Case Number: 2301194/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr P Phiri	and	Canterbury College

Held at Ashford on 25 & 26 January 2018

Claimant	Mr P Ofori, adviser
Respondent	Ms L Millin, counsel

Employment Judge Wallis

JUDGMENT

1. The Claimant was unfairly constructively dismissed by the Respondent;

2. The Respondent is ordered to pay the Claimant compensation of £7,296.12, calculated as set out below.

REASONS

Oral reasons were given at the hearing. The Respondent requested written reasons.

Issues

1. By a claim form presented on 26 June 2016 the Claimant claimed race discrimination, unfair constructive dismissal and unlawful deduction from wages. At a case management discussion on 23 August 2016 Judge Kurrein made an order for additional information.

2. At a case management discussion on 2 November 2016 he indicated that the information provided 'did not advance my or the Respondent's understanding of the basis on which the Claimant advanced his claims'. An Unless order was made.

3. At a preliminary hearing on 3 February 2017 Judge Kurrein made a deposit order in respect of the claims of race discrimination and unlawful deductions. The deposit was not paid and those claims were struck out on 10 May 2017.

4. The issues in the remaining claim of unfair constructive dismissal were set out in the Claimant's additional information schedule and confirmed and recorded at the case management discussion on 3 February 2017, as follows:-

    a Did the events in the Claimant's schedule, taken individually and/or cumulatively, breach the implied term relating to trust and confidence;

    b if so, did he resign in response to that breach;

    c was there any delay that would indicate an affirmation of the contract or a waiver of the breach;

    d if there was a constructive dismissal, was it fair or unfair in all the circumstances (the Respondent's case is that there was reasonable and proper cause for the manner in which it in fact treated the Claimant).

5. The seven matters relied upon by the Claimant (the eighth matter occurred after resignation and is therefore not relevant) are, in summary set out below. I have transcribed them in full in the Conclusions part of this decision;

    a the flawed observation on 17 November 2015;
    b the inaccurate feedback on 4 December 2015;
    c the Respondent placing the Claimant on the Capability procedure on 4 December 2015;
    d being referred to as an idiot on 22 December 2015;
    e bullying on 12, 13, 14 and 19 January 2017 in respect of observations;
    f insufficient notice given for the observation on 19 January 2017;
    g inaccurate feedback given on 22 January 2017.

Documents and evidence

6. There was an agreed bundle prepared by the Respondent, and written statements from the witnesses. I heard from the Claimant himself Mr Phillip Phiri, and then from the Respondent's witnesses Ms Lauren Anning, then Dean of Higher Education, now Executive Director Corporate Services; and Mr Nicholas Broome, a public services lecturer and coach.

Findings of fact

7. The Claimant was employed by the Respondent between 1 September 2009 and 24 March 2016 as a lecturer of motor sport engineering. His contract of employment referred to annual monitoring of performance through the Performance Review and Appraisal Scheme, a copy of which was in the staff handbook.

8. The Scheme provides for various methods of assisting employees to improve performance. One of them was to 'provide closer supervision and guidance in a structured way, temporarily or on an ongoing basis' by a process of lesson observations. It was the Respondent's case that what they had done was done only to support the Claimant to improve; the Claimant's case was that he felt bullied by the process, which was operated unfairly. I found that the Claimant did not receive all of the support that the procedure stated 'should' be included, for example reduction of teaching hours and participation in relevant training.

9. The Procedure includes flow charts which I found made it clear that if a lecturer scored 'immediate cause for concern' then the formal capability procedure began. At page 119 of the bundle the flowchart shows that the result of such a score refers to 'formal capability procedure. Stage 1 following 1st re-observation'. At page 128 of the bundle, the narrative procedure provides that 'A teacher whose observed session does not meet the (required standards) is deemed to be an immediate cause for concern. This triggers the Formal Capability Procedure which starts with a formal re-observation within 4 weeks following support and a performance improvement plan completed with the section manager.' It continues 'If the re-observation shows improvement in the profile achieved then the Formal Capability Procedure is concluded'.

10. I found that the formal procedure was instigated by the finding that the Claimant's score of 'immediate cause for concern, and so the process should have been followed. That would include a meeting with him after the first re-observation arranged formally at which he could have been accompanied. In fact, there was a letter in the bundle referring to such a meeting, but the Respondent's evidence was that it was never sent and the Claimant confirmed that he had never received it. I noted that in fact the Claimant resigned on 24 January 2016, possibly before arrangements could be made for such a meeting, but the letter was dated before the date of the first re-observation, which suggested that some decisions had been made prematurely. This was supported by the haste in arranging the first re-observation even before the Claimant had seen his coach for feedback, to which I refer below. I noted of course that the Claimant was unaware of the letter at the time of resignation, so it played no part in his decision.

11. I noted that Ms Anning was adamant that the formal procedure had not been triggered, but I was unable to agree in the face of the contents of the procedure.

12. To return to the chronology; the Respondent's evidence was that the Claimant's 2014 to 2015 observation resulted in a very low score, but not low enough to cause immediate concern, so no further action was taken. In the absence of any evidence of a poor record, I found that the Claimant had a good record up to the routine observation in November 2015. He had completed his teaching qualifications while working for the Respondent. I

could not accept the Respondent's submission that 'maybe his performance wasn't very good previously and it wasn't picked up', which amounted to speculation without any evidential basis.

13. Dr Shubert and Mr Pilcher carried out the 2015 to 2016 routine observation on 17 November 2015. Neither of them gave evidence at the Tribunal; I was told that they have both left the employment of the Respondent. In the trial bundle there was very little documentation of the discussions held between the Claimant and the two managers. In the absence of the Respondent's two main players, I accepted the Claimant's evidence about what had occurred, particularly where it was supported by what little documentation there was. I found that the Claimant's explanations and comments were not incorporated into the observation report. The feedback was given on 4 December 2015, outside the procedural timescale of 5 days.

14. The outcome of the routine observation was 'immediate cause for concern'. As set out above, this triggered the capability procedure and I accepted the Claimant's evidence that Dr Shubert told him that the procedure was to be followed. In fact, the Respondent's evidence was that the whole of the motor vehicle department performed to a low standard and the motor vehicle courses were identified as inadequate at a performance board meeting.

15. I noted that all of the staff in the motor department were warned orally about their performance on 20 November 2015. Targets were set with a deadline of 27 November 2015, to be audited on 1 December 2015. I was told by the Respondent that the other lecturers in the department met the targets, but I was not provided with any documentary evidence to support this. The document that I was shown appeared to pre-date the November 2015 assessment.

16. I noted that the Respondent set some targets for the Claimant and arranged for e-training of the Claimant, but he did not attend. When questioned about this, he said that he was unaware of it, despite an email sent to his work email address. I accepted the Claimant's evidence, in the absence of any challenge, that he was having problems with his email and had referred that to the IT department, but had no time to chase up because he was providing extra coaching to four students who had arrived late on the course. I noted that the Claimant was very committed to his work and became emotional when discussing it.

17. The audit of the motor vehicle team on 1 December 2015 showed that the October progression audit for the Claimant's course was incomplete for about two thirds of his course, and that there were very few actions in place. The disciplinary procedures for students were not commensurate for the attendance issues they sought to address. I was not given any details of what this meant, and the Respondent's witnesses were unable to help. It was not clear, and never became clear, how the audit process operated or how it

linked with the capability process, if at all. There were no documents in the bundle to assist and the witnesses could not help.

18. The Respondent's case was that only the Claimant was identified as requiring ongoing improvement within the department; however, an undated document showed another lecturer had also been graded 'immediate concern'. Without the date of that document (although as the Claimant was in the same category it was probably around the same time as his observation) and because the Respondent's witnesses could not help on this, it was impossible for me to decide whether the Respondent was being accurate.

19. Mr Broome, a part-time lecturer with the Respondent and an experienced coach, was appointed as coach to the Claimant. It was curious that his evidence was that he was appointed as coach in September 2015, because the routine observations took place in around November each year. He was unable to say whether he was appointed because of concerns from the November 2014 observation, or for some other reason. He contacted the wrong person and so did not make contact with the Claimant until early December 2015.

20. The Claimant did not attend a meeting with Mr Broome on 10 December 2015, but they met on 17 December. They agreed a plan of action and Mr Broome was to observe a lesson informally and then give detailed feedback. The Christmas holidays intervened, and he saw a lesson on 14 January 2016, which he described as 'very poor' with many issues arising. He gave some brief feedback to the Claimant and arranged to meet for detailed discussions on 21 January.

21. There was a dispute about what occurred on 22 December 2015 at a team meeting. I found that the Claimant had, in completing a form, referred to his practice, when at school, of leaving early. Somehow there was perhaps a miscommunication between Dr Shubert and Mr Pilcher about this, which led to Mr Pilcher telling the team that 'only an idiot' would write that on a form, because he thought it was a reference to leaving work early. I accepted that the Claimant would have known that the reference, albeit misunderstood, was to what he had written, but I found that the others present would not have known that. I accepted the Claimant's evidence that he spoke to Mr Pilcher about this and received an apology. I was satisfied that this was a relatively trivial incident, but I could understand that the Claimant, already feeling that he was being treated unfairly, was sensitive about this.

22. Meanwhile, Dr Shubert carried out two or three Learning Walks in the Claimant's lessons between 12 and 14 January 2016. The procedure states that the 'walk ins', where senior managers drop into lessons for 10 to 15 minutes, are informal; that the 'walkers' should 'engage and interact with the session… and talk directly to students'; make notes; make recommendations; and 'timely feedback must be provided for tutors via a brief email to thank

them, giving a short bullet point summary of the strengths and suggested areas for improvement'.

23. I accepted the Claimant's evidence that Dr Shubert did not interact with the session, and took notes but gave the Claimant no feedback. There was no documentary evidence of any feedback shown to me. I found that the manner in which these 'walk ins' were conducted was not supportive, but intimidating, particularly when the Claimant was already within the capability procedure.

24. I accepted the Claimant's evidence that during the observation process Dr Shubert had suggested to him that if he was not happy he might like to resign, and that if he did the Respondent might waive his liability to repay training fees. In fact, they did not, when he resigned. The date of her suggestion was not clear, but I found that it was probably at the feedback on 4 December 2015. Whether it was 4 December 2015 or 19 January 2016, it was at a very early stage of the capability process and I could find no reason why she would have mentioned this, unless she wanted him to leave. Dr Shubert confirmed during the grievance process that she had made the suggestion to the Claimant, having agreed it with HR. I found this even more inexplicable that a personnel professional would agree to such a tactic. Ms Anning suggested in evidence that Dr Shubert had heard a rumour that the Claimant wanted to leave, but I found that that would not justify such an approach, neither was there any reference to that 'rumour' in the notes of the interview with Dr Shubert. I found that the suggestion, and the timing of it, had a profound affect on the Claimant's confidence in his employer.

25. Shortly after 14 January Mr Pilcher told the Claimant that the first re-observation would take place on 19 January 2016. I accepted Mr Broome's evidence that he spoke to Mr Pilcher to seek a postponement, to give him time to provide feedback and support to the Claimant. I noted that this was in contradiction of the Respondent's amended response, which said that it was unclear whether Dr Shubert or Mr Pilcher knew of the request; it was clear that they, or certainly Mr Pilcher, did know. I found it most unlikely that he would not have told Dr Shubert about the request.

26. The request was refused. I found that this was contrary to the Respondent's expressed intention to support the Claimant to improve his performance. There appeared to be little point in appointing a coach to work with the Claimant, and then not give him time to provide feedback and assistance, particularly when the coach himself considered that a postponement of the observation was warranted.

27. I found that the Claimant was unaware that the request had been refused and so he was taken by surprise when Dr Shubert and Mr Pilcher attended his lesson on 19 January 2016. The lesson did not go well; the Claimant's evidence was that two members of staff who normally provided assistance were absent, and this, with a challenging group, made things particularly difficult. There was no reference to the absence of staff in the observation

report. I accepted the Claimant's evidence that the feedback was negative and that his comments were ignored and not put into the report.

28. The Claimant considered matters over the weekend and wrote a letter of resignation, which he sent by email. He said 'I will like to tender in my resignation with immediate effect as the sequence of events in the department from November up to recent weeks have made my position here as a lecturer untenable. I have been unfairly treated by the college in certain ways and this has resulted in a severe work-related stress and anxiety which always gets to a boiling point just before I get to the college. Please accept this resignation to afford me the opportunity to rebuild my life. I will be coming in on Friday to hand in a signed copy of this email, my college keys and other items. Yours faithfully Phillip Phiri.'

29. The Respondent held an exit meeting and suggested that the Claimant consider changing his mind, but he decided not to do so. After a brief period of sick leave, he returned to work in order to work his notice. Deductions were made from his final salary and accrued holiday pay in respect of the training fees.

30. The Claimant presented a grievance which was investigated by Ms Anning. She interviewed Dr Shubert and Mr Pilcher; there are brief notes of their interviews in the trial bundle. The grievance was not upheld, but the Claimant was not told the outcome.

Submissions

31. On behalf of the Respondent, Ms Millin produced a written skeleton argument, which I adjourned to read, and made a number of oral submissions. She submitted that the Claimant had not shown that the Respondent's conduct went to the root of the contract. She accepted that the Respondent had not followed the procedure rigidly, but even if that was unreasonable it was not a fundamental breach.

32. She submitted that the Claimant had been provided with support, and that it may be that his performance had previously not been very good, but had not been picked up. She suggested that the Claimant did not like criticism. There was reasonable and proper cause for the Respondent's conduct. He was treated courteously and given support.

33. She submitted that even if there was a breach the Claimant waived the breach and affirmed the contract by working his notice, because most people walk out. There was no evidence that the 'idiot' comment was directed at the Claimant.

34. Ms Millin submitted that if there was a dismissal, a fair procedure would have resulted in the same outcome. The Claimant contributed to his dismissal 100% because he did not do the etraining and he missed the meeting with Mr

Broome on 10 December. He did not follow the Acas code because he did not present a grievance before he resigned.

35. On behalf of the Claimant, Mr Ofori submitted that the Claimant was not given the opportunity to improve. There were breaches in the procedure. His hours should have been reduced in accordance with the procedure, and they were not. In fact, his workload increased. It was a stressful period without any clarity. There was no feedback, apart from after the two observations, and that was harsh feedback, not constructive as required by the policy. It was conduct likely to destroy confidence. His request for a postponement was refused. There was intense observation and walk ins.

36. He submitted that Mr Pilcher knew that the Claimant had made a comment about leaving early, so the 'idiot' comment was directed at him. It was the combination of all these things which was fundamental and damaged the relationship.

37. He considered that if the Claimant had presented a grievance, it would have made the situation worse. A fair procedure would not have led to dismissal; the Claimant had a good record and could have improved further with support. He did not contribute to the dismissal, he took on extra work, unaware that this may have affected the process as he was not clear about the process.

The Law

38. In a claim of unfair constructive dismissal, an employee resigns in response to a fundamental breach of a term of their contract of employment by the Respondent. The Claimant must show that there had been a fundamental breach of an express or implied term of that contract. The test is whether or not the conduct of the "guilty" party is sufficiently serious to repudiate the contract of employment. In **Western Excavating (ECC) Limited v Sharp [1978] ICR 221**, Lord Denning said

"if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intended to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

39. In the case of **Woods v WM Car Services (Peterborough) Limited [1981] IRLR 347**, the Employment Appeal Tribunal said that it was clearly established that there was implied in a contract of employment a term that the employer would 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 a

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.

40. That test was confirmed in the case of **Malik v BCCI [1997] IRLR 462**, by the House of Lords.

41. It is recognised that individual actions taken by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust and confidence, thereby entitling the employee to resign and claim constructive dismissal (see **Lewis v Motor World Garages Limited [1985] IRLR 465**).

42. In the case of **London Borough of Waltham Forest v Omilaju 2005 IRLR 35**, the Court of Appeal held that a final straw, if it is to be relied upon by the employee as the basis for a constructive dismissal claim, should be an act in a series whose cumulative effect amounts to a breach of trust and confidence. The act does not have to be of the same character as the earlier acts, and nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the final straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be the final straw, even if the employee genuinely, but mistakenly, interprets it as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

43. In the case of **Bournemouth University v Buckland (EAT0492/08)**, the EAT confirmed the test in the case of **Malik v BCCI,** that to prove an alleged breach of the implied term of mutual trust and confidence, the employee must show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence. The Court of Appeal also confirmed that once a breach has occurred, it is not possible to remedy it. The Court endorsed the four-stage test offered by the EAT, as follows; -

    (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the 'unvarnished' Malik test should apply;
    (ii) if, applying the principles in Sharp, acceptance of that breach entitled the employee to leave, he has been constructively dismissed;
    (iii) it is open to the employer to show that such dismissal was for a potentially fair reason;
    (iv) if he does so, it will then be for the tribunal to decide whether dismissal for that reason, both substantively and procedurally, fell within the band of reasonable responses and was fair.

44. Once a fundamental breach has been proved, the next consideration is causation - whether the breach was the cause of the resignation. The employee will be regarded as having accepted the employer's repudiation only if the resignation has been caused by the breach of contract in issue. If there is an underlying or ulterior reason for the resignation, such that he would have left the employment in any event, irrespective of the employer's conduct, then there has not been a constructive dismissal. Where there are mixed motives, the Tribunal must decide whether the breach was *an* effective cause of the resignation; it does not have to be *the* effective cause.

45. The third part of the test is whether there was any delay between any breach that the Tribunal has identified, and the resignation. Delay can be fatal to a claim because it may indicate that the breach has been waived and the contract affirmed. An employee may continue to perform the contract under protest for a period without being taken to have affirmed it, but there comes a point when delay will indicate affirmation.

46. If it has been established that there was a constructive dismissal, the last part of the test is whether it was fair or unfair in all the circumstances.

47. It is useful to note two other decisions. In **Morrow v Safeway Stores plc [2002] IRLR 10**, it was confirmed that any breach of the implied term of trust and confidence is always to be viewed as fundamental.

48. In **Croft v Consignia plc [2002] IRLR 851**, the EAT held that "the implied tem of trust and confidence is only breached by acts or omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach is very much left to the assessment of the Tribunal as the 'industrial jury' ".

49. With regard to remedy, section 119 of the Employment Rights Act 1996 sets out the provisions relating to the calculation of a basic award. It can be reduced in certain circumstances which are set out in paragraph 122; those are not relevant in this case.

50. The compensatory award is calculated pursuant to the provisions of section 123 of the Act. It shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. That award can also be reduced in certain circumstances.

51. The House of Lords decision in the case of *Polkey* provided in summary that an employer cannot elude a finding of unfair dismissal by pleading that a failure of procedure made no difference to the outcome of the dismissal process. However, in such cases the Tribunal is entitled, when assessing a

compensatory award, to consider whether a reduction should be made on the ground that the lack of a fair procedure made any practical difference to the decision to dismiss. In King & Others v Eaton Ltd (No. 2) [1998] IRLR 686, the Court of Session held that, in considering the question of what would have happened had the unfairness not occurred, making a distinction between the procedural and the more genuinely substantive will often be of some practical use. If there has been a merely procedural lapse or omission, it may be relatively straightforward to envisage what the course of events might have been if procedures had stayed on track. If, on the other hand, what went wrong was more fundamental, and seems to have gone to the heart of the matter, it may well be difficult to envisage what would have happened in the hypothetical situation of the unfairness not having occurred. In that case it was said that the Tribunal could not be expected to embark on a sea of speculation.

Conclusions

52. I began by noting that although the Respondent's witnesses had tried to assist with their evidence, they had no knowledge of important and relevant parts of the chronology of events. Ms Anning had been unable to find much documentation to assist her investigation. Much of the Claimant's evidence was therefore unchallenged and I concluded that it was credible; to some extent it was supported by Dr Shubert's email to a colleague, and the notes of her interview with Ms Anning.

53. I concluded that the Respondent did not follow the procedure in respect of timescales for feedback, and his comments were not included in the feedback report. I concluded that this failure, coupled with the early suggestion that he consider resignation (with the misleading 'hint' that training fees might be dropped – I noted that the Claimant did not know that was misleading at the time, but I concluded that such a hint served to emphasise the seriousness of the suggestion) and the intense scrutiny of his lessons combined to erode trust and confidence from an early stage of the process. That erosion would inevitably be likely to damage the employment relationship.

54. Turning to the issues: the first was to consider whether the events set out in the Claimant's schedule, taken individually or cumulatively, breached the implied term of trust and confidence. The first incident relied upon by the Claimant was '17 November 2015. The observers left observation before the session was completed. Feedback was given late and did not reflect the session in its entirety. Claimant comment on the oral feedback was not taken into account in the final feedback report. This is not in line with Department of Education Teacher Appraisal and Capability policy and National Union of Teachers observation guidelines'.

55. In the absence of any evidence from Dr Shubert and Mr Pilcher I accepted the Claimant's evidence that the feedback was late and his comments were not included in either of the feedback reports. I concluded that the failure to do so suggested to the Claimant, not unreasonably, that the Respondent had a hidden agenda about the termination of his employment. I concluded that that was the start of the erosion of trust and confidence.

56. I concluded that the erosion was compounded by Dr Shubert's suggestion to the Claimant that he should consider resignation, with a hint that teaching fees might be waived if he did so. To make such a suggestion at such an early stage of the capability process, without any foundation, would, I concluded, be likely to seriously damage the employment relationship.

57. I could find no evidence that the observations themselves were flawed, as suggested by the Claimant, but clearly the feedback was flawed.

58. The Claimant's second issue was 'On 4 December 2015 oral and written feedback was given on the same day and about three weeks after the observation. The feedback was inaccurate, did not reflect the session that was observed, and failed to consider the Claimant's comments'. I have already set out my conclusions about the feedback. With regard to the timing of the feedback, I concluded that the time limits in the Respondent's procedure were breached.

59. The Claimant's third issue was that ' On 4 December 2015 the Respondent put the Claimant under capability procedure without any appraisal period or formal notice. He was not asked to be accompanied by a work place colleague to the capability meeting as stipulated. He was set targets to improve without sufficient opportunity or time for improvement.'

60. I had found that the Respondent's procedure provided that if a lecturer was assessed as an 'immediate cause for concern', then the capability procedure was automatically instigated, beginning with a first re-observation. It was not clear why this clear reading of the procedure was disputed by the Respondent's witness Ms Anning. However, the Claimant's suggestion that he should have had notice was incorrect, and so there was no breach in that regard. Good practice might suggest that the process be confirmed to the Claimant in writing, so that the position was clear, but that in itself was not a breach.

61. It was clear from the flow chart setting out the support to be given to a lecturer who was an 'immediate cause for concern' that the Claimant was not provided with the full range of that support. I concluded that that was a breach of the procedure.

62. The Claimant's fourth issue was that 'On 22 December 2015 abuse and insult. The Respondent breached the express and implied contract to show respect to employees. The Respondent called the Claimant 'idiot' over

inaccurate information. The Respondent had every opportunity to clarify the information before verbally abusing the Claimant but chose not to.'

63. I heard no evidence from Mr Pilcher about this. I accepted that the Claimant was upset by the comment, but on balance I was satisfied that it was a general comment, albeit that the Claimant knew that it referred to what he had written; his colleagues did not know that. When he complained, there was an apology.

64. The Claimant's fifth issue was that 'on 12, 13, 14 and 19 January 2016 there was bullying and intimidation by the Respondent. Intense teaching session observation and lesson walk-in in an intimidating atmosphere intentionally created to cause fear, apprehension and panic.'

65. I did not hear from Dr Shubert, and in the absence of any challenge I accepted the Claimant's evidence that she carried out a number of walk-ins between 12 and 14 January 2016 and did not follow the walk-in procedure, did not interact with the session and did not provide timely (or any) feedback.

66. The Claimant's sixth issue was that 'On 19 January 2016 there was a failure to give the Claimant adequate notice to prepare for the observation and turned up for the observation when the Claimant was not expecting to be observed. There was no agreement following cancellation of the formal capability observation.'

67. I noted that the Respondent had appointed a coach for the Claimant, but gave him no opportunity to benefit from that appointment. Mr Broome, an experienced coach, considered that the first re-observation should be postponed so that he could provide feedback and support to the Claimant. There was no evidence from the Respondent as to why that request had been refused. I accepted the Claimant's evidence that he was unaware that the request had been refused and that he was taken by surprise on 19 January. I concluded that that was a breach of the procedure and of fairness generally.

68. The Claimant's seventh issue (and last, because the eighth took place after the resignation) was that 'On 22 January 2016 feedback was inaccurate, judgmental, failed to recognise any strengths in the Claimant. Dr Shubert did not seem to understand the session she observed. She failed to add the Claimant's comments.'

69. I have already set out my conclusions about the feedback. I concluded that it was a breach of fairness to omit any reference to the Claimant's comments or the lack of staff at the session on 19 January.

70. Having considered each of the Claimant's issues individually, the next issue was to decide whether either individually or cumulatively they amounted to a breach of trust and confidence. I concluded that many of the issues could not, individually, be described as a fundamental breach. However, the cumulative

effect of the Respondent's conduct, as set out in that list, was a breach of that implied term. The context of the Respondent's conduct was that the Claimant had been working there for six years without any problems and then suddenly, as far as he was concerned, there was an intense and negative assessment of his work, without the provision of any time to benefit from any support.

71. I accepted that an employer is entitled to monitor performance, and challenge poor performance. However, that should be done by following the agreed procedure and allowing an opportunity to improve. I acknowledged that the Respondent was at the start of the process, but the way it was handled between November and January indicated to the Claimant that there would be only one outcome - his dismissal, if he did not resign.

72. With reference to the next issue on the case management order, I concluded that the Claimant was entitled to resign because of the Respondent's conduct, and in fact did resign in response to that breach. He did not delay so long so as to affirm the contract or waive the breach. I did not accept the Respondent's suggestion that arguably he affirmed the contract by working his notice; not many people can walk out of a job without another one lined up.

73. I concluded that there was no reasonable and proper cause for the manner in which the Respondent treated the Claimant. The Respondent's conduct went to the root of the contract and was a fundamental breach of trust and confidence. I concluded that the Claimant could not trust the Respondent to follow the procedure in a fair manner and support him as required. I concluded that the Respondent's conduct had destroyed the Claimant's confidence in his employer.

74. I concluded that there was a constructive dismissal and that it was unfair in all the circumstances.

75. With regard to Polkey, I noted that the Claimant was a very dedicated employee, demonstrated in particular by working his notice in order to assist the students. He had relatively long service with the Respondent. I concluded that had a fair procedure been followed he would have understood the concerns and reacted positively to the support of his coach by improving his performance.

76. It would not therefore be appropriate to reduce any award under this heading.

77. With regard to contributory conduct, having accepted the Claimant's evidence that he made a number of comments and gave explanations about his lessons which were not included in the feedback, some of which may have mitigated some of the criticisms, I concluded that there were no grounds for finding that his conduct contributed to the dismissal. Alternatively, I concluded

that any such contribution was de minimis given that his performance had previously been good.

78. With regard to whether the Claimant should have presented a grievance before resigning, and whether this attracted a penalty for failing to follow the Acas Code, I concluded that because his trust and confidence in his employer had been destroyed, it was not unreasonable that he had not done so.

Remedy

79. Having announced the decision, I indicated that I would proceed to hear evidence about remedy. Ms Millin protested that this would prejudice the Respondent as the Claimant had provided few details of his losses, attempts to mitigate and so on. She asked me to make a note of her objections, which I have done. I decided that the remedy part of the hearing should proceed, taking into account (i) the matter had been listed for liability and remedy, some months previously; (ii) the Respondent had received the schedule of loss several months before this hearing and so had ample time to seek further information from the Claimant and had not done so; (iii) delay would prejudice the Claimant more than the Respondent – he was entitled to his award; (iv) the schedule of loss indicated that he had obtained new employment and largely mitigated his loss, so it would not be proportionate to return on another day to consider remedy.

80. I heard evidence from the Claimant. He amended the dates in the schedule of loss. He had started his new job on 24 April 2016, not March as shown. There was some confusion about the pension loss, but ultimately that was agreed as being for a period of 20 weeks before he joined the scheme in place at his new job, at £1,903.80. He also confirmed that the figures relating to the wages in his new employment were net, and this meant that he was earning more than he had earned with the Respondent.

81. After his evidence I agreed to the Respondent's request for a short adjournment. Upon their return, the Respondent confirmed that the basic award was agreed at £3,076.60. I found that the Claimant had mitigated his loss and that the only loss of wages occurred during the month in which the Claimant looked for work, and that was £1,815.72.

82. I awarded loss of statutory rights at £500. The Claimant questioned whether he was entitled to future loss. I explained that he was not, partly because he had not claimed this in his schedule of loss, but mainly because having obtained new employment, the fact that it had ended was not the responsibility of the Respondent and so they were not liable for any loss arising. He had not produced any evidence to show, for example, that a fixed term job was the only one available to him at the time and/or that it was the only reasonable mitigation available.

83. Accordingly, I ordered the Respondent to pay the Claimant compensation for unfair dismissal of £7,296.12. The Recoupment Regulations did not apply.

Employment Judge Wallis
6 February 2018