

# THE INDUSTRIAL TRIBUNALS

CASE REF: 21774/20

**CLAIMANT:** Paul Hughes  
**RESPONDENT:** Hughes Precast Concrete Ltd

## JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claim of constructive unfair dismissal is dismissed.

### CONSTITUTION OF TRIBUNAL

**Employment Judge:** Employment Judge Tiffney  
**Members:** Ms M J McReynolds  
Mr A Barron

### APPEARANCES:

The claimant was represented by Mr N Richards, Barrister-at-Law, instructed by Jarlath Fields Solicitors.

The respondent was represented by Mr P Ferrity, Barrister-at-Law, instructed by Elliott Duffy Garrett.

### BACKGROUND

1. The respondent is a limited liability company which produces precast concrete products used in building, civil works and farming. The respondent employs approximately 20 employees and operates in a premises located in Middletown, County Armagh.
2. The claimant had been employed by the respondent as a General Operative. The claimant held this role for just under five years until he resigned on 11 May 2020.

### THE CLAIM

3. The claimant claimed he was unfairly constructively dismissed by the respondent owing to a breach of the implied term of trust and confidence caused by the cumulative conduct of the respondent over the period December 2019 to 11 May 2020. The relevant conduct was the respondent's continued failure to act, or adequately investigate the claimant's allegation that a work colleague had subjected

him to a campaign of harassment by writing three anonymous letters about the claimant, designed to cause him distress and upset his marriage. Two of the letters were sent to the claimant's neighbour and one to his wife. The claimant alleged that his conversation with the respondent's General Manager on 11 May 2020, represented the last straw incident which triggered his resignation on the same date.

## **THE RESPONSE**

4. The respondent denied that the claimant was unfairly constructively dismissed; specifically that its reaction to the claimant's complaint about the anonymous letters amounted to a breach of the implied term of trust and confidence. The respondent contended the claimant's concern regarding the anonymous letters was a private matter, unconnected to the workplace which did not engage the respondent. The respondent further contended that the only connection between the letters and the workplace was the claimant's belief that the work colleague was the author. In the respondent's view that belief was based on tenuous evidence which had little or no probative value. Additionally, the respondent maintained the claimant did not resign in response to the alleged breach of the implied term of trust and confidence as it had been made clear to the claimant long before he resigned that the respondent would not be taking any action to address his concern; thus the claimant delayed in terminating his contract in response to the alleged breach. The respondent asserted the claimant resigned because he had been informed the work colleague was returning to work from furlough and disputed that this fact could amount to a breach of the implied term of trust and confidence in the contract of employment between the claimant and the respondent.

## **THE ISSUES**

5. An agreed issues document was provided to the tribunal. However in light of the evidence presented a number of the factual issues (numbers 1 & 5) were not in dispute and in view of the tribunal's relevant findings of fact and conclusions, some factual issues (numbers 3, 8, 10 & 11) were not relevant to the legal issues. The claimant's counsel referred the tribunal to Reply 1 (a) of the claimant's replies to a request for Additional Information which set out the relevant conduct of the respondent over the period December 2019 to 11 May 2020 which the claimant contends amounted to a cumulative breach of the implied term of trust and confidence. With one exception, all of the incidents relied on are conversations between the claimant and the respondent's General Manager, Mr V Watterson. The exception is a telephone conversation between Mr Watterson and the claimant's wife on 15 January 2020. The key dates identified are; 18, 19 and 20 December 2019 and 6 and 15 January 2020, an unspecified date in late January 2020, 4 May, 8 May and 11 May 2020.
6. The agreed issues in contention were as follows:-

### **Legal Issues**

- (1) Was the claimant subjected to a constructive unfair dismissal by the respondent?
- (2) Subject to the above, what if any compensation is the claimant entitled to?

## **Factual Issues**

- (1) Did the claimant suffer “harassment” in late 2019 by way of letters allegedly sent to his neighbour and family?
- (2) To what if any extent - and in what context – did the claimant (or his wife) bring allegations about a colleague’s supposed involvement to the attention of Victor Watterson of the respondent?
- (3) Whether there are defined procedures for complaining about the alleged conduct or for otherwise raising grievances within the respondent; and, if so, did the claimant follow them?
- (4) What, if any, steps were required to be and/or actually taken by the respondent in relation to the allegations made by the claimant?
- (5) Why was the claimant on sick leave from January 2020? What was relayed to the respondent in respect of the claimant’s sickness?
- (6) What communication occurred between the claimant and the respondent during his sickness absence and furlough period, and, in particular, in relation to the claimant’s return to work in or around May 2020?
- (7) What occurred during the final week of the claimant’s employment viz 4-11 May 2020?
- (8) What was said between the claimant, Mr Watterson and Helen McKenna Brady of the respondent on 11 May 2020?
- (9) What were the reasons for the claimant’s resignation?
- (10) In the context of claiming constructive dismissal, did the claimant delay his resignation and, if so, why?
- (11) What relevant financial loss has the claimant suffered?
- (12) To what if any extent did either party comply with the LRA Code of Practice on Grievance Procedures? If there was a failure to comply, to what extent should any award of compensation be adjusted?

## **CASE MANAGEMENT**

7. This case had been case managed and detailed directions were given in relation to the interlocutory procedure and the witness statement procedure.
8. The evidence presented to the tribunal included serious allegations and/or negative statements about three individuals who were neither witnesses nor a party to these proceedings. At the outset of the hearing counsel for the claimant informed the tribunal that the parties agreed that it was not necessary to name these three individuals in order to uphold the principle of open justice and the right to a fair hearing enshrined in the European Convention on Human Rights (“ECHR”). In reaching this agreement the parties acknowledged that the right of the three

individuals to a private life enshrined in Article 8 of ECHR was engaged. In the absence of this agreement the tribunal would have considered whether it was appropriate to issue a restricted reporting order under Rule 44 of the tribunal's Rules of Procedure 2020 to anonymise all references to these three individuals at the hearing and/or in this written judgment. That requirement was obviated by the parties' agreement that during the course of the hearing and in the tribunal's written judgment, the three individuals would be referred to in the following terms:-

- (i) The alleged author of the anonymous letters – “the work colleague”.
- (ii) The neighbour who received two of these letters – “the neighbour”.
- (iii) The neighbour of the claimant's brother – “CH”.

The tribunal was satisfied that this agreed approach was a necessary and proportionate step which protected the Article 8 rights of the three individuals and did not undermine the principle of open justice or competing rights enshrined in the ECHR, notably the right to a fair hearing.

## **SOURCES OF EVIDENCE**

- 9. Each witness swore to tell the truth, adopted their witness statement as their evidence-in-chief and moved immediately to cross-examination and where appropriate, brief re-examination.
- 10. The claimant gave evidence on his own behalf. Evidence was also given on the claimant's behalf by his wife, Mrs Sharon Hughes.
- 11. On behalf of the respondent, the tribunal heard evidence from Mr Victor Watterson, General Manager of the respondent.
- 12. The parties presented a lever arch file of documents running to 207 pages. The tribunal has taken account of all relevant documentation to which it was referred during the hearing.
- 13. The tribunal sat from 17-19 November 2021. At the conclusion of the evidence the parties gave oral submissions.

## **THE LAW**

- 14. The parties referred to a number of authorities in their oral submissions. The key authorities are referenced in the summary of the relevant legal principles set out below. Both parties referred the tribunal to ***Harvey on Industrial Relations and Employment Law*** (“Harvey”) - *Division DI Section 3*. Counsel for the respondent referred to a number of specific paragraphs within this section. Key extracts are also referenced below.

## Relevant Legal Provisions

15. The right of an employee to not be unfairly dismissed by his/her employer is enshrined in Article 126 of the Employment Rights (Northern Ireland) Order 1996 ("the Order"). By Article 127(1)(c) of the Order, a resignation by an employee can, in defined circumstances, constitute a dismissal by the employer. This is generally known as constructive dismissal. In so far as is relevant and material to these proceedings, Article 127(1)(c) of the Order states as follows:-

*"(1) For the purposes of this part an employee is dismissed by his employer 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's conduct."*

16. In a constructive dismissal the burden is on the employee to show that he resigned in response to a repudiatory breach of contract and that his resignation therefore amounted to dismissal.

## Relevant Legal Principles

17. Harvey at Division DI, Section 3 states as follows:-

*"Initially some courts took the view that any sufficiently unreasonable conduct by the employer might justify the employee in resigning and claiming that he had been dismissed. However, as the Court of Appeal made clear in **Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, [1978] ICR 221**, it is not enough for the employee to leave merely because the employer has acted unreasonably; its conduct must amount to a breach of the contract of employment. (Paragraph 401)*

*"In order for the employee to be able to claim constructive dismissal, four conditions must be met:*

- 1. There must be a breach of contract with the employer. This may be either an actual breach or an anticipatory breach.*
- 2. That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law.*
- 3. He must leave in response to the breach and not for some other unconnected reason.*
- 4. He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract." (paragraph 403)*

18. Under the “last straw” principle, which is relied on by the claimant in this case, an employee can be justified in resigning following a relatively minor incident if it is the last in a series of acts, one or more of which amounted to a breach of contract, and cumulatively the acts amounted to a sufficiently serious breach of contract to warrant resignation amounting to dismissal, see **Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493**. That last straw does not have to amount to a breach of contract itself but it must *contribute something* (tribunal’s emphasis) to the events which cumulatively are alleged to amount to a breach of contract, even if relatively insignificant. Consequently, if the final act did not contribute to the earlier series of acts, it is not necessary to examine the earlier history. This was the case on the facts in the Court of Appeal decision in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978** where the claimant relied on her being disciplined as the last straw to show various earlier alleged incidences of employer misconduct. However on the facts it was held that the employer acted entirely properly in activating the disciplinary procedure and so that could not constitute a last straw at all.
19. Whilst on the facts, the claimant did not succeed in ***Kaur***, the judgment of the Court of Appeal contains a useful analysis of the last straw concept with particular focus on its interaction with the argument that there has been affirmation or earlier breaches. According to the Court of Appeal in ***Kaur***, the concept of affirmation of contract is not strictly relevant in “last straw” cases. All that is required for a last straw resignation is that a series of incidents, whether or not previously affirmed, amounts to a fundamental breach of contract. In other words, further contributory acts effectively “revive” the employee’s right to rely upon the whole series of acts notwithstanding the earlier affirmation(s). If the employee does not delay in their resignation from the last of these incidences, their claim will be well-founded. In its judgment, the Court identified five questions for the tribunal to consider:-
- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, the resignation?
  - (2) Has the employee done anything to suggest that they have accepted (or affirmed) the contract since that act?
  - (3) If not, was that act (or omission) by itself a repudiatory breach of contract (ie, of sufficient importance to justify resignation)?
  - (4) If not, was it nevertheless a part of a course of conduct comprising of several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the employee’s contract by showing that all trust and confidence had been destroyed? If it was, there is no need for any separate consideration of a possible previous affirmation.
  - (5) Did the employee resign in response (or partly in response) to that breach?
20. In this case, the claimant alleges that the relevant conduct of the employer breached the implied term in the contract that the employer will not conduct itself in a manner likely to damage the relationship of trust and confidence between the employer and the employee. This is generally known as the implied duty of trust and confidence. If the employer breaches that term, it can amount to a repudiation

of the contract – see **Woods v WM Car Services (Peterborough) Ltd 1983 IRLR 413 & Malik v BCCI HL 1997 IRLR 462**. In affirming the existence of the implied term of trust and confidence in the **Malik** judgment, Lord Steyn described the implied term as follows:-

*“The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”*

21. Following on from this judgment the EAT in **Baldwin v Brighton and Hove County Council [2007] IRLR 232** concluded that the use of the word “and” in the above passage was an error in transcription and determined that the relevant test is satisfied if either of the requirements are met, i.e. the employer’s conduct is “*calculated or likely*”. Consequently it is not necessary to show a subjective intention on the part of the employer to destroy or damage the relationship. This view was reaffirmed by the EAT in **Leeds Dental Team Ltd v Rose [2014] IRLR 8**. In the claim before the tribunal, the claimant alleges that the relevant conduct of the respondent fell into the category of conduct likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
22. Their Lordship’s in **Malik** pointed out that the test as to whether the implied term of trust and confidence is breached is an objective one. This was endorsed by the Court of Appeal in **Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493**. If on objective analysis the term has been breached it does not matter that subjectively the employee’s trust and confidence is not in fact undermined. Conversely there will be no breach purely because the employee subjectively feels such a breach has occurred irrespective of how genuinely held that belief is.
23. A breach of the implied duty of trust and confidence always amounts to a fundamental breach of contract and will entitle the employee to resign in response to that breach – **Morrow v Safeway Stores PLC, 2002 IRLR 9**.
24. Counsel for the respondent referred to a leading case of the Supreme Court on contract law generally - **Braganza v BP Shipping Ltd [2015] UKSC 17**. This case confirmed that if the subject matter of the employee’s objection(s) is the way that the employer exercised a discretion under the contract (to the claimant’s detriment), he or she must show that the decision was irrational under the administrative law Wednesbury principles rather than the lower threshold of establishing whether the decision was unreasonable. The Court of Appeal extended the application of this principle to the implied trust and confidence terms in the case of **IBM UK Holdings Ltd v Dalgleish [2017] EWCA Civ 1212**. This case concerned changes to a pension scheme but the judgment considered the implied term generally and in terms of the appropriate test to be applied, the Court of Appeal made an important distinction. If the alleged breach of the implied term arises generally from the bad behaviour of the employer the test formulated in **Malik** applies. If the employee is objecting to the exercise of a discretion given to the employer under the contract of employment (to the employee’s detriment) then the tougher test of irrationality under the Wednesbury principles applies as directed by **Braganza**.

25. Counsel for the respondent referred to a number of extracts from the Labour Relations Agency Code of Practice on Disciplinary and Grievance Procedures (“the Code”) and in particular Section 2, paragraphs 67 and 68.
26. The status of the Code (set out at Page 3) indicates that whilst the Code does not of itself make a person or organisation liable to proceedings, Industrial Tribunals shall take the Code into account when considering relevant cases. With specific references to grievances, the Code provides an Industrial Tribunal make take into account any unreasonable failure to follow the grievance aspects of this Code and may financially penalise the employer or employee accordingly.
27. A “grievance” is defined in paragraph 67 of the Code as “concerns, problems or complaints that an employee has about some aspect of their work.” Examples of such matters are given in Paragraphs 67 and 68 and include a working relationship, personal relationships at work, bullying and harassment and working environment.

## **RELEVANT FINDINGS OF FACT**

28. Based on the sources of evidence referred to at paragraphs 9 – 13 above, the tribunal found the following relevant facts proven on the balance of probabilities. Save where indicated, the facts were not in dispute. This judgment records only those findings of fact necessary for determination of the issues and does not record all the competing evidence.

### **Background**

29. The claimant was employed by the respondent in the role of General Operative from August 2015 until his resignation on 11 May 2020.
30. The respondent manufactures two different types of product which are produced on two different lines. One line produces well finished products and is referred to as the “wet” line. The other line produces products which are rougher in finish and is referred to as the “dry” line. Staff working on both lines hold the title of General Operative, but tend to work exclusively on the line they are trained on as they develop the particular skills required for the products made on that line. The claimant and the work colleague worked on the dry line.
31. The respondent’s General Manager, Mr Watterson managed all of the staff working on both lines and was responsible for the running of the respondent’s entire operation. It is common case that the claimant and Mr Watterson had a relatively good working relationship.
32. A key feature of this case is three anonymous handwritten letters about the claimant. Two of these letters were sent to the claimant’s neighbour, one in July 2019 and the other in December 2019. The claimant was told about the letters by his neighbour on 16 July 2019 and 11 December 2019 respectively. The first letter claimed that the claimant was “bad mouthing” the neighbour and his brothers by alleging that they were involved in criminality, including murder, human trafficking and theft and were police informers. The author of the letter suggested the neighbour may wish to consider silencing the claimant via physical force. This letter was followed by an anonymous letter to the claimant’s wife (see paragraph 33 below). The second letter to the claimant’s neighbour was the third and final

anonymous letter. Within this letter it was alleged the claimant was telling people that he was the neighbour's "eyes and ears" around Middletown and that the claimant was gossiping to his brother who lived near the author of the letter. The author expressed a concern that this would lead to rumours being spread about him and his associate which could lead to them being arrested. The author threatened the neighbour's wife and family if the neighbour did not silence the claimant. The claimant interpreted the third letter as being styled to give his neighbour the impression that it was written by CH who lived near his brother. CH was known by the claimant's neighbour and was regarded as being involved in criminality. The claimant saw this as a deliberate enticement to his neighbour to attack him. The claimant was understandably very upset and anxious about these letters, particularly given his evidence that the neighbour had a reputation for being dangerous and connected to those involved in criminality.

33. The second anonymous letter was addressed to the claimant's wife and was received on 15 August 2019, just before the claimant and his wife went on holiday. In this letter the author presented as female, referring to themselves as "a mother". The author alleged that the claimant was a sexual predator who had been "sexting" a family friend of the author and other women who were prepared to report him to the police. The claimant was understandably very distressed by this letter which he reasonably regarded as an attack on his marriage.
34. After his wife received the second letter in August 2019, the claimant reported the matter to the PSNI in Armagh. However, the claimant was informed that the police could do nothing as the letters did not contain any specific threat to the claimant. No evidence was presented to indicate whether the claimant reported the third letter to the police. However in view of the claimant's understandable interpretation of the letter as an attempt to encourage his neighbour to attack him, the tribunal concludes it would have been a reasonable step for the claimant to take to address his concerns about the letters.

### **Connection between the anonymous letters and the claimant's workplace**

35. The anonymous letters contained no reference whatsoever to the claimant's employment with the respondent, or to any of the claimant's colleagues. Therefore there was no obvious or tangible connection between the letters and the claimant's place of work.
36. The claimant first made a possible connection between the anonymous letters and his workplace when the second letter was sent to his wife in August 2019. The basis for this connection was that the letter was received just before the claimant and his wife went on holidays. The claimant believed that this timing was deliberate, as an aim of the letter was to ruin any enjoyment the claimant and his wife hoped to have from their holiday. The claimant maintained that aside from his mother, only his work colleagues would have known of his holiday plans, as it was common knowledge within the workplace when staff were due to take annual leave. The tribunal finds the basis for this connection to be extremely weak. The letter makes no reference to the claimant's impending holiday which undermines the credibility of the claimant's suspicion. Moreover the tribunal finds it hard to accept that aside from his mother, no one outside of the claimant's workplace would have been aware of his holiday plans with his family. The weakness of this connection to work

is in all likelihood the reason why the claimant did not raise his concerns about the letters to the respondent following the second letter.

37. In cross-examination, the claimant maintained that at this point in August 2019, he also suspected that the author of the letters was the work colleague whom he ultimately identified to Mr Watterson during their third conversation on 20 December 2019. The tribunal does not accept that this was the case. This is because he did not inform the respondent of this suspicion or indeed the fact of the letters at this time. Also this statement is at odds with the claimant's evidence in his witness statement that at this point in time he did not understand who would be sending the letters or why and conflicts with the claimant's reply to the respondent's request for additional information to the effect that at that point he suspected a 'possible connection' to his workplace.
38. In light of these facts the tribunal finds that the claimant first formed a view that the author of the letters was the work colleague after he was informed of the third letter. In addition to the holiday connection, the claimant formed this view based on the following beliefs/suspicions:-
- (i) The work colleague was 'troublesome' in that there was tensions/issues between him and some of the other staff working for the respondent.
  - (ii) The handwriting of the work colleague on "make sheets", (a one page work document affixed to each machine onto which the operative records the number and details of the products made) was similar to the handwriting on the anonymous letters.
  - (iii) The work colleague had overheard the claimant telling another work colleague that his brother lived beside CH which provided a link to the contents of the third letter.
  - (iv) The work colleague sent the anonymous letters with a view to ousting the claimant from his job, so that he could assume his role which attracted a higher rate of pay.
  - (v) The claimant had witnessed the work colleague going into Middletown Post Office at some point in time after receipt of the third letter.
39. The tribunal is clear that the claimant's belief that the author of the anonymous letters was the work colleague, was a genuine and firmly held belief. However in light of the following facts the tribunal is satisfied that by any objective analysis it was not a reasonable belief:-
- i. The belief was largely, if not entirely, rooted in the claimant's subjective views which were entirely speculative.
  - ii. The respondent disputed that the work colleague was a troublesome employee and no evidence was presented by the claimant to support this characterisation save for his observation that there had been tension between the work colleague and a number of staff. Furthermore there had been no issues between the claimant and the work colleague to give the work colleague a motive to target the claimant.

- iii. The singular motive presented by the claimant was the pay differential. However, the claimant conceded in cross examination that he and the work colleague received the same rate of pay thus eliminating the credibility of this motive.
  - iv. There was no credible basis to link the claimant's conversation at work about CH to the third letter. CH is not referred to in the letter. The letter contains a reference to the claimant's brother '*living up the country now*', which the claimant asserts is a phrase he used in the conversation overheard by the work colleague. However the letter contains nothing further to draw any credible linkage between the claimant's brother and CH, let alone to draw any linkage to the contents of the letter and the particular conversation the claimant had in the workplace about this matter. The claimant's related theory that the author of the third letter was pretending to be CH, was on the facts nothing more than pure speculation. Even if the claimant's theory was accurate there was no credible or objectively verifiable basis to draw a conclusion that this pointed to the work colleague as the author.
  - v. Whilst Mr Watterson conceded in cross-examination that there was a slight similarity between the "P" and a strong similarity in "4" written by the work colleague on a make sheet and the "P" and "4" written on the envelope of the letter sent to the claimant's wife, the tribunal is satisfied there were no clear similarities between the hand writing samples relied on which could have allowed an untrained eye to reasonably conclude that the hand writing of the work colleague and the letter writer were similar, let alone the same. Additionally, the writing on the make sheet was insufficient to give an overall sample of any operatives handwriting and may have been unreliable given that operatives often write on the make sheet whilst it's affixed to the machine, hence at an awkward angle. In a fuller sample of the work colleague's handwriting opened to the tribunal which was not available at the material time, the claimant accepted that the work colleague did not use a distinctive "dd" that consistently appeared in the anonymous letters to refer to "Middletown". In the absence of glaringly obvious similarities, the tribunal is satisfied that credible conclusions could only be drawn by a handwriting expert following analysis of a full and reliable handwriting sample of the work colleague. Despite their accessibility, the claimant did not engage the services of an expert. In view of these facts, the tribunal is clear that the handwriting samples were not an objectively reliable source to justify levelling the very serious accusation to the work colleague that he was the author of the anonymous letters.
  - vi. The claimant accepted that a fourth anonymous letter was not received after his sighting of the work colleague at the Post Office.
40. In summary therefore, the tribunal finds that the claimant had no credible basis to link the letters to the workplace. The only link was the claimant's suspicion that the author of the letters was the work colleague. That connection was based on inaccurate or irrelevant facts and suppositions which lacked cogency. The parties disputed which of the factors grounding the claimant's suspicion were shared with Mr Watterson at the material time in December 2019 when the claimant first raised the letters with the respondent. The tribunal regarded this dispute to be irrelevant.

This is because viewed collectively, the factors grounding the claimant's suspicions did not provide a compelling basis to link the letters to the claimant's work or to the work colleague. Consequently, whilst the letters were deeply distressing for the claimant and his family, the tribunal unanimously found that they were a private matter which did not engage or concern the respondent.

### **Events over the relevant period**

41. The claimant first raised the letters with the respondent in December 2019 during three conversations between the claimant and Mr Watterson on 18, 19 & 20 December 2019. This report was triggered by the third letter and the connection made by the claimant between the letters and the work colleague. Again the tribunal does not regard the dispute between the parties as to which of the letters were shown to Mr Watterson over the course of these exchanges. This is because it is uncontested that at some point during these conversations, the claimant showed Mr Watterson photographs of at least one of the letters and a photograph of the work colleagues handwriting from the make sheet on his phone. The perceived similarity of the handwriting between the two documents was the core basis of the claimant's suspicion. It is also accepted that the only material given to Mr Watterson by the claimant were two photographs sent to him by WhatsApp on 18 December 2018, following their first conversation; one of part of the second letter to the claimant's wife and the other of the envelope addressed to her.
42. A central issue in dispute is Mr Watterson's reaction to the information and specifically to the claimant's suspicion that the work colleague was the author. The claimant's evidence was that upon showing Mr Watterson the two handwriting samples, Mr Watterson agreed that the handwriting looked the same, the work colleague was probably the author and indicated that it was likely he would therefore "get rid" of the work colleague. According to the claimant Mr Watterson undertook to contact HR in the respondent's sister company and advised that the matter would be sorted by the New Year. Mr Watterson strenuously denied making any of these comments. His competing evidence was that whilst he had sympathy for the claimant's plight, he told the claimant this was a private matter and he would need to be sure of his facts before he accused any one of being the author of the letters. By way of support, Mr Watterson offered to keep a close eye on everyone in the workplace to see if he could make any connection to assist the claimant with this matter.
43. Faced with these two conflicting accounts, the tribunal unanimously concludes that Mr Watterson's is the accurate account. This is because it is by far the most credible account given the lack of connectivity between the letters and the workplace, the weakness of the claimant's suspicion that the work colleague was the author and the severity of the claimant's allegation. The primary basis relied on by the claimant during these conversations to ground his suspicion was his personal analysis of the handwriting samples. However on the facts this link was at best, tenuous. Therefore the tribunal is clear that Mr Watterson's acknowledgement of some similarities does not undermine the credibility of his evidence that he did not agree that the work colleague was probably the author. Even assuming the claimant had informed Mr Watterson of all of the reasons grounding his belief that the work colleague was the author of the letters and had shown him photographs of all three letters on his phone, the connection was so weak the tribunal does not find it believable that Mr Watterson as an experienced General Manager would endorse

the claimant's identification of the author, let alone undertake to resolve the matter by dismissing the work colleague. The tribunal finds it hard to imagine how any right thinking employer could or would have reacted in the way the claimant suggested Mr Watterson did. On the facts, there was simply no credible basis to do so.

44. Following these conversations, Mr Watterson took a number of steps to support the claimant. The main step was to check staff records and available make sheets, to see if any potential connection could be made between the handwriting of any staff member and the author of the letters. Mr Watterson conducted this inquiry on 20 December 2020, assisted by a colleague, Ms McKenna Brady. There were limited handwriting samples and the outcome was that no connection could be made. The claimant disputes that this exercise was carried out and points to the fact there is no record of this investigation in Mr Watterson's work diary and he did not inform the claimant of this investigation or its outcome. The tribunal finds that this inquiry was made. The tribunal found Mr Watterson's evidence on this point and indeed generally to be honest and credible. It was clear to the tribunal that he was a supportive and level headed manager who proactively addressed issues brought to him by staff as swiftly and as informally as possible, as evidenced by two work related examples outlined to the tribunal. The handwriting analysis was an informal scoping exercise. It was not carried out under any of the respondent's policies and given the personal nature of the claimant's concern it was not an act the respondent was under a duty to carry out. Therefore the tribunal attaches no significance to the fact it was not recorded. The tribunal finds it was carried out as part of Mr Watterson's undertaking to the claimant to see if he could support him deal with a very upsetting but personal matter. The tribunal finds Mr Watterson's contention that it was a brief exercise owing to the fact that there were twenty staff and very limited handwriting samples to be entirely plausible. Mr Watterson conceded that he should have reported his conclusion to the claimant and the tribunal agrees. However in light of the above findings, the fact that Mr Watterson did not do so does not undermine the credibility of his assertion that he carried out the task.
45. The second step taken by Mr Watterson was to seek advice from an independent HR Consultant. The HR Consultant drafted a letter to be sent to the claimant, the central message of which was to stress to the claimant that there was nothing the respondent could do in relation to his concern, to urge him to report the matter to the authorities and confirm that the respondent would fully co-operate with any police investigation. The draft letter, dated 7 January 2020 was not sent to the claimant due to the claimant's sick leave commencing the following week. The tribunal regards this to be unfortunate as the letter would have reiterated and reinforced Mr Watterson's verbal response to this matter in late December 2019.
46. The respondent's factory re-opened on 6 January 2020 following a two week closure for Christmas. There was a dispute as to whether the claimant and Mr Watterson had a conversation on this date about the work colleague. The claimant asserts that he raised the fact that the work colleague was still employed and Mr Watterson informed him that he and HR were looking into the matter. Mr Watterson has no recollection or record of any such conversation. In the absence of any record or witness to this conversation it is difficult for the tribunal to draw a definitive conclusion on this matter. However it is undisputed that at that point in time Mr Watterson was seeking advice from a HR Consultant and thus the tribunal finds that the claimant's account has a ring of truth to it. On that basis, the tribunal concludes that the claimant raised the matter with Mr Watterson on this date. However the

tribunal is not clear what precisely Mr Watterson's response was as the claimant's evidence differs from the reply to respondent's request for additional information in which the claimant contends that Mr Watterson stated that the matter was not his problem but he was watching the work colleague. Irrespective of the precise response the tribunal is satisfied that in view of its findings at paragraph 43 above, the claimant's inquiry about the fact the work colleague remained employed was not rooted in any previous assurance from Mr Watterson that the work colleague would not be employed. The tribunal also finds that the nature of the claimant's inquiry underscored the unreasonableness of the claimant's expectation as to what the respondent could do about his personal concern and made it all the more unfortunate that Mr Watterson did not send the claimant the letter drafted by the HR Consultant.

47. The claimant commenced a period of sickness absence on 15 January 2020, and was admitted to hospital on the evening of 15 January 2020. The claimant's GP notes referred to vertigo as the reason for his absence. The claimant was admitted to the stroke ward and was diagnosed with acute labyrinthitis and stress.
48. Mr Watterson telephoned Mr Hughes on 15 January 2020 to ask about the claimant's health. Mrs Hughes informed Mr Watterson that the claimant was very unwell and described his symptoms. During this call Mr Watterson wished the claimant a speedy recovery so that he could return to work soon. Mrs Hughes informed Mr Watterson that the reason for the claimant's ill-health was the anonymous letters and the claimant's firm belief that the work colleague was the author of these letters. The respondent did not dispute at any point that this was the cause of the claimant's ill health. Given the malicious nature of the letters the tribunal has no hesitation in finding that they were the cause. Mrs Hughes told Mr Watterson the claimant felt let down by him as he had not helped him to sort the situation out. Whilst the exact words used by Mr Watterson are disputed, it is common case that in essence Mr Watterson indicated that the issue with the letters was a personal matter, unrelated to work, there was nothing that he could do about the matter and invited Mrs Hughes to suggest what he could do. There was also a discussion about the claimant reporting the matter to the police and Mr Watterson confirmed that the respondent would co-operate with any police investigation. Mrs Hughes updated the claimant about her conversation with Mr Watterson. Whilst no specific indication was given as to when this happened given the importance of this matter to the claimant and his wife, the tribunal concludes it is likely that the claimant's wife updated him shortly after her conversation with Mr Watterson.
49. The tribunal is clear therefore that any illusion the claimant harboured that the respondent was prepared to take action against the work colleague would have been dispelled at this point, i.e. by mid to late January 2020. By implication, subsequent inquiries made by the claimant with Mr Watterson about the work colleague, some of which are disputed, are in the tribunal's view immaterial as they were not rooted in any realistic expectation by the claimant that the respondent was treating the matter as an employment issue, or had assumed any responsibility to address it. Given the lack of any connection between the letters and the work place, the extremely weak basis for the claimant's identification of the work colleague as the author and the severity of the allegation levelled against the work colleague, the tribunal regards Mr Watterson's response to be wholly reasonable and appropriate. Mr Watterson's conclusion that this was not a matter for the employer and thus his

failure to take action to address the claimant's concern could not by any objective analysis be regarded as a breach of the implied term of trust and confidence.

50. The tribunal also finds that thereafter, both parties acted in a manner consistent with this implied duty remaining intact, as evidenced by the following uncontested facts;
- (i) Mr Watterson visited the claimant at his home shortly after he was discharged from hospital to inquire after the claimant's wellbeing.
  - (ii) At the claimant's request, Mr Watterson visited the claimant at home again on 6 March 2020.
  - (iii) The respondent took steps to move the claimant from sick leave and onto furlough relying on the claimant's indication to Mr Watterson on 23 March 2020 that he would be fit to return to work imminently.
  - (iv) Following a period of zero production due to the national lockdown, Mr Watterson chose the claimant as part of a limited number of staff to return to work in early May 2020.
51. Mr Watterson telephoned the claimant and sought his return to work on 4 May 2020. Mr Watterson informed the claimant that he and the work colleague were chosen to return to work on the dry line. The claimant informed Mr Watterson that he did not want to work with the work colleague. In light of this, Mr Watterson arranged for the return of a different member of staff to work alongside the claimant. An issue in dispute is whether during this conversation, the claimant indicated to Mr Watterson that he would only return to work on the understanding that the issues relating to the letters and the work colleague were dealt with. The tribunal finds that the claimant made no such statement as it is at odds with the claimant's knowledge of the respondent's stance that it could do nothing to address the letters issue. Moreover the claimant returned to work on 4 May 2020 without getting any such assurance.
52. The claimant and Mr Watterson had a further discussion on the evening of Friday 8 May 2020, during which the claimant asked which members of staff would be coming back to work. Mr Watterson confirmed that the plan was to bring back more staff to work on the dry line, including the work colleague. The claimant informed Mr Watterson that he could not work with the work colleague and referenced the anonymous letters. Mr Watterson indicated that he would come back to the claimant on Monday about this matter. The tribunal accepts Mr Watterson's explanation that he said this as he did not have time to talk about the matter that evening. However the tribunal queries the merit of doing so as it may have given the claimant false hope that the respondent may in fact do something to appease his concerns.
53. The claimant alleges that Mr Watterson told the claimant to challenge the work colleague 'man-to-man' which the claimant interpreted to mean a physical challenge. Mr Watterson strenuously denied this. The tribunal finds it highly unlikely that Mr Watterson made any such suggestion. The tribunal draws this conclusion based on its overall assessment of the credibility of Mr Watterson's evidence, the fact that he was an experienced manager and the undisputed evidence that he was a hands-on manager who was proactive in addressing any

issues or bad feeling between staff with a view to maintaining harmony in the workplace and avoiding any altercations between staff members. Therefore the tribunal found the suggestion that Mr Watterson encouraged the claimant to have a physical altercation with the work colleague to be so wholly out of character with his management style, as to be simply not credible.

54. On Monday 11 May 2020, Mr Watterson and the claimant had a further discussion about the return of the work colleague during which that the claimant verbally communicated his decision to resign. The claimant made this decision after Mr Watterson informed him the work colleague was returning to work, the claimant's concerns about the anonymous letters was a personal matter and in the absence of any evidence of wrongdoing by the work colleague, the respondent could take no action. Mr. Watterson advised the claimant that the respondent would require a letter of resignation. The claimant left the workplace following this conversation. Later on that day, the claimant provided the respondent with a last letter of resignation which was typed and delivered on his behalf by his wife.
55. The claimant made a statement to Mr Watterson either on Friday 8 May 2020 or Monday 11 May 2020. The precise date of the statement is not agreed but is not important. What is important is the statement itself which is not in dispute. With reference to the return of the work colleague the claimant informed Mr Watterson that it was either "*the work colleague or me*".
56. Given the context and the words used, the tribunal is clear that the only reasonable interpretation of what the claimant was saying, was that either he or the work colleague had to leave the employment of the respondent. That was how Mr Watterson interpreted the claimant's statement. The tribunal did not accept the claimant's suggestion in cross-examination that what he meant was that he wanted to Mr Watterson to raise the matter with the work colleague, or move the work colleague from the dry line to the wet line. This is because the claimant's wording did not lend itself to any such interpretation. Moreover this position was at odds with the claimant's evidence in his witness statement that having been told by Mr Watterson that the work colleague was returning to work, the letters were a personal matter and not a matter for the respondent; "*I told Victor that I could not continue working with (the work colleague) and that I was leaving as a result*" (paragraph 15) and with his inquiry on 6 January as to why the work colleague was still at work. Furthermore, the production lines were adjacent to each other in a relatively small building. Therefore, had the work colleague been moved to the wet line, he would still be working in relatively close proximity to the claimant which was what causing the claimant's anxiety. Finally and perhaps most significantly, upon being informed by Mr Watterson that the work colleague would not be dismissed, the claimant resigned.
57. Mr Watterson accepted that during the course of this discussion with the claimant, he had suggested that the claimant may wish to look for a job elsewhere and suggested that the claimant consider a job in a local manufacturing company. Whilst the tribunal finds that Mr Watterson's words may have been open to misinterpretation by the claimant, it was not the claimant's case that his interpretation of what Mr Watterson was saying about another job, was a material factor in his decision to resign.

58. The tribunal accepts Mr Watterson's explanation for making these comments and finds his suggestion that the claimant may be happier working elsewhere was well intended and reasonable given the negative impact the claimant's suspicions were having on his health and wellbeing, his resolute view that he could not work with the work colleague and Mr Watterson's inability to do what the claimant wanted.
59. The tribunal found the claimant's belief Mr Watterson simply wanted to get rid of him and "*wash his hands of the matter*" (paragraph 15 of the claimant's witness statement) to be unfounded and illogical. Due to the nature of the claimant's concern Mr Watterson had no legitimate basis to take any action. Despite this Mr Watterson did what he could to support the claimant by; checking the employee records, keeping in touch with the claimant on sick leave, ensuring the claimant could avail of furlough and appeasing the claimant's concerns albeit temporarily upon his return to work by replacing the work colleague with another member of staff to come to work alongside the claimant for the first week of his return, encouraging the claimant to refer this matter to the police and ensuring him that the respondent would fully co-operate with any associated investigation. These were all signs of a caring, empathetic and supportive employer who had every desire to maintain the employment relationship.

### **Reason for the Claimant's Resignation**

60. The tribunal is clear that claimant's belief that the work colleague was the author of the anonymous letters was a firm and genuinely held belief. The tribunal is also clear that the anonymous letters were malicious in nature and were designed to cause the claimant and his family severe upset and distress. Therefore the tribunal had every sympathy for the claimant's plight. However on the facts the tribunal finds there was simply no objective, rational basis for the claimant to conclude that it was up to the respondent and specifically Mr Watterson's to directly put the allegation to the work colleague, consider moving the work colleague let alone dismiss the work colleague. The respondent had no legitimate basis to take any of these steps and had made this clear to the claimant long before the final conversation on 11 May 2020. By implication the tribunal is satisfied that there was no credible basis to conclude that Mr Watterson's repeated refusal to take any steps amounted to a series of acts which cumulatively amounted to a breach of the implied term of trust and confidence. Conversely, had the respondent raised this allegation with the work colleague or moved him from the dry line, the tribunal is wholly satisfied that either step would have undermined and quite possibly breached its implied duty of trust and confidence towards the work colleague.
61. The tribunal has no hesitation in finding that the claimant's decision to resign was not because Mr Watterson was failing to investigate his concerns regarding the work colleague, at all or quickly enough, as suggested by counsel for the claimant. The claimant knew long before this point in May 2020 that the respondent was not taking any action in relation to his concerns. On the facts the claimant resigned because the respondent refused to dismiss the work colleague based on the claimant's uncorroborated belief that the work colleague subjected him to harassment outside of the workplace by writing the anonymous letters to the claimant's neighbour and wife. In light of the facts found the tribunal finds that the position adopted by the claimant in relation to this matter was wholly unreasonable. In contrast the tribunal found Mr Watterson's stance that the claimant's expectation that the work colleague should be dismissed was neither realistic nor reasonable

and not a request that the respondent could have countenanced to be entirely reasonable. Had the respondent dismissed the work colleague, the tribunal is clear that such action would almost certainly have amounted to an unfair dismissal. It could also have damaged its duty of trust and confidence towards its other staff, as it would have signalled that it was an employer willing to dismiss an employee in relation to matters wholly unconnected to employment and in the absence of credible evidence, simply because another employee required this to happen.

62. In summary the tribunal is clear that the claimant's decision to resign was his personal choice prompted by his genuine belief that the work colleague was the author of the anonymous letters and his associated decision that he could not work with him. In light of this and the tribunal's finding that the respondent's approach to the claimant's concern was not a breach of its implied duty of trust and confidence, the conversation between the claimant and Mr Watterson on 11 May could not amount to a last straw.
63. In support of this finding the tribunal finds it significant that the claimant's resignation letter was written in affable terms in which he expressed his gratitude to the respondent for the opportunities afforded to him. By implication, the tribunal finds that at the material time the claimant appreciated on some level that his resignation was not due to any unreasonable behaviour on the part of the respondent.

#### **Absence of a written complaint and the respondent's Grievance procedure**

64. There was much debate throughout the hearing as to as to what the respondent should or could have done in relation to the claimant's concern about the letters and the work colleague. Linked to this was significant analysis as to whether the claimant was asked, or should have put his concern in writing and analysis of the respondent's grievance procedure which had only been recently introduced (in December 2019) as part of new written contracts which were issued to all of the respondent's staff.
65. In relation to the first issue the tribunal has found that there was nothing the respondent could or indeed should do in relation to what was a non-work related, private matter. Moreover it was clear that in the claimant's mind the only acceptable outcome would be the dismissal of his work colleague which on the facts was wholly unrealistic and unreasonable.
66. In respect of the second issue the tribunal is satisfied that whether or not the claimant was asked to put his complaint in writing, is not relevant. The tribunal is clear that committing his concern to writing could by no reasonable consideration have turned the claimant's complaint into a matter that engaged the respondent; nor could it have closed the evidentiary gap between the claimant's suspicions and a credible grounding for this suspicion. By implication it could not have legitimised Mr Watterson raising this very serious allegation with the work colleague.
67. Similarly, the tribunal queries the significance of respondent's grievance procedure to the claimant's concern given the nature of the concern and places no significance on Mr Watterson's concessions in cross examination that he felt he understood the claimant was raising an informal grievance and he was under a duty to look into the concern. This is because Mr Watterson also admitted that he was

not an educated man and did not fully understand the respondent's grievance procedure. He also conceded he did not know how to deal with the claimant's informal grievance. The tribunal found these admissions to be true and compelling. This is because the tribunal was presented with a number of undisputed examples where Mr Watterson addressed informal grievances, swiftly and effectively. However unlike the claimant's grievance these other grievances were work related and were relatively minor concerns. The fact Mr Watterson sought advice from a HR Consultant rather than from the respondent's HR function, underscores in the tribunal's view the fact that Mr Watterson was at a loss as to how to handle the claimant's concern. Prior to receipt of this advice, Mr Watterson was acting on his own instinct as a manager, rather than relying on any provision in the grievance procedure to reach the conclusion that this was not an employment matter falling within his remit. It is the tribunal's view that logic dictates that the respondent's grievance procedure or indeed any employer grievance procedure can only apply to work related matters as these are the only matters within an employer's power to address. This view is supported by the definition of a grievance in the LRA Code which makes express provision that the subject matter of the grievance should be about "*some aspect of their work*". At no point during the course of these events was there any clear indication that the anonymous letters were connected to the workplace; nor was there any credible evidence to suggest that the author of these letters was employed by the respondent. In the absence of an evidentiary basis to link that matter to the workplace, the tribunal finds that no significance can be attached to the status of the claimant's complaint vis-à-vis the respondent's grievance procedure. The claimant's concern did not engage the respondent; by implication the matter fell outside the scope of the respondent's grievance procedure and indeed fell outside of the scope of the express and implied terms of the contract of employment between the claimant and the respondent.

## CONCLUSION

68. The tribunal applied the relevant principles of law to the findings of fact, set out above, in order to reach the following conclusions.
69. The question posed for this tribunal is whether or not the respondent breached the claimant's contract of employment and, if so, was that breach sufficiently serious so as to entitle the claimant to resign without notice, by reason of that breach. If the tribunal answers this question in the affirmative, it must then go on to consider the claimant's motive for resigning and the timing of that resignation to ensure that all four conditions required to establish a constructive dismissal claim, set out in ***Western Excavating***, are met.
70. Looking at the first element and the case presented, the tribunal must assess whether or not the respondent breached the implied term of trust and confidence in the claimant's contract of employment by virtue of its conduct and specifically Mr Watterson's handling of the claimant's concern about the work colleague over the period from 18 December 2019 until the claimant's resignation on 11 May 2020 following a conversation with Mr. Watterson that morning.
71. In order to do so, the tribunal must first identify the appropriate test for the breach of the implied term of trust and confidence as opposing tests were put forward by the parties. Counsel for the claimant argued that it was the well settled test set out in ***Malik*** and specifically whether the employer's conduct which amounted to a

repeated failure to act was conduct likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Counsel for the respondent argued that the test of irrationality as per the Wednesbury principles applied. This higher threshold was identified by the Supreme Court in **Braganza** and applied to the implied term of trust and confidence by the English Court of Appeal in **Dalgleish**. The basis for this contention was the assertion by counsel for the respondent that an employer cannot be bound to investigate every complaint raised by an employee. Having considered the case law the tribunal is satisfied that in this case the applicable test is the original **Malik** test, not the irrationality test. This is because the respondent did not point to any contractual provision which afforded the respondent the relevant discretion exercised so as to trigger application of the irrationality test. On the facts, the discretion exercised by Mr. Watterson in relation to the claimant's concern about the work colleague was not aligned to any specific contractual term opened to the tribunal. Crucially whilst much emphasis was placed at the hearing on the terms of the respondent's new grievance procedure which formed part of the contract of employment; this was not a procedure which Mr. Watterson was conscious of at the material time when he was invited to address the claimant's concern. The discretion exercised by Mr. Watterson was rooted in his own personal judgement having assessed the nature and basis of the claimant's complaint. Finally as the nature of the complaint was not work related the tribunal queries how any contractual discretion contained within the respondent's grievance procedure, or elsewhere, could have applied.

72. The next matter for the tribunal to address is whether the respondent's identified conduct amounted to a breach of the implied term of trust and confidence between the employer and employee. As illustrated by the cases of **Malik** and **Omilaju** this is an objective test. Following an objective analysis of the pertinent facts, this tribunal as an industrial jury unanimously finds that Mr Watterson's approach to this matter over the relevant period did not amount to a breach of the implied term of trust and confidence in the claimant's contract. The tribunal unanimously concludes by no objective or reasonable consideration could Mr Watterson's conduct over this period fall within the scope of the definition of a breach of the implied term of trust and confidence defined by Lord Steyn in **Malik**, as either being calculated to, or as the claimant's contends, likely to damage the relationship of trust and confidence between the respondent and the claimant.

73. The tribunal's principal reasons for reaching this conclusion are as follows:-

- (i) The issue of the anonymous letters was not a workplace matter. Whilst the claimant was the subject of the letters, he did not receive any of them, they made no reference to work and there was no incident occurring during work to provide any link to the letters and the claimant's employment.
- (ii) The only link between the letters and the claimant's employment was the claimant's belief that the author of the letters was his work colleague. Whilst this was a genuine and strongly held belief, the totality of the evidence which the claimant maintained he presented to Mr Watterson to support this belief was extremely weak. It was a belief largely rooted in the claimant's subjective interpretation of the relevant factors he deemed connected the work colleague to the letters and had little or no probative value. The claimant's suspicion was further undermined by the absence of any motive for the work colleague to launch this personal vendetta against the claimant.

Therefore the tribunal concludes that the respondent had no legitimate basis to treat the claimant's complaint as an employment matter that fell within the scope of its grievance procedure.

- (iii) Even if the evidential gap linking the work colleague to the letters was closed, the tribunal concludes that this would simply have given the claimant a stronger basis to go to the police and ask them to investigate what was a private matter. It would not have given the respondent any compelling basis to take disciplinary action against the work colleague. This is because the recipients of the letters were not employees of the respondent, no work issue was raised in the letters, no work colleague was mentioned and nothing occurred in the workplace so as to bring the fact of these letters into the scope of the claimant's employment.
- (v) As this was not a work matter, the tribunal finds the respective arguments raised by the parties about the respondent's grievance procedure, its terms and the respondent's failure to apply same to be a red herring. The claimant's concern by its nature was not a matter that could reasonably be deemed to a matter that fell within the scope of the respondent's grievance procedure, or indeed its disciplinary policy.
- (vi) In light of this, what could the employer have done? The tribunal concludes the respondent could do little or nothing to assist the claimant with his concern and on the facts, Mr. Watterson did what he could. Mr. Watterson was entirely correct in telling the claimant that this was a private matter which he should raise with the police and that the respondent would fully co-operate with any police investigation. Mr Watterson's reluctance to raise this serious allegation with the work colleague was in the tribunal's view entirely understandable and correct. Raising such a serious allegation with the work colleague would have inevitably led to a discussion with the work colleague about the content of the anonymous letters and an enquiry as to why he suspected as being the author of the letters. On the basis of the very tenuous evidence presented by the claimant, the tribunal is satisfied that any such course of action would have been likely to have seriously damaged the relationship of trust and confidence between the respondent and the work colleague.
- (v) The flipside of the above conclusion is that it was not reasonable for the claimant to expect Mr Watterson to do anything about his concern regarding the author of the anonymous letters. The claimant had simply presented no credible basis to expect Mr Watterson to take action. Furthermore, the fact that the claimant was not prepared to raise his concerns privately with the work colleague underscores the unreasonableness of his expectation that Mr Watterson would raise a concern on his behalf.

74. In summary therefore in view of the above mentioned reasons, the respondent's failure to take action to address the claimant's concerns about the anonymous letters did not and could not amount to a breach of the implied term of trust and confidence as it was not a work related matter but rather a private matter which fell outside the scope and remit of the respondent as the claimant's employer.

75. The tribunal regards the claimant's constructive engagement with Mr. Watterson about his sick leave, his transfer from sick leave to furlough and his early return to work as indicators that the claimant accepted the respondent's refusal to address his concern about the work colleague was reasonable and did not seriously damage or destroy the relationship of trust and confidence between the claimant and the respondent.
76. The initial steps taken by Mr Watterson to see if could assist the claimant in any way in relation to his concern was consistent with Mr Watterson's caring and supportive management style. These steps when viewed in the context of Mr. Watterson's repeated indication to the claimant that his concern was a private matter, could not reasonably be construed as an acknowledgement on the part of Mr Watterson that he was under a duty as the claimant's manager to take forward his concern as a grievance, informal or otherwise.
77. In light of this the tribunal concludes that the first of the four conditions in **Western Excavating** has not been met. In the same vein, because the respondent's approach to the claimant's issue with the work colleague did not cumulatively amount to a breach of the implied duty of trust and confidence, Mr. Watterson's conversation with the claimant on 11 May 2020 about this matter could not amount to a last straw incident as there was no previous breach to which this incident could connect or contribute to. In the alternative, as in the case of **Kaur**, in light of the tribunal's finding that Mr. Watterson's conduct during this conversation was entirely proper, it could not amount to a last straw in any event. Mr. Watterson's indication that the work colleague was returning to work and his indication that the issue with the letters was a private matter was entirely reasonable and proper and could not by itself or cumulatively when considered as part of the respondent's response to the claimant's complaint since December 2018, on any objective analysis amount to a breach of the implied term of trust and confidence entitling the claimant to resign. In light of this, the conversation between the claimant and Mr. Watterson was not the reason why the claimant resigned and thus could not amount to the last straw and so the questions posed in the case of **Kaur** do not apply. Therefore the claimant's claim for constructive dismissal fails.
78. In light of these conclusions it is not necessary for the tribunal to consider the further arguments advanced by counsel for both parties on the question of constructive dismissal and arguments on remedy in relation to this question.
79. Throughout the course of the hearing, the claimant made a number of criticisms about Mr Watterson's approach to his concern which the tribunal regarded to be valid. Mr. Watterson should have informed the claimant of the outcome of his assessment of the handwriting of work colleagues. Mr. Watterson could and should have arranged a meeting with the claimant to explain why the respondent could not address the claimant's concerns about the letters. Whilst the message was conveyed to the claimant, it was conveyed verbally and ultimately indirectly via the claimant's wife. Given the serious nature of the claimant's concern, the negative impact it was having on him and the fact that the employer's hands were tied in terms of assisting the claimant with his concern, it was important that the claimant's expectations were managed deliberately and at all times directly. However, the tribunal is satisfied that viewed objectively these procedural failings did not amount to a breach of the implied term of trust and confidence.

## **SUMMARY**

80. For the reasons set out above, the tribunal as an industrial jury unanimously concludes that the claimant's constructive dismissal claim is not well-founded. Whilst the respondent had every sympathy for the claimant's concern about the work colleague and his perceived connection to anonymous letters; the respondent rightly formed the view that this was a private matter which did not engage the respondent in its capacity as the claimant's employer. On the facts, it was not within the respondent's power to do anything to address the claimant's concerns and the tribunal finds that any reasonable employer would have also concluded that this was private matter that did not fall within the scope of the employer's internal policies and/or power. Therefore the respondent's failure to address the claimant's complaint did not amount to a breach of the implied term of trust and confidence. Furthermore the claimant's decision to resign was due to his inability to work with the work colleague due to his suspicions. That too was a personal choice rather than a reaction to the respondent's approach to his complaint. Whilst it was unfortunate that the claimant decided to leave his employment of some five years, on the facts there was nothing the respondent could do to prevent this as the matter was outside of its remit and control.
81. Therefore the claimant's claim of constructive dismissal is dismissed.

**Employment Judge:**

**Date and place of hearing: 17-19 November 2021, Belfast.**

**This judgment was entered in the register and issued to the parties on:**