THE EMPLOYMENT TRIBUNALS

Claimant:	**Mr R Sweeney-Clements**
Respondent:	**London Borough of Redbridge**
Heard at:	**East London Employment Tribunal**
On:	**20, 21 May and 9 July 2021**
Before:	**Employment Judge P Wilkinson**

Representation

Claimant:	In person
Respondent:	Ms S King

JUDGMENT

1. **The Claimant's claim for unfair dismissal brought under Part X of the Employment Rights Act 1996 is well founded**.

REASONS

1 This is my judgment in the matter of Sweeney Clements v London Borough of Redbridge.

2 The Claimant was employed by the respondent from 2nd September 2006, initially as IT technician and later as ICT instructor and assessment manager.

3 The Claimant left the employment of the respondent by serving notice of his resignation on 3rd October 2019, ending his employment on 2nd December 2019. It is his position that this resignation was in response to a course of conduct amounting to a repudiatory breach of contract by the respondent, such that he should be treated as having been constructively dismissed.

4 The respondent denies that there has been any breach of contract or in the alternative that there was reasonable and proper cause for the behaviour complained of.

5 The respondent has expressly conceded that if the Tribunal finds that there has been a constructive dismissal, that dismissal is unfair.

The applicable law

UNFAIR DISMISAL CONTRARY TO SECTION 94 OF THE EMPLOYMENT RIGHTS ACT 1996

The legal framework – unfair dismissal

6 Section 94 of the Employment Rights Act 1996 (hereafter 'the ERA 1996') sets out the right of an employee not to be unfairly dismissed by his or her employer.

7 For the Claimant to be able to establish his claim of unfair dismissal he must show that he has been dismissed. Dismissal for these purposes is defined in Section 95 ERA 1996 and includes in Sub-section 95(1)(c) 'the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct'.

8 Western Excavating (ECC) Ltd and Sharpe 1978 IRLR 27 established that in order for the circumstances to entitle the employee to terminate the contract without notice, there must be a breach of contract by the employer, secondly that that breach must be sufficiently important to justify the employee resigning; the employee must leave in response to the breach not some unconnected reason; and that the employee must not delay such as to affirm the contract. The breach relied upon can be a breach of an express or implied term.

9 In Mahmood v BCCI 1997 ICR 607 it was confirmed that every contract of employment contains an implied term 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 confidence and trust between the employer and employee. It is implicit in the case of Mahmood v BCCI that any breach of the implied term will be sufficiently important to entitle the employee to treat himself as dismissed and the reason for that it is necessary do serious damage to the employment relationship. That position was expressly confirmed in Morrow v Safeway Stores Ltd 2002 IRLR 9.

10 Where the breach alleged arises from a number of incidents culminating in a final event, the tribunal may, indeed must, look at the entire conduct of the employer and the final act relied on need not itself be repudiatory or it even unreasonable, but must contribute something even if relatively insignificant to the breach of contract see Lewis and Motor World Garages Ltd 1985 IRLR 465 and Omilaju v Waltham Forest London Borough Council 2005 IRLR 35. In Omilaju it was said:

> *'19. … The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*
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> *20. I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken*

together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

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

11 The test to be applied in assessing the gravity of any conduct is an objective one and neither depends upon the subjective reaction of the particular employee nor the opinion of the employer as to whether its conduct is reasonable or not see Omilaju v Waltham Forest London Borough Council and Bournemouth University Higher Education Corpn v Buckland [2011] QB 323.

12 There is no general implied contractual term that an employer will not breach some other statutory right such as the right not to suffer discrimination Doherty v British Midland Airways [2006] IRLR 90, EAT. However, the same facts that might support a finding of unlawful discrimination or any disregard of such a statutory right may, depending on the facts, suffice to establish a breach of the implied term of mutual trust and confidence see Green v Barnsley MBC [2006] IRLR 98 and Amnesty International v Ahmed

13 Once there is a breach of contract that breach cannot be cured by subsequent conduct by the employer but an employee who delays after a breach of contract may, depending on the facts, affirm the contract and lose the right to treat him/herself as dismissed - Bournemouth University Higher Education Corpn v Buckland.

14 The breach of contract need not be the only reason for the resignation providing the reason for the resignation is at least in part because of the breach Nottinghamshire County Council and Meikle [2004] IRLR 703.The employee need not spell out or otherwise communicate her reason for resigning to the employer and it is a matter of evidence and fact for the tribunal to find what those reasons were Weatherfield v Sargent 1999 IRLR 94.

15 The proper approach, in the main distilled from the cases set out above was considered by the Court of Appeal in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 per Underhill LJ at paragraph 55.

'it is sufficient for a tribunal to ask itself the following questions:

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

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

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

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?

16. If dismissal is established sub-section 98(1) ERA 1996 requires the employer to demonstrate that the reason, or if more than one the principal reason, for the dismissal was for one of the potentially fair reasons listed in sub-section 98(2) of the ERA 1996 or for 'some other substantial reason'. If it cannot do so then the dismissal will be unfair.

17. If the employer is able to establish that the reason for the dismissal was for a potentially fair reason, then the employment tribunal must go on to consider whether the dismissal was actually fair applying the test set out in section 98(4) of the ERA 1996 which reads:

> '*(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.'*

18. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

> *'any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.'*

19. The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

Issues for determination

20. My findings on the issues identified in the Order of EJ Burgher of 18th March 2020 are as follows:

1. Did the Respondent breach the implied term of mutual trust and confidence byreason of its treatment of the Claimant by all or any of the following:

1.1 At the meeting on 24 June 2019:

1.1.1 there was a failure of proper consultation.

1.1.1.1. Ray Sweeney Clements had been at the school for 9 years. He had been in receipt of a salary supplement as a retention allowance for the previous 3 years, which was due to end. That allowance was paid to him as he was at the top of his scale. As the respondent repeatedly made clear in evidence, he could not be paid on a teaching scale, because he is not a teacher. There was no prior consultation on the renewal or otherwise of this allowance. In fact, there was no consultation at all. It was presented as a fait accompli.

1.1.1.2. Mrs Donnelly made clear to the claimant that his retention allowance was not going to be renewed. She challenged his job title, which she clearly considered to be wrong and effectively to reflect an earlier role and she told the claimant that he would be expected to provide cover for classes of children, which he had never done before and which he was not qualified to do.

1.1.1.3. He had no experience in supervising children or managing a classroom and, as the respondent points out in the context of pay, he is not qualified to teach.

1.1.1.4. The claimant was also told there would be a complete change to the way his role was delivered. A change in how IT was delivered throughout the school, with an end proposed to dedicated ICT lessons and closure of the ICT suite intended to take place. The new head considered the existing model old fashioned and not the right way to teach children ICT. This meant the end of the claimant's role as he knew it.

1.1.1.5. I am satisfied that there was no proper consultation before the meeting and that there were substantial changes to the claimant's role, imposed on him without notice.

1.1.1.6. I find that this was a breach of the implied term of trust and confidence and set the stage for everything that was to follow.

2. Ms Donnelly informed the Claimant that he would no longer be partof the Assessment Team from 1 September 2019. The Claimant's job title was assessment manager.

2.1. As already set out, I find that this happened as part of the unheralded changes conveyed to the claimant in the meeting of 24th June.

3. Ms Donnelly informed the Claimant that he may have to cover classes from 1 September 2019. The Claimant had not previously done this.

3.1. I accept the claimant's evidence (essentially unchallenged) that he had never been responsible for a class of children, having always delivered his material with a class teacher present. It is agreed that he has had no classroom training and has no experience of behaviour management or control.

3.2. To impose on him a role as cover teacher without proper consultation, training and support seems to me to have been completely inappropriate - it is a fundamentally different role and one for which he would have needed at least some in classroom support, which he was not going to have.

3.3. As already noted, I consider this to be a clear breach of the claimant's contract and to be repudiatory.

4. Ms Donnelly informed the Claimant that the ICT Suite may be removed. This was an important part of the Claimant's role.

4.1. Again, the major problem here was the complete lack of consultation. The claimant had worked in ICT in the school for 9 years. He delivered ICT support and he delivered ICT lessons in the ICT suite, in the presence of a teacher. Of course it is open to the respondent to tear up the existing model and start again. The respondent was entirely within its rights to change to a holistic teaching method for ICT but to simply present it to the claimant as the future of his role, with no discussion and no consultation is obviously a repudiation of his existing contract.

5. On 5 July 2019, the Claimant requested confirmation that there would no longer be an Assessment Manager role from 1 September 2019. Ms Donnelly provided this confirmation by email on the same date.

5.1. I have already dealt with this. Again, there was a complete lack of proper communication. Down-titling an employee does not seem to me to be a breach of contract, but to do so in such a high handed way does seem to be calculated to foster distrust and a lack of confidence in the support provided by management.

6. On 15 July 2019 the Claimant sent an email seeking to arrange a meeting with Ms Donnelly regarding the changes. Ms Donnelly responded on 16 July 2019

saying she was confused by the Claimant's email.

6.1. It is a matter of record that this took place.

7. On 17 July 2019 the Claimant sent the then Chair of Governors, Misbah Khurram, an email setting out his informal concerns. Contrary to the school grievance policy there was no meeting between the Claimant and the headteacher. Again, contrary to the policy, the School Business Manager, Ms Amanda Lawman to deal with the informal concerns.

7.1. I was somewhat concerned by the way in which this was handled. There seems to have been a rather laisse faire approach to the application of policy. Although I do not regard this as a breach of contract per se, it seems to me that it added to the lack of confidence and undermined trust.

8. On 23 July 2019 Ms Lawman sent the terms of the Claimant's informal grievance to Ms Donnelly. The Claimant alleges that this should nothave been sent to Ms Donnelly. It is also alleged that Ms Lawman told the Claimant not to talk to Ms Khurram or Ms Donnelly about this. This was contrary to the grievance policy.

8.1. I have not found it necessary to make specific findings about this, in the light of my other findings, set out already. I do not consider that any findings I might make in this respect would alter my overall conclusions.

9. On 24 July 2019 the Claimant asked what his new job description wouldbe. He was told that this would be discussed in September 2019. The Claimant was also told that the school website provider would be changed. The school website was part of the Claimant's responsibility.

9.1. Once more, the problem is in the implementation and the lack of consultation. To tell the man responsible for managing the website provision that the provider is being changed, without troubling to seek his view might be regarded as somewhat high handed at any point. To make such a change against the background of the existing bad feeling was at best ill-judged and again just added to the claimant feeling excluded and sidelined.

10. The Claimant was signed off sick from work on 30 August 2019. Contrary to the school sickness policy the Claimant was referred to occupational health on 4 September 2019. The usual timeframe for referral is 20 days.

10.1. I do not consider that anything turns on this. Clearly, the usual timeframe is indeed 20 days, because after 20 days it is paid for centrally, whereas before 20 days it comes at a cost. I do not consider that this was a breach of contract.

11. On 4 September 2019 the Claimant had his access to the school server removed. He was unable to access his payslips and other relevant documentation.

12. On 6 September 2019 the Claimant had his position as the point of contact for the London Grid for Learning removed by Ms Donnelly.

13. On 6 September 2019 the school changed its policy relating to accessing emails for staff who were on long term sickness absence.

14. The Claimant asserts that this was changed to specifically access his emails as the business plan for the changes presented at the Governor meeting on 4 September 2019 stated that it was a threat to the network.

15. I will deal with the above three issues together.

15.1. It is clear from the documentary and oral evidence that the respondent specifically changed its policies and procedures to shut the claimant out of all access to the school IT system; emails, server and point of contact were all taken away.

15.2. I am satisfied that this was a deliberate act and was aimed specifically at the claimant.

15.3. The business case presented to the governors on 4th September 2019 sets out "it is requested that RSC's [RSC is the Claimant, Ray Sweeney Clements] access to both the network and email be restricted…" and "this is in the event of a potential breach in both procedures and security and improper access by the employee, who is able to access the system remotely…"

15.4. I find that the claimant was not told that he was being shut out of the system and found out by chance when trying to access his payslips.

15.5. I find that this action was neither necessitated by nor motivated by a need to have someone else as point of contact during the claimant's absence. It was accepted that it was possible to have more than one point of contact and it seems to me that this could have been established by a 5 minute phone call.

15.6. I find that there was a complete failure to either consult or inform the claimant either before denying him access to the network and his emails or afterwards.

15.7. I find that there was no evidence that the claimant had improperly accessed the system nor done anything that amounted to a breach of procedures and security.

15.8. The claimant was away from work sick with stress. He had a current grievance and evidently felt undermined and side-lined by the new head teacher. In those circumstances in particular, for him to simply find himself shut out of the system without explanation seems to me to have been the clearest possible breach of the implied term of trust and confidence. How much more clearly could the respondent have communicated their lack of trust in the claimant.

15.9. Perhaps things might have been different if, immediately after the governors meeting, the respondent had communicated with the claimant to explain their actions. They did not and they left him to discover for himself that he had

simply been shut out.

16. On 8 September 2019 the Claimant received a letter stating that the changes to his job description would be discussed at a meeting on 16 September 2019. The Claimant was still on sickness absence.

16.1 I note that the respondent's own internal communications with LB Redbrige suggest that any changes to the claimant's contract should be consulted on and any substantive change should wait until there had been proper consultation. Anita Seaton of LB Redbridge proposed that any such change should perhaps wait until after the autumn half term. This seems to have been entirely disregarded.

16.2 Julie Donnelley's attitude to the claimant and to this dispute is succinctly summed up by her email in response, when a query is raised over whether the removal of the retention allowance should be part of the consultation. Her response was "Nope, he's not getting it!". That could almost be taken as a motif for this case. I consider that Julie Donnelly imposed the changes she wanted, without regard to the effect on the claimant and that when challenged, she ploughed on regardless.

17. On 19 September 2019 the Claimant sent two grievances to the new Chair of Governors, Ms Avril Carnelley. These were sent by recorded delivery and receipt acknowledged on 23 September 2019. Contrary to the grievance policy these were sent to Ms Donnelly.

17.1 It does not seem to me that anything turns on this. Although this may be a breach of the procedure, I do not consider it to be material.

18. On 3 October 2019 the Claimant read an email that demonstrated that his confidential grievance and private, personal and sensitive and medical information was sent to an external third party, Karen Mount of KJM Governors Services. There was no authority for the Respondent todo this, and it was contrary to the grievance policy. The Claimant asserts that this amounted to the last straw. He resigned on this day.

18.1 The claimant had his role changed without consultation, he was denied any kind of proper discussion about his remuneration and the termination of the allowance he had been paid for the previous 3 years, he was shut out of the system with no notice and without even the courtesy of being informed after the fact. He was off sick with stress.

18.2 Once more, there was a complete failure of communication or consultation. The school effectively brought in an outsider, not known to the claimant and again, did not tell him he was going to receive any contact from her. She described herself in her email to him of 3rd October as an 'independent clerk'.

18.3 I was profoundly unimpressed with the evidence of Avril Carnelly on this issue. She gave evidence that she passed the grievance to Karen

Mount because Karen Mount was Clerk to the Governors. Only when I pressed her on the matter did she agree that in fact Karen Mount had been brought in as clerk during this grievance and had left shortly after it was dealt with.

18.4 I note that Karen Mount herself says in her email that she is an independent clerk, engaged by the governors of Manford Primary School.

18.5 It is not so much the passing of confidential information to Ms Mount, as a question of data protection or privacy, so much as the abject failure to consult, inform or seek consent from the claimant for the disclosure to a third party of his confidential information, including his grievances and presumably his sickness record.

18.6 How could he not have been alarmed and offended by this sudden and unheralded change in the way his grievance was being dealt with?

18.7 I remind myself of the Omilaju test and the question of what might be said to constitute the final straw in a case of this kind.

> *"The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*
>
> *20. I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence."*

18.1.1. I am satisfied that the passing of the claimant's confidential information to Ms Mount without even informing the claimant of her proposed involvement in advance was capable of contributing to, and did in fact contribute to, the breach of the implied term of trust and confidence.

18.1.2. I am satisfied that the letter of 03/10/2019 was the last straw.

18.1.3. I am satisfied that the Claimant resigned on the same day as he received that letter and that he did so in response to the letter of 30/10/2019

19. If so, were the breach(es) sufficiently serious to entitle the Claimant to resign and treat himself as dismissed?

19.1 I am satisfied that the breaches set out above were sufficiently serious to entitle the Claimant to resign and treat himself as dismissed. As

already set out above, I consider the breaches cumulatively and in some instances individually to amount to a repudiatory breach of the implied term of trust and confidence.

20. Did the Claimant resign in response to the breach(es)?

20.1 It is agreed that the Claimant resigned by letter of 3rd October, the same day as he received the email from Karen Mount. As set out above, I have found that eh resigned in response to that letter.

21. Did the Claimant delay in resigning such that he waived the breach(es)?

21.1 As already noted, the final straw was the unheralded disclosure of his confidential information to Karen Mount. The Claimant discovered this on 3rd October. He tendered his resignation on 3rd October. Accordingly, I find that he did not delay such as to waive the breach.

22. The Claimant will seek an adjustment to compensation on the basis that the Respondent did not comply with the ACAS process on grievance processes.

22.1 have not heard from the parties on compliance with the Acas code. This issue is to be determined at any remedy hearing.

23. Given all of the above, I find that the claimant was constructively dismissed by the respondent as a result of a course of conduct amounting to a repudiation of the implied term of trust and confidence.

24. The respondent does not seek to argue that the dismissal was nonetheless fair.

25. I therefore find that the Claimant was unfairly dismissed.

26. I will list a remedy hearing for 1 day but would suggest that the parties attempt to resolve or narrow their differences in order to avoid or reduce the costs associated with that hearing.

Employment Judge Wilkinson
Dated: 13th September 2021