



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Mohammad Miah

**Respondent:** Thomas Burgess t/a Toms Motors

**HELD AT:** Manchester

**ON:** 8-10 March 2023

**BEFORE:** Employment Judge Newstead Taylor  
(sitting alone)

## REPRESENTATION:

**Claimant:** Mr Miah in person

**Respondent:** Mr Roxborough (Counsel)

**JUDGMENT** having been sent to the parties on 23 March 2023 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:

## REASONS

### Introduction

1. The Claimant was employed with the Respondent from 24<sup>th</sup> February 2020 until his eventual resignation on 13<sup>th</sup> April 2022. He brings a claim for unfair constructive dismissal under s.95 (1) (c) Employment Rights Act 1996 (“ERA”).
2. The issues were agreed with the parties at the start of the hearing and are set out in Annex A. For the avoidance of doubt, the Respondent confirmed that if he was found to have breached the contract he was not arguing that there was a potentially fair reason for so doing. The issue of remedy was left to be dealt with at a further hearing if necessary.

## Findings of Fact

3. I had a bundle of 161 pages. I had witness statements from the Claimant, Mrs Khadijah Taymiyyah (the Claimant's Mother), the Respondent, Ms Booth (the Respondent's independent HR Consultant), Ashley Flynn (the Claimant's girlfriend), Mr Kudos (the Claimant's Barber) and Mr Dobson, (the Claimant's college tutor). I heard oral evidence from the Claimant, the Respondent and Ms Booth. Mrs Taymiyyah's evidence was agreed. Ms Flynn, Mr Kudos and Mr Dobson did not attend to give oral evidence and, consequently, were not cross examined. Therefore, it is a matter for me what weight, if any, to attach to their evidence. I also received the Respondent's Skeleton Argument – Closing Submissions, which I considered. I make the following findings of fact based on the balance of probabilities.
4. In January 2020 the Claimant enrolled at Mantra College.
5. On 24<sup>th</sup> February 2020, the Claimant started working as an apprentice mechanic at the Respondent. He worked 40 hours per week initially receiving £273.20 per week. He attended college one day a week.
6. The Claimant's start date was disputed. The Claimant said it was the 3<sup>rd</sup> February 2020. The Respondent said it was the 24<sup>th</sup> February 2020. Ultimately nothing turns on this point because the claimant has two years' qualifying service whether the start date is 3<sup>rd</sup> or 24<sup>th</sup> February 2020. On this point, however, I prefer the Respondent's evidence. I find that the Claimant's start date was 24<sup>th</sup> February 2020 because that is the date in the Claimant's signed employment contract.
7. The Respondent is a small business. Specifically, Mr Burgess, who is a sole trader, operates as a general servicing, diagnostic, accident repair and MOT garage. It is a family run garage and a close-knit community. Friends, delivery drivers, parts people, on occasions stop for a cup of tea. The garage has two workshops. The first is large enough to fit two motor vehicles side by side, the second has an MOT bay and a ramp. At all relevant times there were seven employees, two of whom worked in the office. Darren was the workshop supervisor. Neil worked in the workshop. Caroline Burgess (the Respondent's sister) was the office manager and supervisor.
8. In the period from 24<sup>th</sup> February to 27<sup>th</sup> August 2021, the Claimant and the Respondent had a good working relationship. The Respondent acted as the Claimant's mentor, offering support and help. Also, as the Claimant was the Respondent's first apprentice, they spent significant one on one time together, becoming friends, meeting each other's families and socialising outside of work. Initially at least there was considerable trust and confidence between them and they would laugh, joke and talk frankly.

9. On 28<sup>th</sup> August 2021 the Claimant sustained a serious hand injury in an accident at work. In short, he fractured his fingers and suffered a partial amputation. Whilst the specific circumstances of the accident itself are not relevant for present purposes, what is relevant is what happened immediately after the accident at work. Specifically:
- a. The Respondent did not have any first aid trained staff. There was a first aid kit in the office.
  - b. The Claimant, whose hand was bleeding as a result of the severing of his fingertips, ran to the Respondent, whose response, due to shock, was something like “ugh”.
  - c. The Respondent neither called for an ambulance nor got the first aid kit. He gave the Claimant a dirty rag from the workshop and sat the Claimant down on a stool.
  - d. The Respondent then left the Claimant, who was pale, in order to get him an energy drink from a shop. At this point in time the Claimant was left alone. Neil was working in the other workshop. Neil was not with the Claimant at this time. In his evidence the Respondent candidly accepted that it would have been better to stay with the Claimant and perhaps send somebody else to obtain the energy drink.
  - e. The Claimant was left to phone his Mother who came to collect him and take him to hospital.
10. Following the accident the Respondent was aware that the Claimant had had surgery on his hand, was in bandages and was on pain medication. No welfare check was conducted by the Respondent. The Respondent's girlfriend, who got on well with the Claimant, visited the Claimant (taking her baby with her). This was not a welfare check by the Respondent, as accepted by Mr Burgess. Whilst the Respondent's girlfriend did some ad hoc work for the Respondent, she was not an employee of the Respondent. I was told that she worked as a carer / teacher.
11. In fact, the reason for the Respondent's girlfriend's visit was to obtain his signature on an accident form and a policy addressing the correct way of entering and exiting a motor vehicle at work. There was no need for the Claimant's signature to be obtained at that stage. It could have waited for the Claimant's return to work, as the Respondent accepted in response to my questions. The reason that it was done at this stage was because the Respondent was concerned that he would be sued in relation to the accident.
12. On one occasion thereafter, the Claimant and his Mother visited the Respondent at his home. This visit involved some general chitchat and the

Claimant and his Mother raised some concerns in respect of health and safety at the Respondent.

13. The Claimant was off work for about ten weeks on full pay. There were some text messages that passed between the Claimant and the Respondent. There is a very small extract within the bundle. Whilst I accept that on the balance of probabilities there is likely to have been some more text messages, overall the messages were minimal and were at the instigation of the Claimant.
14. On 6 September 2021, the Claimant sent the Respondent a photo of his hand. The photograph shows that a metal screw is still in place in his finger. The Respondent's response was, "*yes, you'll be back at work next week, it's minor that*". The Respondent contended that this was banter. Clearly, and as the Respondent accepted, it was not a minor injury. It was inappropriate to suggest that it was a minor injury. This showed insufficient regard for the Claimant in the circumstances. Nonetheless, the Claimant was not pressured to return to work. The Respondent was content for the Claimant to keep him updated and return to work when he could.
15. The Claimant returned to work in October 2021. He argued that there had been no return-to-work interview. I accept that there was no formal return to work interview, but the Respondent, who had no internal HR department, had an informal conversation with the Claimant on the morning of his return. As a result of that conversation and in accordance with his fit note, the Claimant was placed on amended duties (meaning office work) for four weeks thereafter progressing to smaller jobs. The Claimant was not rushed back into any tasks. It was a managed process.
16. Following his return to work, the Claimant had not explained to the Respondent either the exact difficulties he was having with his hand injury or how he was feeling about it. However, the Respondent observed that the Claimant was not using his hand. The Respondent accepted that he commented to third parties about the Claimant not using his hand. Whilst the Respondent did not intend to demean the Claimant by doing so, the Claimant did feel that the Respondent was making fun of him.
17. In December 2021, the Claimant turned 19. As a result of his age and the completion of the first year of his apprenticeship, he understood that his wage would increase. In the middle of December 2021, the Claimant, following receipt of his payslip, raised with the Respondent the fact that he had not received the expected pay increase. There was a dispute between the parties about when the Claimant first raised this issue. The Claimant said it was in January. The Respondent said it was in December. I find that it was in December because at this point the Claimant was being paid weekly, would have received his weekly payslip and noticed the absence of the anticipated

pay rise. The Respondent was unsure if the trigger for the pay increase was completing the first-year exams or simply completing the first year. He sought advice from the internet, from external HR and ultimately from Mantra College. Following that advice, he accepted that the pay increase applied and actioned it. Unfortunately, because the payroll was run by an external agency, there was some delay on the accounting side and it was not until 1st February 2022 that the payroll was corrected. The payments were correctly backdated. Whilst the Claimant felt that there was some reluctance on the Respondent's part to increase his wage, no grievance was raised. This episode placed further stress on the parties' working relationship.

18. The Respondent's workplace involved a significant amount of banter. Specifically, the Respondent made comments about other employees to the Claimant, such as surprise that an employee would drive under the influence of alcohol, that another employee was particularly slow with a task or that another employee made mistakes in their work. The Claimant joined in with these types of comments. Also, I am satisfied on the balance of probabilities that the Respondent made the more vulgar remarks, namely "*do her in the bedroom*" and "*Go on get in there so I can give you a quick one.*" In reaching this finding, I have taken into consideration the Respondent's work environment, as detailed above. I have also taken account of the fact that initially the Claimant incorrectly named the individual to whom the second comment was allegedly directed. I am satisfied that this was a simple error. The Claimant mixed up the individual's name with that of her sister, both of whom he knows. Finally, I consider, having heard the Respondent's evidence, that he knew that the comment related to the sister which indicated that he recalled the comment. However, none of these comments concerned the Claimant or the Claimant's work.

19. In or around January 2022 specifically, the Claimant says both that he was ostracised and/or exposed to a hostile working environment and that the Respondent incited and encouraged his employees in this behaviour.

a. I am not satisfied on the balance of probabilities that the Claimant was ostracised or exposed to such a working environment. He referred to exclusions from the tea run, the shop run and people not saying, 'good morning' or 'good night' and/or ignoring him. First, there is a stark lack of detail about these alleged incidents of ostracization / hostility. There are no dates, there are no names of the individuals involved and no grievance was raised about them. Second, by this stage the Claimant was prone to thinking that things had an ulterior motive that may well not have done. Notably, the Claimant complained that conversations would stop when he came into the room, but when cross examined by Mr Roxborough he accepted that maybe that was because they were talking about a confidential matter unrelated to the Claimant. Third, the Claimant suggests that everybody was involved but this does not fit

with the fact that at or around the same time Neil was staying after work to assist the Claimant with the repair of his personal motor vehicle. Fourth, I note that Ms Flynn's witness statement mentions telephone calls from the Claimant referring to being ignored or left out. However, these are hearsay. There are no specifics. She was, and I understand continues to be, the Claimant's girlfriend and is loyal to and supportive of him. In the absence of her evidence being tested I place no weight on it.

- b. I also do not accept that the Respondent incited or encouraged this kind of behaviour. There is no evidence to support the contention that the Respondent behaved in this way. If such behaviour in fact took place, I am not satisfied that the Respondent was aware of it. He was clear in his evidence that had he been aware of it he would have put a stop to it. I think that the suggestion that the Respondent incited or encouraged such behaviour reflects the Claimant's perspective, namely that he was prone to thinking that things had an ulterior motive.

20. On 10<sup>th</sup> February 2022, following a dispute concerning the collection or delivery of an Astra motor vehicle, Caroline Burgess said to the claimant, *"Mudge, you are a fucking dickhead, I fucking hate you, I hope you fucking die, you scruffy cunt"*. The Respondent accepts that those were the words that were used. On returning to the garage that day, the Respondent was made aware of both the incident and the words used. However, he did not speak to the Claimant or check if he was ok either that day or the next. Whilst the Claimant would have been at college the next day, he could have been contacted by telephone.

21. On 11<sup>th</sup> February 2022, the Claimant raised a grievance regarding harassment and verbal abuse from Caroline Burgess. Specifically, he stated that he wanted the incident to be placed on record and he wanted to get to the bottom of it, sort it out and draw a line under it. In his grievance letter, the Claimant referred to the impact of this incident on his mental health. It was only at this stage, that the Respondent addressed the incident by instructing Ms Booth.

22. On 12<sup>th</sup> February 2022, Ms Booth, an independent HR agent instructed by the Respondent, visited the garage and spoke to the Claimant. The Claimant agreed that the matter could be resolved informally. The Claimant was not forced to agree to an informal meeting. He had the opportunity to say no but chose to pursue an informal resolution. The agreed informal meeting was to take place on 14<sup>th</sup> February 2022. The Claimant knew that he would be in a room with Caroline, and he did not object to that.

23. On 14<sup>th</sup> February 2022, Ms Booth met with the Claimant and the Respondent. She then met with Caroline and the Respondent. Then all parties were

brought together, the primary purpose of which was for Caroline to apologise to the Claimant. Caroline did find that process difficult, initially apologising more to Ms Booth than to the Claimant. However, on the Claimant's return to the room following a short break, Ms Burgess apologised and the apology was accepted. The Claimant apologised to Ms Burgess. The meeting also clarified the Claimant's reporting lines, namely that the Claimant reported to Caroline Burgess for office matters and Darren for workshop matters. The parties confirmed that they were satisfied.

24. The Claimant suggested that in this meeting the Respondent said that it was very serious to raise a grievance especially against his sister. I have considered that evidence. I do not accept that the Respondent said that, In reaching that finding, I rely in particular on the evidence of Ms Booth who confirmed that it was not said. She was an independent witness. She was not a friend of the Respondent. She had no reason to be partial on the point. However, what the Respondent did do during the informal meeting was raise conduct issues in relation to the Claimant, in particular concerning how he spoke to the parts people on the telephone. I do not accept that this issue was raised by Caroline, albeit it was raised in front of her. There had been no prior warning to the Claimant that conduct issues would be discussed in this informal meeting. I do not accept that it had any relevance to the grievance that was being dealt with
25. The Claimant argued that no consideration was given during the grievance process to the comments he had made about his mental health. I do not accept this. I accept the evidence of Ms Booth that she did ask the Claimant about his mental health and that she did suggest some things that he could do to help himself, for example speaking to his mentor at college. However, Ms Booth's evidence that she told the Claimant he could access support in the workplace from Caroline and Darren cannot have been in relation to the Claimant's mental health. In light of the 10<sup>th</sup> February 2022 incident, it would be nonsensical for Ms Booth to be suggesting that the Claimant went to Caroline for support for his mental health.
26. On 15<sup>th</sup> February 2022 Ms Booth advised the Respondent to check on the Claimant to see he was ok. I find that that was not done. I note in particular that the Respondent does not refer to it in his witness statement.
27. On or around 18<sup>th</sup> February 2022 a resolution letter was hand delivered both to the Claimant and to Caroline Burgess. Both were required to sign to confirm the letter's contents. Caroline Burgess did. The Claimant did not. Notably this letter does not record or state that the Claimant was satisfied with the outcome of the grievance procedure. The Claimant says, and I accept, that he did not sign this because he did not accept the resolution. The Respondent told me in evidence that he had chased the Claimant for a

signature. I do not accept that. First, because it was not mentioned in his witness statement and was raised for the first time in cross examination of the Claimant. Second, because the Respondent was not familiar with HR procedures. He had not told Ms Booth that the letter had not been signed. She became aware of this fact during the course of these proceedings. Therefore, the Respondent would not have received advice as to the importance of having the letter signed. I do not accept that the Respondent would, on his own account, have chased the Claimant for his signature. In those circumstances I find that the Respondent, as he accepted in his evidence, was not certain that the Claimant was happy with the grievance process despite any oral indication given on 14<sup>th</sup> February 2022.

28. On 20<sup>th</sup> February 2022, the Claimant attended the christening of Mr Burgess' daughter. The fact that he was concerned about attending the christening is clear from the contemporaneous text messages from his Mother. The christening was fine but Caroline did not speak to him at all.

29. Until the grievance in February 2022, it was the Claimant's practice to put away the Respondents' tools. The Respondent considered this to be part of the Claimant's role, namely, to keep the place tidy. The fact that the Claimant had stopped doing this disappointed the Respondent, but the Respondent did not raise this with the Claimant. On or around 26 March 2022, there was an incident when the Respondent found that the Claimant had not tidied away the tools. The Respondent then had to spend time tidying those tools away and locking the cupboard. This annoyed the Respondent and he instructed Darren not to allow access to the tools. The Respondent denied that he gave any such instruction. I find that he did. This was due to his frustration with the Claimant not tidying away the tools. It was an attempt to make a point.

30. On 29 March 2022, the Claimant asked Darren for access to the tools. Darren denied him access. Darren said that the Respondent had told him not to open it. The Respondent disputes that this was said. I find that that was said. On the one hand, the Claimant was there. He recalls Darren's response, which is in keeping with the Respondent's actions on 26<sup>th</sup> March 2022. Also, Darren later provided one of his own electric tools for the Claimant's use because he had been instructed not to open the cupboard to provide the Respondent's tools. On the other hand, the Respondent was not there. Further or alternatively, the Respondent suggested that following Darren's refusal the Claimant should have gone hunting for the keys to the cupboard to open it himself. I do not accept this. Ms Booth had advised the Claimant to approach Darren for support at work relating to the workshop. He understood Darren had the keys. He requested access and was refused. The refusal to allow access to these tools meant that the Claimant was required to do tasks manually which were more difficult for him given his hand injury. Whilst the Claimant had some of his own tools, he did not have the required electric tools.



31. From 30<sup>th</sup> March 2022, the Claimant was off work sick following a personal crisis the previous evening. Whilst Ms Booth was meant to return towards the end of March 2022 to see the Claimant, this did not happen. No steps were taken to arrange such a meeting. Notably, there were no discussions about the date, time or location of the meeting. It is right to note that the Claimant went off work sick from 30<sup>th</sup> March 2022. However, this was only 2 working days before the end of March 2022 and no preliminary steps had been taken in respect of any meeting.
32. Between 29<sup>th</sup> March 2022 – 13<sup>th</sup> April 2022, the Respondent felt that, following the Claimant's personal crisis, it was not right to contact the Claimant directly but instead contacted the Claimant's Mother.
33. On 13<sup>th</sup> April 2022, the Claimant resigned. The Respondent made no attempt to persuade the Claimant to change his mind.
34. Following the end of his employment, the Claimant brought a personal injury claim against the Respondent in respect of the accident at work, which was settled.

## The Law

35. Pursuant to S. 95 (1) (c) ERA, an employee is constructively dismissed if:

*“(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.”*

36. The classic statement of what must be established in a constructive dismissal is contained in *Western Excavation (ECC) Ltd v Sharp* [1978] ICR 221 which states:

*“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 employees entitled to treat himself as discharged from any further performance. If he does so, then he terminated the contract by reason of the employer's conduct. He is constructively dismissed.”*

37. In summary, a claimant must prove: (1) that the employer acted in breach of his contract of employment; (2) that the breach of contract was sufficiently

serious to justify resignation or that the breach was the last in a series of events which taken as a whole are sufficiently serious to justify resignation; (3) that he resigned as a direct result of the employer's breach and not for some other reason; and (4) that the Claimant did not waive the breach or affirm the contract.

38. As to the breach of contract, this can be of an express and/or implied term of the employment contract. The most common implied term is the term of trust and confidence. The House of Lords in *Malik and Mahmud v BCCI* [1997] ICR 606 stated 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 between employer and employee.*" The test is an objective one and all the circumstances must be considered. It is important to note that the conduct must be "...calculated and likely to destroy or seriously damage the relationship of confidence and trust..." The Employment Appeals Tribunal ("EAT") in *Frenkel Topping Limited v King* UKEAT/0106/15/LA note that acting in an unreasonable manner is insufficient. The strength of the implied term is such that it is only breached if the employer shows objectively by its behaviour that it is abandoning and altogether refusing to perform the contract.
39. Whilst the breach must be by the employer that does not mean only an individual with the authority to dismiss. Pursuant to *Hilton International Hotels (UK) Ltd v Protopapa* [1990] IRLR 316 "*the conduct of any supervisory employee will bind the employer provided the supervisor is acting in the course of his or her employment.*"
40. The fundamental breach of contract need only be a reason for the claimant's resignation. It does not have to be the only reason; *Wright v North Ayrshire Council* [2014] IRLR 4 and *Gordon v J & D Pierce (Contracts) Ltd* UKEAT/0010/20. A claimant may affirm the contract after a breach if they show an intention for the contract to continue. An employee who continues to work under the contract, even if expressly under protest, runs the risk of affirming; *WE Cox Toner (International) Ltd v Crook* [1981] ICR 823 EAT. Exercising the contractual right to raise a grievance does not constitute affirmation; *Gordon v J & D Pierce (Contracts) Ltd* and *Kaur*. Although, delay which occurs when an employee is not performing the contract, for example whilst on sick leave, is less likely to constitute an affirmation; *Chindove v William Morrisons Supermarkets PLC* UKEAT/0201/13/BA.
41. In *Omilaju v Waltham Forest London Borough Council* [2005] IRLR 35 the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. The 'last straw' does not itself have to be a repudiation of the contract. *Omilaju* was confirmed in *Kaur v Leeds Teaching Hospitals*

*NHS Trust* [2018] EWCA Civ 978 which also confirmed that so long as the last straw adds something new it effectively revives earlier conduct by the employer even if the employee affirmed the contract after those earlier matters.

## Conclusions

42. In accordance with the agreed List of Issues, the first question for consideration is whether or not the Claimant was dismissed. This involves considering whether or not the Respondent did any or all of the 6 issues identified at the outset, taking care to consider those issues cumulatively as well as individually. I refer to the facts as found. I have decided that the Respondent:
- a. Failed to care, either adequately or at all, for the Claimant following the accident on 28<sup>th</sup> August 2021. This failure to care included not getting a first aid kit (which would presumably have contained bandages), providing the Claimant with a dirty rag, leaving him alone when he was bleeding and not phoning for medical help. I have taken into consideration both the Respondent's shock and his lack of first aid training, but it is my decision that even allowing for these matters the Respondent failed to care for the Claimant following the accident on 28<sup>th</sup> August 2021.
  - b. Delayed the Claimant's pay increase, which was raised in December 2021 but not resolved until February 2022.
  - c. On 10<sup>th</sup> February 2022, Caroline Burgess, a supervisory employee acting in the course of her employment, verbally abused the Claimant. The Respondent was aware of the verbal abuse and took no steps to address it until the Claimant raised his grievance.
  - d. On 29<sup>th</sup> March 2022, the Respondent prevented the Claimant from using the tools.
43. For the avoidance of doubt, in light of my findings of fact I do not accept that the Claimant was ostracised at work, exposed to a hostile working environment or that the grievance hearing was improperly conducted. In relation to that grievance hearing, I note that the Claimant had consented to an informal hearing, so no notice or notice of accompaniment were necessarily required.
44. Second, I have considered whether or not the Respondent was in fundamental breach of the Claimant's employment contract. I am satisfied, having reminded myself of the strength of the implied term, that:

- a. The failure to care either adequately or at all for the Claimant following the accident on 28<sup>th</sup> August 2021 breached the implied term. I consider that this breach was so serious that the Claimant was entitled to treat the contract as at an end. In relation to the accident itself, the Claimant was a young man who had suffered an accident at work. He had severed fingertips and was bleeding. The Respondent left the Claimant alone and did not call for medical care.
- b. The verbal abuse on 10<sup>th</sup> February 2022 breached the implied term. This breach was serious, being verbal abuse of a young man in the workplace by a superior.
- c. The refusal to allow the Claimant to use the tools on 29<sup>th</sup> March 2022 also breached the implied term. This was a fundamental breach. Specifically, in light of the Claimant's hand injury and the implications for how he could undertake his work that day, i.e. manually.

45. In summary, I consider that the above individually and cumulatively breach the implied term and that the Respondent's behaviour on each of those occasions was either calculated or likely to destroy or seriously damage the trust and confidence between the parties, and that there was no reasonable and proper cause for it.

46. However, I am not satisfied that the delay in sorting out the Claimant's pay breached the implied term of trust and confidence because it was not calculated or likely to destroy or seriously damage that trust and confidence, and in any event there was a reasonable cause being the time required by the Respondent to research the position and then by the accounting team to effect the changes.

47. Third, I have decided that the Claimant did resign in response to the cumulative effect of those breaches. He resigned on 13<sup>th</sup> April 2022, being approximately two weeks after the tools' incident on 29<sup>th</sup> March 2022. I am satisfied that the tools incident is in itself a fundamental breach of the implied term, but, if I am wrong on that, then I am satisfied that it does contribute something to the other breaches, and in light of the case of *Kaur* reawakens the earlier breaches whether they have been affirmed or not.

48. Fourth, as to affirmation, I am satisfied that:

- a. The Claimant did not affirm the contract after the tools' incident on 29<sup>th</sup> March 2022. He was on sick leave from 20<sup>th</sup> March 2022 for two weeks and then immediately resigned. The time spent on sick leave is

not delay that amounts to affirmation; *Chindove v William Morrisons Supermarkets PLC*.

- b. The Claimant did not affirm the contract following the verbal abuse and the grievance meeting. The raising of a grievance does not amount to affirmation; *Gordon v J & D Pierce (Contracts) Ltd* and *Kaur*. Further, whilst the Claimant continued to work for the Respondent following both of these incidents. The Claimant's position about whether or not the grievance was resolved was unclear. At the grievance meeting he confirmed that he was satisfied with the outcome of the grievance, but he did not sign the letter. The Respondent knew about this lack of clarity and accepted in evidence that he could not be certain that the Claimant was happy with the grievance process despite any oral indication given on 14<sup>th</sup> February 2022. Accordingly, I consider that the Claimant was, effectively, working under protest. Further, it is important to note that the Claimant was a young man who (as the Respondent knew) was suffering with his mental health. In all the circumstances, I am not satisfied that the fact the Claimant continued to work in the period between 14<sup>th</sup> February and 29<sup>th</sup> March 2022 amounts to affirmation. In any event, if I am wrong on that then the last straw doctrine brings this earlier event back to life.
- c. The Claimant did affirm the contract following the accident in August 2021. He returned to work in the October 2021 and worked through until April 2022, allowing for sick leave at the end. Nonetheless, the last straw principle brings back to life this breach as well.

49. In conclusion, the Respondent was in fundamental breach of contract, the Claimant resigned in response and to the extent that the Claimant affirmed the contract the last straw doctrine operates to bring those earlier affirmed breaches back to life.

50. Finally, the Respondent has not sought to argue that the Claimant caused or contributed to his dismissal so there is no need to consider whether it is just and equitable to make any reduction on this basis. Also, I find that the ACAS Code of Practice on Disciplinary and Grievance Matters did not apply as the Claimant agreed to deal with matters informally. Therefore, the issue of an uplift does not arise.

Employment Judge Newstead Taylor  
Date: 2 May 2023

REASONS SENT TO THE PARTIES ON  
4 May 2023

FOR THE TRIBUNAL OFFICE

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## **Annex A** **Agreed List of Issues**

1. Was the claimant dismissed?
  - a. Did the respondent do the following things:
    - i. Fail to take any or any adequate care of the Claimant following the accident at work on 28th August 2021.
    - ii. Ostracise and/or expose the Claimant to a hostile work environment.
    - iii. Delay the Claimant's pay increase.
    - iv. Harass and/or verbally abuse the Claimant.
    - v. Fail to properly conduct the grievance meeting on 14th February 2022.
    - vi. Prevent the Claimant from using the Respondent's tools on 29th March 2022.
2. Did that breach the implied term of trust and confidence? The Tribunal will need to decide:
  - a. whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
  - b. whether it had reasonable and proper cause for doing so.
3. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.
4. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.
5. If the Claimant was unfairly dismissed, did he cause or contribute to it by any blameworthy conduct and, if so, by what proportion would it be just and equitable to reduce the Claimant's compensatory award?
6. Did the ACAS Code of Practice on Disciplinary & Grievance Procedures apply? If so, did the Respondent fail to comply with it? If so, is it just and equitable to increase the award and if so by what percentage up to 25%?