EMPLOYMENT TRIBUNALS

Claimant: Mr D Meyer

Respondent: Wolverhampton The Citizens Advice Bureau

Heard at: **Midlands West (by CVP)** **On:** **24 and 25 February and 22 March 2022**

Before: **Employment Judge Woffenden**

Representation
Claimant: In Person
Respondent: Ms A Jervis, advocate

RESERVED JUDGMENT

The claimant was not unfairly dismissed.

REASONS

Introduction

1 The claimant was employed by the respondent as a part time Pension Wise guider from 12 April 2018 until he resigned with immediate effect on 4 May 2020.On 3 July 2020 he presented a claim of (constructive) unfair dismissal.

The Issues

2 Although the respondent has been represented throughout ,no further information had been sought from the claimant about which things in his claim form he says made him resign and no draft list of issues had been prepared. I therefore sought the necessary clarification from the claimant and the parties agreed a list of issues (liability only).

3 The issues for the tribunal to determine were:

3.1 Was the claimant dismissed?

3.1.1 Did the respondent do the following things:

3.1.1.1 Bullying and intimidation by the colleague (on a weekly basis reminding the claimant about leaving office on time and overrunning Pension Wise meetings; a week or so before 25 June 2019 criticising the claimant's questioning of a customer's accommodation arrangements; and the incident on 25 June 2019);

3.1.1.2 No communication from Emma Byrne after 25 June 2019 until receipt of an email to the claimant from the colleague dated 3 December 2019 that she would conduct an observation of the claimant on 11 December 2019;

3.1.1.3 Emma Byrne's allegedly 'dismissive' email response to the claimant's email of the same date

3.1.1.4 Craig Alford's failure to take the claimant's complaint seriously belittling it and implying the claimant was partly responsible in his email of 28 January 2020;

3.1.1.5 Delay in addressing the claimant's grievance of 11 February 2020 from 12 February 2020 until 4 May 2020;

3.1.1.6 Other contributory factors (collusion between the colleague and David Prince in terms of the PensionWise advice provided by the claimant; David Prince asserting in feedback paper the length of time recorded by the claimant at PensionWise meetings was excessive; Craig Alford 's email to the claimant from 3 April to 26 April 2020 giving the claimant the impression that he thought the colleague was in control of the claimant's work and did not want him to do anything to give concern to her; Craig Alford's allegedly unreasonable inflammatory offensive and contradictory email to the claimant dated 29 April 2020 which confirmed he had not ever properly investigated the claimant's complaint of 5 July 2019 and had no intention of doing so;2 allegedly intimidating telephone calls from Peninsula telling the claimant that if he did not take part (in the grievance process) it would undermine his case if it went wrong in the future).

3.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

3.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

3.2.2 whether it had reasonable and proper cause for doing so.

3.2.2 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

3.2.3 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

3.3 If the claimant was dismissed, what was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract the respondent says 'some other substantial reason'- breakdown in relationship?

3.4 Was it a potentially fair reason?

3.5 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

Evidence

4 I heard from the claimant and on behalf of the respondent I heard from Emma Byrne (the respondent's Advice Services Manager) and Craig Alford (the respondent's former operations director). There was an agreed bundle of documents of 317 pages. I have considered only those documents to which I was referred in witness statements or cross-examination.

Fact Finding

5 The claimant was employed by the respondent as a part time Pension Wise Guidance Specialist from12 April 2018 to 4 May 2020 when he resigned with immediate effect.

6 The respondent is an independent charity offering free information and specialist case work to people in Wolverhampton. The claimant worked three days a week as part of a small team of 4 or 5 Pension Wise colleagues, providing guidance to clients. That team included a colleague who had been a Pension Wise Guidance Specialist since 2015 ('the colleague').

7 The claimant largely worked alone. He occasionally attended staff meetings. He was given a lot of responsibility to manage his own workload which he did very well. His line manager was Emma Byrne (the respondent's Advice Services Manager) and the respondent's operations director was Craig Alford.

8 Under the contractual arrangements to provide such guidance ,peers (subject to having been trained as Quality Assurance ('QA') assessors) had to carry out mandatory monthly observations of Pension Wise client appointments to ensure all Pension Wise Guidance Specialists followed the same prescribed methodology and acted appropriately. The colleague had no management responsibilities for the claimant but she was a QA assessor and also the

respondent's QA lead reporting to Emma Byrne monthly with the scores the Pension Wise team were given as a result of observations. Emma Byrne had had to speak to the colleague in the past when she had overstepped the mark in assuming management responsibilities for colleagues as a result of having previously performed such duties following the departure of a colleague. David Prince is a member of the PensionWise team who works out of Shropshire office.

9 Under the claimant's contract of employment (paragraph 11) it was stated that if he wished to raise a grievance in connection with his employment he should raise it with his line manager . The respondent had a grievance policy which had an informal and an formal stage. The informal stage advised employees to start by talking it over with their manager. If it was resolved informally that would end the process. If not ,it would then move on to the formal stage. It also said that '*in certain circumstances'* both at the informal and formal stages it may feel appropriate to agree to mediation but both parties would have to agree. Under the formal stage employees were advised to raise the matter formally in writing fully stating the grievance .The purpose of a meeting was provide an opportunity to the employee to state their case alongside providing any supporting evidence to assist it. If need be ,management would investigate further into the grievance claims .The respondent also has a Dignity At Work Policy which defines bullying as any persistent behaviour directed towards an individual which is intimidating offensive or malicious and harassment is unwanted conduct related to a 'relevant protected characteristic'.

10 On 25 June 2019 (a Tuesday) the claimant was unable to attend a meeting with a customer at Birmingham Citizens Advice Bureau and arranged to meet her the following Friday. He told the colleague about this by text .It transpired that the client was not able to make the rearranged appointment and (although the customer had left her contact details for him to get in touch) the colleague had intervened , rearranged the appointment and made it with her in July.

11 The claimant telephoned Emma Byrne sometime in the week commencing 1 July 2019 and told her about the incident on 25 June 2019.He said there had been other incidents with the colleague and she asked him to detail them in writing. She could tell the claimant was very upset. When it was put to him under cross-examination that the colleague had in essence tried to rearrange a customer meeting the claimant said that that was not exactly true; she had done so by taking over the customer which she had no right to do .He said if a customer is assigned to a Pensionwise Guidance Specialist the latter takes responsibility and at no stage should they be usurped or should power be taken from them. She had taken ownership of the customer. It was unnecessary ,unwarranted and against the rules and the colleague had assumed power over the customer. However, I find there are no formal rules in place about customer relationships such that Pensionwise Guidance Specialist have 'ownership' of that relationship; customers are simply allocated to a Pensionwise Guidance Specialist prior to meeting and that Specialist then prepares a document setting out the points covered in the meeting and sends it to the customer.

12 On 5 July 2019 the claimant sent Emma Byrne an email which he said summarised the key points of the events on 25 June 2019.He referred to 'other instances in recent weeks' where he had 'felt rather uncomfortable' about the colleague's conduct towards him and that he had 'mentioned that I had decided not to react or report this to you at the time' .He mentioned 'one such incident'

where the colleague had made 'critical comments' in a PensionWise observation debrief. He said that he thought it would be inappropriate for him to be subjected to future observations by the colleague which would be 'very awkward and stressful' and 'would lack the necessary objectivity.' He suggested further thought be given as to 'how we can best proceed' after his return from holiday. Under cross-examination he explained that in relation to the 'critical comments' this concerned a remark by the colleague after an observation to the effect had he not spotted that a customer having an affair when discussing the person's finances which he considered concerned the customer's sexual proclivities and found embarrassing and not a fit subject for discussion.

13 After her initial telephone call with the claimant and before receipt of his email of 5 July 2019 Emma Byrne (who took the concerns raised by the claimant seriously) spoke to the colleague to tell her that the claimant felt uncomfortable with the way she spoke to him and to remind her she was not his line manager or supervisor.

14 After receipt of the claimant's email Emma Byrne sought advice from Craig Alford about what to do next. She was concerned that the claimant had said in his email he no longer wanted the colleague to undertake his observations. She thought she would speak to the claimant to say she had spoken to the colleague and if he was still not happy to ask him to raise a formal grievance or offer mediation. She then emailed the claimant on 8 July 2019 and asked if they could have a telephone conversation about a couple of the points he had raised.

15 Emma Byrne reported back to Craig Alford on 9 July 2019.She said she had spoken to the colleague on 8 July 2019 and told her she intended to speak to the claimant on 9 July 2019 to see if she would have 'to get mediation involved'. She would update her about the fact that the claimant was happy that she had spoken to the colleague and 'wishes to not take this any further.'

16 Emma Byrne spoke to the claimant by telephone on 9 July 2019 following which she reported to Craig Alford that he did not want to take the matter any further and was happy for the colleague to continue doing observations and would let her know if any further incidents occurred. He accepted under cross-examination that there was such a pause in observations and he had been given what he wanted. Emma Byrne's evidence under cross-examination was that there had been no agreement about the length of any pause in observations by the colleague and this coincides with the claimant's account of the agreement reached in paragraph 23 below that pause was for an unspecified length. I find that during a telephone call on 9 July 2010 the claimant said he would not be taking the matter any further and it was agreed between Emma Byrne and the claimant and the colleague would not be carrying out future observations for a period of time. There was no agreement about how long the pause in observations by the colleague would last.

17 Emma Byrne did not feel it was necessary to confirm the position to the claimant in writing because he had said he did not want to take the matter any further. She decided that 2 observations would be carried out for the claimant in August to avoid him not having to come in on a day he did not usually work to have an observation carried out by the colleague and emailed the claimant to confirm this on 11 July 2019,the claimant having indicated that this was his 'strong' preference. She inferred from this that the claimant was happy to be in a

1:1 observation with the colleague after the incident in July 2019.In the event the claimant did not come in for observation because it would have meant him coming in when he did not work and subsequent observations were not carried out by the colleague. Emma Byrne was keen to get the claimant progressed to undertake observations for others and on 14 August 2019 told him about a training session for this in October 2019. She was told by Ian Williams (an external observer) on 21 August 2019 the session was not in fact appropriate for the claimant because it was for quality assurance leads (of which the colleague was one-see paragraph 8 above) which had been explained to the claimant who was said to have understood the situation and the benefit of waiting for an appropriate course.

18 On 3 December 2019 the colleague emailed the claimant to say they would be conducting his monthly observation on 11 December 2019. By this time the colleague was the only trained observer for the respondent.

19 The claimant was taken aback, having expected the end of the pause in observations to have been announced .On 5 December 2019 the claimant emailed Emma Byrne to express his surprise and concern about the colleague's email and to 'register that my previously stated reservations about the potential lack of objectivity/impartiality remain unchanged'. She replied by email that day to say she had told him that there would be a period of observations by the external Quality Assurance team 'which have now taken place'. She reminded him she had told him external mediators could be pursued to see if the differences between him and the colleague could be rectified and that she had spoken to the colleague and he had said in July that he did not wish to take the matter any further. She asked if his position had now changed and he wanted the issue to be managed formally.

20 By email dated 10 December 2019 the claimant thanked Emma Byrne for her response and said 'against the background of the events in July and taking into account the wider developments' he had decided to hand in his notice. Mr Alford replied to him by email on 11 December 2019.He said he was disappointed the claimant felt this was his only option when to the best of his understanding Emma Byrne had tried to address his concerns from July and believed she had done so .He was not aware any further matters had been raised and 'we are now well beyond the point where I would normally revisit such an old issue unless there were very compelling reasons such as substantive bullying or discrimination that had not previously been brought to our attention. If there is something that you would like to bring to my attention please let me know and either I or Emma will look into it is as appropriate (sic)' . If however the claimant believed resignation was the most appropriate step then he would accept it.

21 The claimant withdrew his resignation on 12 December 2019 in an email in which he thanked Craig Alford for his email and allowing him to reflect on his expressed intentions said he would give further thought to the points raised in Craig Alford's email and get back to him in due course. He asked for a copy of Emma Byrne's email which he could not find.

22 Craig Alford then wrote to the claimant by email on 19 December 2019 offering to work with Emma Byrne to review his concerns with a view to finding a lasting solution and 'to facilitate this ',he asked him to summarise them. On 20 December 2020 the claimant replied to say he thought the proposed steps were

a good way forward and asked to reply in early January 2020 to which Craig Alford agreed though he said in an email of 20 December 2019 that they needed to find a way to conduct observations without too much delay.

23 In the event it was not until 24 January 2020 that the claimant set out his concerns in an email to Craig Alford. He said he made it clear to Emma Bryne in his telephone conversation with her following his email of 5 July 2019 that he was prepared not to take matters further 'subject to an understanding that I would not be expected to have to tolerate such conduct towards me in the future and subject to an understanding that (the colleague) would not be carrying out any further observations for a period of time.'

24 The claimant also said in his email of 24 January 2020 that he understood the need for observations and had no objection to whomsoever was given that task but objectivity/impartiality should be respected as part of those observations and he had strong reservations against the background against which that objectivity/impartiality was delivered. He also said that it was 'really' Emma Byrne's email of 5 December 2019 with its reference to mediation between him and the colleague which had the clear assertion that he had some responsibility for the unfolding events described in his complaint that was the specific point that led to his resignation. This was 'by far the most offensive comment' in the email. Under cross-examination he reiterated that the suggestion of mediation made him feel he was being held partially responsible, although he also accepted that offering mediation was all the respondent could do if he did not raise a grievance and confirmed he did not take issue with the proposition that the respondent had reasonable and proper cause to offer mediation.

25 On 28 January 2020 Craig Alford replied to the claimant in a carefully worded polite and tactful email. He said his purpose was neither to investigate or pass judgment about the concerns the claimant had raised but to clarify the broad position as he saw it so the claimant could make an informed decision about next steps .In summary he said the colleague was the only resource available to carry out the necessary observations and suggested a mediated response under the respondent's Dignity at Work Policy which he considered was the appropriate framework though this did not preclude the claimant choosing to go down the route of a grievance and a formal complaint could still be submitted.

26 On 11 February 2020 the claimant wrote to complain that Craig Alford did not seem to recognise the colleague's conduct towards him was 'totally unacceptable' and that he appeared not to understand that 'had management dealt with' his complaint 'professionally at the time we would not be where we are now.' He described Craig Alford's response as 'seeking to make me part of the problem'. He also complained under the heading 'Wider Developments' that Ian Williams had told him shortly before the October training date when he was undertaking an observation for the claimant that it was not appropriate for him to attend the October training session and had made some comments about keeping the session with customer within time limits (though he had never raised this before) .This had happened after Ian Williams had had a hour long meeting with the colleague and observed 'one could be forgiven for being a lile (sic) suspicious about the two key issues' being raised by Ian Williams. Under cross-examination he accepted it was reasonable for the colleague and Ian Williams to have had a meeting but he had concluded the colleague had told him to mention it to him because it had no relevance to the observation score card filled in by Ian

Williams about the observation he carried out on the claimant when the session had lasted 55 minutes only.

27 On 12 February 2020 the claimant confirmed he wanted his email dealt with as a formal grievance. Mr Crockett (Chair of the Board of Trustees) had been asked to hear the claimant's grievance but he was on a phased return to work so the claimant was told it would take longer a bit longer. He then became unwell . Then Nick Cheesewright (the vice chair of trustees) who had been asked to hear the claimant's grievance and to whom the claimant sent 8 supporting emails could no longer address the claimant's grievance due to ill health. On 6 March 2020 Craig Alford emailed the claimant to tell him that and due to his own involvement and the need to keep Mr Crockett for an appeal if needed the respondent had contacted Peninsula (described as its HR consultants)

28 On 1 April 2020 Craig Alford emailed the claimant to tell him of the resumption of PensionWise sessions which meant his grievance could no longer be put to one side because of its implications for his management supervision and observations. He referred in particular to the risk that in the normal course of their duties Emma Byrne or the colleague might exacerbate his concerns particularly if critical comment or action was called for in relation to his conduct or performance. He said he thought the only way forward was for Peninsula to conduct a telephone meeting in the next 7 to 14 days. Because this was a 'sudden' departure from the status quo he wanted to give the claimant the opportunity to comment and alert him to contact from Peninsula.

29 On 2 April 2020 the claimant emailed Craig Alford to say he understood 'you wish to progress matters ' and would wait to hear from Peninsula with next steps. He said he had understood what Craig Alford had said about Emma Byrne but as far as the colleague was concerned it was implied that that the colleague had a degree of control or supervisory role in his day to day conduct or performance and sought clarification. On 3 April 2020 Craig Alford apologised to the claimant for any confusion and explained he had used the word 'supervision ' in the context of observations and any feedback arising and was not implying any formal authority for the colleague beyond that context.

30 The claimant was ill and did not attend work from 6 to 17 April 2020. He then had a period of annual leave and his first day back at work was due to be 5 May 2020. He complained about the ongoing delay in resolving his grievance in an email to Craig Alford dated 29 April 2020 saying he was concerned there had been little progress over the last 4 weeks. He said unless the telephone meeting with Peninsula took place the next day or Friday he would 'have to consider my position.' He was taking account the Coronavirus situation but he trusted Craig Alford would agree the continued delay was becoming unacceptable.

31 On 29 April 2020 Craig Alford sent an email to the claimant informing the claimant that his grievance would be heard by Face2Face on 5 May 2020 via video conference .In that email he said he set out 'for ease of reference 'the claimant's 'issues /concerns'. In doing so he used the phrases 'You believe ' 'You feel' 'You do not believe' before setting out the concern in question as he understood it. He enclosed the respondent's grievance procedure and urged the claimant to participate in the hearing with Face2Face. Under cross examination the claimant described that email as both biased and unkind.

32 The claimant's witness statement did not provide an account of the allegedly intimidating phone calls with the consultants at Face2Face .Under cross-examination he said he had received two telephone calls from a consultant at Face2Face in which he was asked if he understood that by not participating in the grievance process he was undermining his position and (although he was unable to explain what it was about either the tone or content of the phone calls in question that made them intimidating) he had felt that he was being hounded and treated like a schoolchild. He said there were no circumstances in which he would involve himself with a person like that. I find that the calls were made as alleged but the claimant has failed to prove that there was anything about them which made them intimidating; he simply disliked the message and the messenger who was reinforcing what Craig Alford had already said in his email to the claimant of 29 April 2020.

33 The claimant resigned by a lengthy letter dated 4 May 2020 in which he said he would not be attending the grievance meeting. His email set out information under a number of headings which he described as being 'among the main reasons for his resignation' .The headings were 1 the respondent's failure to provide him with sufficient protection from bullying by the colleague, 2 changes and delays in the grievance procedure, and 3 the proposed telephone meeting with the external consultant. Summarising what was said each under heading as far as 1 was concerned he complained about the respondent's failure to take remedial action since his complaint of 5 July 2019, its failure to protect him from further bullying in December 2019 despite the agreement there would be no more observations by the colleague by Emma Bryne's decision that such observations resume without notice or his knowledge and Emma Byrne's failure to write to him about his complaint since 5 July 2019. Under 2 he referred to his having withdrawn his resignation on the understanding that his original complaint and subsequent events would be investigated and dealt with fairly ,during the informal stage facts had been ignored and during the formal stage there had been delays of 'some weeks' and on more than one occasion the respondent had tried to hold him partially responsible /part of the problem. Under 3 he described the temporary halt in the process in March 2020 due to the appointment of Face2Face as being by mutual agreement due the coronavirus pandemic and that it was the respondent that had requested a speedy resumption of that process on 1 April 2020,there had been a disingenuous response to his email of 2 April 2020,there had been insufficient preparation for the resumption of the grievance procedure so deadlines were not met, he suspected that there was something 'untoward ' confirmed following the 'ultimatum' in his email of 29 April 2020 showing little preparation for the meeting withFace2Face,the 'unacceptable' letter from the respondent dated 29 April 2020 omitting important contributory factor in correspondence using 'disrespectful and unnecessarily provocative 'language e.g. the repeated use of the phrase 'you believe that' ,and it would be an 'unacceptable burden to restate at the telephone meeting all the salient points documented but left out of the respondent's letter. He concluded by saying the conduct and behaviour of the respondent had become intolerable .As a result of the way he had been treated over many months and the lack of respect throughout he believed the employment relationship had irrevocably broken down and his decision to resign stemmed from its 'fundamental breach of its employment contract.'

34 The grievance hearing proceeded in the claimant's absence on 5 May 2020.The outcome was that the grievance was not upheld.

The Law

35 In order to make a complaint of unfair dismissal an employee must have been dismissed by the employer.

36 Section 95 ERA sets out the circumstances in which an employee is dismissed by the employer. Section 95(1)(c) ERA 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 called a constructive dismissal. The burden of proving dismissal falls on the claimant.

37 In the leading case of **Western Excavating (Excavating) Ltd v Sharp [1978] ICR 221,** it was held that in order to claim constructive dismissal, the employee must establish (1) that there was a fundamental breach of contract on the part of the employer (2) that the employer's breach caused the employee to resign (3) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

38 In **W A Goold (Pearmak) Ltd v McConnell [1995] IRLR 516** the EAT (Morison J presiding) accepted 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*'.

39 In the case of **Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347 EAT** it was held that: "*It is clearly established that there is implied in a contract of employment that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it*".

40 It is therefore irrelevant that the employer does not intend to damage his relationship provided the effect of the employer's conduct, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it. It is the impact of the employer's behaviour on the employee that is significant - not the intention of the employer *(***Malik***).* The impact on the employee must be assessed objectively. In **Niblett v Nationwide Building Society UKEAT/0524/08** His Honour Judge Richardson said, in the context of an employer's conduct of a grievance procedure and whether the implied term of trust and confidence had thereby been broken, that "*the implied term of trust and confidence is a reciprocal obligation owed by employer to employee and employee to employer. In employment relationships both employer and employee may from time to time behave unreasonably without being in breach of the implied term. It has never been the law that an employer could summarily*

terminate the contract of an employee merely because the employee behaved unreasonably in some way. It is not the law that an employee can resign without notice merely because an employer has behaved unreasonably in some respect. In the context of the implied term of trust and confidence, the employer's conduct must be without proper and reasonable cause and must be calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

41 In **BG plc v O'Brien [2001] IRLR 496 Langstaff P said '***The question is whether, objectively speaking, the employer has conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. If the conduct has that effect, then the question of whether there has been a reasonable and proper cause for the behaviour must be considered*.' As was observed by Lindsay P in **Croft v Consignia plc [2002] IRLR 851 EAT**: *'It is an unusual term in that it is only breached by acts or omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows*.' As was said in **Cantor Fitzgerald International v Bird and Others [2002] IRLR 867 H C** '' *loss of confidence in management is not the same as conduct by the employer calculated to destroy or seriously damage trust and confidence between employer and employee in the sense of the implied term relied upon*.'

42 In **Omilaju v Waltham Forest London Borough Council 2005 ICR 481,** the Court of Appeal considered the necessary quality of 'a last straw'. It said '*When Glidewell LJ said that it need not itself be a breach of contract, he must have had in mind, amongst others, the kind of case mentioned in Woods at p 671F-G where Browne-Wilkinson J referred to the employer who, stopping short of a breach of contract, "squeezes out" an employee by making the employee's life so uncomfortable that he resigns. A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts 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.*

> *20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.*

21. *If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.*

22. *Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective (see the fourth proposition in para 14 above*). '

43 In **Wright v North Ayrshire Council [2014] IRLR 4** it was pointed out that the test to be applied is not what is the principal or effective cause of a resignation, but whether the claimant resigned at least in part by reason of some or all of the conduct which is said to amount to a repudiatory breach.

44 In **Kaur v Leeds Teaching Hospital NHS Trust [2018] CACiv** it was held that "*the following through, in perfectly proper fashion on the face of the papers, of a disciplinary process*". Such a process, properly followed, or its outcome, cannot constitute a repudiatory breach of contract, or contribute to a series of acts which cumulatively constitute such a breach. The employee may believe the outcome to be wrong; but the test is objective, and a fair disciplinary process cannot, viewed objectively, destroy or seriously damage the relationship of trust and confidence between employer and employee. In **Kaur** also provided at paragraph 55 practical guidance in approaching a case in which the last straw event was not per se repudiatory but acts against a background of an earlier course of conduct ,despite earlier affirmation. Underhill LJ said : "*I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the* Malik *term? (If it*

was, there is no need for any separate consideration of a possible previous affirmation ….)

(5) Did the employee resign in response (or partly in response) to that breach? None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy."

45 I remind myself the claim ,as set out in the claim form is '*not just something to get the ball rolling as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so'* (Langstaff P in **Chandhok v Tirkey UKEAT/0190/14/KN**). In **Chapman v Simon [1994] IRLR 124 CA** it was held that the jurisdiction of the employment tribunal is limited to the complaints which have been made to it. It is not for us to find other acts of which complaints have not been made if the act of which complaint is made is not proven.

46 I thank both parties for their written and oral submissions which I have carefully considered.

Conclusions

47 In the claimant's written submission dated 15 March 2022 ('skeleton argument') he said the respondent's refusal to provide information under a subject access request('SAR') may limit the extent of a fair hearing and said there would be a separate paper about this. In that paper dated 22 March 2022 he sought 'release' of the SAR data which he said would reveal further information that will point to concerted action taken by the respondent which amounted to a breach of trust and confidence. An employment tribunal only orders disclosure of documents if they are disclosable in the sense they are likely to support or adversely affect the case of one or other party. Even then disclosure will only be ordered if it is in accordance with the overriding objective (Rule 2 of the Employment Tribunal Rules 2013) i.e. necessary for the fair disposal of the issues between the parties as set out in paragraph 3 above. The claimant did not identify with any precision what documents he sought other than to say it was the SAR data to which he was legally entitled. He did not say why the documents were likely to be disclosable with reference to the overriding objective proportionality or cost. It seems to me he does not know whether the documents in question are disclosable ;he just hopes or suspects they could be. Even if there were documents which contained evidence of 'concerted action' taken by the respondent which amounted to a breach of trust and confidence of which the claimant was hitherto unaware the claimant could not have resigned in response. I am not persuaded that the respondent's refusal to provide information under an SAR has or may have limited the extent of a fair hearing as submitted by the claimant.

48 Issue 3.1.1.1 . The respondent did not call the colleague to give evidence and has not explained why. That entitles me to draw an inference which is adverse to the respondent that strengthens the evidence of the claimant. Emma Byrne accepted the colleague had previously overstepped the mark in wrongly assuming management responsibilities .However the claimant's witness statement does not contain cogent evidence about events prior to 25 June

2019.It merely described the behaviour of the colleague as becoming increasingly unpleasant over an (unspecified) period of time .No further evidence was provided about the nature or frequency of the unpleasantness. I conclude that from time to time the colleague acted towards the claimant in a way consistent with her having assumed management responsibilities for him by reminding him about leaving office on time and overrunning Pension Wise meetings, which (as a peer) she was not entitled to do. This was irksome to the claimant but I cannot on the evidence before me conclude in terms of its nature or frequency that it can be categorised as bullying or intimidation. I conclude that the colleague also a week or so before 25 June 2019 criticised the claimant's questioning of a customer's accommodation arrangements in a comment which he found embarrassing and inappropriate but I cannot on the evidence before me conclude in terms of what or the way it was said that it can be categorised as bullying or intimidation. As far as the incident on 25 June 2019 is concerned the colleague's intervention was regarded by Emma Byrne as part of the assumption of management responsibilities. However, in the absence of any formal rules about customer relationships, I cannot conclude on the evidence before me that it can be categorised as bullying or intimidation as perhaps might be the case if the claimant had any reasonable basis for regarding the colleague's behaviour in the way set out in paragraph 11 above .Further I remind myself that I am concerned with the conduct of the employer; the colleague did not have any supervisory function over the claimant (save for carrying out mandatory observations) and the respondent had tried to address the colleague's behaviour in the past.

49 Issue 3.1.1.2 It is not in dispute that Emma Byrne did not communicate further with the claimant until receipt of an email to the claimant from the colleague dated 3 December 2019 that she would conduct an observation of the claimant on 11 December 2019.Given the history between the colleague and the claimant it would have been better for Emma Byrne to have discussed in advance with the claimant the resumption of observations and sought his views. However , I conclude that her failure to communicate with the claimant until receipt of the email from the colleague dated 3 December 2019 was not conduct likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. There had been a pause in observations of several months and the claimant had not complained of any recurrence of conduct by the colleague.

50 Issue 3.1.1.3 The claimant alleged Emma Byrne's email response to the claimant's email of 5 December 2010 was dismissive but in my judgment it was an reasonable email for a line manager to write in the circumstances; in essence it was doing no more than asking him if his position had changed from what she had understood it to be in July and if so what he wanted to do. It was not the 'dismissive' nature of the email response which concerned him in any event but ,as he made clear in his email of 24 January 2020, its reference to mediation which he found offensive for the reasons set out in paragraph 24 above. In my judgment the suggestion of mediation was not conduct likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee in circumstances in which an employee had not raised a grievance and as the claimant conceded the respondent had reasonable and proper cause to offer mediation .

51 Issue 3.1.1.4 The claimant also alleged Craig Alford failed to take his complaint seriously belittling it and implying the claimant was partly responsible in his email of 28 January 2020.His perception appears to stem from the claimant's view that the suggestion of mediation has connotations of responsibility on his part . Again in my judgment it was an reasonable email for Craig Alford to write in the circumstances and was not conduct likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. Mediation cannot be unilaterally imposed by an employer ;it has to be agreed.

52 Issue 3.1.1.5 Delay. Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received. The claimant raised his grievance on 12 February 2020.Delays were occasioned by the illness of the persons identified to hear the claimant's grievance. As at 1 April 2020 he was content to wait to hear from Peninsula. He himself was ill from 6 to 17 April 2020.He did not complain about the lack of progress until 29 April 2020 having it would appear taken into account the impact of the coronavirus and the meeting was immediately arranged for 5 May 2020 (his first day back at work after a period of annual leave. In those circumstances any delay was not conduct likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee or the respondent had reasonable and proper cause for it.

53 Issue 3.1.1.6 Other Contributory Factors .The claimant first alleges collusion between David Prince and the colleague which is a serious allegation requiring cogent evidence to support it and I have to address the allegations made (**Chapman v Simon**) . There is no evidence of collusion. This allegation is not proven. Craig Alford 's email to the claimant dated 1 April 2020 may have given the claimant the impression that he thought the colleague was in control of the claimant's work and did not want him to do anything to give concern to her but that was a misunderstanding on his part which Craig Alford fully and promptly addressed in his email of 3 April 2020. It was not conduct likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. To describe Craig Alford's email to the claimant dated 29 April 2020 as unreasonable inflammatory offensive and contradictory and confirming he had not ever properly investigated the claimant's complaint of 5 July 2019 and had no intention of doing so is in my judgment a perverse interpretation of that email. Craig Alford had made it clear in his email of 28 January 2020 that he was not investigating or passing judgment on the claimant's concerns. His email of 29 April 2020 simply set out his understanding of what he understood the claimant's grievance to be about . Until the grievance was determined by Face2Face these matters were claims made by the claimant . The claimant knew from Craig Alford's email of 6 March 2020 his grievance would not be heard by Craig Alford (because of his previous involvement) but by Face2Face and knew or should have known from the grievance procedure that the purpose of a meeting was provide an opportunity to him to state his case alongside providing any supporting evidence to assist it. It was therefore important that the nature of the grievance was identified in readiness for that meeting. That was all Craig Alford was seeking to do .It would be for Face2Face to decide if the claims made in the grievance would be upheld and if so to what extent and what action to take. The claimant also knew or should have known from the grievance procedure that if

necessary there would be further investigation into his grievance claims . Craig Alford's email of 29 April 2020 was not conduct likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. The claimant has failed to prove there were intimidating telephone calls from Peninsula telling the claimant that if he did not take part in the grievance process it would undermine his case if it went wrong in the future (see paragraph 32 above).

54 It follows that (viewed objectively) the respondent has not behaved in a way which (individually or cumulatively) was calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The claimant has undoubtedly lost confidence in the respondent's management but that is not the same as conduct by the employer calculated to destroy or seriously damage trust and confidence between employer and employee in the sense of the implied term relied upon.

55 If I am wrong about that in relation to the respondent's conduct prior to his resignation on 10 December 2019 the claimant affirmed the contract by remaining in employment until 4 May 2020 thereby waiving any such breach. If **Kaur** is applied the most recent act or omission on the respondent's part which the claimant says triggered his resignation on 4 May 2020 are the telephone calls telling him that if he did not take part in the grievance process it would undermine his case. As I have found above the telephone calls did not amount to repudiatory breach of contract; they were innocuous and the claimant cannot subsequently rely on those earlier acts.

56 The claimant was not therefore dismissed but resigned. His claim of unfair dismissal fails.

Employment Judge Woffenden

Date 20 June 2022