EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4101655/2023

Hearing held in Glasgow on 2, 3, 4 and 5 May 2023

Employment Judge M Whitcombe

Ms Jen Nelson	**Claimant** **<u>Represented by:</u>** **Mrs L Lindsay** **(Solicitor)**
Renfrewshire Council	**Respondent** **<u>Represented by:</u>** **Mr N Young** **(Solicitor)**

JUDGMENT

The claimant was not constructively dismissed and therefore the claim for unfair dismissal fails.

REASONS

Introduction and background

1. Oral reasons for this judgment were given in the presence of the parties at the end of the hearing on 5 May 2023. These written reasons are provided at the claimant's subsequent request in accordance with rule 62(3) of the ET Rules of Procedure (2013).

2. The claimant was formerly employed by the respondent local authority as a teacher from 20 February 2012 until 7 November 2022, when the claimant resigned with immediate effect. Latterly, the claimant worked at Linwood High School as a Support for Learning Teacher. She is a member of the EIS trade union.

3. In a claim form received by the Tribunal on 9 February 2023 the claimant made a complaint of unfair constructive dismissal. It is common ground that the claim was presented within time since ACAS EC notification took place on 1 December 2022 and the certificate was issued on 9 January 2023.

4. The claim arises from the claimant's alleged mistreatment by the respondent in the 13 month period from 7 October 2021 until her resignation with immediate effect on 7 November 2022. The parties were agreed that the effective date of termination was 7 November 2022, even though the respondent continued to pay the claimant for a period after that date.

Issues

5. By the end of the hearing the only live issue was whether the respondent had breached the implied term of trust and confidence, explained in more detail below. The key components of the alleged breach of contract are set out in paragraph 41, below.

6. The respondent had originally argued that the claimant did not resign in response to the alleged breach of contract and also that the claimant had affirmed the contract even if there had been a fundamental breach. However, both of those arguments were abandoned during the hearing. That was an entirely realistic decision considering the evidence.

7. The respondent did not put forward any potentially fair reason for dismissal if the claimant established that she had been constructively dismissed. For obvious reasons in those circumstances, no case was put forward regarding the test of fairness in section 98(4) of the Employment Rights Act 1996 either.

Evidence

8. The hearing was conducted on the basis of a joint file of documentary evidence running in the end to 226 pages. Some additional pages were handed up during the hearing, but that was largely to deal with points taken by the respondent that were ultimately dropped.

9. I heard from the following witnesses, all of whom gave evidence on oath or affirmation and were cross-examined.

   a. The claimant.
   b. Vince Avarl, computer science teacher at the same school as the claimant and also the SSTA trade union representative for that school. He was present for part of an incident on 7 October 2021.
   c. Mark McGlynn, English teacher at the same school as the claimant and also the EIS trade union representative on site. He was also present for part of an incident on 7 October 2021.
   d. Kenny Fella, EIS trade union official. At the relevant time he was the Renfrewshire Secretary on a job share basis. He represented the claimant both at the stage 1 and the stage 2 grievance hearings.
   e. John Trainer, Head of Care and Criminal Justice. He conducted the stage 2 grievance hearing.
   f. Linda Mullins, Principal HR Advisor for several services including

schools. She had overall responsibility for the grievance process.

10. There were some notable absentees from that list. First, the Head Teacher Gillian Bowie, whose alleged conduct on 7 October 2021 is said to be part of the breach of contract. Second, Susan Bell, Education Manager, whose conduct of the stage 1 grievance hearing is alleged not only to have been inept and unfair, but also biased, and as such another important component of the breach of contract.

11. Once the issues had been clarified at the start of the hearing it seemed that the scope of the breach of contract was put more broadly than I had anticipated when reading the file. I asked Mr Young whether there were any changes to his initial list of witnesses, since there was certainly time for additional witnesses to be called within the very generous time allocation of five days. After time to reflect Mr Young confirmed that no additional witnesses would be called. I therefore proceeded on the basis that the respondent had been given a full and fair opportunity to call Gillian Bowie and Susan Bell, even if the way in which the claimant put the breach of contract had not been clear until the start of the hearing.

12. An issue arose when the witness evidence was all but finished. It transpired from Mr Trainer's evidence that, contrary to the instructions given to the respondent's representative, the respondent held two sets of notes of the stage 2 grievance meeting. The conspicuous absence of those notes was a matter I had raised with the respondent earlier in the hearing. Remarks allegedly made by Susan Bell at that meeting are important and highly contentious. To my even greater surprise, the claimant's representative indicated on behalf of her client that both the claimant and Kenny Fella had their own notes of that meeting. They had not been referred to or relied on up to that point. The remainder of the day was spent obtaining and exchanging the various notes. Consequently, it was not possible to complete the hearing within 3 days as planned. I made it clear that if either representative wished to recall any witness to answer further questions about any of the notes then

they could do so. John Trainer and Kenny Fella were duly recalled to comment on the notes, although the cross-examination of John Trainer strayed rapidly into other matters, revisiting themes which had been covered the previous day.

Timetabling

13. It was apparent at the start of the hearing that the time allocation was very generous. Although the parties proposed to spread the witness evidence and submissions over all 5 days allocated, the case appeared to be one that could be heard fairly within 3 days. I therefore asked the representatives for their estimates of the time necessary for oral evidence in chief and cross-examination of each witness. A timetable was based on those estimates. There came a point late in the hearing when Mrs Lindsay stated that she "would be surprised" if she kept to her estimate of the time needed to cross-examine Mr Trainer. I restricted cross-examination to her original request in accordance with rule 45 because it was ample to cover all the relevant issues fairly. I also thought it was fair to expect an experienced representative from a specialist firm to tailor their cross-examination accordingly, especially when the respondent had been able to stick to the timetable when cross-examining the claimant's witnesses.

Observations on the evidence

14. I have already highlighted the fact that the respondent chose not to call two witnesses whose conduct lay at the heart of the alleged breach of contract. On those issues the respondent's approach was essentially to highlight minor inconsistencies in the evidence of the claimant and her witnesses and on that basis to invite me to reject their evidence altogether, and to conclude that it was impossible to make any findings of fact at all as to what had really happened. I disagree. The standard of proof is not "beyond reasonable doubt" and I do not have to be sure of a fact to make that finding for the purposes of this decision. The standard of proof is of course the "balance of probabilities",

or in other words a "more likely than not" basis. I just have to be satisfied that a fact is more likely to be true then untrue. The respondent's approach to the case meant that on some issues it was a question of weighing some evidence against no evidence at all. I heard sufficiently cogent and credible evidence in support of the claimant's case to accept it when it was the only witness evidence on a particular issue.

15. Further, the more that Mr Agarl and Mr McGlynn were cross-examined the more impressed I was with their measured, consistent and firm evidence. I found them to be entirely credible and reliable witnesses who provided important support for the claimant's account.

Findings of fact

16. As noted above, where facts were in dispute I made my findings on the balance of probabilities, in other words a "more likely than not" basis.

The conduct of the Head Teacher on 7 October 2021

17. The claimant alleged that the Head Teacher had behaved in an aggressive and intimidating way towards her during discussions about a work issue on 7 October 2021, both in the Head Teacher's office and also in a nearby stairwell after the claimant had left the meeting.

18. I heard from three witnesses called by the claimant who were present for some or all of the relevant events. The trade union representatives had been waiting nearby for an unconnected meeting with the Head Teacher. The respondent did not call any witnesses at all to contradict the evidence of the claimant and her witnesses. Most strikingly, the Head Teacher has not given evidence. There was not even a hearsay witness statement from her, taken during the grievance process. It really was a case of some evidence versus no evidence. I have already set out above why I prefer the evidence called by the claimant in those circumstances. The inconsistencies in the evidence

called by the claimant were extremely minor overall and the key points were corroborated. I believe what the claimant told me about events in the stairwell and, by extension, I therefore believe what she says about the conversation in the Head Teacher's office too.

19. The Head Teacher's voice was raised when discussing matters with the claimant in her office. I accept Mr McGlynn's description of the tone as "angry". That went on for several minutes and the claimant emerged from the office looking visibly upset. I find that the Head Teacher did say, *"if you've got something to say, say it to my face*" or certainly very similar words to that effect, as well as "*what we were discussing was confidential*". I find that the Head Teacher was pointing at the claimant as she made that remark.

20. The claimant brought a formal grievance on 10 March 2022. That grievance raised many issues including, but by no means limited to, an allegation that the Head Teacher had on 7 October 2021 treated the claimant in a way which was "threatening, insensitive and aggressive" contrary to the respondent's "Respect at Work" policy. Stage 1 of the process would normally have been heard by the Head Teacher, but since the grievance partly concerned her it was instead heard by Susan Bell, Education Manager, on 29 April 2022. The claimant was represented by Kenny Fella of the EIS and witness statements from Vince Avarl and Mark McGlynn were relied on by the claimant. The only other person present was Valery Timoney, HR Adviser.

21. The outcome on seven numbered points was given in a letter dated 27 June 2022. The conclusion on the relevant point was expressed as follows. "*There are two witness statements which state that the head teacher pointed at you and said, 'if you have anything to say to me, say it to my face.' This could be construed as an aggressive statement. However, this is denied by the head teacher and by another witness which makes it one word against another. I therefore do not find evidence that the head teacher treated you in a manner that was 'threatening, insensitive and aggressive'.*"

22. The words "do not find evidence" are curious given that the allegation was supported by the claimant's own evidence and there was at least partial corroboration of the claimant's account. The question was whether that evidence was more likely to be correct than that of Gillian Bowie and Eileen Sheridan. I find that no statements were taken from Gillian Bowie at any stage and that the only statement taken from Eileen Sheridan post-dated the stage 1 decision. It was contained in an email dated 30 June 2022. That appears to have been an attempt to bolster the decision with written evidence after the decision had been communicated to the claimant. It appears that Susan Bell must also have had undocumented conversations with the Head Teacher Gillian Bowie and with Eileen Sheridan that were not shared with the claimant prior to reaching a decision.

23. The claimant appealed to stage 2 by a "statement of appeal" dated 24 August 2022. The stage 2 hearing was chaired by John Trainer, Head of Care and Criminal Justice, on 14 October 2022. Once again, the claimant was represented by Kenny Fella. Susan Bell, the stage 1 decision maker, joined the appeal via a MS Teams call. Once again, there were seven points of appeal only one of which was directly relevant to the issues in this case.

24. On the relevant issue John Trainer summarised the sources of evidence without explaining even in the broadest terms why he gave more or less weight to any particular piece of evidence. The only facts really found were ones on which all witnesses agreed – Ms Bowie had spoken to the claimant in the stairwell and also spoke to the trade union representatives about a meeting they were due to attend with her. The conclusion acknowledged that the claimant experienced the incident to be "threatening, insensitive and aggressive" but Mr Trainer said, "*I do not, however on the basis of the evidence heard consider it was established that the Head Teacher was 'threatening, insensitive or aggressive'.*"

25. In his oral evidence at this hearing Mr Trainer explained, and I accept, that he disregarded the statement obtained by Susan Bell from Eileen Sheridan after

the stage 1 decision. It is curious that he should do so if the stage 2 hearing was, as he asserted, a full re-hearing at which he would "*consider all the evidence presented to me, whether written or verbal*". He also seemed to regard it as being Susan Bell's decision, rather than his own, whether Eileen Sheridan should be called to give evidence in person to the stage 2 hearing. Mr Trainer did not think that he, as the chair, had any power to call witnesses. My reading of section 4.2 of the grievance procedure is that it certainly does not prohibit the decision maker from requiring the attendance of a relevant witness. Either way, Mr Trainer's logic appears to have been that since Eileen Sheridan was not called to give oral evidence at the stage 2 hearing the statement obtained from her would be disregarded.

26. On the following points I prefer the evidence given by the claimant and Kenny Fella to the recollection of John Trainer. I found them to be credible witnesses whose evidence was broadly supported by the notes. I am satisfied on the balance of probabilities that during the stage 2 hearing Susan Bell said words to the effect of, "*I don't believe the Head Teacher would have said those things*" and also words to the effect of "*you can't get more credible witnesses than a Head Teacher and the Education Support Manager.*" Those remarks were made in circumstances where it was wholly unclear precisely what either witness had said to Susan Bell before she reached her decision. I find that both remarks are revealing, since they suggest that Susan Bell had a predisposition to believe those witnesses because of their roles and status within the school hierarchy and because of her prior general knowledge of the Head Teacher.

27. The stage 2 outcome letter reminded the claimant of her further right of appeal to stage 3. Paragraph 1.4 of the respondent's grievance procedure states that *"employees will normally be expected to exhaust these grievance procedures if they wish to take their grievance to an employment tribunal."* Stage 3 would be heard by the Personnel Appeals and Applied Conditions of Service Appeals Panel. That is a panel of elected council members rather than members of the local authority management team. The panel typically

consists of 5 or 6 elected members with a quorum of 3. Kenny Fella's evidence was that such panels rarely upheld appeals whereas Linda Mullins' evidence was that panels certainly did so and were often perceived not to want to find in favour of management. She said that the last couple of stage 3 appeals she had been involved in had been allowed. John Trainer's more limited experience of stage 3 processes (by which he meant disciplinary appeals rather than grievance appeals) was that elected members took their responsibilities particularly seriously and that their sympathies, if any, lay with staff rather than management. My finding is that in the absence of specific evidence to suggest otherwise in a particular case, stage 3 appeals to elected members could be expected to be diligent, fair and certainly not biased in favour of management.

28. The claimant did not exercise her right to appeal to stage 3. Her evidence was that she no longer had any faith in the system and I accept that was her view at the time. However, she also said that she had not particularly considered whether the stage 3 appeals panel could give an unbiased hearing, reasoning that what she had experienced was already sufficiently serious for her to resign.

29. The claimant resigned with immediate effect by a letter dated 7 November 2022, referring to a "serious material breach" of contract and constructive dismissal. The reasoning was that the evidence of first hand witnesses had been ignored, that Susan Bell had admitted that she was not impartial and that John Trainer had ignored that admission. The claimant stated that she consequently had no other option but to resign.

30. Although the documents included evidence of subsequent discussions between the claimant and the respondent they are not relevant to my decision and I make no findings in relation to them. They post-date the alleged acceptance of a fundamental breach of contract and matters must be assessed at 7 November 2022. The later documents cast no light on whether a breach of contract existed prior to 7 November 2022.

Relevant legal principles

Constructive dismissal

31. It is for the claimant to satisfy the Tribunal that she was constructively dismissed for the purposes of section 95(1)(c) of the Employment Rights Act 1996. Otherwise, the legal effect is that her employment terminated by a resignation which is not to be treated as a dismissal.

32. The claimant must prove that the respondent was in repudiatory breach of her contract of employment. That entails proving 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" (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221, CA). The Court of Appeal expressly rejected the argument that the predecessor provisions of s.95(1)(c) ERA 1996 introduced a concept of reasonable behaviour into the contract of employment. An employee is not able to resign and claim constructive dismissal merely because their employer has behaved *unreasonably*.

The implied term of trust and confidence

33. The claimant relies on a breach of the implied term of trust and confidence. It is uncontroversial that the following fundamental term is implied into every contract of employment.

34. It is a fundamental breach of contract for either party, without reasonable and proper cause, to conduct itself in a manner 'calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee' (***Courtaulds Northern Textiles Ltd v Andrew*** [1979] IRLR 84, EAT, ***Malik v BCCI*** [1997] ICR 606, HL).

35. If the claimant establishes a repudiatory breach of contract then she must

also demonstrate that the breach caused her to resign and that she did not delay too long before resigning, thereby affirming the contract and losing the right to claim constructive dismissal. However, those are no longer contentious issues in this case.

36. Where there is more than one reason for an employee's resignation then it is not necessary for the employee to prove that the repudiatory breach of contract was the sole, predominant, principal, major or main cause of the resignation. The crucial question is whether the repudiatory breach "played a part in the resignation" (***Wright v North Ayrshire Council*** [2014] ICR 77, EAT). The repudiatory breach need only be one of the factors relied on when resigning. That is the legal context in which the respondent abandoned its argument that there were other reasons for the claimant's resignation.

Seriousness of breach of contract

37. A breach of the implied term of trust and confidence is necessarily fundamental (***Morrow v Safeway Stores plc*** [2002] IRLR 9, EAT) – it is a "fundamental term". Breaches of other contractual terms may or may not be of the required seriousness. It is essentially a question of fact and degree whether the breach reached the level described in ***Western Excavating*** (above). The test of whether there was a repudiatory breach of contract is objective, and it neither depends on the subjective intentions of the employer (***Leeds Dental Team Ltd v Rose*** [2014] ICR 94, EAT) nor on the subjective perception of the employee.

38. If a fundamental breach of contract occurs, then it cannot be "cured" by the employer's subsequent actions. However, an employer may of course act to make amends to prevent such a breach from occurring in the first place (***Bournemouth University Higher Education Corporation v Buckland*** [2010] ICR 908, CA).

Submissions

39. I have already set out the key legal issues at paragraphs 5 to 7, and in paragraph 41 I set out the 6 aspects of the alleged breach of contract outlined by the claimant at the start of the hearing. The parties made oral submissions which I limited to 30 minutes per side. The claimants' submissions overran slightly so I allowed the respondent to do the same. I will deal with the key points when setting out my own reasoning.

Reasoning and conclusions

40. I have considered all of the facts in the round and have attempted to assess the aggregate effect on the relationship of trust and confidence between the claimant and the respondent. I have carefully applied the definition of the implied term of trust and confidence set out in ***Malik*** and ***Courtaulds*** (above). My approach has been to consider the facts *objectively* and not from the subjective perspective of either side, since that is how breaches of contract must be assessed. The important words used to describe the implied term in the above cases must be applied and it is certainly not a question of simply seeking to identify objectively *unreasonable* behaviour.

Aspects of the alleged breach of contract

41. These are the matters which the claimant says amount, either individually or cumulatively, to a breach of the implied term of trust and confidence.

    a. The conduct of the Head Teacher, Gillian Bowie, on 7 October 2021.
    b. Education Manager Susan Bell's "apparent bias" as displayed in her stage 1 grievance outcome letter.
    c. The use by Susan Bell of a statement from a witness Eileen Sheridan (Education Support Manager) as evidence at the stage 2 grievance hearing.
    d. Susan Bell's "apparent bias" at stage 2 which tainted the stage 2 grievance decision.

e. John Trainer's failure to intervene or restart the grievance process, which should have been abandoned and assigned to a completely new stage 1 decision-maker to investigate afresh.
f. John Trainer's apparent bias in the stage 2 outcome letter.

42. As I made clear at the start of the hearing, I did not think that the Tribunal was tied to technical legal definitions of "apparent bias" because the overall question always remained whether there was a breach of the implied term of trust and confidence. Allegations of bias had to be considered in that context.

The conduct of the Head Teacher on 7 October 2021

43. I have set out above my findings of fact on this issue.

44. While I do not accept the submission that the Head Teacher's words, "*if you've got something to say, say it to my face*" are *necessarily* aggressive regardless of context, I accept that they were aggressive when seen in their proper context in this case. The tone of voice was angry and the Head Teacher was pointing at the claimant. I accept the eyewitness assessment that it was "*not professional behaviour*" and that the Head Teacher's manner was aggressive. Similarly, while I find that the words "*what we were discussing was confidential*" were unobjectionable in principle they must be seen in the overall context, which was of aggressive behaviour.

45. The Head Teacher raised her voice, both in her own room and also near the stairwell. She pointed at the claimant and spoke in a way which was aggressive when assessed in its overall context.

46. I therefore find the essential allegation proved. I find that on the relevant occasion the Head Teacher acted in a way which was not only insensitive but also aggressive and intimidating. The claimant's case in her grievance was that the Head Teacher's conduct had been "threatening, insensitive and aggressive". I find that it met all three aspects of that definition.

47. Assessed objectively, I find that this incident was likely to, and did, undermine trust and confidence without reasonable and proper cause. However, on its own, it would not come close to a breach of the implied term because it does not reach the level of *destruction* of, or causing *serious damage* to, the relationship of trust and confidence. It was regrettable and inappropriate behaviour. It should not have happened. It should have been a matter for reflection and apology, sooner rather than later. It was, however, a one-off incident of relatively brief duration. There seems to be general agreement that it was out of character and that the Head Teacher had not been known to act in a similar way on any previous occasion, whether towards the claimant or anyone else. That is why I find that although the incident caused *some* damage to the relationship of trust and confidence, that relationship was certainly not seriously damaged or destroyed.

Susan Bell's approach to the grievance process

48. I recognise that the claimant's grievance had a much broader scope than the matters under scrutiny at this hearing. The incident on 7 October 2011 fell under one heading of seven in the grievance. Susan Bell was not concerned with a single issue, whereas this hearing has focussed on one of the grievance issues at greater length. I also recognise that internal grievance procedures are not intended to be as rigorous as courts and they are not even expected to adopt the less formal approach to evidence seen in employment tribunals. They are intended to provide a swift, informal and non-legal resolution of complaints. That said, they should also be conducted reasonably competently and conscientiously. Grievance procedures should not be tainted with bias. HR advisors are involved to ensure that those standards are met and a failure to do so might risk undermining trust and confidence.

49. I find that Susan Bell's approach to her task was unsatisfactory for several reasons. There was no proper attempt to gather evidence from the Head Teacher at all. No statement was obtained from her and she did not attend

any sort of minuted hearing. The Head Teacher did not face any questions from the claimant or her representative. Her evidence seems to have been gathered in an informal discussion. That was not only inadequate for a fair and thorough investigation, it also meant that a rather different process and level of scrutiny was applied to the claimant's evidence on the one hand and the Head Teacher's evidence on the other. That was not a promising starting point for a fair comparison.

50. Susan Bell's reasoning as expressed in the outcome letter is not reassuring. The outcome letter need not be a refined product of draughtsmanship but it should demonstrate that the decision-maker had understood and engaged with the issues and undertaken a conscientious process. In this case, the process necessarily required the conscientious weighing of two opposed accounts. The claimant's account was supported, at least in part, by the evidence of two other witnesses with no obvious reason to be dishonest or mistaken. The reasoning in the outcome letter is thin, describing the case as one of "*one word against another*" leading to the conclusion that "*I therefore do not find evidence that the Head Teacher treated you in a manner that was 'threatening, insensitive and aggressive'*". There is no indication that Susan Bell attempted to assess in any analytical way whose evidence might be more credible or persuasive, still less to explain why. Since she did not give evidence at this employment tribunal hearing I have not had any opportunity to discover whether any more detailed reasoning lay behind the brief treatment of the relevant issue in the outcome letter. I therefore conclude that there was none.

51. The fact that Eileen Sheridan's written evidence was obtained only after the stage 1 decision was made and communicated to the claimant was unsatisfactory and procedurally irregular. It reflected a confused and clumsy approach to decision making but I do not regard it as evidence of bias, as was submitted on behalf of the claimant.

52. I find that the stage 1 grievance decision was one of poor quality. That should

be a matter of concern to the respondent and specifically to those in its HR department responsible for ensuring that grievance decisions are taken fairly. I find that this, even without more, undermined trust and confidence without reasonable and proper cause.

53. However, those are not the only concerns. Susan Bell made two comments when defending her decision at the stage 2 hearing which revealed bias on her part. I refer to the findings of fact made above. Susan Bell took into account her own prior knowledge and assessment of the Head Teacher rather than weighing the eye-witness evidence impartially. She also gave more weight to the evidence of the Head Teacher and another witness because of their rank and status within the school hierarchy. That hierarchy of credibility amounted to bias against the claimant.

54. For those reasons, I find that Susan Bell's handling of stage 1 of the grievance process was not only inadequate and unfair, it was also biased against the claimant. That fact also damaged the relationship of trust and confidence without reasonable and proper cause.

John Trainer's handling of the stage 2 grievance hearing

55. The approach to evidence at the stage 2 grievance hearing was also problematic. While portrayed by the respondent as a "re-hearing", it was not a re-hearing in any meaningful sense. While it is true that grounds of appeal are not strictly necessary and that the stage 2 decision maker (John Trainer) was prepared to substitute his view for that of the stage 1 decision maker (Susan Bell), he received a good deal of evidence from and through Susan Bell, rather than from the primary sources. That was a flawed approach, especially given that the claimant alleged that procedural irregularities and bias tainted Susan Bell's stage 1 decision. Mr Trainer did not hear any direct evidence from the Head Teacher, nor did he have a statement from her. All he had was Susan Bell's version and interpretation of the Head Teacher's evidence. I do not accept that John Trainer could properly "re-hear"

contentious issues of witness credibility without any first-hand assessment of the evidence given by those witnesses in a structured setting.

56. I do not accept the respondent's submission that responsibility for a failure to call the Head Teacher lies with the claimant or her representative. It was the respondent's obligation to conduct a fair and conscientious process overall. I do not read the grievance procedure as prohibiting the stage 2 decision maker from requiring the attendance of witnesses and it is difficult to see how it could be a full re-hearing (as Mr Trainer thought) unless he had the power to do so. Where a key issue on appeal is the way in which disputed evidence was weighed at stage 1, stage 2 can only be a meaningful re-hearing if the decision maker is in a position to weigh the same evidence (and possibly more) themselves.

57. However, unlike Susan Bell, John Trainer did attend this employment tribunal. He was tested in cross-examination and allegations of bias were put to him and explored with him. My impression was of a genuinely impartial manager who had overseen a flawed and inadequate process, but not a biased one. I did not detect any hint of prejudgment on his part and I did not detect any predisposition to believe the Head Teacher's evidence. The fact that the stage 2 hearing was insufficient to restore fairness or to reveal and deal with Susan Bell's bias does not mean that John Trainer was himself biased. I am satisfied that he was not.

58. I do not accept the claimant's submission that John Trainer was obliged to intervene when Susan Bell made remarks arguably revealing bias, or to abandon the stage 2 hearing and assign a completely new stage 1 decision maker to investigate afresh. Those might have been permissible options, but they were not the only fair, reasonable or realistic approach. Alternatively, John Trainer could simply have gathered the relevant evidence himself and reached a fair decision after a fair process. He failed to do that, but I do not accept the claimant's submission that his failure to re-start the process amounted to or revealed bias on his part. The grievance was not primarily

about Susan Bell's bias at stage 1, rather those were criticisms made on behalf of the claimant in pursuit of a different grievance outcome. Mr Trainer thought that he was addressing all of the substantive points in the claimant's grievance. While I do not share his view that Susan Bell was unbiased I accept that he reached his own conclusion honestly and impartially.

59. The claimant's final submission was that there was apparent bias in the outcome letter written by John Trainer. The suggestion made in cross-examination was that Mr Trainer's failure to explain what his conclusion in relation to the Head Teacher's behaviour was based on revealed bias on his part. I disagree. It reveals a flawed process which failed sufficiently to grapple with a central conflict of evidence, but I see no evidence of bias merely because it was unsatisfactory in that way.

60. Pausing there to consider the respondent's handling of the grievance up to the end of stage 2, I find that it was likely to, and did, cause damage to the relationship of trust and confidence without reasonable and proper cause. Both stages of the process had lacked rigour and reasoning. The stage 1 decision maker was also biased in favour of management and although the stage 2 decision maker was not similarly biased, stage 2 of the process was inadequate to detect and correct the earlier bias. The respondent had got a lot of important things wrong, and the claimant was, and was entitled to be, distressed about those failings. Objectively, the relationship of trust and confidence had been damaged.

The significance of stage 3 of the grievance process

61. However, stage 3 of the grievance process remained available. The claimant chose not to proceed to that stage of the process before resigning.

62. Stage 3 would have entailed an appeal to elected members of the council. Not only would those individuals have had no previous involvement in the grievance process, they would not have been part of the respondent's

management structure at all. I accept the respondent's evidence that elected members serving on stage 3 appeal panels take their responsibilities seriously and that they are quite prepared to hold management to account if there have been failings. There was every prospect that the stage 3 decision would have been taken diligently, independently and without bias.

63. The claimant knew that she could be represented by an experienced trade union representative at stage 3, just as she had been at stages 1 and 2. It was clear to me during this hearing that Mr Fella had a complete grasp of the issues and evidence. I have little doubt that he would have done an effective job at stage 3, highlighting the procedural failings and bias earlier in the process and explaining why elected members should prefer the claimant's account of the head teacher's conduct on 7 October 2021.

64. Assessed objectively, I find that stage 3 was an entirely viable option with a realistic chance of righting the wrongs of stages 1 and 2. There was a very reasonable expectation that stage 3 would be independent, fair, thorough, and free from bias. There was also a very reasonable expectation that the claimant's account of events on 7 October 2021 would have been accepted and that the bias and procedural irregularities at earlier stages of the process would have been acknowledged and corrected.

65. My conclusion is that although the claimant had been poorly treated on 7 October 2021 and badly let down at stages 1 and 2 of the grievance process, there remained a realistic prospect of resolution and a satisfactory outcome at stage 3. That is my assessment of the objective facts at the date of the claimant's resignation. In contractual terms, I find that there was no breach of the implied term of trust and confidence because although that relationship had certainly been damaged without reasonable and proper cause, the situation had not reached the level of *serious damage* to, or *destruction* of, the relationship of trust and confidence. In other words, the degree of damage to that relationship had not reached the level necessary to constitute a breach of the implied term.

66. I have considerable sympathy for the claimant's position. She was let down by processes intended to ensure that disputes are resolved at an early stage without needing to bring an employment tribunal claim. However, at the date of her resignation those internal processes had not been exhausted and the potential of the remaining stages was enough to mean that the relationship of trust and confidence had not been damaged sufficiently seriously to found a claim for constructive dismissal. As the authorities set out above emphasise, a breach of the implied term is not established simply by showing that the employer acted unreasonably.

67. Since I have concluded that there was no breach of the implied term of trust and confidence, the claimant's resignation was not in response to a fundamental breach of contract. That means that the situation falls outside the definition of dismissal in section 95(1)(c) of the Employment Rights Act 1996. Since the claimant was not dismissed, the claim for unfair dismissal is not well-founded.

Employment Judge: **M Whitcombe**
Date of Judgment: **20 May 2023**
Entered in register: **24 May 2023**
and copied to parties