EMPLOYMENT TRIBUNALS

Claimant: Mr D Kuroor John

Respondent: Caretech Community Services Ltd

REASONS

1. These written reasons are provided at the Claimant's request.

Introduction

2. The Claimant brought a constructive unfair dismissal claim. For a repudiatory breach of the implied term of trust and confidence, he relied upon the following matters:

    2.1 On 8 January 2020 Grace Moshi unfairly allocated duties to the claimant as a result of which he was in conflict with colleagues who he says were aggressive and bullied him.

    2.2 The investigation into the events of 8 January 2020 was unsatisfactory, in particular because it was severely delayed.

    2.3 The claimant was falsely accused by his colleagues about the events of 8 January 2020 but the respondent failed to put enough weight on the claimant’s version of events which resulted in the outcome of 4 March 2022 being unfavourable to the claimant.

    2.4 In September 2021 the regional manager, Liz Mallton, asked the claimant to return to work in another branch working with female residents before the investigation had been concluded.

    2.5 On 8 November 2023 refuse to listen to an audio recording made by the claimant as part of his evidence presented for use at his grievance hearing.

3. I began the hearing by explaining the process we would follow, how evidence would be received, including cross-examination and closing submissions after all of the witnesses had been heard. I repeated this at various stages and invited the Claimant to tell me his understanding, which he did in appropriate terms.

4. There was also a lengthy discussion on the morning of day 1 about covert audio recordings the Claimant had made. Transcripts of these were in the bundle of documents and their accuracy was not challenged. The Respondent's failure to listen to the recordings was one of the matters the Claimant relied upon for a repudiatory breach. I attempted to ascertain what he wanted me to hear but the Claimant's position was somewhat ambiguous and appeared to change. Initially, he seemed content to rely upon the transcripts alone. Then after further discussion, the Claimant said there were about five minutes of relevant material. Given the Respondent took no point on admissibility, I decided to listen to this. Ms Beech had expressed a concern about the time it would take for the exercise and she was proven correct. The Claimant first had to download the audio onto his tablet (he had not done this beforehand) and this was a slow process. He then had to find the relevant part, which was not straight forward. Then when the audio was actually played, it turned out the maximum volume on his tablet was not loud enough for me to hear. Ultimately, having found the relevant part, Ms Beech played it from her laptop. Following this, and contrary to what he had previously said, the Claimant then asked me to listen to all his audio, circa 19 minutes from 8 January 2020 and then various recordings of conversations made on other dates. I explored with the Claimant the purpose of this exercise and in particular, what the audio would demonstrate that the transcript could not. The Claimant had some difficulty focusing on this enquiry. Eventually, however, it became clear there were two matters he was trying to show, firstly that he had not on 8 January 2020 thrown a telephone at his manager and secondly that he was not shouting that day, rather others had been shouting at him. This could only relate to the recording made on 8 January 2020. Furthermore, he had already played the part he said included others shouting. His criticisms of things said at later dates by his managers could be pursued by reference to the transcripts. In the circumstances, I declined to listen to any more of the audio.

5. I set a timetable for the hearing. This involved allowing the parties a little less time for cross-examination than they had sought. The Respondent would have two hours and 15 minutes to cross examine the Claimant and he would have one hour to cross examine each of the Respondent's three witnesses (i.e. three hours in total). I also allocated time for my questions, re-examination and closing submissions of 30 minutes each. In this way, I would be able to deliberate on the morning of day three, give a decision to the parties and deal with remedy, if appropriate. This fairly focused constructive dismissal claim had been listed for 3 days and I was satisfied that was proportionate.

6. Whilst I had explained to the Claimant the opportunity he would have to ask questions, when the Respondent's witnesses gave evidence it did not appear he had done any preparation. The Claimant appeared to be trying to think up questions as he went along. He did not know where documents were in the hearing bundle (in some instances when he explained what he was looking for, the relevant page was found for him). The Claimant's approach was, therefore, somewhat disorganised. As is often the case with unrepresented parties, the Claimant tended to make statements rather than ask questions. Sometimes I was able to turn these into questions by summarising what he had said and asking the witness to comment. At other times, the Claimant appeared to flit from subject to subject by way of partial sentences and it was not easy to follow his train of thought or identify something the witness could be asked to speak to.

This necessitated frequent intervention on my part for clarification and to ensure the Claimant was focusing upon the issues.

7. Whilst I heard the Respondent's closing submission at the end of day 2 and was intending to hear from the Claimant as well, this did not go ahead as planned. Having explained to the Claimant, at some length on day 1, what his opportunity to make a closing submission would comprise and then asking him to explain this back to me, to be sure of his understanding, it appeared he had made no notes of what he wanted to say. When due to speak, the Claimant told me he was suffering with anxiety and was finding it difficult to continue. Because he was upset, I decided to take a short break. Whilst the Claimant did not ask for the hearing to be adjourned, I considered whether this might be appropriate and came to the conclusion it was. Whilst I was reluctant to put the matter back, as this risked my deliberations being postponed, the Claimant was not in an appropriate state of mind to carry on.

8. On the morning of day 3, the Claimant made his closing submission, using an amended and annotated version of his witness statement as a prompt. Close to the end of this, he became very upset. We had a discussion about whether there should be an adjournment or he would do better just to carry on, given he was so near the end. When I suggested I could read his note aloud (he had been doing this just before becoming distressed) he agreed. I did so.

Facts

9. The Respondent provides residential care to service users with mental health problems, including autism and learning difficulties.

10. The Claimant was employed by the Respondent from 3 January 2017 at its Newton Road premises. He was a Support Worker.

11. As at January 2020, the Claimant’s Team Leader was Grace Moshi. She in turn reported to a Deputy Manager, Betty Mukunde.

12. On the morning of 8 January 2020, the Claimant was late for work. Mrs Moshi had already completed the allocation of work and this was recorded (handwritten) in the relevant book. On his arrival, the Claimant discovered he had been assigned to work with a service user, MR. The Claimant was unhappy about this. MR was known to have challenging behaviours, including the risk that he might try to hit members of staff. The Respondent’s staff at this residential home were trained to deal with such situations. The Claimant’s dissatisfaction stemmed from the fact of having worked with the same service user on 5 and 6 January 2020. The Claimant thought it unfair to find himself with MR again so soon.

13. Mrs Moshi had not been responsible for staff allocation on either 5 or 6 January 2020 and was unaware of the Claimant working with MR on those days. Because the Claimant was late for work, he had not raised this with her when she was allocating the staff.

14. The Claimant immediately approached Mrs Moshi to complain about this situation. He said he did not want to work with MR, he wanted instead to work

with another service user, who he could take swimming. Mrs Moshi said the work would be done as allocated.

15. Evidently, the Claimant took this matter up with Ms Mukunde, as a short time later she called a meeting . The staff sat around a table in the living room / dining area. Ms Mukunde explained that in light of MR's challenging behaviours, the person allocated to work with him would rotate every four hours. At this point, the Claimant started to complain that Mrs Moshi was always allocating MR to him. As he did this, the Claimant became increasingly loud, to the point he was shouting. This included telling Ms Mukunde to call Lisa, the Service Manager. Whilst doing this, the Claimant was banging a telephone on the table.

16. Thereafter, Mrs Moshi tore the allocation sheet from the book, Ms Mukunde completed a new one and after the work had all been done, Mrs Moshi signed to confirm the position.

17. A short time later, the Claimant began following Mrs Moshi and trying to initiate further conversation about his allocation to MR. The Claimant was then making a covert audio recording on his mobile phone. The Claimant feared a complaint would be made to higher management about his behaviour earlier that day. The obvious explanation for this recording is that he hoped to capture something he might be able to use against Mrs Moshi, so as to counter any complaint she made.

18. From the audio played during the hearing, I am satisfied that Mrs Moshi and others to whom the Claimant was speaking did raise their voices during these exchanges. Importantly, however, the recordings were all made after his initial discussion with Mrs Moshi about work allocation and indeed, the meeting with Ms Mukunde during which he banged a telephone on the table. The recordings do not, therefore, shed any light on those matters. Given the Claimant was returning repeatedly to the same matter, a degree of frustration on the part of his team leader or other colleagues is understandable. Furthermore, given the Claimant was making the recording, he would have an obvious incentive to try to moderate his own tone. Notably, the audio and transcripts include other members of staff saying the Claimant had been shouting earlier in the day and since they were wholly unaware of the Claimant's covert activity, they could not be said to be doing so for the record. I find they said he had been shouting previously because he had.

19. The Claimant's evidence included that he had raised the issue of working with MR in only modest terms. He had not been annoyed or frustrated. He did not raise his voice and did nothing with a telephone during the meeting with Ms Mukunde. Despite this, he says that Mrs Moshi immediately threatened to report him and accused him, falsely, of shouting The Claimant says this was done in the presence of five colleagues and it was apparent they all intended to gang-up on him and make false statements. I have little hesitation in rejecting that evidence. The Claimant could provide no remotely credible explanation for why these various individuals should all gang-up on him in this way and fabricate evidence, let alone tell him what they were planning to do. Much of the Claimant's evidence was vague, meandering and difficult to follow. This was especially so when I asked him to explain the events immediately before he began to make his covert recordings and what had prompted him to act in this

way. Whilst I took into account the possibility the Claimant's responses were being effected by his poor mental health or medication, his account was not persuasive. Mrs Moshi had no reason to behave as he alleges. She was doing her job, allocating work. The Claimant became agitated and angry about this, which was reflected in his behaviour. Whatever the Claimant now believes or recalls, I am satisfied that at the time, he expected complaints because of the way he had overreacted and wanted to gather material to use in his defence.

20. Mrs Moshi was sufficiently concerned by the Claimant's behaviour to send a handwritten letter to Ms Smith about it, which included:

> **"I came on shift on Wednesday as a shift leader allocating duties to staff in the morning and John Dalu was not happy at all. John came on shift after 8.30 am and find out that the allocation book was done and he is supporting MR and pointing at the book saying that he wanted to work with SH and take him swimming and I said to him that whoever is supporting SH can take him swimming no issues about it.**
>
> **Later on Betty come from office […] and said that she wants to have a meeting with all the staff at that time and all the staff came back downstairs in the […] room and listen to what is going to say. When Betty was talking John was laughing continuously and not paying attention. When she was saying that staff will have to swap around four hours because of MR behaviour is very high for only one staff to support him John said that I always allocate him with MR and that is not true because we don't work the same shift always and it is not fair me to do that because we have enough staff on shift. Then John was continue shouting and talking loud, raise his voice to me and telling Betty that she should be phoning Lisa […] and bang the phone on the table. Then I decided to tell Betty that she can allocate the shift again because John is not happy and I remove the shift I was allocated before then Betty allocate the shift again and all the staff went do their duties as normal and Betty said that she will have to talk to Lisa […] and inform the incident of today's shift.**
>
> **Please I would like the management to have a word with John because this behaviour is not good and is upsetting even service users […]**

21. I pause to note, Mrs Moshi expressed herself in modest terms, seeking only that higher management "have a word" with the Claimant. This is good evidence of what transpired, being written shortly after the events in question. I accept it as accurate. Whilst the Claimant has his audio, this sheds little light on what happened earlier in the day, save that I note it captures several of the Claimant's colleagues saying it was he who had been shouting. If others, subsequently, became frustrated and raised their voices, the Claimant provoked this by pursuing them during the remainder of the day.

22. Mrs Moshi's account is also supported by letters written by several of the Claimant's colleagues shortly thereafter. Whilst there is some variation, including as to whether the Claimant banged the phone, threw it, or dragged it across the table, discrepancies of this sort are not uncommon between eye witnesses. Clearly, the Claimant did something improper and aggressive with the phone, hence it sticking in the mind of those present. The fact they recalled this in slightly different ways points to the absence of collusion.

23. On 15 January 2020, the Respondent agreed to the Claimant's flexible working request. This was so that he might provide childcare when his wife was working.

24. On HR advice, the Respondent commenced an investigation into the incident on 8 January 2020. There was some discussion about whether he should be suspended, including because of previous similar behaviours. A view was reached, however, that this was not appropriate as it had not been done immediately.

25. An investigatory meeting took place with the Claimant on 20 January 2020. The Claimant denied shouting. He said he had to lock himself in the kitchen because everyone was shouting at him. He also denied throwing or even picking up a phone. At several points during the interview the Claimant was laughing. He said he knew they (i.e. the other staff) had written statements about him. The Claimant did not provide his audio recordings then or say that he had made any.

26. Ms Smith produced an investigation report and this concluded:

> **4.0 Conclusions**
>
> **1 . It is alleged that DJ was verbally aggressive towards the Deputy Manager and the Senior on 08.01.2020**
>
> **On review there is sufficient evidence to support this allegation. 5 staff members have indicated that DJ was verbally aggressive (shouting or raising his voice).**
>
> **2. It is alleged that DJ was physically aggressive towards Betty by "throwing" the phone across the table at her**
>
> **On review there is insufficient evidence to support that JD threw the phone towards Betty. There is sufficient evidence however to support that the phone was moved / projected towards Bettys direction in an act that was aggressive.**
>
> **5.0 Recommendations**
>
> **I recommend that his matter is put forward for a disciplinary meeting.**

27. By a letter of 26 February 2020, the Claimant was required to attend a disciplinary meeting. Allegations were set out in the following way:

> **1. You was verbally aggressive towards the Deputy Manager and the Senior on 08.01.2020**
>
> **2. The phone was moved / projected towards the Deputy Managers direction in an act that was aggressive.**

The letter warned the Claimant this might amount to gross misconduct and he was at risk of dismissal. He was also advised of his right to be accompanied.

28. On 20 February 2020, the Claimant asked for the disciplinary meeting to be rescheduled, saying it was short notice and her needed to arrange his union. The Respondent offered to put the meeting back.

29. On 2 March 2020, the Claimant reported that he would not be attending for work as he was unwell.

30. On 3 March 2020, Ben Martin, Locality Manager, wrote to the Claimant suggesting the disciplinary proceedings be paused until he was fit and well enough to return to work, at which time this would be recommenced.

31. The Claimant presented a fit note dated 12 March 2020, signing him as unfit for one month because of work-related stress.

32. A letter of 23 April 2020, invited the Claimant to a welfare meeting by telephone with Ms Smith. A similar invitation was extended to the Claimant on 1 May 2020.

33. A review meeting took place on 6 May 2020. The Claimant said he felt stressed because of the disciplinary letter and could not come back to work. He was going to ask his GP for counselling. He was finding it difficult to get an appointment because of Covid. It is relevant to note, the Claimant's sickness absence coincided with the pandemic and lockdown.

34. On 10 May 2020, the Claimant said his GP had suggested counselling and he provided a further fit note.

35. An occupational health referral was made on 28 May 2020. A report of 9 June 2020, advised the Claimant was not fit for work, he was suffering with stress because of the disciplinary letter. The report suggested that treatment should lead to the Claimant's return "in the next few weeks".

36. Unfortunately, the Claimant's absence continued. A further occupational health referral was made on 26 August 2020. The report indicated he remained unfit for the same reason and no advice could be given about when he might return.

37. There is little evidence to show what happened at the end of 2020 and beginning of 2021. This appears to have coincided not merely with the pandemic but also a change in personnel within the Respondent.

38. On 12 March 2021, the Claimant wrote to Mr Martin saying he was now well and wanted to return:

> **Hope you are doing very well.**
>
> **My mental health condition has now improved and I would like to rejoin as soon as possible.**
>
> **I was told by Lisa to contact the new manager Ms Liz in Newton road and I tried to communicate couple of time but unfortunately I was unable.**
>
> **So I thought to inform you.**
>
> **I would much appreciate if you could contact Liz and let me know.**

39. This prompted an internal discussion, within the Respondent. It appeared difficult for the Claimant to return to Newton Road in the circumstances. As such, the Respondent looked at both finding a work location for the Claimant to return to and recommencing the disciplinary proceedings. There was further

communication with the Claimant, including the need for an up to date occupational health referral.

40. An occupational health report of 2 June 2021, provided that the Claimant was now “considerably better” and there were no medical reasons preventing a return to work. The adviser recommended a phased return to work, re-familiarisation given the period of absence, and dealing with the outstanding disciplinary matter as soon as possible.

41. Progress thereafter was, however, slow.

42. On 17 August 2021, Liz Milton, Locality Manager spoke with the Claimant on the phone to discuss his return to work. Her email thereafter is an accurate reflection of what was said:

> **Just so you are aware I have called and left a voice mail for him to call me back. Dalu called back I explained that he would be returning on a phased return to Newstreet North. I suggested doing two early shifts (8-2) each week for two weeks and then we can review it.**
>
> **I also explained that he would be at Newstreet until the investigation was finalised and the outcome concluded.**
>
> **He said his wife is working and he is doing the child care so he would need to speak to her before letting me know what he could do.**
>
> **When he calls me back I will let you know the arrangements are.**

43. The Newstreet North premises were close by to those at Newton Road. They were no less accessible to the Claimant. Furthermore, his contract of employment included a mobility clause and such a small change to his place of work would fall well within the Respondent’s discretion to vary this. In his evidence at the Tribunal, the Claimant said he did not wish to return to Newstreet because female service users resided there and in an unspecified way, this made him vulnerable. This is not, however, a concern he raised with Ms Milton at the time or indeed at any point prior to the hearing before me. The practical obstacle cited by him at the time was childcare and the need for the Claimant to be available when his wife was not. This is the same reason for which he had sought flexible working.

44. Because of the passage of time, the Respondent decided to investigate the disciplinary matter afresh. To that end, Ms Duncan was instructed to carry this out.

45. An investigatory meeting took place by Microsoft Teams on 24 November 2021. The Claimant was accompanied by his trade union representative. He said that Mrs Moshi was cross with him and started raising her voice. He said that after ripping out the allocation sheet she had thrown the book it on the table, she was shouting and swearing, everyone was supporting her and shouting at him, he locked himself in the kitchen and asked Betty why they were all attacking him. He also said there was no phone. Save for the old allocation sheet being torn out, I do not accept the Claimant's account otherwise reflects what transpired.

46. The meeting was transcribed and I am satisfied this is reasonably accurate. The Claimant was not, however, happy with this as his evidence in the disciplinary proceedings. He chose to prepare his own written account. The Claimant told the Respondent that he had assistance with grammar. I note the language in the statement is not consistent with that the Claimant used elsewhere. The substantive account was, however, much the same as his recent interview. The Claimant submitted his statement on 19 December 2021.

47. Once again there was delay. This appears to have been the result of the Christmas and New Year break, followed by further consequences of the pandemic.

48. On 23 February 2022, the Claimant chased for progress on the disciplinary.

49. Ms Duncan provided her investigation outcome on 3 March 2022. This included:

> **Whist witness statements outline you pushed the phone across the table and a number of people involved were shouting, you deny having a mobile phone in your hand and reported that you were calm.**
>
> **The statements I have received from staff members are consistent and I could not identify any defending reason which would lead me to believe their statements were not true.**
>
> **Therefore on balance, the outcome of the investigation is that It is considered the allegations are supported by evidence. However, having regard to all the circumstances of this matter, it has been decided that on this occasion it will be concluded by means of informal action specifically a meeting of concern.**
>
> **Due to the duration of absence in order to support you I recommend your e-learning is completed in full and a small number of supernumeracy hours are provided on your return.**

50. Whilst Ms Duncan made a finding that the allegations were upheld, the only sanction she proposed was an informal “meeting of concern”. The Claimant referred to e-learning in his evidence at the Tribunal, but it is apparent this was related to his long period of absence rather than being a disciplinary outcome.

51. The Claimant was dissatisfied with this decision and decided to raise a grievance. A final version of this appears to have been agreed between the Claimant and his trade union by 6 April 2022. There is a somewhat ambiguous email of that date passing between them:

> **The grievance is good to go it stands. Sent it to HR directly and I will set up a grievance hearing.**

52. On balance, it appears likely the Claimant’s trade union representative meant to say “send” it to HR (i.e. that he should do this). The Claimant, however, appears to have believed his trade union were doing this for him.

53. The grievance was eventually sent to Beth Wheeldon of the Respondent on 4 May 2022. The Claimant’s trade union representative acknowledging that it had not been sent previously. Ms Wheeldon responded to say she hadn’t received it

before but would now set up a meeting to discuss it. Unfortunately, she did not do this and left the Respondent's employ, without it would seem a handover in this regard.

54. On 19 August 2022, the Claimant's new trade union representative forwarded an email chain to Miss Woodall. Whilst within the body of this email the trade union referred to chasing up the Claimant's grievance, the email chain itself related not to his May 2022 grievance but rather his December 2021 statement for the disciplinary proceedings.

55. Miss Woodall wrote back saying the matter (i.e. the disciplinary) had already been looked into concluded. This did, however, cause her to look at the Claimant's circumstances. He had been absent from work for a very long period of time without any fit note to certify his sickness. Miss Woodall wrote to the Claimant on 23 September 2022, saying he had been absent without authorisation since 2021 and he was asked to contact his manager, named as Gino Galos by 3 October 2022 to discuss when he would be able to return to work and what the Respondent could do to assist this.

56. On 20 October 2022, the Claimant resubmitted his grievance, sending this directly to Miss Woodall. She acknowledged receipt and said she would be in touch to arrange a meeting.

57. A letter of 28 October, invited the Claimant to a grievance meeting on 3 November 2022 by Microsoft Teams. This was subsequently rearranged to 8 November.

58. Although there appears to have been some communication attempts between the Claimant and his new line manager, they did not actually speak. It is unclear why this was so.

59. By an email of 4 November 2022, the Claimant sent digital files containing the covert audio recordings he had made on 8 January 2020 and a transcript. This was the first time he had disclosed the fact of any recordings. The Claimant's transcript was not limited to capturing the words spoken, it included his interpretation or characterisation of what was said.

60. The grievance meeting went ahead on 8 November 2022. Mr Galos was the decision-maker although he acted upon advice from Miss Woodall of HR and in substance, joint decisions were made.

61. The Claimant was accompanied by his trade union representative. This meeting was recorded and transcribed by the Respondent using an automated process, which does not always correctly identify the words spoken. There was a general exploration of the Claimant's grievance. There was also a specific discussion about his audio recordings. Miss Woodall asked whether the Claimant had sought the permission of his colleagues to record their conversations. He said he had not. Miss Woodall said that because the recordings were covert (not "curve it" as per the transcript) and he had not sought permission they would not accept that as evidence. They would, however, take into account his transcripts of the various conversations. The Claimant was unhappy with this. He pointed to discrepancies between the accounts of his colleagues. He believed his audio

recordings were better evidence of what had gone on. There was also a discussion about the Claimant's willingness to return to work. He said he wanted his grievance sorted out first. Miss Woodall asked the Claimant about returning to Newstreet so as to avoid the staff members with whom he had difficulties. The Claimant reiterated he wanted the grievance dealt with first.

62. The Claimant submitted further information in support of his grievance by emails on 14 & 15 November 2022.

63. The Claimant had not provided any GP fit note and was reminded of the need to do this. Mr Galos wrote to him on 30 November 2022:

> **I hope you're well.**
>
> **You currently contracted to 35 hours per week, therefore in line with your contract you needs to fulfil these hours unless you are not fit for work, we would like to have a copy your medical certificate. Failure to attend shifts will be deemed as an absence from work without authorisation and could therefore result in disciplinary action being taken.**
>
> **We are willing to accommodate you to work in New Street if you feel uncomfortable working at Newton or in other service while the grievance is being investigated.**

64. The Claimant resigned by way of his 6 December 2022 email:

> **Following the recent Grievance hearing, during which I was not allowed to introduce audio evidence that would have proved my case,**
>
> **I feel am now unable to return to work at Caretech.**
>
> **Please therefore accept this as my resignation from my position of support worker.**

65. The Respondent wrote to the Claimant on 7 December 2022, inviting him to reconsider his resignation whilst the internal grievance procedure was being conducted:

> **I am writing following receipt of your written resignation, where you have indicated that you will not be returning to work. I understand that you have a number of concerns that have led to your resignation, and so accordingly, I trust you have thought long and hard about your decision to resign, and that you are not acting in haste.**
>
> **You attended a formal grievance meeting on 8th December with Gino Galos. Whilst the company is investigating your concerns through our internal grievance procedure, I would ask if you would be prepared to reconsider your decision to resign and see if we can resolve the concerns that you have raised before you make a final decision on your employment with us.**
>
> **I hope that you will reconsider your decision and decide to stay on whilst we undertake our internal grievance process, if you are happy to put your resignation on hold whilst we follow the Company's grievance procedure, will you please contact me on […] or […] by 14th December 2022,**

> **If you are adamant that you wish to proceed with your resignation and leave your position in the Company then please could you confirm this in writing to us, whereupon receipt of this we will process your resignation and forward any monies that are owed to you.**

66. The Claimant did not reply and he was processed as a leaver.

Law

67. So far as material, section 95 of the **Employment Rights Act 1996** ("ERA") provides:

> **95 Circumstances in which an employee is dismissed**
>
> **(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if...**
>
> **(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.**

68. Where, as here, the respondent denies dismissal, the claimant has the burden of proving dismissal within section 95(1)(c).

69. In accordance with **Western Excavating v Sharpe [1978] IRLR 27 CA**, it is not enough for the claimant to leave merely because the employer has acted unreasonably, rather a breach of contract must be established.

70. In order to prove constructive dismissal four elements must be established:

70.1 there must be an actual or anticipatory breach by the respondent;

70.2 the breach must be fundamental, which is to say serious and going to the root of the contract;

70.3 the claimant must resign in response to the breach and not for another reasons;

70.4 the claimant must not affirm the contract of employment by delay or otherwise.

71. Implied into all contracts of employment is the term identified in **Malik v BCCI [1997] IRLR 462 HL**:

> **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.**

72. In **Baldwin v Brighton and Hove City Council [2007] IRLR 232** the EAT held that a breach of trust and confidence may be caused by conduct calculated or likely to have the proscribed effect.

73. When determining whether, objectively, the employer's conduct was likely to seriously damage trust and confidence, the employee's behaviour may also be

relevant, see **Tullett Prebon PLC v BGC Brokers LP [2010] IRLR 648** per Jack J:

> **84. An alternative approach as to how the employee's own misconduct should be taken into account was suggested, and perhaps preferred, by Mr Bernard Livesey QC, the judge in RDF, namely that the employee's conduct may have so damaged the mutual relationship of trust and confidence that the employer's conduct is of little effect. I refer to paragraphs 120 and 141 of the judgment. But I think that this breaks down on analysis. I accept that the relationship is a mutual one, but that means only that the employer is entitled to have trust and confidence in his employee, and the employee is entitled to have trust and confidence is his employer. If the one is damaged it does not follow that the other is damaged. Nor does damage to the one party's trust and confidence in the other entitle him to damage the other's trust and confidence in him.**
>
> **85. In my judgment the conduct of the employee may be relevant in this way. Whether the employer's conduct has sufficiently damaged the trust and confidence which the employee has in him objectively judged, is to be judged in all the circumstances. The circumstances will include the employee's own conduct to the extent that it is relevant to that question. There may in practice be little difference with the approach suggested by Mr Livesey.**

74. Either as an incident of of trust and confidence, or as a separate implied term, employers are under a duty to afford their employees a means of prompt redress with respect to their grievances; see **W A Goold (Pearmark) Limited v McConnell [1995] IRLR 516 EAT**, per Morrison J:

> **11. […] It is clear therefore, that Parliament considered that good industrial relations requires employers to provide their employees with a method of dealing with grievances in a proper and timeous fashion. This is also consistent, of course, with the codes of practice. That being so, the industrial tribunal was entitled, in our judgment, to conclude that there was an implied term in the contract of employment that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have. It was in our judgment rightly conceded at the industrial tribunal that such could be a breach of contract.**

75. At least insofar as the question of breach of the implied term of trust and confidence is concerned, the band of reasonable responses test does not apply; see **Buckland v Bournemouth University [2010] IRLR 445 CA**.

76. Furthermore, the decision in Buckland confirms that a repudiatory breach cannot be remedied; per Sedley LJ:

> **40. This account of the alternative courses which may be taken in response to a repudiatory breach leave no space for repentance by a party which has not simply threatened a fundamental breach or forewarned the other party of it but has crossed the Rubicon by committing it. From that point all the cards are in the hand of the wronged party: the defaulting party cannot choose to retreat. What it can do is invite affirmation by making amends.**

77. In a last straw case, the final act relied upon need not in isolation constitute a breach of contract, nor even amount to unreasonable or blameworthy conduct, although an entirely innocuous act will not suffice; see **Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA**.

78. Whilst mere delay will not amount to affirmation, where the employee continues to perform their contract a point may be reached when that becomes persuasive evidence they have indeed affirmed the contract; see **W E Cox Toner (International) Limited v Crook [1981] ICR 823 EAT**.

79. Where the breach of contract relied upon is comprised of conduct over a period of time, if there was affirmation in the middle this the question may arise whether the claimant has lost the right to rely upon the earlier behaviour. This point was addressed recently by the Court of Appeal **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**, per Underhill LJ:

> **51. […] As I have shown above, both Glidewell LJ in Lewis and Dyson LJ in Omilaju state explicitly that an employee who is the victim of a continuing cumulative breach is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation; provided the later act forms part of the series (as explained in Omilaju) it does not "land in an empty scale". I do not believe that this involves any tension with the principle that the affirmation of a contract following a breach is irrevocable. Cases of cumulative breach of the Malik term (which was not the kind of term in issue in either Safehaven or Stocznia Gdanska) fall within the well- recognised qualification to that principle that the victim of a repudiatory breach who has affirmed the contract can nevertheless terminate if the breach continues thereafter. It is true that, as Safehaven says, the correct analysis in such a case is not that the victim can go back on the affirmation and rely on the earlier repudiation as such: rather, the right to terminate depends on the employer's post-affirmation conduct. Judge Hand may therefore have been right to jib at Lewis J's reference to "reactivating" the earlier breach (though, to be fair to him, he did say "effectively re-activates"); but there is nothing wrong in speaking of the right to terminate being revived, by the further act, in the straightforward sense that the employee had the right, then lost it but now has it again.**

80. Where the claimant resigns in part because of a repudiatory breach of contract, that will suffice, the breach need not be the only or the main cause for that decision; see **Nottinghamshire County Council v Meikle [2004] IRLR 703**.

81. If a constructive dismissal is established the employment tribunal must still consider whether the respondent has shown a potentially fair reason for dismissal within ERA section 98(1) and whether or not dismissal was reasonable in all the circumstances under section 98(4).

Conclusion

82. I will consider in turn, each of the matters is the Claimant relies upon is causing or contributing to a repudiatory breach of contract.

<u>On 8 January 2020 Grace Moshi unfairly allocated duties to the claimant as a result of which he was in conflict with colleagues who he says were aggressive and bullied him.</u>

83. Mrs Moshi did not unfairly allocate duties to the Claimant. Whilst it is easy to see, how from the Claimant's perspective, being allocated to work with a difficult service user on three days within a relatively short period was unsatisfactory, it could not be said this was anything other than a reasonable management instruction. Mrs Moshi was unaware of the Claimant's work allocation of the two previous days, as she had not been on duty. It was not incumbent upon her to carry out a review in that regard and ensure a statistically equal distribution, or something of that sort. Plainly, if an employee made a request, that might be something proper for her to consider. The Claimant could not, however, simply demand alternative duties. Mrs Moshi was acting with reasonable and proper cause. Her actions could not, objectively, seriously damage or destroy trust and confidence in the employment relationship.

84. Furthermore and for the reasons set out in the fact find above, I do not accept that the Claimant's colleagues were aggressive or bullied him.

The investigation into the events of 8 January 2020 was unsatisfactory, in particular because it was severely delayed.

85. The investigation into the events of 8 January 2020 was delayed. The primary reason for this was the Claimant's poor health. Following an initial investigation that concluded promptly, quite properly, the Respondent decided not to proceed with this matter whilst the Claimant was ill and unwell to attend for work. The Claimant did not say they should have acted otherwise. Progress was relatively slow in the second half of 2021. This was in part due to the Respondent's decision to reinvestigate the matter, which I am satisfied was appropriate. An outcome was eventually provided to the Claimant on 3 March 2022. Taking into account the complex circumstances, including the Claimant's ill-health, the covid pandemic and lockdown, I find the Respondent did act with reasonable and proper cause in the time it took to complete the disciplinary. For like reasons, I am not satisfied, objectively, the delay could have seriously damaged or destroyed trust and confidence.

86. Whilst the disciplinary outcome may have been unsatisfactory to the Claimant subjectively, it could not be said to be unreasonable objectively. Ms Duncan had broadly consistent witness accounts to the effect the Claimant had become angry and was shouting, before then doing something aggressive with a mobile phone on the table during the meeting called by Ms Mukunde. The findings she made were open to a reasonable decision-maker. As such, she had reasonable and proper cause to act as she did. This conduct could not objectively seriously damage or destroy trust and confidence.

The claimant was falsely accused by his colleagues about the events of 8 January 2020 but the respondent failed to put enough weight on the claimant's version of events which resulted in the outcome of 4 March 2022 being unfavourable to the claimant.

87. The Claimant was not falsely accused. The various members of staff provided statements reflecting their recollection of his behaviour. Ms Duncan was entitled to prefer their evidence to his. Such a decision was well within the ambit of a reasonable decision-maker.

In September 2021 the regional manager, Liz Mallton, asked the claimant to return to work in another branch working with female residents before the investigation had been concluded.

88. It was entirely proper for the Claimant to be invited to return to work, when he appeared well-enough to do so. The Claimant had no right to remain absent from work because there was an outstanding disciplinary matter. Inviting him back to a different branch, where he would avoid contact with staff he accused of colluding against him was eminently sensible. The Claimant did not raise an objection to working with female residents at the time and there is no reason why this should have been apparent to the Respondent. The reason given at the time was not an objection to the site per se, it was childcare. I find this was the reason, it is consistent with his earlier flexible working request. Ms Malton had reasonable and proper cause to propose such a return to the Claimant. It could not, objectively, seriously damage or destroy trust and confidence.

On 8 November 2023 refuse to listen to an audio recording made by the claimant as part of his evidence presented for use at his grievance hearing.

89. Covert audio recordings can be a sensitive issue. Even in the Employment Tribunal, there may be an issue over their admissibility, although the preferred view is now that relevant evidence should be admitted even if the Tribunal has to "hold its nose". The Respondent in this case was concerned that it was improper for the Claimant to have recorded his colleagues, without first seeking their permission. Miss Woodall advised Mr Galos not to admit the audio and he accepted this position. This was a proper decision for a grievance hearing manager to take. I am not persuaded the exclusion of this evidence, involved the Respondent acting without reasonable and proper cause. Furthermore, the decision was mitigated to some extent at least by the admission into evidence of the transcripts. There are points that can be made both ways. On the one hand, an audio recording is more difficult to challenge than a transcript. On the other hand, no challenge was actually made to the content of the Claimant's transcript, which included much characterisation and interpretation on his part. Once again, I am satisfied the Respondent was acting with reasonable and proper cause and the decision in this regard could not, objectively, seriously damage or destroy trust and confidence.

90. For the reasons set out above, the Claimant has failed to show a repudiatory of breach of contract and his claim must fail.

91. Given my decision on the question of repudiatory breach, the questions of waiver or affirmation and causation do not arise.

EJ Maxwell
Date: 5 July 2024