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EMPLOYMENT TRIBUNALS

Claimant: Mr S Shah

Respondent: Tesco Stores Ltd

Heard at: East London Hearing Centre

On: 12 May &
8 June 2017

Before: Employment Judge Martin (sitting alone)

Representation

Claimant: In person

Respondent: Mr O Holloway (Counsel)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that the Claimant's complaint of unfair dismissal is not well-founded and is hereby dismissed.

REASONS

Introduction

1 The Claimant gave evidence on his own behalf. Ms Jo Mansfield, Personnel Manager, Mr Nik Rabadia, Customer Experience Manager, Mr Shakeel Ahmad Duty Manager and Ms Rachael Elizabeth Gorte-Clarke, Personnel Manager all gave evidence on behalf of the Respondent. The Tribunal were provided with a bundle of documents marked Appendix 1.

The law

2 The Tribunal considered the law as follows.

3 Section 95(1) of the Employment Rights Act 1996:

“For the purposes of this Part an employee is dismissed by his employer 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.”

4 The case of *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27 where the Court of Appeal held that an employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. The employee must make up his mind to leave soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.

5 The case of *Woods v WM Car Services (Peterborough) Ltd* where the EAT held that any breach of the implied term of trust and confidence 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.

6 The case of *Mahmud v BCCI* [1997] ICR 606 where it was held that a contract of employment includes an implied obligation that the employer would not, without reasonable and proper cause, act in a manner that was likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

7 The case of *Lewis v Motorworld Garages Ltd* [1985] IRLR 465 where the Court of Appeal held that a breach of the implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last act of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term – the “last straw”.

8 The Claimant produced in submissions a bundle of cases on which the Tribunal comments as follows. The Claimant agreed that the Tribunal did not need to review all the cases which the Claimant had produced since he accepted that some of those cases dealt with compensation or related to a different jurisdiction and therefore did not need to be considered. The cases which were handed in by the Claimant were as follows:-

- 8.1 A copy of the Employment Tribunals Rules of Procedure 2013;
- 8.2 The case of *Watson v University of Strathclyde* UK EATS/0021/10/B1.

The Claimant referred to paragraph 45:

“None of the foregoing steps were taken by the Respondent and we agree that their failure were, for the reasons we have explained, such as to amount to a breach of the implied term of trust and confidence. It is not we think surprising that the Claimant regarded their conduct in this matter as justifying her resignation. We agree that it did. Her resignation amounted to constructive unfair dismissal.”

- 8.3 The case of *GAB Robins (UK) Ltd v Triggs* [2008] EWCA Civ. 17 which only dealt with the issue of remedy
- 8.4 The case of *Buckland v Bournemouth University Higher Education Corporation* [2010] EWCA Civ. 12.
- 8.5 The case of *Sutherland v Hatton* and conjoined cases [2002] EWCA Civ. 76. These cases related to a different jurisdiction and issue of negligence.
- 8.6 The case of *Salford Royal NHS FT v Roldan* [2010] EWCA Civ. 522 which was a case dealing with summary dismissal.
- 8.7 The case of *A v B* EAT 1167/01 which was a case dealing with unfair dismissal but not constructive dismissal and related to delays in process.
- 8.8 The case of *Green v DB Group Services (UK) Ltd* [2006] EWHC 1898 related to issues about compensation and psychiatric illness in a different jurisdiction.
- 8.9 The case of *Rayment v Ministry of Defence* [2010] EWHC 218 which again related to a different jurisdiction and an issue of damages.
- 8.10 The case of *Horkulak v Cantor Fitzgerald International* [2003] 1918 QB which was a case dealing with constructive dismissal and referred to the cases of Mahmud, Wood and Lewis as referred to above.
- 8.11 *Tower Boot Co Ltd v Jones* EAT 95/1596 which was a claim relating to race discrimination.

The issues

9 The issues which the Tribunal had to consider was whether there was a fundamental breach of contract on the part of the Respondent. In that regard the Tribunal had to consider whether there was a breach of the implied term of trust and confidence. In particular whether the respondent failed to conduct an investigation into the incident where the Claimant was threatened/verbally abused on 22 May 2015. The Claimant says that the conduct was a breach and that the Respondent failed to support him and that the last straw was being invited to a disciplinary meeting where the manager was not in attendance.

10 The Tribunal then had to consider whether the Claimant resigned in response to any breach of any implied term and then had to consider whether the Claimant had affirmed the contract in the meantime.

Findings of fact

11 The Respondent is a multinational grocery and general merchandising retailer. It operates a network of stores throughout the country.

12 The Claimant commenced employment with the Respondent in October 2004. He worked at the Respondent's Gallions Reach extra branch which is in the East End of London. He worked part-time as a Customer Services Assistant. He also had another part-time job as a security manager during the entire period of his employment with the Respondent.

13 The Respondent's grievance policy is at page 36II-36QQ of the bundle.

14 At page 36LL it explains how a formal grievance can be raised at paragraph 5. The policy states that resolving the majority of issues informally helps the organisation to respond to concerns quickly and agreeably but that that will not always be the right approach. The policy goes on to state that if concerns have not been resolved informally and the employee remains unhappy with the situation at work or that the situation is too serious to raise informally that a formal grievance should be raised. It states that in some cases the formal grievance policy will not be followed until informal approaches have been exhausted.

15 The policy then states that a formal grievance should be raised in writing and refers to the grievance form which is available online, through the people manager or trade union representatives. The policy goes on to state how the formal grievance would be dealt with, namely, that the employee will be invited to a meeting in writing, have the option to be accompanied by either a colleague or trade union representative, receive a written outcome of the grievance investigation.

16 Paragraph 9 at page 36NN deals with dignity at work. It refers to protecting colleagues from discrimination. It states that if the person involved in any discrimination / harassment or bullying is a customer that the decision-maker will choose the most appropriate action to take. It may include informing the customer that their behaviour is unacceptable and unwelcome and may ultimately result in excluding the customer from the store.

17 The timetable for dealing with grievances is set out in the policy at page 36OO. It states that the grievance will be heard in seven days. The outcome will also be notified within seven days.

18 The Respondent's unauthorised absence policy is at pages 36DD-36FF. At page 36FF the policy sets out what will happen if an employee does not notify the employer of their absence. It states that the employee will first be contacted by telephone and that if they do not contact their employer, the Respondent will write to the employee inviting them to a disciplinary hearing. If the employee does not attend

that disciplinary hearing or notify the employer that they are unable to do so the employee will then be invited to a final disciplinary hearing. The policy goes on to state that if the employee fails to attend the rescheduled disciplinary meeting that it may be held in the employee's absence and a decision will be made which may result in dismissal.

19 The Claimant's contract of employment refers to the disciplinary and grievance procedures which it says can be found in the staff handbook. The Claimant does not dispute that he was aware of the grievance procedure.

20 The Claimant had previously raised grievances about a number of matters including holidays; allegations of unfair treatment and the behaviour of other staff in particular his manager Mr Bala. He raised all of these grievances in writing by way of letters to which this Tribunal was referred namely letters dated 7 June 2014; 18 August 2014; 28 November 2014 and 5 February 2015 as is noted at pages 40-41; 43-44; 47-48; and 53-54 respectively of the bundle.

21 The Claimant was absent on sick leave for stress during November 2014. However he did not provide the Respondent with a sick note, so Jo Mansfield, who was then the personnel manager, wrote to the Claimant on 29 December 2014. In that letter she asked him to provide a sick note for the period in question - page 50 of the bundle. She referred in that letter to the fact that she had tried unsuccessfully to contact the Claimant by telephone.

22 The Claimant was issued with a verbal warning in January 2015, for being absent without authorisation, as is noted at page 52 of the bundle.

23 An incident occurred on 22 May 2015 when the Claimant was at work.

24 The Claimant says that he refused to serve alcohol to a customer who he did not think was over the prescribed age limit. He says that he asked for that customer's ID.

25 The Claimant says that the customer spat at him and verbally assaulted him. He says that his team leader sent him to the canteen and that his line manager, Jo Dudman came in to the canteen and shouted at him in front of colleagues.

26 The Claimant says that Mr Shakeel Ahmad, the Duty Manager was called. The Claimant says that he narrated all the events as referred to above to Mr Ahmad and asked him to deal with the issue. The Claimant says that Mr Ahmad told him to write down what had happened in relation to the incident on a grievance form. He says that is the grievance form at page 60 of the bundle. The Claimant says that he wrote it all down and was then sent home. The Claimant also says that Mr Ahmad said that he would complete the SYA (Supporting Your Attendance) form, duty log and check the CCTV and then submit documents to personnel and update HR for the coding of his shift under the Respondent's absence policy.

27 The Claimant says that he was extremely upset and stressed after this incident and felt personally threatened.

28 Mr Ahmad says that he was contacted and met the Claimant briefly after he was called to see him that evening. He says that the Claimant told him that he had been feeling unwell after an altercation with a customer. Mr Ahmad says that the Claimant did not want to talk about the incident and did not want to provide any details about the incident at that time. Mr Ahmad says that he did not give the Claimant a grievance form to complete and nor did the Claimant complete any grievance form and hand it to him. Mr Ahmad said that the first time that he had seen the grievance form at page 60 of the bundle was a couple of days before he was asked to give evidence in Tribunal. In fact he was only contacted to give evidence in Tribunal after witness statements had been exchanged in the case.

29 Mr Ahmad says that if he had been given this grievance form at page 60 he would have passed it to personnel. He said that an incident with a customer would not be recorded on a grievance form but would be dealt with as a complaint.

30 Mr Ahmad said that grievance forms were available in the training room, from HR, trade union representatives or online. He said that he was not sure whether the forms were available online at the time of the incident.

31 The Respondent only retains CCTV footage for three months and then it is recorded over. There is no CCTV available in the canteen or the training room.

32 The Claimant says that he called the Respondent's emergency number the following day to tell them that he was sick. He says that he went to see his GP and was subsequently diagnosed with a stress disorder and received treatment for it.

33 On 5 June 2015, Ms Mansfield wrote to the Claimant on behalf of the Respondent regarding his unauthorised absence since 23 May 2015. In that letter she said that a meeting would be arranged with Mr Rabadia for 12 June 2015 to discuss the matter. She pointed out in the letter that non-notification of absence was a breach of contract and could be coded as AWOL. That letter is at page 62 of the bundle.

34 The Respondent did not receive any response to this letter and Ms Mansfield said that she tried to contact the Claimant by telephone.

35 On 15 June 2015, Ms Mansfield wrote again to the Claimant to invite him to a disciplinary hearing regarding his unauthorised absence. In that letter she explained that he had the right to be accompanied. In the letter Ms Mansfield stated that absence without authorisation could amount to a fundamental breach of contract and result in dismissal. The meeting was arranged for 19 June 2015. That letter is at page 63 of the bundle.

36 The Claimant did not attend the meeting on either the 12 or 19 June and did not respond to the letter of 15 June 2015.

37 On 23 June 2015 Ms Mansfield wrote to the Claimant to arrange a further disciplinary meeting regarding the Claimant's unauthorised absence. That letter is at page 65 of the bundle.

38 Shortly after 23 June 2015, the Claimant contacted Ms Mansfield. He told her that he was sick and said that he was absent due to stress. He also told her about the incident on 22 May 2015 when he said that a customer verbally abused him and spat at him. He told Ms Mansfield that Jo Dudman was aware of the incident. Ms Mansfield agrees that this conversation took place and that she told the Claimant that she would look into the matter. She also asked him for a fit note to cover his absence.

39 Ms Mansfield says that the Claimant did not mention that he had put in a written grievance regarding the incident. The Claimant did not indicate in evidence to the Tribunal that he had mentioned the written grievance to her on the telephone.

40 On 29 June 2015, Ms Mansfield wrote to the Claimant and refers to her telephone conversation with him. She again asked for a copy of his sick note(s), page 68 of the bundle.

41 Ms Mansfield said that she contacted Jo Dudman about the allegation made by the Claimant in relation to the incident on 22 May 2015. In evidence before the Tribunal she said that she recalled Jo Dudman indicating that she had to calm the customer down because the Claimant had been rude to the customer. Ms Mansfield said that she did not make any notes of this discussion or provide any response to the Claimant in relation to her enquiries about the incident. She left the store in July 2015.

42 On 20 July 2015, the Claimant wrote to Ms Mansfield. It is not clear if she had left the store at the stage or not. In that letter the Claimant disputed that the Respondent has been trying to contact him by telephone. He then goes on to refer to his telephone conversation with Ms Mansfield and the incident on 22 May 2015 and the fact that the Duty Manager sent him home from work. He does not refer to his written grievance at page 60 of the bundle. In the letter he also complains about not being paid sick pay and encloses copies of his sick notes dated 3 June and 25 June 2015. He asks that his wages be effectively reinstated. That letter is at page 69-70 of the bundle.

43 A new personnel manager was appointed to the store in September 2015. It appears that there was no personnel manager covering the store between July-September 2015 and no handover.

44 The new personnel manager Mrs Gorte-Clarke says that as part of her role she started to contact employees on prolonged sickness absence.

45 Mrs Gorte-Clarke says that she arranged for Ms Fatima Lahai, the compliance manager to contact the Claimant to arrange a well-being meeting.

46 Mrs Gorte-Clarke says that she had a meeting with the Claimant in around January 2016. The Claimant says that the meeting took place in February 2016 with which we will deal with further in due course.

47 At that meeting the Claimant told Mrs Gorte-Clarke about the incident with a customer on 22 May 2015 when he said that he had been verbally abused and spat at and that another colleague had then served the customer. He said that he been off since then with stress. Mrs Gorte-Clarke indicated at that meeting that she would look into the Claimant's concerns.

48 Mrs Gorte-Clarke says that she decided to deal with the matter informally as she was trying to resolve matters with a view to getting the Claimant back to work and because no formal grievance has been raised about the matter. She said the Claimant did not refer to any written grievance. In evidence before the Tribunal the Claimant did not suggest that he had referred to his written grievance during the course of that meeting and did not challenge Mrs Gorte-Clarke's evidence in Tribunal in that regard.

49 Mrs Gorte-Clarke says that during the discussion about the incident the Claimant had referred to Jo Dudman and Mr Ahmad. She had told him that she would make some enquiries and come back to the Claimant once she had made those enquiries.

50 Mrs Gorte-Clarke said that she spoke to Ms Dudman and Mr Ahmad. She did not make any notes of her meeting with the Claimant or her discussions with Ms Dudman or Mr Ahmad. Mr Ahmad indicated in evidence before the Tribunal that he could not be a 100% sure that Ms Gorte-Clarke had investigated the incident with him.

51 Mrs Gorte-Clarke said that the Claimant's account of the incident differed to that given to her by Dudman and Mr Ahmad, the former could not recall the customer spitting at the Claimant and Mr Ahmad described the Claimant feeling unwell which is why he had told him to go home.

52 In evidence before the Tribunal Mrs Gorte-Clarke said that she did not make any notes of any of these discussions because she was dealing with the matter informally, because effectively she took the view the Claimant had raised it informally with her as a part of the well-being meeting.

53 On 4 February 2016, Mrs Gorte-Clarke wrote to the Claimant. She referred to her meeting with the Claimant. She also told him that she had spoken to Ms Dudman regarding the incident and wanted to set up a further meeting with him to discuss her findings. She arranged the meeting for 12 February 2016 at 18:00 hours. That letter is at page 82 of the bundle.

54 The Claimant says that he did not receive the letter of 4 February and suggested that it was fabricated for these proceedings.

55 Both parties agreed that there was only one meeting between them.

56 The Claimant says the meeting between himself and Mrs Gorte-Clarke took place in February. He refers to the visitor's signing in book for February. He refers to an entry for him on 12 February 2016 at page 82(d) of the bundle. It shows him signing in at 19:19 hours and leaving at 19:50 hours. He had signed in to see the compliance officer. Mrs Gorte-Clarke says that she has spoken to the compliance officer and that the Claimant did not see her on that day.

57 There is another entry for the Claimant on 15 February in the visitor's book at page 82(e) of the bundle. He has signed in on that occasion to see the personnel manager and appears to have been signed in at either 12:32 or 13:32 hours until 15:10 hours.

58 Mrs Gorte-Clarke says that she was not in the office on that day 15 February, until 4:30pm. There is a copy of a text from her indicating that she has been held up but she does tell her compliance manager Ms Lahai in that text that if the Claimant shows up to ask him to wait. That text is at page 82(f) of the bundle.

59 Mrs Gorte-Clarke says that she did not have a meeting with the Claimant on 12 or 15 February. She said that employees on sick leave would not sign in to the visitor's book. She said that the security guard would arrange for visitors, suppliers or employees from another store attending a training event, to sign in the book but that all employees even on sick leave would be required to clock in in the usual way.

60 The Claimant's last sick note was issued in late January and said that he would be fit to return to work from 10 February 2016.

61 It seems likely to this Tribunal that the meeting with the Claimant took place in January rather than in February as suggested by the Claimant as both parties agreed that there was only one meeting. The Tribunal will deal with the issue about the authenticity of the letter of 4 February further in its judgment but suffice to say that assuming that letter had been sent then in terms of the sequence of events the meeting with the Claimant must have taken place before that letter was sent in early February.

62 The Tribunal notes that neither Mrs Gorte-Clarke nor the Claimant suggested that there was a further meeting when Mrs Gorte-Clarke reported back from her findings following her enquiries with Ms Dudman.

63 The Respondent says that they did not receive any further sick notes for the Claimant following sick note in January when the Claimant was certified fit to return to work on 10 February.

64 Mrs Gorte-Clarke says that the Respondent made several attempts to contact the Claimant by telephone to discuss the findings from her informal investigation into the incident on 22 May 2015 and in relation to the Claimant's ongoing absence. She indicated in evidence to the Tribunal that attempts were made on 30 March 2016; 13 April 2016 and 12 May 2016.

65 On 23 May 2016, Mrs Gorte-Clarke wrote to the Claimant regarding his absence. In that letter she refers to attempts made to contact the Claimant unsuccessfully. She also refers to wishing to discuss the outcome of the investigation into the incident on 22 May 2015 and look at ways to support the Claimant back to work. In the letter she also indicates that the Respondent has not received any fit notes for the Claimant since January 2016. She asks him to attend a meeting on 3 June 2016 to discuss his unauthorised absence. That letter is at page 83 of the bundle.

66 The Claimant says that he did not receive this letter and says that it was fabricated for these proceedings.

67 The Respondent has produced an extract from their computer showing when the document was created which is noted to be the day after 23 May, namely 24 May as is noted at page 83 of the bundle.

68 Mrs Gorte-Clarke says that the reason that the document was created the day after 23 May was because she started drafting that letter at page 83 of the bundle when she was on night shift on 23 May. She says that she started the letter at 6 minutes past midnight on 23 May as is noted at page 83(a) of the bundle.

69 The Respondent did not receive any response to this letter or any contact from the Claimant.

70 Accordingly on 16 June 2016, Mrs Gorte-Clarke wrote again to the Claimant inviting him to a disciplinary meeting to discuss his unauthorised absence. In that letter she refers to her letter of 23 May. In her letter of 16 June she indicates if the Claimant does not attend the meeting then it may go ahead in his absence and that it could result in his dismissal. The meeting is arranged for 18:00 hours on 24 June 2016. The meeting is indicated to be with Mrs Gorte-Clarke. That letter is at page 84 of the bundle.

71 Mrs Gorte-Clarke says that she realised after sending the letter that she was on leave on that day and that she asked another manager to chair the meeting in her absence.

72 The Claimant attended the meeting on 24 June 2016. He says that neither the store manager nor personnel manager were present and that he then asked for the Duty Manager and insisted that the meeting went ahead.

73 Mr Rabadia says that the Claimant attended the meeting late and that he was waiting for him. He said that he told the Claimant that the store manager had left because the Claimant was late and that he would hold the meeting in his absence.

74 The notes of the meeting are at pages 85-89 of the bundle.

75 At the meeting the Claimant is noted as indicating that he did not receive the earlier letters from Mrs Gorte-Clarke. It is also noted that there was a discussion about the Claimant's unauthorised absence and the Claimant raised the issue about a grievance. Mr Rabadia said that he agreed to adjourn the meeting to speak to Mrs Gorte-Clarke and get an update regarding her findings about the incident. The Claimant says that he thought the meeting had concluded and that it was not a disciplinary meeting.

76 Mr Rabadia says that after the meeting he spoke to Mrs Gorte-Clarke after her return from annual leave at the end of June.

77 Mrs Gorte-Clarke says that following her return from leave that she tried to contact the Claimant again by telephone but did not get any response.

78 On 1 July 2016, the Claimant sent in a letter of resignation. That letter is at page 90-91 of the bundle.

79 In his letter of resignation the Claimant refers to previous allegations of unfair treatment that he felt he had suffered, namely those grievances back in 2014/early 2015. He then refers in detail to the incident on 22 May 2015 but does not indicate that he had put in a written grievance about the incident. He goes on to say that he is fit for work. He refers to his attendance on 12 and 15 February and refers to the meeting with Mrs Gorte-Clarke when he explained the situation and that she had indicated that she would look into the matter and update him. He goes on to indicate that he has received threatening letters regarding disciplinary action being taken against him. In the letter he then goes on to refer to attending at the meeting on 24 June when neither the store manager nor personnel manager were present. He concludes by saying that he has now lost all trust and confidence in the Respondent and considers there is a fundamental breach of contract on their part and he is resigning.

80 The Respondent accepted the Claimant's letter of resignation.

81 In November 2016, the Claimant submitted a claim to the Tribunal. He does not refer to his written grievance in that claim form.

82 The Claimant's written grievance is at page 60 of the bundle. It is handwritten and is dated 22 May. It refers to the incident on 22 May. He alleges that a customer whom he refused to serve due to the Respondent's alcohol policy spat at him and verbally assaulted him but that that customer was served by another assistant. He says that his team leader sent him to the canteen but his manager Ms Dudman came in and then shouted at him in front of his colleagues.

83 The Respondent says that it was not provided with a copy of this written grievance until the disclosure of documents in this case.

Submissions

84 The Respondent's representative submitted that there was not a fundamental breach of contract on the part of the Respondent. He asserted that the Respondent had not received the written grievance and the Respondent had sought to resolve the grievance on an informal basis, but were unable to do so, due to the Claimant's unauthorised absence and the Respondents' inability to be able to contact him.

85 The Respondent's representative submitted that the Tribunal should prefer the Respondent's evidence in relation to the evidence about the written grievance and the attempts by the Respondent to contact the Claimant, particularly in relation to the correspondence. In that regard they referred to various facts and evidence in support of their contentions.

86 The Respondent's representative accepted that the Respondent had not dealt with this matter particularly well, but that it did not amount to a repudiatory breach of contract.

87 Finally, the Respondent's representative submitted that there could be no criticism of the Respondent after the meeting in early 2016 because of the actions taken by them. He submitted that any breaches which might have occurred prior to that

had been accepted by the Claimant and that he had effectively affirmed the contract in the meantime.

88 The Claimant's representative submitted that there was a fundamental breach of contract and submitted that it was of the implied term of trust and confidence. He submitted that he had filed a written grievance and that the Respondent's failure to deal with his grievance was a breach of contract. He said that the last straw was being asked to go to a meeting regarding his unauthorised attendance and threatened with disciplinary action and then attending the meeting when the manager did not do so.

89 The Claimant's representative produced a bundle of cases at the conclusion of the case which initially he indicated he wanted to refer to and rely on. However, he then accepted that a number of those cases did not deal with the issues in this case because they dealt with issues relating to compensation in unfair dismissal cases and issues in other jurisdictions. The Tribunal agreed with the Claimant that it would review all the other cases that may be relevant to the issues in this case.

Conclusions

90 This Tribunal reminded itself that the burden of proof in cases of constructive unfair dismissal is on the Claimant.

91 This Tribunal will first deal with the issues of evidence and in particular the disputed evidence that has arisen in this case.

92 On balance, this Tribunal finds that the written grievance at page 60 of the bundle was not provided to the Respondent until these proceedings commenced and therefore after the Claimant's employment had ended. We make those findings for the following reasons:-

- 92.1 The Claimant was clearly aware of the grievance procedure; he did not dispute that he had seen the policy. Furthermore he had written a number of grievances earlier that year and the previous year.
- 92.2 This Tribunal finds it surprising and highly unlikely that the Claimant would not have referred to the written grievance at any stage during discussions or correspondence about this matter whilst he was still employed with the Respondent. In particular he does not suggest he referred to it during the telephone conversation with Ms Mansfield; the meeting with Elizabeth Gorte-Clarke nor does he refer to it in his letter of 20 July 2015 when he refers to the incident and non payment of his sick pay nor significantly does he refer to it in his letter of resignation. Furthermore he did not refer to it at all in his claim form when these proceedings were issued.
- 92.3 This Tribunal accepts the evidence of Mr Ahmad which we found to be clear and credible on this point. We consider that his account of the events are more likely to be credible as on both parties' evidence the Claimant was upset. This Tribunal considers that the Claimant would have been unlikely to have been in a position to write such a detailed

account of what happened in relation to the incident as is set out at page 60 of the bundle.

93 On balance, we also find that the letters of 4 February and 23 May 2016 were produced by the Respondent and sent to the Claimant. We find this for the following reasons:-

- 93.1 The Claimant says that he did not receive those letters and argues that they were fabricated for these proceedings.
- 93.2 We note that the Claimant has in the past disputed receiving correspondence from the Respondent dating back to 2014. Numerous letters have been sent to him by Respondents, following apparent attempts to contact him by telephone.
- 93.3 We have been provided with documentary evidence (p.83(a)) showing the date and time when the letter of 23 May was created, albeit we have noted it was created a day later. Mrs Gorte-Clarke's explanation of the time delay is credible. This Tribunal found her evidence on this issue and generally to be credible and consistent with the documentary evidence. On the basis, that there is clear documentary evidence that the letter of 23 May was created we find on the balance of probabilities that it was therefore more likely that all of the letters were created and sent as indicated by the Respondent to the Claimant.
- 93.4 The Tribunal notes that the subsequent letter that, the Claimant accepts he received, refers to the letter of 23 May which is again consistent with the fact that it was created and sent to the Claimant around that time.
- 93.5 The Claimant's suggestion about two of the letters being fabricated for these proceedings is not credible, as at that stage the Respondent could have had no idea that the Claimant was considering resigning and claiming constructive dismissal.

94 On the basis that this Tribunal finds that the written grievance was not made at the time of the incident nor during the Claimant's employment and that we find the correspondence, in particular the letters of 4 February 2016 and 23 March 2016 were sent by the Respondent, it follows that we find that the Respondent did not fail to investigate and/or deal with the Claimant's grievance.

95 On the contrary, the Respondent did after early 2016 deal with these issues as an informal grievance. The Tribunal accepts Mrs Gorte-Clarke's evidence which I found to be credible. She made attempts to investigate the matter on an informal basis and as is supported by correspondence attempted on various occasions to contact the Claimant by telephone and in correspondence to meet with him to report the findings of the outcome from her investigation into that informal grievance. The Tribunal finds that the only reason why the Respondents were unable to report back their findings to the Claimant is because he was on unauthorised absence from his employment and was failing to respond to any communication from the Respondent.

96 The Tribunal went on to consider whether there could have been a breach of contract of the implied term of trust and confidence, when the Respondent failed on to deal with the Claimant's grievance which was raised informally with them in June 2015 and upon which, although they may have been some investigation, but upon which they did not report back to the Claimant. This Tribunal considers that that failure could have amounted to a breach of the fundamental term of trust and confidence. We cannot say any more than could, because we accept Ms Mansfield's evidence that she attempted to investigate the matter, but there does not appear to be any evidence that she made any attempts to communicate those findings to the Claimant, albeit that at that stage again he appeared to be on unauthorised absence and was again failing to make contact with the Respondent.

97 However, in any event it is clear that the Claimant effectively accepted any breach at that stage and affirmed the contract of employment in the meantime.

98 He remained in employment for at least a further year, continued to receive sick pay for at least another nine months and then also raised this issue again with the Respondent effectively asking them to investigate the matter early 2016 on his own evidence. All of these actions are consistent with him accepting any breach and waiving his rights, thereby affirming the contract of employment.

99 Accordingly this Tribunal does not consider that there was any breach of the implied term of trust and confidence in relation to the Claimant's allegation that the Respondent failed to investigate and/or deal with his grievance.

100 Equally, the Tribunal does not find that the Respondent's invitation to the Claimant to a disciplinary meeting to discuss his unauthorised absence did or could amount to a breach of contract. We note that the Claimant's own evidence on this issue is unclear. In his letter of resignation, he referred to threatening letters, yet his evidence to the Tribunal was that he only actually received one letter threatening disciplinary proceedings at this stage, because he says that he did not receive the letter of 23 May. In any event, the actions taken by the Respondent in this regard is what any reasonable employer would do when an employee has been on unauthorised absence for as many months as the Claimant had been. Furthermore, it could not be a breach of contract, because the Respondent were effectively following their own policy on unauthorised absences by employees. The fact that the meeting was ultimately not held by the manager who as initially allocated to hear the meeting did not amount to a breach of contract. The Claimant could not complain about who actually held a disciplinary meeting to which he was invited, unless there was some issue about bias which has not been raised by the Claimant at any stage during his evidence. Further, this particular manager was in fact previously allocated to hear another disciplinary meeting with the Claimant on the same issue of unauthorised absence in the past.

101 Accordingly this Tribunal does not consider that there has been any breach of the implied term of trust and confidence which would entitle the Claimant to resign from his employment.

102 On the contrary the Tribunal does have concerns about whether it was in fact the Claimant who was in breach of contract, bearing in mind that he has been on unauthorised absence for at least four months before he resigned from his employment.

103 For those reasons the Claimant's complaint of constructive unfair dismissal is not well-founded and is hereby dismissed.

.....
Employment Judge Martin

26 June 2017