EMPLOYMENT TRIBUNALS

Claimant: Joszef Katona

Respondent: Westfield Europe Ltd

Heard at: **London Central Employment Tribunal (via CVP)**

On: **27, 28, 29 and 30 March 2023**

Before: **Employment Judge Bunting**

Appearances

For the Claimant: Ms S Bewley, counsel
For the Respondent: Mr S Brittenden, counsel

RESERVED JUDGMENT

1. The claimant's claim that he was unfairly dismissed is dismissed.

REASONS

INTRODUCTION

1. By a claim form received by the Employment Tribunal on 9 March 2022, following a period of early conciliation between 16 November 2021 and 27 December 2021, the Claimant (Joszef Katona) submitted a claim of unfair dismissal against the Respondent (Westfield Europe Limited – 'Westfield').

2. In a schedule of loss, the Claimant claims compensation in the sum of £7,072.00 as a basic award and £74,406.00 as a compensatory award.

3. In detailed 'Grounds of Resistance' annexed to the ET3 response form, the Respondent gave detailed grounds of opposition. In brief, it is said that the Claimant voluntarily resigned.

4. The case was heard over four days by CVP. It became clear during the course of the fourth day that there was not sufficient time to conclude the evidence and submissions and for an oral judgment to be given. For that reason, judgement was reserved.

EVIDENCE

5. In coming to my decision, I had the following evidence :

   a) The written and oral evidence of Ann-Charlotte Ladous, Amanda Beattie and Dawn Thwaites on behalf of the Respondent
   b) The written and oral evidence of the Claimant
   c) An agreed bundle of documents of 482 pages
   d) A 6 page Opening Note prepared by Ms Bewler

6. In addition, both lawyers provided detailed, and helpful, written and oral submissions after the evidence.

THE CLAIM

7. The Claimant was employed by the respondent from 03 May 2011 to 26 November 2021, firstly as an Office Manager, and then subsequently as a Project Manager (in 2015) and latterly, from 2018, as Car Parking Manager.

8. At the start of the hearing the issues were discussed. It was agreed that (as per Ms Bewley's note prepared over the weekend prior to the hearing) the issues were:

   8.1. Was the respondent in fundamental breach of the claimant's contract of employment?

8.2. If so, were any or all of the breaches affirmed by the claimant before his resignation?

8.3. If so, was there a 'last straw' act (or omission), which had not been affirmed, and thus entitling the claimant to resign?

8.4. Did the claimant resign, wholly or partially, in response to any such breach of contract and/or last straw?

9. At that point it appeared that the breaches of contract were as per para 27 ET1. However, Ms Bewley produced a supplementary note that widened, or potentially widened, the basis of claim. Following submissions from both sides, and having regard to, in particular, to the Employment Tribunal Rules of Procedure and **Tydeman v Oyster Yachts Ltd [2022] EAT 115**, I gave a ruling in relation to that on 28 March 2023. In this I permitted all matters to be pursued, other than in relation to mental health in what is para 10(i) below.

10. As a result, the fundamental breaches relied upon in 8.1 above, were broken down in a separate list of issues, were as follows:
    a. unduly reprimanding the Claimant for taking agreed time off and making a false and misleading record of a conversation between the Claimant and Katie Wyle in September 2021;
    b. exposing the Claimant to the risk of injury by not properly assessing his workstation and/or training him to create a safe work station at home or in the office or providing a safe environment to work in (para 14, 15);
    c. Placing and/or singling out the Claimant for being placed on two days furlough from November 2020 and January 2021 when this had a significant impact on the Claimant's ability to fulfill his role fully and his holiday and finances (paras 11, 12 & 13)
    d. failing to reasonably take into account the impact of the Claimant's mental and physical health from December 2020 in decisions around workload, contact and performance (para 23);
    e. placing the Claimant on furlough and seeking to expand his duties at the same time without reasonable consultation and/or the manner in which

this was done and without the Claimant's consent from January 2021 until February 2021 (paras 16, 17 & 18);

f. refusing the Claimant's position that he was not consenting to be furloughed 2 days a week if undertaking further tasks from January 2021 until HR intervened on 9 February 2021 where furlough days were still imposed at one day per week. (para 18)
g. not paying the Claimant his full bonus and/or only 50% of the same when he had reached his performance target when others who had reached their targets were paid more (para 19) – this was either an implied term of the contract itself or an unreasonable exercise of discretion;
h. putting the Claimant on an improvement plan in response to alleged shortcomings in performance which had not been raised as performance concerns previously (paras 20, 21 and 23);
i. failing to take into account and/or explore the impact of furlough, workload, and physical health prior to and in placing the Claimant on a PIP (paras 21, 22, 23);
j. telling the Claimant in the meeting on 28 May 2021 that "if he was looking for a pay cheque he wasn't getting one" (para 22)
k. KW and/or ACL unfairly targeting the Claimant and/or attempting to push him out of his job (para 23)
l. refusal or lack of attempt to extend the Claimant's sick pay between 31 May 2021 and 4 August 2021 (para 24)
m. The failure to handle the grievance and grievance appeal in a full and fair, open and non-biased way (para 26 & 26).

11. The claimant's case is that the above matters, whether considered individually or taken together, amounted to a fundamental breach of the implied term of trust and confidence and/or the implied duty to provide a safe working environment, such that they entitled the claimant to terminate his contract without notice.

THE LAW

<u>Legislation</u>

12. Any employee (such as this claimant) who has accrued the relevant period of employment (two years in his case) has the right under s94 Employment Rights Act 1996 not to be unfairly dismissed.

13. A 'dismissal' is defined in s95, as far as is relevant, as follows:

> **Circumstances in which an employee is dismissed.**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) —
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Caselaw

14. There was no dispute as to the relevant law. Both parties agree that the claimant resigned. However, the claimant claims that he had been constructively dismissed. He resigned following, he says, a series of acts or omissions by the respondent which, taken together, in whole or in part, amounted to a breach of the implied term of trust and confidence (and, where set out in relation to the particular issue, the implied term to provide a safe working environment.

15. In **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**, Lord Denning said (in relation to previous legislation, but applicable to this case):

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

16. The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in **Malik v BCCI; Mahmud v BCCI 1997 1 IRLR 462** where Lord Steyn said that an employer shall not:

"...without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

17. The burden of proving the absence of a reasonable and proper cause lies on the claimant - **RDF Media Group plc v Clements 2008 IRLR 207**. I also remind myself that a constructive dismissal is not, without more, unfair. However, in this case the respondent does not seek to argue that this would be the case.

18. In order to establish that there was a constructive dismissal it must be shown that:
    a. there was a fundamental breach of contract on the part of the employer,
    b. the employer's breach caused the employee to resign,
    c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

19. In **Frenkel Topping Limited v King UKEAT/0106/15/LA** it was reiterated that the bar is a relatively high one. The strength of the implied term is shown by the fact that it is only breached if the employer demonstrates objectively by its behaviour that it is abandoning and altogether refusing to perform the contract.

20. Although every case is fact specific, it is not sufficient that the respondent was acting in an unreasonable manner - **BG plc v O'Brien [2001] IRLR 496**.

'Last straw'

21. In this case the claimant alleges that all the points raised above are fundamental breaches of the contract. Alternatively, he alleges that even if that is incorrect then the whole series of events taken together amount to a fundamental breach.

22. In those circumstances, then the 'last straw' does not have to be a repudiatory breach of the contract - **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**, upholding **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** where it was said that :

    "19. … The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do

not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20. I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. *Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so.* If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle. [Emphasis supplied]"

23. In **Kaur**, Underhill LJ confirmed the above, and also said:

42. First, the "last straw doctrine" is relevant only to cases where the repudiation relied on by the employee takes the form of a cumulative breach of the kind

described in the passages which Dyson LJ quotes from *Harvey* and from the judgment of Glidewell LJ in *Lewis.* It does not, obviously, have any application to a case where the repudiation consists of a one-off serious breach of contract. I make this point because it was sometimes used in this case as if it were simply a synonym for "the act of repudiation". I think it will conduce to clear thinking if representatives and tribunals start from the position that the ultimate issue is always whether the employee has resigned in response to a repudiatory breach of contract, and refer to "the last straw" only where the doctrine has a role to play.

43. Secondly, the italicised sentences in para. 21 of Dyson LJ's judgment are concerned with the issue of affirmation. That issue may arise in the context of a cumulative breach because in many such cases the employer's conduct will have crossed the *Malik* threshold at some earlier point than that at which the employee finally resigns; and, on ordinary principles, if he or she does not resign promptly at that point but "soldiers on" they will be held to have affirmed the contract. However the point which Dyson LJ is making in these sentences is that if the conduct in question is continued by a further act or acts, in response to which the employee *does* resign, he or she can still rely on the totality of the conduct in order to establish a breach of the *Malik* term. Glidewell LJ had already made substantially the same point in *Lewis* (see p. 170 A-C):

> "This case raises another issue of principle which, so far as I can ascertain, has not yet been considered by this court. If the employer is in breach of an express term of a contract of employment, of such seriousness that the employee would be justified in leaving and claiming constructive dismissal, but the employee does not leave and accepts the altered terms of employment; and if subsequently a series of actions by the employer might constitute together a breach of the implied obligation of trust and confidence; is the employee then entitled to treat the original action by the employer which was a breach of the express terms of the contract as a part - the start - of the series of actions which, taken together with the employer's other actions, might cumulatively amount to a breach of the implied terms? In my judgment the answer to this question is clearly 'yes'."

Although Glidewell LJ is there referring to a situation where the earlier act is a repudiatory breach of an express term, the same logic necessarily applies to a series of earlier acts which cumulatively cross the *Malik* threshold; and that is what Dyson LJ holds. I will refer to the employer's further act in such a case as "reviving" the employee's right to terminate: I will have to consider below a possible objection to that terminology, but, as will appear, I regard it as perfectly apt.

44. It is obvious why the position as stated in *Omilaju* is right in principle. In a case of this kind the repudiatory nature of the employer's conduct consists precisely in the accumulation of a series of acts and omissions which are not repudiatory if viewed in isolation. It would be extraordinary if, by failing to object at the first moment that the conduct reached the *Malik* threshold, the employee lost the right ever to rely on all conduct up to that point: when the threshold had been reached would of course be a matter of assessment in every case, and no-one would know whether the employee had jumped either too early or too late until a tribunal ruled. Such a situation would be both unfair and unworkable.

45. Thirdly, even when correctly used in the context of a cumulative breach, there are two theoretically distinct legal effects to which the "last straw" label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the *Malik* threshold: in such a case the breaking of the camel's back[4] consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so. I have thought it right to spell out this theoretical distinction because Lewis J does so in his judgment in *Addenbrooke* which I discuss below; but I am bound to say that I do not think that it is of practical significance in the usual case. If the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the *Omilaju* test), it should not normally matter whether it had crossed the *Malik* threshold at some earlier stage: even if

it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so.

46. Fourthly, the "last straw" image may in some cases not be wholly apt. At the risk of labouring the obvious, the point made by the proverb is that the additional weight that renders the load too heavy may be quite small in itself. Although that point is valuable in the legal context, and is the particular point discussed in *Omilaju*, it will not arise in every cumulative breach case. There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect).

Affirmation of the contract

24. If, after a fundamental breach, the claimant, by his behaviour, shows that he intends the contract to continue then he will be taken to have affirmed the contract.

25. However, not all instances of delay constitute an affirmation and so the fact that in response to a breach somebody does not ‘down tools and walk out’ immediately is not fatal to a claim. It is a question of fact in each case.

Reason for resignation

26. It does not matter if there were other reasons for the resignation, provided that he did resign as a response to the fundamental breach - **Wright v North Ayrshire Council [2014] IRLR 4**.

FACTUAL BACKGROUND

27. The Respondent is a company that operates a number of premises including the Westfield Shopping Centre in White City and, as featured in the evidence, the Centre in Stratford.

28. The Claimant started working for the Respondent on 13 May 2011. It was agreed that he remained employed until he resigned on 20 September 2021.

29. There are a number of different issues that need to be considered, and I shall start by setting out more details of the claim, and the respective position of the parties.

Holiday and TOIL – September 2019

30. In September 2019 the claimant was working as the Car Parking Manager. Among his colleagues was Katie Wyle who, whilst they were personal friends, from 2018 was his line manager. However, in the summer of 2019 she had been promoted to being General Manager and so responsibility for managing the claimant was to pass to Jacinta Rowsell.

31. The claimant's case is that he had arranged a holiday between 13 and 18 September 2019 which he would go on with his husband, as well as Ms Wyle. This would be to celebrate the Claimant's one year wedding anniversary, as well as Ms Wyle's 40th birthday. However, Ms Wyle fell pregnant, and so could not go.

32. Despite being aware of the dates, Ms Wyle took exception to the claimant unilaterally putting his holiday dates in the calendar, especially as the holiday overlapped with that of Matt Coppings (the Claimant's number 2). The claimant states that he acted in a professional way whilst Ms Wyle's overreacted to this for no good reason (not least because she was no longer his line manager).

33. This set off an acrimonious period of time and chain of events that led, in the claimant's mind, to the rest of the incidents aired at the tribunal.

34. Following this, Ms Wyle went on maternity leave in January 2020 and the claimant continued to be line managed by Ms Rowsell until she went on sick leave from October 2020 to March 2021. At that point, the claimant was again line managed by Ms Wyle.

Use of furlough – November 2020

35. There were two periods of furlough in issue in the claim. Although these were elided in the claim form, it appears to me that these are distinct, and I consider them separately.

36. In November 2020 a 'flexi-furlough' scheme was introduced by the Government due to the worsening of the Covid-19 pandemic.

37. It was agreed that the claimant was furloughed for two days a week November 2020. He states that he was targeted to be furloughed for two days rather than one by Ms Wyle for reasons other than genuine business need.

38. The consequence of this is that he suffered financial loss due to the way that the furlough scheme operated and, because he only had three days a week to work which was not sufficient time.

39. The claimant's complaint is that the respondent unreasonably furloughed him for two days a week when others at his level were furloughed for either zero or one day.

Claimant's workstation

40. In December 2020 the claimant suffered a trapped nerve that caused pain and numbness in his right arm, and which required hospital treatment. As a result, he was off work for four days, and was engaged in physiotherapy until 18 May 2021.

41. Whilst he believes that this injury was caused by his increased workload, in fairness, he accepts that there is no evidence of this. However, he states that the claimant acted unreasonably by failing to carry out a Home Working Risk Assessment until 8 January 2021. Even then there was a further delay until March 2021 in providing him with the necessary work equipment.

42. The respondent did not dispute that the claimant had a trapped nerve, nor that he had attended hospital. However, it was disputed that this was caused by the respondent.

43. The respondent's case is that it. took reasonable steps to undertake the necessary assessments. In assessing what was reasonable, the context of the Covid-19 pandemic must be taken into account.

Use of furlough / Workload – starting January 2021

44. The furlough scheme was again introduced in January 2021. Again, the claimant was furloughed for two days a week.

45. His case is that it was not until 7 January 2021 that Ms Wyle, still then his line manager, finally 'checked in' on him, and offered to expand his duties. The claimant was happy with that, provided he was given sufficient time. His complaint is that the respondent was simply getting him to do more work in less time. Against this, the respondent relies on the fact that there was an express agreement to vary the terms of his contract for him to be furloughed for two days. For that reason, there could be no complaint on his part.

46. On 19 January 2021 responsibility for line managing the claimant transferred to Ann-Charlotte Ladous. He felt that she kept him furloughed for two days a week whilst pushing through the extra work. He complains that she was unrealistic in her view that three days was sufficient time to complete the work that he had to do and, having just taken over managing him, failed to investigate what it was that his job entailed.

47. On 9 February 2021 the claimant was in fact put back down to one day furlough.

48. There is a significant dispute between the parties as to what conversations there were about the claimant's performance in the period from February to May 2021. The claimant says that there was none, for the simple reason that there could be no complaint about his work other than the fact that he was overworked.

49. The respondent's position is that Ms Ladous, in their regular meetings, would regularly raise issues of concerns that his performance was lagging behind where it should be. During these meetings the claimant was very defensive and, on one occasion, aggressive.

Bonus Pay – February 2021

50. In February 2021 the claimant has his annual performance review for the year 2020 which gave him a 'solid' rating.

51. On 8 February 2021 the claimant received a letter (p428) stating that his bonus for that year (which related to the previous year) was £7,441. This would amount to 10% of his salary. His complaint is that there was no reason that he did not get the 20% that he would have expected.

52. The respondent's position is that the performance review was looking backwards over the last year. Further, the 'solid' rating is the 3rd out of 4th levels, and so the level of bonus was appropriate. In any event, the bonus envelope was significantly reduced that year because of the impact of Covid-19.

Performance Improvement Plan

53. The claimant was made subject to a Performance Improvement Plan ('PIP') on 28 May 2021. The procedure for this is set out in the document entitled 'Performance Management Policy & Procedure' (page 443).

54. As an overview, this states the following:
    - consideration must be given to the reason for any poor performance, including whether this is down to a lack of 'skill' or 'will'.
    - There should be informal discussions with the employee to ascertain any reasons for the poor performance and agree a course of action. The policy states that 'these informal discussions should always take place before any formal Performance Management Process is initiated.
    - Only when concerns remain after the employee has had a reasonable opportunity to address them should a formal performance management process occur.
    - The employee should be formally invited to this meeting, with the letter inviting them identifying what performance issues are to be discussed and the employees right to be accompanied by a representative. This should also indicate that a formal warning may be issued if performance does not improve. Any documents that may be referred to should be included.

55. This meeting should be formally minuted, usually by someone from HR being in attendance. The aim of the meeting is to create (jointly) an action plan going forward within a defined review period, although that point was not reached in this case. For completeness, at the end of that period, there will be a second review (which would again be a formal meeting) with the outcome depending on the progress made.

56. There are several complaints raised under this heading. Firstly, it is said that the respondent failed to take account of the impact of the complainant's workload (especially caused by furlough) and his physical health before taking this course of action.

57. Secondly, it is said that the respondent failed to give any warning over any alleged issues prior to issuing the PIP.

58. Thirdly, and in an overarching way, the claimant says that there was nothing wrong with his performance and no need for this at all. The purpose of the PIP implemented by Ms Wyle and Ms Ladous was an attempt to force him out of his job.

59. The respondent's position is that Ms Ladous had lain the groundwork for the PIP in the months leading up to it, and she only took this step because the claimant was underperforming.

60. It states that this was a genuine attempt to address a genuine problem, and done in good faith. The claimant had been employed for ten years and they wished to retain him rather than see him leave, if that were possible.

<u>The 'cheque comment' at the meeting of 28 May 2021</u>

61. The claimant states that at the meeting of 28 May 2021 (the 'PIP' meeting) the respondent (through Ms Ladous) made a remark to the effect of '*if [you are] looking for a pay cheque [you aren't] going to get one'*.

62. The respondent denied that this was said.

Sick pay (May- June 2021)

63. Following the meeting on 28 May 2021 it is not in dispute that the claimant went on sick leave between 31 May and 4 August 2021.

64. The respondent operates a 'Sickness Absence Policy and Procedure' (page 451) that sets out the policy that will be followed. This provides that an employee on sick leave will normally be paid Company Sick Pay for 20 days, although it is stated that 'Company Sick Pay is paid at the discretion of the Company, and is not contractual'.

65. This policy further states that 'The Company will consider each absence case on its own merits and as such there may be occasions where Company sick pay may be withheld or extended. Any decision to extend Company sick pay will be at the sole discretion of the Company, and Line Managers must consult HR before making a decision'.

66. It can be seen that this provides both a discretion to the respondent to pay less than 20 days in some cases. In others, the respondent can pay for longer.

67. The complaint is that the respondent wrongly failed to exercise its discretion to extend the period of time for which the claimant would be paid company sick pay, especially as, he states, him going off on sick leave was caused by the respondent's own actions putting him on the PIP.

68. The respondent states that the company was simply exercising its policy, and there is nothing to suggest that this was done in an inappropriate way.

Mishandling of the grievance procedure

69. The claimant initiated the respondent's grievance procedure on 4 August 2021 when he returned from sick leave.

70. The respondent operates a policy which is set out in 'Grievance Policy and Procedure' (page 199). The procedure is that the once a formal grievance is made, this will be handled by a Grievance Manger (normally the Line Manager, unless that would be inappropriate) and a meeting arranged.

71. This also states that:

> The meeting will be held as soon as reasonably possible. The Company will need time to consider the grievance and carry out any necessary investigations. The investigation may involve interviewing and taking statements from the employee and any witnesses, and/or reviewing relevant documents. The employee will be advised within a reasonable time frame if there is a delay and why.
>
> The employee must take all reasonable steps to attend the meeting to enable the Company to bring the matter to a satisfactory conclusion as quickly as possible. The meeting may be rearranged in the event that either the employee or their companion is unable to attend (as set out at 'Employee Representative' below). **The meeting may be adjourned if the Grievance Manager considers it necessary to investigate further.**
>
> **Grievance outcome**
>
> Once the meeting has been held, the employee will be informed of the Grievance Manager's decision and findings in writing. The grievance outcome letter will usually be provided within 5 working days of the grievance meeting (or its final day, if it was adjourned). The employee will be notified of their right to appeal against the decision if dissatisfied with the outcome.

72. Following that, an employee that is dissatisfied with the outcome can be appealed:

> **Step 3: Appeal**
>
> If the employee wishes to appeal against the decision:
>
> - The outcome letter will detail who the appeal should be sent to (this will usually be HR). The appeal letter should be sent within 5 working days of receipt of the grievance outcome letter and should clearly state the detailed grounds for appeal.
> - The employee will be invited to attend a further formal meeting, organised by HR, which will be held with an independent manager as the Appeal Manager, normally within 5 working days of the request. Where possible, the Appeal Manager will be a more senior manager than the Grievance Manager.

- The employee will have the right to be accompanied by a work colleague or Trade Union official or Trade Union representative at the meeting, who shall have the same rights as at the grievance meeting
- The employee must take all reasonable steps to attend the meeting to enable the Company to bring the matter to a satisfactory conclusion as quickly as possible.

After the appeal meeting the Appeal Manager will write to the employee and inform them of their decision, usually, within 5 working days of the appeal hearing. This decision is final and will conclude the matter. The employee will have no further right to appeal.

73. The Grievance Manager appointed was Dawn Thwaites, a Shared Services Manager. She spoke to the claimant on 11 August 2021 and, following that, to Ms Wyle, Ms Rowsell and Ms Ladous on 12 and 13 August 2021.

74. She concluded the investigation and, in a decision letter dated 17 August 2021 (although the Claimant states that he did not receive this until 24 August 2021), she dismissed the claimant's grievance in whole, although she recommended that he have an open discussion with the others to resolve matters and move forwards.

75. The claimant exercised his right to appeal in a letter dated 24 August 2022. This appeal was conducted by Amanda Beattie, the UK General Counsel, who was appointed the next day.

76. She met the claimant on 27 August 2021 and conducted an interview with him. She also interviewed Ms Wyle the same day and, on 31 August 2021, with Ms Lanous. Following that, she met with Krzysztof Makarewicz on 2 September 2021, whilst Maria Lovesey (from the respondent's HR department) interviewed Philip Jones and Shaun Turnbull on 6 September 2021.

77. Ms Beattie gave her conclusion on 6 September 2021. In this, she dismissed the grievance, although she did suggest that the claimant be repaid the 3 days of extra holiday that he had bought in February 2020.

78. Complaint is made of the whole approach taken by the respondent. In particular it is said that both Ms Thwaites and Ms Beattie failed to approach the case with an open mind, failed to investigate the case properly and was too quick to accept the statements of 'management' to the detriment of the claimant. As a result, the investigation was fundamentally flawed.

FINDINGS OF FACT

79. I turn to my findings of fact. I have set out above the evidence that I heard. As well as a large bundle of documents there was oral evidence over two and a half days. I make it clear that I have taken all of this into account, even if I have not referred to each and every piece of evidence in my conclusion.

Holiday and TOIL – September 2019

80. The claimant was clear in his evidence as to the background, and there was no challenge to his account of the friendship with Ms Wyle, nor did the respondent call live evidence from anyone who could speak to what was happening at the time.

81. The claimant's account of the background is supported by the emails that were sent (pages 68-71). They confirm that Ms Wyle was planning on going on holiday with the claimant. Although they were work colleagues, the emails are amicable in tone, and consistent with a friendship.

82. It can be seen that this had changed by 12 September 2019 (page 74). The email exchange there, and in the days afterwards, are clearly frosty and formal, and in stark contrast to before. This email exchange also sets out both parties' contemporaneous account of what had been said. Having heard from the claimant, I accept that he genuinely believed that he was, or would be, authorised to take the holiday when he did.

83. The claimant emailed Ms Wyle on 25 September 2019 (page 79) to say that '*Whilst I would like this conversation to be on record with HR, I hope that we can draw a line under this incident and move on it*'.

84. Following the email exchange, the claimant spoke to Louise Haffenden from HR (the Whatsapp messages arranging this meeting are at pages 465-467 bundle). I accept that Ms Wyle was advised by Ms Haffenden to not put any record on file, and that Ms Heffenden advised the claimant to raise a grievance, which he did not.

85. The upshot was that there was no formal action taken by either party. The last email of relevance is from 01 October 2019 (page 90) where Ms Haffenden tells a colleague 'Please can you file all this emails trail and attachment to [the claimant's] file'. The attachments referred to there being the record of conversation and the claimant's response.

86. The claimant was aware of this, as can be seen in his grievance letter of 04 August 2021 (page 192) where he says that, in relation to the above issue, '*you will already be aware of the context of this as [Ms Wyle] put a record of conversation on my HR file, the record was inaccurate, so I responded and asked that this too be put on file*'.

87. At that point in October 2019, it appeared that the claimant and Ms Wyle were still arranging to have a meeting in order to resolve any tension between them and 'draw a line under this and move forward'.

88. Following that, matters 'petered out' until, in December 2019, the Claimant contacts Ms Wyle to 'put the matter to bed', which is a course of action that she agreed to (page 97).

89. The way that the claimant's case is pleaded is that Ms Wyle 'unduly reprimanded' the claimant. When considering the email of 12 September 2019 at 09:53 (page 74), it appears to me to be a proper one, although its tone may have caused some puzzlement in the claimant given the shift in tone and their previous friendship. Ms Wyle was entitled to raise these concerns given that the procedure about booking holidays appeared not to have followed.

90. Further, I find that the email of 12:22 on 18 September 2019 (page 76) is also a proper one. Ms Wyle' explanation of why she was involved, that Ms Rowsell had only recently started as the claimant's line manager, is also a reasonable one.

91. The other part of the allegation is that Ms Wyle created a 'false and misleading' record of the conversation, which she then caused to be put on the claimant's HR file.

92. As stated, the record of that conversation of 18 September 2019 is set out at page 76 in an email sent that day by Ms Wyle, with the claimant's response set out at page 82. This was sent in an email of 25 September 2019, but was clearly drafted earlier and is certainly a contemporaneous record.

93. It is a common experience that when two people witness the same incident then they see it a different way and remember it differently. This is not just in the manner and tone of how a discussion happened, but also as to the facts of what happened. When there are differences, whilst there may be an objective truth (even if it is hard to discern) that does not always mean that one person is lying.

94. Having heard the claimant give evidence and be cross-examined on this point, I have no doubt that he was telling the truth as he recalled it. The most useful document in ascertaining the claimant's version of events however is the email that he sent roughly at the time, rather than at the hearing some 3½ years later.

95. I will not set it all out in full but Ms Wyle sets out her concern about the holiday, which the claimant responds to. Here, the claimant's challenge in his email is mostly not to what was said at the meeting, but to providing the context to what happened in relation to the holiday.

96. The more significant points for the claimant's claim relates to the claimant's alleged behaviour at the meeting. Ms Wyle set this out in detail, and the claimant's response is equally detailed.

97. The claimant accepted in his witness statement, and his evidence, that prior to the meeting he was upset and annoyed, although he denied being angry. Given the previous cordial relationship, that reaction is an understandable one. This will have impacted on the way that the claimant approached the meeting.

98. The difficulty in relation to this conversation is that the two versions of events are largely the respective parties' impression or interpretation of the conversation and the surrounding demeanor and body language. The one point of clear factual dispute

is whether the claimant pointed his finger at Ms Wyle, which she states happened, but he categorically denied.

99. However, having accepted, as he did that he was upset, and that he is someone who does 'talk with [his] hands', I consider that this is again likely a question of interpretation.

100. I am not deciding exactly what happened at the meeting, but it appears to be that it was most likely somewhere between the claimant's account and Ms Wyle's. Given the factual similarities between their version of events, I do not consider that it has been shown that Ms Wyle's fabricated an account of what had happened to put on the file.

101. In relation to whether it was misleading, again I find that it has not been shown that it was a knowingly inaccurate account of the meeting, which is what would be needed.

102. There is an issue with the TOIL day, which is of less significance. It can be seen from the Whatsapp exchange at page 84 between the claimant and Jacinata Rowsell where, once the confusion about meeting days was raised, the claimant offered to come in to the office. However, he was told that it was not necessary, and no action followed. This conversation was 'screenshotted' by the claimant and included in his email.

103. For those reasons I do not consider that there was a fundamental breach of the implied term as alleged. In those circumstances I do not go on to consider whether the contract was subsequently affirmed.

<u>Use of furlough – November – December 2020</u>

104. The way in which the furlough would be approached is set out by Jakub Skwarlo, the UK Director of Operations (p103). This reflects the approach of the government at the time.

105. So, those earning less than £30,000 would have all their wages paid and so would be fully furloughed. Those such as Krystof who fell between £30,000 and £37,500 would be furloughed for 3 days.

106. Ms Wyle responds (page 103) by saying that the claimant should be furloughed for two days due to holiday. This relates to the fact that the claimant had purchased extra holiday days in February 2020 just before pandemic.

107. Mr Skwarlo responds saying 'yes' later that day. I note that that email was forwarded to the claimant that day by Ms Wyle, so he would have been fully aware of what was suggested.

108. It seems to me that the ultimate decision was Mr Skwarlo's. Even if Ms Wyle had an ulterior motive in suggesting the claimant was furloughed two days, the decision was a good faith one made by Mr Skwarlo, and made on sensible business grounds, namely that the claimant had the extra holiday.

109. Inevitably, furloughing a person will have meant that they have less time to do their job, which will increase the pressure on them. This will be offset to some extent by a reduced workload due to the pandemic, but I accept that there will be a core minimum that will need to be done in relation to any business. Further, whilst many shops were shut, some were permitted to operate throughout the pandemic which did generate some activity.

110. During this time, the claimant was away from work on sick leave for part of the time. In addition, Krystof was furloughed for only one day a week. I accept that this would have added to the general stress. However, as the claimant himself stated in an email of 8 January 2021, this did not impact on his performance.

111. It seems to me that in November and December 2020 the actions of the respondent in relation to furlough were reasonable. Whilst this operated to the detriment of the claimant, it was a legitimate business decision taken by Mr Skwarlo on legitimate business grounds. Therefore to the extent that the claimant was treated differently, this was on reasonable grounds and for a proper cause.

<u>Claimant's workstation</u>

112. The facts in relation to this are not in dispute. The respondent's working from home policy, that was put in place in March 2020, is at page 460 bundle. It appears that a substantially similar policy was in place prior to the pandemic and this new policy had been prepared before March 2020 and was not implemented due to Covid-19.

113. Under 'Health and Safety' is the following:

> **HEALTH & SAFETY**
>
> Work undertaken at home will typically include telephone calls, administration, paper based or work on a computer. In general this is not high risk. However, all employees who work from home have a duty to ensure, insofar as is reasonably practicable, that they work in a safe manner and that they follow any health and safety guidelines, as confirmed by the Risk Department.
>
> Before working from home, employees should complete a DSE home working assessment to assess whether any adjustments are required to their home working environment. Before working from home, please speak to the Risk Training Manager for more details on how to complete your DSE assessment.
>
> It is expected that employees who request to work from home will have appropriate facilities, including but not limited to; a designated work area, work surface and lighting. However, if the assessment highlights that adjustments are required, this should be flagged to the relevant Risk Manager for review before commencing any home working.
> working environment changes, a new DSE assessment must be completed.
>
> Where an employee requires reasonable workplace adjustments and/or specialist equipment, Line Managers should liaise with Risk to discuss whether this can be accommodated in a homeworking environment.
> To keep in line with URW employee and Line Manager that working from home does not mean that an employee is expected to be available outside

of their normal hours (such as late evenings and/or weekends) whilst working from home, unless this is part of an agreed flexible working arrangement

IT / EQUIPMENT

If additional equipment needs to be ordered to enable an employee to work from home on a regular and ongoing basis, this will only be considered where working from home has been approved as part of a formal flexible working agreement. Where this is the case, Line Managers must seek approval from their Department Head, and subsequently the HR Director and Finance Director, before any additional equipment is ordered. E.g. this may include monitors, laptops, mobile phones etc.

If the employee requires additional equipment to be able to undertake their role from home on an ad-hoc basis, this should be discussed with the Line Manager and IT in advance to ensure that devices are available for the day(s) in question. As soon as no longer required, any loaned equipment must be returned to a member of IT at the earliest available opportunity.

114. It was not suggested that this was done before the claimant started working from home. Clearly, however, what happened globally in March 2020 was unprecedented and unanticipated.

115. Had it been that for personal reasons, or out of personal choice, the claimant had started to work from home that it may be fair to criticise the respondent for failing to follow the policy. However, in the circumstances as they were, it does not seem to me that that applies.

116. Whilst it is implicit in the claimant's case that the injury he suffered in December 2020 was caused by the working from home, the claimant accepts that this cannot be shown. In fairness, in his grievance interview (page 223) he states '*I'm not holding the business accountable for my neck injury, that's not the point, but what I want to highlight is that I made the business aware that I was in a bad way and their response was really poor*'.

117. It was not disputed that a BUPA referral was made, and an assessment was carried out by 'Posturite'. The respondent had made the arrangements for this by 11 January 2023. Further, even on the claimant's case, this was completed in about two months (page 236), albeit after some chasing (see, for example, Ms Ladous email of 05 February 2021 at page 145).

118. The respondent states (page 263), which was not disputed and I accept, that a Purchase Order for the recommended equipment was raised on the day of the assessment. Further, there was a delay caused by the suggested equipment not being '*aesthetically pleasing*'.

119. From when it was notified of the claimant's injury to when the assessment was arranged is approximately one month. Given that the claimant was off sick at the start of that month, and the Christmas period then followed, to the extent that there was a delay in failing to undertake an assessment quicker than the respondent did is not, given the context of the pandemic at the time, unreasonable. There was no breach of the implied term to provide a safe working environment.

Use of furlough / increased workload – starting January 2021

120. The furlough scheme was again introduced in January 2021. Again, the claimant was furloughed for two days a week. By this point the reason of him having extra holiday would no longer have been a factor.

121. However, he agreed to being placed on Flexible Furlough leave on 7 January 2021 (page 157). The email does not raise any issues or concerns about workload.

122. At page 119 there is an email exchange between the claimant and Ms Wyle from 08 January 2021. In this (page 121), Ms Wyle 'checks in' with the claimant to say that

> *'I've noticed on the managers calls that you've been distant and not contributing as much as you would have previously. I'm conscious that you've been in a lot of pain over Christmas so I had been putting it down to that but after today's furlough call it struck me that perhaps something else was at play here. Contribution is obviously not compulsory but as one of the senior managers your view is very much appreciated and valued by all.*

Some of your peers have also noticed this distance too and so I wondered if us having a check in would be of support to you?

Following end of year reviews Jacinta fed back that you mentioned that you were struggling with motivation and so I wondered if this was still the case, and was therefore the reason for your engagement levels on the manager calls? If so then Charlotte and I have had a discussion about how we can widen your remit to align closer to Chris at WSC and the varying involvements he has with other parts of the business.

123. I note that this is exactly what Ms Wyle would be expected to do under the terms of the PIP policy. The claimant responded to that email by explaining that he is still suffering from pain. However, he states that '*my motivation has not hindered of affected by performance at work'*.

124. Ms Wyle then states that (page 119):

'regarding the remit under the estate part of your job title, these elements are something that will transition to you over the next few weeks and months and so is not something that will affect your immediate workload of that of Krzystof. Chris Mitchell at WSC is only on 1 day a week furlough due to the pressures of the Cherry Park residential project which is consuming a significant part of his time, therefore we will not need to review your current furlough requirements at this time. That said, as mentioned in all my team meetings this week, we can be flexible as we go through the next few weeks and so please let Charlotte or myself know if there are any changes in the workload that require a review'

125. The claimant responded saying '*Thanks for the clarity in your email. Understood I will pick up with Charlotte in our one to ones. Have a lovely weekend too'*. The reference there to Charlotte being to Ms Ladous who was to take over managing him shortly.

126. With hindsight it may be that being placed on furlough whilst increasing his remit was always going to present challenges. However, the decision to furlough was made by the business as a whole and I do not consider that there is evidence to support the claimant's concern that he was 'stitched up' in any way by Ms Wyle.

127. Further, I accept that in his email of 08 January 2021 (page 120) the claimant states '*with regard to a wider remit – I do believe duties in line with my peers at Stratford would be beneficial so would like to take you up on your offer…*'. He does go on to say '*Can I presume this would also mean being brough in line re Furlough? It's my understanding Chris is on just 20% furlough*'.

128. Whilst that is a hope, that does not change the fact that he did accept the change in his responsibilities at that point. It was not a conditional acceptance. This is mnade clear in a further email sent be Ms Wyle an hour and a quarter later (page 119) saying that the '*estates part of your job title*' will transfer over '*the next few weeks and months*'. She then states that whilst the person at WSC is on one, rather than two, days of furlough a week this is because he was dealing with a separate project as well.

129. Ms Wyle then states '*therefore we will not need to review your current furlough requirements at this time. That said, as mentioned in all my team meetings this week, we can be flexible as we go through the next few weeks so please let Charlotte or myself know if there are any changes in the workload the requires a review*'.

130. The claimant replied that day saying '*Thanks for the clarity in your email. Understood. I will pick up with Charlotte in our one to ones*'.

131. There then is the question of the claimant's workload over this period of time up until 09 February 2021 when he was reduced to one furlough day a week rather than two. I accept that the claimant had raised his workload as an issue by 26 January 2021 (page 137). There were a number of discussions between the claimant and Ms Ladous centred around the claimant's workload, and whether it was 'doable' in the three days working.

132. Ms Ladous was consistent in her view that that was the case, which was a position that she maintained at the hearing.

133. The claimant was equally consistent that that was not the case. This is set out clearly in an email of 08 February 2021, that refers back to previous discussions and emails. The claimant asks Ms Ladous to explain how she came to the view that his job could be done in three days.

134. He then states that '*working 3 days per week has left me at capacity which has started to affect my Mental and psychical health*', before making it clear that the fundamental 'sticking point' is the number of days on furlough. Ms Ladous wrote this up and passed it to Ms Lovesey as '*I feel this will become an HR issue*'.

135. This was resolved the next day following a meeting with the claimant, Ms Ladou and Ms Lovesey. The upshot of this was that the claimant's furlough was reduced to one day as he had requested. The claimant confirmed in an email of 09 February 2021 (page 158) that '*I am happy with the outcome and the business meeting me half way, which will support the additional Community elements*'.

136. From the above I conclude that there was no fundamental breach over this period of time. I understand that from the claimant's point of view that it must have been quite frustrating to be told how long it should take him to do his job by someone who as not ever done his job. However, I find that this was a view that Ms Ladous genuinely held, and it was a view that she was entitled to hold.

137. There is one discrete point to note, and that is in relation to travel to work. Ms Ladous had suggested that the claimant work from home more often to free up travel time. I agree with the claimant that this was not appropriate, at least in the sense that it would give him more time to do his work. This is because he would travel to work on his own time and should not be expected to, in effect, work extra hours.

138. However, this appears to have been to some extent a throwaway line by Ms Ladous, and was certainly not a thought out position on her part. In his email, the claimant addressed that and it does not appear to have been taken further by Ms Ladous. I do not consider that that could be considered a fundamental breach (although, of course, it may feature in the overall picture).

<u>Bonus Pay – February 2021</u>

139. In February 2021, the claimant has his annual performance review for the year 2020 where he was rated ‘solid’.

140. Although the claimant had always received a 20% bonus, it has always been described as a discretionary scheme and is not included as an express contractual term. Whilst that cannot be determinative as to whether it is truly discretionary, I do not consider that the claimant has shown that he had a contractual entitlement to a bonus.

141. Even if there was a contractual entitlement to be considered for a bonus, the claimant would need to show that the exercise of the respondent’s discretion was unreasonable. The claimant states that others in the same position received a 20% rather 10% bonus. However, there is no evidence that that is the case. The one other bonus letter in the papers relates to Matt Coppins (page 472) who received a bonus of £3,356 in February 2021. However, he was assessed as having a ‘very strong performance’ and I have not been given full details of his salary and past bonus history.

142. It is said that Ms Ladous was evasive in relation to this, but I do not consider that that is fair. Whilst her answers were not clear and straightforward, that would be easily consistent with her having to recollect information about this. Even if she was aware that this was a potential issue, it was not something that featured in the evidence to a great degree, and it is not surprising that she would be focussing on other matters.

143. In those circumstances I do not consider that it has been shown that there was anything improper or untoward about the bonus that the claimant received. In those circumstances, there is not a breach of the implied term of trust and confidence.

144. I further note that it is well known that Covid-19 had a significant impact on many businesses, and it is unsurprising that this will have had a large impact on the respondent which is a business that is tied in with retail. For that reason, the position in relation to bonuses in the year 2020/2021 was always likely to be difficult.

Performance Improvement Plan

145. The claimant was clear that this came without warning. Ms Ladous was equally clear that she had raised performance issues previously. They were both consistent in their written and oral evidence and, when cross-examined, maintained their position. Both answered questions freely, and there was nothing in the manner in which they gave their evidence to suggest that they were trying to remember an untrue account. I do not consider that either were being dishonest with me.

146. What appears to have happened is that Ms Ladous was trying a 'light touch' approach and had raised some concerns, but that the claimant did not appreciate this. It appears that she would start their meetings by discussing the positives, before coming to a negative issue at the end. In her report, Ms Thwaites (at page 269) who also considered that there had been some issues raised prior to that meeting, although that is not something that I take account of.

147. I accept Ms Ladous evidence that she had a genuine belief that there was a performance issue that required addressing. I also find that the formal PIP meeting came as a shock to the claimant. However, as he acknowledged in his witness statement (para 27) Ms Ladous had sometimes raised issues with him.

148. Having said that, the absence of any emails raising the performance issues between January and May 2021 is striking, especially given that Ms Ladous had previously followed a practice of reducing important matters to writing.

149. It would have been clearly preferable for her to have raised any performance issues in writing before the meeting of 28 May 2021. This is precisely to avoid the situation that ultimately occurred in this case.

150. However, at this stage the respondent was still at the 'informal' stage of the policy, which appears to have been to some extent a fact finding exercise to establish what difficulties the employee was facing, and how it would be possible to resolve them. In those circumstances, I find that Ms Ladous account is not undermined by the lack of email contact.

151. I do agree with the respondent that there was an inconsistency in the claimant's case. At some points he said that there were no performance issues at all, and

therefore the decision to instigate a PIP was unreasonable. However, at others he stated that there were shortcomings, but these were caused by the respondent's own failure to provide him with sufficient resources to do his job.

152. The nearest contemporaneous account is in Ms Ladous email record from 01 June 2021 (page 190). In this, she makes a number of comments about the claimant's demeanour at the meeting. She states that the claimant accepted some of Ms Ladous points, but stated that this was because he did not have enough time to do the work.

153. The claimant could not remember all of what was said at the meeting. In light of that, and the fact that the email was written shortly afterwards, I accept that that is the best, and most reliable, account of the meeting.

154. It is important to note that the claimant did not raise any issues about his physical or mental health being a factor at that meeting, or in the months before other than where Ms Ladous's note states that the claimant said that '*his doctor had advised him to go off sick many times and he says he did not want to do it because of his professionalism*'. Further, there is no indication before that meeting that the claimant had raised the lack of resources as being an issue.

155. For that reason, I do not consider that the respondent could be criticised for not taking into account those issues.

156. Therefore, in relation to the PIP issue, whilst Ms Ladous could have reduced her concerns to an email before the meeting, the failure to do so was not a fundamental breach.

157. A lot of time at the hearing was taken up (on both sides) with consideration of the claimant's performance. However, whether I would have acted in the way that Ladous did is not the point. I find that the decision to start a PIP was one that was open to Ms Ladous, and was one that she started due to honestly held concerns about the claimant's performance in the previous months.

<u>The 'cheque comment' at the meeting of 28 May 2021</u>

158. There is a straightforward dispute between the claimant and Ms Ladous as to what was said. I do not consider that this is something that the claimant fabricated, but I also accept that Ms Ladous's denials were genuine. It is clear to me that something must have been said.

159. There is nothing in Ms Ladou's notes of the meeting (page 190), although that is not surprising given the subsequent denial. However, I note that there is nothing in her notes of any discussion about money or redundancy.

160. The first mention of it is in the complainant's grievance on 04 August 2021 (page 196) where he states '*Ann-Charlotte also said in this meeting "If you are looking for a pay cheque you're not getting one", I would like to understand what she meant by this statement*'. The claimant also states that '*by this point in the meeting, I was extremely upset and crying as I was in utter shock as to what had just happened and how unfair it all was the realisation that I was being pushed out of the business given all my efforts and hard work'.*

161. In her interview for the grievance procedure, Ms Ladous was asked about this and said '*No, I didn't say that. But at somepoint he was telling me that if you want to pay me then this is something we can discuss and I said that's not something I can discuss you will need to discuss with HR*'.

162. Given the oral evidence, the clear denial of Ms Ladous, the fact that the claimant does not have a complete recollection of the meeting (which was remote rather than in-person) and that by the time the alleged comment was made he was, by his own account, extremely upset, crying and in shock, I find that Ms Ladous did not make the comment attributed to her. Instead, it is more likely than not that the claimant has misheard something being said about redundancy and, after the event, convinced himself that that is what was said.

163. I re-iterate that I accept that his evidence on this was honestly given, and he genuinely believes that this was said. However, on balance, I find that it was not.

164. There is therefore no breach of the implied term of trust and confidence.

<u>Sick pay (May- June 2021)</u>

165. In relation to the period of sick leave following 28 May 2021, it is not in dispute that the option to extend sick pay beyond twenty days was a discretionary one, and the respondent had a wide discretion.

166. Although there was reference in the claimant's submissions to Ms Rowsell being given a much long period of sick leave, I do not have sufficient details of that to say that I could draw any conclusions about any claimed differential treatment.

167. I do not consider that there is any evidence to indicate that this decision was in any way capricious, or that the claimant was targeted or treated less favourably for any reason. In those circumstances, there is no breach of the implied term of trust and confidence.

Mishandling of the grievance procedure

168. There were two aspects to this - the initial complaint and the appeal. Although they are distinct and require separate consideration, I will group them together here. I remind myself that my remit is limited and, specifically, I am not conducting a further appeal in relation to the claimant's grievance.

169. I shall start with the initial investigation carried out by Dawn Thwaites. She has experience in having conducted other grievance procedures on an informal level but accepted in her witness statement that this was the first time that she had dealt with a formal grievance.

170. She was formally asked to deal with this shortly after it was made, at some point in the day or so before 09 August 2021.

171. The procedure that she followed was to meet with the claimant on 11 August 2021 (with Ms Lovesey in attendance from HR, and to act as notetaker). This started (page 216) at 9.30am, running until 11.10am with an 8 minute break for technology issues.

172. Following that, Ms Thwaites interviewed Ms Rowsell and Ms Ladous on 12 August 2021, and Ms Wyle on 13 August 2021. These interviews were, unsurprisingly, shorter, but were still of some length.

173. The outcome of the investigation conducted by Ms Thwaites was sent to the claimant by letter dated 17 August 2021. This is at page 266 bundle.

174. I find that the interviews that were carried out were thorough. It is clear that Ms Thwaites approached her task conscientiously and tried to be fair. Her conclusions, as set out in her letter of 17 August 2021, were reasoned.

175. Criticism is made of the investigation in a number of ways, but the essential complaint is that Ms Thwaites was too quick to accept the evidence of 'management' and failed to carry out her own investigation. The claimant himself accepted in his evidence that, on the evidence she heard, Ms Thwaites was entitled to come to the conclusion that she did.

176. In fairness to Ms Thwaites, in cross-examination she accepted that there were points about which she was incorrect. Having considered Ms Thwaites evidence, I do not consider that she was in any way acting out of malice. I also consider that she was acting in a way that she thought fair.

177. However it is clear that, with hindsight, there was an amount of evidence that could have been obtained. For example, one point that was highlighted at the hearing was an email thread between the claimant and Ms Wyle between September and December 2019.

178. I accept that the grievance policy specifically includes provision for the initial meeting to be adjourned if 'the Grievance Manager considers it necessary to investigate it further'. It may well be that, had I been conducting the Grievance hearing, I would have adjourned it to obtain further evidence and/or, having finished the interviews with the other three witnesses, gone back to the claimant for his comment.

179. However, that is not the test that I apply. Here, a thorough and conscientious investigation was carried out, in good faith. I do not accept that there was any evidence of bias on her part. In those circumstances, the way that the respondent conducted the initial grievance procedure was not a fundamental breach of the implied term of trust and confidence.

180. Moving then to the appeal. Ms Beattie is the respondent's UK General Counsel. Although she had been employed by the respondent since 2007, this was the first appeal that she had conducted. She was appointed to hear the appeal on 25 August 2021.

181. In order to conduct the appeal, she met with the claimant on 27 August 2021 at 10.00am, with the meeting lasting an hour and a half. In his written appeal beforehand, and at the hearing itself, the claimant set out his grievance in full, and that '*there were key facts missing*'.

182. Ms Beattie stated in her witness statement and her evidence that she '*explored [the grievance] with an impartial and open mind*'. Again, her fundamental honesty or credibility was not challenged and, having heard her be cross-examined, I conclude that she also approached her task in an open and fair-minded way, and set out to be even-handed in her approach.

183. Having spoken to the claimant, she met with Ms Wyle on the same day and, on 31 August 2021, with Ms Ladous (this was after the August bank holiday).

184. Subsequently, on 02 September 2021, she meet with Krzysztof Makaerwicz and then caused Ms Lovesey to meet with Philip Jones and Shaun Turnbull on 06 September 2021. Following that, she issued her decision on the appeal on 06 September 2021.

185. I consider that this is indicative of a fair approach being taken by Ms Beattie. It is also strong evidence that there was a genuine attempt on her part to take the claimant's grievance seriously and investigate it properly. It was not necessary for her to speak to the three 'new' witnesses. Her actions in doing so is fundamentally at odds with the suggestion that she was simply rubber stamping a decision by management, or upholding the finding of Ms Thwaites in a perfunctory manner.

186. Further support for that can be seen in her conclusion in that, whilst she did not uphold the appeal, she did recommend that the claimant be reimbursed in relation to the three extra days of holiday that he had bought in February 2020. Again, this is consistent with her adopting an fair minded approach.

187. Ms Beattie accepted that there were some areas where, with hindsight, there were errors (such as Ms Wyle's account in relation to the number of days that other employees were on furlough), however she maintained her position that her assessment of the appeal was fair.

188. Again, my task is not to state what conclusion I would have reached, or what procedure I would have followed, had I been conducting the appeal.

189. The purpose of the grievance procedure is to provide a swift, but fair, assessment of an employee's complaint. I have found that Ms Beattie approached the matter in a fair way, and conducted enquiries motivated by good reasons. Following this, she came up with a carefully reasoned decision. I consider that that is a complete answer to the claimant's claim.

190. The respondent's assessment of the grievance and the appeal was *bona fide* and conducted in a fair way. The fact that it is possible to point to something that could have done better, or reasons why the outcome could have been different, does not detract from that.

191. In those circumstances, there was a proper assessment of the grievance and appeal and, I therefore find, no breach of the implied term of trust and confidence in relation to this.

192. It is further said that Ms Wyle and/or Ms Ladou targeted the claimant for bullying and/or attempted to 'push him out of his job'.

193. This is tied in with the grievance procedure to a large extent. It was something mentioned that was mentioned briefly in the claimant's closing written and oral submissions. I agree with the respondent that it is quite an unspecified allegation and, in light of my findings above, I find that it is not proven that either had sought to push the claimant out of his job.

Conclusions

194. Against that backdrop, it is necessary to draw the above strands together.

195. The claimant was undoubtedly, and genuinely, aggrieved by the way that he was treated. He has an honest belief that he was mistreated by the respondent.

196. The threshold for constructive dismissal is a high one. In light of my findings of fact, even if it could be said that there were areas where the respondent could have done better, there was no conduct that was likely to destroy or seriously damage the implied terms suggested.

197. In those circumstances, it is not a 'last straw' case. For completeness however, I do not consider that even if all the sequence of events from September 2019 to September 2021 are taken together this would amount to a repudiatory breach of the contract by the respondent.

Conclusion

198. For the above reasons, the Claim must be dismissed.

DATE: 26 April 2023

Employment Judge Bunting

Sent to the parties on:
27/04/2023
For the Tribunal: