EMPLOYMENT TRIBUNALS

Claimant: **Mr M Crosby**

Respondent: **Network Rail Infrastructure Ltd**

Heard at: **Hull** **On:** **8, 9 November 2017**

Before: **Employment Judge Davies**

Representation
Claimant: **In person**
Respondent: **Mr B Randle (counsel)**

JUDGMENT

1. The Claimant's claim of unfair dismissal is not well-founded and is dismissed.

REASONS

1. Introduction

1.1 This was the hearing to determine a claim of unfair dismissal brought by the Claimant, Mr Crosby, against his former employer, Network Rail Infrastructure Limited. The Claimant represented himself and the Respondent was represented by Mr Randle of counsel. I was provided with and agreed bundle of documents. I heard evidence from the Claimant on his own behalf and from Mrs S Hare (project manager), Mr J Derrick (local operations manager) and Ms N Napier (local operations manager) for the Respondent.

2. Issues

2.1 The issues to be decided were:
- 2.1.1 Was the Claimant dismissed, i.e.:
  - 2.1.1.1 Was the Respondent in fundamental breach of the implied term of mutual trust and confidence;
  - 2.1.1.2 If not, was the Respondent in breach of express terms of the contract, contained in the stress management policy, disciplinary procedure or grievance procedure;
  - 2.1.1.3 If so, did the Claimant resign in response and without affirming the contract?
- 2.1.2 If so, what was the reason for dismissal?

2.1.3 If the reason for dismissal was a potentially fair reason, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

3. The Facts

3.1 The Respondent is Network Rail Infrastructure Ltd. The Claimant started work for the Respondent in July 2001 as a signaller based at the Marsh Lane signal box. He was valued and respected.

3.2 The Respondent operates a Promotion, Transfer, Redundancy and Resettlement policy ("PTR&R"). It was agreed with the RMT in 1986, and by the standards of modern employment law is in antiquated language. The PTR&R policy applies to any restructuring exercise undertaken by the Respondent that affects signalling employees. In outline, the PTR&R policy provides for an allocation process to be followed where signallers are displaced by a restructuring exercise. They are allocated to vacant roles within up to 75 minutes' travel time from home in strict order of seniority, which is calculated by reference to the time they have spent in grade. Before roles are formally allocated, displaced employees have the chance to express a preference for any vacancies. They are therefore provided with a closed list of vacancies and have the chance to express a preference for particular roles. Displaced employees are then allocated to roles by a panel. Employees are allocated to vacancies on the closed list, grade by grade, according to seniority within each grade and taking into account their preferences.

3.3 The Respondent has an agreement with the RMT that it will not make compulsory redundancies. In a restructuring exercise voluntary severance may be offered to affected or potentially affected employees. When that is done, employees are first given the opportunity to apply for voluntary severance and that is dealt with. The closed list of vacancies is then provided only to those employees who have not been selected for voluntary severance.

3.4 The Respondent also operates a contractual grievance policy. Of relevance to the issues before me, the policy requires the employee to put his or her grievance in writing, stating what the complaint is and the reasons for it. The policy says that an acknowledgement confirming receipt of the grievance will be sent within three working days and that a date will be agreed for hearing the grievance within seven working days of its submission. The hearing itself will be held as soon as possible.

3.5 There is also a contractual disciplinary procedure, although my attention was not drawn to particular parts of it. The Claimant also produced copies of a Stress Management Guide dated April 2007. However, the Respondent's evidence was that it did not know where the Claimant had obtained that guide from. The guide is no longer used within the Respondent; managers take advice from HR instead. I accepted that evidence. The Guide was plainly not a contractual or even a current document.

3.6 In January 2015 as part of an ongoing consolidation of signalling and control activities across the business, a project started that would see the closure of 13

signal boxes in the North Lincolnshire and Brigg area. One of the affected signal boxes was the Marsh Lane signal box.

3.7 The process was overseen by Mrs Hare. On 30 April 2015 a letter was written to the Claimant informing him that his role was affected by the proposed changes, and that he would be displaced from his current post in January 2016. He was reminded of the agreement not to make compulsory redundancies that was in force and was told that it had been agreed to offer voluntary severance to all affected signallers in this case. The Claimant was given details of his likely voluntary severance package and was told that he must confirm by 29 May 2015 whether he wanted to apply for voluntary severance or remain in the Respondent's employment. The Claimant did not apply for voluntary severance.

3.8 After the deadline for voluntary severance had passed, the closed list of available vacancies was sent to the Claimant and he was told that he was required to indicate a minimum of three preferences against available positions. Appointments would then be made in line with PTR&R arrangements at allocation meetings in August. The Claimant was told that if he wanted to discuss his options or seek further guidance he should contact his local operations manager who would arrange a one-to-one discussion. The deadline for returning preferences was 14 August 2015. The Claimant did not express any preference nor did he request any further information about any of the posts.

3.9 The allocation process then took place. The allocation panel appointed displaced signallers to roles on the closed list by reference to their grade, seniority and preferences. There were 21 grade 3 signallers affected and the Claimant was 13th in seniority among them. He was allocated to a role in accordance with that seniority. Given that he had not expressed a preference he was allocated to the nearest remaining position to his home address at the appropriate grade. That was at Goole Town. The Goole Town signal box was almost an hour's drive from the Claimant's home, whereas he had walked to work at Marsh Junction. In addition it had a different shift pattern. The shifts were longer than Marsh Junction, although there were fewer of them. The Claimant was informed of his allocation to that post by letter dated 25 August 2015.

3.10 The Claimant contacted the signallers at Goole Town and discovered that of the three signallers currently working there only two had requested voluntary severance. However, three people had been allocated to posts at Goole Town. The Claimant raised this with his union representative, Mr Kaminski, who in turn raised it with Mrs Hare and others on 31 August 2015. Although he was aware of this issue on 3 September 2015 the Claimant confirmed his acceptance of the post at Goole Town.

3.11 Mrs Hare looked into the situation. She established that if the Claimant had not been allocated to Goole Town, he would have been allocated to the Prince of Wales signal box, a further 10 minutes' drive from his home. Her evidence was that she was reluctant to change the allocations because of the disruption that any reorganisation has on affected employees. Were the Claimant to be reallocated, plainly there would be a knock-on effect for all those lower in seniority than him. Mrs Hare's experience was that there was always a degree of natural movement or turnover and they concluded that they could accommodate all three signallers who had been allocated to Goole Town there. She anticipated

that natural movement would enable them to accommodate this by the time the changes came into effect and in the event, one of the other signallers ended up being seconded to a different role before the transfers to Goole Town.

3.12 The Claimant continued to correspond with his union about this. By 14 January 2016 the Claimant had been copied into an email chain in which Mrs Hare had expressed the view that they could not displace any of the three individuals allocated to Goole Town. She wrote, "our error which should resolve itself in time." She confirmed that the Claimant was the least senior of the three affected signallers and that if anyone was at risk of having to come out of Goole it would have been him. However, she stressed that nobody was at risk of displacement. In cross-examination the Claimant accepted that he was told and understood that he would not be displaced.

3.13 Mr Derrick was to be the Claimant's line manager following the move to Goole. They met shortly before Christmas 2015, when the Claimant mentioned that he was unsure how the travel time would impact on him. They agreed to keep it under review and Mr Derrick said that he would search for alternative roles nearer to the Claimant's home. The Claimant started the role in January 2016. From the outset the Claimant was unhappy with the travelling and told Mr Derrick so. For example, Mr Derrick noted some concerns the Claimant had raised during a visit he made to the signal box on 12 January 2016. The Claimant also continued to raise the fact that three people had been allocated to two places at Goole.

3.14 That remained a source of discontent for him throughout the events that followed. I asked him about that in his evidence. I asked him why he had not expressed a preference for any particular role prior to the allocations process. He said that he was waiting to see what would be allocated and that none of the roles were going to be any different. I asked him whether there was something about the role at Prince of Wales signal box that he thought would have been better for him had the allocation process been correctly followed. He said, "I would have felt that I was in the correct job and that the process was done properly." I asked him whether there was any effect on his ability to do his job and he said, "In some ways, no, but I would not have thought I was in the wrong job." The Claimant's discontent seemed to me to be simply with the principle that there had been a mistake in the allocations.

3.15 Mr Derrick continued to keep in regular contact with the Claimant. The Claimant readily accepted in cross-examination that Mr Derrick was very helpful and was looking after him. In about May 2016 Mr Derrick agreed with the Claimant that he did not have to work the extra "safety hour" in the morning that signallers at Goole Town could generally be asked to work. At most he might be asked to come in five minutes early. Furthermore, in about July 2016 he agreed to try and limit the number of Sundays on which the Claimant was required to work. Although Mr Derrick was not able to offer a guarantee that the Claimant would not be required to work on Sundays he told him that he would do all he could. His evidence was that when the rosters came out he would set about organising what were sometimes complicated swaps to ensure that the Claimant did not have to work. His recollection was that the Claimant was never required to work on a Sunday after that.

3.16 By July 2016 the Claimant told Mr Derrick that the role at Goole Town was not working out and that he was willing to accept a demotion to transfer to a different location. Mr Derrick had been looking unsuccessfully for an alternative role for the Claimant since January 2016. When the Claimant indicated a willingness to accept demotion, Mr Derrick identified a position at the Crabley Creek signal box between Goole and Hull at a lower grade. He agreed with Mrs Hare that the Claimant would be allowed to transfer to that position and carry out the lower grade role but retain his existing salary. The travel time to Crabley Creek was 39 minutes. There was also a position available at Brough signal box. The Claimant said that he would prefer Crabley Creek because it was a longer term role. They continued to discuss the position during August 2016.

3.17 At the same time the Claimant mentioned to Mr Derrick that he had heard stories of displaced employees being reallocated to other positions in the area and asked why he had not been reallocated nearer to his home address. Mr Derrick explained that those people had initially been allocated to positions out of their grade and were now being moved to positions at their correct grade when it became possible. That was in accordance with the PTR&R policy. Such employees would take precedence over the Claimant because the Claimant was not out of grade. In his evidence to me the Claimant referred to Steve Arnold as being one of those people. In cross-examination he accepted that Mr Arnold had been out of grade and would take priority for reallocation under the PTR&R process. The Claimant also referred to a grade 3 signaller and it was put to him that the signaller had been given the choice of moving to Goole or accepting a downgrade. He said that he did not know about the circumstances of that individual.

3.18 By the end of August 2016 no decision had yet been taken. Mr Derrick kept in touch with Mrs Hare. The Claimant's concerns were not going away and Mr Derrick asked Mrs Hare to visit him to explain how the reallocation process operated. She did so on 19 September 2016 and explained the reasons for his placement at Goole. She confirmed that now he had indicated he was willing to step down a grade they would look at moving him to Crabley Creek. On 21 September 2016 Mr Derrick emailed Mrs Hare to thank her for visiting the Claimant. He recorded that the Claimant appreciated the visit and knew that they were doing as much as possible to help him with his current personal issues and travel to work. Mr Derrick said that he was going to put the Claimant on additional monitoring to keep an eye on his health and well-being.

3.19 Mr Derrick kept in regular touch with the Claimant. During visits in September and November 2016 Mr Derrick noted that the Claimant seemed happier now that a move to Crabley Creek was on the cards. However, no real progress was made in terms of that move. Mr Derrick encouraged the Claimant to visit Crabley Creek but he did not do so. He suggested that he spend some shifts at Crabley RDW (i.e. paid rest days worked) to train the location. The Claimant did not do so. It is evident from the various documents that he was struggling with the travel and shifts at Goole Town over this period.

3.20 There was an incident on 22 November 2016 when the Claimant made a mistake that led to a train being incorrectly routed. The Claimant thought that the travel demands were affecting his concentration. Mr Derrick met him to discuss what

had happened and the Claimant explained that things were not getting better at Goole. Mr Derrick continue to monitor the Claimant.

3.21 On 19 December 2016 the Claimant went on annual leave. On 30 December 2016 he was signed off work sick. His fit note referred to stress and anxiety. He did not return to work after that.

3.22 In January 2017 Mr Derrick moved to become local operations manager at Hull and was replaced by Ms Napier. However, he continued to be fairly closely involved in the Claimant's case during January 2017 given his knowledge and involvement to date. Mr Derrick told Ms Napier that the Claimant had been struggling at Goole Town because of the travelling involved. He told her that he had found a suitable position at Crabley Creek, which significantly reduced the Claimant's travel time, but that although he had initially been interested it seemed the Claimant had since had a change of heart. Mr Derrick said that he was continuing to search for alternative roles for the Claimant.

3.23 On 3 January 2017 the Claimant telephoned Mr Derrick to say that had been signed off sick because of the stress and anxiety of the job and commute. At that stage the Claimant said that he no longer considered that a move to Crabley Creek would improve things for him. He returned again to his point that the PTR&R process had not been followed correctly, and set out his concerns in an email the same day. Mr Derrick emailed Mrs Hare to ask whether there was any way of looking into swapping the Claimant with Steve Arnold so that he went to Holton le Moor. He told the Claimant that he had done so.

3.24 The Claimant received a fit note covering the period 3 January to 17 January 2017. That said that he might be fit for amended hours and duties. The doctor wrote "due to anxiety and stress related symptoms advised amended duties. Reduce the hours and driving distance as much as possible. And where possible adjust tasks to less safety critical tasks."

3.25 Ms Napier referred the Claimant to occupational health on 6 January 2017. Interim reports were provided on 13 and 24 January 2017. On 13 January 2017 the occupational health advisor reported that the Claimant was experiencing some psychological symptoms and had attended his GP. The adviser noted that the Claimant had told her about the difficulties with his current role and explained that on reflection he now did not feel that the alternative (Crabley Creek) would improve his health. Unless there was any other alternative the occupational health advisor was not able to see a solution. On 24 January 2017 the occupational health advisor reported that she had requested consent to write to the Claimant's GP for further clinical information.

3.26 Meanwhile, on 11 January 2017 Mr Derrick held a welfare meeting with the Claimant, which was also attended by Mr Derrick's manager, Mr Foote. Mr Derrick said that the Claimant did not seem himself. He explained that he had been declared fit to return to work but only to carry out light duties. He mentioned the possibility of taking voluntary severance instead of staying at Goole or moving to Crabley Creek. Mr Derrick told the Claimant that Ms Napier would be taking over as his line manager. He agreed to explore with Mrs Hare whether voluntary severance in the 2018 resignalling project could be taken early. They agreed to leave things a couple of weeks.

3.27 On 16 January 2017 the Claimant emailed Mrs Hare to make a formal request for voluntary severance. He said that he could no longer carry on with Goole and also thought that Crabley Creek would present him with the same problems, namely the shift start and finish times and travel distance. He said that he had offered to downgrade himself if a suitable post could be found and suggested that he did not understand why he could not be offered Holton le Moor. He also repeated his concern about the original allocation issue. He said that he believed an error was made at the time which had led to his current situation.

3.28 Mr Derrick, who was copied in on the email, forwarded it to Mr Foote. Mr Derrick said that he and Ms Napier needed to put an end to this because they could not accommodate the Claimant on light duties forever. If he was not suitable on reasonable adjustments for Crabley Creek then maybe ill health was the way forward. The managers then explored the possibility of the Claimant being allowed to take voluntary severance under the forthcoming re-signalling scheme, but leaving before the end of that scheme in 2018.

3.29 Mrs Hare wrote in an email, "If as a route we continue to offer the Net Ops VS scheme (which looks highly probable), Mark would certainly fall into the scope of signallers who would be invited to express an interest in VS… The post at Goole Town would definitely be filled through closed listing so he would be approved to leave with VS. What you are looking for is to use the Ops VS scheme but allow an earlier release then you would under normal circumstances so I would suggest that it would need A.D./route HR support – particularly given the HRBP is advising pursuing ill-health (which is obviously more cost effective to the route but in my experience very hard to get occ health to commit to)…."

3.30 Mr Derrick forwarded that to the Claimant on 24 January 2017. The Claimant replied to ask whether that meant that VS would be offered to him now. Mr Derrick reiterated that it was an option, but needed route support. He was concerned that this might be more an ill health situation. However, he said that his intention was for voluntary severance and that they would certainly explore that now within the framework and guidelines Mrs Hare had provided. It seemed to me that the Claimant had misunderstood this correspondence. In cross-examination it was put to him that he had been told that voluntary severance might be available when the next scheme began. He disagreed. He said that he was told that voluntary severance was available.

3.31 The Claimant had received a further fit note on 18 January 2017. That again indicated that he might be fit for work with amended duties and hours. It made the same recommendations about reducing hours and driving distance as much as possible and less safety critical work if possible. It covered the period to 1 February 2017. The Claimant did not provide a copy of that fit note to the Respondent. Eventually in his evidence he accepted that he knew he should do so. The Claimant received a further fit note in similar terms on 1 February 2017 covering the period until 15 February 2017. Again, he did not provide the Respondent.

3.32 Ms Napier took over sole responsibility for managing the Claimant at the end of January 2017. She took advice from HR who suggested that it was unlikely he

would be offered ill-health severance in circumstances where he was fit to work close to home. Ms Napier had discussed voluntary severance with Mrs Hare. Mrs Hare told her that it was likely the Claimant would be offered voluntary severance as part of the next re-signalling project which was likely to start in the next couple of months. However, he would not receive his voluntary severance until the re-signalling went through in March 2018.

3.33 Ms Napier telephoned the Claimant on 8 February 2017. She kept a note of their conversation. The Claimant's evidence was that Ms Napier told him that voluntary severance and medical severance were not now available and that if Crabley Creek was not going to be suitable there was no other option and he would have to leave. Ms Napier disagreed. She said that they discussed other possible locations including Crabley Creek and that the Claimant did not feel that this was suitable. She discussed the advice she had been given about ill-health severance and voluntary severance. She said that she made it clear that it was likely the Claimant would be offered voluntary severance in the next couple of months as part of the new re-signalling project but that he would not be eligible for payout until the re-signalling occurred in March 2018 unless he was considered to receive this early. She said that she reiterated this more than once. She said that the Claimant mentioned that he did not feel that the previous PTR&R process had been properly followed and said that he should have been sent to Prince of Wales signal box. She asked him if she if he would be prepared to go to Prince of Wales if there was still a vacancy and he said that he would for a couple of months until voluntary severance became available. She said that she would explore this with Mrs Hare. Ms Napier's evidence was consistent with the note she made on the Respondent's electronic system at the time.

3.34 In cross-examination the Claimant accepted that he had referred to the Prince of Wales signal box and that Ms Napier told him she would explore it. It was suggested to him that if that was right it could not be right that he had been told he had no option but to leave. He said that that was "twisting it." He said that it was the first time he had been told that voluntary severance and ill-health severance were not available and that he was told that if Crabley Creek was not suitable he would have to leave, but Ms Napier would look into Prince of Wales. It was suggested to him that that simply did not make sense. In cross-examination the Claimant repeatedly said that during the conversation on 8 February 2017 the situation changed completely. He said that there were "no possibilities" and that he had "no options." He was asked how that could be the case if he had been told that Ms Napier was going to explore the Prince of Wales signal box. He said that he did not see that as an option. I noted that he did not make reference in his witness statement to any discussion about Prince of Wales signal box. I preferred Ms Napier's account of the conversation. The Claimant's account simply did not make sense. He accepted that Ms Napier had told him she would explore the possibility of a move to Prince of Wales signal box. If that was so it seemed to me implausible that she would have told him that if Crabley Creek was not suitable he would have to leave. I prefer her evidence that she did not. The position at the end of the telephone call was therefore that the Claimant was being told that voluntary severance was not available immediately. He was not being told that he must either move to Crabley Creek or leave.

3.35 There was a further conversation between the Claimant and Ms Napier on 9 February 2017. The Claimant asked Ms Napier to put in writing what she had

said yesterday, namely that Crabley Creek was his only option and that voluntary or medical severance were not now available. Ms Napier refused to do so. She explained to me that she did not consider that would be appropriate. These were effectively just rough notes of what had been discussed. The Claimant had not asked for them in advance and, further she did not agree that she had said the words that were being attributed to her.

3.36 The Claimant went to a solicitor. He was considering resigning but was advised not to hand in his notice because he needed to raise a grievance first. He did so on 9 February 2017 in writing to Ms Napier. In short he was complaining that the PTR&R process had not been followed correctly at the outset. He said that this had put him at a disadvantage and led to the position he was now in. He said that he was at the point that he could no longer work for the Respondent. On 10 February 2017 Mr Foote emailed the Claimant to acknowledge his grievance. He said that he would appoint a suitable manager to proceed but that before he could do so he needed the Claimant to inform him which individual the grievance was against otherwise it could not proceed. The Claimant replied that morning to say that the grievance was not directed at any one individual. It was the management team that dealt with the PTR&R process. He said that he was unaware that he had to direct the grievance at an individual. On 15 February 2017 Mr Foote emailed the Claimant to say that Mr Hewitt in Newcastle would hear the case for him and would be in touch shortly.

3.37 On 16 February 2017 a final occupational health report, prepared with information from the Claimant's GP, was provided. The occupational health advisor reported that the Claimant had said that he would consider any role with the appropriate travel time and shift pattern but would not be able to return to his current role because of the distress the hours and shift patterns had caused him and his family. The adviser said that such a return would be detrimental to the Claimant's mental health. The adviser said that the Claimant was very motivated to return to work if a suitable alternative role could be found. He was managing to undertake all of his normal activities of daily living and had no other underlying medical condition. The adviser's view was that the Claimant was fit to return to work in a suitable and appropriate role in regard to travelling distance from home shift times and pattern. The adviser's view was that the Claimant was unlikely to be considered to meet the definition of disability. The adviser recorded specific questions that had been asked of the Claimant and his answers. One of the Claimant's suggestions was that a travel time of up to 30 minutes and a similar shift pattern to the one at Marsh Junction could be considered.

3.38 On 22 February 2017 the Claimant emailed Mr Foote to say that he had not heard from Mr Hewitt about his grievance. He referred to the grievance procedure and the fact that a hearing should be held as soon as possible and the date agreed for the hearing within seven working days of the submission of the grievance. Mr Foote replied by return. He apologised and said that this was his fault he had only transferred the case over to Mr Hewitt today.

3.39 Meanwhile, the occupational health report had been provided to Ms Napier. She discussed the situation with Mrs Hare on 23 February 2017. Mrs Hare said that she could allocate work for the Claimant at her office in York and could provide him with a laptop so that he could work from home. Ms Napier said that she was

really pleased to have a position for the Claimant that comfortably fell within the remit of the occupational health report.

3.40 She spoke to the Claimant by telephone on 24 February 2017. Again there was some dispute about what was said. There was no dispute that Ms Napier offered the Claimant the role working at York and also the opportunity to work from home with occasional trips to York to collect that work. The Claimant declined both offers without asking any questions, for example about how often he would need to travel to York if he worked from home or whether he could collect the work from an alternative location closer to home.

3.41 Ms Napier's evidence was that she then spoke to HR for some advice. By this stage she had not received any fit notes for the Claimant, despite him being required to provide them. They advised her that the Claimant was effectively absent without leave because he was refusing to work even though reasonable adjustments were being made. She said that she called the Claimant back and told him that if he was going to keep turning down reasonable offers of alternative roles they would have to treat his current absence is unauthorised and consider stopping his pay and initiating disciplinary proceedings. Her evidence was that the Claimant said that this was "fine" and that she should do what she needed to do. It was the Claimant's evidence that all of those points were addressed in the first telephone call. There was a second telephone call but that was only so that Ms Napier could tell him what his notice period was. I preferred Ms Napier's evidence, which was consistent with the notes she made at the time.

3.42 Shortly after their telephone call the Claimant emailed Ms Napier to say that because of the ongoing situation and the stress and anxiety that was being caused he had no option but to tender his resignation giving four weeks' notice. He asked that she replied and confirm that she had received the email and also indicated that he expected that his grievance would still be addressed. Ms Napier did indeed reply confirming that she had received his letter of resignation and acknowledging that he was giving four weeks' notice effective from 24 February 2017. His employment ended four weeks later.

4. Legal principles

4.1 It is well-established (see *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221) that in considering whether an employee has been constructively dismissed, the issues for a Tribunal are:

4.1.1 Was there a breach of the contract of employment?

4.1.2 Was it a fundamental breach going to the root of the contract, i.e. such as to entitle the employee to terminate the contract without notice?

4.1.3 Did the employee resign in response and without affirming the contract?

4.2 It is an implied term of the contract of employment that the employer will not, without reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: *Malik v BCCI* [1997] IRLR 462. This is a demanding test. The employer must in essence demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract: see *Frenkel Topping Ltd v King* UKEAT/0106/15/LA. Individual actions taken by an employer

that do not by themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust and confidence, thereby entitling the employee to resign and claim unfair dismissal. The final act in such a series (or "last straw") need not be of the same character as the earlier acts but it must contribute to the breach of the implied term: see *Omilaju v Waltham Forest BC* [2005] IRLR 35 CA.

4.3 Once a fundamental (repudiatory) breach of the contract by the employer has been established, the Tribunal must ask whether the employee has accepted that repudiation by treating the contract of employment as being at an end. The employee's resignation must be in response (at least in part) to the repudiation, which must be an effective cause of it: see *Nottinghamshire County Council v Meikle* [2005] ICR 1, CA; *Wright v North Ayrshire Council* UKEATS/0017/13/BI.

5. Determination of the claims

5.1 Applying those principles, the first question is whether the Respondent was in fundamental breach of contract – either the implied term of mutual trust and confidence or the express terms of the grievance policy, disciplinary policy or stress management guidance.

5.2 I find that there was not a fundamental breach of contract. The Claimant resigned on 24 February 2017, so I am concerned with events up to and including 24 February 2017. Anything that took place after that date cannot have formed part of his reasons for resigning and therefore cannot contribute to a constructive dismissal

5.3 I begin with the PTR&R allocation process. The question is whether the Respondent's conduct was calculated or likely to destroy or seriously damage mutual trust and confidence either when it mistakenly allocated three people to two roles or in its handling of that situation once it was drawn to its attention, I find that it was not.

5.4 The context is that the Claimant had not expressed any preference for a particular allocation. He had to that extent indicated an equal willingness to be assigned to any of the available roles. If there had not been the mistake in allocating three people to two roles, he would have been allocated to the Prince of Wales signal box, a 10 minute further journey from his home. As indicated, his own evidence was that an assignment to Prince of Wales would not have made a difference to his ability to do the job. He was not saying that there was something about the Prince of Wales signal box that would have addressed the issues he had at Goole Town. Fundamentally, it was the principle that there had been a mistake in the allocation process that was concerning him. I have also taken into account the fact that he knew the mistake in allocations when he accepted that role. Furthermore the allocation of three people to two roles was not in practice a problem because one of those three people very shortly went on secondment to a different location. There may have been some failure to keep the Claimant informed after he raised the issue in September/October 2016. It is not clear whether any such failure lay at the door of his RMT representative or management or both but it was certainly clear that by 14 January 2016 he had been told that he would not be displaced and that his role was secure. I consider that it was reasonable for the Respondent, once the mistake was drawn to its

attention, not to re-run the allocation process. It was confident from its experience that there would be sufficient natural movement to address the potential issue. This had been a complex allocation process, carefully run in conjunction with the RMT. Everybody had been given their allocations in accordance with that process. The alternative to sticking with the three allocations to Goole Town would have been that everybody from the Claimant downwards had to be reallocated. In my view it was reasonable for the Respondent to decide not to do that and this was not conduct that was likely to undermine mutual trust and confidence. The Claimant had a substantive post at Goole Town and that was made clear to him. For all those reasons I find that the Respondent's approach in making the mistake and in dealing with it once it had been drawn to its attention was not conduct calculated or likely to undermine or destroy mutual trust and confidence.

5.5 The next element I have considered is the steps that were taken to assist the Claimant in the role at Goole Town. It is important to note that this is not a claim of disability discrimination. It was not said at the time and it has not been said to me that this was a case where the Claimant was disabled and the Respondent was under a duty to make reasonable adjustments. There had been a significant restructuring exercise and a number of job roles had been lost. The Respondent has an agreement that it will not make compulsory redundancies, and displaced workers were therefore reallocated to the nearest available role pursuant to an agreed and long-standing process. The available role to which the Claimant was allocated was a substantial distance from his home. He had previously walked to work. It had a different shift pattern involving much earlier starts. Both of those matters proved to be a problem for him. They caused him stress and anxiety and, towards the end of the process, mental ill health. The question is what was the Respondent obliged to do in response? There was no duty to make reasonable adjustments and there was no freestanding obligation on the Respondent's part to find another role for the Claimant. In any event, the Respondent's approach was neither calculated nor likely to destroy mutual trust and confidence. On the contrary, it seemed to me that Mr Derrick made extended efforts to try and find a solution to the difficulties the Claimant was facing. The Claimant accepted throughout his evidence that Mr Derrick was doing his best to help. He kept in touch regularly with the Claimant. He agreed with him that the extra hour that could be added to shifts at Goole Town would not be added to the Claimant's shift at the start of the day; he would only ever be asked to come in five minutes early. Mr Derrick agreed that he would do everything he could to avoid the Claimant having to work on a Sunday and in fact he always managed to arrange things so as to avoid that. Mr Derrick also made efforts to find an alternative role for the Claimant nearer to home and with a more convenient shift pattern. That led to him offering the Claimant a transfer to Crabley Creek, 10 to 15 minutes closer to the Claimant's home. He offered to pay the Claimant at his current grade although the role at Crabley Creek was at a lower grade and he offered to pay him to visit Crabley Creek. The Claimant did not visit Crabley Creek and eventually decided not to accept that role. Nothing in Mr Derrick's approach was inconsistent with mutual trust and confidence.

5.6 The Claimant raised a particular concern about the way that Steve Arnold was treated when he was moved to a role at Holton le Moor. However, as the Claimant accepted in cross-examination, Mr Arnold was dealt with in accordance with the PTR&R process. Mr Arnold took priority for a transfer under the process

because he was out of grade following the reallocation. That was explained to the Claimant at the time.

5.7 That brings me to when the Claimant went off work sick. He had two or three weeks of being unfit for work but from 3 January 2017 he was fit to return to work on amended duties. The fit note advised that time spent driving be reduced as much as possible and that, where possible, tasks should be adjusted. Mr Derrick had a welfare meeting with the Claimant on 11 January 2017 when he said that he was not willing to consider the transfer to Crabley Creek and they agreed that they would leave it a couple of weeks. At that stage the Claimant raised the question whether he might still be considered for voluntary severance. That query was eventually answered in the email from Mrs Hare on 24 January 2017. As indicated, it seemed to me that the Claimant had misunderstood what Mrs Hare meant. She was talking about the fact that the next restructuring exercise would give the opportunity for a voluntary severance package for the Claimant because Goole Town would be an appropriate location to be included for the voluntary severance exercise. Ordinarily voluntary severance would take place at the end of the reallocation process and what Mrs Hare was saying was that it might be possible to look into releasing the Claimant under that process earlier than the very end of it. She was not saying that it might be possible to release the Claimant under a voluntary severance package before that process had started nor was she definitely saying that an early release was possible. I find that it was not a breach of contract, or likely to undermine mutual trust and confidence, for the Respondent to tell the Claimant that voluntary severance was not available to him otherwise than in accordance with a restructuring round where voluntary severance is part of the agreed process.

5.8 There was some difference in what Ms Napier said about voluntary severance on 8 February 2017, because she appeared to rule out the possibility of an early release under the 2018 scheme. She did so having spoken to Mrs Hare. However, Ms Napier was not telling the Claimant that voluntary severance was not available. She was saying that it was not available now or imminently. The Claimant was obviously suffering from mental ill health by this stage. He had tried the role at Goole but found that he simply could not cope with the travel and shift pattern. He evidently saw voluntary severance as a way out of that difficulty. When it became apparent that voluntary severance in the immediate term was not available, it may well be that he felt unable to continue working for the Respondent. But that is not the same as the Respondent being in breach of contract by telling him that voluntary severance was only available through the reallocation process yet to take place.

5.9 As indicated above, I find that Ms Napier did not tell the Claimant that there were no options left and that he would have to resign. Rather there was a discussion of where they were up to what the options were and there was agreement that Ms Napier would go off and explore matters further.

5.10 The next matter about which the Claimant complains is Ms Napier's refusal to provide him with her handwritten notes of the telephone conversation when he asked for them on 9 February 2017. I find that it was not unreasonable of her to refuse to provide the notes, and that this was not calculated or likely to undermine mutual trust and confidence. Ms Napier was not under any obligation

to provide her handwritten notes. She was not asked to keep notes in advance; the Claimant was capable of making his own notes and did so. Further, Ms Napier did not agree that she had said what the Claimant was requiring her to confirm in writing. In those circumstances it seemed to me reasonable and not in breach of contract for her to say that she was not going to provide her handwritten notes.

5.11 That brings me to 24 February 2017, when I have found that Ms Napier offered the Claimant a role working at York and a role doing work from home, which she explained would require occasional trips to York to collect work. By that stage she had all three occupational health reports, the last of which was written with the benefit of information from the Claimant's GP. It expressed the view that the Claimant did not meet the definition of disability in the Equality Act 2010. In that context, it recommended that the Claimant was fit to return to work with adjustments to his hours of work and travel. It recorded the Claimant's view that a travel time of 30 minutes would be suitable. I find that there was nothing in the report that made the offer of a role based at York or working from home unreasonable or incompatible with trust and confidence. The Claimant's response to the offer was essentially to dismiss it out of hand. He did not ask the basic question of how frequently he would need to travel to York if he took the home working option. Nor did he say that he might manage homeworking if he could pick the work up from another location. He simply responded immediately to say that he could not do it and would need to speak to his doctor.

5.12 As noted, by 24 February 2017 the Claimant had not provided any of his fit notes since 3 January 2017 and he knew he had to provide them. When he refused the two roles identified by Ms Napier, she sought HR advice. Then she told the Claimant words to the effect that if he was going to keep turning down reasonable offers they would have to treat his absence as unauthorised and consider stopping his pay and initiating disciplinary proceedings. In my view, that was somewhat heavy-handed given the references in the occupational health report to his state of mental health. But, he was being made the offer of working from home with the occasional trip to York to collect work and he was not even willing to discuss that position. In those circumstances disciplinary proceedings or the termination of his sick pay were plainly possible consequences and it was appropriate to make the Claimant aware of that. Although it might have been handled differently, I do not find in those circumstances that this was, by itself, calculated or likely to destroy or seriously damage mutual trust and confidence.

5.13 That brings me to the particular policies and procedures on which the Claimant relies. As indicated above, the stress management guidance is not used by the Respondent any more - they take HR advice instead. The failure to follow that guidance cannot therefore amount to a breach of contract. What matters is whether an employee with stress and anxiety was appropriately managed. As indicated I find that when the Claimant was still at work he was very carefully managed and supported by Mr Derrick. Once he was absent, appropriate steps were taken, including referring him to occupational health, keeping in touch with him and seeking to identify and discuss with him roles that he might be fit to perform.

5.14 The Claimant also referred to the disciplinary procedure. He did not refer me to any particular part of that policy that he said was breached by Ms Napier warning him that disciplinary proceedings might be instigated. I find that there was no such breach.

5.15 The last policy to which the Claimant referred was the grievance procedure. Mr Foote initially made a mistake when he told the Claimant that his grievance could not be considered unless he named an individual manager as the subject of it. But the Claimant drew attention to that and it was put right promptly (and before the Claimant resigned). I find that falls into the category of a mistake rather than a breach of contract. The next criticism relates to the delay in arranging the grievance hearing. There was undoubtedly a delay and the timescale of seven days in the policy was not met. Furthermore, there was no good reason for the delay. Fundamentally it was because Mr Foote had not passed the grievance on to Mr Hewitt to deal with and that was not done until the Claimant chased the matter up. The context is that the Claimant was suffering from stress and anxiety and mental ill health. This was plainly a matter of importance to him and it was not acceptable simply to sit on the grievance for no good reason. However, there is a high threshold for something to amount to a fundamental breach of contract. While this delay in arranging to deal with the grievance should not have happened, I find that it did not reach that high threshold. It did not suggest that the Respondent intended no longer to be bound by the contract of employment and it was not calculated or likely to destroy or seriously undermine mutual trust and confidence. It was a breach of the procedure, but in circumstances where the Respondent had made clear that it would hold a grievance hearing.

5.16 The last matter about which the Claimant complains is the way the grievance was handled after that point and its outcome. However, that took place after he had resigned and cannot have formed part of a fundamental breach of contract that led to his resignation.

5.17 I have taken care to look at each matter relied on individually and also to take a step back and consider the cumulative effect of these events, in particular the somewhat heavy-handed approach on 24 February 2017 and the delay in processing the grievance. On either basis I take the view that the high threshold of a fundamental breach of contract entitling the Claimant to regard himself as being dismissed was not met. For that reason he was not (constructively) dismissed and his claim of unfair dismissal cannot succeed.

Employment Judge Davies

Date: 30 November 2017