable for the Claimant to believe that he was in fact a member of the board, due to his management role. His subsequent actions in not filling vacancies and changing reporting lines were underpinned by and consistent with this understanding.

Unlawful Deduction from Wages Claim

69. The Claimant's contract of employment states,

You will be entitled to Company Sick Pay for a limited duration dependent on length of service followed by Statutory Sick Pay for

any period of absence due to sickness or injury subject to meeting the required qualifying conditions.

[Emphasis Added]

70. For the Claimant the qualifying conditions were that after 12 months of service, he was entitled to 12 weeks full pay followed by statutory sick pay for weeks 13-28.
71. The contract is clear, that this applies to “*any period of absence.*” There is no reference to any restrictions, such as a rolling 12-month period or to a calendar year. Giving the wording its ordinary meaning, for each period the Claimant is absent, he is entitled to 12 weeks full pay.
72. The Respondent does not construe the contract in this manner but cannot point to where the contract states that the sick pay provision should be applied differently, such as it being 12 weeks full pay within a rolling 12-month period. Although the Respondent stated that this was the case and acted on that basis.
73. The Claimant supplied the Respondent with fit notes for the period 21 July 2020 to 14 October 2020. This is the first period of sickness absence. He was paid at full pay for that period. The Claimant then produced a further fit note for the period from 11 January 2021. The Claimant continued to be paid full pay until 11 January 2021, when the Respondent reduced his pay to that of statutory sick pay as set out in the email from Mr Bowers of 21 January 2021 [P.300].
74. During the gap in the Claimant’s fit notes from the 14 October 2020 to 11 January 2021, the Respondent continued to pay the Claimant at full pay during this period. This was because the Claimant was suspended, but not off work due to sickness. The Respondent required the Claimant to attend meetings during this period, including the disciplinary meeting on 16 December 2020, which the Claimant attended. Plainly, the Claimant was available to work during this period had he have not been suspended. Therefore, the second period of absence from 11 January 2021 was a new period of absence and as per the contract the Claimant was entitled to full pay.
75. Accordingly, the Respondent unlawfully deducted the Claimant’s pay by only paying him statutory sick pay from 11 January 2021, when the Claimant was entitled to his full pay.
76. That the Respondent unlawfully deducted the Claimant’s pay is itself a repudiatory breach of the contract, which the Claimant was entitled to treat as destroying or damaging the relationship of trust and confidence.

Constructive Dismissal

Alleged Breaches not Amounting to a Repudiatory Breach of Contract

77. The Tribunal concluded that the following alleged breaches by the Respondent, did not amount to repudiatory breaches of the contract.

Suspending the Claimant without first assessing the Claimant's response and reaction to the allegations

78. Due to the serious nature of the allegations against the Claimant, specifically that he had bullied and harassed Mr Williams, it was not inappropriate for the Respondent to suspend the Claimant whilst those allegations were investigated.
79. The decision to suspend followed the ACAS code, in that the Respondent believed it needed to protect the investigation. As the allegations concerned harassment and bullying, the Claimant's senior position, may have prevented witnesses from coming forward to assist the investigation if he remained a visible presence within the business. Alternatives to suspension, such as the Claimant working from home, in a different part of the business or in a different office, were not practical alternatives. The allegations stemmed from the Claimant's conduct with others and there was no way for his senior role within the organisation to be managed, without him coming into contact with Ms Williams and potential witnesses. Part of the allegations also concerned the Claimant exceeding his authority with regard to Ms Williams and roles not being filled.
80. Mr Bowers was aware that the Claimant had not informed other senior managers of Ms Williams resignation, which Ms Williams had attributed to the Claimant's conduct. Therefore, there was a need also to protect the business whilst the investigation was carried out, in that the Claimant may not have informed other senior staff of important developments and leavers from the business.
81. The Claimant was suspended on full pay for this period and whilst it undoubtedly caused him stress and anxiety, the Respondent genuinely believed that the investigation could be completed swiftly and did not anticipate the delay that followed.

Suspending the Claimant without explaining the nature of the allegations against him

82. The letter of 15 July 2020 from Mr Bowers to the Claimant suspending him, clearly stated that,

"I write to inform you that a grievance has been raised against you in connection with allegations of Harrassment (sic) and Bullying. You have been identified as having been involved in this alleged conduct for a sustained period including but not exclusive to the last 12 months."

83. The letter makes clear that the allegations are harassment and bullying over a sustained period of more than a year. At this stage the Respondent did not have much more information to provide the Claimant as Ms Williams had only raised her verbal grievance with Mr Bowers on 9 July and the investigation meeting between Ms Williams and Mr Bowers did not take place until 24 July. It would not have been appropriate for the Respondent to have identified Ms Williams as being the subject of the harassment and bullying, as the investigation meeting had not yet taken place.

Attempting to move the Claimant to a new company after the Claimant had raised concerns

84. The Tribunal found that there was no evidence that the Respondent tried to move the Claimant to a new company. Indeed, at the conclusion of the process, the Respondent had provided the Claimant with a return to work date of 11 February 2021, for him to continue his employment with the Respondent.

Ignoring concerns about Holly Grace Williams and promoting her to managing director after suspending the Claimant

85. The Tribunal did not find any concerns about Ms Williams, which the Respondent could have ignored when promoting her to Managing Director. The Tribunal found Ms Williams to be a credible and fair witness, who reasonably raised a complaint in relation to the Claimant's actions which she perceived to amount to harassment and bullying of her by the Claimant. As discussed above, this stemmed from the Claimant taking actions he believed appropriate for what he understood as his role as an employed director of the Respondent. Whereas Ms Williams understood and was led to believe by the Respondent, that the Claimant was not senior to her.

Removing the Claimant's remaining direct reports and assigning these to Holly Grace Williams

86. Considering the Claimant's suspension, it was appropriate for the Respondent to reassign his direct reports to Ms Williams.

Informing the Claimant's direct reports that the Claimant would not be returning

87. The Tribunal did not find that the Respondent informed the Claimant's direct reports that he would not be returning. The Claimant's direct reports were assigned to Ms Williams during his suspension to ensure continuing management and supervision during this period.

Failing appropriately to deal with the Claimant's grievance dated 16 July 2020 which included allegations of discrimination

88. On 16 July 2020, the Claimant's solicitors wrote to Mr Bowers [Pp. 302-306]. Amongst the matters raised, the Claimant raised an allegation of bullying against Mr Bowers, specifically,

"We draw your attention to the emails sent to all staff yesterday at 09:30am replacing Our Client's direct reports. Clearly these posts have the effect of causing the maximum embarrassment to Our Client, and have indeed caused humiliation.

We remind you that according to your own policy, it is the impact on the individual that matters, and not the intention.

Turning to bullying, this is identified as acts that cause someone to suffer stress. Please see above. Not only has the undermining

nature of the communications done so, but also the act of suspending Our Client without providing any information about why, and in breach of your own policy in that no attempt to explore it informally was undertaken first. This is without reference to the fact that you have suspended in contravention of the ACAS guidance.

We also refer to other acts seen as bullying. The high handed supervision, without discussing or consulting on anything whether it be in Our Clients responsibility or directly related to Our Client.

It seems to us that the way Our Client has been treated in the first 12 hours of your tenure are the very definition of bullying and harassment.”

89. As referenced in the final paragraph above, the Claimant's allegations of harassment and bullying by Mr Bowers, relate to the actions taken by Mr Bowers upon his appointment as CEO of the Respondent. As stated above, in view of the serious nature of the allegations against the Claimant, the Tribunal found no issue with the Respondent's decision to suspend the Claimant. Consequently, there was a need for the Claimant's direct reports to be assigned to another manager.

90. These grievances were included as part of the scope of the external investigators investigation and were considered as part of Mr Ryland's disciplinary outcome. More specific criticisms of Mr Ryland's involvement are dealt with below.

Actively seeking further complaints against the grievance from Holly Grace Williams in order to strengthen the reasons for the suspension

91. Following the Claimant's suspension, the Respondent sought further information from Ms Williams at the meeting on 24 July 2020. It was not the case that the Respondent was seeking further complaints to strengthen the decision to suspend the Claimant but was in fact seeking to obtain further information from Ms Williams about her harassment and bullying investigation, as part of the investigation.

Pre-determining the outcome of the grievance by way of arranging a meeting between the Respondent, its solicitor and the Claimant (without the Claimant's solicitor present) to discuss a termination agreement, which is improper conduct and therefore not within the ambit of section 111A of the Act

92. Following advice and representation from the Claimant's solicitor, this meeting never took place. There is no evidence to support the Claimant's contention that the intention of the Respondent in having this meeting was that the outcome of the grievance was predetermined. Both Ms Williams' grievances and the Claimant's grievances were determined by Mr Ryland. The outcome of which was to issue the Claimant with a final written warning not to dismiss him. The implication that the meeting was arranged in order to engineer the Claimant's exit from the business, is not supported by the fact that at the end of the disciplinary process, the Claimant was not dismissed but instead issued a final warning.

Appointing an independent investigator to consider the complaints against the Claimant, but without investigating the complaints raised by the Claimant, despite agreement to the contrary

93. Mr Bower's emailed the Claimant on 13 October 2020 [P.139] to confirm that the independent investigation would consider his grievances. Mr Bower's wrote,

“As previously stated, your grievance is connected and overlaps with matters arising out of Holly's grievance and as such they will be dealt with concurrently by [The investigator] conducting all necessary investigations and interviews.”

94. Regrettably, the independent investigation was not completed as the investigator lost part of her investigation when transferring data to a new laptop.

95. However, the independent investigator spoke to the witnesses put forward by the Claimant and obtained evidence from them. From this it was quite clear that the independent investigator intended to investigate the Claimant's grievance as she was instructed to do by the Respondent in agreement with the Claimant. This information was provided to the Respondent to conclude their investigation with.

The independent investigator initially refusing to consider the Claimant's grievance

96. The independent investigator contacted the Claimant by email of 25 September 2020 [P.134], to introduce herself and to invite the Claimant to a meeting. This email does refer only to the allegations against the Claimant and does not refer to his grievance also being investigated.

97. The Claimant replied on 28 September 2020 [P.135] to seek clarification about whether his linked grievance was also being investigated.

98. The investigator sought clarification of this from the Respondent and Mr Bower's email of 13 October 2020, confirmed that the investigator was also to investigate the Claimant's linked grievances.

99. Accordingly, this issue was clarified in quick order and the investigator went onto consider the Claimant's linked grievance in her short-lived investigation.

The Respondent dictating to the external investigator the response which it wished to give to the Claimant

100. The Tribunal found no evidence that the Respondent dictated to the independent investigator the response to be given to the Claimant. The independent investigator sought clarification from the Respondent as to whether the scope of the investigation covered the Claimant's linked grievance, and it was confirmed to her that it did.

101. Further, when the investigator believed that her laptop had been hacked, discussions were had with the Respondent to investigate this and to try and retrieve the data.
102. However, the Respondent did not direct the investigator to respond to the Claimant in a particular way and indeed the Claimant was unaware that the independent investigation had been abandoned.

The Respondent agreeing that a fair investigation had not taken place and to reach out to the Claimant's witnesses, and agreeing that the grievance had not been investigated properly and agreeing to do so, but then renegeing on that agreement

103. The Respondent did not accept that a fair investigation had not taken place. Due to the Claimant's linked grievance, the Respondent agreed to an independent investigator being appointed to investigate. The issue of the independent investigation being abandoned and Mr Ryland's role as both disciplinary officer and witness to the investigation is discussed below in relation to repudiatory breaches of contract.

Repudiatory Breaches of Contract

104. The Tribunal concluded that the following acts by the Respondent as set out by the Claimant at the Case Management hearing on 10 January 2023, amounted to conduct likely to destroy or damage the relationship of trust and confidence and amounted to a repudiatory breach of contract.
- (a) Dismissing the Claimant's direct reports by reason of redundancy on the day of his suspension without discussing this with the Claimant;
 - (b) Informing the Claimant's team members that their office was to close on the first day of the Claimant's suspension;
 - (c) Acting in breach of contract by failing to pay contractual sick pay due (the Claimant asserts that he was notified at the beginning of January 2021 that he would only receive SSP, which the Respondent asserts was the appropriate payment under the relevant contract);
 - (d) The independent investigator abandoning the investigation without informing the Claimant, believing that the Claimant had hacked her computer relying on representation to that effect by the Respondent; and the Respondent abandoning the external investigation and appointing the company officer to investigate the matter internally despite the fact that company officers involved in the allegation;
 - (e) The Respondent issuing a final written warning to the Claimant for the charges described as discrimination and harassment without conducting a hearing or interviewing any of the Claimant's witnesses;
 - (f) The Respondent alleging that the Claimant was "contemptuous" in the final written warning letter and categorising his explanations as "spurious" without ever having investigated them (This breach is said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).
105. The letter of appointment makes clear that the Claimant was recruited by Mr Jones to build the Cheltenham office and the team based there.

106. It can be no coincidence that on the day the Claimant was suspended, the staff at the Cheltenham office were informed by Ms Williams who had herself only been appointed as Acting Managing Director that same day, that the Cheltenham Office was being closed and that staff were being made redundant. Such decisions would not have been taken without significant prior consideration and with regard to redundancy should have been undertaken with proper consultation. It cannot have been the case that the decision to close the Cheltenham office was taken on the same day and only minutes after Ms Williams was made Acting Managing Director. These were decisions, that the Tribunal would have expected the Claimant to have been a party to prior to his suspension, as the person responsible for building the Cheltenham office.
107. From Mr Jones letter of appointment of 9 October 2018, the Claimant would quite rightly understand that he was a director of the company responsible for the Cheltenham office and the team there. Prior to his suspension, conversations must have been had about the closure of the office and the redundancy process that he was neither party to nor aware of, thereby excluding him from the central part of his role, which he only became aware about following his suspension. That these actions to close the office he was recruited to build up and to make redundant the staff he was responsible for, without any reference to him prior to his suspension, undermined his role.
108. Further, that both Mr Bowers and Ms Williams as CEO and Acting Managing Director respectively, were unaware that the owner Mr Jones had appointed the Claimant as a board member and had acted without him as a board member, plainly demonstrates that Mr Jones had not made the Claimant a member of the board as he explicitly states in the letter of 9 October 2018 and that they simply determined to act without consultation with him.
109. All of this clearly stems from Mr Jones failure to appoint the Claimant to the board as per the appointment letter and to make the relevant people aware that the Claimant had been recruited to join the board.
110. It is apparent from the evidence that Mr Jones communication to various parties led to confusion and conflicts in the scope and remit of employees in various roles.
111. This failure to consult the Claimant about the closure of the Cheltenham office and the redundancy of staff that he was responsible for, undermined him and his role and are of themselves so serious that they amount to a fundamental breach of trust and confidence. That the Claimant was unaware until Mr Bowers gave his evidence to the Tribunal that the Claimant was not in fact on the board, only serves to demonstrate the lack of communication by Mr Jones to the senior leaders of his business, thereby creating a dysfunctional business. To be clear, Mr Jones failure to appoint the Claimant to the board as per the appointment letter and/or to communicate the appointment to other senior leaders within the Respondent, explains the background giving rise to the breach. But, the fundamental breach of trust and confidence arises from the failure to consult the Claimant about the

closure of the Cheltenham office and the redundancy of the staff employed there.

112. It is through no fault of either the Claimant or the Respondent, that the investigation went on longer than was anticipated and both parties had sought a swift resolution. Due to the grievances raised by both Ms Williams and the Claimant, both parties agreed to the instruction of an outside investigator. It is through no fault of either party that, that investigator did not complete her report due to the loss of her data.
113. However, when the Respondent then recommenced the investigation themselves, it was not appropriate for Mr Ryland to take on the role of disciplinary officer as he was himself a witness to the investigation and he was supplied with his own account by Mr Bowers, to view impartially. No doubt Mr Ryland would have tried to have put his involvement to the back of his mind when taking his decision, however, that is very difficult to do and, in any event, gives rise to the impression of bias and unfairness. The process cannot possibly have been fair and could not be seen to be fair by the Claimant, where Mr Ryland was both a witness to the investigation and the ultimate arbitrator of that evidence in determining sanction.
114. The Respondent said that they needed to instruct Mr Ryland as they are a small company with approximately 35 staff and because of the Claimant's grievance there was no-one else available. However, the company is part of a group of companies, and it would be perfectly possible for a manager or director from another group company, unconnected to either grievance, to have performed the role of disciplinary officer, thereby ensuring independence in the decision. Indeed, it was proposed that any appeal of the decision could be heard by Gail Jones [P292], if she was sufficiently independent to have heard the appeal, then she could have been the disciplinary officer. The Claimant was entitled to treat the appointment of Mr Ryland as the disciplinary officer when he was also a witness to the investigation, as a fundamental breach of trust and confidence.
115. The Respondent also failed to make the Claimant aware that the external investigation had been abandoned and his first knowledge of this was when he received the letter of 27 November 2020 [p242], inviting him to the disciplinary meeting with Mr Rylands and stating that the investigation was now concluded. The letter also states that the Claimant had failed to participate in the first investigation by the company, when the Respondent had accepted the need for an external investigation due to the Claimant's related grievances against Mr Bowers.
116. The letter goes on to accuse the Claimant of failing to participate in a meaningful way with the abandoned second investigation, when he had in fact supplied the details of his witnesses, who had provided accounts to the investigation and the investigation was abandoned only when the Claimant was falsely accused of hacking her computer by the investigator.
117. The accusations that the Claimant failed to participate in the first investigation and then failed to participate in a meaningful way with the second investigation are both incorrect.

118. Mr Ryland then reached his decision with regard to the Claimant without determining the Claimant's own grievance, saying in the letter of 8 January 2021 [P283] wherein he confirmed his decision to issue the Claimant with a Final Written Warning, that

In relation to your own complaints, I am not yet in a position to confirm the outcome of certain elements of your grievance as you did not submit this to me until after the meeting...and I have to separate and distinguish between what aspects of your grievance amount to counter allegations and defences to the disciplinary allegations and which are unrelated grievances.

119. Mr Ryland, therefore explicitly states that he determined the outcome without considering matters raised by the Claimant as his defence. It was also agreed by both parties that the investigation would consider both Ms Williams and the Claimant's grievances as they were related, Mr Rylands has therefore failed to do that.

120. Mr Ryland then wrote to the Claimant on 20 January 2021 [Pp 285-292], providing his reasons for his decision. There are a number of issues with this letter, not least the tone of it. Mr Ryland states that the Claimant and his solicitor have raised what he considers to have been unreasonable and repeated objections to the investigation being conducted internally. However, as we have discussed Mr Ryland was both witness and decision maker to the investigation. Thereby demonstrating some of the very reasonable concerns previously raised by the Claimant and his solicitor about the investigation being conducted internally. In any event, the Respondent had accepted the need for an independent investigator.

121. Further, as set out above in relation to the related unlawful deduction of wages claim, that the Respondent unlawfully deducted the Claimant's pay is itself a repudiatory breach of the contract, which the Claimant was entitled to treat as destroying or damaging the relationship of trust and confidence.

Reason For the Claimant's Resignation

122. The cumulative effective of the following,

- a. The Respondent making staff aware on the day that the Claimant was suspended that the Cheltenham office he was responsible for would be closing and that members of staff were being made redundant,
- b. the failure to communicate that the Respondent had abandoned the external investigation,
- c. That the third investigation had concluded without the Claimant being given opportunity to present his evidence to the disciplinary officer, Mr Ryland,
- d. That Mr Ryland stated that he had made the decision to issue a final written warning without considering aspects of the Claimant's defence, and
- e. That the Respondent failed to pay the Claimant the full pay he was entitled to for the second period of sickness absence from 11 January 2021,

Led to the Claimant deciding that the contemptuous tone of the letter of 20 January 2021 amounted to the final straw.

123. The actions of the Respondent, to close the Cheltenham office and make staff redundant on the day the Claimant was suspended, having not involved the Claimant in those discussions previously when the letter of appointment makes clear that the Claimant's remit was to build up the Cheltenham office that was now closing, is in itself a repudiatory breach of contract. That the Claimant without any discussion would then be returning to a business some 7 months after being suspended, with his office closed and a number of his subordinates no longer employed, meant that he could in effect not return to that role. Neither the letters of 8 nor 20 January 2021, set out what role he would be returning to and how that would be managed.

124. As such he was entitled to treat those breaches as a repudiatory breach of contract and leave because of them. The final straw being the letter of 20 January 2021. This formed part of a course of conduct by the Respondent amounting to a breach of the implied term of trust and confidence amounting to a repudiatory breach of the contract.

Did the Claimant Affirm the Breach?

125. The Claimant did not delay in resigning on 2 February 2021, following the letter of 20 January 2021 which amounted to the final straw.

126. The Claimant did not affirm the breaches of contract by the Respondent as he waited until the outcome of the disciplinary investigation before resigning, there being a course of conduct by the Respondent which when viewed cumulatively amounted to a breach of the implied term of trust and confidence.

Claimant's Conduct

127. We find that the Claimant's conduct in his dealings with Ms Williams, in the honest belief that he was a board member and his conduct throughout the investigation were reasonable and that he did not contribute to the dismissal in anyway.

128. For all these reasons the Claimant was unfairly dismissed by way of constructive dismissal.

Employment Judge Millard
Date: 17 March 2023

Judgment & reasons sent to the Parties on March 22 2023

For the Tribunal Office