



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Woods

**Respondent:** City Care Partnership Limited

**HELD AT:** Manchester **ON:** 23, 24, 25 & 26  
October 2023

**BEFORE:** Employment Judge Johnson

## REPRESENTATION:

**Claimant:** Unrepresented

**Respondent:** Mr M Haywood (counsel)

# JUDGMENT

The judgment of the Tribunal is that:

- (1) The claimant's complaint of constructive unfair dismissal contrary to section 95(1)(c) Employment Rights Act 1996 is not well founded. This means that the claim is unsuccessful.
- (2) The complaint brought seeking payments in respect of unpaid annual leave entitlement (known as holiday pay) contrary to the Working Time Regulations 1998, is dismissed upon withdrawal by the claimant on the first day of the final hearing.

# REASONS

## Introduction

1. These proceedings arose from a claim presented by the claimant to the Tribunal on 16 June 2022 following a period of early conciliation from 10 February to 23 March 2022. The claimant brought complaints of unfair

dismissal and unpaid holiday pay entitlement. It related to his resignation on 9 February 2022 from his role of maintenance worker.

2. The response was presented by the respondent on 22 July 2022, and it resisted the claim.
3. Case management followed and at a preliminary hearing case management (PHCM) on 18 November 2022, Judge Leach refused the respondent's application seeking a deposit order, listed the case for final hearing and made appropriate case management orders to ensure that the case was ready for the final hearing.

### **Issues**

4. The parties had discussed a list of issues at the PHCM with Judge Leach on 18 November 2022 and it appeared that they would have been finalised in readiness for the final hearing this week, following consideration by the parties of the claimant's grievance letter dated 25 December 2021. This was not available to Judge Leach and he made an order for issues to be agreed by the parties once they had considered this letter. However, Mr Haywood explained that the list as currently drafted and referred to in the Note of PH, required some revision and this took place during the time that I spent on day 1 reading the witness statements and hearing bundle.
5. The claimant confirmed on day 1 of the hearing that the holiday pay complaint had been brought in error and I confirmed that this complaint would be dismissed upon withdrawal in the final judgment.
6. Paragraph 1.1.1.1 of the proposed list of issues and referred to in the Annx to the Note of PH produced by Judge Leach was varied before the evidence was heard. It identified the specific allegations of the breach of the implied term of trust and confidence by the respondent as employer, to the claimant as employee in accordance with the allegations contained within the aforementioned grievance letter dated 25 December 2021. Mr Haywood provided the claimant and the Tribunal with the clarified list of issues. They were many in number, but concluded with a final straw and they will be discussed in the findings of fact below.
7. However, the list of issues was primarily a standard list used in a constructive unfair dismissal complaint and raised the usual questions asked of a Tribunal in accordance with well established principles, discussed in the law section below.

### **Evidence used.**

8. The claimant gave evidence along with his wife, Mrs Elaine Woods.
9. The respondent relied upon the following witnesses:
  - a) Sharon Fowler (heard grievance brought by claimant and more generally dealt with HR issues arising)

- b) Peter Aughey (colleague who gave evidence as to allegations)
  - c) Brian Sheppard (evidence relating to claimant's last day at work and sickness absence/end of employment)
  - d) Lilly Kour (dealing with the respondent's awareness of the claimant's injuries when a fridge was moved).
10. Documents were provided in a joint and agreed final hearing bundle of some 390 pages and consisting of pleadings, documents including contract of employment, photographs and emails, medical evidence, claimant's mitigation documents, accident reporting policies, additional documents and claimant's further disclosure.

### **Findings of fact**

11. The findings of fact are made following the hearing of the evidence of witnesses and considering documents in the bundle which were identified within the witness statements or during the hearing of the witness evidence as part of cross examination and judicial examination.
12. This is a claim of constructive unfair dismissal and accordingly the burden of proof rests with the claimant and the evidential test applied when making findings of fact is based upon the balance of probabilities.
13. The respondent (City Care) is a limited company with two directors, Jonathan Crowther and Sheila O'Neill. It is a specialist care provider for adults with learning disabilities and autistic spectrum condition. It is understood that this includes the management of accommodation and the provision of carers to support these adults with independent living.
14. Taking into account the services provided, City Care has premises and buildings which experience wear and tear and require regular repairs and maintenance and they have employed several maintenance workers to carry out these tasks, although one of these workers, Mr Aughey, explained that sometimes it was necessary to request that management instruct external builders for larger jobs.
15. As an employer with some 225 employees, City Care employ HR staff. Mrs Fowler is the HR Manager, with Mr Sheppard being the Recruitment Lead. Employees are issued with statements of terms and conditions (which includes reference to the grievance procedure) and an Employee Handbook, (which contains the grievance procedure in chapter 17), (pp62-127).
16. The claimant (Mr Woods) was employed by City Care as a maintenance worker from 15 August 2011. He was recruited by Mr Crowther when he was carrying out building work in connection with Mr Crowther's domestic residence. When Mr Woods commenced his employment, he received the statement of terms and conditions of employment and signed his agreement on 15 August 2011 that he agreed that this document, that the handbook formed his contract of employment and that he received the same documents, (p66).

17. I accept that from time to time, Mr Crowther, Mr Aughey and another maintenance worker might be asked to carry out further work on Mr Crowther's domestic properties, but they would be paid for this work separately, that this was not part of their day to day duties while employed by City Care and that they would not suffer any loss of pay for the employed roles when providing this separate work.
18. The contract of employment which applies to Mr Woods describes his job role as that of 'maintenance worker' and while he disputed that the role was a broad one, I considered the diverse work and tasks carried out by these workers in terms of the photographs included in the bundle, the descriptions in evidence given by the witnesses of the work that was carried out, in particular that given by Mr Aughey and Mr Woods himself. On balance, I conclude that this was a wide-ranging role and while not a '*jack of all trades*' position, maintenance workers were knowledgeable and practical and able to carry out a variety of tasks. Examples of this work included the fitting and fixing bathrooms. Mr Aughey gave convincing evidence of their general ability to deal with most maintenance related activities but where necessary, they could ask Mr Crowther to instruct third party building contractors for larger jobs beyond their usual work.
19. I also accept that although at times, Mr Woods could be reluctant to adapt to some of the management and administrative systems, he was a valued employee who would be left to resolve the problems which he was called to solve by City Care employees. However, while this was the case, he was ultimately managed by Mr Crowther. From the evidence which I heard, although Mr Woods complained in his grievance in December 2021, with a number of issues, he faced no disciplinary action, nor did he raise any informal or formal grievances.
20. Mr Woods referred to several workplace injuries, I was not persuaded that this was something which he complained of to his employer, and he confirmed that he had not brought any accident at work claims for injuries sustained. However, I accept that he had a number of health issues, but he was able to continue working without difficulty until 28 September 2021. On this day and during lunchtime, he called Mrs Fowler who is the HR manager at City Care and explained he was leaving work early to see his GP about his bad back and sore wrist. This was the last time that he attended work.
21. From 28 September 2021 Mr Woods began a lengthy period of sickness absence before he resigned on 9 February 2022. When he attended his appointment with his GP and mental health issues were discussed. Acute stress and depression were identified. He conceded that when the reason for this absence was informed to City Care, it was the first time that his employer was aware of him having mental health difficulties.
22. Mrs Fowler sought to manage the absence and requested that Mr Woods attended a welfare meeting on 28 October 2021. This was followed up with a voicemail and on 15 November 2021, Mrs Woods explained that the earlier letter had not been received, but that '*[a]t this moment in time Don is not Physically and mentally well enough to the attend this meeting.*' (pp173/174). I

noted that during this period, Mr Woods had been referred to Trafford Psychological Services.

23. Mr Wood's sickness absence continued and on 25 December 2021 an email was sent by Mrs Woods entitled 'grievance letter' and which enclosed a letter which she had prepared, and which was headed 'To whom it may concern.' The letter described a number of issues he had with his employer over several pages.
24. Not surprisingly, no acknowledgement took place until 27 December 2021 and in a brief email to Mrs Woods, she confirmed that the letter was being treated as a grievance and would be fully investigated upon return to office on 4 January 2022. This was not unreasonable given that the letter was sent on Christmas Day and during the wider Christmas holiday period.
25. The grievance procedure within the Employee Handbook broadly reflects the ACAS Guide: Discipline and Grievances at Work (2020). The emphasis is upon an informal discussion with a local manager, with the matter proceeding to a formal step 1 discussion following submission of a written grievance by the employee. Step 2 explains that efforts should be made by the employer to resolve the grievance within 7 days, with a hearing taking place and the employee having a right to be accompanied. Step 3 provides for an appeal which should be sent by the employee within 7 days of the outcome of the Step 2 hearing.
26. I noted that the grievance letter sent by Mrs Woods was 4 pages in length and following an initial preamble regarding him suffering from back and wrist pain for the previous 4 years, with the subsequent mental health related sickness absence then taking place, she raised a number of varied concerns regarding her husband's employment. (pp176-179). They related to many of the allegations included within the list of issues, but they were not precise in terms of the dates when they happened. Additionally, they were wide ranging, covering areas such as being on call, health and safety issues, pay issues, concerns regarding training and matters arising from during the Covid pandemic. I noted that these matters had not been previously raised as either informal or formal grievances (Mr Wood confirming in evidence that this was the case). Mrs Woods explained within the grievance letter that while off sick and during '*...this period of reflection Don [Mr Woods] has come to the conclusion that he has been unfairly treated and has been put on more and more.*'
27. Not surprisingly, Mrs Fowler had a large number of issues to investigate, and I accept that it was not reasonably possible to meet with Mr Woods initially given his wife's previously raised concerns. Moreover, it was difficult to meet with other members of staff due to the ongoing Omnicom Covid virus strain which was prevalent in the UK at the time and the lack of precision in the grievance allegations, meant the usual time limits could not be complied with under the grievance procedure with a 7 day turnaround of the Step 2 process. I did note that it would have perhaps been helpful to Mr Woods to manage expectations by regularly updating him as to progress made, but this was not critical to the overall fairness of Mrs Fowler's handling of the grievance.

28. Indeed, I noted that Mrs Woods sent a further email on 27 January 2022 complaining that City Care had had '*...more than enough time...to have fully investigated the contents within the grievance*'. (184). This prompted a swift response from Mrs Fowler with the grievance letter being sent to Mr Woods the same day. An explanation was provided at the beginning the letter that '*...information had to be collated from various services which had proved difficult due to absence and Covid restrictions...*'. (p186).
29. Mrs Fowler, in her decision letter had broken the grievance letter complaints into 8 points, which can be described as follows:
- Point 1 – Mr Woods having suffered from back and wrist pain for more than 4 years and alleging that Cit Care knew of the allegations.
- Point 2- Mr Woods alleged a general dissatisfaction with being expected to manage maintenance and being on call.
- Point 3 – Health and Safety concerns.
- Point 4 – concerns regarding pay and in particular overtime rates.
- Point 5 – concerns regarding Covid, what was essential work, furlough and the way he was spoken to by Mr Crowther.
- Point 6 – concerns regarding Mr Woods' hourly rate and pay rises.
- Point 7 – concerns that Mr Woods had to do the vast majority of work compared with colleagues.
- Point 8 – allegation that Mr Crowther '...spoke to Don [Mr Woods] like a piece of dirt' on the day he went off sick on 28 September 2021.
30. The conclusions reached were as follows in relation to each of the 8 points covered:
- a) Point 1 could not be determined because Mrs Fowler required further information from Mr Woods as there was no record of injuries held by City Care.
  - b) Point 2 was considered unfounded because Mr Woods had been informed that whoever had the use of the van be available on call and he could have delegated responsibility to another member of team but failed to do so.
  - c) Point 3 was considered unfounded as Mr Woods was known to carry out his own informal risk assessments, safety equipment could be supplied if asked for and that accident books are located at each premises and Health & Safety training has been provided.

- d) Point 4 was considered unfounded because Mr Woods had been given provision to access payslips with a work email account and more recently an iPad to access Softworks time management system and that he was paid time and half overtime rate in accordance with the contractual terms provided.
  - e) Point 5 was partly upheld because although there was confusion regarding the government's furlough scheme and testing arreagments and work to deal with vulnerable service user's accommodation was an essential activity. However, in relation Mr Woods not attending the private property belonging to Mr Crowther's family, Mr Crowther should not have spoken to him when Mr Woods did not turn up for the job.
  - f) Point 6 was considered unfounded because although recognised rises were limited by local government payment levels, there was evidence that pay had been increased in the same way that other staff had been.
  - g) Point 7 was partly upheld as Mrs Fowler agreed that the other maintenance workers did not have the same skillset as Mr Woods, but it was noted that this had not been previously raised by him to Mr Crowther as a concern.
  - h) Point 8 was considered unfounded as although the issue appeared to arise from Mr Woods previously making complaints about Mr Crowther's son taking drugs giving rise to his dismissal and Mr Crowther denied that he had subsequently said Mr Woods deserved being attacked by his son, (allegedly said to another employee who then told Mr Woods).
31. The letter concluded with Mr Woods being invited to provide clarification regarding the outstanding matter (Point 1), in order that a final outcome could be made.
32. Mrs Woods responded on 4 February 2022 and challenged the grievance decision on the basis that it was not carried out by an impartial third party and requested copies of the attachments which had not been included, (p195). These were sent and consisted of emails and documents relating to log in details for Mr Woods and training records. (pp198-200).
33. In reply to further comments made by Mrs Woods, Mrs Fowler sent a further letter on 7 February 2022 explaining that as the complaint was made against Mr Crowther and Philip Jones and Mrs Fowler was not named in the grievance letter, she was as HR manager able to deal with the grievance process, (pp203-4).
34. On 9 February 2022, Mrs Woods replied to say that her husband was considering his options as he disputed most of the response, which I accepted referred to the decision letter concerning the grievance, (pp205). Later that day (at 22:30 hours), Mrs Woods wrote on his behalf enclosing his letter to her email which said the following: (pp206-7):

*'Due to your response(s) to the grievance, along with other points raised, I have taken advice and I now feel I have no choice but to resign with immediate effect from my position as maintenance worker within the company'.*

35. A signed copy of the resignation was sent following a request from Mrs Fowler on 10 February 2022 (p210) and a further grievance decision letter was sent by her to the claimant the same day. It provided additional comments to *'conclude the grievance raised'*. (pp211-217). In relation to the unresolved point 1, a revised entry explained that the allegation was unfounded:

*'as no further evidence has been provided to allow recovery of any records showing accidents that were sustained by Don whilst on sick at any services.*

The remainder of the letter effectively 'tidied up' the original letter, but the other decisions previously made were retained. A final paragraph was included advising a right of appeal and effectively this letter was the decision as part of Step 2 of the City Care grievance process.

36. No notice of appeal was raised by Mr Woods and instead a further email/message was sent by Mrs Woods to City Care following receipt of the decision letter (p219) stating the following:

*'Can I just clarify that Dons resignation was due to breach of contract which is PERFECTLY CLEAR in your response to Don's grievance.*

*Ref: -email sent to you dated 9.2.2022 at 15,37.*

*As far as Don is concerned, he has NOT answered your response to the grievance letter as Don is awaiting on Legal Advice hence this matter is definitely not closed'.*

37. A further email was sent by Mrs Woods on 15 February 2002 to Mr Sheppard when her husband was asked to return his iPad and sim card to be delivered by hand due to *'...the lack of trust that now exists (sic)'*, (p220). Further correspondence was sent during February and March 2022 effectively checking to see whether Mr Woods wished to appeal the grievance decision. However, in evidence, he confirmed that did not appeal because he sought legal advice and he was told not to reply again to his employer.

38. City Care accepted that no appeal was being brought and that Mr Woods' resignation took place on 9 February 2022. The following day he notified ACAS of a potential claim and early conciliation took place with a certificate being issued on 23 March 2023 and Tribunal proceedings being presented on 16 June 2022.

#### Pre-grievance allegations

39. In terms of his earlier employment and the issues raised in the grievance, I did hear evidence from the parties' witnesses concerning these matters. As the case primarily turns on the grievance and the decision to resign following



receipt of the preliminary decision, it is not necessary to consider them in detail as they did not form part of any earlier grievance, whether informal or formal. But nonetheless, for the purposes of determining this claim, I did need to make some enquiries of these matters.

40. I noted from Mr Woods contractual documents that he was employed as a maintenance worker and that his statement of terms and conditions described his role as being:

*'[y]ou may be required to perform such other and/or additional duties within your skill and competence as the business of the Employer may require'*.  
(p62).

This was a broad job description, and this was agreed in evidence by Mr Aughey and also from the examples of work explained in evidence by both him and Mr Woods. I thought Mr Aughey was a credible witness and accepted that where work was beyond the maintenance workers capabilities, a third-party building contractor would be used. However, it was clear to me that both men had a wide range of skills to carry out the range of tasks they were confronted with. Indeed, Mr Woods explained that when asked to do a job he would have a go and he was clearly confident in his abilities.

41. Although I acknowledge that Mr Woods has several ongoing health issues and despite some discomfort has been able to attend the 4 days provided for this final hearing, he did not provide me with sufficient evidence to prove that at the time he was working for City Care, he had suffered injuries while at work or was working with difficulty because of them. He had not provided any evidence of accidents being recorded in accident at work books which I accept would have been available at the City Care premises and while he may have routinely worn an arm or wrist brace, these can be worn for many reasons and at the material time, he did not request any adjustments from his employer. Indeed, Ms Kaur's oral evidence regarding the moving of a fridge without offers of support, persuaded me that Mr Woods was a person who would try to work without assistance.
42. There was no evidence of mental health issues being known to City Care managers until Mr Woods was signed off sick from September 2021.
43. This was not a case where I was dealing with accidents at work, and I was not provided with any evidence of formal workplace risk assessments. As maintenance workers I accept that Mr Woods and his colleagues would carry them out on an ad hoc and dynamic basis which while informal, recognised the nature of their supporting role within the City Care operations and the diverse activities carried out. Mr Aughey's evidence was persuasive in this respect and Mr Woods never raised a grievance regarding this matter during his employment until his final grievance letter in December 2021.
44. Similarly, Mr Aughey's evidence was unchallenged regarding the ability of maintenance workers to ask Mr Crowther for such safety equipment as they required and indeed, I accept that the photograph of Mr Woods' mobile phone

showed an email dated 5 February [year unknown] checking whether he had various items of safety equipment in his possession.

45. I accepted that Mr Woods would have been aware to report any accidents at work and while Mr Aughey acknowledged that minor cuts and bruises would not be recorded, anything major would have been entered into the relevant accident book located in the workplace where the accident occurred, had they happened. This was duty required of employees under the Employee Handbook at 8.14 and required accidents off site to be notified to the office, (p337). This was a document which was available to and signed for by Mr Woods.
46. The training provided by City Care according to the documents provided and the evidence heard was limited, but I find having heard evidence from Mr Woods and Mr Aughey that as maintenance workers, they had general skills regarding their jobs which were gained from many years of experience and they felt that they did not additional training concerning the fundamental part of their job role. They were clearly very experienced men who had an aptitude to problem solve and deal with a variety of problems independently. In terms of safety training, this was offered to Mr Woods and the record produced in the bundle revealed that although offered to him, the problem was that he appeared reluctant to attend it and even was recorded as declining it in relation to health and fire safety and safeguarding.
47. There was an acknowledgement by City Care (in particular as part of Mrs Fowler's evidence), that IT training was not as good as it should have been. Indeed, she agreed with Mr Woods' allegation that it was a case of *'the blind leading the blind'*. But there was also a reluctance on the part of Mr Woods to be trained and this was noted from the evidence of Mrs Fowler and Mr Sheppard. While this is understandable given Mr Woods' role and the independent way in which he worked, together with an apparent dislike of workplace IT, he did not help matters and Mr Sheppard gave evidence of the attempts made to include him in workplace processes, which I accepted.
48. Although I appreciated that Mr Woods was unhappy with arrangements concerning pay, I did not hear any convincing evidence that he was underpaid throughout his employment, and he received payrises like everyone else (when they could be made) and received overtime at the correct rates applicable. I noted that Mr Woods had provided photographs of a smartphone and appeared to be able to access emails, and he was not in a position where he could not access pay details even when available online. He worked in a sector which derived its income predominantly from the public purse and the challenges of austerity no doubt affected pay levels during the 2010s, but I did not see evidence of a deliberate attempt to underpay him or pay him inconsistently.
49. In terms of what happened during the beginning of the Covid pandemic, it may have been the case that Mr Woods was told that he was going to be furloughed but given the confusing and often changing situation at the time, it was not unreasonable for Mr Woods to be later informed that he was not being furloughed as an essential worker. Fundamentally, however, I did not

hear any evidence which demonstrated Mr Woods had suffered a loss or drop in pay because of confusion over furlough.

50. It was correct that Mr Woods was asked to attend Thomas Crowther's home to attend to a boiler during the early lockdown period. However, I noted that Mr Woods despite initially agreeing to attend, chose not to and it was acknowledged by Mrs Fowler in her consideration of the grievance that Mr Crowther should not have spoken to Mr Woods concerning this failure in the way that he did.
51. I also accepted that in the early days of the Covid pandemic (and take judicial notice of these circumstances), that even the care sector found it difficult to acquire PPE and testing kits. On balance, I therefore find that there was no failure of the employer's duty towards Mr Woods to provide necessary equipment based upon the evidence that was heard before me.
52. Although there was an allegation regarding a failure to employ anyone with equivalent skills to Mr Woods, this was not raised in cross examination of the respondent's witnesses. I agree with Mr Haywood that this would routinely be a management decision. But Mrs Fowler dealt with this matter in point 7 of the grievance and while acknowledging the issues raised, did note that Mr Woods should have raised this with Mr Crowther should it have been an issue.
53. Insofar as the allegation that Mr Crowther spoke to Mr Woods in an inappropriate manner, I was not persuaded that this incident arose on 28 September 2021 as alleged based upon the evidence before me. The grievance decision did not uphold this allegation, although it recognised the inappropriate comments made during Covid and discussed above. In terms of a historic grudge concerning Mr Woods reporting Mr Crowther's son for drug taking, this was rejected and explained in Mrs Fowler's grievance decision and was not the subject of an appeal by Mr Woods. While Mr Crowther was understood to be surprised to be not to be called as a witness by his representatives (he did attend the hearing as an observer), it remains Mr Wood's allegation to prove and I simply did not have sufficiently convincing and persuasive evidence before me to conclude that this allegation happened as alleged. On balance, their relationship appeared to be long standing and usually good. If Mr Woods had any ongoing issues, they were not raised until the final grievance and until his resignation appeared to be regarded by his employer as good worker.
54. To conclude, while a number of issues were raised within the grievance letter submitted on 25 December 2021, these allegations did not appear to have been raised on previous occasions. While they caused Mr Woods some irritation on occasion, it was only when he began his sick leave following the mental health issues identified by his GP, that he began to reflect and identify problems with his job. In this respect, he had dealt with these issues previously as part of the day-to-day vicissitudes of working life. He focused upon his maintenance role at work and which he appeared to carry out to a high standard and without complaint.

55. I would add that while Mr Woods raised in his submissions the question of honesty on the part of the respondent witnesses (and in particular the statements of Mrs Fowler and Mr Aughey in terms of errors in the statement), I was satisfied that this amounted to failures arising from the preparation of witness statements and the use of questionnaires which the respondent's solicitor then used to produce witness statements. It is unfortunate that the witnesses did not read their statements more carefully before signing them. But in evidence and under oath, they were willing to explain the error and how it came about and to concede the mistakes which they had made. In the absence of anything else which might concern me, I do not take issue with the evidence given during the hearing from the respondent witnesses.

## Law

### Constructive Unfair Dismissal

56. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if 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.

57. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:

- (i) that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach); (note that the final act must add something to the breach even if relatively insignificant:
- (ii) that the breach caused the employee to resign – or the last in a series of events which was the last straw; (an employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to plead constructive unfair dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract; and,
- (iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

58. All contracts of employment contain an implied term 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: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores plc [2002] IRLR 9.

59. Mr Haywood referred me to two cases in his final submissions which require particular mention, and they relate to the question of what a final straw for the purposes of is determining constructive unfair dismissal complaints.
60. The first was the Court of Appeal case of London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493. In this case, the Court of Appeal unanimously agreed that the Employment Tribunal correctly held that an employer's refusal to pay the claimant for time taken without leave being granted, to attend Tribunal hearings on earlier complaints could not amount to final straw, justifying resignation. In its consideration of the case, Dyson LJ noted that '*...[a]lthough the final straw may be relatively insignificant, it must not be utterly trivial.*' He went on to say that '*[i]f 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 has that effect.* in other words, it is not necessary to consider the earlier conduct in order to determine whether the alleged final straw has effect. Additionally, '*... entirely innocuous act on the part of the employer cannot be final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer.*'
61. The second case was also from Court of Appeal and was Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978. Their decision was that an employee of a continuing cumulative breach can rely upon the totality of his employer's acts even if he has previously affirmed the contract. This is subject to the later act forming part of the earlier series of acts. The right to terminate can therefore be '*revived*' in such circumstances. Additionally, the case provides a helpful summary of the questions which should normally be applied when an employee claims to have been constructively dismissed, namely:
- a. What was the most recent act (or omission) on the part of the employer which the employee says caused or triggered their resignation?
  - b. Have they affirmed the contract since that act?
  - c. If not, was that act/omission by itself a repudiatory breach of contract?
  - d. If not, was it nevertheless a part of a course of conduct comprising several acts/omissions which, viewed cumulatively, amounted to a repudiatory breach of contract? (The Court noted that if it was, there is no need for a separate consideration of possible previous affirmations in relation to those breaches by the employee).
  - e. Did the employee resign in response/partly in response to that breach?
62. A third case was provided during final submission by Mr Haywood and Williams v Governing Body of Alderman Davies Church of Wales Primary School [2020] IRLR 589. This case advises that where the last straw is entirely innocuous, a constructive unfair dismissal claim can still succeed, provided that there was earlier conduct amounting to a fundamental breach. The EAT noted that where such a case arises, the final act relied upon is 'not a last straw in the legal sense at all'.

## Discussion

### The final act relied upon

63. Having considered the findings of fact and discussed the law, the first matter I must consider is what the most recent act is on the part of City Care, which Mr Woods says caused or triggered his resignation. In this case, he has argued that his employer failed to properly consider his grievance and as a consequence, they denied him a fair outcome to the grievance.
64. Mr Woods submitted that taking into account the conclusions reached in the initial grievance decision letter sent by Mrs Fowler, he felt that there was no point in appealing and his trust and confidence was totally destroyed. In effect, he was arguing that this allegation alone, was not only a final straw but a repudiatory breach in its own right and either caused or triggered his decision to resign.
65. Mr Haywood argued that in reality, the reason to resign as result of a grievance process was not reasonable and could not amount to a final straw as it was an '*innocuous*' action on the respondent.
66. He accepted that there had not been an affirmation of the contract by Mr Woods during the period from his receipt of the initial grievance decision and the actual decision to resign a few days later. I agree that this must be the case and I can therefore move on to consider the question of whether the consideration of the grievance was not properly carried out and if so, whether it amounted to a repudiatory breach.
67. There was a clear grievance procedure provided within the employee handbook and which consisted of an informal stage and 3 formal stages, concluding with a third appeal stage. There is no dispute that Mr Woods chose not to appeal and whether or not this decision arose from legal advice, it was his decision and despite several subsequent reminders following his resignation, he failed to respond further with his decision concerning an appeal.
68. Mr Woods was absent from work on sickness grounds when the appeal was sent to the respondent on 25 December 2021. It was reasonable for respondent therefore to treat it as a formal Step 1 grievance and to ignore the informal stage allowed by the procedure and indeed encourage by the ACAS Code of Practice.
69. Step 2 which in effect was the investigation was subject to some delay over and above the usual 7-day period allowed by the procedure and was a provisional decision was reached without a hearing more than a month following the grievance letter being sent. However, it is important to explore the context of this process and I first of all accept that Mr Woods had previously indicated that he was not well enough to attend welfare meetings at work and to wait until he was able to do so, could have given rise to a much lengthier delay.

70. Moreover, the grievance was sent on 25 December 2021, which for most people will fall within the middle of the Christmas holiday period. Nonetheless, Mrs Fowler acknowledged the letter on 27 December 2021, but inevitably progress with the investigation would not begin until the New Year. I did note in my findings of fact that regular updates from Mrs Fowler during January 2022 to Mr or Mrs Woods, would have helped manage their expectations. But even so, although the Step 2 grievance decision letter was sent more than 7 days following the presentation of the grievance, the delay was not an unreasonable one. The allegations made were wide ranging, not particularly specific in many cases and did not identify dates as to when events took place, with many matters alleged covering significant periods of Mr Woods' employment. Additionally, the implications of the ongoing Covid pandemic and the 'spike' caused by Omnicrom variant, made it more difficult for meetings to take place and for documentation to be obtained.
71. Nonetheless, Mrs Fowler quickly reacted to the chasing email sent by Mrs Woods on 27 January 2021. The decision attempted to identify specific allegations, provided details of evidence obtained and identified a conclusion for each one. It was not perfunctory in its content and was objectively an attempt to engage with what was a broad grievance relating to issues not previously raised with the respondent and often dealing with historic issues. Mrs Fowler clearly was willing to acknowledge where further information was required in relation to allegation 1 and invited Mr Woods to provide further evidence. Despite Mrs Woods' reservations about Mrs Fowler hearing the grievance, her response confirming that she was the HR manager and not named in the actual grievance meant that it was reasonable for to investigate this matter.
72. Mr Woods decided to resign without either further engaging with the initial Step 1 letter or seeking an appeal to Step 2, (without even a request for an independent appeal hearing officer being appointed). He did not do this and while there were some variants to the procedure identified in the Handbook, he had been confronted with a grievance decision that had been properly carried out within the context of the time when it was made.
73. I was reminded by Mr Haywood of the Court of Appeal decision in Omilaju and Kaur and I agree that a grievance procedure properly carried out by an employer is analogous to a disciplinary hearing and is not open to criticism by Mr Woods. It was indeed innocuous within the meaning of the caselaw and importantly had not been allowed to finish by Mr Woods before he considered his position.
74. It simply cannot amount to a repudiatory breach and while Mr Woods may have convinced himself of bad faith on the part of Mrs Fowler (and her colleagues), objectively there was no evidence before me that this was the case in relation to the grievance. There was no breach of the implied term of trust and confidence.
75. I am nonetheless obliged to consider whether the decision in the grievance which led to the resignation was the last in a series of failures or omissions

which when viewed cumulatively gave rise to a repudiatory breach justifying Mr Woods' resignation.

76. I appreciate that Mr Woods raised a significant number of allegations in the list of issues and indeed, to some extent they reflected what was described in the grievance letter dated 25 December 2021. It is relevant that none of these matters were previously raised as 'grievances' or 'concerns' whether informally or formally and the first time that the respondent became aware of the matters giving rise to the allegations was in the grievance letter. As a consequence, the issues raised only came to be identified by Mr Woods because of his sickness absence.
77. However, I have considered the allegations raised which predated the grievance and I note that a number of them were not addressed by Mr Woods in his cross examination of the respondent's witnesses or were found not to have happened as alleged.
78. Mr Woods had a role which had wide ranging job description and this led to him carrying out a variety of maintenance roles and he was not asked to work beyond what could reasonably be expected of his role. He was diligent worker and adaptable with years of experience and what is commendable it that he and his colleague got on with the job and carried out their own risk assessments and were left to request equipment and report accidents when they arose. There were no complaints regarding these matters and no obvious unhappiness on his part before he was absent from work.
79. He was offered training but from the available evidence was reluctant to engage with it, even refusing to carry it out. I noted Mr Woods's questioning of Mrs Fowler that his conduct should have been the subject of disciplinary action for refusing the training that was offered to him. I accepted that his employer tried to engage with him regarding various matters, but Mr Woods' complaint ultimately arose from his own decision to obstruct management attempts to involve with administrative functions and this was illustrated by the attempts to get him involved with the fingerprint clocking and clocking off system that was introduced.
80. I was not convinced that he had not been paid properly or that he had received overtime payments correctly. The pay documentation in the bundle confirmed that. While unhappy with pay rises, he did receive them in the same way as other employees and it is not a breach of the implied term of trust and confidence not to increase pay, especially in a sector dependent upon public sector funding which in turn was subject to austerity during the time of his employment.
81. Covid of course presented particular difficulties and I found that the matters complained of were not unreasonable. There was the question of being asked to work on the Crowther's family property, but Mr Woods was not compelled to do so. The problems with testing kits, PPE were an issue relating to the unfortunate consequence of the national situation existing in the early days of Covid and I take judicial notice of this. These matters are currently being considered as part of the Hallett Public Inquiry, which is



currently in progress, but I am unable to conclude that the issues identified by Mr Woods were repudiatory breaches on the part of the respondent.

82. There were clearly some issues raised concerning the relationship with Mr Crowther. However, apart from the exchange which took place following Mr Woods' failure to attend the previously agreed repairs to his son's house during Covid and which Mrs Fowler agreed was not appropriate, no complaints were raised at the time and based upon the evidence before me, I must conclude that overall, their relationship was a good one.
83. In conclusion these pre grievance allegations were not subject to any concerns being raised at the time and appeared to be examples of the 'lesser blows' which employees are expected to absorb during their employment and if not, were in any event accepted and affirmed. Consequently, I cannot accept that the earlier allegations amount to a fundamental breach either singly or cumulatively and accordingly, the innocuous event which allegedly prompted the the resignation namely the grievance cannot give rise to a successful claim of unfair dismissal.
84. However, I have also considered whether Mr Woods actually resigned in response to the breach which he has alleged. His resignation letter dated 9 February 2022 did indeed allude to the grievance but also referred to advice having been taken that he no choice but to resign. While he may have had a number of conflicting thoughts in his mind at this time and was clearly signed off work through ill health, I noted there was no attempt to query the initial findings of Mrs Fowler or seek to appeal the decision and the very next day he notified ACAS on 10 February 2022. However, on balance I do accept that at least in part, the resignation was prompted by the grievance decision letter, which was initially sent along with its attachments, even if he was considering other matters at the time. Indeed, I expect that had the decision upheld the majority of his complaints, it may have affected his decision. But while this might be the case, what is relevant as already explained above, is that the grievance was not a repudiatory breach or even a minor breach amounting to a last straw, but an innocuous event which could not trigger the resignation and a finding of constructive dismissal.

## Conclusion

85. Accordingly, the complaint of constructive unfair dismissal is not well founded and is dismissed.

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Employment Judge Johnson

Date 7 December 2023

JUDGMENT SENT TO THE PARTIES ON  
11 December 2023

FOR THE TRIBUNAL OFFICE