EMPLOYMENT TRIBUNALS

Claimant: **Mr S Jones**

Respondent: **Cleveland Fire Authority**

Heard at: **Newcastle Employment Tribunal (sitting in Middlesbrough)**

On: **14th, 16th, 17th October 2024**

Before: **Employment Judge Sweeney**

Appearances For the Claimant, In person For the Respondent, Ben Williams, counsel

JUDGMENT having been given on **17 October 2024** and written reasons for the Judgment having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

WRITTEN REASONS

Background

1. In a Claim Form presented on **19 September 2023**, the Claimant, Mr Simon Jones complained of unfair constructive dismissal. The hearing was originally listed for a oneday final hearing on **13 February 2024.** However, this was converted to a preliminary hearing before Judge Jeram. She discussed the factual and legal complaints being advanced by Mr Jones. He clarified that he was advancing his claim for unfair dismissal on the basis of the Respondent's response (or lack of response) to his grievance and that it thereby demonstrated that it failed to take matters of serious misconduct seriously (paragraphs 16, 20 and 22 of the case management summary on **page 316-317**). Mr Jones identified the term which he contended had been breached by the Respondent's response to his grievance as being the well-known term of mutual trust and confidence.

Judge Jeram identified the acts which were said to amount to repudiatory conduct in paragraph 22 of her case management summary. The case was expressly not advanced as being that the acts of Mr Suggitt or Mr Summers or the bullying he was exposed to as amounted to repudiatory conduct in response to which the Claimant resigned or that the or that he resigned in response to some later 'last straw' (such as the failure to take forward his grievance). The claim was focused on the response to the grievance submitted by him after the conclusion of disciplinary proceedings and after Mr Summers had returned to work. It was this that was said to amount to a breach of the implied term of trust and confidence. In deliberations, I considered whether (in addition to or as an alternative to the term of 'mutual trust and confidence') the Claimant's case should be considered as a complaint involving a breach of the term of the sort described by the EAT in **WA Goold (Pearmak) v McConnell**. I have attached the issues as an Appendix at the end of these reasons.

2. The Claimant prepared an opening note, which I read, along with the witness statements and key documents. He referred to criminal proceedings regarding Mr Suggitt which are to take place in **June 2025**. Mr Jones wrote that Mr Summers was, in his view, 'privy to and took part 'in the actions of Mr Suggitt which were the subject of the forthcoming criminal proceedings. It further transpired (when I asked) that the Claimant is to be a prosecution witness in those proceedings. I asked how I was to determine the issues without treading on areas that might be the subject of criminal proceedings. The Claimant explained that his case was that his complaint had not been taken seriously, that he was not told the outcome, that there was no visible sign of any outcome and that the Watch Manager (Mr Summers) had gone back to his watch. Still concerned about proceeding in the absence of having a view from the prosecution/police, I asked the parties to contact the officer in the case and to explain that we were about to start proceedings and to ask whether they had any concerns in this respect. This inevitably delayed the hearing of evidence. Upon receiving confirmation from the officer in the case and the CPS that there was no concern about the employment tribunal proceedings continuing in advance of the criminal trial, and satisfied as I was that the issues were containable so as not to prejudice the criminal proceedings and given that both parties agreed that the tribunal hearing should proceed, I was content to proceed. began to hear the evidence on **16th Octobe**r.

3. One other preliminary matter was discussed prior to hearing evidence. This related to documents. In his opening note, Mr Jones had referred to documents not being included in the bundle. I asked whether he was making an application for disclosure. However, he said that he wasn't. He was observing that documents that he had sent to the Respondent had not initially been included in the bundle but that they were subsequently inserted into section E of the bundle. I raised of my own volition the issue of the outcome letters to Mr Summers and Mr Suggitt. These were not in the bundle and had never been disclosed to the Claimant. Mr Williams said he could tell me the outcomes. That may be

so but I was concerned about how I could fairly determine the issues without the Claimant having sight of those documents. Those were, in my view, clearly disclosable documents. Mr Williams arranged for them to be disclosed to the Claimant. These were disclosed later that day (14th October) and added to the bundle as **pages 323-329**. Before commencing evidence on 16th October, the Claimant confirmed that, whilst unhappy about not having been given copies when he asked back in December 2023, he was able to proceed with the hearing. I was satisfied that he had had sufficient time to digest them and that – whilst late – they did not unfairly prejudice his case or adversely affect the way in which his case had been or would be presented.

Findings of fact

4. The Claimant, Mr Jones, commenced employment with Cleveland Fire Brigade in **February 2002** as a Firefigher. In approximately **2017** he moved from Middlesbrough Green Watch to Thornaby Green Watch ('**TGW'**). The Watch Manager there was Philip Summers. Among other Firefighters stationed at **TGW** were James Sharrocks and Ben D'Cunha and Stephen Suggitt, crew manager.

5. In approximately **November 2022** a complaint (or complaints) were made about the conduct of Mr Suggitt and Mr Summers. They were both suspended and investigated on allegations (in Mr Suggitt's case) of:

   (1) Using offensive and inappropriate language, including comments related to protected characteristics towards colleagues in WhatsApp messages.

   (2) Bullying members of the watch.

   And, in Mr Summers' case, of:

   (1) Having taken an active part in WhatsApp groups at TGW, which included offensive, discriminatory and inappropriate language, some of which were directed towards individual members of staff.

   (2) That in his role as Watch Manager, he failed in his duty to stop this negative behaviour.

6. Also, in about **November 2022**, Mr Jones transferred to Thornaby Blue Watch ('**TBW'**).

7. The allegations were investigated by Lee Brown, Group Manager and Head of Training and Assurance. He interviewed a number of people, including the Claimant. He recommended that the allegations proceed to a Level 3 disciplinary hearing. Within the Respondent's disciplinary procedures there are thee levels of hearing: 1, 2 and 3. The

maximum penalty for a level 1 hearing is a 6 month warning (para 2.16 of the policy) [**page 77**]. The maximum penalty for a level 2 hearing is a final written warning of up to 18 months (para 2.21) [**page 78**]. The maximum penalty on a level 3 hearing is summary dismissal (para 2.25) [**page 79**].

8. Mr Summers attended a disciplinary hearing on **27 March 2023**. This was chaired by Simon Weastell who was, at the time, the Area Manager and Senior Head of Operations. After deliberations, Mr Weastell told Mr Summers the outcome of the hearing on **29 March 2023**. It was confirmed in writing by letter dated **06 April 2023** [**page 323**].

9. Mr Suggitt did not attend a disciplinary hearing. He resigned or retired during the course of the investigation and prior to any such hearing. However, Mr Weastell held a hearing in Mr Suggitt's absence on **03 May 2023**.

10. Mr Weastell found that the allegations against Mr Summers and Mr Suggitt were made out. In Mr Summer's case he administered a sanction of an 18 months' final written warning, required him to complete a development plan, assigned a mentor and stipulated that he would be monitored to assess his performance against the values and behaviours of the Brigade. In arriving at his decision, he took time to consider all the material, including that put forward by Mr Summers in his own mitigation. He carefully deliberated what sanction to apply and he set out his reasoning in the letter of **06 April 2023**.

11. As regards Mr Suggitt, Mr Weastell found the allegations were made out. He decided that, had Mr Suggitt not retired from the Brigade, he would have been summarily dismissed. He also made arrangements for Mr Suggitt's conduct to be referred to the police. Mr Suggitt is to stand trial on some criminal charges in about **July 2025**.

12. Shortly after he was told the outcome of the disciplinary hearing Mr Summers returned to **TGW** as the Watch Manager. Upon learning of this, the Claimant commenced a period of sick-leave, from which he was not to return prior to his resignation.

13. He was seen by Occupational Health ('**OH**') on **19 April 2023**. **OH** advised that Mr Jones was unfit to work and that management should meet with him to identify and address his stressors. A welfare meeting was arranged with Station Manager Richie Brown on **17 May 2023**. One of the things offered to Mr Jones, but not accepted, was a move. The Claimant rejected this on the basis that working with Mr Summers could not be ruled out and in any event Mr Jones did not see why he should be the one that should have to move.

14. On **22 May 2023**, the Claimant raised a formal grievance with Station Manager Richie Brown [**page 92 – 93**].

15. The grievance read, in part, as follows:

> "*Due to the serious allegations involved in those procedures, with all evidence provided with WhatsApp messages and personal statements, Cleveland Fire Brigade has decided that no significant consequences are to be handed out to watch manager Phillip Summers or Watch Manager/Crew Manager Stephen Suggitt*.
>
> *These findings and outcomes are against CFB's own ethics code of conduct – PRIDE (Protect, Respect, Innovation, Doing the right thing, Engagement with others) and the Core Code of Ethics, Fire and Rescue Services England.*
>
> *….*
>
> *The concerns I raised previously have not been resolved and I perceive that CFB have not complied with the Code of Ethics Fire Standard. The implications of the findings have been significant for myself and others who voiced their concerns. The clearly unfair, unacceptable and concerning behaviour being reported, then being investigated and the findings were that this behaviour is deemed as acceptable. The integrity of those conducting the hearings needs to be questioned as there was a distinct lack of impartiality of Duty of Care towards those who were treated unfairly, with the findings contrary to the Brigade's duty to promote and maintain high standards of conduct."*

16. The Claimant then identified the codes which he identified as being disregarded and/or Conduct which had not been adhered to by the Respondent.

17. It is clear that the Claimant was expressing his concerns with the outcome of the disciplinary proceedings against Mr Summers and Mr Suggitt. In essence, he was concerned about the lack of any visible outcome of the investigation into the conduct of Messrs Suggitt and Summers. He assumed that no action had been taken. He inferred from Mr Summers' return to **TGW** and from the fact that Mr Suggitt had retired that their behaviour was deemed by the Respondent as acceptable.

18. Michelle Richardson acknowledged receipt of the grievance on **25 May 2023**. She suggested that there be attempt to resolve the grievance informally to begin with and arranged for an informal meeting with her and Mr Simon Weastell to take place at 10.30am on **31 May 2023**.

Meeting of 07 June 2023

19. That meeting was rearranged as Ms Richardson had not taken account of Mr Jones' leave dates. It was, in fact, held on Wednesday **07 June 2023**. The notes of that meeting are on **pages 102 – 103**. The gist of the notes was not in dispute, although the Claimant had not received the notes until **May 2024**. Mr Jones believed one part of the notes was

drafted so as to give an impression that he wanted to leave his job. For what it is worth, they do not appear to me to be drafted to give such an impression, even if that is how Mr Jones reads it. I accept his evidence that as a long-serving firefighter, this was the last thing that he wanted to do.

20. In that meeting, Mr Jones expressed his concern about what he perceived to be a lack of action having been taken against Mr Suggitt and Mr Summers. The gist of what he said was that he no longer wished to work for an organisation that condoned such behaviour. That was his way of conveying his upset. He was angry, frustrated and very disappointed that it appeared Mr Suggitt and Mr Summers had 'got away with it' and was concerned that nobody would come forward with issues in future as there was no trust in management.

21. Mr Weastell explained to the Claimant that action had been taken against both individuals, that due to data protection the detail of such action could not be shared with him. He and Ms Richardson explained that they were both comfortable with the decision that they had come to on the case and that it had been made having taken into account all of the evidence that was presented by the investigating officer and the defence from the individual. The deliberations process was explained to Mr Jones and that the brigade did not tolerate or condone the inappropriate behaviour.

22. The Claimant suggested that Mr Weastell was biased in favour of the individual – this was a reference to Mr Summers. When asked if there was any evidence to support this suggestion, the Claimant did not refer to any. None has been adduced in these proceedings.

23. Mr Weastell explained that whilst he empathised with the Claimant, Mr Jones saw only his own version of events whereas the disciplinary panel had to make a decision based on approximately 18 witness statements. Mr Weastall was asking Mr Jones to trust in the process that they had followed and the care with which Mr Weastell considered the matters. Mr Weastell did not tell Mr Jones of the nature of the sanction administered to Mr Summers because the disciplinary process and outcome was confidential and subject to data protection laws and he explained this to Mr Jones.

24. Mr Jones did not accept the assurances given by Mr Weastell and Ms Richardson. He did not believe that the Respondent had taken matters seriously. He said that he wished to take the matter to a formal grievance, Mr Jones was asked by Mr Weastell and Ms Richardson what his desired outcome would be but he was unable to say.

25. After that meeting, Ms Richardson wrote Mr Jones on **12 June 2023**. She set out what was understood to be Mr Jones' main area of concern as being:

"your perception that there had been a lack of action by the Brigade which you felt showed that inappropriate behaviour was being condoned. We explained to you that action had been taken against both individuals however due to data protection the detail of such action could not be shared with you."

26. He was informed that if he did not feel this had resolved his concerns he could escalate them to the formal stage of the grievance procedure by writing to Station Manager Richie Brown [**page 104 – 105**]. The Claimant did that by email dated **15 June 2023** [**pages 106 – 108**].

27. The key point in the grievance was, as he put it, that there had been no significant consequences for Mr Suggitt or Mr Summers as a result of bullying which had greatly affected him. In the formal grievance he stated:

" *… I feel that I have not been listened to and there has been no noticeable consequences for the alleged perpetrators. …. I perceive that CFB have not complied with the Code of Ethics Fire Standard.*

I have been greatly affected by bullying, harassment, discrimination and exclusion which have significantly affected my mental wellbeing, being deemed unfait for work by both GP and OH …

…. The outcome of the investigation [into Suggitt/Summers] given over the telephone by GM Lee Brown that there had been no significant consequences for either WM/CM Steven Suggitt, or WM Philip summers. GM Lee Brown advised SS had retired and that he will not receive a good employment reference and WM Philip summers returning to his managerial role. These findings and outcomes are against CFB's own ethics code of conduct and PRIDE and the Code of Ethics, Fire and Rescue Services England.

Following the informal chat related to the informal grievance submitted, I received an email which showed no action was to be taken to address the issues. Sanctions were in place for WM Philip summers though to protect his privacy these cannot be reported."

28. Mr Jones drew from this that '*the findings were this behaviour is considered as acceptable'*. The Claimant then quoted from a document referred to as 'the Service Plan P41, Content 11 – Shaping our future'. He attached samples of WhatsApp messages. He attached an **OH** report. He attached an email from the Chief Fire Officer, Ian Hayton dated **02 March 2023**. He attached some other policy documents.

29. On **26 June 2023**, Emma Doubooni asked the Claimant if he could, for clarity, document in an email his desired outcome [**page 129**]. The Claimant replied on **30 June 2023** [**page 130 – 131**]. He set out in bullet form a number of statements:

a. that Mr Weastell and Ms Richardson should be investigated 'as to how these behaviours uphold CFO Hayton's email' – by 'these behaviours' he was referring to Mr Weastell's decision that Mr Summers could return to his Watch Manager role.

b. That the CFO review the implementation of the Core Code of Ethics;

c. That senior leadership commitment to PRIDE be improved;

d. That staff who raise concerns be listened to and that lack of accountability should be addressed;

30. He said he would like the grievance to be dealt with impartially and if possible by a manager not previously involved in the case. On **10 July 2023** Emma Doubooni, Head of HR, wrote to the Claimant [**page 139-141**]. She said:

"The investigation was concluded and recommendations were made on how to proceed. These recommendations were followed and two disciplinary hearings were undertaken. However, as I am sure you will appreciate that due to issues of confidentiality I am unable to share with you the outcomes of those hearings. On reviewing the processes that have taken place I am satisfied that our disciplinary procedure has been followed. I don't believe that this can be taken forward as a grievance as any Investigating Manager would be unable to share any further detail on outcomes with you. Again, I am aware that you have been informed that we referred the matter on to Cleveland Police with reference to race related communication and we have shared our documentation from the process with Cleveland Police. I believe this is an indication of how seriously we considered the concerns raised."

31. She then went on to respond to the Claimant's desired outcomes. She said simply that the relevant policies and values were followed, that there was clear and robust commitment to the values and all concerns raised are taken extremely seriously and investigated. She added that:

"*I appreciate that for those who raise concerns the outcomes may not be visible. As such I would appreciate your input on how we improve our feedback mechanisms to individuals who raise concerns, without compromising the individual's right to confidentiality*."

32. Ms Doubooni noted that as part of his grievance the Claimant had submitted some WhatsApp messages that had not apparently been seen by Mr Brown when he investigated. However, she was not sure about this and asked the Claimant to confirm if this was evidence he had at the time of the investigation and did not share it or if it was

new evidence that he wished to be considered. She noted that the Claimant was absent on sick leave with stress and said she would like to organise a welfare meeting with him and Station Manager Richie Brown and to complete a stress risk assessment.

33. The Claimant, with the assistance of his wife, prepared a response to Ms Doubooni's letter of **10 July**. That is the document of **12 July 2023** [at **page 150 - 154**]. However, Ms Doubooni did not receive this and the first time she saw it was when in the proceedings. I find nothing mysterious in that. It is simply that it either did not leave the inbox or it did not arrive in Ms Doubooni's inbox. Mrs Jones had intended to send the email from Mr Jone's account. However, she sent it from her own work account and the original email is no longer available as her work emails are deleted after six months. It is more likely than not that the email was blocked at one or either end. The upshot is that the Respondent did not receive this. Had it been received, Ms Doubooni would have seen that the Claimant said he had retrieved some images and confirmed that he wished them to be considered as new evidence in the case against Mr Summers. He did not wish to have a face-to-face meeting to complete a stress risk assessment as he felt that this would add to his stress and said he was happy for this to be done remotely.

34. A video meeting was arranged for **04 August 2023** to undertake the stress risk assessment. The form which was sent to Mr Jones is a straightforward stress risk assessment which requires input from the employee. A couple of days before that, on **02 August 2023,** the Claimant emailed Richard Brown [**pages 162-162]**. He expressed his deep unhappiness with the way in which the Brigade had dealt with matters. He made it clear that he considered Mr Summers' conduct to be wholly unacceptable and that any reasonable employer would have treated his conduct as gross misconduct justifying dismissal. He said:

"In my opinion, the behaviour of Philip Summers was wholly unacceptable. You are aware of the allegations against Philip Summers and the messages which he allowed Steven Suggitt to send to members of the Watch, the messages Phillip himself added to the groups, and you are aware of the way in which he treated me. In my opinion any reasonable employer would have treated his behaviour as gross misconduct justifying his dismissal. As it is, he has been allowed to stay in his post and I am now expected to work alongside him and the persons who condoned his behaviour and sent me to Coventry. I am being told that measures have been put in place following the disciplinary proceedings, but I am being told that I am not entitled to know what those measures are. I have been told that I should return to work and 'just let it go'. I am being made to feel as though I am the problem rather than the victim here, something which I find wholly unfair. The whole situation has made me ill and I do not consider that it is reasonable to expect me to return to work alongside the very people who caused my illness in the first place. It will, I am sure, just cause a further deterioration in my health.

At the previous grievance meeting I was told that if I were to pursue matters by way of a formal grievance, the outcome would not change because the same people who had dealt with the informal grievance would be dealing with the formal grievance. In the circumstances I doubt whether anything that I would say to you on Friday is going to change the position of CFB. Nevertheless, I would invite you to look at matters again and to acknowledge that the way in which I have been treated has been wholly unacceptable."

35. Mr Brown replied shortly after that email. He assured the Claimant that the service did not think he was a problem and that they could discuss matters further. He added that; "the outcome and actions of the grievance can't be changed now as that's the process and subsequent decision the service took." He disagreed with the Claimant's recollection of what he had been told at the informal grievance meeting. He said that the Claimant had been told that they would not re-raise the investigation (i.e. the investigation into Messrs Suggitt and Summers) if he was not happy with the outcome. He concluded that they could discuss this further on Friday and also how the stress risk assessment would work to benefit him.

36. The stress risk assessment meeting did not take place and the form was never completed. On **07 August 2023**, the Claimant resigned [**pages 164-165**]. He said that he was resigning in response to a repudiatory breach of contract (the breaches being 'Allowing a climate of bullying and harassment' and 'Raising a formal grievance that the Brigade refuses to investigate') and said he was going to start proceedings for constructive dismissal. In the letter of resignation he stated:

"You should be aware that I am resigning in response to a repudiatory breach of contract by my employer and therefore consider myself constructively unfairly dismissed.

My formal grievance was rejected on 11th July 2023, regarding the situation of bullying and harassment, racism, discrimination, sexual harassment and isolation, this sets out the basis on which CFB have forced me to resign my position.

Fort he avoidance of doubt, the respective omissions by Management and HR to have acted with diligence and competence germane to the concerns, which I raised as per the correct process and pathways, led me to believe that the actions of bullying and harassment, racism, discrimination, sexual harassment and isolation in the workplace are acceptable. Any reasonable employer would have treated this behaviour as gross misconduct justifying dismissal; however, CFB have been unreasonably lenient.

Breaches to employment contract –

- *Allowing a climate of bullying and harassment.*
- *Raising a formal grievance that the Brigade refuses to investigate"*

Relevant law

Constructive dismissal

37. Section 95 Employment Rights Act ('ERA') defines the circumstances in which an employee is dismissed for the purposes of the right not to be unfairly dismissed under section 94. Section 95(1)(c) 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. This is known as 'constructive dismissal'.

38. The word 'entitled' in the definition of constructive dismissal means 'entitled according to the law of contract.' Accordingly, the 'conduct' must be conduct amounting to a repudiatory breach of contract, that is conduct which shows that the employer no longer intends to be bound by one or more of the essential terms (express or implied term) of the contract of employment: **Western Excavating (ECC Ltd) v Sharp** [1978] I.C.R. 221, CA.

39. It is for a claimant to prove the matters relied that constitute the allegedly repudiatory conduct / breach of the contract of employment.

The implied term of mutual trust and confidence

40. In many cases, the breach of contract relied upon is of the implied term of trust and confidence. In **Malik v Bank of Credit and Commerce International SA (in liquidation)** [1998] A.C. 20, the House of Lords definitively established the ambit of this term. Often referred to as 'the Malik term' it can be stated thus:

"*The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*"

41. An employee may well genuinely lose trust and confidence in his employer (and vice versa) but that, of itself, does not mean that the term has been broken. A tribunal must assess objectively whether the conduct of the Respondent is such that it can be said the relationship of trust has been seriously damaged or destroyed. That may come about either by a single instance of conduct, or by conduct which, viewed as a whole, cumulatively cross the '*Malik*' threshold. In addition, the conduct, even if it does seriously damage trust and confidence, must be conduct for which there is no reasonable or proper cause.

Grievance procedures

42. A contract of employment contains an implied term that the employer will reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance they might have: **WA Goold (Pearmak) Ltd v McConnell** [1995] I.R.L.R. 516.

Resignation in response to fundamental breach

43. It is enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer. The fact that the employee also objected to other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the circumstances of the repudiation: **Meikle v Nottinghamshire County Council** [2005] ICR, CA. It follows that once a repudiatory breach is established, if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon: **Wright v North Ayrshire** [2014] I.C.R. 77 and **Abbey Cars West Horndon Limited v Ford** UKEAT 0472/07, per Elias J @ para 34.

Last straw cases

44. The final incident which causes the employee to resign does not in itself need to be a repudiatory breach of contract. Nor does it necessarily have to amount to unreasonable or blameworthy conduct. In other words, the final incident may not be enough of itself to justify termination of the contract by the employee. The resignation may still amount to a constructive dismissal if the act which triggered the resignation was an act in a series of earlier acts which cumulatively amount to a breach of the implied term. This final incident or act is commonly referred to as the 'last straw'. The last straw does not have to be of the same character as the earlier acts. An entirely innocuous act on the part of the employer cannot be a final straw, regardless of whether the employee perceived it. When taken in conjunction with the earlier acts on which the employee relies, it must amount to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial**: *Omilaju v Waltham Forest London Borough Council*** *[2005] IRLR 35*. If the act that triggers the employee to resign is entirely innocuous, an employee may still claim to have been constructively dismissed if there was earlier conduct that amounts to a fundamental breach, the contract had not been affirmed by the employee and the employee resigned at least partly in response to it. That sort of case would not be a 'last straw' case in the legal sense: **Williams v Governing Body of Alderman Davies Church in Wales Primary School** [2020] I.R.L.R, EAT.

Discussion and conclusion

45. As I have set out already, it is for Mr Jones to establish the conduct/failings asserted and I must then be satisfied that the Respondent's conduct as established was such that *it was calculated or likely to destroy or seriously damage the relationship of confidence and trust and that the conduct in question was conduct for which the Respondent had no reasonable and proper cause.*

46. In these proceedings, Mr Jones advanced a very narrow case. He identified the repudiatory conduct of the Respondent as:

    a. The Respondent's failure to take his grievance forward,

    b. The absence of any identifiable or apparent steps taken to address the complaints he raised with the respondent,

    c. Being told in the welfare meeting of **04 August 2023** that his grievance would not be taken forward.

47. His case before me was emphatically not that the harassment/bullying to which he (and others) was exposed and which formed the basis of the disciplinary allegations against Mr Suggitt and Mr Summers amounted to repudiatory conduct. Mr Jones noted in his written submissions that he felt disadvantaged by not being able to ask questions about the bullying/harassment. He said that most of the questions he had prepared to ask the Respondent witnesses (in particular Mr Summers) were about the events prior to the suspension of Mr Summers and Mr Suggitt. However, that would have taken me down an unnecessary path – unnecessary for the disposal of the issues. I was at pains to explain during the hearing that, while recognising Mr Jones' is a litigant in person, nonetheless I had to ensure that questioning was kept to relevant areas. That was why I had taken care to check the position with the parties and the police at the outset of this hearing. Had the case being advanced been that the acts of Mr Suggitt and Mr Summers amounted to repudiatory conduct (or was repudiatory conduct in respect of which the last straw was the grievance outcome) I would have been required to make findings of fact regarding that conduct and of course, would have permitted Mr Jones to explore those matters in cross-examination. However, I was assured that their conduct was not the repudiatory conduct relied on in the proceedings. Had it been otherwise, I almost certainly would not have proceeded to hear a case where I would be or might be required to make findings in relation to the conduct of Mr Suggitt, in respect of which there are pending criminal proceedings.

48. Given the narrow scope of the case and the fact that Mr Weastell found the allegations against Mr Summers to be made out and that <u>his</u> conduct was found by Mr Weastell to be a serious breach of mutual trust and confidence there was no necessity to cross examine on the acts which were the subject of the disciplinary allegations. It may be that

Mr Jones would have liked to cross examine Mr Summers on his and Mr Suggitt's conduct (and Mr Summers being 'privy' to that conduct) but I considered that to be unnecessary to dispose of the issues and that it did not disadvantage the Claimant in the case he was running. Judges are entitled to and must control the extent of crossexamination, ensuring that it is relevant to the matters before the court or tribunal.

49. Although Mr Weastell had found the allegations against Mr Summers and Mr Suggitt to be made out, it does not follow that the inevitable result must be the dismissal (or demotion) of Mr Summers. Conduct that amounts to gross misconduct does not automatically – or necessarily - result in dismissal or demotion. It is not unusual for tribunals to hear such misconceptions expressed to it – usually by employers, who say 'because' an employee committed gross misconduct, they 'must' be dismissed. The appropriate sanction is for the employer. The employer must address its mind to the sanction and must act reasonably in regards to the person who is the subject of the disciplinary proceedings. Of course, it also has duties to other employees as well, including Mr Jones. It has contractual duties (such as that known as the '**Malik'** term) and it has some statutory obligations.

50. Another of the contractual duties owed to employees relates to grievances. As set out in the 'relevant law' section above, it is an implied term that the employer will give an employee a reasonable opportunity to obtain redress in respect of a grievance; a breach of this term will constitute a repudiatory breach (**WA Goold (Pearmak) Ltd v McConnell** [1995] IRLR 51*)*

51. The term is not to provide the employee with a right to any particular outcome. Rather it is to provide a reasonable opportunity to obtain a redress in respect of a grievance. There seems to me in this case that there is an overlap with this term and another term ('mutual trust and confidence') and the Claimant's assertion that the Respondent, without reasonable or proper cause, destroyed or seriously damaged trust and confidence by not 'taking forward' his grievance. I considered both terms.

52. I asked myself whether, on the facts found by me, the Respondent failed to provide the Claimant with a reasonable opportunity to obtain redress in respect of a grievance. This is an employer that has set up systems for the bringing and hearing of grievances generally. Therefore, it cannot be said to have failed to set up a system. However, the term probably goes beyond the general level. Even where an employer has set up a system, it may be argued that in a given case, there has nevertheless been a failure to afford the opportunity to obtain redress. In the specific case of Mr Jones, a relevant factor to consider must also be what redress he was seeking. No doubt this explains much of Mr Williams' questioning of Mr Jones – and indeed, explains why it was that Ms Doubooni asked what preferred outcome Mr Jones was seeking.

53. It is clear – and Mr Jones ultimately accepted this – that the redress he was seeking to obtain was that someone else, other than Mr Weastell and Mr Richardson, should look again at the investigation into Messrs Summers and Suggitt and more particularly, the sanction administered to Mr Summers and the decision to 'allow' Mr Suggitt to retire without sanction. This was based on Mr Jones' perception that no action had been taken against them and not trusting that the Respondent had taken any action against Mr Summers. In other words, he was in substance asking for the investigation and decision making to be reopened.

54. In reality, things boil down to Mr Jones' dissatisfaction with the outcome of the investigation. He does not challenge the genuineness or reasonableness of the investigation carried out by Lee Brown. He described it as excellent. It is the outcome that he was unhappy about. Had Mr Summers been dismissed or demoted he would not – as he accepted - have submitted a grievance. In reality, he was asking for the disciplinary proceedings to be re-opened and for the question of sanction to be re-visited. That was what his grievance was about. Although he did not put it in those terms, it was clear to those to whom he was speaking (Mr Weastell and Ms Richardson) that this is what he was seeking and it was clear to Mr Jones that he was seeking this.

55. That was a redress that the Respondent believed they could not provide him. In my judgement, they acted reasonably and properly in arriving at that conclusion. They had carried out a reasonable investigation and Mr Weastell arrived at a sanction in Mr Summers' case having considered all the material before him, including the points made in mitigation by Mr Summers. That exercise was complete. It is very difficult to see how it could reasonably and fairly be reopened. Ms Doubooni, nevertheless, considered the Claimant's grievance. As I have set out in my findings she wrote to Mr Jones on **10 July 2023** to say that she had had an opportunity to consider his grievance in full alongside his desired outcomes. She expressed recognition of Mr Jones' courage in raising his concerns and affirmed the matters were taken seriously. She referred to the full and thorough investigation that had been carried out, that she has reviewed the processes and was satisfied that the procedure had been followed and that she did not believe that this could be taken forward as a grievance.

56. Courts and tribunals are more interested in substance than words. Mr Jones relies in these proceedings on the reference to not '*taking forward'* his grievance. It is obvious that taking forward his grievance meant re-opening the investigation and decision making. The Respondent could not reasonably re-open the sanction imposed on Mr Summers. Whether Mr Jones agrees or not, that would be unfair to Mr Summers and would expose the Respondent to a risk of litigation from that direction. Certainly, in my judgement, the Respondent had reasonable and proper cause not to 'take the grievance' forward on the facts of this case.

57. Mr Jones is not entitled to a particular outcome and there may be outcomes he does not like. This is one of them. The Respondent did have a system in place for him – and other employees - to obtain redress of a grievance. It is just that, when looked at, the redress he sought was not reasonably open to the Respondent. His grievance was not 'closed off' as he put it. He was not fobbed off in any way. He met with Mr Weastell and Ms Richardson and then Ms Doubooni considered the matter on paper. There was no grievance 'hearing' as such but that was not unreasonable in the circumstances of this case. A hearing to tell the Claimant what Ms Doubooni told him in writing would have been pointless. I conclude that the failure to hold a grievance hearing in those circumstances was not conduct, on an objective basis, that was likely or calculated to destroy or seriously damage the relationship of trust and confidence. The Respondent had reasonable and proper cause for taking the approach that it did.

58. As regards the absence of any apparent steps taken to address the complaints Mr Jones had raised with the respondent, like Mr Williams, I had understood this to be a reference to the apparent failure to address the initial complaints against Mr Suggitt and Mr Summers (and which led to their suspension). In his evidence, Mr Jones suggested that this was still about his grievance: i.e. that the Respondent took no identifiable or apparent steps to address his grievance.

59. If that is the case, then Mr Jones is, on my findings and conclusions, wrong about that. Mr Weastell and Ms Richardson met with him on **07 June 2023** and Ms Doubooni wrote to him asking him for information and outcomes and replied to him with a decision on **10 July 2023**. Therefore, they did take steps to address the grievance. However, they decided that the redress sought was not reasonably available. I have concluded that they had reasonable and proper cause to arrive at that position.

60. However, I do not believe that that is what paragraph 22.2 of Judge Jeram's summary refers to. It is (and in keeping with the whole of the evidence) a reference to the Claimant's complaint about the absence of identifiable or apparent steps to address the complaints against Mr Suggitt and Mr Summers. He perceived no steps had been taken.

61. In fact, the Respondent did take steps. The Respondent could do nothing to prevent Mr Suggitt leaving his employment before the conclusion of the disciplinary proceedings. It did not 'allow' him to leave or retire. There is no reliable or credible evidence that they 'allowed' Mr Suggitt to do so. Moreover, the Respondent went on to hear the case against him and concluded that Mr Suggitt would have been dismissed and then reported him to the police. That is compelling evidence of how seriously they took the matter.

62. The Respondent also administered a final written warning to Mr Summers. I know that Mr Jones considers this to be lenient – he said so. But a final written warning to last 18 months is a serious sanction. Yes, Mr Weastell could have dismissed Mr Summers but

he did not. Whether he could have demoted him I do not know (as that would depend on the terms of Mr Summers' contract) but working on the assumption that he could have done, nevertheless that was a matter for him to weigh in the balance. It was not put to Mr Weastell that he let Mr Summers 'get away with it' (as Mr Jones sees it) for any improper reason. In my judgement, Mr Weastell arrived at a decision based on the information available to him and that included the representations made to him by Mr Summers or on his behalf at the disciplinary hearing. I have seen no evidence to undermine the approach he took, which appeared to me on the whole to be a considered one.

63. I explored in the hearing the issue of 'lack of visibility' of sanctions and the relevance of this to the Claimant's claim. After all, Mr Jones had been told that, because of confidentiality and data protection, he could not be told of the outcome. He then sees Mr Summers go back to his Watch as Watch Manager. He perceives that he has 'gotten away with' inappropriate behaviour and that the Brigade did not take the matters seriously, feeling that no one will trust the Brigade again on such matters. I can see that point of view and Mr Weastell also agreed that he could see it.

64. I considered whether this was what the Claimant meant by '*the absence of any identifiable or apparent steps taken to address the complaints'* and whether, by not telling him the outcome of the particular sanction, that this amounted to repudiatory conduct – either of itself or taken alongside the decision that his grievance could not be taken forward.

65. However, I am satisfied and conclude that it is not repudiatory conduct. The question is whether the Respondent acted without reasonable or proper cause in such a way as was calculated or likely to destroy or seriously damage trust and confidence. That is an objective test. Mr Weastell and Ms Richardson explained the process that resulted in the decision that was arrived at. They investigated the matter thoroughly. They held a level 3 hearing, the import of which the Claimant understood. They considered the evidence and the mitigation advanced by Mr Summers carefully. They arrived at a decision based on the information before them. They then explained to the Claimant why they could not reveal the outcome but sought to reassure him that they had followed a through process and arrived at a carefully deliberated outcome which resulted in sanctions being applied.

66. It is debatable whether or not the Respondent could have managed the situation differently, or whether there was any better way to manage what was a difficult situation. Mr Weastell did not, at the time, consider whether to seek Mr Summers' consent to explain the sanction that had been administered. When I asked him about this he expressed a concern that taking such an approach might result in future cases requiring disciplinary outcomes to be revealed. Be that as it may (and there may well be a risk of that), I am satisfied and conclude from my findings in this case that the Respondent had

reasonable and proper cause for not revealing the outcome (and thereby not making it 'visible') and that they acted reasonably in how they conveyed matters to Mr Jones and in what they conveyed. The question is not what they could have done differently but the objective effect of what they did (or failed to do).

67. In any event, I also agree with Mr Williams and conclude that it was not the failure to tell Mr Jones of the actual sanction that destroyed Mr Jones' confidence and led him to resign. It was that Mr Summers was not demoted or dismissed. Mr Jones only became aware of the sanction administered to Mr Summers on the first day of this hearing. He still regards it as inadequate and unreasonable and – even though he had never expressly asked for Mr Summers to be dismissed or demoted – he considers that dismissal or demotion were the only reasonable sanctions that could and should have been administered. When he learned in these proceedings of the eighteen months' final written warning, Mr Jones considered this to be lenient. Therefore, even if Mr Weastell had told Mr Jones of the actual sanctions, this would not have changed Mr Jones's view on the adequacy of the sanction. I make it clear that Mr Jones did not call for or demand for the dismissal or demotion of Mr Summers. However, he expected it. And by not demoting him (at the very least) and seeing Mr Summers return to manage a Watch, it was this that caused Mr Jones to submit a grievance and it was the failure to reopen the investigation and decision making that caused him to decide to terminate his employment.

68. From all of this, I conclude that the Respondent did not – in the way advanced in these proceedings – repudiate the Claimant's contract of employment by breaching the socalled 'Malik' term of trust and confidence or by failing to ensure reasonable redress for grievances. Therefore, the claimant was not constructively dismissed and the claim of unfair dismissal must be dismissed.

69. Although that is my decision I must make it clear that I accept entirely that Mr Jones in fact lost trust in the Respondent. I have no doubt that it was the failure to demote Mr Summers or to dismiss him that led to this loss of trust. Equally, I have no doubt that he did not take the decision to leave his employment lightly. It was a difficult decision for him. It is clear to me that the acts which Mr Suggitt and Mr Summers were found to have committed had a great effect on him. But I must apply legal principles to the claim advanced before the tribunal. Mr Jones's subjective and genuine loss of trust, as I have explained, is not the correct legal test. The outcome may have been different had the Claimant advanced a different case to that which he advanced in these proceedings.

Employment Judge **Sweeney**

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Date: 13 November 2024

APPENDIX

List of issues

UNFAIR CONSTRUCTIVE DISMISSAL (Section 98 Employment Rights Act 1988)

1. Was the Claimant dismissed?

2. Did the Respondent do the following things:

    a. Conclude that the Claimant's grievance would 'not be taken forward'?
    b. Fail to take any identifiable or apparent steps to address the complaints he raised with it?
    c. Verbally confirm, at a welfare meeting on 04 August 2023, that it would not be taking forward his grievance?

3. In doing or failing to do any or all of the above did the Respondent without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee?

    and/or

    In doing or failing to do any or all of the above did the Respondent fail to reasonably and promptly afford a reasonable opportunity to the Claimant to obtain redress of a grievance he had?

4. Did the Claimant resign in response to the breach?
5. Did the Claimant affirm the contract before resigning?
6. If the Claimant was dismissed what was the reason or principal reason for

dismissal? [what was the reason for the fundamental breach of contract?]

7. Was the reason a potentially fair reason for dismissal?

8. Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?