Case Number: 3200531/2017

STO

EMPLOYMENT TRIBUNALS

Claimant: **Mr I Ndu**

Respondent: **Coventry University London Campus**

Heard at: **East London Hearing Centre** **On: 6-9, 12 & 13 February 2018**
14 February 2018 (in chambers)

Before: **Employment Judge O'Brien**
Ms M Long
Dr J Ukemenam

Representation:

Claimant: In person

Respondent: Ms Dickenson of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. **The claimant's complaint of constructive unfair dismissal fails and is dismissed.**

2. **The claimant's complaint of unfair dismissal on the grounds of protected disclosure fails and is dismissed.**

3. **The claimant's complaint of detriment on the grounds of protected disclosure fails and is dismissed.**

4. **The Claimant's complaint of a failure to make reasonable adjustments under section 21 of the Equality Act 2010 fails and is dismissed.**

REASONS

1 On 13 May 2017, the claimant presented complaints of constructive unfair dismissal, detriment and/or dismissal on the grounds of protected disclosure, and failures to make reasonable adjustments. The respondent resists the claims.

ISSUES

2 The parties had been unable to agree a list of issues in advance of the hearing. Mr Dickinson was prepared today to acquiesce to the claimant's amendments to her side's proposed draft; however, in deliberation the tribunal found that list not to be workable as formulated. The tribunal has, therefore, identified the following issues to be determined, using the parties' statements of case and the further information provided by the claimant on the first day of the hearing in response to the respondent's request dated 10 August 2017:

Constructive unfair dismissal

2.1 Whether the respondent committed a fundamental breach of contract. The claimant relies on the implied term of trust and confidence and on an implied term that the respondent shall not act in a way such as to endanger the claimant's health and safety, and relies on the matters set out in paragraphs 1 to 11 of his statement of claim as alleged breaches of those terms.

2.2 Whether the claimant resigned in response to that breach.

2.3 Whether the claimant acted in such a way so as to be taken to have affirmed the contract.

Public interest disclosure dismissal

2.4 The claimant relies on his email of 21 March 2016.

2.4.1 Whether that email disclosed information.

2.4.2 Whether the claimant actually believed that the information tended to show that a criminal offence had been committed.

2.4.3 Whether the claimant believed that the disclosure was in the public interest.

2.4.4 Whether these beliefs were reasonable.

2.4.5 Whether the disclosure had been made in good faith (relevant only to remedy).

2.5 Whether the behaviour of the respondent alleged by the claimant after 21 March 2016 was because he made the protected disclosure.

2.6 If so, whether that behaviour was sufficiently serious as to cause or contribute to a fundamental breach of contract.

2.7 If not, whether it was nevertheless a detriment.

Failure to make reasonable adjustments

2.8 The claimant relies on asthma as a disability for the purposes of the Equality Act 2010.

2.8.1 Whether the claimant's asthma had a substantial adverse effect on his ability to carry out normal day-to-day activities at the material time.

2.8.2 Whether those effects were long term.

2.9 The claimant relies on the following provisions, criteria or practices (PCP's):

2.9.1 Being notified of significant changes by email without being forewarned by telephone or in-person.

2.9.2 being subjected to the respondent's disciplinary procedure

2.10 Whether the respondent apply any of those PCPs to the claimant.

2.11 Whether the PCP put the claimant a substantial disadvantage compared to nondisabled employees. The claimant says that he suffered an adverse impact on his health.

2.12 Whether the respondent was aware of the claimant's disability and/or the substantial disadvantage.

2.13 Whether the respondent failed to make adjustments to avoid the disadvantage. The claimant asserts that the respondent should have forewarned him by telephone or in person of any significant change, the claimant asserts that the respondent should not have subjected him to disciplinary proceedings.

Remedy

2.14 If the claimant succeeds in all or part of his claim, to what remedy is he entitled. Matters of remedy to be decided at a separate hearing if necessary.

EVIDENCE

3 Over the course of this hearing, the Tribunal took evidence on the basis of written witness statements. The claimant gave oral evidence on his own behalf and relied on the evidence of Usha Mistry and Jude Dunkwu. On behalf of the respondent we heard oral evidence from: Dr Andreas Nabor; Dr Peter Ye; Ms Stephanie Edwards; and Ms Joanne Oguzie.

4 The Tribunal was also provided with a joint bundle comprising approximately 1,000 pages. A number of applications were made by the claimant for disclosure of additional documents. Whilst a small number of documents were voluntarily produced by the respondent, the majority of the documents sought by the claimant were unnecessary to determine the issues as decided above and the applications were refused.

5 The parties each made oral submissions, which we took into account when determining the issues before us.

FINDINGS OF FACT

6 In order to determine the issues as agreed between the parties, the tribunal made following findings of fact, resolving any disputes on the balance of probabilities.

7 The respondent is a higher education organisation based in London providing amongst other things course modules in accounting and finance. It is a subsidiary of Coventry University with a very limited on-site human resource function. It is described as a "lean organisation", which we took to mean, and except, that it operated without any spare staffing capacity in any of its functions.

8 The claimant is a highly intelligent individual, educated to Masters level and with professional qualifications in accounting.

9 The claimant was employed by the respondent on 15 April 2013, initially as a lecturer on a fixed-term, part-time basis. In his equal opportunities monitoring form signed and dated on 9 April 2013, the claimant indicated that he did not consider himself to have a disability. The form specifically gave asthma as an example of a disability under the Equality Act 2010. This, we find, was indicative of the claimant's reluctance (until very late in his employment, as discussed below) to disclose his asthma or any of its adverse effects.

10 On 15 September 2014, the claimant became a permanent member of staff as a lead teaching fellow at 80% FTE. He was told in the offer letter that there was no need for him to complete a further probationary period. By January 2015, the claimant felt that he was routinely working in excess of these hours and requested a 100% contract. On 22 January 2015, he was written to confirming a temporary variation of his contract to 100% FTE for the period 26 January to 19 April 2015, and that the variation in his hours would be reviewed near to the end of the term.

11 The claimant asserts that this was contrary to an express agreement for an immediate permanent change to 100% FTE made between him, Kenny Tang and Andreas Nabor in January 2015. However, it is clear from the email exchanges between the claimant and Peter Ye that the change to his hours was not agreed to be permanent until around March 2015.

12 This permanent change was confirmed in a letter dated 23 March 2015, although there was some delay in the claimant receiving that letter, which was emailed him on 15 April 2015. In the interim, the claimant was told verbally that his 100% FTE contract had been made permanent and that he would be allocated teaching hours accordingly. Nevertheless, the claimant refused to work more than 10 timetabled hours per week until he received the letter, and described Peter Ye's instructions to the contrary as "further bullying and intimidating [him] at work". We entirely disagree with that description; it was ordinary and lawful management of the claimant.

13 Peter Ye had joined the respondent in January 2015 as a principal lecturer and took over from Kenny Tang as the claimant's line manager in September 2015. Peter Ye holds a PhD from the University of Hertfordshire.

14 Throughout the material time, Andreas Nabor remained the Head of Accounting, Finance and Energy, the Department within which the claimant was employed.

15 The claimant was absent from work because of sickness on 2 June 2015. The claimant claims that this was for respiratory problems; however, the respondent's sickness records (which were not suggested by the claimant in his oral evidence to be inaccurate) record the reason as being headache and migraine [793]. We find that this was the reason given by the claimant at the time.

16 On 7 May 2015, Peter Ye told the claimant to send him his personal annual review (PAR) appraisal form. The claimant replied saying he was busy but would try to send it, reflecting their recent discussions, during the following week. Peter Ye emailed again on 27 July 2015 asking the claimant to send the PAR that day and to attend a PAR meeting the following day. The claimant replied complaining that he had been given too short notice and so Peter Ye delayed the meeting by a further day. That prompted a further response from the claimant, saying:

> "Thank you for your email message. However, I find your tone to autocratic, undemocratic, intimidating and aggressive. I have decided to defer my PAR meeting indefinitely until CULC can assure me beyond reasonable doubt and I am totally confident that there are satisfactory procedures in place that I will have an objective and fair PAR appraisal."

17 We disagree entirely with that description of Peter Ye's email. The claimant, we note, copied that response to Kenny Tang, Andreas Nabor, Philip Roberts, Stephanie Edwards and Joanne Oguzie (in other words to the entirety of Peter Ye's line management and to human resources).

18 Albert De Jonge was an experienced retired academic who was recruited by the respondent to lecture from May 2015. In his interview, Albert De Jonge had indicated that he did not want too heavy a workload. He was therefore allocated to teach with the claimant on module 313LON, for which the claimant was module leader. During his short period time with the respondent, Albert De Jong complained to PTE on a number of occasions about the claimant's quality of lecturing.

19 Albert De Jonge was absent through sickness on 9 June 2015 and Peter Ye asked the claimant to cover. Each accuses the other of shouting in that discussion and denying that they themselves shouted. Throughout his evidence the claimant had a tendency to exaggerate and we observed in him no appreciation of the effect his behaviour has on others. Peter Ye also complained to Kenny Tang by email about the claimant's behaviour at the time, whereas the claimant only made the allegation much later and not in his email of 23 July 2015 in which he referred to covering for Albert De Jonge. For those reasons, we prefer the evidence of Peter Ye and find that it was the claimant and not Peter Ye who shouted.

20 The claimant's email of 23 July 2015 prompted a response from Albert De Jonge, in which he detailed his own complaints against the claimant and intimated 2 grievances against him for harassment and bullying, and defamation of character. As it was, Albert De Jonge left the respondent three days later. He had intimated that it was the claimant's behaviour which had made him ill.

21 At this time, the claimant wanted to be consulted before being paired up again. Peter Ye and Andreas Nabor each understood this to mean that the claimant wanted to work alone.

22 It was the practice of the Department that module leadership and portfolios were changed occasionally, not just for the claimant. For instance, in the case of module M040, Peter Ye gave the lecturing hours to Albert De Jonge in order to keep the claimant's total teaching hours within limits.

23 On 28 July 2015, the claimant made allegations to Andreas Nabor of long-term bullying by Kenny Tang and Peter Ye. The allegations were made at a meeting between the individuals and repeated in an email that night. Andreas Nabor initiated an informal investigation but took no further because the claimant did not want to raise a formal grievance. Andreas Nabor did not consider that Peter Ye's emails were hostile, and we agree.

24 The claimant repeated his allegations of bullying by Peter Ye and Kenny Tang by email on 1 September 2015, in the context of his refusing to meet with either of them to discuss his PAR. Andreas Nabor met with the claimant on 2 September 2015 at which the claimant informed him of an historic alcohol problem and Andreas Nabor offered confidential counselling. Andreas Nabor nevertheless insisted that the claimant except Peter Ye's invitation to a PAR meeting. This meeting went ahead on 7 September 2015.

25 On 30 September 2015, Andreas Nabor supported the claimant's application for an HEA senior fellowship.

26 On 11 November 2015. Peter Ye emailed the claimant asking for him to provide a departmental profile for use on the respondent**'s** website and to arrange a probationary review. The claimant responded, informing Peter Ye correctly that he was not required to undertake any probationary review. Peter Ye indicated that he would check with HR but unfortunately spoke to an inexperienced member of the department who misinformed him that the claimant was required to undergo a probationary review.

27 The claimant responded to this and other matters raised by Peter Ye indicating that he had sought the advice of a lawyer and was prepared to go to an employment tribunal. The claimant copied this email to Andreas Nabor, Stephanie Edwards and Joanne Oguzie, as did Peter Ye in his subsequent response. Joanne Oguzie intervened by email on 16 November 2015, confirming that the claimant was not required to undergo a probationary review. The claimant asserted in his email correspondence that he considered Peter Ye to have bullied him. We find no evidence of such bullying in the emails or otherwise.

28 On 11 December 2015, Peter Ye emailed the claimant notifying him of his teaching workload for January 2016. In particular, it said, "As per your request, I have only allocated on [sic] module to you" and invited the claimant to let him know if he had any questions. The claimant replied, "thanks Peter." The claimant asserts that he never made such a request and did not read the entirety of this email. We are unable to accept that that was the case; the terms of this concise email are clear. In short, we find that the claimant had asked Peter Ye to be allocated to one module making up all of his teaching timetable and that Peter Ye accommodated that request.

29 We are satisfied that at this time relations between the claimant, Peter Ye and Andreas Nabor were positive.

30 An open day was due to take place at the respondent on 23 March 2016. Attending this open day was a duty shared between colleagues which did not fall only to module or program leaders. The claimant had not recently covered any such event and Peter Ye nominated him to participate along with Naima Parvin and Adrian Euler. The claimant was reluctant to do and after some email discussion, in which the Peter Ye challenged the claimant to explain himself if there was a reason why he could not perform the duty, the claimant took issue with the tone of Peter Ye's email and said:

> "I am sorry but I do not like the tone of your last message. There was no prior discussion with me regarding this out of courtesy which I think is very important for communication and personal relationship and to avoid misunderstanding and friction. I am sorry but I will very respectfully decline this invitation and regret any inconvenience this may cause."

31 We find nothing wrong with the tone of Peter Ye's communications; this was a perfectly reasonable management written instruction and the claimant was given the opportunity to give reasons why he would be unable to comply. The fact was that the claimant did not wish to comply. It was only after the claimant was told that it was a duty and not an invitation that the claimant referred to pressure of work. Although the claimant may have been teaching 14 hours a week and organising a visit to the United States of America, it is was not unreasonable to expect the claimant to participate in the open day.

32 The claimant complained in emails in March 2016 about teaching allocation, describing it as "poor governance and systematic abuse." Andreas Nabor responded to the effect that Peter Ye, in allocating modules, was simply doing what he was paid to do. We agree.

33 The claimant began to include Joanne Oguzie in this exchange of emails, using hyperbole and alleging constructive dismissal. On any reasonable view, this was an inaccurate description of what we find to have been proper exercise of management. The claimant confirmed on 11 March 2016 that he wanted his complaint to be treated as a formal grievance.

34 On 21 March 2016, the claimant emailed Joanne Oguzie, Stephanie Edwards, Andreas Nabor, and Philip Roberts, alleging "systemic and rampant abuse of power and authority" and accusing Peter Ye and Alid Kambwili of using the allocation of workload as "an instrument of torture and abuse on their fellow staff". He indicated in the email that he believed those two gentlemen to be "imposters". The claimant said that he had visited the University of Hertfordshire but had found no record of Peter Ye's thesis. He had also checked with ACCA to find that Alid Kambwili had only been a member since 2015. He alleged that both had therefore acted fraudulently when applying for employment with the respondent.

35 Joanne Oguzie responded to the claimant's allegations against Peter Ye and Alid Kambwili on 22 March 2016. She noted that they were very serious and confirmed that she had verified Peter Ye's PhD with the University of Hertfordshire. She concluded: "I must ask you to consider your motivation for continuing to raise concerns about Peter and Alid, the escalation could be perceived as malicious and I am sure that is not what you intend". We find that that was an appropriate response in the circumstances.

36 The claimant told us that he was frightened thereafter to raise concerns because he had been threatened. However, we note that he made further allegations of potential misconduct against Peter Ye and Dr Roberts on 15 April 2060, citing a rumour that Peter Ye was "untouchable" having previously worked with Dr Roberts prior to coming to the respondent. We reject, therefore, any suggestion that the claimant felt threatened by Joanne Oguzie or that he felt constrained thereafter from raising any genuine concerns.

37 The respondent held a grievance meeting with the claimant on 23 March 2016. In attendance was the claimant, Joe Oguzie and James Whitton. The claimant alleged that

the pressure from Peter Ye was impacting on his teaching and his health but, in the latter regard, did not give specifics.

38 At this time, the claimant was declining again to participate in the PAR process. He was told by Andreas Nabor on 13 April 2016 that he should continue with the PAR process notwithstanding the outstanding grievance. The claimant indicated that he would be happy and willing to have a PAR review with Andreas Nabor; however, Joanne Oguzie decided on 15 April 2016 that the PAR process would be suspended until the outcome of the grievance was known.

39 Joanne Oguzie referred the claimant to occupational health on 15 April 2016; however, the claimant declined to attend. The claimant explained to us that he considered her referral to be intrusive and had understood that his GP could provide a report instead. However, no report was obtained at that time by the claimant from his GP.

40 The claimant was given the outcome of his grievance on 5 May 2016. Three out of the four allegations were not upheld. However, his complaint about a lack of transparency and communication around workload allocation was upheld. It was recommended that the claimant and Peter Ye undertake mediation to improve their working relationship and to identify appropriate communication method. It was also proposed that Joanne Oguzie would work with Andreas Nabor to develop a plan for improving the workload allocation process. As it was, these arrangements were not put in place because the grievance appeal and disciplinary process were not concluded until October 2016.

41 The claimant submitted his grievance appeal on 18 May 2016, the meeting for which was held on 16 June 2016 and the outcome distributed on 26 June 2016. His grounds of appeal were rejected. The claimant claims that it was at the grievance appeal meeting that he first mentioned that he had asthma. However, it is only on 22 July 2016 the claimant indicated in an email that he considered himself to be disabled. Until that point, none of the respondent's witnesses had ever seen or understood the claimant to be suffering any adverse effects from asthma.

42 On 6 June 2016, Andreas Nabor asked the claimant to undertake a competitor analysis, comparing the respondent's BA in International Finance and Accounting with the programs of selected competitors. Initially, the claimant thanked Andreas Nabor and agreed to undertake the task. It was only after Peter Ye corresponded with the claimant about this task that the claimant emailed Andreas Nabor on 8 June 2016 saying that "I have finally decided that it is in my personal interest not to do this work until all the pertinent issues I have raised regarding my grievance satisfactory looked into and fully resolved. I am very sorry for any inconvenience caused."

43 This was for Andreas Nabor the last straw and an act of what he described in an email later on 8 June of "disruptive behaviour and insubordination". He commissioned a disciplinary investigation into: insubordination by failing to comply with management instructions; failure to comply with campus policy by refusing to attend a PAR meeting; and making a malicious allegation in respect of Peter Ye and Dr Roberts. We agree that there were reasonable grounds to commence this investigation.

44 The claimant attended Accident and Emergency at the Royal Free Hospital at 1:26am on 18 June. He reported worsening of asthma symptoms due to stress. He had a respiration rate of 25 with 90% saturation on air. This improved with nebulisers to 20 and 95% respectively. He was observed with a mild wheeze which resolved whilst in A&E. The

claimant was not admitted but returned home after a short period at hospital. The claimant's description of this episode as "hospitalisation is, we consider, a gross exaggeration. Nevertheless, the claimant's ability to breath freely had been substantially impinged. Moreover, it appears likely from the claimant's medical evidence that this was a recurrence of earlier temporary breathing difficulties and also that the claimant would have suffered more difficulties but for his use of a nebuliser.

45 The claimant was interviewed in respect of the disciplinary allegations on 23 June 2016 by Stephanie Edwards and Joanne Oguzie. He claimed at the meeting that stress triggered his asthma. At the end of the meeting, Joanne Oguzie urged the claimant to attend occupational health.

46 The investigating team recommended that two of the three allegations proceed to a disciplinary hearing, but not in respect of the allegedly malicious allegation. At this point, the claimant provided no evidence of the effect on him of his asthma and the team's decision was entirely reasonable.

47 On 5 July 2016, those involved in teaching the BA IFA were asked to review their respective modules. The claimant was therefore asked by Dave Briggs to review 310LON. The claimant responded that the module was now the responsibility of Silvie Lee and Naima Parvin. Peter Ye intervened to assert that the claimant was the last module leader and that it was important to have his input. Whether or not Peter Ye was in possession of the correct facts, the matter was quickly resolved even on the claimant's own case by 19 July 2016.

48 An occupational health report dated 20 July 2016 records the claimant telling the OH manager that the academic dean, Jo Cullinane, had addressed his concerns around communication and transparency of work allocation which had helped to improve his mental well-being, and that he was positive about recent communications with his employer. No adjustments were identified in that report. The report was provided to Joanne Oguzie, who advised the claimant that management would need to be involved in any adjustments. The claimant agreed to his condition being discussed with Andreas Nabor, who was provided with a copy of the report.

49 The claimant's disciplinary hearing was eventually fixed for 15 September 2016. However, on 14 September Jo Cullinane contacted the claimant's union representative to inform her that there would no longer be a disciplinary hearing but instead a meeting to discuss an action plan. The decision was taken by Jo Cullinane without consulting HR and was the subject of a subsequent "conversation" (which we take to mean a strong expression of disapproval on the part of HR) between Jo Cullinane and Joanne Oguzie. Both Stephanie Edwards and Joanne Oguzie disapproved of the development.

50 The claimant requested in September 2016, to reduce his hours to 80% with effect from 1 February 2017. However, the respondent was unable to accommodate the request because of staff shortages.

51 The claimant was notified on 13 October 2016 that his line management was to change from Peter Ye to Alid Kambwili by way of email addressed to all those affected by the change.

52 The claimant resigned by email on 14 October 2016 addressed to Peter Ye. In the concluding paragraph of that email, which was part of an exchange of emails about a holiday request, the claimant said:

> "As a separate issue, I would like to seize this opportunity to tender my resignation of my position as senior lecturer at Coventry University London campus with immediate effect commencing today and serve my three month notice with 14 January 2017 as my last day."

53 The claimant then forwarded that email to Jo Cullinane and Andreas Nabor, with copies to Joanne Oguzie and Stephanie Edwards, saying:

> "As you can see below in my email message to Dr Peter Ye who is my current line manager, I have tendered my resignation of my position as senior lecturer at Coventry University London campus with immediate effect commencing today and to serve my three month notice with 14 January 2017 as my last day. Thank you for the opportunity to work with CUA as this has been a rewarding experience."

54 The next day, the claimant sought to withdraw his resignation saying:

> "I'm not sure who to address this letter to whether to management or HR. As a result, I have decided to address this to all parties. Please accept my apologies for any inconvenience caused.
>
> "As my letter and notice of resignation has not yet been accepted by Coventry University London campus, I am writing to withdraw my letter of resignation with immediate effect as that was written in a state of panic and distress that was greatly amplified by my stress induced asthma disability condition and the fact that we are still in the process of normalising relations and establishing trust again after my complaint, grievances, grievance appeals, HR investigatory meetings and the disciplinary charges against me which were eventually dropped. I regret any inconvenience caused by the letter the resignation I emailed to you."

55 He did go on to raise a number of "salient issues" which he wished to be addressed by the recipients.

56 The respondent did not permit the claimant to withdraw his resignation. The claimant submitted a grievance on 25 November 2016, in which the desired outcomes included line management being changed back to Dr Peter Ye, the claimant's reinstatement, adjustments in respect of his "stress-induced asthma disability condition", and a preference to have his hours reduced to 80%. Joanne Oguzie responded in a lengthy letter on 1 December 2016, in short asserting that the grievance raised no new grounds and that no further decision would be taken.

THE LAW

Disability and Reasonable Adjustments

57 Section 6 of the Equality Act 2010 (EA) defines disability as a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities. An effect of an impairment is long-term if it has

lasted for or is likely to last for at least 12 months or is likely to last the rest of the affected person's life. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is treated as continuing to have an effect if the effect is likely to recur. The effect of medication is to be disregarded when assessing the effects of an impairment.

58 Pursuant to s20 EA, where, in particular, a provision, criterion or practice of the employer and/or a physical feature of the workplace, places a disabled person at a substantial disadvantage in comparison with persons who are not disabled then the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. However, an employer does not contravene the duty to make reasonable adjustments if he did not know and could not reasonably have known that the employee was disabled and about the substantial disadvantage.

59 Consideration of whether the duty arises will require asking the following (applying **Environment Agency v Rowan [2008] IRLR 20** (modified to apply to the EA):

59.1 whether there is a provision, criterion or practice applied by or on behalf of an employer; or

59.2 whether there was a physical feature of premises occupied by the employer; or

59.3 whether there was a need for an auxiliary aid;

59.4 the identity of the non-disabled comparators (where appropriate); and

59.5 the nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee.

Burden of Proof

60 Pursuant to s136 EA, if there are facts from which the Tribunal could decide in the absence of any other explanation that a person contravened the provision of the Act, the Tribunal must hold that the contravention occurred unless the employer can show to the contrary. The key question is why the treatment complained of occurred. A Tribunal must be alert to the fact that individuals will rarely admit to discriminatory behaviour event to themselves and draw whatever inferences are appropriate from secondary findings of fact (**Igen Ltd v Wong [2005] IRLR 258**). However, as observed in the case of **Madarassy v Nomura International plc [2007] IRLR 246**, it is not sufficient to show merely a difference in treatment and a difference in characteristic; there must be 'something more' to indicate a connection between the two.

61 Regarding reasonable adjustments, the Tribunal must find the existence of a PCP and/or workplace feature, the consequential substantial disadvantage and facts from which a breach of the attendant duty could be found, before the burden of proof passes to the employer (see **Project Management Institute v Latif [2007] IRLR 579**).

Constructive Dismissal

62 Pursuant to s94 of the Employment Rights Act 1996 (ERA), an employee is entitled not to be unfairly dismissed by his employer. An employee is dismissed by his

employer amongst other things if he 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 (s95(1)(c) ERA).

63 To establish such a constructive dismissal, the employee must prove that the employer was in fundamental breach of contract, that he resigned in response to such a breach, and that he did not act prior to resignation in such a way as to affirm the contract (**Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**).

64 In **Malik v BCCI [1997] IRLR 462**, the House of Lords confirmed that a term is implied into every employment contract that 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. The test is objective.

65 A breach of the implied term of mutual trust and confidence is always such a fundamental breach (**Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347)**.

66 It is an implied term of any employment contract that the employer would provide and monitor for his employees, so far as is practicable, a working environment which is reasonably suitable for the performance by them of their work (**Waltons and Morse v Dorrington [1997] IRLR 488**).

67 The repudiatory breach or breaches in question need not be the sole cause of the employee's resignation provided they are an effective cause. Accordingly, if an employee leaves both in order to commence new employment and in response to a repudiatory breach, the existence of the concurrent reasons will not prevent a constructive dismissal arising (**Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493**).

68 The breach will be an effective cause if the employee resigned in response, at least in part, to the fundamental breach by the employer (**Nottinghamshire County Council v Meikle [2004] IRLR 703**).

69 At common law, an employee accepting a fundamental breach must resign without notice or otherwise will be taken to have affirmed the contract for the period of employment covered by the notice. Section 95(1)(c) ERA varies the common law contractual principles discussed above for the purposes of a statutory claim of unfair dismissal by giving an employee the right to resign on notice without being treated as having affirmed the contract. That said, post-resignation affirmation is capable of being considered under s95(1)(c) ERA (**Cockram v Air Products plc [2014] IRLR 672**). In that case, an employee who had given 7 months' notice when the contract only required 3 months was taken to have affirmed the contract.

70 Conduct which has been affirmed cannot be revived by a later last straw; the employee must show repudiatory conduct which entirely post-dates the earlier affirmation (**Vairea v Reed Business Information UK Ltd [2017] ICR D9, UKEAT/0177/15/BA**).

Protected Disclosures

71 Section 43A ERA('Meaning of 'protected disclosure') provides:

> 'In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any sections 43C to 43H.'

72 Section 43B ERA ('Disclosures qualifying for protection') provides:

> '(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> …'

73 'Reasonable belief' is to be considered in the personal circumstances of the individual concerned; therefore, where they have special skill or professional knowledge of the matters being disclosed the bar of reasonableness may be raised (**Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4**).

74 Section 43C ERA ('Disclosure to employer or other responsible person') provides:

> '(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure–
>
> (a) to his employer,...'

Protection from Detriment

75 Section 47B ERA provides:

> '(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> (2) ... this section does not apply where –
>
> (a) the worker is an employee, and
>
> (b) the detriment in question amounts to dismissal (within the meaning of Part X).
> …'

76 A detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment (**Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland) [2003] IRLR 285**). Moreover, any protection afforded in the field of employment from unlawful detriment must necessarily be limited to detriments that have arisen in that field (para 34 of **Shamoon**).

77 Section 48(2) ERA provides:

> '(2) On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.'

78 Therefore, it is for the employee to prove on the balance of probabilities that she has made a protected disclosure and that she has suffered a detriment; if so, the employer then has to prove that the act in question was no more than trivially influenced by the protected disclosure (**NHS Manchester v Fecitt [2012] ICR 372**).

Automatically Unfair Dismissal

79 Section 103A ERA provides:

> 'An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.'

CONCLUSIONS

Constructive Dismissal

80 The claimant relies on 11 allegations as constituting a fundamental breakdown of trust and confidence and/or a failure to protect his health and safety. Those allegations are set out in paragraphs numbered 1 to 11 in his grounds of claim.

Allegation 1 - unnecessary delay to the claimant's full-time contract.

81 The claimant was not promised a permanent 100% contract in January 2015 but rather in March 2015. Whilst there was a short delay in providing him with the letter of confirmation, he had been reassured of the position orally. Moreover, the change was verified in writing in good time, and did not objectively materially affect trust and confidence or damage the claimant's health and safety. In any event, by continuing to work under the vary contract after written confirmation been received, the claimant affirmed the new contract.

Allegation 2 - hostility and miscommunication by management.

82 We were taken to little if any evidence of communications between the claimant and Kenny Tang, and certainly saw no evidence of hostility and miscommunication from Kenny Tang. We examined a great deal of the communication between the claimant and Peter Ye and found it to be entirely appropriate. These communications could not objectively contribute to a fundamental breach of contract.

Allegation 3 - targeting through de-skilling.

83 The claimant was treated in no way differently to his colleagues regarding modules. The claimant was treated entirely reasonably. He took no objection when programmed to teach only one module. It could not reasonably be said that the claimant was being de-skilled, and the respondent's actions in this regard could not objectively contribute to a fundamental breach of contract.

Allegation 4 - being hounded by Andreas Nabor to undertake a project

84 Andreas Nabor gave the claimant a reasonable management instruction to complete a competitor analysis. The claimant's reaction was unreasonable and Andreas Nabor's response was entirely appropriate. The respondent's behaviour in this regard could not objectively contribute to a fundamental breach of contract.

Allegation 5 - being targeted by Peter Ye in respect of the BA IFA

85 The tasking by Peter Ye of the claimant to participate in the review of 310LON was at worst a misunderstanding, although it appears to have been a reasonable management instruction in any event. In any event, the matter was resolved quickly and objectively had no effect on the claimant's trust and confidence or health and safety.

Allegation 6 - being falsely accused of not wanting to work with colleagues.

86 The suggestion that the claimant did not want to work with others was again, at worst, a misunderstanding and one that was not entirely unreasonable in the context of what the claimant was saying at the time. Again, the respondent's actions could not objectively have had any material effect on trust and confidence or health and safety.

Allegation 7 - being targeted in respect of module leadership and teaching responsibilities.

87 All of the respondent's decision in respect of the claimant's timetable were on any analysis an exercise of reasonable management and objectively innocuous. Moreover, there is no evidence that he was treated any differently to his colleagues.

Allegation 8 - unjustified disciplinary charges.

88 The disciplinary charges brought by Andreas Nabor against the claimant were entirely justified. Andreas Nabor was entitled as a manager to conclude that enough was enough in respect of the claimant's attitude to reasonable management instructions. There were reasonable grounds to commence an investigation into the charges in question. The charges were investigated fairly and did not ultimately lead to any sanction against the claimant (albeit that HR remained of the opinion that a disciplinary hearing should have taken place).

Allegation 9 - manipulation of the claimant's workload by Peter Ye and Alid Kambwili, which intensified after 21 March 2016.

89 We find no evidence of any "manipulation" of the claimant's workload, as opposed to reasonable management of the claimant in line with business and operational needs. There was no discernible change in the claimant's treatment by his colleagues after his email of 21 March 2016.

Allegation 10 - refusal to reduce the claimant hours to 80%.

90 The respondent was a "lean organisation", with no flexibility in its staffing levels. Even the claimant excepts in his grounds of claim that, at the time the claimant sought to reduce his hours to 80%, the respondent was unable to allow his request because of staff shortages. We find that the refusal was for genuine business and operational needs.

Allegation 11 - making changes to the claimant's management and duties without adequate warning.

91 Whilst Andreas Nabor accepted in evidence that perhaps he could have notified the claimant individually of the changes in question, his failure to do so was, in our judgement, entirely innocuous.

92 In summary, to the extent that we have found above that any of the alleged acts occurred, they objectively did not amount (either individually or cumulatively) to a material breach of trust and confidence or health and safety. Therefore, whilst we accept that the claimant probably did resign in response to those matters he has listed in his grounds of complaint, they did not constitute a fundamental breach of contract and so the claimant was not constructively dismissed.

Public interest disclosure

93 We accept that the claimant email of 21 March 2016 disclosed information which the claimant genuinely believed tended to show that Peter Ye and Alid Kambwili had acted fraudulently in their application for employment with the respondent and which he genuinely believed it was in the public interest to disclose. These were, we find, reasonable beliefs. We also consider that the disclosure was made in bad faith; the motivation for making those disclosures was to gain an advantage over and/or to exact revenge against those individuals. However, that would be a matter which went only to remedy if necessary.

94 As it is, there was absolutely no detrimental treatment of the claimant as a result of his sending that email to the respondent. Instead, the respondent properly investigated his concerns and satisfied itself that they were ultimately groundless. We are satisfied that that was, as far as anybody in the respondent organisation was concerned, the end of it.

Reasonable adjustments

95 Throughout his employment with the respondent, the claimant had asthma, which we accept was a physical impairment.

96 He was taken to the emergency department of Queen Elizabeth Hospital by ambulance on 26 August 2012, having suffered an asthma attack after running out of his inhaler. His peak flow was recorded at 250 and saturations at 97%. Having been prescribed a salbutamol inhaler, prednisolone and amoxicillin, the claimant was discharged with peak flows of 600.

97 The claimant attended the emergency department of the Royal Free Hospital on 18 June 2016 in circumstances as described above.

98 On each of these occasions we find that the effect on the claimant of his asthma was such that he had significant difficulty breathing and experienced associated

restrictions on physical activities such as to amount to a significant adverse effect on the claimant's abilities to carry out normal day-to-day activities.

99 We accept, on the strength of the report by Dr Makker dated 19 October 2017 amongst other things, that these adverse effects would be present regularly if not continuously if the claimant did not routinely use his inhaler. In any event, it appears likely to us that the asthma attack in 2012 was likely at some point to recur. It follows that the significant adverse effects suffered by the claimant were long-term as defined by the Equality Act 2010.

100 Hence, we accept that the claimant was disabled throughout his employment with the respondent. However, the respondent was not aware nor could it reasonably have become aware of the claimant's disability until 20 July 2016. To that point, the claimant had resolved to keep the effects of his asthma private.

101 We are not satisfied that, in the circumstances as found above, there was any PCP applied to the claimant of failing to communicate with him individually. However, even if there was, we do not accept that it put the claimant to any substantial disadvantage compared to an employee not having asthma. Even if the claimant did in fact suffer any substantial comparative disadvantage, we do not accept that the respondent was or could reasonably have been aware of it.

102 It is not in dispute that the respondent applied its disciplinary policy to the claimant between 8 June and 14 September 2016. However, again we do not accept that the claimant was thereby placed at any substantial comparative disadvantage or that the respondent knew or could reasonably have known that he might be. In any event, we reject the suggestion that it would have been a reasonable adjustment not to investigate and address the charges in question, which arose from a manifest and inexcusable failure on the part of the claimant to comply with reasonable management instructions.

Employment Judge O'Brien

2 May 2018