



EMPLOYMENT TRIBUNALS

Claimant: Mr Stephen Hunter

Respondent: The Reserve Forces' and Cadets' Association for the North West of England and the Isle of Man (NW RFCA)

HELD AT: Liverpool

ON: 4, 5, 6, 7, 8,
September 2023

BEFORE: Employment Judge Ficklin

REPRESENTATION:

Claimant: Mr J Hughes (lay representative)

Respondent: Mr S Brochwicz-Lewinski (counsel)

JUDGMENT

The JUDGMENT of the Tribunal is:

1. The claimant's claim for constructive unfair dismissal is not well-founded and is dismissed.
2. The claim for breach of contract (notice pay) is dismissed on withdrawal.

REASONS

PREAMBLE

1. In a claim form received on 24 September 2020, following ACAS Early Conciliation, the claimant brought complaints of constructive unfair dismissal and breach of contract (notice pay). The notice pay claim was withdrawn and is dismissed.
2. The respondent is The Reserve Forces' and Cadets' Association for the North West of England and the Isle of Man (NW RFCA). *Inter alia*, the organisation owns and maintains the Altcar Training Camp, which in summary is a training ground for various

purposes including live-fire exercises for UK regular armed forces, reserve and cadet forces.

3. The claimant was employed by the respondent as a camp operative from 11 February 1991 until 10 July 2020, when his employment terminated following his notice of resignation on 20 April 2020. He presented a claim form to the Tribunal on 24 September 2020 following a period of early conciliation from 1 August 2020 until 26 August 2020. He brought complaints of constructive unfair dismissal and breach of contract (notice pay).

4. The claimant made various allegations of bullying against the respondent and argues that these actions, and/or the respondent's apparent lack of corrective action, prompted him to resign. The claimant's case is that he and others were bullied and there was a conspiracy between Col Underhill and Lt Col Black to protect Lt Col Black from consequences of his bullying behaviour. There were no real consequences for Lt Col Black, in the claimant's view, because the investigation into his behaviour was a sham. He also argues that the respondent refused to perform appropriate repairs to his accommodation provided on the premises and which was known as Grange Farm Cottage ("Farm Cottage") as retaliation for his complaints against Lt Col Black.

5. The claimant raised various events in his claim and witness statement that he says contributed to his eventual complaint and resignation. The issues that were addressed in the hearing to greater or lesser degree are set out below. I have not included every incident the claimant raised, but I have included those that go to the agreed issues in the case.

6. At the conclusion of the hearing on 8 September 2023, the parties' written submissions were agreed to be provided simultaneously by 10 October 2023. I understand that written submissions were in fact provided around that time, but I was not informed of receipt of the parties' submissions until 3 November 2023.

7. In this judgment, I refer to the respondent's site called Altcar Training Camp as the Camp. During the hearing, I referred to individuals holding military commissions by their military honorifics, eg Lt Col Black. I maintain that practice in this judgment.

AGREED ISSUES

8. The issues were agreed between the parties. The only claim was of unfair dismissal by way of constructive dismissal.
- a. Did the respondent do the things set out in the claim form of the claimant?
 - i. Did the respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent?
 - ii. If so, did it have reasonable and proper cause for doing so?
 - iii. If so, did the acts of the respondent breach an expressed or implied term of the claimant's contract of employment?
 - iv. Was any such breach a fundamental one in that the claimant was entitled to treat the contract as being at an end?
 - v. Did the claimant resign in response to the breach?

 - b. Did the respondent breach its duty of good faith towards the claimant?
 - i. Did the respondent act in breach of its contractual obligations to the claimant?
 - ii. Was the investigation into allegations of bullying and harassment by employees of the respondent a sham?
 - iii. Did the respondent act in breach of the claimant's contract by allowing Lt Col Black to remain an employee and the claimant's line manager?
 - iv. Did the respondent act in breach of the claimant's contract of employment in deciding not to carry out repairs to the property occupied by the claimant and thereafter determining that the property should be demolished?
 - v. Was the decision not to repair the property by the respondent in effect a punishment of the claimant for his participation in the investigation against Lt Col Black?
 - vi. If so, was the failure to repair the property by the respondent a fundamental breach of the claimant's contract of employment entitling him to treat the contract as being at an end?

EVIDENCE

9. I heard evidence from the claimant on his own behalf. I also heard from Mr Ben Hooton, Mr Callum Broughan, Mr Peter Jackson-Lee, Mr Tony Davis-Musker and Mr Alan Knight.

10. The respondent's live witnesses were Lieutenant Colonel Gordon Black, the Camp Commandant ("Lt Col Black"); Colonel Mark Underhill, the Camp Chief Executive ("Col Underhill"); Mr Gerard Allen, Range Officer; Mr Lee Delaney, Head of Infrastructure; Colonel Alexander Barnes, the former Camp Deputy Chief Executive ("Col Barnes"); and Ms Catherine Campbell, the Tenancy and Lease Manager.

11. The hearing started with a 383-page core bundle, a 171-page supplementary bundle, and a bundle of witness statements.

Decision on Additional Evidence

12. The respondent applied to adduce about 50 further pages of evidence, some of which was not controversial but materially consisting of a survey report of Farm Cottage, some associated correspondence, and further witness statements from Lt Col Black and Col Underhill. The respondent applied for the evidence to be seen only by the representatives and claimant, to protect confidentiality on behalf of Lt Col Black and other people who were named or referred to but who were not here to give evidence.

13. Mr Hughes objected on the basis that the procedure rules had not been followed, and it was prejudicial to allow the respondent's evidence to be amended at such a late stage. He also argued that the evidence should not be redacted or kept confidential in the interest of open justice.

14. I allowed the evidence to be added. I gave brief oral reasons for this and I was asked for written reasons, in particular regarding the new witness statements from Lt Col Black and Col Underhill.

15. I have primarily considered *Frewer v Google UK Limited and Others*: [2022] EAT 34 in making my decision. In particular I found paragraphs 18-23 helpful regarding the principles of disclosure.

16. In the first place, the material was clearly relevant. The survey report was material to the state of Farm Cottage and the potential for remedial repairs. The new witness

statements referred to findings of Lt Col Black's disciplinary investigation and were clearly relevant to the issues before me.

17. I agree that the evidence should have been disclosed earlier, but Mr Hughes had the opportunity to take instructions and prepare to cross examine the respondent's witnesses about it. In particular, the new witness statements did not erase their old ones. Any discrepancies between what Lt Col Black and Col Underhill said in their previous statements could be put to them.

18. While there was reference to people in the materials that were not taking part in the hearing, there was no need to refer to them by name in any public way. There was no real risk of any confidential information from anyone referred to in the documents, with the exception of Lt Col Black, being in the public domain.

19. I rejected the respondent's argument that disclosure of the witness statements should be limited to the representatives and claimant, or in any other way, on the basis that Lt Col Black's disciplinary record as a result of the claimant's complaint was a core issue in this appeal. The need for that issue to be explored in full in this hearing in the interest of justice superseded his desire to keep it confidential. His concerns about reputational damage, in particular regarding his ongoing employment with the respondent as a senior member of the management team, do not outweigh the relevance of the evidence to the issues in the case and, as Mr Hughes submitted, the principles of open justice. I found that there was no public interest in limiting disclosure.

FINDINGS OF FACT

20. The claimant resigned by hand-delivered letter on 20 April 2020, citing that Lt Col Black had not been dismissed and the Notice to Quit Farm Cottage.

21. The Appellant was signed off work due to stress in March 2018, April to June 2019, August to September 2019, most of October 2019, part of November 2019, from January into February 2020, and it seems from March to May 2020. During 2019-2020, the respondent paid for the claimant to attend counselling. The respondent allowed the claimant phased returns to work with reduced hours and work limitations.

22. All the witnesses for both sides agreed that the claimant was a skilled and hard-working employee, with exemplary performance reviews.

Bullying Claims

23. Several of the claimant's witnesses said that they felt Lt Col Black was a bully. The witnesses, except for Mr Hooton, had also been interviewed by Mr Waterhouse in the course of his investigation. I do not know which of the interviews belong to each of the witnesses, because the names on Mr Waterhouse's report are redacted, but their evidence is similar to some of the interview records. The witnesses were quite clear about what they felt was Lt Col Black's management style. But there was nothing in what they said that had not been established in Mr Waterhouse's report. Below I address issues that were foci in the hearing.

24. The claimant says that he had at one point had a good working relationship with Lt Col Black but that it deteriorated. He attributed his periods signed off work to anxiety brought on by Lt Col Black's actions. Some of what he claims regards him personally, while other claims involve Lt Col Black's behaviour toward others.

25. There was a project at the Camp referred to as the Pods. The Pods were single accommodation units set up for servicemen and women who were experiencing post-traumatic stress. The claimant conceived the project in discussion with Col Underhill. He was acknowledged by all parties to have been the lead worker and volunteered many hours on it in addition to his contractual duties. The project was largely unfunded and the claimant also arranged donations of materials and assistance to complete the project through his contacts. The claimant said that Lt Col Black made derogatory or dismissive comments about his work. When the Pods were formally opened at a small ceremony, the claimant says that Lt Col Black largely took credit for himself.

26. It was established by witnesses including the claimant that, at the opening ceremony for the Pods, Lt Col Black praised the claimant's work and led applause for him. The claimant agreed that this happened, but characterised it differently and felt that Lt Col Black took credit for himself. It seems to me that this is not a dispute of fact but of perception. It was not the reason for the claimant's resignation.

27. Lt Col Black instructed the claimant to take the lead in putting up a large sign at the Camp entrance. The claimant did so, but said that he thought the job should be done by an outside firm due to the sign's size. He claimed that Mr Delaney, as Head of Infrastructure, had said to him that he should not be doing that job. The claimant believed that Mr Delaney did not want to confront Lt Col Black. Lt Col Black overrode the claimant's objections and made him do the job irrespective of safety or difficulty. The sign remains standing. I am not in any position to arbitrate whether the job was appropriate for the claimant or not.

28. The claimant had passed courses to fell trees up to a particular size. He said that Lt Col Black ordered him to fell several trees of a larger size than he was certified to handle. The claimant alleged that when he protested, Lt Col Black told him to get on with it.

29. Lt Col Black said in his evidence that the claimant had not resisted his direction to fell trees, and in fact had said that he was the only one who should be allowed to take on the job and should pick his own team. There is a disagreement between the claimant and Lt Col Black about the circumstances of this event. This is not a determinative issue and there is no need for a finding on it, but in any case there is not enough evidence to prove that the claimant's version of this event is correct.

30. The claimant claimed that he had overheard Lt Col Black talking to a German member of staff about World War II, Hitler, the Holocaust and associated themes. The claimant felt this was racist bullying and it was recorded in the interview record with Mr Waterhouse that he felt the employee was upset about it "deep down".

31. There is no evidence that the German employee was offended by conversations with Lt Col Black about Nazi Germany. At its highest, the claimant said that he overheard Lt Col Black talking about these things to her. These subjects are not *per se* racist. The claimant has not given any indication that the German employee reacted negatively to discussing them, or mentioned it to him. I reject the assertion that this shows any poor behaviour by Lt Col Black.

32. The claimant claimed that Mr Allen told him that Lt Col Black had spoken to him aggressively and hit him in the chest with a hand-held radio. Significant time in the hearing was also spent on the claimant's claim that Lt Col Black allowed Mr Allen to have a Nazi marching song as his ringtone.

33. Mr Allen denied that Lt Col Black hit him with a radio or in any other way. Mr Allen was in the Army for many years and has worked at the Camp for decades. The claimant has known Mr Allen apparently since childhood. There was evidence of various interactions they have had over the years that are not in themselves relevant. There is no reason in the evidence for Mr Allen to lie about being assaulted. I bear in mind that the claimant did not claim to have seen this event but said Mr Allen told him about it. I do not accept that this event happened.

34. The claimant said in cross examination that Mr Allen had told him once that his ringtone was a Nazi song. Mr Allen contended in his evidence, and I accept, that his ringtone was not the Nazi song the claimant alleged it to be. It was music from an American war movie during scenes depicting a German tank regiment in World War II. Irrespective of whether Mr Allen told the claimant the song was something else, the song is not *per se* offensive and there is no evidence that Lt Col Black had anything to do with it. The claimant has not shown that there is any real link between this and his resignation.

35. The claimant said that Lt Col Black belittled the work he did to ameliorate flooding in the Camp gymnasium. In a similar incident, the claimant claims that after re-pointing a wall, Lt Col Black was derogatory about his work. I understand from these incidents that the claimant had difficulty working under Lt Col Black. The perception of Lt Col Black's management was at the heart of the subsequent disciplinary investigation.

36. The claimant also claimed that there had been an incident in which Lt Col Black and Co Underhill had been shooting rabbits on the Camp. The claimant said in effect that they had been shooting in the proximity of cadets and so put them in danger. He asserts that they dishonestly conspired to stymie the resulting investigation. When the claimant and others later made the bullying complaints against Lt Col Black, the claimant believed, Col Underhill ensured that there were no real consequences. The

claimant believed that the cover-up was a *quid pro quo* for Lt Col Black's complicity in the shooting incident.

37. I accept the evidence of Col Underhill and Lt Col Black that a Training Safety Officer took the view they were too close to some cadets, so they moved away. The incident was recorded, but there was no serious problem and no need for any other action. The issue was duly raised, considered, found to be inconsequential, and dismissed. The claimant could provide no more than hearsay and assumption that the issue was any more consequential than that. There is no evidence that there was a conspiracy to avoid consequences.

38. An employee told the claimant that Lt Col Black had spoken harshly to him after he failed a work-related course. The claimant felt that Lt Col Black's handling of the situation amounted to bullying, though not of the claimant.

39. The investigation was triggered when the claimant raised allegations verbally on 25 October 2019 in a meeting with Col Barnes, then the Deputy Chief Executive, and Ms Pamela Peers, Head of Human Resources. The decision was taken that an investigation was necessary, and Lt Col Black was informed of the allegations on 30 October 2019.

40. Col Barnes wrote terms of reference for an investigation. The investigation was carried out by Mr Richard Waterhouse, an independent Human Resources (HR) consultant contracted by a firm called Hunter Adams. On 4 November, Mr Waterhouse was engaged and Lt Col Black was informed that the investigation was commencing. During the investigation, Lt Col Black was asked to work from home or off-site to prevent interaction with staff. On 5 November 2019 the claimant informed the respondent that he would not take part in the investigation, but he later agreed and was interviewed on 18 November 2019.

41. Mr Waterhouse provided a report dated 26 November 2019 that describes the Scope of Investigation as:

“...to investigate the incidents alleged. The IO [Investigating Officer, ie Waterhouse] is to explore these allegations and ensure that the investigation

effectively addresses the alleged issues and incidents in order to assist the Deciding Officer [ie Col Duncan] in determining whether any member(s) of staff have been wronged.”

42. Under “Alleged actions by Gordon Black” the report states:

“a. That Gordon Black bullied and or harassed Altcar staff in the workplace...during the period 2 January 2019 to 28 October 2019.

b. That Gordon Black prevented or delayed the carrying out of repairs to Stephen Hunter’s rented cottage and that this was done to put him under increased stress.”

43. Mr Waterhouse relied on extracts from the Association Policy on Bullying and Harassment (“Association Policy”) to define those terms. His report states that he made recommendations to the Deciding Officer (Col Duncan) using the Association Policy definitions.

44. During his investigation, Mr Waterhouse interviewed nearly all the Camp employees, and received written submissions from former employees. With a few exceptions they were interviewed face to face. Their names, except for the claimant’s and one other, are redacted from the notes in the report. Mr Waterhouse provided the notes of the interviews to the interviewees for approval.

45. The report says that on 15 November 2019, before the claimant had agreed to be interviewed, the main points gathered from the staff interviews were put to Lt Col Black for his response.

46. When Mr Waterhouse put the other employees’ claims to Lt Col Black, he responded that they had colluded. Mr Waterhouse found that, though the employees’ accounts were often similar and it was likely that they had communication with each other about the investigation, there was no evidence of collusion. As an example where there was no doubt discussion but not collusion, there are references in the interview records to the fact that Lt Col Black rebuked members of staff for reporting him to HR for something he said to them.

47. One of these employees said in his interview with Mr Waterhouse that Lt Col Black once said to him, “look at the colour of you”. The employee is mixed-race, and in the circumstances took this as a reference to his ethnicity.

48. The report says that after he interviewed Lt Col Black, Mr Waterhouse was informed that the claimant would return to work and agreed to be interviewed. Mr Waterhouse interviewed the claimant on 18 November 2019.

49. Mr Waterhouse found that there was no evidence that Lt Col Black had anything to do with repair decisions at Farm Cottage. Decisions on repairs were made by the “Head Office Team”, whose names were redacted.

50. Mr Waterhouse’s finding was that Lt Col Black “could in no way accept that any of his actions could be interpreted [as bullying or harassment]”. Despite Lt Col Black’s view, and the generally positive assessment of his work by Camp Management Team, Mr Waterhouse found that there were several incidents that could be interpreted as bullying with reference to the Association Policy. Most of the incidents involved other employees but some involved the claimant directly.

51. Mr Waterhouse found that there were several incidents that were raised by “virtually every” employee outside the senior Camp management. The details of each incident are not necessary to record here, but Mr Waterhouse characterised the incidents as “Overbearing supervision or other misuse of power or position”, “Exclusion or victimisation”, “Unfair treatment”, “Ridiculing or demeaning someone”, “Deliberately undermining a competent worker by overloading & constant criticism”, and “Making threats or comments about job security without foundation”. Mr Waterhouse found that Lt Col Black “clearly ignored” the instruction not to walk around the Camp unaccompanied during the investigation.

52. Mr Waterhouse found that the “agreed picture” of Lt Col Black from the Camp staff was that “his actions...equate to bullying” and that staff did not report incidents to management for fear of retribution, because Lt Col Black was perceived to be protected by Col Underhill.

53. The outcome of the disciplinary matters against Lt Col Black was delivered on 10-11 December 2019 by the Deciding Officer, Colonel Alistair Duncan, Chief of Staff of the Council of Reserve Forces' and Cadets' Associations (CRFCA) ("Col Duncan").

54. Col Duncan conducted a disciplinary hearing on 10 December 2019, and produced a letter titled "Outcome of Disciplinary Hearing" dated 11 December 2019. The letter said in summary that "bullying did occur". Lt Col Black was given a formal oral warning, to be held on his record for 6 months, during which time his behaviour would be kept under review. Col Duncan also gave advice on tempering his language and offering more praise, and making better use of line managers

55. Lt Col Black responded by email that he accepted the sanction and did not exercise his right to appeal. The claimant's case is that he knew nothing of this, and as far as he was aware there was no sanction for Lt Col Black at all.

56. The respondent's case is that the disciplinary policy required the respondent to maintain confidentiality about an employee's disciplinary matters from other employees. I do not accept that Lt Col Black's standing in the camp chain of command constituted a reason not to disclose the disciplinary matter, as was put to Mr Jackson-Lee. But I accept that the respondent acted in accordance with its policy to keep disciplinary matters confidential.

57. Despite this, there had been notification to camp employees that Lt Col Black had been subject to disciplinary proceedings that had concluded, via a meeting and a memo that was circulated on or about 19 December 2019. Mr Jackson-Lee recalled the meeting in which employees were informed that a disciplinary investigation into Lt Col Black had been concluded and he would return to work. Mr Jackson-Lee did not recall the memo, nor did the claimant.

58. The claimant gave the example of bullying claims against another employee having been promulgated at the Camp. But his evidence was that the accused himself had told him this. He did not say that he had heard from Camp management about the bullying claims, or that any other employees had. There are no clear examples of the

respondent treating this investigation and sanction differently than in relation to other employees.

59. On 20 December 2019, Col Underhill sent Lt Col Black an email re-iterating Col Duncan's advice to temper his language and actions and stating that any complaints against him in the following six months would be considered in light of the oral warning. Among various management directions, Col Underhill directed that Lt Col Black attend a bullying and harassment course, and that he should write a letter to apologise to the employee who complained of the comment, "look at the colour of you."

60. Col Underhill acknowledged in cross examination that the anti-bullying course referred to in the notes of his meeting with Lt Col Black on 20 December 2019 was not a disciplinary sanction but was merely the same course that senior staff attended every year. Up to that point, the respondent had portrayed the bullying course as part of the sanction, and therefore evidence that the respondent took the matter seriously. It was not part of the sanction, and the intimation that it was is misleading.

61. Lt Col Black wrote the letter to the employee who complained that he had made a racist comment the same day, but did not apologise in the text. Lt Col Black insisted in oral evidence that despite the direction from Col Underhill, he would not apologise for something he had not said, and as far as he knew at the time, the employee was not mixed-race but white. The Association Policy on Bullying and Harassment says at section 906d:

"the perception of the recipient is paramount – it does not matter if the perpetrator does not mean to cause offence if the recipient finds the behaviour offensive"

62. Lt Col Black did not follow the instruction from Col Underhill, but his failure to apologise is not the most egregious issue with the letter he wrote. If I am to assume that every other reference to the employee's name in the papers is correct, then Lt Col Black misspelt the employee's name on the letter to him. That surprising error suggests a lack of interest or contrition. The employee resigned soon after.

63. Lt Col Black and Col Underhill both explained that they said the investigation found Lt Col Black not to be a bully in their original witness statements based on the line in

the disciplinary meeting notes dated 10 December 2019, “[Lt] Col Black is not a bully as he does not purposely go out to bully people.” Mr Hughes put to both of them that it was dishonest to say this, bearing in mind the further line in the notes that “there were enough instances [of] behaviour which on the balance of probability could be considered bullying”. Col Duncan’s letter of 11 December 2019 on the outcome of the disciplinary hearing similarly states “on the balance of probabilities bullying did occur.”

64. In their new witness statements submitted on the second day of the hearing they both admitted that the only sensible reading of Mr Waterhouse’s report, the minutes of Col Duncan’s disciplinary meeting and his outcome letter is that Lt Col Black had bullied people. Lt Col Black admitted in oral evidence that he had been found to have been a bully. The finding of the investigation was clearly that Lt Col Black had bullied people and previous assertions otherwise were misleading.

65. Lt Col Black asserted again in his oral evidence that Mr Waterhouse’s interviewees, ie the Camp employees, had colluded. Mr Waterhouse, while acknowledging that the employees would have discussed the matter, ruled out collusion. Collusion is a different matter to discussion; it means that the employees agreed with each other to say the same things, instead of that they discussed having felt and thought the same things. The claimant’s witnesses that I heard had not colluded, and the interview records in Mr Waterhouse’s report largely detailed events witnessed directly by the interviewees. I find that Lt Col Black accused the Camp employees of collusion to minimise and degrade the claims against him. I reject Lt Col Black’s assertion of collusion, as Mr Waterhouse did in his investigation report.

66. Mr Waterhouse’s report involved interviewing nearly every Camp employee and his conclusions are detailed and forthright. Mr Waterhouse’s independence cannot be criticised. The respondent’s decision to bring in Mr Waterhouse shows that the matter was dealt with properly.

67. The claimant did not distinguish between Mr Waterhouse the Investigating Officer, and Col Duncan the Deciding Officer, though Mr Waterhouse had interviewed him. He declined to comment on Mr Waterhouse’s independence, saying that he did not know him.

68. The claimant claims that Col Duncan's role in the investigation was part of the conspiracy because he was not independent and was Col Underhill's friend. The respondent accepts that Col Duncan and Col Underhill are 'connected' on the LinkedIn platform. LinkedIn is a professional social media platform. The users 'connect' with other people in their sector as a way of online professional networking.

69. The claimant also said in evidence that he did not know how LinkedIn worked but asserted that Col Underhill and Col Duncan were friends. The claimant identified no basis for this other than the LinkedIn connection and that they both worked for some part of the Reserve Forces' and Cadets' Association.

70. No social media connection necessarily implies a real-world friendship, but that is particularly the case on LinkedIn. The point of the LinkedIn platform is professional networks. It is not surprising that Col Underhill would be connected in this way to Col Duncan. It carries no implication that they had a personal relationship. I accept Col Underhill's evidence that while they may have attended the same work events on occasion, they were not friends. I accept Col Underhill's evidence that Col Duncan was asked to be the Deciding Officer because he was not in the chain of command at the Camp. Col Duncan had no personal tie to Col Underhill. There is no evidence that Col Duncan was not independent.

71. The claimant said in response to cross examination that it would not matter what documents he was shown, he believed the investigation was a sham. I find that the investigation into Lt Col Black was not a sham.

72. The claimant may view the sanction of an oral warning to lie on file for six months and various management directions (not including the standard bullying course and deficient apology letter) to be light punishment for bullying, but I accept that the sanction falls into a reasonable and proper act by the respondent. The claimant maintained that he knew of no sanction at all at the time of resignation, and said in his resignation letter and in evidence that only dismissal would have been sufficient. But even if any act by the respondent short of dismissing Lt Col Black would have in the claimant's view damaged the trust and confidence, I find that the respondent had

reasonable and proper cause for both the confidentiality of the investigation and outcome, and the sanction itself.

Farm Cottage

73. Farm Cottage was a four-bedroom home on the Camp premises. The claimant took possession of Farm Cottage in 1991, but did not move in for some two years because it was uninhabitable. He paid a nominal rent for two years while he carried out works to improve the property and eventually he and his family moved in. The claimant made continual upgrades to the property through the years with the respondent's knowledge and approval.

74. There is no evidential basis for the claimant's assertions that the respondent is contractually obliged to house him. There is nothing in his employment contract about it. Documents in the bundle from 1992 refer to a 'tenancy' but as time went on, and certainly by the end of 2014, it was clarified that the basis of the claimant's occupancy was a Licence. The respondent took legal advice in March 2020 that confirmed this.

75. Mr Hughes objected to the Licence in the bundle dated 21 November 2014 on the basis that there was no respondent's signature on it and so it was invalid. His objection did not extend to arguing that the claimant held the property on any other basis, and no evidence was adduced to prove that he did. I accept that the claimant held the property on Licence only. The Licence states that the Licensor (the respondent) may give 60 days' notice of termination of the Licence if:

“5.2.4 We require the Property for disposal or a use deemed as a higher priority than allowing the property to be used as a residential dwelling.

5.2.5 Any other case where the 28 day notice period in paragraph 5.3 does not apply.”

76. Paragraph 5.3 refers to situations where the 28-day notice of termination applies which are not relevant here. I also consider paragraph 9.6:

“We are not obliged to rebuild, reinstate the Property or re-house you if it is destroyed or suffers damage caused by fire, tempest, flood or other accident. ...”

77. I accept that the Licence means that the respondent could decide to take possession of Farm Cottage for any reason at all based on its own priorities. Unsustainable costs, or the property becoming uninhabitable, clearly fall under this meaning, if any reason is needed.

78. The claimant agreed that there had been many repairs needed to Farm Cottage over the years, primarily related to drainage. The claimant acknowledged that until the period leading up to his resignation, most repairs had been agreed without difficulty and were at least temporarily effective at minimising flooding both inside and outside Farm Cottage.

79. The respondent funded the repairs out of a fund that was supported by rental payments of employees who lived on-site. The sustainability of this was first raised to the claimant in a 2015 letter from the then-Head of Infrastructure, long before the claimant's issues with Lt Col Black. The letter states that not all the works were able to be completed that year because the rent would not cover it.

80. Between 2018-2020 there were various episodes of flooding. The respondent reduced the claimant's rent when flooding was particularly bad. The respondent offered alternative accommodation, consisting of houses that had been modified for visiting customers' use, ie the gas had been disabled and they did not use cooking facilities. The respondent offered to reconnect the gas and arrange one of the houses for the claimant and his family. The claimant declined. His refusal does not render the offer itself invalid or a sham.

81. After internal discussion related to the cost of repairs, and after taking legal advice on the claimant's status in Farm Cottage, the respondent sent the claimant a Notice to Quit on a date that is not clear but must be between 19 and 26 March 2020.

82. The claimant gave evidence when shown the Notice to Quit that it was the first time he had seen that document. I do not find that the claimant is lying, due to the passage of time and the stressful nature of the issues, but he was clearly wrong. The claimant referred to the Notice to Quit in his resignation letter dated 20 April 2020; he had seen it at that time and cites it as a reason for his resignation.

83. The respondent's witnesses gave evidence, and I accept, that the fund was not capable of paying for the Farm Cottage repairs indefinitely in the sums required, particularly as the long history of repairs had drained the fund. The respondent provided a summary of expenditure at Farm Cottage from June 2007 to 1 April 2020. More than £86,000 had been spent in that time. More significantly, more than £40,000 of that had been spent since the beginning of 2018. Many of the entries are small matters of upkeep, but the recent large expenditures since March 2019 include £3,660 to repair flood damage to the interior, £5,596 for digging drainage pipes, and £16,747 on other drainage issues. Mr Delaney gave evidence that all reasonable efforts had been made.

84. The claimant repeatedly said that he thought the works were done improperly or were not the right things and the respondent could have got a second opinion. In contrast, the claimant also said that he respected the work of a particular Severn Trent Water employee, who need not be named, who had extensive contact with both parties over the years about the issues at Farm Cottage. That person set out his assessment of the root causes of the issues in an email to the respondent in February 2019. In summary, he said that mitigation by using a Severn Trent Water tanker to empty the septic tank was unsustainable and that the root problem was rising groundwater.

85. That same employee of Severn Trent Water wrote to the Respondent on 23 February 2020 stating that the requests for tankers to empty the septic tank had restarted. While the initial requests were granted, Severn Trent Water would not continue to do so. Severn Trent Water was not contractually obliged to do so, and in any case he said the problem was not the septic tank but groundwater, which Severn Trent Water had no ability to mitigate. His email states *inter alia*:

“Can I request that this issue is given a high priority for escalation as this situation is unsustainable and it is also preventing the progression of whatever major works or decisions are required in relation to [Farm] Cottage and its now unfortunate ground placement on the camp.”

86. In an email dated 28 February 2020, Ms Campbell said regarding Farm Cottage that there was “no funding available to invest in residential properties on [the Camp]”

and that “one of the options for consideration, is termination of the Licence.” She gave evidence that the final decision that the cost of repairs at Farm Cottage were unsustainable was made after the Survey Report Relating to Flood Damage by McGrath Associates, dated only as March 2020 (“the McGrath Report”). Mr Delaney instructed McGrath Associates:

“to assess the current condition of the property following the flooding issue, highlight any major concerns and provide recommendations.”

87. The McGrath Report estimated the cost of partial remediation of the problems at £14,750 + VAT. This estimate excluded other issues that both parties agreed had caused continual problems, including the septic tank, soakaways and water table. Mr Delaney gave evidence that he estimated the cost of addressing those issues to be on the order of £100,000. The claimant thought that repairs could be done for half of that estimate.

88. Over the years, the respondent had spent tens of thousands of pounds on works primarily to mitigate flooding and septic problems. There is no evidence at all that the money the respondent spent on Farm Cottage was anything other than a genuine attempt to repair it. It is fanciful to claim that the external organisations that played roles in the repairs or assessments, including Severn Trent Water and McGrath Associates, were party to any conspiracy or could be criticised as having done, or identified as necessary, any negligent or inappropriate work.

89. The claimant said in evidence that when he was reminded that the respondent could take possession of Farm Cottage if repairs became unsustainable, he took it as a threat. I find that it was not a threat but recognition of the situation as it stood. The respondent had made impressive efforts to repair Farm Cottage and to mitigate the impact of the problems there, including charging him reduced rent for long periods and offering him other accommodation.

90. The claimant said that he believed that the fact that Farm Cottage was not deconstructed until March 2022 indicated that there was no pressing need for him to move out of it in 2020. But there is no evidence that anyone occupied the premises after the claimant left or that any other type of repair was attempted. I accept the

respondent's evidence that the delay was only a matter of prioritisation, budgeting, arranging the work to be done, housing the engineers, etc.

91. There is no evidence that reaches the balance of probabilities that Lt Col Black had anything to do with Farm Cottage. Apart from the claimant's belief that as a senior member of the management team Lt Col Black was in a position to influence the repair decisions, no other evidence shows that he either had the authority to influence what happened to Farm Cottage, or that he attempted to do so. I accept the evidence from the Respondent's witnesses that Lt Col Black's only interest in the matter was whether any of the Camp accommodation used for visiting customers would be offered to the claimant while Farm Cottage was deemed uninhabitable. Lt Col Black would occasionally send an email or pass on reports about accommodation issues, but he did this in the interest of colleague support and efficiency, and his management responsibility did not extend to the employee dwellings on site. I find that Lt Col Black was not in any position to, and did not, negatively influence the repair decisions about Farm Cottage.

LAW

92. Section 95(1)(c) of the Employment Rights Act 1996 states that there is a dismissal where the employer terminates the contract with or without notice in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is commonly referred to as constructive dismissal. In order to claim constructive dismissal, an employee must establish that there was a fundamental breach of contract on the part of the employer, the employer's breach caused the employee to resign and the employee did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal.

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

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

94. The burden of proving the absence of reasonable and proper cause lies on the party seeking to rely on such absence, usually the employee — *RDF Media Group plc and anor v Clements* 2008 IRLR 207, QBD.

95. In *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221, CA, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract:

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

96. In order to successfully claim constructive dismissal, the employee must establish that:

- a. there was a fundamental breach of contract on the part of the employer,
- b. the employer's breach caused the employee to resign,
- c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

97. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident even though the last straw by itself does not amount to a breach of contract — *Lewis v Motorworld Garages Ltd* 1986 ICR 157, CA. However, an employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably. This was confirmed in *Bournemouth University Higher Education Corporation v Buckland* 2010 ICR 908, CA, where the Court upheld the decision of the EAT that the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal.

98. There is no need for there to be 'proximity in time or in nature' between the last straw and the previous act of the employer — *Logan v Customs and Excise Commissioners* 2004 ICR 1, CA.

99. In *Omilaju v Waltham Forest London Borough Council* 2005 ICR 481, CA, the Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, nor need it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective. And while it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the last straw test. In that context, in *Chadwick v Sainsbury's Supermarkets Ltd* EAT 0052/18 the EAT rejected a tribunal's finding that a threat of disciplinary action was 'an entirely innocuous act' that could not constitute a last straw.

100. Where the act that tips the employee into resigning is entirely innocuous it will be necessary to consider whether any earlier breach has been affirmed. In *Williams v Governing Body of Alderman Davies Church in Wales Primary School* EAT 0108/19 a teacher, W, was suspended for an alleged child protection matter. He was also subject to disciplinary proceedings for alleged breach of the school's data protection policy. He was dissatisfied with the process and resigned after several months, stating that the last straw was learning that a colleague, under investigation for a connected data protection breach, had been instructed not to contact him. The tribunal found that this instruction was reasonable in the circumstances and entirely innocuous. It held that, following *Omilaju*, this act could not contribute to a breach of the implied duty of trust and confidence and was not a last straw entitling W to treat his employment contract as terminated. On appeal, the EAT held that, where there is conduct by an employer that amounts to a fundamental breach of contract, a constructive dismissal claim can succeed even if there has been more recent conduct by the employer which does not in itself contribute to a breach of the implied term of trust and confidence, but which is

what tips the employee into resigning. Crucially, however, the employee must not have affirmed the earlier fundamental breach and must have resigned at least partly in response to it.

101. In terms of causation, that is the reason for the resignation, a tribunal must determine whether the employer's repudiatory breach was 'an' effective cause of the resignation. However, the breach need not be 'the' effective cause — *Wright v North Ayrshire Council* 2014 ICR 77, EAT. As Mr Justice Elias, then President of the EAT, stated in *Abbycars (West Horndon) Ltd v Ford* EAT 0472/07,

“the crucial question is whether the repudiatory breach played a part in the dismissal’, and even if the employee leaves for ‘a whole host of reasons’, he or she can claim constructive dismissal ‘if the repudiatory breach is one of the factors relied upon”

102. Where an employee has mixed reasons for resigning their resignation will constitute a constructive dismissal provided that the repudiatory breach relied on was at least a substantial part of those reasons (see *Meikle v Nottinghamshire County Council* [2004] EWCA Civ 859, [2005] ICR 1).

103. Thus, where an employee leaves a job as a result of a number of actions by the employer, not all of which amounted to a breach of contract, they can nevertheless claim constructive dismissal provided the resignation is partly in response to a fundamental breach.

104. If the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract resulting in the loss of the right to claim constructive dismissal. In the words of Lord Denning MR in *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221, CA, the employee

“must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged”

105. This was emphasised again by the Court of Appeal in *Bournemouth University Higher Education Corporation v Buckland* 2010 ICR 908, CA, although Lord Justice

Jacob did point out that, given the pressure on the employee in these circumstances, the law looks very carefully at the facts before deciding whether there really has been an affirmation. An employee's absence from work during the time he or she was alleged to have affirmed the contract may be a pointer against a genuine affirmation.

106. The Court of Appeal in *Kaur v Leeds Teaching Hospitals NHS Trust* 2019 ICR 1, CA, held that, in last straw cases, if the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign.

107. If one party commits a repudiatory breach of the contract, the other party can elect to either affirm the contract and insist on its further performance or accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses. If they affirm the contract, even once, they will have waived their right to accept the repudiation.

108. As to any delay in making such a decision, the employee must make up their mind soon after the conduct of which they complain. Tribunals must take a 'reasonably robust' approach to waiver; a wronged employee cannot ordinarily expect to continue with the contract for very long without losing the option of termination (see, e.g., *Buckland v Bournemouth University Higher Education Corporation* [2010] EWCA Civ 121, [44], per Sedley LJ).

109. The Court of Appeal in *Kaur* (above) offered guidance to tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:

- a. what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- b. has he or she affirmed the contract since that act?
- c. if not, was that act (or omission) by itself a repudiatory breach of contract?

d. if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

e. did the employee resign in response (or partly in response) to that breach?

CONCLUSION

110. I consider whether the respondent's behaviour regarding Farm Cottage breached any express or implied terms of the claimant's contract. If the respondent's behaviour was, as the claimant alleges, a sham and a conspiracy to make his life difficult as punishment for his complaints against Lt Col Black, then it would clearly breach implied terms of trust and confidence, even if the accommodation was not a term of his employment. Or, even if the respondent's behaviour was not a sham or conspiracy but otherwise breached the claimant's employment contract without reasonable or proper cause, then he could succeed on this ground.

111. I find that there is no breach of the claimant's contract in any of the issues around Farm Cottage repairs. To the extent that taking possession of Farm Cottage damaged the trust and confidence between the parties, it was reasonable and proper to do so.

112. There is nothing in any of the background issues raised by the claimant that had not been either substantively dealt with in Lt Col Black's disciplinary investigation, or of themselves constituted a breach of trust and confidence or any other term of his contract. In any case, all the incidents took place before the investigation, and were not, even on the claimant's case, the trigger for his resignation.

113. I find that the respondent's acts, objectively viewed, did not breach the claimant's employment contract. To the extent that the respondent's acts damaged trust and confidence, the respondent had reasonable and proper cause to do so, with respect to their policies on discipline and confidentiality. This means that the resignation cannot be construed as a dismissal, so the claim must fail.

114. I also find that in any event the claimant did not resign in response to Lt Col Black's disciplinary matter. The claimant submitted his resignation some four months after the conclusion of the investigation in December 2019, which I find affirms the

contract. It seems more likely that in the claimant's mind the last straw was the Notice to Quit, served in March 2020. But I find that the Notice to Quit was an innocuous act, the timing of which was unfortunate but which had a years-long history and was entirely fairly reached.

115. The claimant's claim for unfair dismissal is not well founded and is dismissed.

Employment Judge Ficklin
9 February 2024

Employment Judge Ficklin

JUDGEMENT & REASONS SENT TO THE PARTIES ON

Date: 21 February 2024

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FOR THE SECRETARY OF THE TRIBUNALS