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# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Vitali  
**Respondent:** Financial Ombudsman Service  
**Heard at:** East London Hearing Centre  
**On:** 1, 2, 21 and 22 March 2017  
**Before:** Employment Judge Goodrich  
**Representation**  
**Claimant:** Mr M Glynn (Friend of Claimant)  
**Respondent:** Mr R Hignett (Counsel)

## JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant's complaint of unlawful deductions from wages is dismissed on withdrawal by the Claimant.
2. The Claimant was not (constructively) unfairly dismissed.

## REASONS (oral judgment given to the parties on 22 March 2017)

### *Background and the issues*

1 The background to this hearing is as follows.

2 The Claimant presented his ET1 claim form on 13 June 2016. Prior to doing so he had entered into early conciliation with Acas, as prospective Claimants' are required to do.

3 In box 8.1 of his claim form the Claimant ticked that he was making claims for unfair dismissal, arrears of pay and other payments.

4 In section 9 of his claim form the Claimant set out what remedy he was seeking if his claim was successful. He ticked that he was claiming compensation, not reinstatement or re-engagement. He stated that this was salary since his employment ceased, to date; plus exemplary damages for ill treatment and workplace bullying which had led to a serious stress related illness.

5 Included with the Claimant's claim form was a statement of truth, setting out the basis of the claim. The main points in the statement included the following:

- 5.1 He was put on a "PIP" (Personal Improvement Plan) when he did not need to be and there were no prior warnings that he was doing things wrong.
- 5.2 By no means was his work below average and, if he merited being on a PIP, half the team should have been on one including his manager.
- 5.3 His manager made a point of making sure the whole team knew he was on a PIP.
- 5.4 His manager lied to him and others about the whole process of the PIP and stated very clearly to him that he would be fired.
- 5.5 Other team members were coached on their work to avoid receiving red marks, whereas all his work was downgraded systematically with red marks.
- 5.6 He had no support from his manager whilst on PIP and was subjected to public humiliation by being forced to sit next to him. The manager put a big sheet of paper on his computer with his name on it so that everyone would ask why he was sitting next to him, which caused him great stress and embarrassment.
- 5.7 His manager kept keeping him behind at work to have meetings.
- 5.8 His whole team knew what was going on and when a complaint was finally submitted they all lied about it.
- 5.9 His manager admitted to telling the Claimant to hand in his notice then his senior manager had since lied about what was said in the mediation meeting.
- 5.10 The grievance process was delayed for more than six months for no other reason than to obstruct his genuine grievance and attempt to force him to

withdraw his complaint.

5.11 The senior ombudsman dealing with his grievance misconstrued the truth without any investigation and the senior manager merely took the word of the manager without any reference to the mounting medical evidence.

5.12 His formal complaints had been largely ignored.

6 The Respondent entered an ET3 response denying the Claimant's claims. Amongst the main points in the grounds of resistance were the following:

6.1 The Claimant's manager first raised issues about the quality of the Claimant's work with him in October 2014.

6.2 As there was not a substantial improvement in the quality of the Claimant's work after this discussion, a performance improvement plan (PIP) was introduced in December 2014, with the purpose of supporting the Claimant in improving the quality of his work.

6.3 The Claimant's manager recalls the Claimant saying he would resign in one of their final reviews of the PIP; and the manager explained to the Claimant that his performance issues could progress to a disciplinary hearing.

6.4 The Claimant raised a grievance and grievance appeal which were thoroughly investigated by two separate independent senior managers within the organisation.

6.5 Giving details of their account of why the Claimant grievance and grievance appeal were not upheld.

6.6 Contending that the Tribunal did not have jurisdiction to consider the Claimant's allegations of treatment received prior to 13 March 2016, because it was out of time.

6.7 A general denial of the Claimant's claims.

7 The Respondent subsequently accepted that the section on the Tribunal not having jurisdiction to consider the Claimant's case was wrong and this aspect was not pursued by them.

8 The Tribunal initially entered judgment in default against the Respondent on a mistaken basis that they had not submitted their response in time. The judgment in default was revoked and the case set down for a Preliminary Hearing.

9 On 20 December 2016 there was a Preliminary Hearing in which matters raised by the parties representatives were considered; an agreed list of issues was completed; and Case Management Orders made. The case was set down for this two day hearing.

10 At the outset of the hearing I discussed with the parties' representatives the issues in the case and how the case was to proceed, including timetabling of the case. The Claimant was represented at the Preliminary Hearing and this Hearing by Mr Glynn; and the Respondent by Mr Hignett. Mr Glynn informed me that he is the Claimant's uncle; and that, although he has not appeared in at Employment Tribunal before, he has attended other court hearings and spoken at hearings on behalf of others.

11 The parties' representatives agreed that the list of issues for me to decide continued to be those identified at the Preliminary Hearing. At the Preliminary Hearing Mr Glynn had confirmed that the Claimant's claim was for constructive unfair dismissal only, and that they were not additional claims of unlawful deductions from wages or other payments. The Claimant's complaint of unlawful deductions from wages is, therefore, dismissed on withdrawal by the Claimant.

12 Attached to this judgment is a copy of the list of issues that had been agreed as being the issues for me to determine.

13 At the end of the first day of the hearing of the case the evidence of the Claimant and the first of the Respondent's witnesses was completed. The Respondent's second witness was due to give evidence on the second morning of the case, closing submissions to be given and I to deliberate on my judgment. Instead, however, the Tribunal received an email from the Respondent's representative, Mr Hignett. He explained that his back pain was such that he was unable to get himself from his home to the Tribunal. He apologised and suggested that it might be possible for him to conduct the remainder of the hearing via telephone if the Court and parties were agreeable to this.

14 I gave the parties an opportunity to consider Mr Hignett's email, called the parties into the Tribunal and arranged for Mr Hignett to have a telephone conference call with all the parties present.

15 I considered whether it would be feasible to have the hearing continue on the basis suggested and heard representations from both parties.

16 The Respondent's preference was for the hearing to be postponed.

17 Mr Vitali's preference was for the hearing to go ahead. He was stressed by the hearing and wanted it to be completed. Mr Glynn's submission was that, whilst he appreciated that his client (his nephew) was extremely frustrated, he (Mr Glynn) was well aware of the practical difficulties and aware that Mr Hignett needed to be here. He was prepared either for the hearing to go ahead or to be postponed.

18 Although Mr Hignett could hear me clearly, as I was sitting by the conference telephone, he could not hear clearly, or at times at all, what others were saying in other parts of the Tribunal room. When I asked the Respondent's remaining witness, Ms Radia, to introduce herself from the witness table, Mr Hignett had difficulty in hearing her.

19 After considering the Tribunal's overriding objective of dealing with the case fairly and justly, I decided to postpone the hearing to next dates on which all concerned were available, namely 21 and 22 March 2017 (22 March being for me to give judgment orally

and, if the Claimant was successful in his claim, to consider remedy).

20 The Claimant's had not given details of his schedule of loss in his witness statement, nor had he provided some of the necessary documentation for his schedule of loss to be considered, such as details of the job seekers allowance he had been receiving.

21 In order to seek to ensure that, if the Claimant was successful in his claim, remedy could be completed, I made additional Case Management Orders. I ordered that, on or before **6 March 2017**, the Claimant serve on the Respondent copies of any documents relevant to his schedule of loss; and a witness statement in support of his schedule of loss.

### ***The Relevant Law***

22 Section 95(1)(c) Employment Rights Act 1996 ("ERA") provides that 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"

23 In order to show that he/she has been dismissed within the meaning of section 95(1)(c) ERA an employee needs to show that the employer has committed a breach of contract, whether an express or implied term of contract; that the breach of contract is sufficiently serious (a fundamental breach of contract) to entitle the employee to resign; that they have resigned at least in part because of the fundamental breach of contract and not for some unrelated reason; and that they have not delayed too long so as to have been taken to have affirmed the contract or have waived the breach.

24 In the case of *Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347 EAT* guidance was given as follows.

25 It is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

26 Another implied term in the contract of employment relates to an employer's grievance procedures. In the case of *Goold v McConnell [1995] IRLR 516 EAT* it was held that there is a fundamental implied term in a contract of employment that an employer will reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance they may have.

***The Evidence***

27 On behalf of the Claimant I heard evidence from the Claimant himself.

28 On behalf of the Respondent I heard evidence from Mr Nathan Maxwell, Team Manager for the Respondent and the Claimant's line manager; and Ms Nimisha Radia, Ombudsman Manager and Mr Maxwell's line manager at the relevant times.

29 In addition, I considered the documents to which I was referred in two bundles of documents provided to me.

***Findings of Fact***

30 I set out below the findings of fact I consider relevant and necessary to determine the issues I am required to determine. I do not seek to set out each detail provided to me. Nor do I seek to make findings on every matter on which the parties were not agreed. I have, however, considered all the evidence provided to me and I have borne it all in mind.

31 The Claimant, Mr Dominic ("Dom") Vitali was employed by the Respondent from 10 June 2013 until he resigned, by email dated 2 March 2016. The effective date of termination of his employment was described as being 21 April 2016 by the Claimant and 27 April 2016 by the Respondent. It is unnecessary for me to decide which of the two is correct.

32 The Claimant's position was that of an adjudicator dealing with claims handled by the Respondent. The Claimant's job and that of his adjudicator colleagues was to investigate complaints against financial services providers. During the Claimant's employment with the Respondent there were a huge number of complaints against Lloyds Bank to consider. These, together with complaints against HSBC and Marks and Spencer formed most, or all, of the Claimant's work.

33 The Respondent, the Financial Ombudsman, is a large organisation. It employs, according to the Respondent's answer in box 2.7 of its claim form, 3,200 people. It has, as one would expect of a large organisation, an in-house Human Resources Department and numerous policies.

34 The Claimant formed part of a team of about ten to twelve adjudicators. Throughout his employment with the Respondent his immediate line manager was Mr Nathan Maxwell.

35 Mr Maxwell's line manager at the relevant times was Ms Nimisha ("Nimi") Radia. The Claimant's team was one of twelve teams managed by her.

36 Both the Claimant and Mr Maxwell agreed that, until the events in late 2016 that gave rise to Mr Maxwell putting the Claimant on to a Personal Improvement Plan ("PIP"), they had a good working relationship.

37 The Claimant's contract of employment provided that this contract and the

contractual sections of the service employees handbook together constituted the terms and conditions of the Claimant's employment.

38 Amongst the contents of the employee handbook were sections on performance management and the Respondent's capability procedures. It was not made clear to me whether or not they formed part of the contract of employment or part of what was described in the contract of employment as being policies, procedures and working practices that were non contractual but relevant to his employment.

39 Amongst the contents of the contract of employment was a section on performance management standards. Amongst the contents of the section on performance standards were the following points:

- 39.1 If there were any issues with the employee's performance they would work with the employee to help him or her to meet the standards expected and give a reasonable amount of time to improve.
- 39.2 A manager might suggest putting a performance improvement plan in place which would usually outline what the problem was, what had or might be causing it, objectives that should be achieved, what would be needed to improve the performance and the timescale to complete the action.
- 39.3 The manager should explain that if the employee did not improve, the manager might decide to take action under the formal disciplinary and capability procedure.

40 The section in the employee's handbook on capability issues included that they would always seek to sort things out informally through chats with the manager about work and working life; and that if the manager thought the problem had become more serious or was happening too often, they might decide to put a Performance Improvement Plan ("PIP") in place.

41 The Respondent also had capability and conduct procedures. These provided for a staged process of a formal written warning, a final written warning and dismissal; save for matters amounting to gross misconduct.

42 The Respondent accepted that, at least until October 2014, no serious issues were raised about the Claimant's performance of his job.

43 Early on in the Claimant's employment with the Respondent Mr Maxwell passed the Claimant on his probationary assessment. He consulted with his manager, Ms Radia, before doing so.

44 Initially, the Claimant worked full-time for the Respondent, then in April 2016 he applied to work part-time three days per week to accommodate the caring responsibilities he had. His request was accepted.

45 The above findings are by way of background and, so far as I was made aware,

not the subject of disagreement between the parties.

46 I turn next to one of the matters on which the parties are disagreed, namely whether the Claimant was put on a PIP with no prior warning that he was doing things wrong.

47 I find that the Claimant is mistaken in considering that he had no prior warning of the PIP Mr Maxwell placed him on. It is understandable that he is mistaken. By the time that the Claimant presented his Employment Tribunal claim on 13 June 2016 he had been off work sick from June 2015 until he resigned in March 2016 (to which I will refer below), so had been off work a long time and without access to his emails.

48 On 1 October 2014 Mr Maxwell sent the Claimant an email highlighting serious concerns about the quality of his work. The system Mr Maxwell adopted was for all members of the team to have some of their work checked. If Mr Maxwell had particular concerns about one of his team members, or if he felt there might be an underlying concern about an aspect of how he/she did their work, he would make more checks for that team member. If the Respondent procedures had been followed correctly by the adjudicator they would be assessed as green. If the adjudicator had failed to meet the required standards they would be marked red. If the procedures and standards had been met they would be marked as green. If the assessment was for marginal, low risk errors it would be marked as amber. Not all the assessments were done by Mr Maxwell himself, other managers or “mentors” also making assessments.

49 In Mr Maxwell’s email dated 1 October 2014 he not only highlighted what he described as serious concerns over the quality of the Claimant’s work; but also stated that he would be considering an option of putting a Performance Improvement Plan in place to support the Claimant’s improvement.

50 On 21 October 2014 Mr Maxwell conducted the Claimant’s mid year review. This included a section completed by the Claimant; and Mr Maxwell’s comments.

51 The Claimant’s self assessment was generally positive as to his work performance although he did state:

“My quality has been at a decent level in most areas of my work but I feel it does need some improvement”.

52 Mr Maxwell described the Claimant as having had a “steady half year”. He did also comment that Dominic (the Claimant) had experienced highs and lows when it came to the quality of his work; and that he had made a lot of avoidable errors that could have been prevented with extra vigilance. He stated that it was important over the next six months that he should be consistent on his quality. Although, therefore, in his half yearly appraisal Mr Maxwell raised some concerns about the quality of the Claimant’s work he did not specifically warn him that a “PIP” might be imminent.

53 I find, therefore, that the Claimant did receive prior notice of a possible PIP in Mr Maxwell’s email on 1 October but that he did not subsequently make the Claimant aware that it might be imminent. It is understandable, therefore, that the Claimant felt surprised,



or even shocked, when Mr Maxwell inform the Claimant, on 17 December 2014 that he would be placing him on a “PIP”.

54 The next issue in dispute was whether the Claimant merited being placed on a PIP, or whether he was being singled out for this treatment when his work was in reality of a similar or better standard than most of the team he worked in. This is not an easy dispute to resolve as it depends mainly on the Claimant's and Mr Maxwell's assertions and I was not provided (or if provided was not drawn to my attention) documentary comparisons of the proportionate red assessments of the Claimant's colleagues, their appraisals and other comparative yardsticks between them.

55 On the balance of probabilities I find that the Claimant was struggling to meet the quality standards expected of him in the six months leading up to his PIP being introduced. I also find that, although a permissible option under the Respondent's Performance Management Procedures, it was slightly heavy handed for Mr Maxwell to be putting the PIP into effect at the time he did and in the manner he did; and that a further period of active mentoring might well have been a better option for this particular Claimant. I so find because:

- 55.1 Mr Maxwell was not someone who had previously had a difficult relationship with the Claimant. He had passed his probationary assessment and their relationship had been good.
- 55.2 In my questions to Mr Maxwell I expressed surprise that the Claimant could have gone from an individual without performance issues being highlighted for more than the first year of his employment, to being placed on a PIP. Mr Maxwell's explanation appeared plausible to me. His explanation was that new adjudicators started off by being put onto what he described as “an academy” and that, once they left the academy they would start working on cases. He explained it was only when the Claimant started working on cases that needed in-depth work that problems began to emerge.
- 55.3 I am satisfied that Mr Maxwell's assessment of the quality of the Claimant's work was genuine and that he genuinely believed that the Claimant was failing to meeting the necessary standards. He did not have a history of a bad working relationship with the Claimant and his assessments were borne out by assessments from other managers. The Claimant, in the contemporaneous documentation, also accepted that some improvements in his performance were needed.
- 55.4 Commencing the PIP in December, a time that was often busy and stressful for individuals, was not particularly sensitive or tactful timing. This was recognised during investigations of complaints by the Claimant.
- 55.5 A better option, certainly for the Claimant and probably for the Respondent, would probably have been for the Claimant to have been given a period of active monitoring and support by a team member or manager in whom he had confidence. For example, the Claimant described a team member, Mr Paul Clarke, as being an excellent

performer and a friend of his. When, subsequently, he was asked to give additional support and guidance to the Claimant, the Claimant welcomed his involvement. In contrast, as described below, the PIP “stressed the Claimant out” and was subsequently lifted. The Claimant is a young man and sensitive individual.

55.6 There can be a difficult distinction to draw, in my experience, between when reasonable management interventions tip over into undermining and bullying behaviour. In this case, although, as described above, the decision to put the Claimant on a PIP was slightly heavy handed, it stopped short of bullying behaviour. From reading the written communications there was a consistent theme in Mr Maxwell’s email of expressing a concern for the Claimant to improve.

56 The parties also disputed whether the Claimant deserved to be given the number of red assessments he received, whether they gave a fair reflection of his actual performance and whether his work was in fact improving by the time he was placed on to the PIP.

57 Of the 21 checks carried out between June – September 2016, not all of which were carried out by Mr Maxwell, the Claimant received sixteen red assessments, three amber assessments and three green assessments. This was, clearly, a high rate of red assessments. Of the assessments in September many were for the same reason.

58 In October the Claimant received two red assessments and one green assessment. In November he received two green assessments and one amber assessment. In December he received one red assessment and one green assessment. The proportion of red assessments was, therefore, lower than during the period from June to September (i.e. he was making fewer mistakes). Mr Maxwell explained that his decision was based on the six months leading up to the assessment for which the quality of the Claimant’s work was poor, that he had more concerns about the Claimant than the other members of the team in term of quality of work and that the Claimant was the weakest team member in that respect. For the reasons set out in my findings of fact above I accept this explanation, although with the reservation that his approach was slightly heavy handed.

59 The next area of dispute is as to whether the Claimant was given adequate support during the time he was placed on a PIP.

60 On 17 December 2014 Mr Maxwell had a meeting with the Claimant. He told the Claimant that he would be placed on a PIP to start from 6 January 2015. He was given targets to achieve three out of four greens on random checks that would be carried out on his work.

61 At the end of the PIP document was a statement that included notification that failure to the required standards might result in action being taken under the formal capability and disciplinary procedure.

62 In dispute between the parties is whether Mr Maxwell notified the Claimant at the

meeting on 6 January, that he would receive one to one support coaching from Ms Zoe Sestanovich (a team manager); and from Ms Humera Shafiq (a quality and service improvement officer).

63 Whether or not he did on 6 January, Mr Maxwell sent an email to the Claimant on 14 January 2015 notifying him that he had enlisted Zoe and Humera's help to assist him with coaching and checking of his work.

64 Ms Sestanovich followed up Mr Maxwell's email by sending the Claimant an email on 19 January setting out what she would be doing to coach and support the Claimant to make improvements and stating that she was looking forward to working with him and providing additional support.

65 The documentation provided to me showed that Ms Sestanovich was in communication with the Claimant in giving him feedback on his work and producing a checklist to help the Claimant.

66 There were also emails from Mr Maxwell to the Claimant highlighting continuing concerns about errors he stated the Claimant was continuing to make.

67 The Claimant did have, therefore, a structured programme to help support him to improve. As events transpired, it was insufficient to prevent him from becoming highly stressed.

68 Another issue in dispute between the parties was whether one of Mr Maxwell's methods for supporting and supervising the Claimant was in fact causing him stress.

69 Mr Maxwell explained that there was a hot desking policy in his team and that he reserved the desk next to his for the Claimant to sit at; and that reserving desks was a common practice on his part.

70 Initially the Claimant appeared to welcome this intervention on Mr Maxwell's part. The record of a meeting he had with Mr Maxwell contained a statement from the Claimant that he had changed his seat so that Nathan (Maxwell) could assist him if he had questions on a case.

71 After a conversation the Claimant and Mr Maxwell had in late March, to which I refer below, the Claimant made clear to Mr Maxwell that he no longer welcomed Mr Maxwell sitting next to him.

72 The Claimant also felt sensitive about Mr Maxwell putting a note in the desk next to him to reserve the seat for the Claimant. He felt that this indicated to other members of his team that there was a problem and that it was common knowledge that he had been placed onto a Performance Improvement Plan ("PIP").

73 One member at least of the Claimant's team, Mr Clarke, knew that the Claimant was being placed on a PIP, as he was subsequently asked to provide coaching to the Claimant. The Claimant had a good relationship with Mr Clarke, respected him and was pleased at his being asked to provide support. The Claimant's complaint was that the

support provided did not come earlier.

74 It is agreed between the parties, at least to the extent that Mr Maxwell accepted that he did so on two occasions, that Mr Maxwell had meetings with the Claimant that lasted until after the Claimant's usual leaving time. Mr Maxwell's explanation was that these lasted for a few minutes after 4.00pm; but that when he became aware that it was an issue for the Claimant, Mr Maxwell made sure that the meetings did not overrun. I find that this was a relatively minor issue between the parties in that the Claimant did not complain about this issue when he set out in writing his grievance and his additional explanation of his grievance against Mr Maxwell.

75 I turn next to an important dispute between the parties. The Claimant's evidence was that Mr Maxwell told him on two successive days that he should resign or that he would be fired. Mr Maxwell, in contrast, gave evidence that it was the Claimant who expressed an intention to resign, he did not respond to that one way or another, but had a frank discussion in which he informed the Claimant that he felt that the Claimant was not making improvements and that the eventual outcome might be dismissal under the capability policies.

76 Prior to this meeting, from Mr Maxwell's perspective, the Claimant was not making the improvements in his work that were needed. He sent emails setting out what was needed and highlighting concerns. The tone of these emails was friendly and encouraging.

77 This is the background to the meetings at the end of March.

78 The issue of exactly what was said between the parties is not a particularly easy issue to resolve as it involves on what was said in a meeting between two individuals on which both individuals accounts differ in important respects.

79 I consider that the best evidence of what happened is the note taken of a meeting on 1 April, in the course of which the Claimant complained about Mr Maxwell having told him that he would be "fired". This was soon after the one to one meeting, or meetings, at which the Claimant and Mr Maxwell dispute what was said.

80 What these notes show are that the Claimant said that Mr Maxwell had told him that the PIP would only be for three months and said that there were two months in, he had got five reds, and that Mr Maxwell told him to hand in his notice and that he was going to be fired.

81 In response Mr Maxwell is recorded as having said:

"Me talking about you getting fired that came from a place of concern, you've done your research, PIP can lead to disciplinary. I wanted you to understand how serious the PIP was. Underlying statement is my intention wasn't to make you stress for the last three months. You and I know that I would like to think I've been quite considerate to you and you well being.

I apologise for that, it depends on what happens at the end of the plan. I am sorry

if that is how you feel it wasn't my intention. I would like to get to a place where Nimi or Selina isn't involved."

82 Mr Maxwell, therefore, accepted that he did talk about the Claimant "being fired" although he did not specifically respond to whether he also told the Claimant to hand in his notice.

83 On the balance of probabilities I make the following findings. I find the Claimant's account to be the closer of the two to what occurred although neither of the two to be entirely accurate.

84 Mr Maxwell expressed concern to the Claimant about the number of red assessments he was receiving and told him that this could lead to being placed on capability proceedings and might eventually lead to him being "fired". His saying so is consistent with the minutes of what Mr Maxwell said at the meeting on 1 April (the minutes of the meeting are described as being a transcript of the meeting); and also consistent with what the performance improvement plan said at the end of it which makes clear that the PIP outcome might lead to capability procedures.

85 It is likely that Mr Maxwell gave some explanation of how the capability procedures could eventually lead to the Claimant being dismissed. This is consistent with Mr Maxwell's opinion that the Claimant was not progressing under the PIP as he had hoped and they were continuing to be too many mistakes in his work.

86 I find that there was a discussion about the option of the Claimant resigning rather than embarking on capability or disciplinary procedures. I find that in the course of that discussion Mr Maxwell did give the Claimant some active encouragement to resign either in this conversation or in a conversation the following day. I so find because:

86.1 This is an account of events that the Claimant has consistently given.

86.2 It is more consistent with the account of events subsequently given by Ms Radia and Ms Ryan-Denton to Mr McQueen, when he was investigating the Claimant's grievance and is more consistent than the account given by Mr Maxwell near the time. Ms Radia, when Mr McQueen put the Claimant's account of events, said "... all I remember is that Nathan said DV should think about resigning". Ms Ryan-Denton, who was an employee representative (the Respondent does not have a recognised trade union) present at the meeting, when Mr McQueen put the Claimant's account to her said "I think there could be words to that effect, there was some part between Nimi and NM around handing in his notice, I can't remember what was said. It sounds familiar."

87 The day after the meeting at which Mr Maxwell had the discussion I described above he was also due to be sitting next to the Claimant and as indicated above this is also an occasion when Mr Maxwell may have actively encouraged the Claimant to resign. The Claimant did not sit next to Mr Maxwell as Mr Maxwell was expecting. He told Mr Maxwell that he saw no point in doing so if he was going to be fired. Mr Maxwell respected his wishes and subsequently did not continue to place himself on the desk next

to the Claimant.

88 On 2 April 2015 Ms Radia sent an email as a follow up to the meeting the previous day. She confirmed, as she had stated at the meeting, that the Claimant's PIP would be paused whilst they got an Occupational Health assessment carried out and their report and that they would review next steps depending on what the report said. She also highlighted that there remained an issue with the quality of the Claimant's work which needed to be managed by monitoring his quality. She had set out steps for this and gave reassurance that he would be supported in improving his quality and asking the Claimant to take on board the feedback, make those improvements and let know if there were any issues. She notified him that the performance improvement plan might need to be put in place again but that it was not something that needed to be discussed as it depended on what happened with the report and the quality of his work through the coaching and budding up.

89 Any concern the Claimant may have had, therefore, that he was about to be placed on capability procedures or likely to be dismissed were put to rest. He was notified that the PIP would be a possible outcome but that even that it was not necessarily going to be reinstated. Ms Radia did not make any specific reference to the conversation in which the Claimant had complained about being pressured to resign. Her explanation for this was that she felt that the matter had been resolved.

90 Between April and early June the Claimant was at work. He accepted that he was receiving the support he needed from Mr Clark a fellow team member and that they did not appear during that time to be complaints about receiving inadequate support.

91 On 14 April 2015 the Claimant received his annual appraisal.

92 There was a mismatch between the Claimant's self assessment and Mr Maxwell's assessment of the Claimants' performance.

93 The scores for overall rating ranged from "U", which was the assessment of the poorest level of performance, one of under performance; to 6 which was for a top performer. Level 2 was described as the second lowest assessment, with the employee's performance not consistently meeting what was expected and currently being monitored with the employee maybe working to a performance improvement plan; and 4, which was described as not only to understand what it means to be part of the Ombudsman, and also guiding others in applying fairness, listening and team work. It described the individual as having exceeded objectives and pushed beyond the expectations of the role.

94 The Claimant's self assessment was that he was graded at 4. Mr Maxwell's assessment was that he was graded at 2. As part of Mr Maxwell's explanation he stated that throughout the year the Claimant had struggled to get to grips with the quality of his work; that he had been put onto a PIP; subsequently provided with additional support; and concluded by saying that although Dominic (the Claimant) had not consistently met what was expected in the review period he believed that he knew what was expected, could turn that around and improve the consistency of his quality in the coming year. He stated that with additional support and monitoring in place he looked forward to seeing what he was able to achieve.

95 Although, therefore, Mr Maxwell's assessment of the Claimant work was that he was not meeting the required standards, he did offer encouraging comments and a desire to help the Claimant improve.

96 The Claimant was referred to Occupational Health and the Occupational Health Officer reported that the Claimant was fit to work although he had a physical underlying ill health issue related to his back; and also reported that there appeared to be relationship issues with his direct line manager. The advisor recommended that if he was not happy with the resolution of his manager's manager that he should consult HR with the issue.

97 In June 2015, shortly after receiving his appraisal, the Claimant went off work sick and remained off work until he resigned.

98 The Claimant submitted a grievance to HR on 18 June 2015. The main points included complaints about Mr Maxwell subjecting him to daily public ridicule and wrongly being placed on a PIP. His complaints were of:

98.1 Subsequently receiving unnecessary demands and criticisms which made him ill with worry.

98.2 Inadequate training.

98.3 An intention to cause him to resign caused by Mr Maxwell's own incompetence.

99 By email dated 26 June 2015 the Claimant was invited by the Respondent's HR Department, by Ms Stocker, to a meeting on 1 July.

100 On 1 July the Claimant did not attend the meeting. Instead he sent an email that day stating that he was physically too unwell to attend. The tone of his email was angry. For example, the Claimant stated that what he said would not be believed although his line manager would be believed.

101 In reply, Ms Stocker notified the Claimant that it was best to have John Bower act as his team manager until the grievance had been fully investigated; and that he would be his manager if he returned to work before the conclusion of his grievance.

102 Ms Stocker did not, however, arrange another meeting with the Claimant nor ask him how his grievance might best be progressed.

103 The Claimant accepted, when cross-examined, that a meeting was needed to find out what he meant by some of the statements in his grievance.

104 The Claimant remained off worked sick and in receipt of sick pay until he ran out of sick pay.

105 On 28 October the Claimant had another meeting with the Respondent's Occupational Health advisor. The Occupational Health advisor reported to Mr Bower that

the Claimant was still having concerns about how he perceived he was treated by his line manager by being placed on a PIP. She advised that he should be fit to work on a phased basis in three weeks.

106 On 4 November 2015 the Claimant sent an email to Ms Stocker to inquire about his sick pay having run out and about the progress of his grievance.

107 In response, Ms Stocker notified the Claimant that the grievance had been on hold whilst he had been away and asked how he wanted to progress it.

108 There was an exchange of emails leading to the Claimant sending Ms Stocker an email on 11 November giving further details of his grievance. This was intended as being a substitute for having a meeting. These included complaints about how he had been placed on the PIP by Mr Maxwell; Mr Maxwell sitting next to him and making it plain to the team that he was embarrassing him and making it obvious he was on a PIP; being in a meeting that lasted after 4.00pm and in which was told that when HR saw his PIP he would be fired and that it would be best to hand in his notice; that Mr Maxwell repeated this the following day; throughout the PIP he did nothing to progress or support him. He made other complaints about having personal details put into the report to Occupational Health.

109 Mr Futer, a Senior Ombudsman, was appointed to investigate the Claimant's grievance.

110 He interviewed Mr Maxwell, Ms Radia and Ms Ryan-Denton, as well as reading the Claimant's various emails in which he had set out his grievance.

111 Mr Futer's grievance outcome was sent in a letter dated 9 December 2015.

112 The outcome was that he decided not to uphold the Claimant's grievance that he had been bullied, victimised or subjected to harassment.

113 In the course of his conclusions Mr Futer made the following points:

113.1 The Claimant had a very genuine sense of injustice.

113.2 He had discussed the PIP with Nathan Maxwell and that he was not persuaded that anything he had done had made him feel he wanted him to leave was prejudging the outcome.

113.3 He did not feel that the PIP was a disproportionate response.

113.4 The issue of sitting at the desk next to him could have been handled better.

113.5 Mr Maxwell accepted that when the Claimant had raised the prospect of resignation he might not have actively persuaded him to do otherwise.



114 The Claimant appealed against the grievance outcome. The main points he made included that:

114.1 Ms Radia taking him off the PIP was fake caring because she did not want his complaint to leave the division.

114.2 Mr Maxwell admitted to telling him to had in his notice or be fired which was written in the minutes of the meeting.

114.3 Complaints about the implementation of the PIP and lack of support.

114.4 Mr Maxwell had lied about suggesting he should resign.

115 The tone of this grievance appeal was angry.

116 Mr McQueen was appointed to consider the Claimant's grievance.

117 The Claimant did not want to meet Mr McQueen or see Occupational Health. Mr McQueen proposed to do so to check whether the Claimant was well enough to discuss his grievance with him.

118 On 10 February 2016 the Claimant and Mr McQueen had a telephone conversation to discuss his grievance. They had a lengthy discussion of his complaints.

119 Mr McQueen interviewed Mr Maxwell on 16 February 2016. They had a lengthy discussion. In the course of the discussion Mr Maxwell gave his explanation of his reasons for placing the Claimant on the PIP, support given while he was on it and his account of the allegation that he told the Claimant to resign.

120 Mr McQueen interviewed Ms Radia and Ms Ryan-Denton (to which I have referred earlier in my findings of fact above).

121 By a letter dated 23 February 2016 Mr McQueen gave the Claimant the outcome of his appeal. The main points included the following:

121.1 There were some things that Nathan (Maxwell) could have handled better but he did not think that Nathan bullied or victimised him. Seeing the steps had already been taken to put things right he did not think any further action was needed for the reasons he would explain below.

121.2 Having seen the quality checks between June to December 2014 he (Mr McQueen) believed that the Claimant should have been put on a PIP because his performance was not what he would expect and that was Nathan's role as a manager.

121.3 He had asked Nimisha (Radia) why the PIP was suspended; to which she had replied that although the PIP was fair because of the way the quality checks were done it did not give enough time to improve.

- 121.4 Mr McQueen stated that he thought the timing of the PIP was poor on the eve of the Christmas break and that it should have been put in place sooner.
- 121.5 In hindsight, it was not helpful for Nathan to have placed a note on the computer with his name on it but that it was not meant to upset or embarrass him.
- 121.6 Describing the people he had interviewed about the allegation that Mr Maxwell told him that he should resign. He concluded that he could not say what was said at that meeting; but that he thought that Nathan did the right thing in apologising for leaving him feeling that he will be fired, whether or not he actually said that. He stated that he thought no further action was required.

122 Although therefore Mr McQueen did not uphold the bullying and harassment allegation he did agree with some of the Claimant's complaints. It was a balanced outcome report although the Claimant was not satisfied with it.

123 On 2 March 2016 the Claimant sent an email resigning, complaining about the investigations that had taken place and having been lied to.

124 When cross-examined, the Claimant explained that he would have continued in his job and not have resigned if his grievance had been upheld.

125 Having considered all the evidence provided to me was the Respondent's conduct as a whole having in mind its cumulative effect judged reasonably and sensibly such that the employee could not be expected to put up with it? Did the Respondent without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee so as to constitute a fundamental breach of contract justifying the Claimant's resignation.

126 The answer to this question is finely balanced and one to which I have given considerable thought.

127 There was reasonable and proper cause for the Claimant being placed on a PIP. The Respondent's procedures provided for this as a way of performance management. It was done as a way of seeking to prevent needing to embark on the formal capability disciplinary procedure. The Claimant accepted, at least to some extent, at the time, although less so subsequently, that he was making a number of mistakes. A number of individuals as well as Mr Maxwell identified failings in the Claimant's work.

128 The Claimant is a sensitive individual and putting him on PIP before making additional efforts to support him that were subsequently put in place (a combination of Ms Shafiq, Ms Sestanovich and Mr Clark, together with Mr Maxwell) would have been a better approach to have taken with this particular individual.

129 The support given to the Claimant during the early stages of the PIP was

insufficient in the sense that the Claimant was continuing to make sufficient mistakes for him to be at risk of the PIP moving to a formal capability meeting. At least some of the responsibility for this, however, was with the Claimant. He was struggling to meet the standards required of his job.

130 There was reasonable and proper cause for Mr Maxwell warning the Claimant of the likelihood that the PIP was likely to lead to disciplinary action under the capability procedures and that this could ultimately result in the Claimant being dismissed (or “fired”). It is a colloquial way of describing the standard form of words on the Performance Improvement Plan and how the Respondent’s policies operate.

131 Mr Maxwell overstepped the mark in giving the Claimant active encouragement to resign.

132 There are two key aspects to successful management of employees. One is to accomplish the tasks required of the job. The other is to manage successfully the people carrying out those tasks. Mr Maxwell’s handling of how he put the Claimant on the PIP and the remarks he may indicate that his people management skills need some improvement.

133 Looking, however, at Mr Maxwell’s management of the Claimant as a whole, prior to taking performance management steps, he had a good relationship with the Claimant. His written communications throughout show that he was doing his best to help the Claimant improve not to dismiss him.

134 When the Claimant complained about Mr Maxwell’s behaviour a day or two later Mr Maxwell apologised publicly to the Claimant in front of his own manager and a staff representative. This showed humility on his part, although the Claimant has given him no credit for that.

135 Additionally Ms Radia put the PIP on hold. On the face of it the Claimant got what he was asking for. Any understanding or misunderstanding the Claimant might have had that he should resign or be fired was clarified and should have been put to rest.

136 Although the Claimant has criticised the Respondent for their referral of him to Occupational Health, objectively, this is not a fair criticism. The Claimant was feeling stressed and the Respondent considered that getting Occupational Health advice would be helpful. It was intended as a helpful measure and it was a reasonable step to be taking.

137 Sitting next to the Claimant to help coach him was an initiative that was, initially, welcomed by the Claimant. When the Claimant notified Mr Maxwell that it was no longer welcomed Mr Maxwell stopped doing it. Although putting a note on the desk was probably insensitive, as Mr McQueen subsequently recognised when considering the Claimant’s grievance appeal, it was not something that Mr Maxwell could have appreciated at the time.

138 There were some failings on the Respondent’s part in the first stage of the grievance investigation. Ms Perry from Human Resources did not clarify with the Claimant

how best to progress his grievance after the Claimant had cancelled the grievance meeting that had been arranged with him. The grievance was left “in limbo”.

139 There were also failings on the Claimant’s part on this issue. It was the Claimant’s grievance. He had cancelled the meeting that had been arranged to discuss his grievance. He took no steps until later to ask for what he wanted to be done in response to his grievance after he had cancelled the meeting arranged to discuss it.

140 Thereafter, although the Claimant did not get the outcome he wanted, which appeared to be some punishment of Mr Maxwell, the outcome of the grievance was a reasonable response. Both Mr Futer and Mr McQueen interviewed the people concerned. Mr Futer was unable to interview the Claimant, although Mr McQueen was able to and did. They made detailed responses to the Claimant’s complaints. To some extent, particularly Mr McQueen, they agreed with some aspects of his complaint.

141 On balance and by a narrow margin I find that the Respondent’s behaviour falls just short of the test set out in the *Woods* case and approved in many subsequent cases.

### ***Closing Submissions***

142 Both representatives gave oral submissions. In addition, on behalf of the Claimant, Mr Glynn gave written submissions.

143 Both gave submissions on the facts I was invited to find.

144 I also referred the parties to the cases described in my summary of the law above.

145 Additionally on behalf of the Respondent, Mr Hignett’s closing submissions included the following points:

- 145.1 There had been no fundamental breach of contract, giving reasons for this.
- 145.2 If there had been, compensation should be reduced on “*Polkey*” grounds as the Claimant might have been dismissed in three to six months time on performance grounds.
- 145.3 He made no submissions, however that the Claimant did not resign at least in part because of any fundamental breach of contract; or that the Claimant had affirmed his contract; or that, if dismissed, he was dismissed for a fair reason and fairly dismissed.

146 Mr Glynn’s main arguments included, in addition to the above, that the Respondent had lied in its evidence, particularly Mr Maxwell, and that there had been a subsequent corporate cover up.

147 The key issue in the case was, therefore, whether or not the Respondent had committed a fundamental breach of contract towards the Claimant.

**Conclusions**

148 For the reasons given in my findings of fact the Claimant was not dismissed within the meaning of Section 95(1)(c) Employment Rights Act 1996. His claim therefore fails and is dismissed.

Employment Judge Goodrich

27 June 2017