# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Langdale

**Respondent:** Annodata Limited

**HELD AT:** Manchester **ON:** 2 May 2017

**BEFORE:** Employment Judge Horne

**REPRESENTATION:**

**Claimant:** Ms R Jones, Counsel
**Respondent:** Mr T Irving, Solicitor

**JUDGMENT** having been sent to the parties on 8 May 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

**Issues**

1. By a claim form presented on 27 October 2016 the claimant brought a single complaint of unfair dismissal. The issues for me to determine were set out in a list helpfully prepared by the solicitor for the respondent. After some discussion, it was agreed that the tribunal would have to decide:

   1.1. Whether the respondent had breached an express term concerning working hours.

   1.2. If so, whether the breach was fundamental.

   1.3. Whether the respondent had conducted itself without reasonable and proper cause in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence.

   1.4. Whether the claimant resigned in response to such breach or breaches.

   1.5. Whether the claimant affirmed the contract.

2. The respondent did not seek to advance a potentially fair reason for dismissal, which meant that if the claimant was constructively dismissed the dismissal was necessarily unfair.

**Evidence**

3. I heard evidence from the claimant himself, from Mr McKelvey, Mr Stafford and Mr Newton for the respondent. I also referred to documents in an agreed bundle marked CR1 and a supplemental bundle prepared by the claimant attached to his witness statement which I marked C2. The most significant document is a document referred to as AL9.

**Facts**

4. The respondent is a nationwide company which provides technical support for equipment such as photocopiers and printers. It delivers these services under various service level agreements with customers.

5. The claimant was employed by the respondent as a field service engineer from 28 April 2003 until 4 August 2016.

6. The respondent's business is divided into various service regions. The claimant worked within Area 15. His line manager was Mr Steve McKelvey. In practice the claimant's work took him mainly to Liverpool and Manchester, but he was often required to travel to Lancaster, Stranraer, Glasgow and the North East.

7. Early on in his employment he was given a written contract which he signed on 7 September 2003. The contract specified his working hours. In clause 7:

> "Your normal hours of work will be 8.30am to 5.30pm Monday to Friday with an unpaid break of one hour for lunch."

8. The claimant's normal place of work was stated to be Banbury. In practice, the claimant never worked as far south as Banbury and was never expected to do so.

9. There was nothing in the claimant's contract which specified what the claimant would have to start doing at 8.30am in order to fulfil his contractual hours. In particular it was silent as to whether the contract meant, "Be at your first customer's premises by 8.30" or "Start driving from home by 8.30".

10. The contract did not specify where the claimant was required to live. It did not provide for paid travelling time to the first customer of the day.

11. In May 2010, at a meeting to discuss the claimant's working hours, there was a discussion as to what amount of travelling time the claimant would need to do in his own time in order to fulfil his contractual working hours. At that meeting the claimant was told that he would be expected to travel for up to an hour at each end of the working day in his own time. There is a dispute as to whether the claimant agreed to that instruction or not. I have not found it necessary to determine whether he agreed to it.

12. Over the years that followed, what was expected of the entire field service engineer workforce was flexibility. In practice, the respondent did not mind precisely what time they started their working day and what time they finished it, as long as the service level agreements were fulfilled. Provided that the engineer turned up for the first scheduled appointment at the correct time, management did not especially care what time the engineer started driving their vehicle. Nor

was the respondent concerned what time the engineer finished work, as long as they completed all their booked appointments.

13. On 25 March 2014 the claimant underwent a three-day residential training course called Task Alpha. He was given technical training in February 2016. In May 2016 the claimant was booked onto a Kyocera overview course. The respondent also operated its own help desk for engineers. If the respondent's help desk did not solve the problem, the engineer could speak to the manufacturer's help desk or speak directly to one of the respondent's Senior Engineers. The claimant called upon Mr McKelvey's help in this regard from time to time.

14. The claimant was particularly concerned to get training on a brand of equipment known as Ricoh. He received on session in 2013 but nothing thereafter. He pressed his request on a number of occasions for such training.

15. At some point, and I am not sure exactly when, Mr McKelvey took a step which was widely regarded as a positive move. He opened a Google Drive account and gave administrator password assess to all the field service engineers in his region. That enabled manuals to be loaded for all the various forms of equipment they would have to service onto the Google Drive. This was a welcome step. Unfortunately the claimant was not particularly skilled with accessing the Google Drive account and found it difficult to get access to the manuals that he wanted. He was under the impression that the manuals that he needed, in particular for Ricoh equipment, were not on the drive when the reality was that they were.

16. On 2 October 2014 the claimant was invited to a meeting to discuss something that had happened recently before. Mr McKelvey had attended client's premises in response to a complaint about a piece of equipment that kept malfunctioning. The claimant and others had repeatedly been to the client's premises to attempt to fix the problem but it had remained malfunctioning. When Mr Mckelvey attended he found that simply removing a manual feeder and taking out a stuck piece of paper solved the problem. That caused Mr Mckelvey some concern. Removing the manual feeder was part of the basic checks that a field service engineer was required to carry out in a written system of work. I do not have to determine for today's purpose whether the written system of work was actually issued to the claimant or not prior to that complaint being raised. What is clear is that he was handed it on 2 October 2014 and it was regarded as a performance issue by the respondent. A letter confirming what purported to be a performance review was issued shortly after that meeting.

17. The claimant objected to the tone and also to the content of the letter. He emailed on 21 October 2014 about what he perceived to be inaccuracies in the letter and the account of the meeting. The claimant was asked to provide further details of those inaccuracies and he did so by email dated 22 October 2014. In the same email he again renewed his request for Ricoh training.

18. On 27 October 2014 the claimant worked at a client premises in Liverpool. He finished work at 4.00pm. Still to be completed on his list of jobs for the day was one for an important customer called Bibby. They were based not far away. It would have taken approximately 20 minutes to visit the client's premises and to initiate the procedure that was necessary to comply with the service level agreement. Instead of doing that the claimant drove back to his home address in Morecambe. Mr McKelvey when he discovered what had happened invited the claimant to an investigation meeting so that he could explain his actions. I am

satisfied that the invitation to the meeting was nothing to do with the queries that the claimant had raised approximately a week previously.

19. The investigation also examined tracker information which revealed that the claimant had been taking a significant detour via the North Coast Road to get to clients' premises south of Lancaster, when the more direct route would have been to travel through Lancaster. At that time there were roadworks going on to facilitate the construction of the Heysham link road. The claimant's explanation was that he took the detour in order to get around the roadworks. The respondent, however, remained concerned. It appeared from the tracker information that the claimant had been stopping off at the same point on his route. The respondent did not accept the claimant's explanation given at the meeting that he was adjusting his Sat Nav equipment. It did not seem credible that the claimant would always choose the same place to stop and adjust his Sat Nav.

20. In due course the claimant was invited to a disciplinary meeting. Following that meeting was given a first written warning. The claimant appealed unsuccessfully. In a careful outcome letter Mr Stafford explained to him that he did not accept the claimant's explanations, and in particular he had asked Mr Newton to do a test run through traffic at a similar time of day to the time that the claimant had been taking his detour and found that there were no significant problems.

21. The outcome letter very clearly set out Mr Stafford expectations as to the claimant's hours of work. The second to last paragraph read:

> "To reiterate our conversation, your contractual working hours are 8.30am to 5.30pm with one hour unpaid for lunch. We expect you to be at your first customer call by 9.00am each day. As I explained to you we would expect you and all the other service engineers to provide a reasonable amount of your own travel time to be able to get to the customers by 9.00am and as mentioned if you are unable to get to the call at this time you must contact your manager, call planner or appropriate support member and make them aware of this."

22. Following receipt of that letter the claimant was absent from work with depression and anxiety between 26 March and 9 April 2015. On his return to work he made clear that the disciplinary proceedings had played a significant part in his stress and anxiety at that time. Following his return to work, however, he did not register any written protest against the statement of expectations concerning his working hours. He continued to work for the respondent.

23. In January 2015 the claimant moved house from Morecambe to Blackpool. One major reason for his move was convenience of transport. Traffic congestion between Morecambe and the M6 Motorway was notoriously bad. Construction of a new Link Road between Heysham and the M6 promised to improve journey times in the future, but while the road was being built, the roadworks associated with the project only compounded the delays. It could take an hour to get from Morecambe to the motorway. Moving to Blackpool enabled quicker access.

24. From 18 April 2016 to 22 April 2016 the claimant was absent from work again. This period of absence appears to have been triggered by an incident at customer's premises where the claimant was unable adequately to service a Xerox machine. Following his period of absence an instruction was issued that he

should not have to service Xerox machines. This had minimal impact on the respondent because Xerox machines were being phased out. It was recorded at the return to work meeting that the claimant had been prescribed Fluoxetine (Prozac) for his depression.

25. On 25 May 2016 the claimant was due to attend the premises of a client called De Puys. This was a follow-up to an earlier visit. On that earlier occasion the claimant had "escalated" the job to Mr McKelvey. He did not know what he was doing and wanted to be accompanied on his next visit by either Mr McKelvey or a colleague known as Scott. When he was notified of the next visit on 25 May 2016, he sent a message to the call planner, Rhonda Payne, in these terms:

> "When I escalated the call at De Puys Steve said Scott or Steve would be going back in with me. Can you please confirm this is the case as I haven't got a clue what I'm doing with it."

26. Ten minutes later, the claimant received a reply from Payne, stating "Hi Andy, No-one is available to go in with you. Paul needs you to go in and give it a go as site is chasing. If you really struggle I'll send someone in later." The claimant replied, "Yes I am struggling. I'm at the point of a breakdown. I will be going to the doctor's first thing tomorrow. I cannot cope with not having the correct knowledge to do the job. Paul has told me he can't do anything with regard to training. I can't continue without it."

27. Mr McKelvey discovered this email on his return home from work. Later that same evening he emailed his manager Mr Newton in these terms:

> "No, he says he can't fix this. Won't even try. He's no longer fit for the job we pay him for."

28. Mr Mckelvey intended to send this e-mail only to Mr Newton. By accident he also sent it to the claimant. He realised his mistake at 9.45pm that evening. He sent an e-mail directly to the claimant, saying:

> "I apologise, I had a bad day as well. No excuse. We're just very busy at the minute and got frustrated."

29. There is a dispute as to whether Mr Mckelvey apologised orally to the claimant the following day. I did not find it necessary to resolve that dispute.

30. Following that incident there was a meeting between the claimant and Mr Newton to discuss the claimant's training needs. It was agreed that the claimant would be put forward for training in Ricoh amongst other forms of training. There was no talk at that stage about the claimant being accompanied at future client visits, especially where Ricoh equipment was concerned. This was a missed opportunity for the respondent. It was clear following the claimant's emails of 25 May that he desperately wanted to be accompanied on visits to this particular client and with that particular equipment, and no thought appeared to have been given to accompanying him on such visits.

31. On 16 June 2016 an instruction was issued to the call planners that the claimant should only be sent to calls involving Canon and Kyocera equipment.

32. On 22 June 2016 Mr Stafford emailed Mr Newton to suggest an intensive period of accompanied visits.

33. On 23 June 2016 a further meeting took place, described as a training review meeting. Again it was agreed that the claimant would be put forward for training on Ricoh, and also that a period of accompanied sessions would be put in place.

34. The claimant was referred to Occupational Health by a letter dated 28 June 2016 and on the same day a request was made for the claimant to be enrolled onto courses involving the Ricoh equipment.

35. Also on 28 June 2016 the claimant emailed Mr Newton to notify him that he was going to be moving from Blackpool back to Morecambe. The move back to Morecambe would inevitably make most of his work involve additional travel.

36. I accept Mr Newton's evidence that the subject of the claimant's house move was discussed either at the meeting in Blackpool following the 25 May 2016 incident or at the training review meeting in June. At neither of those meetings, however, was there any discussion with the claimant about what if any impact his moving house would have on the hours that the respondent would expect the claimant to work. Mr Newton discussed the matter with Human Resources. Together they agreed that a letter should be sent to the claimant making the respondent's expectations clear. A letter was accordingly sent to the claimant on 29 June 2016. The claimant was reminded, amongst other things, of the expectation to attend his first job at 9.00am. If he was going to be late for his first appointment, he was required to notify the call planner.

37. At the training review meeting on 23 June 2016 meeting Mr Newton had to have difficult conversation with the claimant on the subject of body odour. A customer and some colleagues had informed Mr McKelvey that the claimant had body odour. In turn, Mr McKelvey had passed his concerns onto Mr Newton. In my view there was nothing inappropriate about the manner or the timing of his raising those concerns.

38. On 11 July 2016 the claimant was scheduled to attend two customer premises. Each required work to be done on Ricoh equipment. This was unintentionally in contravention of the instruction that had been given on 16 June 2016. The reason for the mix up was that there was a temporary call planner on duty that day. The claimant attempted to address the first problem at the first customer. It was unsuccessful in the sense that he arrived to find a machine that was partly malfunctioning and by the time he had finished it was not working at all. The claimant found the experience so stressful that he went to see his doctor. He did not attend the second appointment and he began a period of sick leave from which he never returned.

39. The claimant's email complaining about the events of that day was treated as a grievance. By a letter dated 12 July 2016 he was invited to a grievance meeting. That meeting had to be cancelled because of the claimant's ill health. An invitation to a further meeting was extended. That meeting never took place. On 4 August 2016 the claimant submitted his resignation.

40. It is clear from the resignation letter that the claimant regarded as "last straws" for his resignation the events of 25 May, the letter of 29 June and his experience on 11 July 2016. He also cited a failure to investigate and deal with numerous grievances that he had raised, failing to offer him support and training in his position and failing to book appointments for machines with which he was familiar. As a result he claimed trust and confidence had come to an end.

**Relevant law**

41. Section 95 of the Employment Rights Act 1996 ("ERA") relevantly provides:

> 95 Circumstances in which an employee is dismissed
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and… only if)—
>
> … (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. …

42. An employee seeking to establish that he has been constructively dismissed must prove:

    42.1. that the employer fundamentally breached the contract of employment; and

    42.2. that he resigned in response to the breach.

    (*Western Excavating (ECC) Ltd v. Sharp* [1978] IRLR 27).

43. An employee may lose the right to treat himself as constructively dismissed if he affirms the contract before resigning.

44. It is an implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: *Malik v. BCCI plc* [1997] IRLR 462, as clarified in *Baldwin v Brighton & Hove CC* [2007] IRLR 232.

45. The very serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT (Langstaff J) in *Pearce-v-Receptek* [2013] ALL ER (D) 364.

> 12. ...It has always to be borne in mind that such a breach [of the implied term] is necessarily repudiatory, and it ought to be borne in mind that for conduct to be repudiatory, it has to be truly serious. The modern test in respect of constructive dismissal or repudiatory conduct is that stated by the Court of Appeal, not in an employment context, in the case of *Eminence Property Developments Limited v Heaney* [2010] EWCA Civ 1168:
>
> "So far as concerns of repudiatory conduct, the legal test is simply stated ... It is whether, looking at all the circumstances objectively, that is, from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
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> 13. That has been followed since in Cooper v Oates [2010] EWCA Civ 1346, but is not just a test of commercial application. In the employment case of Tullet Prebon Plc v BGC Brokers LP [2011] EWCA Civ 131, Aikens LJ took the same approach and adopted the expression, "Abandon

> and altogether refuse to perform the contract". In evaluating whether the implied term of trust and confidence has been broken, a court will wish to have regard to the fact that, since it is repudiatory, it must in essence be such a breach as to indicate an intention to abandon and altogether refuse to perform the contract.

46. A fundamental breach of contract cannot be "cured", but if an employer takes corrective action the employer may prevent conduct from developing into a breach of the implied term of trust and confidence: *Assamoi-v-Spirit Pub Co Ltd* [2012] ALL ER (D) 17.

47. Where a fundamental breach of contract has played a part in the decision to resign, the claim of constructive dismissal will not be defeated merely because the employee also had other reasons for resigning: *Wright-v-North Ayrshire Council* [2014] IRLR 4 at paragraph 16. See also *Abbey Cars (West Horndon) Ltd v Ford* UKEAT 0472/07 at paragraph 34 and 35.

48. An employee who remains in employment whilst attempting to persuade the employer to remedy the breach of contract will not necessarily be taken to have affirmed the contract. All depends on the circumstances of the particular case: *W E Cox Toner (International) Ltd v Crook* [1981] IRLR 443,

49. In *Mari (Colmar) v Reuters Ltd* UKEAT/0539/13*,* HHJ Richardson reviewed the authorities relating to affirmation by employees who are on sick leave. The following principles were derived:

    49.1. It is open to the tribunal to find that an employee has affirmed the contract simply by remaining in employment for a period of time, even if the employee was absent on sick leave for the whole of that period.

    49.2. It is relevant to consider whether, during the period of sick leave, there was any affirmatory behaviour beside the receipt of sick pay.

    49.3. It is also relevant to consider whether, during the period of sick leave, the employee continued to protest about the breach.

    49.4. Each case depends on its own facts.

50. It is not uncommon for an employee to resign in response to a "final straw". In *Omilaju v. Waltham Forest London Borough Council* [2005] EWCA Civ 1493*,* [*2005*] IRLR 35*, CA* the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. It followed that although the final act may not be blameworthy or unreasonable it had to contribute something to the breach even if relatively insignificant. As a result, if the final act was totally innocuous, in the sense that it did not contribute or add anything to the earlier series of acts, it was not necessary to examine the earlier history.

51. *Vairea v Reed Business Information UK Ltd* UKEAT/0177/15 is authority for three further points in relation to the "final straw" and affirmation:

    51.1. There cannot be a series of "last straws".

    51.2. Once the contract is affirmed, earlier repudiatory breaches cannot be revived by a subsequent "last straw".

51.3. Following affirmation it takes a subsequent repudiatory breach to entitle the employee to resign.

**Conclusions**

No breach of express term

52. First of all I deal with the alleged express term of the contract. It is too simple to say there was an express term of the contract in that the claimant's working hours were 8.30am to 5.30pm. The over-simplicity of this term can be demonstrated by imagining how the parties would have reacted to two questions posed by a hypothetical officious bystander. Suppose, first, that our bystander asked, "What if the employee lives in Morecambe and has to visit a customer in Glasgow? Does he have to be there by 8.30am and travel in his own time?" The parties would unhesitatingly have answered, "Of course not!" The contract did not mean that the claimant always had to be at a client's premises by 8.30am. Now imagine that the bystander asked, "What if the employee moves home to Glasgow? Does his fulfil his hours by getting into his car at home by 8.30am, even if the customer is in Manchester?" Again, the parties would have resoundingly dismissed such a suggestion. The contract did not mean that he could start driving from home at 8.30am because of the absence of a term requiring where he should live.

53. There were possible interpretations that lay between these two extremes. One was that the claimant was required to be at his first customer job at such time after 8.30am as the respondent directed, but that his travelling time between 8.30am and his arrival on site was paid and the respondent would not direct start times that would involve an unreasonable amount of unpaid travelling time. Such a term was consistent with the respondent's instruction to him in March 2015 when he was informed that he must arrive at the customer's premises by 9am. It did not perfectly cater for every situation, but avoided some of the more absurd possibilities highlighted by the fictional bystander above.

54. If I am wrong about that, and the March 2015 instruction purported to impose a unilateral variation to the claimant's contract, I would find that the claimant accepted the variation (and waived his entitlement to sue for breach) by continuing to work for the respondent without protest. He did not make clear that his return to work was conditional upon him having the right to insist on what he understood to be a different form of working hours.

55. Either way, from March 2015 onwards, the claimant's contractual working hours were 8.30am until 5.30pm plus such reasonable unpaid travel time as would enable the claimant to arrive at his first job by 9.00am and depart by 5.30pm. There was no breach of contract in reminding the claimant of that term on 29 June 2016.

Breach of implied term

56. Turning now to the relationship of trust and confidence, I find that there were a number of acts of the respondent which undermined trust and confidence which featured in the claimant's reasons for resigning. I have dealt with them in reverse chronological order because it is important to identify if there was a last straw. I find that the last straw in this case was the events of 11 July 2016. The claimant was sent to work on Ricoh machines in contravention of an express instruction that he should not do so against the background of him repeatedly having stated

that he could not work on Ricoh machines without further training, and knowing that on at least one occasion having attended a customer's premises to work on a machine about which he did not have sufficient had actually affected his mental health. I do not have to find that this by itself is particularly culpable or blameworthy in order to be capable of amounting to a last straw. It is sufficient that taken together with other things it could add cumulatively to the breakdown in trust and confidence. This it clearly did.

57. Other acts that undermined trust and confidence were the failure to arrange at an earlier stage accompanied visits to either De Puys or to clients' premises involving Ricoh equipment. The respondent should have realised before Mr Stafford had to spell it out to them that such visits were necessary. The absence of a companion on 25 May 2016 was the reason why the claimant found it so stressful that he could not complete the job.

58. I find that there was a serious damage to the relationship of trust and confidence when Mr McKelvey made the remark that he did in the evening of 25 May 2016. Again the background that the claimant's mental health was suffering, that he had recently been off work for an extended period with problems with his mental health, that he had clearly made a cry for help in his email; Mr McKelvey's comment must have had a very severe impact on the claimant. His apology went some way towards repairing the relationship of trust and confidence but still left the relationship in a parlous state. It would not take much more for the relationship to break down.

59. Trust and confidence was further damaged by the sending of the 29 June 2016 email without prior consultation. The respondent was contractually entitled to insist on the working hours as per the terms of the contract which I have identified. But their contractual entitlement did not absolve the respondent from making any effort to handle the matter sensitively. There was no attempt to discuss with the claimant the impact of his move to Morecambe on his ability to carry out his job. Against the background of somebody with a mental health absence from work, somebody who previously had problems in keeping to time expectations, the respondent could very easily have discussed these matters with the claimant rather than proceeding straight to a letter setting out the respondent's expectations. This was particularly important because there were still some questions left unanswered. as I have stated, my interpretation of the term, whilst preferable to the two extremes, did not cater for every possibility. For example, if the claimant had an appointment in Glasgow, he might have legitimately expected a later start time or an agreement to pay for travel time, say, before 7.00am. Friendly resolution of such problems became more difficult once the letter of 29 June 2016 had been sent.

60. What I have to do now is look at the ways in which the respondent did undermine the relationship of trust and confidence. In my view the respondent did not have reasonable and proper cause for such conduct. The question is did the respondent's actions destroy or seriously undermine the relationship? It is a difficult test for a claimant to overcome. The claimant has to show that the respondent demonstrated an intention to abandon or altogether refuse to perform the contract. In my view the combination of those various failings from 25 May 2016 onwards did cross even that high hurdle. The claimant was entitled to regard the relationship of trust and confidence as having been seriously

damaged. He was entitled to resign and regard himself as being constructively dismissed.

Resignation in response to the breach

61. Before considering whether the claimant resigned in response to the breach, I set out her some reasons why the claimant resigned which in my view involved little or no blame on the respondent's part. He resigned in part due to the comments made in the meeting on 29 June 2016 about body odour. Mr Newton was in my view fully justified in taking up this very difficult issue with the claimant. The claimant had a perception that the respondent was not properly training him. In my view the respondent was making reasonable efforts to provide the claimant with training. Where they fell short was by failing to put in place a system of supervision or accompaniment in response to the acute need identified on the 25 May 2016. The claimant resigned partly in response to being told what his working hours were. That was something which the respondent was entitled to do; they could have just handled it better. He resigned partly in response to his own problems with information technology which meant that he was not able, as some of his colleagues may well have been able to do, to get access to online manuals or to access the Google Drive and find the relevant manual, or to diagnose problems which other colleagues appeared to be able to do. He resigned partly in response I find to the change of address which would make travel more difficult.

62. Another point which influenced the claimant's decision, although in my view weighed less heavily, was his mistaken perception that he had been victimised in the autumn of 2014 and the winter of 2015 for having queried the minutes of the performance review meeting.

63. What I am not finding at this stage is whether those factors on their own would have caused the claimant to resign in any event, or what the percentage chance of those factors on their own causing the claimant to resign in any event. I have not heard submissions on that point and I would need to do so in order to reach a finding.

64. I now return to the ways in which the respondent did damage the relationship of trust and confidence. Was that breach of contract an effective cause of the claimant's resignation? In my view it was. The respondent's conduct that breached the term was clearly set out in the claimant's resignation letter. The claimant also resigned for other reasons, but that fact did not prevent the claimant from being constructively dismissed.

Affirmation

65. I have looked at whether the claimant affirmed the contract by remaining employed, albeit on sick leave, from 11 July 2016 until 4 August 2016. In my view he did not. He was absent on sick leave. That is not an entirely neutral act, but the claimant did very little by way of positive affirmation during that time other than to receive sick pay. It was not enough, in my view, to indicate to the respondent that he was prepared to let bygones be bygones. He was still entitled to resign when he did by letter on 4 August 2016.

66. The claimant was therefore constructively dismissed. In view of the concession made at the start of the hearing, that dismissal was unfair.

Employment Judge Horne

12 July 2017

REASONS SENT TO THE PARTIES ON
17 July 2017

FOR THE TRIBUNAL OFFICE

[AF]