# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C Smith

**Respondent:** Veolia ES Merseyside & Halton Limited

**Heard at:** Manchester (by CVP) **On:** 1, 2 and 3 September 2021

**Before:** Employment Judge Whittaker
(sitting alone)

**REPRESENTATION:**

**Claimant:** In person
**Respondent:** Mr D Campion of Counsel

# JUDGMENT

The judgment of the Tribunal is that the claimant's claim of constructive unfair dismissal fails is dismissed.

# REASONS

**Introduction**

1. The legal principles and issues have been set out in paragraph 1.1.2 and 1.1.5 in the written summary of a Preliminary Hearing conducted by Employment Judge Sharkett, a copy of which appeared at pages 65 and 66 in the bundle. The Tribunal adopted those principles.

2. Furthermore, the Tribunal reminded itself that in cases involving a “last straw” that an identified “last straw” must contribute, however slightly, to the overall breach of the implied term of trust and confidence. Furthermore, the Tribunal reminded itself that an entirely innocuous act by an employer cannot be a breach of the implied term even if the employee mistakenly interprets it as hurtful or destroying trust and confidence. Furthermore, for the employee to succeed, the actions of the employer must be unreasonable actions. If the actions can be justified or can be viewed as reasonable then that must point to a lack of breach on the part of the employer.

3. The claimant, following discussion with the Tribunal, adopted nine separate factual allegations of breach which had been included by Employment Judge Sharkett in her written summary which was included at page 65 of the bundle. It is right to set out that point number 8, "failed to adequately deal with the claimant's grievance 8 January to 24 February 2020", was a claim which the claimant withdrew following discussion with the Tribunal during the course of this hearing. The claimant accepted that the conduct of Mr Cannon, the senior manager who conducted the claimant's grievance, was not in any way a breach of the implied term of trust and confidence. However, at paragraph 17 of the claimant's witness statement the claimant had indicated that "the letters and emails between John and Ian (Wayne) - - - tipped me over the edge". It was clear from discussions with the claimant that the reference to "Ian" was incorrect and that the claimant was at all times referring to Wayne Mulholland, the senior shop steward of the trade union. The letters and emails which the claimant was referring to were at pages 482 and 483 and this was confirmed by the claimant. The words "tipped me over the edge" were interpreted by the Tribunal as representing the last straw which had persuaded the claimant to resign on the basis of what he alleged were breaches of the implied term, both as individual acts of behaviour on the part of the respondent and/or collectively as acts which cumulatively justified his resignation following the "last straw".

4. The Tribunal therefore adopts the numbering at page 65 of the bundle. The first allegation was: **falsely accused the claimant of defrauding the respondent of company sick pay (31 July 2019 – John Whitham)**:

(a) The obligation of the Tribunal was to consider whether or not the employer had reasonable grounds for commencing an investigation into the claimant. The claimant had posted a number of photographs whilst he was absence on sick leave with a significant shoulder injury. He had published them on social media. They showed him holding his arm in the air without it being in a sling. They also demonstrated that the claimant had participated in a fun run despite being off work with his shoulder injury. On seeing these photographs Mr Whitham suspended the claimant and wrote to him to say that he must attend an investigation meeting in order that he could offer an explanation for the photographs against the background of him being off sick and receiving company sick pay. That letter was sent in writing on 25 July 2019. The claimant was never required to attend an investigation meeting. He did however receive assurances from Mr Whitham that all Mr Whitham wanted to do was to ask him a few questions. Mr Whitham apparently received additional information which persuaded him that an investigation meeting was no longer necessary. He spoke to the claimant in the company car park to tell him that the matter was not being taken any further. The Tribunal was not presented with any evidence from Mr Whitham. He did not provide a witness statement and he did not give evidence. What therefore persuaded Mr Whitham to abandon the proposed investigation meeting remained a mystery. Having been reassured by Mr Whitham verbally in the car park that the matter was not being taken any further, the claimant did not ask for any written clarification or confirmation that that was the case. He appeared to have accepted the reassurances and moved forward. There was no complaint or request for any additional information or reassurance made by the claimant.

(b) This was not, in the opinion of the Tribunal, a case where the claimant had been "falsely" accused of fraud. Mr Whitham had simply followed the standard procedures identified in the company's disciplinary procedures. The Tribunal was satisfied that on the basis of the posts on social media made by the claimant that Mr Whitham had reasonable grounds for asking some questions and receiving some form of explanation from the claimant, bearing in mind the shoulder injury was relatively serious. On the basis that Mr Whitham had reasonable grounds for commencing an investigation, the Tribunal was satisfied that there was nothing unreasonable or improper by Mr Whitham proceeding in that way. The investigation was concluded without an investigation meeting and on the evidence was concluded to the satisfaction of the claimant. It is not therefore accurate to suggest that the claimant had been falsely accused. He had been invited to an investigation meeting against the background of a suggestion that on the basis of the content of the social media posts that the claimant had some questions to answer. That is standard employment law practice. It was in accordance with the respondent's disciplinary procedures. Furthermore, it was in accordance with the ACAS Code of Practice which applies to disciplinary procedures.

(c) In summary, therefore, the Tribunal could not find that there was any serious or blameworthy conduct on the part of Mr Whitham in respect of this allegation, and it did not therefore amount to or in any way contribute to a breach of the implied term of trust and confidence.

5. The second allegation addressed by the Tribunal was: **Instructed the claimant to return to working full-time on the line which was contrary to the medical recommendations agreed on his return to work following his accident, that he should only work on the line for 1-3 hours. The instruction came via management.** This was considered in conjunction with the third allegations, which was: **When the claimant expressed his concern about returning to work on the line full-time he was told that if he did not do so he would have to go back on sick leave**:

(a) In respect of the second allegation, it was set out in the summary from the preliminary hearing that that was an allegation which was dated 20 August 2019. It became clear, however, during the hearing that the date was incorrect and that in fact it should read "late October/early November 2019". Furthermore, it was clear that both allegations involved a supervisor employed by the respondent by the name of Mr Hitchen.

(b) The Tribunal regarded these two allegations, effectively arising from one alleged conversation between the claimant and Mr Hitchen, as the most serious of the allegations brought by the claimant. The Tribunal was satisfied that if the conversation happened as alleged by the claimant then it would have amounted to a most serious breach of the implied term of trust and confidence and would have been a stand alone breach of the implied term.

(c) The claimant alleged that he had been spoken to by Mr Hitchen, who had said that he was passing on instructions from Mr Whitham, the claimant's supervisor, that even though the claimant was working on reduced hours

and reduced duties that unless he went back on the line full-time he would have go on sick leave, and that in effect the arrangements which had been made for some time with the claimant for him to work reduced hours and reduced duties would come to an end. The claimant, in giving his evidence to the Tribunal, was adamant in strong and persuasive terms that this discussion had taken place.

(d) The only persons present were the claimant and Mr Hitchen. In March 2020 Mr Cannon, whilst investigating the claimant's grievance, had taken written statements from Mr Hitchen and from Mr Whitham about this allegation. In those written statements they both denied that Mr Whitham had instructed Mr Hitchen to speak to the claimant in this way, and Mr Hitchen specifically denied that he had spoken to the claimant in the manner alleged. Furthermore, Mr Hitchen gave evidence in accordance with his written statement to the Employment Tribunal, on oath (as did the claimant) in support of what he had said in his earlier statement. The Tribunal was therefore faced with a complete and frank disagreement between Mr Hitchen and the claimant.

(e) The Tribunal reminded itself of the burden of proof and that it was for the claimant to satisfy the Tribunal on the balance of probabilities that his version of events should be preferred to that of the respondent.

(f) The claimant was only able to rely upon his own sworn and very clear evidence. There were no witnesses to the alleged conversation. The claimant did not at the time raise any written or verbal complaint or grievance about the alleged conversation, and therefore there was nothing of that nature to support the version of events put forward by the claimant.

6. The evidence put forward by the respondents, in addition to the sworn evidence of Mr Hitchen, was as follows:

(a) The Tribunal found the absence of any complaint or grievance on the part of the claimant extremely troubling, bearing in mind that the claimant said that in response to the threats which had been made by Mr Hitchen on behalf of Mr Whitham that the claimant had suffered very considerable levels of pain and discomfort and had even thought of wanting to die. This was obviously a very extreme piece of evidence put forward by the claimant. However, it was clear that Mr Smith was very easily able to identify the managers over and above both Mr Hitchen and Mr Whitham. He did not however raise this issue with them. If, as the claimant alleged, he was within a few weeks suffering such dreadful effects as a result of the ultimatum which was allegedly given to him by Mr Hitchen, and the Tribunal found it very troubling indeed that the claimant had not made any complaint of any nature to any of the senior managers, and had not even sought the assistance or support of his trade union in raising a formal complaint, bearing in mind the effect that the claimant said that the ultimatum had on him.

(b) The Tribunal, having heard from Mr Cannon, believed, as indeed the claimant did, that he was an honest and reasonable manager. There was therefore every evidence that if Mr Smith had indeed spoken to Mr Cannon

about this ultimatum that Mr Cannon was someone who would have done something about it. It would have been very easy for Mr Cannon to have dealt with such an ultimatum and to have overruled it. It would have been very easy to get the claimant's scheduled return to work back on track, and it would have been equally easy for the claimant to have been once again referred to Occupational Health, as he had already, for guidance as to what the appropriate steps should be to continue to support the claimant in connection with a return to full-time work. The claimant could not offer any explanations for why he had not raised such a complaint in order that such steps could be taken. He was equally unable to say why he had not sought the assistance of his trade union. The trade union representative, Mr Cunningham, did assist the claimant in respect of other allegations and indeed attended a mediation appointment with the claimant in 2021.

(c) The Tribunal also took into account that Mr Hitchen was the supervisor responsible for all return to work processes and procedures of the respondent company in the part of the business unit that the claimant worked. It appeared obvious to the Tribunal that Mr Hitchen would have known without a shadow of a doubt the personal and professional difficulties that he would be in if it was found that he had delivered such an ultimatum on behalf of Mr Whitham. The Tribunal could not find any evidence to suggest why Mr Hitchen may have been prepared to take such risks against the background of his experience in dealing with return to work issues.

(d) Furthermore, if as alleged Mr Whitham had instructed Mr Hitchen to pass on this ultimatum then the Tribunal looked for some explanation/understanding as to why, apparently out of the blue, Mr Whitham decided to depart from the established return to work process and instead instructed Mr Hitchen to deliver the ultimatum to the claimant that he must return to work full-time. There was no evidence of any pressure on either Mr Whitham or Mr Hitchen to deliver such an ultimatum. There was no evidence of any threats to production. There was no evidence that the phased return of the claimant was causing any workplace difficulties or challenges for Mr Whitham or Mr Hitchen at all. The Tribunal was unable therefore to understand what the motive would have been for Mr Whitham and/or Mr Hitchen to believe in this way.

(e) It was clear from the documentation that there was a history of the management of the injury suffered by the claimant, which was sympathetic, constructive and reasonable. The Tribunal therefore looked for some evidence/reasoning as to why there should be such a sudden change of approach on behalf of Mr Whitham and Mr Hitchen but was unable to find any explanation for such sudden change. None was offered or suggested by the claimant.

(f) Mr Campion, on behalf of the respondent, suggested to the Tribunal that the claimant had deliberately made up this allegation as a lie to deflect attention from his issues with positive drug tests. The Tribunal rejected that proposition out of hand. The Tribunal at all times found the claimant to be a truthful and honest witness and was fully satisfied that the claimant

had not told lies, either to the respondent or to the Tribunal as Mr Campion suggested.

(g) The Tribunal therefore looked for some explanation as to how the claimant could have gained the impression that Mr Hitchen had spoken to him in a way which amounted to an ultimatum to return to full-time work or go on sick leave. The only conclusion the Tribunal could reach was that there must have been some discussion about returning to full-time work, but that discussion had been misinterpreted by the claimant. At the time of the alleged discussion the claimant was working up to three hours on the picking line, and following discussion with Occupational Health it had been agreed that the claimant would progress to working 70% of his working hours on the line. The progression therefore from 70% to full-time work seemed to the Tribunal to be something that had very likely been the subject of discussion. Indeed the claimant told the tribunal that he had every intention of doing just that. However, there was no evidence as to what that discussion may or may not have been, but it was the only rational conclusion that the Tribunal could reach as to why the claimant appeared to have reached the impression that he had been given the ultimatum that he had. However, assessing all the evidence as set out above the Tribunal was not satisfied that the claimant could satisfy the burden of proof. He could not show on the balance of probabilities that the threat had been made by Mr Hitchen as alleged, and on that basis the Tribunal was not satisfied that there had been any breaches of the implied term of trust and confidence in the manner alleged by allegations numbered 2 and 3 set out above.

7. The fourth allegation was that the claimant had been: **"unreasonably tested for drugs when others were not tested"**.

The Tribunal was easily unable to find that this was unreasonable in any circumstances whatsoever. Indeed the Tribunal concluded that the conduct of the respondent was beyond criticism. The claimant was tested in accordance with the drug policy and procedures of the company. He was one of 66 people who were included on a list of people for random drug testing. Of the 60 people, the procedure adopted by independent drug testers employed by the respondent, Alere, was to carry out 15 random drug tests, and the evidence was that from their experience, in order to ensure that they could obtain 15 tests every time, that they needed to supply to the respondent a list which Alere themselves selected (not the respondent) of at least 60 names. Clearly there were business reasons why certain persons were not able to provide a test and there were incidents of holidays and sickness. It is not disputed that the claimant was on the list which had been supplied by Alere to the respondent. He was therefore selected from that list and he was tested. He was not therefore unreasonably tested. He was perfectly reasonably tested in accordance with the policies and procedures which were well established and well recognised within the respondent company and equally well known to the claimant on his own evidence.

8. The fifth allegation made by the claimant was that the respondent had: **unreasonably suspended the claimant from work following a positive (non-negative) drugs test which arose because of the unprescribed medication he was taking to manage his pain – caused because of his early return to working on the line full-time**:

(a) The Tribunal was not able to find anything which was unreasonable about the suspension of the claimant at all. Suspension was entirely in accordance with the written policies and procedures of the company. Furthermore, the Tribunal was satisfied that suspension was in accordance with recognised employment law practice and procedure of an employer, especially one engaged in a manufacturing environment where there is potentially dangerous machinery. The claimant failed a drugs test, and in accordance with that policy and procedure he was suspended whilst a laboratory test was carried out in order to ascertain the level of drugs which had been found by the non-negative test. The initial drugs test either produced a positive or negative result if the reading was sufficiently clear, or alternatively produced a non-negative result which then required a laboratory test to be carried out. Suspension of the claimant therefore in those circumstances was entirely reasonable and entirely appropriate response of the respondent.

(b) The claimant had taken unprescribed drugs which had been supplied to him by his second cousin. He told the Tribunal that he had been given six or seven pills which he believed may or may not have contained some form of cannabis in order to provide him with non-prescribed pain relief.

(c) The claimant said he had been taking that unprescribed drug/pills because of his earlier return to working on the line. The Tribunal refused to accept that as a rational explanation. If the claimant was genuinely in significant pain then he ought to have approached his GP or a recognised medical practitioner for advice and assistance. Instead, he decided to purchase unspecified pills from his second cousin. The reason for the non-negative test, therefore, was the decision of the claimant to take non-specified medication supplied by his second cousin. It had nothing to do with an earlier return to work on the line full-time. Even if the claimant had suffered pain as a result of that then the only and obvious common -sense approach was to get advice and assistance from a recognised medical practitioner. It was the claimant's decision to take unspecified and non-prescribed mediation which led to the drugs test and the claimant's suspension, not any action on behalf of the respondent.

(d) Inevitably, therefore, the Tribunal concluded that this allegation was not proven and could not be substantiated as any conduct on behalf of the respondent which in any way breached the implied term of trust and confidence.

9. The sixth allegation was that: **the respondent "unreasonably refused to postpone a further drugs test so the claimant's medication would have gone out of his system"**:

(a) The overwhelming conclusion of the Tribunal was that it was perfectly reasonable for the respondent to test the claimant again on 23 December. The Tribunal could not agree that the claimant was justified in describing the pills that he had received from his second cousin as "medication". It was certainly not any formal or prescribed form of medication. The first drugs test had proved non-negative, and a second

laboratory test had therefore been carried out. That produced a reading which was seven times over the maximum reading of 15 which was permitted by the respondent's drug policy. The claimant was, therefore, at the time of the first test, over seven times the limit described by the respondent's drug policy. This was therefore a quite extraordinary reading, particularly bearing in mind the manufacturing environment in which the claimant was employed.

(b) The claimant attended a disciplinary hearing on 20 December when, as an act of leniency, Ms Browning who conducted the disciplinary hearing issued the claimant with a final written warning as a result of the drugs test. The conclusion of the Tribunal was that the claimant was extremely fortunate not to have been dismissed summarily bearing in mind the size of the reading and the fact that it had been produced as a result of the claimant taking non-prescribed medication obtained from his second cousin.

(c) At page 181 the respondent had asked their independent expert how long the drug which had led to the excessive reading might remain within the system of the claimant before it would be safe and reasonable to test the claimant again. Their written opinion was set out at page 181 of the bundle, and it indicated that after 17 days it would be safe to test the claimant again. That was on the basis that the person being tested might be a regular user of cannabis, which was the drug found in the system of the claimant by the first drugs test. There was, however, no evidence that the claimant was a regular user and so it would have been quite reasonable for the respondent to suggest that the claimant might in fact be tested earlier than 17 days.

(d) However, the claimant accepted that he had not taken any of the pills in question after 28 November. He was tested again on 23 December and this was therefore at least 25 days (not 17 days) after the last consumption. That was on the evidence of the claimant himself.

(e) The claimant and Mr Cunningham, his trade union representative, had apparently looked at all sorts of different websites on the internet and they had suggested to Ms Browning that on the basis of that unspecified information (none of which was produced either to Ms Browning or to the Employment Tribunal) that the retesting should be adjourned until after Christmas and into the New Year. Ms Browning refused. She relied on the written opinion of their independent drug testers set out at page 181.

(f) The Tribunal's conclusion was that it was eminently reasonable and sensible for Ms Browning to have relied on the evidence at page 181 in preference to the unspecified and unidentified information allegedly available on the internet. It being unreasonable, therefore, to postpone another drugs test, the conclusion of the Tribunal was that it was overwhelmingly fair and reasonable for the test to be conducted on 23 December. This allegation of behaviour amounting to a breach of the implied term of trust and confidence was therefore rejected.

10. The seventh allegation was that: **on 23 December John Whitham had sent the claimant home from work following a positive (non-negative) result from a second drugs test – at which time the claimant thought he had been dismissed**.

(a) The Tribunal divided this allegation into two separate parts, the action of sending the claimant home, and secondly the claimant believing that he had been dismissed as a result of actions of Mr Whitham.

(b) Addressing the first of those two allegations, the Tribunal could find absolutely nothing wrong with that whatsoever. Indeed it was the appropriate step for the respondent to take bearing in mind that once again the claimant had provided a non-negative test. He was treated in exactly the same way that he was when he had provided the first non-negative test, which was entirely in accordance with the company's written drugs policy and procedures. In short, therefore, there is nothing whatsoever for the claimant to complain about when he was sent home. What actually happened was that he was suspended rather than being "sent home". That was not in any way behaviour which the Tribunal could criticise the respondent for. Indeed quite the opposite.

(c) Turning to the second part of the allegation, the claimant alleged that due to the way that he was treated when he was suspended by Mr Whitham he believed that he had been dismissed. He alleged that he had been ushered off the premises by Mr Whitham. He did not say that Mr Whitham had said anything at all to the claimant. He had silently, using his arm as a guiding mechanism, guided the claimant through the office premises of the respondent and out into the yard. He had never touched the claimant, he had simply ushered and guided him out of the office premises. In addition, the claimant said that Mr Whitham had done so with a smug grin on his face. As has already been said, Mr Whitham neither submitted a witness statement nor appeared as a witness for the respondent. The Tribunal therefore accepted the evidence which was given by the claimant and made a judgment accordingly.

(d) The Tribunal, however, even taking the claimant's description at face value, could not find any evidence on which the claimant could reasonably have believed that he had been dismissed as a result of the actions of Mr Whitham. He was being suspended and escorted off the premises in exactly the same way that had occurred when he had been suspended following the first drugs test. There was nothing unusual or unreasonable in the conduct of Mr Whitham. The claimant complained that it had been embarrassing for him to be suspended in the presence of his work colleagues, but the view of the Tribunal is that that often occurs in cases of suspension. Indeed in some cases it is inevitable. There was no evidence at all on which the claimant could reasonably have concluded that by being suspended and being escorted off the premises in this way amounted to the claimant being dismissed by Mr Whitham. The reasonable conclusion was that he was being suspended in exactly the same way that he was suspended following the first non-negative drugs test which had resulted in the claimant being issued with a final written warning.

(e) These two allegations, therefore, did not amount to breaches of the implied term of trust and confidence as alleged or at all.

11. The eighth allegation in the list which appeared in the written summary of the Preliminary Hearing was not proceeded with as the Tribunal has indicated above.

12. The next allegation, which was numbered 9, was: **during the mediation meeting on 2 March 2020 John Whitham again expressed views about the claimant's injury and referred back to matters that were meant to have already been resolved**:

(a) The claimant indicated that in addition to himself, Joh Whitham, Ian Hitchen and Paul Cannon, the Senior Manager, were present at the mediation. Furthermore, the claimant had been accompanied by his trade union representative, Mr Cunningham.

(b) In effect, what the claimant objected to was Mr Whitham raking over old coals which he clearly believed had been dealt with. This related to the first allegation relating to the social media posts and Mr Whitham at first indicating that he wanted the claimant to attend an investigation meeting to explain what was shown in the photographs which had been posted by the claimant.

(c) During the course of the mediation both Mr Cunningham and the claimant, on oath, alleged that Mr Whitham had produced paper copies of the photographs which the claimant had posted on social media at the end of July 2019. They alleged that in effect Mr Whitham had gone to the trouble of either printing them off again or alternatively hunting the photographs out and ensuring that he brought them to the mediation hearing. They both also alleged, on oath, that during the mediation appointment Mr Whitham was seen to simulate the claimant waving his arms around on the basis that the claimant had been seen to be doing that in the social media posts. Mr Cunningham and the claimant therefore gave very clear evidence that the manner in which this was raised by Mr Whitham was both inappropriate and confrontational.

(d) Once again, however, the Tribunal was faced with a complete disagreement of evidence. Mr Hitchen and Mr Cannon, who also both gave evidence on oath by reference to written witness statements and who were cross examined, denied that Mr Whitham produced these paper copies and equally denied that he was seen to be waving his arms around during the course of the mediation to mimic the alleged behaviour of the claimant in or about the end of July 2019. They denied that the paper photographs had ever been produced or that Mr Whitham had behaved in that way.

(e) There was however, again rather troublingly, bearing in mind that the claimant was represented by his trade union representative, no evidence of any formal complaint or grievance raised following the mediation either by the claimant or by Mr Cunningham on his behalf. The Tribunal found it difficult to believe that Mr Cannon, as the senior manager, would not remember the production of photographs and the alleged confrontational

behaviour of Mr Whitham if indeed it had occurred. It would have been a significant hurdle in a mediation and in the opinion of the Tribunal something that would have stood out.

(f) Furthermore, following the mediation on 2 March 2021 Mr Cannon, the senior manager, wrote to the claimant in a two page letter at pages 233/234. The Tribunal found its contents to be relevant. It clearly showed a positive tone. It recognised the willingness of the claimant "to try to resolve the issue". It advised the claimant that if he had any further problems that he should speak to HR or to a member of the management team, or indeed it suggested that if Mr Smith needed any support that he should not hesitate to contact Mr Cannon personally. Mr Cannon also said that he looked forward to the claimant returning to work. There was no indication in that letter of any disagreement of hostility during the course of the mediation at all. The whole tone of the letter was positive.

(g) Four days later on 6 March (page 236) the claimant wrote a two page letter but this was not to Mr Cannon. It was the claimant raising a variety of issues but the vast majority of that letter related to the disciplinary hearing involving Ms Browning. The only reference to the mediation and the alleged conduct of Mr Whitham was the claimant saying, "some of the comments made in the mediation meeting". No details at all were set out, however, and the Tribunal did not find that to be a serious or significant complaint bearing in mind that the reference comprised no more than ten words with no description whatsoever.

(h) The Tribunal therefore carefully considered all the evidence available about the conduct of the mediation but was unable to find that it amounted to a breach of the implied term as alleged or at all. The Tribunal Judge himself has 10/15 years of being a qualified mediator. He used his own experience of mediations which was that the focus was always on moving forward rather than looking backward. In this case it appeared that a solution had been found which had been confirmed by Mr Cannon when he said that he was looking forward to the claimant returning to work in the same job. There was no suggestion at the end of the mediation that it had been necessary to move the claimant elsewhere or indeed to remove Mr Whitham or Mr Hitchen as the claimant's line manager. The Tribunal found this very surprising if indeed Mr Whitham had behaved in the manner alleged.

(i) The Tribunal again found itself therefore applying the burden of proof. Had the claimant proved to the Tribunal on the balance of probabilities that Mr Whitham had behaved in this confrontational manner? The answer to that question on the part of the Tribunal was no. He had not satisfied the burden of proof. The witnesses gave conflicting but equally clear evidence. The documents referred to above however were inconsistent with the allegations now raised by the claimant. In those circumstances the alleged behaviour of Mr Whitham could not, in the opinion of the Tribunal, contribute to a beach of the implied term of trust and confidence between Mr Smith and the respondent.

13. The tenth and final allegation was that which appeared in paragraph 17 of the claimant's witness statement. In that paragraph he referred to pages 482/483 of the bundle. The claimant in his witness statement said that when he got these letters that they "tipped me over the edge". The Tribunal has already referred to these pages but feels it appropriate to do so again at this point in the Judgment:

(a) All that the Tribunal could see had happened was that the trade union at page 482 had raised a grievance indicating that they had some misgivings about the allegedly random nature of drug testing. They did not however produce any evidence. They simply said that "we believe" and "we feel". That was the height of their allegation. In response at page 483 Mr Whitham had sent a comprehensive justification for and explanation of the application of the drugs policy and random testing. There was nothing whatsoever to suggest that the trade union had done anything other than to accept that explanation and move forward. There was no further complaint on the part of the trade union. The Tribunal concluded, therefore, that the views expressed by the trade union were nothing more than their opinion which had then been rejected, with evidence and reference to policies and procedures by Mr Whitham.

(b) The claimant however in his witness statement said that reading these two pieces of correspondence had "tipped him over the edge". The Tribunal could only conclude that reading these documents had in some way contributed to the claimant's view that he had been unfairly and unreasonably targeted for drugs testing and for suspension following the supply of non-negative tests. The Tribunal, however, has already explained that if the claimant had those views that they were not justified. In any event if the claimant formed the view that these pages added to his sense of victimisation then that was not because of any view or conduct of the employer: It was only because of a view expressed by the trade union at page 482 and unsubstantiated by any evidence. It was clear however that this correspondence had tipped the claimant over the edge. It was obvious therefore that if that had been the case that this was not because of any conduct on the part of the respondent, indeed quite the opposite. Mr Whitham had provided a comprehensive explanation and justification which all parties appeared to have accepted. It was therefore somewhat difficult to understand why the claimant believed that having read this correspondence that this then tipped him over the edge. However, that was his evidence.

(c) The correspondence did not in any way, however, amount to serious or blameworthy conduct on the part of the employer, in fact quite the opposite. As it was not blameworthy conduct by the employer, the only conclusion that the Tribunal could reach was that if that correspondence at 482/483 was indeed the last straw relied upon by the claimant, that it could not in any way have been a last straw because it did not and could not have contributed to a breach of the implied term of trust and confidence. It was not therefore a last straw justifying his resignation.

14. If, however, the Tribunal was wrong about the correspondence at 482/483 being the last straw then the Tribunal looked back through the list and the only alternative last straw was the alleged behaviour of Mr Whitham in the mediation

hearing. Again, however, the Tribunal for reasons which it has set out above concluded that was not serious or blameworthy conduct on the part of the employer either, and as that did not amount to a breach of the implied term of trust and confidence in any way, then equally that could not amount to a last straw.

## Conclusion

15. The conclusion of the Tribunal therefore was that the claimant had not proved that there was behaviour by employees of the respondent which was calculated or likely to destroy or seriously damage trust and confidence between the claimant and his employer. Although the claimant resigned the Tribunal was unable to conclude that he resigned because of breaches of the implied term of trust and confidence. Indeed the Tribunal found that there were no such breaches for reasons which have been set out above.

16. The conclusion was therefore that the claimant had not been dismissed in accordance with section 95(1)(c) of the Employment Rights Act 1996 and in the absence of a dismissal his claim of unfair dismissal fails and is dismissed.

Employment Judge Whittaker

Date 23rd September 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
23 September 2021

FOR THE TRIBUNAL OFFICE