



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Sansome

**Respondent:** Leicester City Council

**Heard at:** Leicester      **On:** Tuesday 5 December 2017

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

## Representatives

**Claimant:** In Person

**Respondent:** Ms D Masters of Counsel

# RESERVED JUDGMENT

The claim of unfair dismissal fails and is dismissed.

# REASONS

## Background and Issues

1. The Claimant presented his claim to the Tribunal on 25 November 2015. He had been employed by the Respondents from 23 November 2007 until his resignation on 24 August 2015. He was a Case Management Officer.
2. He claimed:-
  - Constructive unfair dismissal
  - Disability discrimination
3. He explained in that claim form that at a home visit arranged to discuss his long term absence which was held in May 2015 he was suspended after an audit on his computer use. The grounds for his suspension being that he had “broken the Council’s computer use policy”.
4. He felt that this had been “sprung on him” and he had been upset by what had happened.
5. He visited his GP and obtained a sick note for a period of 3 months and after he had presented this he had been told that the suspension had been “a mistake” and that he was not suspended.

6. He complained that he had then been told that he had been overpaid in his wages and that the Respondents had started to claim back the over payment from him. He complained about this.

7. Shortly after this he received information that he was now suspended again and the investigation would continue. He described this as “a final straw” and that he had no other option than to resign which he did by way of letter dated 27 July 2015.

8. The Respondents denied the allegations of disability discrimination and unfair dismissal and the matter came before my colleague Employment Judge Ahmed and his members Mr N Khan MBE and Ms B Tidd. The hearing took place over 3 days on 16, 17 and 18 May 2016 and they found that his complaint of disability discrimination failed and was dismissed but his claim of constructive unfair dismissal succeeded. A judgment and reasons was sent to the parties on 29 June 2016.

9. The reasons at paragraph 33 set out that Mr Sansome had explained his reason for resignation as follows:

“I felt that to keep my work reputation in tact I had to resign so that I could still get a job if and when needed as I needed a reference from Leicester City Council. It was only after resigning that I learned if I asked for a reference from the City Council it would state that I was under investigation when resigning. I had been suspended, taken off suspension and then suspended again, it was so obvious that I was going to be pushed out, and I felt I had no choice other than to resign.”

10. The Tribunal’s conclusions were at paragraphs 40 to 64 of the reasons.

11. The crucial part of the Tribunal’s findings was at paragraph 62 onwards namely:

“62. It has been suggested that the Claimant resigned because he knew that dismissal was inevitable and his resignation was to avoid dismissal, not because of the alleged breach of the implied term of trust and confidence. It seems to us that what triggered the entire process of resignation began with the breach of the implied term of trust and confidence as to the suspension and the failure by the Respondent to consider whether suspension was indeed necessary and justified. If the Respondent took the view that delaying suspension for several months because the Claimant was on sick leave was in his best interests that is not something which, for good reason, the Claimant agrees with.

63. We are therefore satisfied that the conduct of the Respondent amounted to a breach of the implied term of trust and confidence by reason of the unjustified suspension. The breach clearly went to the root of the contract of employment. The resulting breach caused a breakdown of trust and confidence in the employment relationship sufficient to satisfy the **Malik** test. The Claimant did not unreasonably delay his resignation.”

12. The Respondent's appealed to the Employment Appeal Tribunal on 9 July 2016. Eight grounds of appeal were set out.

13. At a hearing at the Employment Appeal Tribunal (EAT) on 18 July 2017 the Honourable Mrs Justice Simlar DBE, President of the EAT ordered that the appeal be allowed and the matter be remitted for rehearing to a differently constituted Employment Tribunal on the narrow issue of whether the suspension of the Claimant on 14 May 2015 was a breach of the implied term of trust and confidence (because it was a knee jerk reaction and unjustified) entitling him to resign claiming unfair constructive dismissal.

14. At paragraph 44 of that judgment the President of the Employment Appeal Tribunal held that:

“That it was not open to the Employment Tribunal on the unchallenged evidence given by the Respondent to conclude that this suspension was unjustified. The underlying reasons relied on by the Tribunal are not supported by the evidence and the Tribunal's analysis is accordingly flawed... In the circumstances the finding that there was a breach of the implied term of trust and confidence cannot stand.”

15. The President concluded that it would be necessary to hear further evidence on the question of the suspension. She concluded that it would not be appropriate to remit the matter to the same Tribunal and the fresh hearing was to have a narrow compass and should be focussed on the question of suspension only.

16. The conclusion was:

“The finding that the Claimant was unfairly, constructively dismissed on the basis of the breach of the implied term of trust and confidence by reason of an unjustified suspension is set aside. That issue is remitted to a fresh Tribunal to be reconsidered in light of fresh evidence and submissions.”

### **The Hearing Today**

17. The Claimant represented himself and Ms Masters represented the Respondents. I heard evidence from the following:-

- Helen Manning – Head of Service, Contact and Response Service
- Nicky Ward – HR Adviser
- The Claimant

There was also an agreed bundle of documents and where I refer to page numbers it is from that bundle.

18. Mr Bill Hind, Team Leader within the Council's Adult Social Care and Safeguarding Department provided a witness statement which I considered along with other statements from Clive Cooper and Julie Griffiths on behalf of the Claimant. It was agreed that these witnesses did not need to be called as their evidence would not be relevant to the issues I had to determine.

**The issue**

19. As described by Ms Masters I was required to consider the following question; was the Claimant unfairly dismissed on the basis of a breach of the implied term of trust and confidence by reason of an unjustified suspension?

**The Facts Relevant to the Issue**

20. The Claimant had been employed by the Respondent's from 23 November 2007 until 24 August 2015 when he resigned. He was a Care Management Officer with responsibility for manning an emergency helpline and devising care plans for adult service users with difficulties.

21. In February 2014 Mr Sansome was elected as a Councillor for Charnwood Borough Council. During his working hours in what he described as his "down time" Mr Sansome undertook some of his Councillor responsibilities.

22. Mr Sansome also wrote fiction in his spare time and some of his work had been published.

23. In June 2014 the Claimant's Team Leader, Jane Robinson was approached by one of the Claimant's colleagues with a complaint that the Claimant had always appeared to be using the internet during work time and was carrying out work in relation to his Council role whilst at work. Helen Manning and Nicky Ward were both made aware of this.

24. Jane Robinson asked the IT Department to check the Claimant's internet usage and after obtaining the data a meeting took place between Jane Robinson and Nicky Ward on 26 June 2014 when they looked at the data.

25. Further enquiries had to be made with the IT Department about internet usage. A formal request for information was made on 18 July 2014 by Ms Robinson (pages 26-7). In August 2014 the Claimant informed his employers that he was suffering considerable pain and discomfort with his back. He was hospitalised for almost 4 months and off work. His absence continued and an occupational health report was obtained.

26. In his absence in early September 2014 information was received from the relevant IT staff as to the level of his internet usage. This pointed out the difficulties in accurately assessing the use not least because the number of "hits" depended on the type and content of the webpage opened.

27. On 21 October the Respondent's appointed a new Line Manager for the Claimant, Binda Purawal. Ms Robinson had been having conversation with Lynne Knights who was the Locality General Manager about the internet use and in October 2014 in an e-mail conversation between Ms Knights and Ms Ward they realised that matters had not been taken forward with regard to any investigation into the Claimant (pages 38-9).

28. In November 2014 Ms Knights commissioned an internal report from the Corporate Counter Fraud Team as to the Claimant's internet usage and the personal use of Council's e-mails.

29. That report was completed on 12 December 2014 and sent by Denise Hickling a Corporate Counter Fraud Officer. It made a number of findings and

concluded that disciplinary action should be considered (pages 60-60a). The report has a considerable number of appendices at pages 60b – 155.

The findings were as follows:-

“1. Internet usage during work time.

The earliest date available for checking is 16 May 2014 and reports have been produced from then until 20 August 2014 when Simon Sansome’s internet usage ceased....

...Simon Sansome was the highest user with twice the number of hits as the next highest user...

2. Personal use of e-mail.

....You will see from the list that he has sent e-mails which appear to be in connection with his work as a councillor, often to what appears to be his own private e-mail address....

..There is evidence of significant personal use of the Council’s email system including emails to colleagues...

....He has sent scripts containing inappropriate sexual content to (e-mail address) as well as a colleague Jake Wharton. He has also sent scripts and children’s stories to himself...

..One particular script “Talking Dirty” has a number of versions and has been sent by e-mail on 4 separate occasions, in view of the size of this document, only the one called “Final draft” has been attached to this memo....

...The Council’s acceptable use policy states that any personal email exchange should be through a personal web-based email service and not the employee’s Council email account...

3. H-drive.

In view of the inappropriate attachments found in the e-mail account I have analysed Simon Sansome H-drive and found that he has saved documents including scripts containing inappropriate content onto his Council computer.

The Council’s ICT Acceptable Use Policy states that “misuse of Council equipment may result in the application of the Disciplinary Process..”

30. In January 2015 the responsibility for the Claimant’s line management moved to Mr Bill Hinds. He was unaware of the CCFT report, although he was aware that he was being investigated. He had no involvement in the disciplinary process. His role was supporting the Claimant and managing his sickness absence. There was no discussion concerning the report when he met with the Claimant on a home visit on 22 January 2015 the notes of which are at pages 167-70. The Claimant said that he hoped to be fit to return to work prior to 22 May 2015.

31. Ms Ward wanted to look at options which might avoid the necessity of suspending the Claimant. On 15 January 2015 she wrote for advice about whether they could apply relevant restrictions on his IT access. Her e-mail is at page 160. It says that they would be investigating the Claimant under the disciplinary policy. After discussion Ms Knights decided that it was not possible to restrict his access to IT and still allow him to perform his role for the Council whilst he was being investigated. She decided at this time to progress the disciplinary process and suspend the Claimant. The Claimant was absent still on sick leave.

32. Thus, by 17 February a decision had been made to investigate the matters raised in the report. This is indicated in the e-mail from Nicky Ward to Lynne Knights of 17 February 2015 at page 174. It says in that e-mail:

“Hi Lynne

Following on from our conversation yesterday regarding Simon specifically around how we manage his pending disciplinary. I have attached a letter (very similar to the one that was given to Amanda Dussay as this was a very similar situation) which advises Simon of the investigation.

As we discussed yesterday I do think we need to be advising Simon sooner, rather than later, of the pending investigation against him as time is ticking on.”

33. No action was taken at this time though and Mr Hinds continued with the business of obtaining an occupational health report about the Claimant's return to work. The Claimant cancelled an appointment with Occupational Health at short notice 13 February 2015. This had to be re-arranged and eventually took place on 19 March 2015. The report is dated 20 March 2015 and is at pages 185-8. It concluded that Mr Sansome was fit to return to work subject to measures being taken to support him.

34. In April 2015, Helen Manning's secondment came to an end and she returned to her role as Head of Service, Contact and Response. She had a handover meeting with Ms Knights who had been acting up in her absence. The handover document at page 228 indicates that whilst a decision had been taken to suspend the Claimant and begin a disciplinary investigation into gross misconduct no action had been taken at that time.

35. Along with the handover document Ms Manning also had the Counter Fraud report (pages 60-155).

36. Ms Manning then considered this report and requested additional information from the Counter Fraud Team. She wanted to review the allegations and consider the evidence. She requested additional evidence from the Counter Fraud team. Having received this she took the view that the missue of the IT system had been prolonged and sustained.

37. Ms Manning was also provided with the occupational health report dated 20 March 2015. She noted that the Claimant would soon be in a position to return to work but this would be on the basis that he would work from home for an initial period of 2 months.

38. Ms Manning took the view that because of the allegations it would not be appropriate to provide the Claimant with access to the Council IT system to work from home. Given the Claimant's stated intention to return to work she decided that the disciplinary process had to be commenced and she decided to do this at the home visit that she arranged to take place on 14 May 2015.

39. In her letter to the Claimant on 1 May 2015 (page 191) it refers to arranging a home visit to discuss:

"Your sickness absence and welfare as you have been away from work for some time."

40. At the meeting they would discuss the occupational health advice. It did not mention that they would also discuss a disciplinary investigation or that Nicky Ward from HR would also be there. I am satisfied that this was not a deliberate omission. It had always been her intention to have Ms Ward with her. It was an oversight.

42. Ms Ward and Ms Manning met prior to the meeting to discuss how they would deal with it and the notes of that discussion are at page 192. It can be seen that they planned to discuss first the Claimant's sickness absence and his possible return to work. If the Claimant was fit to return to work, even working from home initially, it was agreed that Ms Manning would suspend him.

43. Ms Manning and Ms Ward attended the Claimant's home on 14 May 2015. The Claimant was asked if he was happy to proceed with the meeting and was invited to have a trade union representative with him if he so wished. Mrs Sansome attended the meeting throughout.

44. They discussed the occupational health report and the Claimant said that he had recently had improvements in his condition. Mr Sansome said that he did not want another medical report and he agreed that he did not meet the ill health retirement criteria. He said that he was bored at home and was looking forward to getting back into work. He said that he considered that he was fit to return and wanted to do so initially from home.

45. Having established that the Claimant was wishing to return to work and felt that he was fit to do so Ms Manning told him that she needed to discuss issues regarding his IT usage and that a corporate report had been obtained concerning this. At this point she checked whether the Claimant wished to proceed without a trade union representative present.

46. Having established that he was prepared to proceed she explained that a further report had been obtained and that an analysis of his hard drive and e-mail had taken place. Mr Sansome was told that there were several areas of concern which required investigation under the disciplinary procedure. In the circumstances he was told that he would be suspended. She explained that the suspension was a neutral act and did not in any way pre-judge the outcome of the investigation.

47. He was then handed 2 letters in an envelope. The first was informing him of the disciplinary investigation and the areas of concern (page 193-4) and the second advising him of his suspension under the disciplinary procedure (pages 195-6).

48. Mr Sansome then opened the letters and began to read out and question each of the allegations. Ms Ward pointed out to him that it was not an appropriate time to discuss the allegations and that these would be addressed at the disciplinary investigation meeting.

49. It was confirmed to Mr Sansome that because he would have returned to work at that time had it not been for the suspension he would be put back onto full pay from 14 May 2015.

50. The notes of the meeting are at pages 212-4. They were sent to the Claimant on 20 May 2015 (page 210). Mr Sansome replied shortly after complaining that he had not known the purpose of the meeting. If he had known he would not have had the meeting in his living room in front of his wife.

51. A letter was sent to the Claimant on 19 May 2015. It invited him to attend a disciplinary investigation meeting at 2:00 pm on Friday 5 June 2015 (pages 206-7). It confirmed the details of the allegations and told him of his right to have a representative with him at the meeting. On the following day the Claimant said that he was ill and wanted to exercise his right to a second medical report (page 208-9).

52. The disciplinary investigation meeting scheduled for 5 June 2016 was adjourned pending the outcome of the occupational health report as to whether the Claimant was fit to attend the meeting (page 215a-c).

53. Arrangements were made for the Claimant to be referred back to occupational health and an appointment was arranged for him for 12 June 2015 (page 217). In an e-mail to the Claimant on 1 June (page 216) Ms Manning confirmed the appointment for the second opinion. She went on to say:

“I understand you have obtained a further Med Cert – I have checked with HR and note that your absence is treated as due to suspension rather than sickness at this point.”

54. Ms Ward advised that this was incorrect. The second e-mail was sent by Ms Manning to Mr Sansome on 2 June (also page 216). This says:

“Apologies, the advice I gave you yesterday about your reason for absence is wrong.

As you have obtained a concurrent Med Cert indicating you are not fit to work that is treated as the primary reason for your absence.

HR has advised that the suspension is lifted. This has implications for your salary as I understand any period under suspension is paid at full pay and any period deemed as sickness absence is paid at half pay due to the length of absence.

I propose that I advise payroll that the suspension was effective for the period 14 May (date of home visit) to 28 May (date of OH referral) although I am happy to discuss if there are different views.”

55. It can be seen from the e-mail that the reason the suspension was lifted was because the Claimant was now off sick. There was no indication given that the disciplinary process would not be pursued.



56. On 22 June 2015 Ms Manning received the second occupational health report dated 16 June (pages 223-5). It confirmed that the Claimant would be fit to attend any meetings within a period of 4-8 weeks. It can be seen from the report that Mr Sansome had told the occupational health physician that:

“His disciplinary proceedings had been lifted and as far as he is aware he does not need to attend any formal meetings with regard to a disciplinary proceeding”.

57. Ms Manning telephoned Mr Sansome immediately on receiving this to say that the disciplinary process was still pending and it would recommence when he was fit to return to work.

58. On 27 July 2015 the Claimant resigned by e-mail (pages 233-4). It simply says:

“Morning Bill

After serious consideration, I would like to give my 30 days’ notice; I get paid until 16 August and due 29 days’ holiday.

Cheers

Simon Sansome.”

59. A letter was sent to the Claimant on 30 July accepting his resignation. It invited him to attend an exit interview. Ms Manning did prepare a letter regarding the disciplinary investigation which is at page 239-40 but this was not sent to the Claimant.

60. In response to the question of engaging in an exit questionnaire Mr Sansome wrote to Mr Hinds on 4 August 2015 (page 240b). The letter says:

“I would like to leave as quietly as possible. The reason for this it was not my idea to leave LCC, I have been put in a horrible situation by management (not you one higher) forcing me to resign. As soon as I got suspended I applied to University, so while I am looking forward to a new chapter I was pushed because I didn’t accept ill health retirement and wanted to return to work. I had to fight to keep my job at the first OH appointment as they were ready to sign me off. Only to be told a few weeks later I may not be allowed to return due to suspension.

As a newly disabled person I could not take the risk of getting fired, no one in their right mind would employ a disabled person who has been sacked from the Council. It was made clear to me I was not going to survive the suspension.

As you know I was looking forward to returning to work either full or part time so while having a collection is great this kind of pours lemon onto the wound.”

61. On 3 August 2015 he made a formal complaint about Helen Manning. The document is at pages 242-4. The complaint related to the meeting that had taken place on 14 May.

62. In his ET1 the Claimant describes the behaviour of Ms Manning and Ms Ward at the meeting on 14 May as being one of the factors that led to his resignation. He said that he had been distraught after the visit and that he had been to see his doctor and been signed off sick and then believed that the suspension had been lifted. He complained that he had been told that he had been overpaid his wages which had come as a complete surprise to him and the Respondent's had started to claim back the overpayment from his wages. He said that he had written to complain about this treatment and the e-mail was never answered and a short while after he received the e-mail from Helen to tell him that as soon as he returned to work he would be suspended again and the investigation would continue. He described this as a final straw giving him no option other than to resign.

63. In his witness statement the Claimant explained his reason for resignation as being:

"I felt that to keep my work reputation in tact I had to resign so that I could still get a job if and when needed as I needed a reference from Leicester City Council. It was only after resigning that I learned that if I asked for a reference from the City Council it would state that I was under investigation when resigning. I had been suspended, taken off suspension and then suspended again, it was just so obvious that I was going to be pushed out, I felt I had no choice other than to resign.

## **The Law**

64. The claim of unfair dismissal is made under the provisions of Section 94 of the Employment Rights Act 1996 (ERA). Section 95 provides:

"The circumstances in which an employee is dismissed:-

(1) for the purposes of this part an employee is dismissed by his employer if (and, subject to sub section (2)... only if) –

(c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer."

65. In her submissions to me Ms Masters asked me to consider carefully the Employment Appeal Tribunal's judgment in this case. The original Tribunal had found that the Claimant had been subjected to an unjustified suspension that breached the implied term of trust and confidence.

66. As referred to in the Employment Appeal Tribunal judgment at paragraph 23 the ACAS code expressly recognises that there may be instances where suspension by an employer of an employee with pay is necessary while an investigation is carried out. The code states that suspension with pay should only be imposed after careful consideration and should be reviewed to ensure that it is not unnecessarily protected. It should be made clear that suspension is not an assumption of guilt and is not considered a disciplinary sanction but is a neutral act.

67. The Honourable Mrs Justice Similar then went on to refer to the cases of:-

- **Crawford v Suffolk Mental Health Partnership NHS Trust** [2012] IRLR 402
- **Gogay v Hertfordshire County Council** [2000] IRLR 703

68. There were a number of points that emerged from the Court of Appeal's decision in **Gogay** namely:-

68.1 The mere fact of an investigation taking place does not inevitably mean there must be a suspension.

68.2 Employers should give careful consideration to whether suspension is necessary and justified. This includes consideration of the strength of the allegations and whether it is appropriate in the interests of both the employer and the employee, and indeed potentially others, to separate the employee from his or her usual place of work.

68.3 If separation is appropriate, before concluding the suspension is necessary, consideration should be given to how separation might be achieved without suspension, including whether a transfer to different duties or some other means of affecting separation can be arranged might avoid suspension.

69. As Ms Masters described for there to be a reasonable and proper cause for suspension there must be:-

- A careful consideration of the strength of the accusations – there must be no “knee jerk” reaction
- A risk to the Respondent, its employees or a third party if he remains at work
- No alternative to suspension

70. Ms Masters also referred me to the case of **Agoreyo v London Borough of Lambeth** [2017] EWHC 2019 (QB). It was Mr Sansome's submission to me that he should only have been facing 2 allegations. That suspension was not a neutral act, that he was banished from the building. He says that he could have worked at another department and that the Respondent's didn't investigate other options.

## **My Conclusions**

71. I am satisfied that the decision to suspend the Claimant was justified in the circumstances of this case. It was as Ms Masters described “entirely understandable”.

72. The allegations that the Claimant faced at page 195 were serious and particularly those numbered 3 and 4 namely:

“Breach of the Council's acceptable use of e-mail at work policy regarding offensive material of pornographic text and inappropriate swear words of a sexual nature”

“Breach of Leicester City Council's code of conduct – 9 – use of Council

facilities by saving material of a personal nature on your computer's H drive, including information containing inappropriate content"

5.2 – failing to comply with the Council's information security policies and procedures."

73. On the face of the report that had been obtained pornographic material had been saved onto the H drive and then e-mailed to the Claimant's own e-mail address.

74. This matter required investigation and it was appropriate to suspend the Claimant during that investigation and prevent him from having access to the Council's IT system.

75. I am satisfied that it was not a knee jerk reaction. Ms Manning's decision was made after careful consideration of the report and the circumstances of the Claimant. She had decided that she did not need to suspend him whilst he was off work because of sickness. She had decided that if the Claimant indicated that he would return to work at the meeting on 14 May she would need to suspend him at that stage to prevent him from doing so. She would not need to suspend him if he was not returning to work. As he indicated that he would return then she needed to suspend him.

76. That was entirely reasonable. It was necessary and justified. She had considered the strength of the allegations and decided it was appropriate in the interests of the Council and Mr Sansome to separate him by suspending him. There was a risk to the Respondent and there was really no alternative to suspension.

77. I am therefore satisfied in this case that there is no breach of the implied term of trust and confidence. The suspension was a considered decision, was a neutral act and was entirely reasonable and the Claimant's claim therefore for constructive unfair dismissal fails and is dismissed.

78. The provisional remedy hearing set for 22 February 2018 is no longer required and is cancelled.

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Employment Judge Hutchinson

Date 08 February 2018

JUDGMENT SENT TO THE PARTIES ON

10 February 2018

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FOR THE TRIBUNAL OFFICE