



# EMPLOYMENT TRIBUNALS

**Claimant:** Kevin Pretlove

**Respondent:** Network Rail Infrastructure Limited

**Heard at:** Southampton

**On:** 6 and 7 March 2022

**Before:** Employment Judge Dawson,

## **Appearances**

For the claimant: Mr Renton, counsel

For the respondent: Ms Crew, counsel.

# REASONS

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

## **Introduction and issues**

1. The claimant presented his claim to this Tribunal on 4 May 2022. He brings a claim only of constructive unfair dismissal. His brief particulars of claim refer to failing to support him as a victim but instead choosing to treat him as an instigator and leaving his line manager in situ forcing him to choose between returning to work under the line manager or relocating from his workplace and colleagues.
2. The parties have helpfully agreed a list of issues as follows:
  - 1 Constructive unfair dismissal

1.1 Was the Claimant dismissed in accordance with section 95(1)(c) of the Employment Rights Act 1996 (ERA)? Specifically:

(a) Did the Respondent breach either an express or an implied term of the Claimant's contract of employment as alleged?

(i) The Claimant relies (in general) on the implied term of trust and confidence and (in particular) on the term that the employer will give his employee reasonable support to ensure that the employee can carry out his job without disruption or harassment from fellow workers.

(b) If so, was any such breach a repudiatory breach of contract?

(c) Did the Claimant waive any such alleged breach of contract?

(d) Did the Claimant resign as a result of the alleged breach of contract?

1.2 The breach of contract alleged and relied on by the Claimant is:

The failure of the Respondent's Mr Scott to do or seriously consider each or any of the following: (i) discipline (i.e. warn) Mr Archibald, or (ii) require him to attend a course or other training, so as to signal that a change was needed in Mr Archibald's conduct; or (iii) restrict his day-to-day contacts with Mr Pretlove, (iv) or permanently vary Mr Pretlove's line management relationships; or (v) move Mr Archibald to an alternative work site, or (vi) move the Claimant permanently to an alternative work site, so as to keep his contacts with Mr Archibald to a minimum, following the upholding of his grievance, and/or following Mr Archibald's final derogatory remark about Mr Pretlove, on 11 February 2022.

1.3 If the Employment Tribunal finds that the Claimant was constructively dismissed, what was the reason or the principal reason for the Claimant's dismissal? In particular, was the Claimant dismissed for some other substantial reason of a kind such as to justify the dismissal of the Claimant within the meaning of section 98(1)(b) of the ERA?

1.4 If the Employment Tribunal finds that the Claimant was constructively dismissed, was the Claimant's dismissal fair within the meaning of section 98(4) of the ERA? In particular, did the Respondent act reasonably in treating the reason for dismissal as sufficient for dismissing the Claimant?

2 Remedy

2.1 What financial loss, if any, has the Claimant suffered as a result of any alleged unfair dismissal?

2.2 If the Claimant has suffered financial loss, by what percentage should any basic and/or compensation awarded be reduced (having regard to those factors set out in section 122 and section 123 ERA)? In particular:

(a) If the Respondent failed to follow a fair procedure, can the Respondent show that that following a fair procedure would have made no difference to the decision to dismiss the Claimant?

(b) To what extent did the Claimant contribute to their own dismissal?

(c) To what extent has the Claimant mitigated their losses?

2.3 Did the Respondent and the Claimant comply with the ACAS Code of Practice on disciplinary and grievance procedures (the Code)? [The Claimant says that the Respondent breached paragraph 4 of the Code by failing to act consistently with the grievance outcome].

2.4 If not, was such failure to follow the Code reasonable in all the circumstances? If not, would it be just and equitable for the Tribunal to increase or reduce any award?

3. At the outset of the hearing Ms Crew, for the respondent, confirmed that it was no longer seeking to assert that there was a potentially fair reason for the dismissal if I were to find that the claimant was dismissed and it was agreed with the parties that in the liability part of the hearing I would also deal with questions of Polkey and contributory fault.

#### Findings of Fact

4. The claimant has been employed since June 2020 as a railway signaller at the Bristol Panel Signal Box. He had worked with a colleague, Mr Archibald for seventeen years. In August 2020, Mr Archibald became the Bristol local Operations Manager and therefore the Line Manager for the claimant.
5. The claimant says that he had been the subject of Mr Archibald's banter and put down since he had worked with him, but that the banter had become more serious upon Mr Archibald becoming the claimant's Line Manager. He says that the banter became serious criticisms to his face and behind his back which started to affect him personally.
6. In addition, from 2019, the claimant had become the local RMT Union representative and the claimant says that there were issues, from Mr Archibald's point of view, about his status as that representative. The claimant says that his concerns were supported by Lucy Elliot, a colleague of his who kept a diary which, to some extent, has appeared in the papers before me.

7. The claimant's witness statement refers to a number of particular incidents which he complains about.
  - a. Firstly, an occasion when Mr Archibald verbally abused him in a public area, claiming that he was not a bona fide trade union rep.
  - b. Secondly, when there had been a line side fire at the Worle junction, Mr Archibald was criticising the claimant behind his back and thereafter spoke to the claimant about the incident, criticising his behaviour and indicating that the claimant would be placed on some sort of special measures because of his behaviour.
  - c. Thirdly, an incident in May 2021, where the claimant suggested it would be useful to have refresher training in respect of the Convective Rainfall Action Tool which, he said, led to Mr Archibald becoming extremely angry and accusing the claimant of not being able to make an emergency call and telling colleagues that the claimant's competence to operate certain equipment was questionable.
  - d. Fourthly, in the way that the claimant was called to Mr Archibald's office to discuss the T3 engineering form.
8. The claimant says that those matters caused him frustration, stress and anxiety and he went off sick on 14 June 2021.
9. Having considered the evidence I find there is evidence that Mr Archibald was, at least, speaking about the claimant behind his back.
  - a. In the grievance witness meeting, which was carried out with Lucy Elliot on 29 October, she told the person who she was meeting with that she was concerned about the claimant's competencies being openly talked about in public by Mr Archibald and pointed out that no other line manager had an issue with the claimant (page 118 of the bundle).
  - b. Lucy Elliot's diary entry for 21 May 2021 records that Mr Archibald said that the claimant did not understand line clear verification and there were other things that he did not understand and on 7 June 2021, that the claimant did not know how receive and broadcast emergency calls on the GSMR (page 120 of the bundle).
  - c. At page 149 is a document from Mr Thacker who writes that Mr Archibald could direct his jokes or sarcasm towards a certain person and sometimes more often than not that was the claimant. Mr Thacker noted that bullying can take many forms and sometimes the bully may not even know that what they are doing is affecting somebody. He says that the last straw for the claimant was when the claimant took on the the LDC rep position for Bristol panel and Mr Archibald never took him seriously and never answered the emails that the claimant sent to him.

10. I find, therefore, that there was an objective basis for the concerns raised by the claimant. The claimant raised a grievance on 21 June 2021 in respect of that behaviour.
11. The claimant had a meeting with Mr Scott in July 2021 who was at that time the Operations Manager for the West Country North. He was also to act as the claimant's Welfare Manager because the claimant had raised a grievance against his line manager Mr Archibald.
12. The claimant says that at some point Mr Scott told him that even if the claimant went ahead with his grievance Mr Archibald would not be going anywhere. The claimant says that Mr Scott told him that on the telephone when his wife was present and his evidence is supported by Mr Dixon who was the claimant's representative throughout the grievance process. Mr Dixon says that on at least three occasions Mr Scott told him that nothing would happen to Mr Archibald and so that the claimant was wasting his time pursuing a grievance.
13. The evidence of Mr Dixon and the claimant is consistent with a comment which was made in the welfare meeting which took place on 20 January 2022 where the claimant, Mr Dixon and Mr Scott were present. The minutes at page 192 of the bundle record the claimant stating:

"The outcome was already predetermined by you saying it was unlikely that Rob would go anywhere"

To which Mr Scott replied

"I was merely setting expectations but I had no influence over FM's outcome".

14. In answer to my questions, Mr Scott stated that he did not use the words that Rob would not go anywhere but the claimant may have got that impression when Mr Scott had given the claimant an explanation from his own knowledge as to how the grievance process would work. I find that Mr Scott did say something to the effect that Mr Archibald would not be moved following any grievance being raised which is why the claimant gained that impression and the impression that raising a grievance would be a waste of time.
15. The claimant's grievance was then investigated by Mr Mellon. Around that time the role of welfare manager was changed from Mr Scott's role to Ms Rosser's role. Having investigated the matter Mr Mellon sent an outcome letter to the claimant dated 1 December 2021 which appears at page 165 of the bundle. That included a number of statements some of which I will repeat now. Although in doing so I acknowledge that is always a danger of taking certain passages out of context and the whole document must be read for its full effect.
16. In respect of the claimant's complaint about being confronted in respect of his trade union activities, Mr Mellon concluded:

“This is a valid complaint as Kevin’s line manger any discussions should have taken place in an office environment behind closed doors and carried out in a controlled manner.”

17. In respect of the claimant’s complaint about the behaviour following the Worle junction fire, Mr Mellon concluded “on top of the previous incident again we see questioning of Kevin’s ability and putting him in a position to question his own abilities which would have further implications in the final incidents”.
18. In respect of the issue in relation to Convective Rainfall Action tool (which in this outcome letter was referred to as the CATS briefing), Mr Mellon concluded:

“The issue with Kevin’s use of the GSMR equipment in this case it is unwarranted that Rob questions competence when it is considered that the GSMR test kit has been out of action for well over a year”

and went on

“The fact Kevin is asking for refresher training should be applauded not highlighted as a failing during the meeting. Rob also advised me that GSMR equipment has been lost at Parkway training school will need to be followed up. This will again have a detrimental affect on Kevin’s confidence and mental health.”

19. The letter then set out a section headed Conclusion Reached. In the course of a lengthy paragraph Mr Mellon stated.

“As we can clearly see from his Sig ops 4 result of 92.97% of which Rob mentioned during his investigation meeting was a similar result to his own could be construed as undermining his knowledge and skills and possibly seen as a form of indirect bullying”

20. He went on later in the paragraph to say:

“During the investigatory meeting it became apparent that whilst Rob remained reasonably composed through the interview it became clear he did have an issue with Keven over certain matters. First in respect of his competence which can be seen as uncalled for. Secondly, Kevin’s desire to spend as much free time at his caravan in Weymouth as he possibly could... Thirdly his rubbishing of whether Kevin’s mental stressed was valid and that maybe his actions were the cause of much of Kevin’s upset and because as he personally did not have access to view the doctor’s paperwork as far as he was concerned, he was not in his view legitimately ill.”

21. Under the heading “What Action is to be taken to resolve this issue” he wrote:

“Realistically, this can only be done through proper workplace mediation done in a controlled manner as per our HR guidelines until those relationships are rebuilt with Rob Archibald, HR and union representation should be present at the mediation to provide support to all parties. The reason for this is that Kevin has suffered mentally from this case and if Network Rail is

serious about the important of staff mental health, we should rectify this issue.”

22. He went on to say:

“If this cannot be concluded properly this grievance will need to be progressed within our disciplinary process.”

23. The claimant did not appeal that outcome and the matter was referred for workplace mediation as appears from page 170 of the bundle.

24. On 9 December 2021, the claimant returned to work at Bishton Crossing with a phased return to work and workplace mediation took place on 29 December 2021. The mediation was unsuccessful, the claimant found the mediation stressful and when he was required to meet with Mr Archibald on a face to face basis, he was unable to do so.

25. On 29 December 2021, as is apparent from page 179 of the bundle, Mr Singer, the practitioner who had been carrying out mediation, wrote to Ms Rosser and Mr Mellor stating that “Kevin had said no to the face to face meeting at this time due to feeling very anxious and unsafe.” He then conveyed a message from the claimant asking that the claimant be able to have a meeting with certain people -Kerry Elton, Timothy Ball and Mike Gallop. He said if that meeting was to happen and Mr Pretlove would reconsider a meeting with Mr Archibald.

26. Following that a welfare meeting took place between the claimant and Mr Scott on 20 January 2022. It is apparent that by that point, notwithstanding the change of welfare officer role in November 2021, Mr Scott was the manager on behalf of the respondent trying to resolve the situation and in his own statement Mr Scott describes himself as holding a welfare meeting with Mr Pretlove on 20 January attended by Ms Rosser and Mr Dixon who was still representing the claimant.

27. Having read the minutes of that meeting as a whole, I find that the claimant was saying that mediation was not going to work. Mr Scott on the other hand was saying that he wanted mediation to work. I highlight the following exchanges but again the whole set of minutes need to be read for their full flavour.

KP I felt like I had to attempt mediation otherwise I would be seen as being difficult, seems you have an agenda with Rob. Mediation has proved I can't be in a room with Rob. I can't change his mentality, he has something against me, no respect as a person, signaller or rep.

...

NS Are you expecting Rob to be dismissed?

KP I'm expecting him to be held accountable.

NS We have followed the grievance process, and while your grievance was upheld, the

recommendation was mediation. How do you want to move forward?

KP John Mellon's (JM) grievance investigation report conclusion said all I wanted was to go back to being all chummy. It was taken out of context, I said I wanted to go back to a time before Rob was a LOM and not have to

deal with him in the future. The report also said if mediation was unsuccessful, then it would go to disciplinary.

NS Is that what you want?

KP I want to be able to go back to work, do my job and not have to worry or look over my shoulder.

NS You wouldn't be made aware if it progressed to a disciplinary or not due to our policies, nor any outcome of the disciplinary, you need to consider what you want to do if Rob stays at Bristol.

KP Even a slap on his wrist, least Rob is made aware and then it's on his record. I'm continuing to be penalised; loss of earnings, I'm getting really annoyed – annoyed with rosters, 42hr week reduced to 35.

NS We have had conversations with Rob and he is aware of how he has made you feel, hence he wants to attempt mediation with you. Have you discussed with Craig Simmonds about hours?

KP I don't mind going to Bishton, but still need to be on the Bristol roster.

...

NS Are you coming back to Bristol? The recommendation was mediation and you haven't completed that process yet, if finishing mediation is not option, going forward are you back at Bristol?

WD He can't go back and work with Rob

...

KP You expect me to go back to work with Rob, he will say sorry, not compensated for losses, and he wouldn't be disciplined?

NS Under GDPR, we can't tell you if Rob is disciplined and the outcome, it's between Rob and the company, compensation is a no, the idea is mediation to get you back to work and rebuild your relationship.

..

NS We would hope that would be resolved through mediation. If not going to do mediation, we have reached the end of the line of the outcome of the grievance. So next step would be expecting you back at work at Bristol. What is clear,

28. What is surprising is that at this stage and even until the Friday before this hearing, Mr Scott had not seen the grievance outcome report. He was told, he says, that he could not see it because of GDPR. I do not understand why GDPR would have that effect and I was not addressed on it by counsel.
29. However, it is clear from his evidence, that not having seen the report Mr Scott was unaware of the recommendation in respect of a disciplinary process. His evidence was that a disciplinary process would only be appropriate if Mr Archibald had refused to engage in mediation but that is not what was said in the outcome letter. What Mr Mellon said was that if mediation cannot be properly concluded, the grievance would need to be progressed within the disciplinary process.
30. In the extracts which I have set out, it is clear that Mr Scott was discounting any suggestion that the disciplinary process would be progressed. Twice he said that the claimant would not be told even if Mr Archibald was disciplined and he expressly said that if the parties were not going to do mediation then that would be the end of the line of the outcome of the grievance.



31. Matters were left that the claimant had not expressly said that he would not mediate, but had made clear that he could not be in the same room as Mr Archibald which meant that any mediation would go the same way as the one from the previous December.
32. On 11 February 2022 there was a further OH report which recommended that the claimant should work in a role which would not require him to have contact with his manager.
33. There is evidence in the bundle that on 11 February 2022, there was a discussion between Ms Elliot and Mr Archibald where they were talking about the resignation of Cressida Dick. Ms Elliot stated that the Met have lower standards than Avon and Somerset Constabulary. Mr Archibald then said that the claimant was in the Met before moving to Bath. Ms Elliot felt that the remark showed no respect for the claimant. (I was told by the claimant that, in fact, he had worked for Avon and Somerset but not the Met). The claimant was told about the comment and concluded that even though mediation had taken place Mr Archibald was still bringing his name up in a derogatory context and he felt that the only solution would be for Mr Archibald to be subjected to a disciplinary process.
34. There was then a further welfare meeting on 23 February 2022 with the same people present. At this meeting there appears to have been a brief suggestion by Mr Scott that in order to move forward there should be consideration of other locations of Gloucester or Newport to which the claimant replied "why do I have to move?" and to that Mr Scott replied "we have been through this the answer will be the same mediation or we need a different resolution." The claimant replied "what would mediation achieve? Lip service as far as I am concerned." Then the claimant pointed out that the outcome was mediation and if mediation was not successful then disciplinary. Mr Scott replied "we are going round in circles. We are trying to support you on returning to work but it is your choice not to come to Bristol." At which point the claimant said "it's not that I won't, I can't. It would make me uncomfortable that I can't do the job. I can't guarantee his behaviour has changed."
35. Again it is clear that Mr Scott had no intention of progressing any disciplinary process in circumstances where the mediation was not happening.
36. There was a discussion about a temporary change of line manager but it was made clear that that would only be on an interim basis and then at one point Mr Scott said "we have spoken about Bristol and not seeing Rob and that I could not guarantee that. There would need to be a way eventually Rob comes back into your life if you continue working at Bristol."
37. There was then a suggestion by Mr Dixon about the claimant coming back to Bristol on a phased return to work basis. The claimant would not manage or see Rob. Then the parties would have a meeting to sort it out. Mr Scott said the respondent was willing to give that a go and after four weeks there would be a meeting which was less formal than mediation but there would be a mediator present.

38. The claimant agreed to that and returned to work at the Bristol panel on 9 March 2022. He expected he would encounter Mr Archibald though on 15 March. He said that he attended the night shifts but he could not escape the feeling that Mr Archibald may walk into the panel at any point and he felt constantly on edge. He described that as the days passed and his encounter with Mr Archibald got closer, his levels of anxiety and stress continued to rise to the point where he just could not face him. He felt that the only options available to him were to relocate away from his colleagues or work with Mr Archibald with the constant fear he would be looking for excuses to continue to pick on him. He felt that he had no other choice but to resign and did so on the 15 March 2022.

### The Law

39. I accept the proposition advanced by the claimant that in order for an employee to be able to succeed in a claim of constructive dismissal four threshold conditions must be met. Firstly, a breach of contract. Secondly, the breach must be sufficiently serious to justify the claimant's resignation. Thirdly, the breach must cause the resignation and fourthly, the claimant cannot waive the breach (*Western Excavation v Sharp*).
40. I also accept the point made by the Counsel for the respondent that in *Western Excavation v Sharp* it was pointed out that the claimant must make his mind up soon after the conduct of which he complains, if he continues for any length of time, without leaving he will lose his right to treat himself as discharged.
41. Both parties referred to the case of *Leeds Dental v Rose* which holds that the test of seriousness is an objective one, focussing on the conduct and asking whether an employee could be expected to put up with it. The subjective intention of the respondent employer is not relevant.
42. When considering whether there has been a repudiatory breach *Tullett Prebon Plc v BGC Brokers LP* confirmed the orthodox test that a repudiatory breach is one in which the contract-breaker has shown an intention objectively judged to abandon and altogether refuse to perform the contract. Maurice Kay LJ endorsed the following legal test at paragraph 20: 'whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.'
43. In terms of what the implied term of trust and confidence is, it was held in *Malik* that it is that the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust .
44. In this case the parties have agreed, at least, that the Malik term includes something akin to a further duty that the employer will render reasonable support to an employee to ensure that the employee can carry out the duties of his job without disruption and harassment by fellow workers. Mr Renton goes further and says that duty stands alone as an implied term within the contract as well, as being an incident of the implied term of trust and confidence.

Conclusions

45. The starting point is, in my judgment, to start with paragraph 1.2 of the list of issues to consider the alleged breaches of contract relied upon by the claimant.
46. The breaches that are set out in 1.2 are alleged to be breaches of the implied term of trust and confidence and, to the extent that it is different, the implied term to support an employee to ensure that they can carry out their duties without disruption or harassment.
47. The first question, therefore, is whether there was a failure by Mr Scott to seriously consider disciplining (ie warning) Mr Archibald. I conclude that there was such a failure. Mr Scott consistently dismissed the suggestion of a disciplinary process and clearly had no intention of going through one against Mr Archibald. His view was that unless Mr Archibald was shown to be refusing to engage in the mediation, such a course of action was simply not appropriate. In adopting that view he did not behave in accordance with the suggestion in the grievance outcome letter.
48. Although Mr Mellon has given evidence to the effect that he intended that the disciplinary route would only be exercised if Mr Archibald refused to engage in the mediation process, that is not what he has written in his report. His outcome report, read as a whole conveys that Mr Archibald has been at fault in the way in which he has dealt with the claimant, that the claimant's mental health has been affected as a result and that there should be a solution. The initial attempt at a solution should be mediation. However, if that was not successful, then in order to resolve the situation a disciplinary process would be necessary. Possibly because the respondent chose not to show that report to Mr Scott, he only ever engaged in the first part of the suggested solution, namely mediation.
49. The next question is whether that failure amounted to a breach of the implied term of trust and confidence; in my judgment it did. The claimant had raised a grievance because of the way he was being treated. His grievance had been upheld. There were findings that Mr Archibald had not treated the claimant properly. The grievance outcome set out what the way forward should be. The respondent then refused to follow its own grievance outcome. In circumstances where the claimant had justifiable grounds for believing that he was the subject of, at least, indirect bullying, the failure by the respondent then to follow its own grievance outcome was bound to seriously damage the relationship of trust and confidence in the employer. Thus in this respect there was I find a repudiatory breach of contract by the respondent.
50. The next assertion of a breach of contract is that there was a failure by the respondent to require Mr Archibald to attend a course of training so as to signal that a change was needed in Mr Archibald's conduct. Again, it is the case that there was such a failure. Again therefore, I must consider whether that amounts either to a breach of the implied term of trust and confidence or, to the extent it is alleged as separate, the term to give reasonable support

to employees to ensure that they can carry out their job without disruption or harassment.

51. I do not think that the respondent was in breach of contract in this respect. In my judgment the point had been reached where the respondent should properly have concluded that a mediation could not be properly concluded. Thus, the point had been reached where the disciplinary process should be invoked. If the respondent had gone down the disciplinary process it is possible that Mr Archibald would have escaped with no sanction at all. It is equally possible that the sanction may have been a warning or some other sanction. Whether Mr Archibald should be retrained would depend upon the misconduct which was found proved against him in the disciplinary process and the views of the decision-maker within that process. In my judgment to say that the point had been reached where Mr Archibald should have been retrained is to go too far.
52. I consider that the same is to be said about the allegation that it was a breach of contract not to restrict the claimant's day-to-day contact with Mr Archibald. Whilst there had been a finding that Mr Archibald had behaved inappropriately, had the respondent gone down the disciplinary route it may have concluded that the way to deal with such inappropriate behaviour was simply to warn Mr Archibald. It may have decided that it was not necessary for there to be limitation on a day-to-day contact basis.
53. Moreover, I am not satisfied on the evidence which I have seen that such a limitation of contact was necessary. Whilst the behaviour of Mr Archibald was inappropriate, there is clear evidence, which was given by Ms Elliot who was supportive of the claimant, that his behaviour had changed and there is evidence that he had not fully appreciated the way his actions were being perceived. If the disciplinary process had been engaged it may not have been necessary to limit contact between Mr Pretlove and Mr Archibald on a permanent basis. The respondent was willing to restrict day-to-day contact on a temporary basis until matters were resolved by mediation. I am not satisfied that the point had been reached where it was necessary for the respondent to do more than that.
54. The same points can be made about the assertion that Mr Archibald should have been moved to an alternative work site and the suggestion that the claimant's line management relationship should have changed or he should have been moved to an alternative site. Those suggestions would have required significant changes to the respondent's normal structure. It may have been necessary, at some point, for a role to be created to allow the claimant to move but in my judgment on the basis of the situation as it existed between January and March 2022, it was not a breach of contract for the respondent to refuse to do those things. The respondent should have been progressing the disciplinary process and seeing whether that would resolve matters.
55. I must then consider whether the claimant resigned in response to the breach which I have found proved. I find that he did resign because the respondent was dismissing out of hand the suggestion that a disciplinary process should be followed in respect of Mr Archibald.

56. The next question is whether the claimant waived any such breach. I do not think that he did. Even if it was apparent to him in January 2022 that the respondent would not consider disciplining Mr Archibald, it is not unreasonable for a person who had worked for as long as the claimant had and who was at the stage of career that the claimant was at to seek to persuade the respondent to change its mind and/or to take time to think about his position. The claimant was still asking the respondent to honour the grievance outcome in the February meeting, he was not in any way suggesting that he was affirming the respondent's conduct. The delay is only two months and in my judgment that is not sufficient to say on the facts of this case that there was affirmation.
57. I must then consider whether the respondent can show that following a fair procedure would have made no difference to the outcome. In a constructive dismissal case, I consider that I should ask, what would have happened if the respondent had not been in repudiatory breach of contract.
58. If the respondent had not been in repudiatory breach of contract the disciplinary process would have been carried out. Given the evidence that Mr Archibald had already begun to change his management style, I consider that it is unlikely that any action would have been taken against Mr Archibald apart from a warning.
59. Having seen the way in which the claimant had firmed up his position on whether he could work with Mr Archibald in January and February, I think there is a significant chance that the claimant would still not have returned to work if Mr Archibald was only given a warning. Mr Pretlove was taking a view that mediation would not be successful because Mr Archibald could not be trusted to change, even if he said that he had changed. I think that it is quite likely that the claimant would have taken the view that he could not trust Mr Archibald to change even if Mr Archibald was given a warning.
60. Doing the best I can, and this exercise of the Tribunal's judgment is inevitably a matter of speculation, I think there is a thirty percent chance that the claimant would still have resigned even if the respondent had gone down the disciplinary route because he would have felt that he could not trust Mr Archibald to have changed. It would take some time to go down the disciplinary route and therefore there may have been a delay in Mr Pretlove's resignation.
61. I must turn, then, to the question of contributory fault. The claimant was not criticised in the grievance report for any of his conduct. The question of contributory fault only really bites on the question of whether the claimant should be criticised for not taking a more active part in the mediation.
62. The difficulty with that argument, from the respondent's point of view, is that it does not challenge that the claimant was finding mediation stressful and anxiety inducing. There is no doubt that the claimant had been signed off for a considerable period and having to face somebody that you believe has abused you, across a table in a mediation, is a daunting process. Whilst the claimant was the one who stopped the mediation progressing, I do not believe that it could be said he was culpable in that respect. He was suffering from stress and I do not think he can be criticised for not having the strength to

face Mr Archibald across a table and therefore I do not reduce compensation on that basis.

63. In those circumstances my conclusions are that the claimant was constructively dismissed that there is a thirty percent chance that he would have resigned at a future point in any event. That point would have been the date when the disciplinary process was concluded. I have not heard evidence on when that would have been and, if necessary, will do so at the remedy hearing.

Employment Judge Dawson  
Date: 24 March 2023

Reasons sent to the Parties: 04 April 2023

FOR THE TRIBUNAL OFFICE

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