



EMPLOYMENT TRIBUNALS

Claimant: Mr G Owen

Respondent: M2 Digital Ltd

Heard at: Manchester

On: 5 and 6 June 2018

Before: Employment Judge Ross

REPRESENTATION:

Claimant: In person

Respondent: Ms R Levene, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claim for unfair (constructive) dismissal is not well-founded and fails.

REASONS

1. The claimant was employed by the respondent for a period of 16 years. He resigned on 28 September 2017 by email (see pages 223 and 224). He brought a claim to this Tribunal.

2. I heard from the claimant. For the respondent I heard from the claimant's line manager, Mr Robert Gregory; his line manager, Mr William Forrest (known as Bill), and Mr Damien Baker, Chief Operating Officer for the respondent.

3. The claimant confirmed at the outset of the hearing that his claim was that there was a breach of the implied duty of trust and confidence. The claimant confirmed he relied on the following allegations within his claim form as amounting to breaches, individually and cumulatively, of the implied duty of trust and confidence:

- (1) Allegation 1 – Line manager, Mr Gregory, made allegations around conduct which he could not evidence.

- (2) Allegation 2 – Mr Forrest, Department Director, was aware and did not intervene.
- (3) Allegation 3 – Ms Mitchell, HR, and Board Director, Ms Smith, offered no advice beyond advising me to work it out with my line manager myself.
- (4) Allegation 4 – Respondent failed to follow company procedure around reports of bullying.
- (5) Allegation 5 – Line manager, Mr Gregory, sent further allegations via meeting agenda.
- (6) Allegation 6 – Formal grievance not dealt with as indicated in the company handbook with regard to timescales.
- (7) Allegation 7 – Mr Forrest and Ms Mitchell, already privy to situation, undertook the investigation despite my raising concerns about this.
- (8) Allegation 8 – Final investigation provided no specific reference to my concerns nor any evidence.

The Law

4. The relevant law is found at section 95C and section 98 of the Employment Rights Act 1996. The case of **Western Excavating Limited v Sharp [1978] IRLR 27** is relevant, as is **Malik v BCCI [1997] IRLR 462** where it was stated in relation to the implied duty of trust and confidence that:

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

5. I reminded myself of the decision in **Buckland v Bournemouth University [2010] IRLR 445 CA** which states that:

“A repudiatory breach of contract cannot be cured unilaterally by the party in default.”

The Issues

6. The issues in this case were:

- (1) Was there a breach of the implied duty of trust and confidence, individually or cumulatively, in relation to the eight allegations relied upon by the claimant?
- (2) Was the breach fundamental? (Note: **Morrow v Safeway Stores PLC [2002] IRLR 9 EAT** which states that a breach of the implied duty of trust and confidence is inevitably fundamental).
- (3) Did the claimant resign because of the breach?

- (4) Did the claimant delay too long, waive the breach and affirm the contract?

7. For the respondent it was disputed there was any breach of the implied duty of trust and confidence, but even if there had been the claimant had affirmed the breach, and in any event the claimant had left for unrelated reasons, namely the expiry of his full sick pay and the fact he had obtained a new job.

The Facts

I found the following facts:

8. The respondent is a national business offering print services to a wide range of customers including many blue chip companies. The company's Head Office is based in Manchester, but it has other offices in London, Bracknell, Bristol, Birmingham, Wakefield and Glasgow. It has approximately 250 employees.

9. The business began approximately 20 years ago and has grown substantially since then. I find that in more recent times the business, given its increasing size and success, has become more formal, adopting formalised processes, for example proper HR practices and procedures.

10. There is no dispute that the claimant, who was working as a pre sale technical architect at the time his employment ended, was a highly regarded employee. All the witnesses remarked on the claimant's technical skills, his attention to detail and his experience. He was regarded as an asset to the business because of these skills.

11. I find that for a period of time the claimant had been a team manager for the respondent. However, he had asked to step back from that role, which he had not enjoyed, to concentrate on the role he was working on at the time his employment ended, namely of a pre sale technical architect. I find the claimant stepped down from the management role in November 2016 and Mr Gregory joined the business in December 2016 to take up the role the claimant had vacated as team manager.

12. I find that despite the potential for a difficult relationship, given that Mr Gregory was the claimant's line manager, a role which the claimant himself had held some months earlier, the relationship between the two men was cordial until May 2017.

13. This was confirmed by the claimant in cross examination and is illustrated by the emails between the claimant and Mr Gregory in the bundle. For example, in March 2017 a problem was raised with the claimant (see page 82). He admitted the problem, saying "I can't explain why I did this, it's a stupid mistake", and Mr Gregory was conciliatory in response, saying "No problem, mate, thanks for the confirmation". This was despite the fact that the problem would be costly to the company, "There is a 5K difference" (page 81).

14. During February and March 2017 there are emails going back and forth between Mr Gregory and Mr Owen showing that they were working well together and the language is conciliatory throughout (see pages 74, 76, 77, 78). I find that the claimant had a positive appraisal on 15 March 2017 (pages 101-108).

15. I found Mr Gregory to be a clear and forthright witness although sometimes prone to hyperbole although this may have been a manner of speech. For example, in his statement he said, when describing how the claimant could be inflexible in his work, "He always took his lunch between 12.00pm and 1.00pm and every single ticket he worked on would be logged as 30 minutes in his diary". This was something of an exaggeration because in cross examination the claimant took Mr Gregory to an entry in the bundle where he conceded that for that week (page 160) the claimant had taken his lunch at varying times and the ticket entries were not all 30 minutes. However, I found Mr Gregory to be a thoughtful and honest witness who made concessions where necessary. I find the context of his evidence in the example given above was accurate namely that the claimant was a precise individual who completed his diary in a detailed fashion.

16. I rely on Mr Gregory's evidence that although the claimant was technically very good at his job some problems were being communicated to Mr Gregory by other employees, including the claimant's immediate colleagues and members of the sales team because of a number of issues. These included the difficulty of contacting the claimant by telephone, and the claimant's attitude to work in terms of taking on additional work at very busy periods. I rely on the evidence of Mr Forrest and Mr Gregory that these were not serious matters and certainly did not warrant any disciplinary or performance management. Rather they were issues which Mr Gregory hoped to raise with the claimant from a management point of view to improve cohesion of the team and to meet the business objectives.

17. I find on 8 May 2017 at 11:36 Mr Gregory asked the claimant to "take a look at Spiceworks" and he also explained he had assigned him a Northern Gas ticket (page 133). It is not disputed that a "ticket" is an item of work which needs to be done. The claimant responded promptly, "I'm happy to have a look but it comes at the expense of the work I have in my diary already". I find Mr Gregory was frustrated by this. He responded, "Thanks, Graham, I'm really looking for a bit of above and beyond these next couple of weeks, we're starting to get busier now". The claimant replied, "As always I'll do what I can to help".

18. Later the same day Mr Gregory sent an email message to the whole team asking for a volunteer to give a presentation to the new sales starters because he had to be in London on a series of meetings (page 134). The claimant did not volunteer. I find his answer was given the next day on 9 May at 17:08 after a heated meeting between the claimant and Mr Gregory. His response was that he was not in a position to help owing to a prior commitment, but he put the ball in Mr Gregory's court, "If there's an opportunity to swap things round to free me up".

19. Both men agree that the informal meeting held on 9 May 2017 was not a success. Both agree it was heated. The meeting was a scheduled meeting to discuss the claimant's personal objectives and personal development plan for the year ahead. I find that Mr Gregory raised his concerns with the claimant that he felt there was a lack of trust in the claimant with him as his manager, and that he was getting resistance from the claimant for taking on more workload or responsibility. He asked for a more positive and enthusiastic approach.

20. It is not disputed that Mr Gregory did not give documented examples to the claimant in that meeting of precisely what it was he was concerned about. I entirely accept Mr Gregory's evidence to the Tribunal that this was largely because the concerns which had been raised with him came from other team members and he considered it would not be productive to raise with the claimant that named individuals he was working closely with had concerns about his methods of working.

21. I find that the claimant, who it is agreed was a technical person with a high attention to detail, felt he was being attacked. He considered the attacks were unwarranted and he became very defensive.

22. The fact that the meeting was not a success is clear from the emails sent between the two men. The claimant said, "I think it's fair to say neither of us would be satisfied with the outcome of our meeting this afternoon". He also said, "I'm really struggling to understand what it is that I'm not offering at the moment or what I can change in future to be recognised within the business" (page 136). Mr Gregory replied that night, "I think we both need some time to digest what's been said today and consider the best route forward". He suggested, "I do believe that maybe bringing Bill (*Forest*) in to give his opinion is an option and I'll speak to him about this in the morning". He went on to say:

"Like I have always said to you, I value the work you do, however there needs to be a change in approach for me to be able to believe that you are truly committed to the department. I sense a real lack of trust in me as your manager and for that reason I often feel that I'm going to get resistance to you taking on more workload or responsibility. I hoped that over time you'd start to believe in the progress we have been making and I would see a positive change in attitude. Unfortunately, so far, I don't feel that's been the case. I genuinely just want more buy in and a more enthusiastic can do approach."

23. A further meeting was held on 10 May 2017. Once again, no minutes were taken. In attendance were the claimant, Mr Gregory and Mr Forrest. The claimant summarised it:

"I don't feel that any progress was made though so I'll await next steps from yourselves. All I'm looking for here is some clarity around what I need to do differently (that goes beyond just saying do more work) in future."

24. He goes on to state, "I don't feel as though Rob's accusations relating to my integrity, trustworthiness and work ethic are justified at all". He concludes by saying, "The serious nature of these accusations means I'm not able to just ignore them unfortunately". (See page 137)

25. On 11 May at 00:27 the claimant wrote to Mr Gregory with specific information as to who had closed which tickets-which I find relates to which members of the team had completed certain tasks. (see page 142). That was responded to by Mr Gregory on 11 May at 06:12. He did not accept the comparison the claimant had made:

“I’m not going to accept you keep comparing yourself (unfairly) to your colleagues. Ni has been bombarded with other work including Defra which is M2’s most comprehensive and demanding tender process to date.”

26. He clarified what he had actually said and identified four reasons why he had made the comments, namely:

- “(1) You made me feel as if I cannot allocate you work when needed.
- (2) Your comments to the team are damaging morale and the progress I am making.
- (3) Your attitude is negative noticed and commented on by members of M2’s staff.
- (4) Your lack of willingness to even give indicative timescales of the BB project caused a situation that was avoidable.
- (5) You constantly undermine the work I am doing by making comments like ‘You’re only doing what I was trying to do before you came’ or ‘if I had the backing of the people you do I wouldn’t have stood down’.”

27. He went on state:

“This will have a direct impact on the next stage of this disagreement. Our relationship is clearly damaged. I’m your manager and you are aggressively challenging my comments. You also swore multiple times in the meeting and displayed aggressive behaviour. One comment was ‘I’ll just f**k off then’, which is hugely unprofessional.” P 141-2.

28. I find that this given this was a contemporaneous document it is likely to be reflective of what was said at the meeting. Although the claimant denied at Tribunal he had sworn in that meeting and denied he said he would just “f**k off,” I find that because this contemporaneous email refers to such behaviour and because the email was not challenged by the claimant specifically in terms of the claimant’s language in the meeting, it is likely that he used such language.

29. That same day the claimant contacted the respondent’s HR department saying that he felt he was being victimised and that there was an attempt by a manager to bully him into undertaking additional work outside of working hours (see page 140). He also complained that in meetings where he was subject to accusations about his work ethic/integrity he had refuted those allegations and “Rob was unable to provide any evidence to support them”. He complained that the allegations were repeated with no evidence to support them.

30. So far as attitude is concerned, he said:

“If Rob could introduce me to some of the individuals that have complained then I would be happy to speak to them personally, apologise and look forward to preparing any relationships that may have suffered due to my own behaviour.”

31. He went on to say that some of the statements were untrue.

32. I find that Anna Mitchell from HR replied on 12 May with the suggestion that there was a further face to face discussion (see pages 139-140). The claimant agreed to do this but suggested that there were some discussion points in advance. Ms Mitchell suggested that the meeting should just be the two of them (see page 138).

33. I find that Mr Gregory wrote to the claimant on 5 June with suggestions for an agenda for the next day's meeting (see page 143-144). I find that email was conciliatory. Mr Gregory said:

"I can accept from our meeting and email exchanges that I have an element of blame for this and I admit I had a lack of confidence in your genuine willingness to help. For that I have apologised already.

I'm prepared to wipe the slate clean and hope you are too."

34. Earlier in the email he stated:

"From my side I made my feelings clear in my email of 11 May and I personally have moved on from it."

35. He suggested that at the meeting they could clear the air once and for all.

36. The claimant said that, "I'm glad we are both in agreement with regards to working towards a positive outcome". He added two more points for the agenda (see page 145). Once again, no minutes were taken of the meeting.

37. The parties had a difference of view about the meeting. Mr Gregory felt the meeting on 6 June went well. He had discussed the issue with his manager Mr Forrest who had suggested that he change his management style towards the claimant. In cross examination Mr Gregory said that this meant he backed off. He never again challenged the claimant about his attitude and where there was additional work to be done he tended to do it himself rather than ask the claimant to do it. He remained very conciliatory always towards the claimant in emails and that is evidenced by the documents in the bundle.

38. Given the nature of the communication between the two individuals and the fact that they did not work in close proximity (Mr Gregory was based in London, not Manchester and the claimant worked frequently from home), I find that it was not unreasonable for Mr Gregory to assume that the relationship had been repaired.

39. However, I find that the claimant, who is a man with attention to detail, felt concerned by the matters that had been raised with him at the meetings on 9 and 10 July and was not satisfied by the outcome of the meeting in June. There are one or two emails in the bundle, for example at page 153 where the claimant says he is "snowed under" and on 18 July the claimant says he is "up against it and can't take any additional work". However, I accept the evidence of all witnesses that this was an extremely busy time. I find the respondent had high expectations of the amount of work it was expected team members should take on in this period.

40. On 21 July the claimant was indicating that when he was allocated a new piece of work or “ticket” it was “no problem”. And he would “pick it up when I can.”

41. The claimant believed he was unfairly being allocated additional work. On 9 August he wrote a formal grievance to Anna Mitchell of HR (pages 178-180). He complained:

“I find myself having to regularly undertake work at evenings and weekends in order to keep from missing deadlines and targets due to the increasing pressure and workload being inflicted upon me.”

42. The claimant said he had been given additional projects and had been unable to attend team meetings. He referred again back to the meetings in May and June with Mr Gregory

43. On 14 August 2017 the claimant went absent from work sick. He informed the respondent (page 174a), “I have a doctor’s appointment this evening which will help determine my return date”. Mr Gregory asked that day:

“Hi Graeme, could you please let me know once you have heard from the doctor and have a clearer picture on whether you will be available tomorrow, please? There is another piece of work that is looming and I just need to have an idea of your projected absence.” p174b

44. The claimant was critical of this email given that he was suffering from stress and anxiety and had told the respondent that he had a doctor’s appointment that evening which would help to determine his return date.

45. However, objectively from the respondent’s perspective I find Mr Gregory did not know at this stage the claimant was suffering from stress and anxiety related to work, and I find at that point it is not unreasonable to ask whether it was likely the claimant would be returning to work.

46. I find that on 17 August there was a formal response from HR (see page 177) and the claimant was informed that Mr Forrest would conduct the investigation. On 18 August the claimant objected to this (see page 176). The claimant received a response from HR and replied to it by saying:

“I note your comments with regards to Bill(*Forrest*) and his previous involvement and while I find myself not to be in complete agreement wish to focus now on completing this process at the earliest opportunity. It would now appear we have some clarity and can proceed and as such I expect to hear from Bill via email in the coming days.”

47. I therefore find that the claimant did not maintain his opposition to Mr Forrest conducting the investigation into his grievance.

48. The claimant was diagnosed as suffering from anxiety and work-related stress and his fit note showed that he was not fit for work. The claimant remained under a fit note up to and including his resignation. His final fit note was due to expire after his resignation.

49. Mr Forrest sought to meet with the claimant to discuss his grievance but the claimant felt he was too unwell to do so although he did want the grievance progressed. In these circumstances it was agreed that Mr Forrest and the claimant would communicate by email. This was done and on 1 September 2017 (page 204) Mr Forrest gave the claimant the outcome of his grievance which was unsuccessful. The claimant appealed by a letter of 4 September 2017. This was acknowledged the following day by the respondent. The claimant chased the matter up on 13 September, and on 14 September Mr Baker, the Chief Operating Officer, contacted the claimant (see page 213). The claimant chased the matter again on 21 September (page 215) and received a response on 22 September (see page 217). Like Mr Forrest at the grievance hearing stage, Mr Baker would have preferred to have conducted the grievance appeal in person but the claimant, due to his mental health, preferred to deal with the matter by email and that was what was done.

50. The claimant resigned on the evening of 28 September 2017 at 21:15 (see pages 223 and 224). In cross examination the claimant said the reason he resigned at that moment in time was that he had had a discussion with his wife and he was frustrated about the delay in relation to what had happened and could not continue any longer. His letter of resignation says:

“I feel I am left with no choice but to resign in light of the recent grievance I have raised surrounding the conduct of my line manager.”

51. There is no dispute the claimant resigned before his appeal was concluded. He was offered an opportunity to retract his resignation but he did not accept it.

52. It is a matter of fact that the claimant was entitled to eight weeks' full pay when he was absent on sick leave then eight weeks' half pay (see page 231). His absence record is at page 230 which shows that at the point of his resignation he had recently exhausted his entitlement to full pay. P230

53. The claimant's outcome of appeal in relation to his grievance was sent to him by a letter dated 29 September 2017. The appeal was unsuccessful.

Application of Law to Facts

54. I turn to apply the law to the facts. I must consider whether the eight allegations relied upon by the claimant can amount individually or cumulatively to a breach of the implied duty of trust and confidence.

Allegation 1

55. I find it is factually incorrect to state that Mr Gregory, the claimant's line manager, “made allegations around conduct which he couldn't evidence”. I find it is factually correct that Mr Gregory made allegations around the claimant's conduct which he did not evidence, but that is slightly different. It is undisputed that the concerns Mr Gregory raised with the claimant were about his attitude to taking additional work, comments Mr Gregory alleged the claimant had made to the team which were damaging morale, and that his attitude was negative. Mr Gregory suggested the claimant was making comments which undermined him as his manager.

56. I entirely accept the evidence of Mr Gregory that from a management point of view where other members of the team have made complaints and asked to remain anonymous it would be absolutely inimical to relationships at work for Mr Gregory to name those individuals to the claimant. The claimant is clearly a conscientious individual who is very good at his job but he appeared to have difficulty in seeing that from a management point of view, despite the fact he had done the job that Mr Gregory was doing, that it would be disastrous for relationships within the team to “name names” in that way. Accordingly, I am not satisfied that Mr Gregory made allegations that he could not evidence. I find he made allegations which he was not prepared to evidence in detail at that time because he felt it would be damaging to the team.

57. So far as the second issue is concerned that the claimant was not “pulling his weight” in relation to not taking on additional work, in comparison to other team members, I rely on Mr Gregory’s evidence that he accepted he had not produced a detailed log of comparison of workload in the team but the reason for that was because because it was not a disciplinary or performance management issue it was a general concern in relation to performance development. Secondly producing a detailed log of work completed would, in a small team inevitably identify other individuals and would be damaging to relationships in the team. I rely on Mr Gregory’s evidence that his perception of the work load of team members was not just based on completed work tickets but on his knowledge as manager of other work including project work undertaken by team members. I have borne in mind that at the meeting where Mr Gregory raised these concerns he did so hoping claimant would take on board some general concerns about his attitude and believing that the claimant was a valued team member.

58. Accordingly, because I have found the allegation is not factually correct, I find there is no breach of the implied duty of trust and confidence.

Allegation 2 – Mr Forrest, Department Director, was aware and did not intervene

59. It is factually incorrect to say that Mr Forrest was aware of these concerns and did not intervene. Unbeknown to the claimant, Mr Gregory had made Mr Forrest aware of his concerns and Mr Forrest did intervene by recommending that Mr Gregory change his management style, which he did. I rely on the evidence of Mr Forrest and Mr Gregory to reach this finding. I find that after the meeting on 6 June there is no evidence that there was anything other than cordial exchanges between the claimant and Mr Gregory which is consistent with the evidence that Mr Forrest had suggest Mr Gregory change his management style and Mr Gregory had done so. Accordingly, I find this allegation is factually incorrect and there is no breach of the implied duty of trust and confidence.

Allegation 3- Ms Mitchell, HR, and Board Director, Ms Smith, offered no advice beyond advising me to work it out with my line manager myself.

60. I heard no evidence from the claimant in relation to Ms Smith and this allegation. Ms Smith was not a witness. Therefore, I make no finding there was any failure of Ms Smith in relation to this allegation.

61. Ms Mitchell, who did not give evidence, is an HR representative. I find Ms Mitchell gave advice to the claimant when he first contacted her on 11 May 2017 and he followed her advice. She specifically suggested a meeting with Mr Gregory and that took place. I rely on the respondent's policies, for example see page 33 of the bundle, that both in relation to the complaints policy and grievance policy the respondent suggests an informal approach in the first instance. Given the small nature of the team, the claimant's seniority (he had previously been a team manager) I find there is no breach of the implied duty of trust and confidence in this advice, particularly as when the claimant remained unhappy and progressed the issue to a formal grievance, Ms Mitchell arranged for it to be dealt with reasonably promptly. I find there was no breach of the implied duty of trust and confidence.

Allegation 4– Respondent failed to follow company procedure around reports of bullying.

62. The company's procedure on bullying is at page 34 of the bundle. Although it is not explicitly stated, the fact that the complaints procedure follows the bullying paragraphs appears to suggest that the complaints procedure should be used if there is a complaint of bullying. In reaching this conclusion I rely on the section under "Informal" at page 35 where it says:

"Colleagues should keep a written record of any incidents of bullying including the date, time and nature of the incident."

63. The complaints procedure makes it clear that:

"Any complaint should be made to an employee's manager unless the complaint is in respect of this manager in which case the complaint should be raised with HR."

64. The claimant's complaint was raised with HR because it was about his manager. The procedure states, "The complaints procedure can be informal or formal" and it goes on to state, "the colleague may decide which procedure to use". The claimant is clearly an intelligent man. He was aware of the policies. He followed the advice of Ms Mitchell of HR. He did not suggest to her he did not wish to follow the informal route. Accordingly, if the claimant is referring to the fact that Ms Mitchell suggested he deal with the informally by way of a meeting in the first instance I am not satisfied that that amounts to a breach of the company procedure on bullying.

65. The claimant made his complaint formal when he presented a grievance, "I would like to lodge a formal grievance" (page 179). The respondent's grievance policy is at page 33 of the bundle. The claimant refers to resolving matters:

"In this respect the company's policy is to encourage free communication between employees and managers and managers to ensure that questions and problems arising during the course of employment can be aired, and where possible resolved quickly and the satisfaction of all concerned."

66. The procedure states at page 33:

“Where a colleague has a grievance, and does not wish to deal with it through an informal discussion with his or her manager he should raise it informally with HR.”

It goes on to state:

“Alternatively, the employee can raise the matter either with his or her manager or the HR manager who after a meeting, due investigation and consideration will give a decision and confirm it in writing, if possible, within 14 days of the matter being raised.”

67. I find that once the claimant had made it clear he wanted his grievance dealt with formally, it was. Mr Forrest, the line manager’s manager, was appointed to conduct the investigation, which he did. Although the claimant initially objected to Mr Forrest, on page 175 he makes it clear he does not maintain that objection. Accordingly, I am not satisfied that there was a failure to follow the company procedure on bullying and so I find there was no breach of the implied duty of trust and confidence.

Allegation 5 – Line manager, Mr Gregory, sent further allegations via meeting agenda.

68. Mr Gregory, the claimant’s line manager, sent an email with a simple agenda for the meeting on 6 June. See p143. I remind myself of the context of the meeting. I find that the email from Mr Gregory was conciliatory in tone and he was “prepared to wipe the slate clean”. He accepted “an element of blame” and had “apologised already for a lack of confidence in the claimant’s genuine willingness to help”. He suggested the meeting was to “move on from the last meeting and concentrate on how we go about strengthening our working relationship”. The claimant replied at p145 with further suggested points of discussion.

69. I find that the questions Mr Gregory raised at page 143 were genuine enquiries to try and understand how the claimant felt. When asked at the Tribunal why he asked at p143, “are you committed to being at M2 in the long-term?” I accept his reply that it was because he had been informed by recruitment agents that the claimant was seeking work elsewhere.

70. I find the meeting was scheduled for 1½ hours at a busy time for the employees which is consistent with a finding that Mr Gregory was genuinely trying to improve his working relationship with the claimant, rather than making further allegations against him. Taking the wording of the agenda into account and the context in which the email was sent I am not satisfied that Mr Gregory “sent further allegations” in that document at p143-4 and I therefore find no breach of the implied duty of trust and confidence.

Allegation 6- Formal grievance not dealt with as indicated in the company handbook with regard to timescales

71. I find that there were no absolute timescales within the respondent’s policy for grievance or the policy for complaints in relation to bullying. There are suggested operational time limits -see page 33 for the grievance policy timescales:

“If possible the decision on a grievance is to be given within 14 days of the matter being raised.”

72. In terms of the complaints procedure for bullying it states:

“The investigation should be concluded within four weeks of a complaint being received. If this time limit is exceeded the complainant should be advised of this and given a date when the investigation will end.”

73. In terms of the formal grievance the claimant presented, his grievance was presented on 9 August at 21:09. He received an outcome on 1 September at 12:01. That is just over three weeks after the claimant presented his grievance. I find the respondent was not in breach of its timescale for the grievance outcome because the target is aspirational and says, “if possible”. I am satisfied it was not possible to complete within the suggested timescale for a number of reasons. Firstly, there was an initial objection to Mr Forrest dealing with the matter which caused a delay. Secondly, the grievance was conducted via email at the claimant's request. The respondent was understanding and sympathetic that the claimant did not wish to meet in person due to his ill health at that time. However, that inevitably elongated the process because at a meeting all matters could be dealt with at once whereas inevitably with email questions had been posed, answers sought and then considered. In addition to communicating with the claimant Mr Forrest had to consider all the documents and interview Mr Gregory.

74. So far as the appeal against grievance is concerned the procedure states:

“A decision will be given in writing if possible within 14 days of the matter being referred to HR.”

75. Once again, the timescale is aspirational because it includes the words “if possible.” I accept the evidence of Mr Baker that it was not possible to deal with the matter within 14 days of the claimant raising his appeal on 5 September 2017. I find as the Chief Operating Officer he was extremely busy at that time and needed to consider what the claimant had said and speak to Mr Forrest. I also accept that the claimant resigning impacted on the matter because he sought further advice as to whether he needed to proceed with the grievance. The grievance appeal outcome was sent to the claimant on 10 October 2017.

76. I find that the respondent acted reasonably in the time taken to hear the grievance and the grievance appeal and in the time taken to communicate the outcome. I find no breach of its own policies and no breach of the implied duty of trust and confidence.

Allegation 7 Mr Forrest and Ms Mitchell, already privy to situation, undertook the investigation despite my raising concerns about this.

77. The claimant complained that Mr Forrest and Ms Mitchell, who were already privy to the situation, undertook the investigation. I find that it is factually incorrect to state that Ms Mitchell undertook the investigation. Ms Mitchell was the HR representative who was there to guide the management in conducting the investigation. She was not a decision maker.

78. I find it is true that Mr Forrest was privy to the situation. It was not ideal, I find, for Mr Forrest to be the investigating officer when he already had knowledge of the issues in this case and had attended the meeting on 10 May 2017. However, I accept Mr Forrest's integrity. I accept that he himself raised concerns as to whether or not he was the most appropriate person to deal with the matter. I find the respondent's procedure expects the line manager's manager to be involved in the grievance (p33) and that Mr Forrest's previous involvement was limited. Crucially I find the claimant himself, by 18 August (see page 175) implicitly accepts Mr Forrest conducting the investigation:

"While I find myself not to be in complete agreement I wish to focus now on completing this process at the earliest opportunity...As such I expect to hear from Bill via email in the coming days."

79. Therefore, I find for these reasons and particularly given that the claimant agreed to Mr Forrest conducting the investigation, I find there was no breach of the implied duty of trust and confidence.

Allegation 8 – Final investigation provided no specific reference to my concerns nor any evidence.

80. I find Mr Forrest's investigation did refer to the claimant's concerns and to evidence. Accordingly, I find the claimant is factually incorrect in this allegation. At paragraph 204 Mr Forrest details the reasons why he finds the relationship between the claimant and Mr Gregory initially fractured and why he reaches the conclusion that although Mr Forrest was clear that Mr Gregory was wrong to make the "initial unsupported comments about your work and attitude", he had inferred the misunderstanding had been resolved in the meeting of 6 June and believed all was well. Although he does not wish to invalidate the claimant's perspective on the matter and the obvious stress he is feeling, he finds "I do not believe there is enough evidence to take any further formal action regarding your grievance". I find Mr Forrest was satisfied that Mr Gregory remained supportive of the claimant following the meeting on 6 June and relies on documentary evidence (see A – C on page 204) to support this.

81. Therefore I find allegation 8 is factually incorrect and can not amount to a breach of the implied duty of trust and confidence.

82. For the reasons given above I find there was no individual or cumulative breach of the implied duty of trust and confidence in relation to the eight allegations relied upon by the claimant and the claim fails at this stage.

83. However, in case I am wrong about that I have gone on to consider whether if there was any breach did the claimant delay too long and affirm the breach.

84. The last allegation relied upon by the claimant was the failure of Mr Forrest's investigation to provide a reference to the claimant's concerns or evidence. This outcome was sent to the claimant on 1 September 2017. (page 204) The claimant did not resign until 28 September 2017. Although the claimant was absent from work on sick leave during this period he was well enough to engage with the respondent in

relation to his appeal. Accordingly, I am not satisfied that this is a situation where a claimant was so unwell that he was not able to engage with matters at work.

85. The appeal process was ongoing at the point of the claimant's resignation but the claimant cannot be relying on any breach in relating to the appeal process because he left before it had concluded.

86. Therefore if there was a cumulative or individual breach of the implied duty of trust and confidence I find the claimant delayed too long after the final breach communicated to him on 1 September and affirmed the contract.

87. Finally, I turn to the issue of causation. It is unsurprising where an employee is unhappy at work because he considers the relationship with his manager has broken down that he should look for alternative work. Mr Owen is a family man. He and his wife are both wage earners and they have a young son to support and a mortgage to pay. It would not be remotely surprising, and indeed it would be completely understandable, if the claimant was looking for alternative work during that period, and if he waited to find that work before leaving the respondent. That would not necessarily invalidate his claim for constructive dismissal.

88. However, when giving evidence at Tribunal the claimant, I found, was rather implausible. He suggested that although he had resigned by email late on 28 September (a Thursday evening) at a point where his full sick pay had just been exhausted, the fact the sick pay had been exhausted and he had moved onto half pay was not a matter to which he gave any consideration. He also said it was a complete coincidence that after he resigned on Thursday 28 September he started work for an old friend in a smaller business the following Monday, 2 October 2017. I find this is rather unlikely. I find it is much more likely that Mr Owen in the discussion he admitted he held with his wife before resigning wife, took account his health and the family finances, noting that he had gone onto half pay, had secured the opportunity to work for an old friend in smaller business and he took that opportunity.

89. In this case it is unfortunate that the claimant, who had worked for the respondent for very many years and was a valued employee, was unable to continue working for them. I find the relationship between the claimant and Mr Gregory did break down as a result of a meeting which took place on 9 May 2017. Although Mr Gregory, who is a conciliatory individual, took some responsibility for the breakdown in the relationship, the claimant did not.

90. I am not satisfied that there is any breach of the implied duty of trust and confidence. If I am wrong about that and there was a breach of any one of the allegations, individually or cumulatively, the claimant waived the breach and affirmed the contract.

91. For these reasons his claim does not succeed.

Employment Judge Ross

Date 11 June 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES

FOR THE TRIBUNAL OFFICE

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