



EMPLOYMENT TRIBUNALS

Claimant: Mr E Wolstenholme

Respondent: Lancashire Football Association Limited

HELD AT: Manchester

ON: 27 and 28 January
2021

BEFORE: Employment Judge B Hodgson (sitting alone)

REPRESENTATION:

Claimant: Mr T Gilbert, Counsel

Respondent: Mr C Peel, Consultant

RESERVED JUDGMENT ON LIABILITY

The Reserved Judgment of the Tribunal on liability is that

- 1 by consent, the claim of wrongful dismissal is dismissed upon withdrawal
- 2 the claim of constructive unfair dismissal is not well-founded and is dismissed

REASONS

Background

1. By an ET1 claim form presented on 7 June 2019, the claimant brought complaints of unfair dismissal and wrongful dismissal (notice pay). Both claims were denied by the respondent
2. With the agreement of all parties, the hearing proceeded by way of remote video platform (CVP) as indicated by "Code V" in the heading of the action
3. At the outset of the hearing, it was confirmed on behalf of the claimant that he was not pursuing the claim of wrongful dismissal and that he was accordingly consenting to its dismissal
4. The parties indicated that, given the time allocated to the hearing and the extent of the evidence to be called, they were jointly of the view that the hearing should initially be limited to the question of liability only with a separate remedy hearing to follow if that proved necessary. In the circumstances, the Tribunal agreed this as the way forward

Issues

5. The parties had prepared a draft list of issues, which the Tribunal considered and discussed with them, as follows:
 - 5.1. *It is not in dispute that by a letter dated 18 April 2019, the claimant resigned from his employment with the respondent without notice*
 - 5.2. *What was the most recent act (or omission) on the part of the respondent which the claimant says caused, or triggered, his resignation? The claimant says it was the respondent's handling of the grievance process, namely:*
 - 5.2.1. *the respondent's failure to provide documents*
 - 5.2.2. *the respondent's failure to produce Iain Kay for questioning during the grievance procedure*
 - 5.3. *Has the claimant affirmed the contract since those acts or otherwise waived any breach resulting from those acts?*
 - 5.4. *Were the failures to provide documents and Iain Kay for questioning in themselves repudiatory breaches of the implied term of trust and confidence?*
 - 5.5. *If not, were the failures to provide documents and Iain Kay for questioning nevertheless a part of a course of conduct comprising of several acts (or omissions) which, viewed cumulatively, amounted to a repudiatory breach of the implied term of mutual trust and confidence, to which breach the failure to provide documents and Iain Kay for questioning contributed something that was not utterly trivial? The claimant relies upon the following alleged acts as forming part of that course of conduct:*

- 5.5.1. *Simon Gerrard requested that the claimant undertake additional duties in the discipline department in addition to his existing role of referee consultant*
- 5.5.2. *Simon Gerrard asserted that if the claimant did not agree to perform the additional duties, he would be subject to disciplinary action*
- 5.5.3. *dishonesty shown during the grievance including obfuscation by the original chair of the grievance procedure by withholding the true facts about the conversation(s) with David Burgess*
- 5.5.4. *a deliberately and wilfully prolonged grievance procedure*
- 5.5.5. *behaving in this manner when the claimant was suffering from significant health concerns*
- 5.6. *If yes, did the claimant resign in response, or partly in response, to that breach/those breaches?*
- 5.7. *If the claimant was dismissed, does the respondent show a potentially fair reason for that dismissal? [this draft issue subsequently fell away when the respondent's representative in his final submissions confirmed that he was not pursuing any such contention]*
- 5.8. *If yes, in dismissing the claimant, did the respondent act reasonably or unreasonably in all the circumstances of the case? [see above]*
- 5.9. *If the claimant was unfairly dismissed, did the claimant contribute to that dismissal such that it would not be just and equitable to award the claimant compensation?*
- 5.10. *If the claimant was unfairly dismissed, should any compensation be reduced by up to 25% due to the claimant's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?*
- 5.11. *If the claimant was unfairly dismissed, should any compensation be uplifted by up to 25% due to the respondent's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?*
6. The claimant's representative indicated that he was seeking to refine the draft list by extending the references above to Simon Gerrard to include, in the alternative, "the respondent". The respondent's representative was not in agreement and it was agreed that this question would be left over to the end of the evidence, to be considered further in submissions. The Tribunal's subsequent view, following discussion with the parties' representatives, was that, on the facts, the Tribunal should consider the respondent as included more widely, rather than only Mr Gerrard, in the alleged course of conduct
7. On its preliminary reading of the papers, the Tribunal accepted this as an appropriate list of the issues as they appeared likely to arise

Facts

8. The parties had agreed a bundle of documents (which, with agreement, was extended to incorporate 218 pages) and references in this judgment to numbered pages are to pages as numbered in such bundle
9. The claimant gave evidence on his own behalf and also called as a witness Mr David Burgess, a former Chief Executive of the respondent. The respondent called as witnesses: Mr Simon Gerrard; Mr Iain Kay; Mr Philip Brown; Mr Craig Howard; and Mr Roger Haydock – all of whom are current employees or officers of the respondent
10. The Tribunal came to its conclusions on the following facts – limited to matters relevant or material to the issues - on the balance of probabilities having considered all of the evidence before it both oral and documentary
11. The operation of the respondent is perhaps self-explanatory from its title and its structure is illustrated by an organisation chart (prepared during the period 2013 – 2015) as set out at page 91
12. The claimant has a long history of being associated with the respondent, having spent a number of years as a professional referee at the top level of Association Football. More latterly he took up direct employment with the respondent in 2004, as a Referee Development Officer, then from 2008 as a Referee Development Manager which later moved to a part-time role, working 20 hours per week, as set out in a written statement of terms and conditions of employment dated 1 July 2012. A copy of this Agreement is at pages 34 – 38 and, although the copy produced is unsigned, is accepted by both parties as setting out the terms upon which the claimant was employed at that time
13. The claimant's position was further varied in 2013 to the role of Referee Consultant working 10 hours per week. This timing ultimately was accepted by both parties although the claimant, up until the hearing and indeed after starting to give his evidence, was previously insistent that this variation had been effected in 2015. The specific terms of that variation, and the terms therefore upon which the claimant was employed at the time of the events in question, remained an issue between the parties however and this is addressed later within this judgment
14. In the early part of October 2018 the claimant had indicated in discussions both with his Line Manager, Iain Kay and the Chief Executive, Simon Gerrard, that, although he was contracted to work and be paid for 10 hours per week, he had limited work to do which could be completed within 2 to 5 hours per week dependent upon the time of year and that even this was work that could be covered by colleagues
15. Mr Kay followed this up with the claimant to discuss what other tasks he could perform to make use of his spare capacity. One possible option discussed, albeit in very general terms, was a League Ambassador role
16. Separately, an email was circulated on 17 October 2018 (with the Chief Executive's agreement) by the respondent's Discipline Manager (addressed to all staff - "All Lancashire FA") seeking additional support for her department. This was asking for short-term ("about 6 – 8 weeks") assistance to clear an administrative backlog and involved essentially a variety of football related administrative tasks (see page 79)

17. On or about 19 October, Mr Kay and Mr Gerrard discussed the claimant's situation and one possible option raised – viewed as more urgent than the creation of an ambassador role - was the prospect of using the claimant's spare time to assist the Discipline Manager as had been requested. At a subsequent meeting, also involving the Discipline Manager, it was agreed that Mr Kay would propose this to the claimant as a way of using his surplus contractual hours to benefit the Association
18. Mr Kay met with the claimant on 23 October and put this proposal to him. The claimant immediately reacted badly and the discussion did not progress to what precisely might be involved or the time-scale, the claimant not having had sight of the original email
19. Mr Kay followed the meeting up with an e-mail of the same day setting out more detail of what the additional support would involve (page 81). The email ends by stating: "if you can let me know your position on this and we can go from there". It was accepted by the claimant in his evidence to the Tribunal that he appreciated that what was being proposed was a "top-up" to, as opposed to a variation to or replacement of, his existing role (which would continue unchanged), to make use of the spare hours he had available
20. Mr Kay himself had been uncertain how this would be received by the claimant (as shown by his email exchange with the claimant later that same day – page 82)
21. The claimant responded formally by email to Mr Kay dated 24 October (page 80). He expressed in forthright terms his reaction to what he perceived to be an insulting proposal. Having summarised his working experience, he ends the email by stating: "Thank you for your job offer but it is not something I can accept or indeed would be suited for at this stage of my working life. I will continue in my present role until management dictates otherwise. Please note that I am no longer prepared to even consider a change to my current contract in any way whatsoever due to the reasons above". This was copied in to the Chief Executive
22. The claimant subsequently forwarded his email to Mr Haydock, the Chair of the respondent's Board of Directors (see pages 83 – 84). In his covering email, he states that "the longer I have had to reflect on Iain's offer, the greater my disappointment and disdain grows for an organisation which I have served loyally, in some capacity, for over 42 years: Referee, Appointments Officer, Referee Development Officer and Referee Manager." Having referred to his recent job history, he ends his email by stating: "Thank you for the job offer but I am sure you will understand, given the circumstance, that I am no longer prepared to consider a change to my current contract terms."
23. Mr Kay responded by email of 26 October (see pages 85 – 86). There appears to have been an understanding by Mr Kay that the claimant may be suggesting that he was not in fact an employee – this arose out of the claimant's job title of "consultant" but is a non-point as it was subsequently clarified by the claimant that at no point had he been asserting this. Mr Kay did however indicate that the latest contract of employment he had been able to locate in the claimant's file is that dated 1 July 2012 (at pages 34 – 38 as referred to above) and invited the claimant to forward a copy of his more recent contract
24. Mr Kay goes on to state:

"As your employer, we do have the right to request that you carry out reasonable, alternative work, should your normal work diminish.

Management does not have scant regard in your ability to add value to the organisation.

You are merely being asked to carry out a reasonable request and as an employee, reasonable alternative work is expected from you.

Please note that my request is not a change to your contract of employment.

Thus I would urge you to reconsider your statement that the 'job offer but it [sic] is not something I can accept or indeed would be suited to at this stage of my working life. I will continue in my present role until management dictates otherwise.'

Failure to comply with reasonable management requests may result in formal disciplinary action."

It goes on to invite the claimant, if he has a "legitimate and valid grievance", to raise it through the respondent's formal process

25. The claimant replied by e-mail dated 28 October (see pages 87 – 88). He advised that he had now "engaged an employment law solicitor" to advise him "throughout these negotiations". He explained how the then Chief Executive and Chairman, Mr David Burgess and Mr Brett Warburton respectively, had drawn up a new contract for him in 2015 and that, although he himself did not have a copy, the respondent should hold the document
26. The claimant subsequently raised a formal grievance by letter dated 9 November (pages 89 – 92 including attachments) addressed to Mr Haydock. In the intervening period of approximately two weeks, there had been no further discussion between the parties on the matter, whether in terms of taking up the additional duties or any possible disciplinary action, and the claimant had continued in his role as before
27. The claimant's grievance letter states that: "I believe that Simon [Gerrard]'s actions are in breach of the express terms and implied terms of my contract of employment. For the avoidance of doubt, I believe I am an Employee of the Company and have never suggested otherwise." The breaches are said to be "Simon Gerrard via Ian Kay requested that I undertake additional duties ..." which was "confirmed in writing by Iain Kay as instructed by Simon Gerrard" and also that "Simon has asserted that if I do not agree to the additional duties I will be subject to disciplinary action."
28. Having summarised the circumstances of his most recent contract variation, the claimant invites the respondent, in the absence of any copy of his written contract, to raise the matter with those involved at the time (Mr David Burgess and Mr Brett Warburton) who would "confirm that it was never a term of my employment that I would undertake the additional duties the Company is now requesting that I undertake for the Discipline Department." He states that "I believe Simon's request is a fundamental breach of the express terms of my employment contract. In addition, I believe that the intended change to my contract, the threat of disciplinary action and Simon's actions towards me are a fundamental breach of the implied term of mutual trust and confidence" – finding his [Simon's] request to be "totally unreasonable, insulting, humiliating, degrading and feel that he has undermined my position at the company"

and noting that "there are more junior assistants at the Company that could take on these tasks."

29. The claimant then goes on to state that : "I feel that the Company's actions referred to above amount to a breach of the express terms and or implied terms of my contract. The breaches are sufficiently serious to constitute a repudiatory breach and I reserve the right to resign and claim constructive dismissal."
30. Unfortunately, out of the blue, the claimant suffered a serious cardiac arrest on 26 November and was admitted to hospital. He was subsequently absent from work due to ill health through until March 2019
31. Correspondence on the grievance continued however through the claimant's solicitors and it was agreed that a grievance hearing would proceed, with the claimant in attendance, on 22 January 2019. It was further agreed that, especially given the circumstances of his health, he could be accompanied by a friend, Mr Paul Martin (the various exchanges, which are not contentious, are at pages 94 – 103)
32. The grievance meeting went ahead as arranged on 22 January. It was conducted on behalf of the respondent by Mr Philip Brown, a Board Member. A note taker was present but the meeting was also recorded. A full note of the meeting is at pages 104 – 114
33. Mr Brown subsequently wrote to the claimant, rejecting his grievance, by letter dated 13 February (pages 116 – 118). The essential basis of the reason for rejection was the somewhat technical point that the grievance had effectively raised a number of allegations against the Chief Executive, Mr Gerrard, but that the decisions in question had in fact been taken by the claimant's line manager, Mr Kay. In substance, however, the conclusion was that the request to carry out the additional duties was a reasonable one and would have been permitted within the provisions of Clause 40 of the claimant's contract - the reference to disciplinary action being simply a reference to what action may be possible pursuant to the respondent's disciplinary policy. The letter confirmed the claimant's right to appeal
34. In light of what had been said concerning his contractual situation, the claimant spoke to Mr Burgess on this matter and Mr Burgess followed up this call with a confirmatory email of 14 February (page 119). He states, after setting out his recollection of the claimant's most recent role: "As I remember the T&C's were agreed around May 2015 after discussions as to what your ongoing role would be within LFA."
35. By two letters, both dated 18 February and addressed to Mr Craig Howard, the claimant appealed the grievance outcome (pages 120 and 121 – 122). The first letter attached the e-mail from Mr Burgess of 14 February
36. The appeal was acknowledged by Mr Howard by letter dated 28 February (page 123) and the appeal hearing was arranged to take place on 8 March. Mr Brown summarised the claimant's grounds of appeal as follows:
 - The 'missing' Employment Contract including Terms and Conditions and their significance

- In the absence of the above contracts, the failure and unwillingness of the Company's Officers to try to obtain clarification as to what was in those Contracts by contacting the architect of the said Contract
 - The Companies [sic] over reliance on Iain Kays evidence without you having the opportunity to ask him for clarification which you deem is detrimental to your case
 - The email you have provided from David Burgess
37. The appeal hearing went ahead on 8 March as scheduled, conducted by Mr Howard, and the claimant again attended accompanied by his friend Mr Martin. Notes of the meeting were taken and it was also recorded. A minute of the content is set out at pages 127 – 130
 38. Mr Howard was asked by both the claimant and Mr Martin whether any contact had been made by the respondent with Mr Burgess and the reply was that it had not, so far as he was aware
 39. The hearing was adjourned at the claimant's request on the basis that he had been "seriously prejudiced" by the respondent's failure to produce his contract or contact Mr Burgess or Mr Warburton. Also, the failure to allow Mr Kay to attend to be questioned confirmed to the claimant that the respondent was "not acting in good faith in determining a fair outcome of my appeal"
 40. The claimant followed up the adjourned meeting with a letter dated 13 March (pages 132 – 133). He advised that, having taken legal advice, he was prepared for the hearing to be reconvened contingent upon two conditions being met: firstly, that the respondent speak to Mr Burgess and, secondly, that Mr Kay attend to answer questions from the claimant. He also referred to the arrangements towards his potential return to work
 41. Mr Howard responded by letter dated 15 March (pages 134 – 135) stating that the two conditions would not be met and asking whether, in those circumstances, the claimant was prepared to have the meeting reconvened. Mr Howard states within the letter that "for the sake of clarity, I will not be discussing your employment with any ex-employee of the business." He advised also that he would not personally be involved in the claimant's return to work
 42. In the interim, the claimant had been signed fit to return to work by his GP from 1 March, subject to "workplace adaptations", the note stating: "Can return to work to ensure stress management strategies are in place. Encouraged patient to discuss this with employer". The note was forwarded by the claimant to Mr Gerrard under cover of letter dated 1 March (pages 124 – 125)
 43. Mr Kay followed this up with a letter dated 12 March (page 131). He set out proposed arrangements for a phased return, looking to meet up with the claimant for further discussion that week. A return to work meeting was arranged for 20 March which went ahead. The claimant had prepared some questions and noted the answers he received (page 143). Mr Kay produced detailed notes of the content of the meeting (pages 140 – 142)
 44. The role of the claimant going forward was discussed. It was explained to him that the potential issue of his assisting the Discipline Department was closed given the

temporary nature of that request and the passage of time. The respondent was in the process of updating its contracts generally and the claimant wished to see the proposed wording of his contract before committing himself to anything. There was also discussion around the support the respondent may be able to offer the claimant to facilitate his return to work. There was accordingly no actual final decision as to the timing or precise basis upon which the claimant would return

45. The evidence of the claimant to the Tribunal as to his state of mind at and following this meeting was clear – "my intention was to continue working at that point"
46. The claimant wrote to Mr Howard the following day, 21 March (pages 136 – 137), setting out his position on the appeal hearing process. He indicated that he was prepared to attend a reconvened meeting despite not agreeing with the stance adopted by Mr Howard on the two issues he had raised. He asks why, given what he had been told by Mr Kay at the return to work meeting about the Discipline Department assistance, his grievance had been rejected and that position not confirmed in the grievance outcome. The letter culminates with the following:

"The way that the LFA has handled the grievance process and the way it continues to do so is appalling and it has had a serious detrimental impact on my health. The LFA have acted in an unreasonable manner during this process and lied. I believe the LFA's actions are a fundamental breach of contract, it has made my position untenable and I reserve the right to resign and claim constructive dismissal. I look forward to hearing from you."
47. Mr Howard responded by letter dated 27 March (pages 138 – 139) proposing a reconvened date of 1 April which was later changed by agreement to 12 April. He advised that "one of my Board colleagues had now spoken to Mr Burgess" and "whilst he recalls your terms changing in late 2015, he cannot remember if a new written contract was created to reflect these changed terms". The colleague in question was Mr Brown. Mr Howard confirmed that Mr Kay would be released from his duties to facilitate his attendance at the appeal hearing but was under no obligation to attend if he did not wish to do so
48. Addressing the question of what the claimant had referred to as "junior tasks", the letter states: " ... you had stated that you had insufficient duties to fill your contracted hours and as such, the suggested additional duties were put forward as an option. There was never an imposition and as your reaction to the option was very negative there was never an intention to take this further."
49. By email exchange dated 27 March (page 144), Mr Howard offered Mr Kay the opportunity to attend the appeal hearing but Mr Kay declined on the basis that, having been told he was under no obligation to do so, he did not "wish to be a pawn between the grievance and my employers" and that the situation had caused him and his department "enough stress and disruption"
50. By email dated 2 April (see page 147), the claimant confirmed that the hearing could be reconvened and repeated his request that Mr Kay be in attendance
51. On 3 April, Mr Burgess emailed the claimant confirming his conversation with Mr Brown (pages 217 – 218). He said that he had told Mr Brown that "I couldn't 100% confirm or deny you had been given a revised contract" but would have expected one to be on record

52. Mr Howard responded by letter dated 5 April confirming the date of the reconvened appeal hearing as 12 April (pages 149 -150) and that Mr Kay did not wish to attend, enclosing a copy of the 27 March email exchange. He invited the claimant to put any points he wished to raise with Mr Kay in writing and "I will fully review them as part of my investigation prior to making my final decision regarding your appeal."
53. The claimant repeated his position that Mr Kay should be in attendance by email dated 9 April (pages 151 – 152). He requested that Mr Howard have with him at the meeting all interview notes with Mr Kay and an agenda
54. By response of the same day, 9 April, Mr Howard confirmed there were no formal interview notes with Mr Kay and again invited the claimant to put his points in writing for production at the hearing. He advised there was no agenda (pages 153 – 154)
55. The reconvened appeal hearing proceeded as arranged on 12 April. Notes of the meeting, which were taken by hand and subsequently typed up, were produced to the Tribunal (pages 155 – 161)
56. In the meeting, Mr Howard outlined what he been told by Mr Brown of his discussion with Mr Burgess (see page 155). Later in the meeting (see page 158), it is recorded that "since the last meeting there had been a board meeting and he [Mr Howard] had asked [Mr Brown] to speak to [Mr Burgess]. [Mr Brown] did so and [Mr Howard] had disclosed to [Mr Martin] and [the claimant] what [Mr Burgess] had said." When challenged on this entry in cross-examination, Mr Howard stated that this was an inaccurate record and that Mr Brown had spoken to Mr Burgess on his own initiative despite the respondent having taken the view that it was inappropriate to do so for reasons of data protection restrictions. Mr Howard had not been aware of this conversation at the first hearing when he had told the claimant that nobody at the respondent had spoken to Mr Burgess so far as he was aware. The Tribunal accepts the evidence of Mr Howard in this regard. Mr Howard gave his evidence in a straightforward and credible manner and readily acknowledged that he had not previously noted this part of the minute. It does not tally with Mr Brown's recollection of having spoken to Mr Burgess off the cuff in the course of a separate conversation on other matters which he had then reported to Mr Howard. Mr Burgess, in his own evidence, confirmed that the discussion did take place in the context of a wider discussion about unconnected football-related issues. The Tribunal's conclusion therefore is that the respondent was honest with the claimant in what it revealed to him concerning contact with Mr Burgess and its timing
57. Prior to being notified of the outcome, the claimant tendered his resignation, with immediate effect, by letter dated 18 April addressed to Mr Gerrard (pages 162 – 163). The letter states:

"The reasons for my resignation are set out in my grievance letter dated 9th November 2018 and my statement which was read out at the appeal hearing on 12 April 2019, a copy of which is enclosed.

[The enclosed statement reads: "Disappointingly, I believe that all these actions are a serious breach of trust: continued failure to produce documents and not Iain Kay for questioning does not give me any assurance that the Company is genuine in its efforts to resolve the grievance fairly. This only serves to convince me that the Company continues to make my position untenable and on that basis the Company has made it impossible for me to return to work"]

Throughout the grievance procedure, your officers have repeatedly lied about their contact with witnesses, the same Officers have also rejected my request for Iain Kay to attend the hearings as a witness. There has been obfuscation by the original Chair of the Grievance Procedure by withholding the true facts about his conversation with a key witness, David Burgess. Your officers have deliberately, and I believe wilfully, prolonged a grievance procedure, about a change to my duties that they now say, 5 months later, that they had no intention of pursuing, all of this at a time when my health was at a low ebb following major surgery for cancer and heart related problems following a heart attack.

I have now lost all trust and confidence in the Officers of the Company and the Company and, as a result, this has made my position untenable and wholly incompatible for a return to work.

I believe the Company's actions as referred to above, in my grievance letter and my statement are either individually or cumulatively a fundamental breach of the implied term of trust and confidence entitling me to resign and claim constructive unfair dismissal.

The above matters are well documented in Emails, Letters, and Transcripts of meetings already in your possession."

58. Subsequent events are not relevant to the issue in that they post-date the claimant's resignation and accordingly are dealt with shortly by the Tribunal in these findings of fact. The appeal was later rejected by Mr Howard, confirmed by letter dated 24 April (pages 164 – 165). The respondent's Chairman, Mr Haydock, by letter also dated 24 April (page 166) offered the claimant a meeting to give Mr Haydock "the opportunity to discuss these issues with a view to your potentially reconsidering your position." The claimant agreed to meet but indicated that he was not prepared to reconsider returning to employment with the respondent (page 167). A short meeting ensued on 10 May (notes at pages 168- 169) but was not constructive in resolving matters between the parties

Contract of employment

59. As noted, there was an issue between the parties as to the existence or otherwise of a written contract of employment to reflect the change in the claimant's employment which the Tribunal had to determine
60. There was ultimately agreement between the parties that the claimant's job role had been varied in 2013, specifically in respect of his hours of work and his duties
61. Throughout the internal process, the claimant made frequent, insistent and consistent reference to his having signed an amended version of his 2012 contract in 2015. This stance continued through into his giving his evidence to the Tribunal.
62. The claimant had himself produced a note prepared at the time of the proposed restructuring of the department in which he worked (page 59) which indicates the reduction from 20 to 10 hours to take effect from 1 July 2013. The claimant's evidence in cross-examination was that this was a clerical error, a typo. After an early break in his evidence however, he confirmed that, having checked other paperwork in his possession, he now accepted that the change had been made in 2013. He had no explanation for why that simple check had not been possible at any earlier stage.

Whether the variation occurred in 2013 or 2015 is not directly material to the issues before the Tribunal. It does however go to the credibility of the witnesses and the non-production of the contract was a material part of the claimant's case

63. The respondent's position throughout has been that it has carried out a thorough search to locate a copy of the alleged contract, both physically and electronically, but there is no trace of it. The Tribunal accepts that evidence – this has been the respondent's consistent position in contrast to the claimant's changing position
64. The claimant's earlier contract dated 1 July 2012 has been produced (pages 34 – 38). It is said to be in the respondent's standard format. The contract of Mr Kay dated 24 October 2016 (therefore post-dating the claimant's variation) has also been produced (pages 49 -53). This is essentially in exactly the same, standard, format as the claimant's earlier contract and illustrates that the respondent's standard format remained unchanged at that point
65. The point of contention between the parties as to the content of the contract centres on clause 40. This is a standard term which states:

"We reserve the right to make reasonable changes to any of your terms of employment. You will be notified in writing of any change as soon as possible and in any event within one month of the change"
66. Reference was made to that term in Mr Brown's grievance outcome letter of 13 February 2019 (see page 117). The claimant immediately spoke to Mr Burgess (the Chief Executive at the time) who set out his recollection in an email dated the following day 14 February (page 119 – the relevant content of which is set out above). The Tribunal finds it improbable in the extreme that in such discussion, if clause 40 had been recognised as an issue, it would not have been raised by the claimant with Mr Burgess or responded to by him
67. Clause 40 is further referred to in the grievance appeal hearing on 12 April (see page 161) at which point Mr Martin had to explain to the claimant what clause 40 was
68. Mr Burgess was called as a witness in these proceedings. His evidence concerned principally the variation of the claimant's contract of employment at the time he had been Chief Executive
69. In his witness statement, accepted as his evidence in chief, Mr Burgess reiterates the position that the new contract was entered into in 2015. He accepted in cross-examination that this was wrong (after having heard the concession to that effect by the claimant) and that he had indicated this date because it was the date the claimant had told him was accurate
70. There is no mention in Mr Burgess' witness statement of clause 40. It is not mentioned in his email of 14 February (referred to above) when asked by the claimant to set out his recollection in the context of the respondent having specifically referred to clause 40. He did not mention it at any point in his discussion with Mr Brown in March 2019 and could not in fact recall whether a written contract had been entered into at all at that point. Mr Burgess himself confirmed this to be the extent of his recollection in the email he sent to the claimant on 3 April (pages 217 -218)

71. In cross-examination, however, Mr Burgess testified that he had suddenly remembered when the claimant's terms were being discussed in the course of the claimant's evidence, that he had been expressly asked by the claimant to delete clause 40 from the claimant's new contract and that was what he, Mr Burgess, had done. The Tribunal found the evidence of Mr Burgess to this effect to be utterly lacking in any credibility. Mr Burgess had no sensible explanation for why he had suddenly recalled the specific deletion of a standard clause, said to have happened in 2013, when up to that point he had not been able even to recall whether a formal written contract had been prepared despite being specifically asked as to his recollection of the events in question. His evidence in his respect is accordingly totally rejected by the Tribunal
72. Assessing the evidence before it, the Tribunal's conclusion overall is that the claimant's terms of employment, as set out in the July 2012 contract, were varied in 2013 to reflect a change to his hours of work (and therefore pay) and his duties. This variation will have been recorded, either by an addendum to or rewrite of his existing terms but the terms otherwise would have remained unchanged

Law

73. The claimant has a right not to be unfairly dismissed (section 94 of the Employment Rights Act 1996 ("ERA")) and, for the purposes of the relevant Part of the ERA, under section 95(1)(c) of the ERA, an employee is dismissed if ... the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct
74. In ***Kaur v Leeds Teaching Hospitals NHS Trust*** [2019] ICR 1 it was reaffirmed that an employee who is the victim of a continuing cumulative breach of the implied term of trust and confidence is entitled to rely on the totality of the employer's acts, notwithstanding a prior affirmation of the contract, provided the latter act or acts form part of the series and the following five questions were identified to be asked in such a case:
- 74.1. What was the most recent act (or omission) on the part of the employer which the employer says caused, or triggered, his or her resignation?
- 74.2. Has he or she affirmed the contract since that date?
- 74.3. If not, was that act (or omission) itself a repudiatory breach of contract?
- 74.4. If not, was it nevertheless a part (applying the approach explained in ***Waltham Forest v Omilaju*** [2005] ICR 481) 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 ...)
- 74.5. Did the employee resign in response (or partly in response) to that breach?
75. The approach referred to in the ***Waltham Forest*** case is that the alleged last straw must contribute however slightly, to the breach of trust and confidence. It may be relatively insignificant but must not be utterly trivial. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but

mistakenly, interprets the act as hurtful and destructive of his or her confidence in their employer

76. Reference to the **Malik** term is to the case of **Malik v Bank of Credit and Commerce International SA [1997] UKHL 23** in which the following was stated:
- 76.1. The implied obligation extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee
- 76.2. The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to ;look at all the circumstances

Submissions

77. The respondent's representative made oral submissions, summarised as follows
78. Despite assiduous searches, no contract after 2012, from either 2013 or 2015, had been able to be located. The Tribunal should reject the evidence of the claimant and Mr Burgess in this regard and find that no such contract was completed
79. The request to carry out additional administrative duties was not an attempt to vary the claimant's terms and conditions of employment and amounted to a reasonable request given the claimant's willingness to offer to do additional work
80. There was no repudiatory breach arising from the respondent's reference to possible disciplinary action
81. There was no dishonesty in the conduct of the respondent in regard to discussion with Mr Burgess
82. If there was any unnecessary prolongation of the grievance process, this was attributable to the claimant rather than the respondent
83. There was no requirement to produce Mr Kay as a witness during the grievance process either within the respondent's own policy or the ACAS Code and not to do so was not an unreasonable step on the part of the respondent
84. The actions of the respondent amounted neither to a repudiatory breach or part of a series
85. In closing, the respondent's representative confirmed that he was not seeking to pursue an argument, in the alternative, of any potentially fair reason and finally that he did not consider it necessary to refer to any case law
86. The claimant's representative produced written submissions to which he spoke and which the Tribunal does not propose to repeat within this judgment
87. No case law was referred to in the written submissions but it was confirmed that it was the questions raised in the **Kaur** case that had informed the drafting of the issues

88. The Tribunal raised with the parties the case of *Ulsterbus v Henderson [1989] IRLR 251* which confirmed that there is no formal obligation upon an employer to facilitate the cross examination of a witness during a disciplinary process with the potential of dismissal (noting that, in this current case, we are concerned with a grievance process). The claimant's representative confirmed that he was not seeking to argue that there was any such legal obligation but that it was reasonable to have expected the respondent to do so in the circumstances of this case
89. The Tribunal sought clarification of the claimant's argument that there had been a breach of the ACAS Code. The claimant's representative advised that he was contending for a breach of the spirit of the Code rather than a breach of any express provision within it

Conclusions

90. Throughout its deliberations, the Tribunal has been guided by the *Malik* test in assessing the respondent's conduct
91. The first question centres on the most recent alleged conduct, namely the respondent's failure to provide documents and to produce Mr Kay for the claimant to question
92. The Tribunal finding of fact is that the respondent was in no position to produce the claimant's varied contract despite searching for it both physically and electronically. It was not able to locate such a document. The Tribunal accordingly concludes that the respondent cannot properly be criticised in any way for the document not being produced
93. On the second point, there was no legal obligation upon the respondent to produce Mr Kay to allow him to be questioned during the grievance process. It is difficult to see what the claimant felt he was seeking to achieve by this request. There was no material dispute between the parties as to the content of the discussions between Mr Kay and the claimant. The only point in issue was the claimant seeking to argue that the relevant decisions had in fact been taken by Mr Gerrard rather than Mr Kay although it was accepted by the respondent that there had been collective discussions leading to the proposal. It is not apparent what, if any, difference the precise identity of the decision-maker would make to the overall position. It was the substance of what had occurred that was material and not whether Mr Kay had taken that decision himself or had been instructed to do so
94. The first contention is that these two alleged acts, whether individually or collectively, amount to a fundamental breach of the claimant's contract of employment and specifically the implied term of good faith
95. There is no suggestion on behalf of the respondent that the claimant affirmed those acts or otherwise waived any breach arising from them. The respondent's position in regard to these allegations was continued into the grievance appeal. The claimant did not return to work or give any other indication of affirmation between the final appeal hearing and tendering his resignation
96. The Tribunal, for reasons of completeness, also confirms that it would not regard the fact that the claimant pursued his rights through the internal grievance process as

affirming his contract (see, for example, ***Gordon v J & D Pierce (Contracts) Limited UKEATS/0010/20***)

97. The Tribunal's conclusion is clear that the allegation surrounding the alleged non-production of the contract cannot stand. The respondent could not produce what it did not possess. On the second allegation, the respondent had taken a decision it was entitled to take and no, certainly no material, prejudice to the claimant can be identified in its having taken that decision. The Tribunal's overall conclusion therefore is that it cannot properly be said that, either individually or in combination, these allegations amount to a fundamental breach
98. Having reached this conclusion, the Tribunal assessed the significance of the two allegations applying the approach in ***Waltham Forest***. Even with the low threshold set out in ***Waltham Forest***, the Tribunal's assessment, based upon the same reasoning, is that such threshold is not met
99. The claimant confirmed that, at and following the return to work interview, he was prepared to return to work. That being the case, he has expressly waived any prior breach. The only subsequent breaches alleged are the two referred to above
100. In those circumstances, the Tribunal's conclusion has to be that the claim fails, there having been no breach (whether fundamental or passing the ***Waltham Forest*** threshold) subsequent to such affirmation
101. The Tribunal however, recognising the question of whether or not the allegation relating to Mr Kay passes the ***Waltham Forest*** threshold to be a fine line, proceeded to consider the alternative argument that there was a cumulative breach of the implied term as contended for on behalf of the claimant and its overall analysis of the matters relied upon by the claimant follows
102. The issues between the parties began with the proposal by the respondent that the claimant cover additional administrative duties in the Discipline Department. The claimant clearly took badly to this proposal which, for the respondent, was not in fact an unexpected reaction. The claimant himself refers frequently to this proposal as an "offer" and a "request". This is consistent with the respondent's own position and the respondent's follow up e-mail after the meeting invites the claimant to let Mr Kay know his position. It was always intended that this would be a short-term arrangement although this was not clarified with the claimant until March 2019. Further, the evidence of the claimant himself was that what was being proposed was a "top up" only. On the face of matters, therefore, this would not be an express breach or attempted variation of the claimant's contract whether or not clause 40 was incorporated. It was however at no point pursued by the respondent as a formal instruction in the interim period whether between it being raised and the start of his sickness absence or otherwise
103. The follow up letter refers to the potential for disciplinary action in the event of the claimant failing to comply with a reasonable instruction. Mr Kay accepted in cross-examination that this may be regarded as somewhat heavy-handed but this was a reaction to the respondent's own somewhat blunt response and again no disciplinary action was in fact taken by the respondent. It was clarified within the grievance outcome as being no more than a statement of potential action
104. The Tribunal has found there to have been no dishonesty on the part of the respondent as to the information it gave to the claimant surrounding its contact with Mr Burgess.

In the event, it was clear from the information given by Mr Burgess, both to the respondent and direct to the claimant, that he could add nothing material in terms of the precise terms of the claimant's contract and the claimant cannot therefore be said to have been prejudiced by his non-attendance in the internal process

105. The Tribunal rejects on the facts the allegation that the respondent "deliberately and wilfully prolonged the grievance procedure". There was no such allegation made by the claimant, who was legally advised throughout, during the internal process. The grievance was stalled at the outset by the claimant's ill health, then taken forward by communication with his solicitors in a timely manner. The appeal was adjourned at his request. The Tribunal sees no basis whatsoever for this allegation being supported by the facts
106. The final allegation is that the respondent has "behaved in this manner when the claimant was suffering from significant health concerns". In the timescale, this allegation cannot refer to the initial issues of the proposal to cover the additional duties and the Tribunal finds nothing material in the respondent's conduct of the matter during the claimant's sickness absence to support this as an allegation. The fact also is that the claimant was assessed by his GP as having progressed to the point of being fit to return to work in March 2019
107. Ultimately, the claimant did not await the outcome of his grievance appeal before resigning. He did not know at that stage whether or not his appeal would be successful and his decision was clearly taken regardless of the outcome. The claimant appears therefore to have decided to resign based on his misplaced perception of procedural irregularities rather than the substance of the matter
108. Accordingly, on an overall objective analysis, in summary, the conduct alleged does not meet the **Malik** test and, in all the circumstances, the Tribunal's conclusion is that the claim of constructive unfair dismissal is not well founded.

Employment Judge B Hodgson

Date 15 March 2021

REASONS SENT TO THE PARTIES ON

17 March 2021

FOR THE TRIBUNAL OFFICE

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