



EMPLOYMENT TRIBUNALS

Claimant: Mr M Gore

Respondent: Sefton Metropolitan Borough Council

HELD AT: Liverpool

ON: 3, 4 & 5 April 2023

BEFORE: Employment Judge Johnson

REPRESENTATION:

Claimant: Mr J Searle (counsel)

Respondent: Mr R McLean (counsel)

JUDGMENT

The judgment of the Tribunal is that:

- (1) The complaint of constructive unfair dismissal is well founded which means that it is successful
- (2) The case will now proceed to a remedy hearing to take place on a date to be confirmed before Employment Judge Johnson at the Liverpool Employment Tribunal and with a hearing length of 1 day.

REASONS

Introduction

1. These proceedings arose from the claimant's employment with the respondent from 4 January 2016 until his resignation which took effect on 28 February 2022 and for which he was paid in lieu of his remaining notice expiring on 21 April 2022.

2. This case is about the claimant's resignation, and which was connected with a capability process beginning in 2021 and a grievance process which arose as a result.
3. He presented a claim form to the Tribunal on 29 April 2022 following a period of early conciliation involving two periods, the first from 21 February 2022 to 3 April 2022 and the second from 29 April 2022 to 29 April 2022. The claimant originally presented complaints of disability discrimination and unfair dismissal and was explained in section 15 of the claim form, the second ECC was obtained because the first expired before the date when the resignation notice period expired.
4. The response was presented on 23 June 2022 resisting the claim and following case management before EJ Ross at a preliminary hearing case management ('PHCM') on 5 December 2022, the claimant withdrew disability discrimination complaint on 2 February 2023. Accordingly, the remaining complaint was one of constructive unfair dismissal.

Issues

5. The framework for the list of issues were discussed at the PHCM before EJ Ross on 5 December 2022. They took the usual form and can be summarised as follows, (A64-5 of the bundle):

Unfair dismissal (pursuant to sections 95 and 98 Employment Rights Act 1996)

Dismissal

- a) can the claimant prove there was a dismissal?
- b) Did the respondent do the things set out in the claimant's further and better particulars of information document?
- c) Did that breach the implied term of trust and confidence? Taking account of the actions or omissions alleged in the further particulars document, individually and cumulatively, the Tribunal will need to decide:
 - i) Whether the respondent had reasonable and proper cause for those actions and/or omissions, and if not
 - ii) Whether the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.
- d) if yes, is the fundamental breach of contract a reason for the claimant's resignation?
- e) Did the claimant affirm the contract before resigning, by delay or otherwise? The Tribunal will need to decide whether the claimant's words

or actions showed that they chose to keep the contract alive even after the breach.

Reason

- f) Has the respondent shown the reason or principal reason for dismissal for the fundamental breach of contract?
- g) Was it a potentially fair reason under section 98 ERA?

Remedy

- h) [to be determined upon the claimant succeeding with his complaint at a separately listed remedy hearing]
6. The schedule of allegations (pp.A65a to A65c) identified the occasions where the claimant says the respondent either individually or cumulatively committed a breach of the implied term of trust and confidence and which were provided in accordance with case management order 1.2 made by EJ Ross at the PHCM on 5 December 2022. The allegations were as follows:

Capability Process – Mike Riley

- a) The claimant alleges that Mike Riley committed breaches of the implied term of trust and confidence by way of his decision to implement and the handling of the issues around the capability process, as follows:
 - i. Raising issues with the claimant that he knew the claimant was not responsible for.
 - ii. Instigating a capability process that he knew was not required.
 - iii. Failing to properly follow the capability process, in particular by not providing the claimant with sufficient notice of the allegations against him prior to the meeting on 24 February 2021, attempting to fish for further potential allegations during that meeting, and raising issues after the meeting that had not previously been discussed.
 - iv. Choosing to continue with the capability process after the meeting on 24 February 2021 despite being unable to articulate properly achievable targets as required by the policy.

Grievance Process – John Corrin

- b) The claimant alleges that John Corrin committed breaches of the implied term of trust and confidence by way of his handling of the claimant's grievance, as follows:
 - i. Failing to investigate the claimant's grievance fairly and properly, in particular by failing to interview the claimant and by carrying out no or a limited investigation otherwise.
 - ii. Failing to deal with the claimant's grievance within a reasonable timeframe, it is having been 12 weeks between the claimant

- submitting his grievance on 22 March 2021 and Mr Corrin providing his outcome to the appeal on 14 June 2021.
- iii. Providing an outcome that was flawed to the point of giving the appearance of bias and/or that Mr Corrin had not approached the grievance process properly and with an open mind.

Grievance Appeal – Steve Martlew

- c) The claimant alleges that Steve Martlew committed breaches of the implied term of trust and confidence by way of his handling of the claimant's grievance appeal as follows:
 - i. Failing to deal with the claimant's grievance appeal within a reasonable timeframe, it is having been more than 15 weeks between the claimant submitting his grievance appeal on 19 July 2021 and Mr Martlew providing his outcome to the appeal on 3 November 2021.
 - ii. Failing to cover all of the issues raised by the claimant in his grievance appeal.

Further Questions – Simon Burnett

- d) The claimant alleges that Simon Burnett committed breaches of the implied term of trust and confidence by way of his handling of further questions put by the claimant as follows:
 - i. Failing to reply to the claimant's further questions within a reasonable timeframe, it is having been more than 10 weeks between the claimant raising his further questions on 28 November 2021 and Mr Burnett providing his response on 10 February 2022.
 - ii. Failing to answer all of the questions raised by the claimant.

Last Straw

- e) The claimant relies on the above allegations as amounting to breaches of the implied term of trust and confidence both individually and cumulatively. In the event that a number of the allegations are found to amount cumulatively to a breach of the implied term of trust and confidence, the claimant relies upon the delay in Mr Burnett providing his response and/or the failure of Mr Burnett to answer all of the claimant's questions as the last straw.

Evidence used

7. The claimant gave evidence and also relied upon the evidence of his friend John Wingfield who supported him through the capability and grievance process.
8. The respondent called the following witnesses to give evidence and in the following order:

- a) Mike Riley (Senior Manager and manager of the capability process)
 - b) Marie Lambert (HR Manager)
 - c) Steven Martlew (Locality Services Manager and manager of grievance appeal)
 - d) Simon Burnett (Assistant Director – People and manager dealing with claimant’s further questions to the grievance process)
9. The parties provided an agreed final hearing bundle which comprised of several hundred pages including the proceedings, emails, letters, Occupational Health (OH) evidence, policies and procedures and a transcript of a covert audio recording taken by Mr Wingfield (without anyone else’s knowledge including the claimant) of the capability meeting before Mr Riley. It was understood that the audio recording was available, but it was not necessary to hear the recording during the hearing. I took into account the fact that everyone attending this meeting other than Mr Wingfield were unaware of the recording and reflected upon this when considering any allegations made regarding what was said during the hearing. However, no application was made to remove the transcript from the bundle, and I took it into account, but weighing up its credibility when balanced with other documentary and witness evidence available.
10. I would like to add that all of the witnesses gave evidence in a way which was credible, and which made concessions where appropriate. This reasonable approach adopted by both sides was commendable and assisted with the smooth running of the hearing.

Findings of fact

The respondent

11. The respondent (Sefton) is a metropolitan borough council for the council area of Sefton in Merseyside/Liverpool City Region. It employs according to Ms Lambert, approximately 4200 employees across all services excluding school based staff.
12. It is responsible for the provision of leisure services to the public and operates a number of leisure centres and swimming pools. Mr Riley explained that there were 6 leisure facilities across the Sefton area and managed by 4 managers. He managed the Dunes Leisure Centre and Splash World water park in Southport. This site employs 25 members of staff in a variety of roles.
13. It became clear during the hearing that Leisure centres have significant plant and machinery in operation which requires regular servicing and preventative maintenance as well as failures being repaired. Given the risks of health conditions such as Legionella in water and air conditioning systems as well as more familiar health and safety requirements to avoid slips and trips, a great responsibility was placed upon Sefton to keep the plant and machinery and the overall environment for the visitor and staff in good working order.
14. Sefton relied upon external contractors to carry out a lot of the work, which was required, but did retain some qualified engineering staff. Mr Riley

explained that there were two Facilities Maintenance Engineers in place at the relevant time, Gary Richards and the claimant, as well as a part time handyman, Chris Naylor. In terms of line management, they were line managed by Jeff Jones, the Localities Manager for Leisure.

15. It was understood that the Splash World operation which was connected with Dunes had a chequered history and Mr Riley explained that he had arrived to manage the site in 2009 not long after its opening and early on, problems began to appear relating to electrical functions and paintwork. Tiles in the pool began to lift in 2018 and from December 2019, it was necessary to close Splash World while repairs were carried out and it was understood that Sefton Council had commenced litigation with the contractor to build the facility and this was currently unresolved. The adjoining Dunes centre was able to remain in operation and continued to require staffing and maintenance.
16. This case covers a period of time when the Covid pandemic was a significant issue in the UK and when lockdowns were in place. It was understood that in addition to leisure facilities being closed, Sefton's support services such as HR operated largely remotely with staff working from home. Many staff were redeployed to other areas of work to support the fight against the pandemic, and it is accepted that this would have placed pressures upon the existing services provided and the managers responsible. This in addition to the stresses and strains experienced by many people during what was an unusual and confusing time for many. I noted that while this might be the case, remote working could still take place and there was an expectation that HR functions and the exercise of policies and procedures would by and large, continue to operate in the usual way, with adjustments taking place as appropriate, such as remotely held meetings using Teams or Zoom applications.
17. Like all public bodies with significant HR resources, Sefton had many policies and procedures in place. They were reviewed and updated regularly. Of relevance to this case and included within the hearing bundle were the following procedures:
 - a) Capability procedure (relevant version at time of claim completed in October 2014)
 - b) Code of Conduct
 - c) Grievance Procedure
 - d) Sickness Absence Management Guidelines
 - e) Sickness Absence Policy
18. It is understood that these policies and procedures applied to all Sefton employees. Mr Riley, who carried out a capability procedure with the claimant as described below, confirmed that this was the first time he had used this process. It was also understood that Mr Riley did not have a background or experience in engineering processes typically carried out by the engineers including Mr Gore.
19. The capability procedure (ppD1 to D6) helpfully provided a preamble which explained how a capability procedure was used where poor performance was

not related to conduct and in that case, *'a supportive and structured mechanism to provide the employee with a fair opportunity to achieve and maintain the required standards...'* should be utilised. Alternative employment and dismissal were identified as being options of last resort.

20. The procedure emphasised the need for managers to be supportive of those reporting to them and to provide regular supervision, guidance and training. Additionally, managers were reminded of their duty anticipate workload pressures with the following statement being asserted:

'It must be emphasised that the procedure should only be used in cases where there is a significant or longer term capability issue. Minor shortfalls should be dealt with as part of the normal management/supervisory process.'

21. The actual procedure consisted of a preliminary stage, a series of 3 formal interviews, concluding with an appeal. The preliminary stage was described as being *'...very important in that it provides the employee concerned and his/her manager with a mutual opportunity to openly explore the performance issue in question.'* The emphasis described was very much upon manager and employee cooperating so that the issues can be resolved and there is no need to proceed to the subsequent stages in the procedure.

The claimant

22. The claimant (Mr Gore) is an engineer of many years' experience. He used to work for external contractor and was a senior engineer with a specialism in heating and boilers, although it was understood that was able to apply himself to other engineering matters where required.
23. He was recruited to work for Sefton as a Facilities Maintenance Engineer which was an externally advertised role and which he applied for and was appointed to on 4 January 2016. He was recruited to this post by Mr Jones and Mr Riley
24. Mr Gore was managed by Mr Riley when on site at the Southport base at the Dunes, but he actually was line managed by Mr Jones. It was understood that the working relationship between Mr Riley and Mr Gore was good, but that this deteriorated following the instigation of the capability process in 2021.
25. The question of how allocated work was recorded by Mr Gore and it was noted that while he was based at the Dunes, he could be asked to complete jobs at any of the leisure centres/pools across Sefton. He would usually report to the Dunes and let Mr Riley know before he travelled elsewhere, (Mr Gore lived locally to this workplace in Southport).
26. Mr Gore said that he was never given any formal log documents to complete and instead kept what he described as a 'rough log' which I understood to effectively be a list of the jobs that he had using any available scrap paper that he had available. He acknowledged that he retained some, but not all of the rough logs that he produced. He also said he used a white board with current jobs recorded and which would be crossed off as they were

completed. On balance, I found that this must have been a temporary record and would have been wiped regularly as new jobs were booked.

27. Mr Riley did argue that each workplace had logbooks in place to record jobs, however, I did not see examples of any of these documents and overall, I was left with the impression that Mr Riley was left to manage his days and fit in the various tasks which he was allocated in a way which worked for him. This was perhaps not surprising given his trusted engineering role, but it did appear to make the measuring of his performance and his workload levels, difficult for his managers.

28. I also understood that there was a workplace WhatsApp group involving Mr Gore and his colleagues and although it was primarily created as a means of communicating work related issues with each other, it also fulfilled a social function and I accepted that it allowed employees to remain in good contact with each other, even if they were not always working together at the same location on any given day.

29. Mr Gore certainly appeared to be kept very busy and estimated that he was completing 1200 jobs year and I accepted Mr Riley's evidence that he did not ask to have sight of Mr Gore's logs up to May 2019. This date is relevant because at this point, Mr Gore was absent from work for 2 weeks. He sent a letter to Mr Riley on 21 May 2019 explaining that he had been signed off work for two weeks by reason of *'fatigue that is, undoubtedly stress related'* (p.B1). He did not attribute the problem to his being asked to undertake tasks which were beyond his capabilities, but that it was *'...the sheer volume of work and the inability to effectively schedule it that causes the problems'*. He made reference to his rough logs which kept recording the work which he carried out and explained the conclusion which he had reached, namely that the normal maintenance work was more than enough for one person and the preventative maintenance which he was asked to do on top of this, was too much, leaving him constantly under stress. He explained that he was notifying the problem to Mr Riley so that he knew the problem, the risk that jobs could not be done properly, and that Mr Gore did not want to become ill again through stress at work.

30. Mr Riley said that he thought the health issues experienced by Mr Gore had been viral in nature, namely flu, shakes and a high temperature. He said that he nonetheless had a discussion with Mr Gore about the letter dated 21 May 2019 when it was handed to him in order that he could offer reassurance and workplace support. Mr Riley said that he passed the letter on to Mr Jones, but did not know whether it was then sent on to HR. He thought that Mr Gore was constantly checking in with him each morning and until 2020, he had no concerns with his work performance.

31. However, I accepted that from May 2019, Mr Riley specifically and Sefton more generally, were aware of concerns regarding workloads, the risk of Mr Gore becoming overwhelmed and the impact that this could have upon his health and also the quality of his work. This of course was something which the Preamble to the Capability Procedure anticipated and which should have

been considered by Mr Riley when it came to applying this procedure with Mr Gore in 2021.

Capability process

32. Mr Riley said that during 2020, he did begin to have some concerns regarding the competence of Mr Gore's work and his belief that he had been adopting a 'quick fix' approach to his work. He referred to a contractor identifying water ingress at a shower in the Dunes and a drain underneath a shower had not been correctly secured. These jobs were attributed to Mr Gore. Another issue arose relating to the replacement of 11 pumps at the Dunes whose maintenance was the responsibility of Mr Gore. A meeting took place on 6 November 2020, and it was clear from subsequent email correspondence and the witness evidence of Mr Gore and Mr Riley, that voices were raised. Mr Gore said that he felt he was being accused of making mistakes at work without being given an opportunity defend himself. Mr Riley accepted that as a manager he should not have raised his voice. In an email reply to Mr Gore on 10 November 2020, Mr Riley stressed that the meeting was not a formal meeting, he tried to explain the problems identified and suggested Mr Gore provide his explanation behind the matters in question. Mr Gore then provided a lengthy document explaining why he believed there were no capability issues on his part and expressing his dismay that Mr Riley appeared to have ignored the letter which he had previously sent to him concerning workload pressures in his letter sent in May 2019 and described above.
33. Matters escalated when a letter which was sent by Mr Riley to him on 11 February 2021, inviting him to attend a remote meeting under Sefton's capability procedure(D7-8). This meeting was described as being a preliminary capability meeting and referred to the previous conversation in November 2020 but did not explain why it was felt necessary to escalate matters under the capability process. It identified two matters previously discussed and referred to 4 other matters as well, including '*work absence (10/02/21)*' and which provided no explanation as to what they related to. A copy of the daily work logs was also requested. Mr Gore tried to obtain further information concerning these matters challenging the limited information provided and, in his reply, Mr Riley provided a copy of the capability procedure and the briefest of further details concerning the matters under investigation.
34. A meeting took place on 24 February 2021 and Mr Gore was supported by his friend Mr Wingfield who confirmed that he made a covert audio recording of the meeting without the knowledge of everyone else attending, (including the claimant). The transcript included within the bundle was not disputed and although it is unfortunate that Mr Wingfield did not seek the permission of everyone else attending, I was not asked to consider any matters within the transcript which were in dispute between the parties. Nonetheless, while there may be occasions when an audio recording might assist a party at a meeting, they should always be undertaken with the consent of all present and with an explanation being provided of one being required. To do otherwise, runs the risk of undermining the recording party's case in terms

any consideration of whether they were acting in good faith or not. In this case, I was satisfied that Mr Gore was unaware of the recording being made at the time and the blame for this action solely rests with Mr Wingfield. There may be many genuine reasons for a party requiring an audio recording, but the starting point should always be that those attending are aware that it is taking place. As it was, in addition to Mr Gore and Mr Wingfield, Mr Riley and Joanne Davis were present at the meeting on 24 February 2021.

35. In addition to the transcript, Ms Davis produced a note of what was discussed at the meeting. It was clear that Mr Woodruff sought to intervene to presumably protect Mr Gore during the meeting and it did not appear to assist with the smooth running of this preliminary meeting, which was clearly not a disciplinary matter and was trying to find facts concerning a number of issues which had come to Mr Riley's attention.
36. What I did conclude from the available evidence concerning this process, however, was that Mr Riley failed to take account of the impact that instigating this process in the way that he did, may have had upon Mr Gore. The capability procedure was discussed on a number of occasions during the hearing of evidence and while Mr Riley believed that proceeding to the preliminary stage was not a formal step to take, he did not appear to have taken account sufficiently of the relevant sections in the preamble and the emphasis being placed upon the use of the management and supervisory process.
37. It appeared that Mr Riley as someone who managed Mr Gore, but who did not have the same technical background as him, had carried out minimal supervision in previous years and he admitted that he had not asked for copies of any of the rough logs which he had produced until he implemented the formal capability process. He had already been placed on notice in May 2019 of concerns raised by Mr Gore concerning his health and the danger of jobs not being completed as well as they should, because of pressures of work. Mr Riley appeared not to have taken any further action until he became aware of new issues being reported and two of which he initially discussed in November 2020. But he clearly jumped from what was a very relaxed form of management and supervision to one where he placed Mr Gore in a position where he was being blamed for failures without an informal management discussion having taken place. The move to implement the capability process following a few months of minimal management supervision and then with 4 additional matters being identified in the briefest of terms, (including a work absence issue which appeared unrelated to capability), understandably left Mr Gore with the impression of being subjected to a rigorous process where he was being blamed. While this might not have been Mr Riley's intention, it had that effect and he did not appear to have kept in mind that Mr Gore had previously alerted him to workplace stress and a more gradual addressing of the issues which he had in mind, may well have avoided the events that followed.
38. Following the meeting, Mr Riley produced a letter which was described as the Preliminary Capability Meeting Feedback and which was sent to Mr Gore on 12 March 2021, (pp. D28-30). It identified each issue and provided a short

action point. There was not a great deal of detail in the document and the focus appeared to be upon Mr Gore cooperating with others and seeking management support when required. A further meeting was to be arranged to provide a review at a later date, although this did not take place.

Grievance process

39. On 22 March 2021, Mr Gore presented a lengthy complaint to HR in Bootle by hand delivery, (ppC1-18), which was described as a complaint, but which clearly took the form of a workplace grievance being raised concerning the actions of Mr Riley in relation to the capability issue and his belief that this amounted to conduct of bullying and harassment. It was understood that Mr Wingfield had been involved in the preparation of the letter and while it was unnecessarily lengthy and this might have deterred a manager from dealing with the complaint quickly, it is the subsequent delay in how the processes ran from this point, which ultimately undermined the relationship between Mr Gore and Sefton.
40. Mrs Lambert provided credible and reliable witness evidence concerning the way in which the grievance and subsequent appeals were dealt with, and it is to her credit that she provided an honest and '*non evasive*' account of the issues which arose. It is often difficult for HR managers to give evidence in cases of this nature, where they are often being expected to discuss the actions of others employed by the respondent and who did not give evidence, but Mrs Lambert dealt with these issues fairly and openly.
41. However, she explained that due to Covid, herself and two other managers would attend HR's offices in Bootle to collect post every few days. There was no real physical HR presence in the office at this time and most employees were working remotely from home. Mrs Lambert recalled visiting the office on 30 March 2021 and collecting Mr Gore's complaint letter then. Unfortunately, by 1 April 2021, Mr Gore was concerned that he had received no acknowledgement since 22 March 2021 when he delivered his letter and on 1 April 2021, sent an email to the Head of Personnel, Mark Dale, seeking confirmation that the letter had been received, (p.E5). It was understandable that in raising a complaint against his manager, Mr Gore was concerned that the matter was being dealt with and he had left a reasonable amount of time before chasing Sefton for a reply.
42. Mr Dale's PA replied on 8 April 2021, to explain to Mr Gore in an email that he was away on leave for a few more days and then sending a further email to explain that the hard copy letter had been awaiting collection due to remote working and a HR officer would review the matter and return to him.
43. Mr Gore sent a further email on 19 April 2021 to Mr Dale and expressed his concern that his complaint was not being taken seriously. While Mr Dale replied to the same day, he explained that the officer would be spoken to, but that he was on leave. This correspondence continued for a few days with on 23 April 2021, Mrs Lambert emailed Mr Gore to explain that John Corrin, who was a HR manager, had been allocated the complaint and would deal with the matter as quickly as possible.

44. In the meantime, Mr Gore submitted a fit note where his GP had recorded him as being unfit to work by reason of stress at work and as is normal when such a reason is given, Mr Riley made a referral to Occupational Health (OH). This caused Mr Gore concern because Mr Riley was the subject of his complaint and he understood he would be sent a copy of the OH report which was produced. Mrs Lambert emailed him on 26 April 2021 to say that she could receive the report instead of Mr Riley and that Mr Gore would have to give his consent in any event, before a report was shared with a manager. In the meantime, on 4 June 2021, she emailed Mr Gore to explain that during his absence, Mike Woodruff would be his management point of contact. Importantly, OH noted that it was necessary for Mr Gore's grievance to be resolved as soon as possible to ameliorate his health issues and to return him to work.
45. It was unfortunate that Mr Corrin was not available to give witness evidence to the Tribunal as there were clear delays in his processing the grievance raised by Mr Gore. Mr Gore submitted a further email on 25 May 2021 expressing his concern that he was still waiting to hear from Mr Corrin and asked Mr Dale for details of timescales for progressing the grievance. By 14 June 2021, there was still no reply from Mr Corrin and Mr Gore again emailed Mr Dale informing him that the process was causing him stress and anxiety. He made a fair point that he was surprised he had not even received a brief introduction email from Mr Corrin, even if he was not yet able to provide a substantive reply to the complaint. Mrs Lambert acknowledged the frustration clearly being displayed by Mr Gore at the point during her evidence
46. In any event, Mr Corrin was able to send his letter dealing with the complaint on 14 June 2021, (C61-64). It did not uphold the complaint. Unfortunately, despite being a complaint involving allegations of bullying and harassment where a detailed verbal account from the complainant would be well advised, Mr Corrin failed to interview Mr Gore as part of his investigation. Mrs Lambert acknowledged that she could see why Mr Gore was left feeling that with this and the overall delay, he had not been taken seriously. Overall, the reply did not seek to enquire as to why the grievance was being raised and took a somewhat perfunctory approach to the complaint. While each of the headings briefly discussed the theme of each complaint raised, they simply appeared to fall back upon a reminder of the fact-finding nature of the meeting rather than consider the actual concerns being raised. I was left to conclude that this report was a missed opportunity to remedy the issues raised by Mr Gore and Mr Corrin appeared to rush the report having delayed completing it more quickly. There was no mention of a right of appeal in the decision letter either, which was another omission. His failure by keeping in touch with Mr Gore once he received the complaint, also added to the overall problems arising with the handling of the grievance at this point. Consequently, his brief apology at the end of the letter and the vague reference to *resources and workload pressures* at this time was likely to provide little comfort to Mr Gore.

Appeal

47. On 19 July 2021, Mr Gore emailed an appeal against the decision of Mr Corrin to Sefton's Chief Executive Dwayne Johnson, (E1 to E4 and E34 to E46). Mr Martlew was allocated the case as the appeal hearing officer and it was understood that he was in the process of acting up as Interim Head of Communities while retaining his existing role as this was being subject to a recruitment exercise. There can be no doubt that he was under pressure at the time and in the case with Council officers at this level, he was managing a significant number of responsibilities. I also accepted that once allocated with the responsibility to deal with the appeal, he was reluctant to return it to HR, as he was keen to demonstrate an ability to manage the workload of the interim role as he wished to be appointed to it on a permanent basis.
48. While this might be the case and he conceded that if he had been aware of the significant work involved with Mr Gore's appeal (*'the size of the ask'* as he put it), he would not have taken the case on, it is important to remember that Mr Gore was an employee whose expectations had already been dashed. This was in terms of the preparation of the original grievance and who was on sick leave through work related stress which he believed was connected with the strain of the process. He may have been one individual when compared with the many other people Mr Martlew was responsible for, but there was a further opportunity to regain his trust and unfortunately the failure to process this matter quickly continued to undermine the employer and employee relationship.
49. An appeal hearing took place on 12 August 2021. It was held by Teams remotely and Mr Gore did not attend. Mr Gore explained to Mrs Lambert that he could not attend due to anxiety attacks even though it was essential this grievance was completed in order that his health could improve. This was not unreasonable although not ideal and Mrs Lambert arranged for Mr Martlew to continue with the appeal process.
50. Although there were some emails exchanged between Mr Martlew and Mr Gore during the subsequent months, on 17 October 2021 Mr Gore expressed further concern about the delay and noted that 11 weeks had passed since he had been informed of Mr Martlew being appointed as the appeal hearing officer and he was still awaiting a substantive response.
51. Mr Martlew's decision was sent to Mr Gore on 3 November 2021, (p.E1-E3). Some shortcomings were identified in relation to the determination of the original grievance decision (in particular the failure to specifically inform Mr Gore of his right of appeal). Overall, however, Mr Martlew felt that the correct decision had been reached by Mr Corrin. A right of appeal was offered, and Mr Gore failed to respond in time but further questions which were provided out of time, are discussed below. It was understood that the actual letter sent by Mr Martlew was not received by Mr Gore until late November 2021 and he sent a further reminder on 28 November 2021. He explained to Mr Johnson in his email that the delay was unacceptable, over 16 weeks had elapsed

since he submitted his appeal, and everyone should have been aware of the impact of the delay upon his mental health.

52. It was during Mr Martlew's involvement with Mr Gore's grievance that he decided that he be removed from the workplace WhatsApp group without warning. He said that he was unaware of any social element to the group and said he made this decision "*with the best of interests*" and that with hindsight it was an ill-judged decision. He did say that "*no malice was intended*" in making this decision (he said he believed the group was only accessed from a work issued mobile), and on balance, I accept that this was the case.
53. Mr Gore identified a number of what he believed were errors in the consideration of his case during the appeal, but on balance I concluded that it was the further delay which was the underlying problem which continued to '*chip away*' at the confidence and trust he had with Sefton and its managers.
54. The difficulty of course was that by unilaterally removing an employee from groups such as WhatsApp without any discussion can quite reasonably result in an employee feeling that they have been marginalised. Workplace groups of this nature can of course be problematic as they often have a social as well as a work element. A reasonable manager would seek to engage with an employee before taking such a step to explain the rationale behind removing them from a group. It may even be the case that an employee would prefer to remain part of the group as this may well assist with their rehabilitation and return to work. Each case must of course be judged on its own merits, but on balance of probabilities, Mr Martlew's decision further undermined the employee/employer relationship.

Further questions

55. Mr Burnett who had recently been appointed as Assistant Director of People was asked to pick up this matter because Mr Martlew was unfortunately absent from work for a number of months due to ill health and he was notified of the allocation of Mr Gore's grievance to him on 28 November 2021. Mr Johnson, the Chief Executive forwarded Mr Gore's email where he was seeking the appeal decision which had not yet reached him. Mr Burnett acknowledged the email and notified Mr Gore of his appointment on the following day. Mr Gore provided his further questions on 30 November 2021.
56. Mr Gore did not specifically exercise his right of appeal in response to Mr Martlew's letter and it may well have been connected with the confusion regarding his receipt of the Martlew decision dated 3 November 2021. However, Mr Burnett wrote to him on 20 December 2021, apologising for further delay and gave him an opportunity to exercise this right out of time. In the end, as Mr Gore decided not to appeal, Mr Burnett dealt with the further questions which had been sent previously, but they were not sent to him until 10 February 2022, (ppE107-E110).
57. Once again however, further delay arose. While I accept that Mr Burnett was taking over a matter previously being dealt with by a colleague who had become ill, there should have been a significant attempt made to win back Mr

Gore's confidence, given the history of this grievance. This was not done, Christmas intervened, and this added further to the delay. Mr Burnett explained that he was taking over responsibility for a service with some 870 employees and at this time there were lots of urgent matters involving vulnerable people. But while this may have been the case, a greater awareness should have been exercised in relation to this case by those who understood its history. It may have been that something as simple as regular telephone calls may have assisted in managing expectations and making Mr Gore feel like he was in the minds of the managers dealing with this case. Whatever could have helped, there was an ongoing 'drift' in this case.

Resignation

58. Mr Gore sent a letter of resignation on 21 February 2022, (B46-48). He explained that he had reached a point where he had a complete breakdown in trust and confidence with Sefton. He referred to the capability process which he believed was unfair and the subsequent grievance process which he felt left him feeling guilty and subject to unacceptable delay, which continued through the appeal and further questions process.
59. He explained he was giving 2 months' notice and was in the process of notifying ACAS with the view of commencing Tribunal proceedings. He said that the resignation letter was triggered by the delayed reply by Mr Burnett. However, I find that it was the chain of events together which served to undermine the relationship over time and the delays had an *attritional* effect upon that relationship, culminating in the decision to resign.

Law

60. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if 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.
61. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:
- (i) that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach).
 - (ii) that the breach caused the employee to resign – or the last in a series of events which was the last straw; (an employee may have multiple reasons which play a part in the decision to resign from their position).
 - (iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

62. All contracts of employment contain an implied term that an 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 employer and employee. A breach of this term will inevitably be a fundamental breach of contract.
63. In Croft v Consignia plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.
64. It is open for an employer to argue that, despite a constructive dismissal being established by the employee, that the dismissal was nevertheless fair. The employer will have to show a potentially fair reason for the dismissal and that will be the reason why the employer breached the employee's contract of employment; see Berriman v Delabole Slate Ltd 1985 ICR 546 CA.

Discussion

65. This is an unfortunate case as I was left with the conclusion that Mr Gore's resignation could have been avoided had management dealt with him in a more thoughtful way and avoided the cumulative delays from taking place. To be fair, the respondent's witnesses were aware of these problems and were willing to concede to varying degrees, that he had been let down. There are many cases of this nature where managers remain reluctant to make concessions of this nature when it is plainly appropriate to be contrite. I think it is important that this is recognised by anyone reading this judgment and Sefton will hopefully appreciate this reasonable approach adopted by their managers and which ensured that their witness evidence was not unnecessarily lengthy and antagonistic.
66. In terms of jurisdiction, there was no dispute that Mr Gore had more than 2 years continuous employment with Sefton at the effective date of his resignation. There was no dispute that he had a right to bring a complaint of constructive unfair dismissal, both in relation to section 108 and 111 ERA 1996.
67. This was a case where a number of acts were identified, beginning with the capability process commenced by Mr Riley and then the delays arising from the grievance process initially conducted by Mr Corrin, the appeal by Mr Martlew and the further questions dealt with by Mr Barnett. Further issues arose from failing to manage Mr Gore's expectations by keeping regularly in touch with and also removing him from the work WhatsApp group which clearly and quite reasonably left him feeling marginalised. This decision while well intended, did not consider the implication of removing a means of communication which performed a social as well as a job related function. While the primary reason behind formal work based WhatsApp groups being established in the workplace is to improve performance through better

communication, they inevitably develop into a way working relationships being maintained both inside and outside the workplace. This contributed to the anxieties which Mr Gore was experienced.

Was there a fundamental breach of contract?

68. Mr Gore resigned on 28 February 2022, and this was accepted by the Council with a payment in lieu of notice being made for the period expiring on 21 April 2022. This of course meant that Mr Gore was dismissed with his contract ending when the payment in lieu of notice clause was successfully put into effect. He relied in his resignation letter upon a series of events which ultimately gave rise to a final straw which resulted in his decision to resign.
69. In terms of Mr Riley's involvement in the capability process, Mr Gore made a number of allegations, and it did seem that Mr Riley did jump to conclusions when considering Mr Gore's work and a difficulty was his shift from what was effectively light touch management to a more critical and involved review of his work, despite not having significant experience in Mr Gore's specialism. This is not in itself necessarily a problem for a manager, but it does mean that they should be careful in ensuring that the specialist employee under review, is fully informed what the problems are, and they are given an opportunity to explain the reasons for the working practices under scrutiny.
70. Mr Riley clearly became impatient with Mr Gore and admitted shouting at him and that upon reflection, he conceded that it was inappropriate behaviour on his part. I was impressed by his willingness to acknowledge this unfortunate moment of poor conduct on his part, and he should be given credit for being able to say this. Nonetheless however, the change of management style, the absence of informal management and workload monitoring which clearly affected Mr Gore's health, together with the decision to progress to a capability process, amounted to events which began to undermine Mr Gore's trust and confidence. This gave rise to the grievance process, and which continued to add to Mr Gore's unhappiness with the Council.
71. The ACAS Guide: Discipline and Grievances at Work (2019) provides basic practical guidance to employers, employees and their representatives. A local authority such as Sefton Council will apply the key element of this guidance into their own internal policies and procedures and their HR officers and managers responsible for managing grievances, are expected to be aware of the basic principles involved in this guidance. It is of course important that the employee lets the employer know what the nature of the grievance is, which is usually provided in writing, and it can then be discussed at a meeting with an appropriate manager. The employee should of course be allowed to be accompanied.
72. The ACAS Guide does recommend that the employer should decide upon what action if any, to take. This should of course be communicated to the employee without unreasonable delay and in writing. A right of appeal should also be identified, and this should take place without unreasonable delay. It is of course the case that an impartial officer should consider the appeal, there

should be a right to be accompanied should continue and the outcome should again be communicated without unreasonable delay.

73. Although Mr Gore raises the issues regarding a failure to investigate the grievance fairly and properly, the real problem which arose during the grievance process and which gave rise to a further undermining of his trust and confidence in the Council, was the delay which was compounded at each stage by further delay, and which led to the situation where Mr Burnett was subject to criticism, and which amounted to the final straw. This involved his failure to respond to Mr Gore's further questions within a reasonable timeframe and this was effectively one delay too many for him. There was therefore a breach of the implied term of trust and confidence which Mr Gore could have in his employer.

The Council's actions and their purpose

74. In considering whether the Council had reasonable and proper cause for those actions and/or omissions, I felt that their witnesses gave a candid and understandable explanation concerning the challenges faced by HR and managers faced during early 2021 when Covid was still a significant issue that they faced. As is often the case, officers have a variety of duties to carry out in addition to employee relations issues and inevitably the question of staff leave could add to the delay in any process and this was certainly the case with Mr Gore's grievance. Unfortunately, once a delay arises, it really becomes imperative that efforts are doubled so that the 'aggrieved employee' is not further aggrieved by persistent and continual delay. This could have been ameliorated by better communication to manage expectations, but ultimately Mr Gore felt he was being passed from manager to manager and each one had their own personal delays for him to deal with. He became ill, was referred to OH, became more anxious and the final delays arising from Mr Burnett not sending out his reply to Mr Gore's questions on 10 February 2022. Considering the continual delay and the final straw relied upon by Mr Gore, there was a fundamental breach of contract.

75. In considering whether the Council behaved in a way when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between Mr Gore and the Council, I felt that they did not intend to unduly delay the conduct of grievance process. However, the effect of the continual delays was likely to do so. Local authorities have been under a great deal of pressure for many years and finding suitable managers who can deal with grievances when brought can be a great challenge. Inevitably, these managers have many elements to their job description and are often responsible for a wide range of essential public services and many Council officers. This was clearly the case with those managers who gave witness evidence for the Council in this case.

Was the fundamental breach the reason for Mr Gore's resignation?

76. However, while I have sympathy with these circumstances and with the addition of Covid, the Council's managers may have felt that they faced an almost impossible list of tasks, they nonetheless were expected and required

to ensure employee relations issues were kept under review. A grievance can be an involved process and document heavy resulting in considerable time being spent on its completion. But it is one of those jobs where delay can only serve to make matters worse and the repeated delays as each manager assumed their part in the process, while understandable led to a situation where Mr Gore could quite reasonably conclude that he could no longer have trust and confidence with the Council as an employer. This was cumulatively a fundamental breach of contract, and the final straw was the reason for Mr Gore's resignation. He expressed these concerns in his resignation letter and while he also challenged the fairness of the process, I accepted his evidence during the hearing that the attrition experienced by the lengthy process undermined his confidence and led to his resignation.

Was there an affirmation of the contract by Mr Gore?

77. I did consider whether Mr Gore affirmed his contract of employment before resigning, by delay or some other reason. It should be remembered that he had been absent through ill health for some time at the point that he reached the decision that he did on 28 February 2022, only a few weeks had elapsed since the delayed letter sent by Mr Burnett has reached him. This was not a material delay on his part and did not involve any affirmation before he resigned.

Was there an unfair dismissal?

78. Despite the difficulties face by the Council, I must find that the claimant was constructively dismissed and therefore unfairly dismissed under section 95(1)(c) ERA as he terminated his contract which he was employed in circumstances where he is entitled to terminate it by reason of the Council's conduct as employer.

Conclusion

79. In summary, I must find that Mr Gore was constructively unfairly dismissed was well founded and succeeds and that the final straw was Mr Burnett's delay in dealing with the further questions. By itself, it was not something which amounted to a fundamental breach of contract. However, it was sufficiently connected with the earlier failures and served to finally cut the tie which Mr Gore had with employer and leaving him with the reasonable view that resignation was an appropriate reaction. There was a slight delay in the resignation letter being sent, but it was only a matter of a few weeks and taking into account the lengthy delays which had already taken place and Mr Gore's ill health, he reacted sufficiently quickly and clearly to demonstrate that Mr Burnett's delayed letter was the final straw.

80. I was conscious throughout the case of the pressures faced by Sefton as a local authority with financial pressures and multiple challenges and expectations arising from their statutory duties. It is generally acknowledged that the many years of austerity which have blighted local authorities have made the provision of local services even more challenging. Indeed, it may be said by some that the workloads which arose from these difficulties and

there being fewer managers with increased responsibilities, played a significant part in what happens to employees such as Mr Gore in circumstances such as he experienced. That might be correct, but it is not relevant to what I have to determine in this case. Ultimately, employers remain subject to their duty to their employees to uphold the implied term of mutual trust and confidence.

81. Hopefully, this decision will serve as a reminder to Sefton that managers must treat grievances seriously and matters to be dealt with in accordance with the ACAS Code of Practice. Sometimes employees can produce voluminous and complicated grievances, but nonetheless, management of expectations remains critical and if delays are likely, attempts should be made to rectify them and avoid further delays happening as the process continues. Mistakes can happen, but once trust begins to be tarnished, it is essential that employers work quickly to prevent this trust becoming brittle and ultimately broken.

Employment Judge Johnson

Date 13 June 2023

JUDGMENT SENT TO THE PARTIES ON
20 June 2023

FOR THE TRIBUNAL OFFICE