EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Napper	**v**	The Best Connection Group Limited

Heard at: Cambridge **On:** 4 January 2019

Before: Employment Judge Tynan

Appearances
For the Claimant: Ms M Renaud, Free Representation Unit
For the Respondent: Mr D Maxwell, Counsel

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

RESERVED REASONS

1. The respondent is an employment business. The claimant worked for the respondent as a Sales Consultant at its Milton Keynes office. He commenced employment with it on 9 September 2014. His employment ended on 29 September 2017.

2. The claimant presented a claim form to the Employment Tribunals on 19 December 2017. Although the claimant refers in his claim form to having acute anxiety and depression, his sole claim is that he was unfairly constructively dismissed by the respondent. The respondent denies that it breached the express or implied terms of the claimant's contract of employment, alternatively that any breaches amounted to a repudiatory breach of contract, and it further denies that the claimant resigned as a result of any breach(es) of contract by it. Without prejudice to its various denials, the respondent contends that in the event the claimant is found to have been unfairly constructively dismissed any compensation awarded to the claimant should be reduced to that his conduct was a significant contributory factor in his dismissal. In his submissions Mr Maxwell stated that the respondent no longer contends that a *Polkey* reduction should be

made i.e, to reflect that the claimant would or might have been dismissed by the respondent in any event.

3. The claimant gave evidence in support of his claim. He made two written statements; one dated 7 March 2018, the second dated 10 July 2017 (though I assume intended to be dated 10 July 2018). He also submitted written statements by Mr Graham Wyllie and Mr Alexander Moore. Mr Moore attended tribunal and gave evidence but Mr Wyllie did not. Neither statement assists me in making findings and reaching a conclusion on the issues in these proceedings. Mr Wyllie and Mr Moore's statements deal with what they claim was their respective experience of working at the respondent, but their evidence has no bearing on the issues that I have to decide in this case and as such I attach no weight to their evidence.

4. On behalf of the respondent, Mr Maxwell objected to the claimant's second supplemental statement being admitted in evidence. He referred to the Case Management Order issued on 5 January 2018 in which the parties had been warned that no additional witness evidence would be allowed at the hearing without the permission of the tribunal. I concluded that the interests of justice and balance of prejudice and hardship justified admitting the statement in evidence. The claimant had served his original witness statement at a time when he was unrepresented. The supplemental witness statement was subsequently prepared with the assistance of the Free Representation Unit and served on the respondent in July 2018 prior to a previously adjourned final hearing. As such, the respondent has known for some months what the claimant intended to say and a reasonable opportunity therefore to prepare for the final hearing and to address any additional matters in the supplemental statement. Aside from the lost opportunity to limit the claimant's evidence, I could not identify any other prejudice to the respondent in admitting the supplemental statement, particularly given that it refers to various matters already raised by him in the course of his employment, including in his grievances.

5. For the respondent, I heard evidence from Trudy Carr, the Branch Manager of the respondent's Milton Keynes branch; her statement is dated 16 March 2018. There was no other witness evidence for the respondent, in particular I did not hear evidence from, nor was I provided with witness statements for, Mr Simon Thompson, a Senior Manager at the Milton Keynes office who was closely involved in various of the matters I have to consider, Mr David Schilling, a Director at the respondent who issued two disciplinary warnings to the claimant, or Mr Martin Recci, Group Director at the respondent, who determined a second grievance raised by the claimant and his appeal against a written warning.

6. There was a single hearing bundle comprising 179 pages of documents.

The issues in the proceedings

7. As regards the claimant's complaint that he was constructively dismissed, the claimant gave notice resigning his employment on 31 August 2017 (page 91 of the hearing bundle). It is a short letter in which the claimant wrote:

   "I feel that I am left with no choice but to resign in light of my recent experience regarding a fundamental breach of contract and a breach of trust and confidence.

   I consider this a fundamental breach of the contract on The Best Connection's part."

   Otherwise, the letter does not set out the specific matters relied upon by the claimant in resigning his employment. However, in the weeks leading up to his resignation, the claimant had submitted two grievances to the respondent and these provide important background and context. Naturally I also approach the issue having regard to the Claim Form, albeit the claimant is not legally qualified and therefore not experienced in drafting pleadings. Nevertheless, the Details of Claim at section 8.2 of the Claim Form were adopted by the claimant in his first witness statement and elaborated upon by him in his second supplemental witness statement.

8. In his skeleton argument, Mr Maxwell identifies 14 separate complaints in section 8.2 of the Claim Form, namely:

   a. on 9 June 2017 the claimant's manager said he did not want him in the work place because he had a negative effect on the team;

   b. the respondent did not conduct a formal medical assessment of the claimant;

   c. the claimant did not have a phased return to work following sick leave;

   d. the claimant returned to the same job and targets;

   e. the claimant was bullied and harassed for not meeting targets;

   f. the claimant had to take holiday in order to attend counselling sessions;

   g. on 19 June 2017, managers did not ask about / ignored the claimant's health;

   h. the respondent paid a parking fine incurred by the claimant rather than allowing him to challenge this;

i. on 28 June 2017, the claimant was required to sign to confirm that he understood the sickness absence procedures;

j. the claimant was required to attend disciplinary hearings in connection with time keeping and attendance;

k. the claimant's disciplinary hearings were dealt with by managers whom he objected to;

l. the claimant's grievances were not dealt with;

m. the claimant received disciplinary warnings; and

n. the claimant had clients removed.

Whilst this provides a convenient structure within which the Claim can be considered, as noted above I also have regard to the contemporaneous documents and evidence around the time of the claimant's resignation and obviously the parties' oral evidence at tribunal in reaching a conclusion as to the matters that were in the claimant's mind when he resigned his employment.

9. In the course of her submissions, Ms Renaud invited me to find that the respondent caused the claimant to become ill in 2017 with anxiety or an anxiety related condition. That is not a finding I am in a position to make on the evidence available to me, nor indeed is it necessary for me to make such a finding given that the claimant's complaints relate to the period after he became ill. He did not resign because he had become ill through work, but because of the respondent's alleged treatment of him, including its alleged lack of concern for his health and well being when he returned to work following a period of sickness absence.

Findings

10. On the respondent's own evidence, the claimant had a satisfactory attendance record from September 2014, when he joined the company, to May 2017 when he became ill with anxiety related issues. As Ms Carr noted in her evidence, there were some issues with regards to the claimant's attitude to his work, his focus and work output, but having regard to the personal records at page 104 of the hearing bundle, these issues were minor and must be seen in the context that he was working in a sales focused role and environment and that his performance overall was positive. With the benefit of hindsight, the final two observations in the personal records, dated July and October 2016, may have been an indication of the issues to come. Amongst other things, I note that time-keeping issues were identified in October 2016 and that the claimant's time-keeping was discussed with him on 23 October 2016.

<u>The claimant's initial sickness absence and return to work on 9 June 2017</u>

11. The claimant self-certified sick on 4 May 2017. When he subsequently returned to work his declared reason for absence was anxiety. The claimant had left his workplace at lunchtime on 3 May 2017 and had not returned in the afternoon. He was sufficiently unwell that he was unable to contact the respondent. Instead, his girlfriend messaged the respondent on 3 May and then again on 4 May to inform the respondent that the claimant was *"in a bad place"*. She referred to the claimant as suffering with depression and anxiety. I accept the respondent's evidence that this was the first time it had been made aware that the claimant may have mental health issues. By a letter dated 4 May 2017 to the claimant, Mr Recci of the respondent reminded the claimant of the sickness absence reporting procedure. Whilst I can understand his preference that the claimant or his girlfriend telephone the office with an update rather than simply message the respondent, in my judgment the letter lends an impression that the respondent's initial focus was on its own absence reporting procedures rather than the claimant's health. Although Mr Recci did express concern for the claimant's health he went on in the letter to request that the claimant either telephone Mr Thompson or Mrs Carr or that the claimant report to work by Monday 8 May 2016. The letter does not state in terms that the respondent might support the claimant in his recovery nor does it indicate that the company wished to learn more about any mental health issues which he was then experiencing.

12. Facebook Messenger messages at page 94 onwards in the hearing bundle evidence that Ms Carr expressed concern for the claimant and a desire to see what she could do, *"to ease his anxiety"*.

13. The claimant remained unwell and his ongoing absence was covered was by two statements of fitness for work, the second of which certified him unfit to work until 8 June 2017. At 12:49 am on 9 June 2017, the claimant messaged Ms Carr to say that he had a medical review that morning and would be in the office by 10:15 am or 10:30 am at the latest. Other than the timing of his message, sent late at night, there was nothing else to indicate that anything may be amiss. In the event, the claimant did not arrive at work until midday on 9 June 2017. His evidence at tribunal was that he was delayed at his Doctor's surgery and that poor mobile reception at the surgery had prevented him from alerting the respondent. The respondent's evidence, which I accept, is that the claimant was visibly distressed on arrival at work and appeared *"dishevelled".* Mr Thompson understood the claimant to be saying that he was hearing voices in his head. The claimant's explanation at tribunal is that his level of anxiety was sufficiently elevated that it was intruding into his thoughts and making concentration difficult. I accept that he was not paranoid and that he was not hearing voices in his head. However, I think it is highly unlikely that he was in fact fit to return to work on 9 June 2017.

14. Given the claimant's evident distress, Mr Thompson went to seek advice from Mr Schilling whilst Ms Carr remained with the claimant. She sought to distract him by making conversation about his family. When Mr Thompson returned he suggested to the claimant that he did not appear to be fit for work. In my judgment that was, in the circumstances, a reasonable

suggestion for him to make. The claimant alleges that Mr Thompson told him he did not want him there because he would have a negative impact on the team. Although Mr Thompson did not give evidence, Ms Carr denied that this had been said. I prefer Ms Carr's account. I think the claimant's perception and recollection of what was said is likely to have been impacted by his distress and elevated anxiety. Faced with an employee who had arrived at work at least one and a half hours later than expected, following a five week absence, who appeared dishevelled and in a heightened state of anxiety, and was thought to be reporting voices in his head, Mr Thompson reasonably suggested to the claimant that he return to see his GP, explain how he was feeling and secure more information about a possible phased return to work.

15. During his meeting with Mr Thompson and Ms Carr on 9 June 2017, the claimant also told them that he was attending counselling sessions on a Monday morning and that he wished these sessions to continue; meaning he would effectively be unable to work on a Monday morning if the counselling sessions continued. Whilst it may be that some employers would grant their staff paid leave to attend counselling, there is no statutory right to paid leave in such circumstances. Mr Thompson and Ms Carr did not in my view act unreasonably when they told the claimant that he would have to take holiday or unpaid leave in order to attend the sessions. There is no evidence before me that the claimant was treated differently to other staff in this regard.

16. The claimant was not referred by the respondent for an occupational health assessment, or any other medical assessment, by the respondent's nominated specialist. However, the claimant had been absent from work for a relatively short period of time and there was no immediate indication that he was suffering with a long-term condition, even if his appearance and behaviour on 9 June gave cause for concern. On balance, I consider that the respondent acted reasonably at that point in time in relying upon the claimant to make information available through his doctor and to keep the respondent informed as to how his condition was progressing.

17. The claimant texted Ms Carr at 3:16 pm on Friday 9 June 2017 to say that his doctor would not provide a further sick note and indeed that his doctor had suggested he speak with Acas. This may have prompted the claimant to begin to believe that the respondent was obstructing his return to work. It is unfortunate in a case in which the claimant believes the respondent was not sufficiently concerned for his health and welfare that he criticises Mr Thompson for responding to his evident distress by encouraging him to see his doctor.

18. It seems that the claimant and Mr Thompson spoke again at some point after the claimant had seen his doctor. The claimant emailed Mr Thompson at 6.45pm on 9 June 2017 and referred in his email to a telephone conversation during which he alleged that Mr Thompson had said he would have to return to work on his normal full-time hours rather than on a phased return and that he would also be expected to work to full capacity with the

same targets. Mr Thompson did not give evidence and accordingly I have not had the benefit of hearing his account of that conversation. What I do have is a copy of an email from Mr Thompson to the claimant dated 12 June 2017 at page 46.2 of the hearing bundle. In that email Mr Thompson referred to the fact the claimant had returned to work without a Fit Note or anything else from his doctor on 9 June 2017. He wrote, "*therefore you were deemed to be fit to work, doing your usual job and responsibilities and hours*". That supports the claimant's account of what was said. The overall tone of Mr Thompson's email of 12 June is hostile and aggressive, and I find that it reflects Mr Thompson's hostility and aggression when he and the claimant spoke that afternoon. It is not the sort of communication I would expect an employer to send to a member of its staff, certainly not to an employee who has just returned to work following an extended period of sick leave in connection with possible anxiety and depression. It is unclear what triggered this change of attitude on Mr Thompson's part. The email evidences little or no concern for the claimant and was written just three days (one working day) after Mr Thompson had observed the claimant to be distressed, dishevelled and apparently hearing voices in his head.

<u>Events between 9 and 28 June 2017</u>

19. The claimant arrived at work on 12 June 2017 at 1:15 pm, having attended his counselling session in the morning.

20. Ms Carr met with the claimant on his return to the office, enquired how he was feeling and preceded to discuss his plans for the day. Her evidence was that she set a reduced target for the claimant so that he would not be overwhelmed and that she took other steps to ensure that the claimant felt included on his return. Given Mr Thompson was emphatic in his email earlier that day that the claimant would return to work on his full duties and was deemed fit to perform his usual job and responsibilities, I am doubtful that a reduced target was in fact set as Ms Carr suggests.

21. The following day, on 13 June 2017, the claimant was late for work.

22. On 14 June 2017, Mr Thompson and Ms Carr met with the claimant at his request. At the meeting the claimant produced a Fit Note from his doctor dated 13 June 2017 that recommended a two-week phased return to work (page 47 of the hearing bundle). It is not clear why the doctor had not provided this on 9 June 2017. The claimant's evidence is that he was told by Mr Thompson this was just a recommendation but that the respondent did not have to accept it. Whilst that would be consistent with Mr Thompson continuing to be hostile towards the claimant, I note that Ms Carr's record of the meeting (in an email to Mr Thompson, copied amongst others to Mr Schilling) is that when the claimant had handed the Fit Note to Mr Thompson he had said, "*I know you are not going to accept this*". In which case the available contemporaneous evidence is that whilst the claimant anticipated that Mr Thompson would not agree a phased return, Mr Thompson did not say that. On the other hand, Ms Carr's record of the meeting indicates that

there was no discussion of a phased return during the meeting notwithstanding the doctor's clear recommendation of such.

23. On 15 June 2017, the claimant was 15 minutes late for work and Ms Carr asked him whether there was a reason he was late. He replied, *"no*, not really". His response was unhelpful and indeed passive aggressive. It was necessary for Mr Thompson to call the claimant to remind him of the procedure to be followed if he was going to be late. I accept Ms Carr's evidence that his behaviour that day was felt to be disruptive, in that he was seen to spend time on his personal mobile phone rather than making work related calls. At some point, the claimant left the office stating he was going home as he felt sick.

24. On 16 June 2017, the claimant went to hospital with chest pains. The likely explanation is that he was experiencing ongoing acute anxiety which was manifesting itself in the form of physical symptoms. The respondent was unaware of this at the time. When the claimant returned to work the following day, Ms Carr asked him if he was all right but did not probe further. Her evidence was that she did not wish to raise his anxiety levels or upset him.

25. On 19 June 2017, the claimant came to work wearing shorts. I accept Ms Carr's evidence that she does not consider shorts, even business attire shorts, to be appropriate office attire and accordingly that she sent the claimant home to change. Ms Carr was consistent in her treatment of the claimant and I am satisfied that she was not seeking to punish the claimant for his absence or his time-keeping issues or reacting to his request for a phased return to work. Instead, she was simply applying a common standard of office attire. In the event, the claimant was away from the office for over one hour, although his home was approximately just 10 minutes away from the office.

26. One has to be careful not to judge a situation with the benefit of hindsight, but it seems to me that there were various indications that the claimant was unwell and struggling.

27. Mr Thompson emailed the claimant at 4:02 pm on Monday 19 June 2017. In his email he stated, *"We would like to support you with the recommendation from the doctor that you undergo a phased return to work".* He asked the claimant to *"let us know your proposal for a phased return"* and whether he would be fit to work until such a plan was agreed. Mr Thompson might have managed the situation more proactively, for example by meeting with and speaking to the claimant rather than simply sending the claimant an email. I appreciate that the Fit Note did not suggest the form that any phased return might take, but in my judgment it was incumbent upon Mr Thompson/the respondent to speak with the claimant and to identify and put in place a phased return. Instead, Mr Thompson's response seemed to place the responsibility back with the claimant. In particular it was unhelpful for Mr Thompson to ask the claimant whether he was fit to return pending any agreement on a phased return in circumstances where

the Fit Note itself clearly indicated the need for a phased return from the outset. And of course, by 19 June, several days had elapsed since the doctor's recommendation of a two-week phased return.

28. The following day, 20 June 2017, the claimant was five minutes late for work. Once again, he offered no explanation when Ms Carr asked him why this was.

29. The claimant was on annual leave on 21 and 22 June 2017. This leave was granted to him at very short notice. There is some suggestion that the claimant may not have been entirely straightforward with the respondent as to the reasons why he wished to take leave at short notice. However, it is not necessary for me to make specific findings in this regard. I simply note that Mr Thompson granted his request even though the respondent's policy is that holidays should normally be requested four weeks in advance.

30. At 5:57 am on Friday 23 June 2017, the claimant sent a text message to Ms Carr to inform her he would not attend work as he had food poisoning. The respondent does not seek to suggest that this was not genuine, but equally the claimant accepted at tribunal that it could have given the impression that it was a result of over indulging on his part during his two days off.

31. The claimant was absent from work again on Monday 26 June 2017 but did not report his absence or return Ms Carr's calls. The following day, 27 June 2017, he had another day of pre-booked leave. On 28 June 2017 the claimant messaged Ms Carr at 9 am stating that he had just woken up. His start time was 8 am and he arrived at work at 10:10am.

32. Having returned to work on 9 June 2017 following a five week sickness absence, the claimant's attendance over the following 14 working days may be summarised as follows:

    32.1 he failed to attend until midday on his first day back;

    32.2 he took a half-day on the second day;

    32.3 he had unexplained time-keeping issues on the third, fifth and eighth days;

    32.4 he was perceived to be disruptive on the fourth day;

    32.5 he failed to attend work on the sixth day;

    32.6 he had to be sent home to change his clothes on the seventh day and was then absent from the work place for an extended period of time;

    32.7 was on annual leave on the ninth and tenth days at short notice;

    32.8 he was sick on the eleventh day;

32.9 he was absent on the twelfth day without explanation and could not be contacted;

32.10 he was on leave on the thirteenth day; and

32.11 he was over two hours late to work on the fourteenth day.

33. On any reasonable view, even allowing for the fact he had been absent for five weeks with anxiety, this was an unsatisfactory state of affairs and one which any employer would find challenging to manage and would want to raise with an employee. On the other hand, the respondent was aware that the claimant had been unwell and, if it had reflected on the matter, might also have taken into account that the doctor's recommendation of a phased return to work had still not been progressed. There is no indication from the documents in the hearing bundle that the respondent was giving active thought to whether the claimant's pattern of behaviour might be connected to his mental health issues.

34. Ms Carr and Mr Thompson spoke with the claimant on 28 June 2017 when he came into work to explain the company's procedure with regard to lateness and absence. He was required to sign a short note that documented the company's expectations of him, namely that he (rather than someone on his behalf) would call, not text, Ms Carr between 7.00am and 7:30 am on each day of sickness and update her again at the end of each working day between 4.00pm and 4.30pm. The claimant signed the note to confirm that he understood the respondent's requirements and that he would adhere to these. They differed from the reporting requirements at clause 9 of his terms and conditions of employment (page 34 of the hearing bundle). I accept that claimant's evidence that Mr Thompson stood up during this meeting, possibly over the claimant or in a way that gave that impression, and stated more than once that the claimant was to sign the note, and I also accept the claimant's evidence that he perceived this as threatening.

35. As set out above, whilst the respondent can be criticised for certain aspects of how it managed the claimant, he has failed to substantiate his complaint that after he returned to work on 9 June 2017 he was bullied and harassed for not meeting his targets. Likewise, I am not persuaded that Ms Carr did not speak to him or that she excluded him from general conversation within the office, as he alleges, and I reject the allegation at paragraph 6.3 of the claimant's supplemental witness statement that she laughed at him in a nasty way. His evidence on these aspects did not hold up under cross-examination. The claimant was unable to substantiate his claim that Ms Carr and another member of the respondent's staff would sometimes leave the office in the middle of the day for hours to go to lunch or to go shopping. I prefer Ms Carr's evidence that she is someone who rarely takes her full lunch entitlement. She struck me in her evidence as someone who takes her job responsibilities particularly seriously and that she seeks to lead by example, setting high standards for herself and others. I conclude she may

have become a little wary in her dealings with the claimant, but do not find that this translated into silence or a lack of engagement with the claimant. I also accept Ms Carr's evidence that she applied the respondent's bonus/commission rules consistently in relation to the claimant, in the same way that she was consistent in terms of her expectations of the claimant regarding his office attire. And I accept Ms Carr's evidence that the respondent's directors considered its relationship with DHL Cadburys to be insufficiently profitable to warrant time and resource being devoted to the account; accordingly, I do not uphold the claimant's complaint in paragraph 6.1 of his witness statement that her instruction that he was not to place candidates at DHL evidences that she was seeking to sabotage his performance. Under cross-examination at tribunal the claimant also failed to substantiate his other allegations at paragraph 6.1 of his witness statement. I do not accept that Ms Carr sought to take the credit for a lead generated by the claimant in August 2017 or that Ms Carr instructed the respondent's other staff not to assist him with bookings and to avoid his clients.

<u>The first disciplinary proceedings and grievance</u>

36. On 29 June 2017, the claimant was 20 minutes late for work. He had not messaged Ms Carr to say he would be late or to explain the reasons why he was late. As a result, the respondent concluded that it should initiate formal disciplinary proceedings.

37. I have noted already that the respondent had identified time-keeping issues in 2016 and find that these were managed at that time through informal feedback. I am satisfied that it was decided to manage the issues more formally on this occasion because the claimant's pattern of absences and poor time-keeping was becoming unpredictable and more difficult to manage.

38. The disciplinary hearing was scheduled for 30 June 2107. That allowed the claimant less than one day in which to prepare for the meeting. In my judgment that was unreasonable and the claimant should have been given greater prior notice of the hearing, particularly in circumstances where the letter stated that the outcome could range from a verbal warning all the way up to dismissal (even though, in the event, that was not the disciplinary penalty that was imposed). Furthermore, whilst the letter stated that the company's concerns related to the claimant's time-keeping and attendance, his failure to follow company procedures and his general attitude, no further details of these three matters were provided in the letter. I am critical of the way in which the respondent handled the matter, which was not in accordance with the Acas Code of Practice on Disciplinary and Grievance Procedures. Paragraph 9 of the Code states that any notification of a case to answer should contain sufficient information about the alleged misconduct or poor performance to enable the employee to prepare to answer the case at a disciplinary hearing. The respondent could and should have summarised the time-keeping and attendance issues, identified the relevant procedures that were not being adhered to, and summarised the

respects in which the claimant's general attitude was said to be unacceptable. As set out below, the claimant raised this as an issue in correspondence with the respondent and he reiterated his concerns in section 8.2 of Form ET1 on the continuation sheet (page 13 of the hearing bundle). I conclude that it was a factor in his resignation.

39. The claimant attended work only briefly on 30 June 2017 when he handed Ms Carr two letters, one addressed to Mr Schilling and the other addressed to Ms Carr and Mr Thompson. The former was a letter of grievance. Having handed her his letters he told Ms Carr that he was going home. She offered to bring forward the disciplinary hearing but he told her that the letter addressed to herself and Mr Thompson was his response to the disciplinary issues. In her witness statement Ms Carr describes the claimant as "very agitated and shaky" on 30 June 2017.

40. In his letter to Ms Carr and Mr Thompson the claimant sought to address the three issues of concern contained in Mr Schilling's letter of 29 June 2017. For the first time the claimant stated that his time-keeping issues may be connected to a change in medication that had been prescribed for his anxiety. He was also critical of the respondent for not contacting him on the morning of 16 June 2017 when he had failed to arrive at work; his letter infers that the negative feelings that the lack of contact generated in him may have led to him to go to hospital with chest pains and breathing problems. The claimant indicated, quite properly in my view, that he could not address the allegation that he had failed to follow company procedures until he knew what procedures were being referred to. He may have surmised that it was the absence reporting procedure, but he could not be expected to speculate, he was entitled to know the respondent's specific concerns.

41. Interestingly, the claimant did not take the same position regarding his alleged general attitude. On the contrary, he seems to have accepted that there was poor attitude on his part, but attributed this to Ms Carr and Mr Thompson's poor management of him. Whilst Mr Thompson's frustrations may have manifested in some anger and hostility towards the claimant, I do not accept that Mr Thompson or indeed Ms Carr were pressuring the claimant to leave.

42. In his letter of 30 June, the claimant also said there was *"unlawful discrimination"* in the handling of his return to work and a failure to make reasonable adjustments (though there is no such claim before the tribunal). He also disclosed, for the first time, that he had experienced suicidal ideation.

43. Whatever criticisms might be made of the respondent, it would be unfair for the claimant to suggest that the respondent was responsible for the fact he felt suicidal on his return to work. I accept that the claimant did feel suicidal on his return to work in early June (even if he had not disclosed this to anyone at the respondent at the time) and, whether or not this was fair on the respondent, that by 30 June he believed the suicidal feelings he had

experienced were linked to what he genuinely perceived to be his poor treatment by the respondent. I accept that he believed he had been shown little care or support by the respondent. I am in no doubt that this would have been a very distressing period for the claimant, but the fact he was suffering acute anxiety and suicidal ideation may go some way to explain why he perceived certain events and interactions with Mr Thompson and Ms Carr as he did. But, as he accepted to an extent when questioned by Mr Maxwell, that does not mean his perception was necessarily always well-founded.

44. The claimant's grievance letter to Mr Schilling includes many of the matters referred to in the claimant's Form ET1, albeit fleshed out with a little more detail and obviously limited to events up to the date of the grievance (pages 57 and 58 of the hearing bundle). The claimant's letter contains various proposals for addressing his grievances, including that he would start work at 10 am on the Tuesday, Wednesday and Thursday of the following two weeks whilst he adjusted to the medication that was causing him to be drowsy and to struggle to wake in the mornings. He additionally asked not to work on Fridays until further notice though his letter did not say whether this request was connected to his health issues. The claimant also confirmed that he would agree a severance and set out his proposals in this regard.

45. Having left the office on 30 June, the claimant submitted a new Fit Note covering the period 30 June to 7 July 2017. The stated reason for absence was anxiety symptoms. The disciplinary hearing was re-scheduled to 7 July 2017, namely the day the claimant was expected to return to work.

46. The disciplinary hearing on 7 July 2017 was conducted by Mr Thompson, with Ms Carr present to take notes. I am critical of the respondent for allowing Mr Thompson and Ms Carr to conduct the hearing in circumstances where there was an outstanding grievance by the claimant regarding their alleged treatment of him. Whether or not the grievance was ultimately well founded, the claimant's grievance concerns directly touched upon the issues in the disciplinary proceedings and in my judgment, should have been investigated and addressed by the respondent before it could be satisfied that it was appropriate for Mr Thompson to deal with any disciplinary concerns or for Ms Carr to act as a note taker at any hearing. The claimant does not state in terms in his Form ET1 that he resigned in response to this, but, his letter to Mr Thompson and Ms Carr concluded with him objecting to their involvement and stating that the disciplinary hearing should be conducted by someone impartial. I find that the respondent's handling of the hearing on 7 July 2017 was a factor in the claimant's subsequent resignation.

47. The outcome of the hearing on 7 July 2017 was that the claimant was issued with a verbal warning. The allegations were upheld though, as with the disciplinary hearing invite letter, the respondent's letter of 7 July which confirms that the claimant was being issued with a verbal warning contains no details of the respondent's findings on the three areas of concern. The

warning was stated to remain live for twelve months. The respondent's disciplinary procedure (page 53 of the hearing bundle) does not indicate how long any disciplinary warning will normally remain live.

48. Mr Schilling did not meet with the claimant to discuss his grievance though Ms Carr's evidence at tribunal was that Mr Schilling spoke with her about the matter. Again, the matter was not handled in accordance with the Acas Code of Practice on Disciplinary and Grievance Procedures. Paragraph 33 of the Code states that employers should arrange a formal meeting with an employee to discuss their grievance.

49. The respondent's case is that a detailed decision on the claimant's grievance was issued on 11 July 2017. However, Mr Schilling did not attend tribunal to give evidence and there was no written statement from him. Ms Carr could not give evidence as to when Mr Schilling's letter had been sent. It was suggested to the claimant during cross-examination that he was not opening his post. I prefer the claimant's evidence that he stopped opening his post for a few days at most in July 2017 (I note for example that he attended a disciplinary hearing on 27 July in response to a letter sent to him on 24 July 2017). I find that he only received Mr Schilling's letter of 11 July on 25 August 2017 at the same time he received a letter dated 24 August 2017 from Mr Recci in response to his second grievance and his appeal against a further disciplinary warning. I think the most likely explanation is that the respondent realised on or around 24 August 2017 that the 11 July 2017 grievance outcome letter had not been sent and that this was the result of an administrative oversight on its part. However, having made a genuine error, I find that the respondent has subsequently improperly sought to suggest that the letter was sent to the claimant on or around 11 July 2017 when in fact it is aware it was not.

Events after 7 July 2017

50. The claimant's conduct and performance at work continued to be a matter for concern after 7 July 2017. He was absent from work on 13 and 14 July 2017 but did not make contact with the respondent to advise it that he was ill, nor did he provide a fit note in respect of these absences on his return to work. In her witness statement, Ms Carr refers to the claimant additionally being absent on the morning of Monday 10 July 2017; however, that would have been his regular counselling session.

51. I can understand and accept that Ms Carr struggled to know how to manage the situation, not least given the claimant's grievances about her. In the event, Mr Schilling wrote to the claimant on 14 July 2017. The respondent might have instigated further disciplinary proceedings given that the absences were so soon after the claimant had been issued with a verbal warning. Instead, Mr Schilling informed the claimant that the company was very concerned for his welfare and that they had tried to phone his mobile number but it gave a disconnected tone. Mr Schilling asked that the claimant either contact Ms Carr or report for work by midday on 17 July.

Notwithstanding Mr Schilling's apparent concern for the claimant, his letter concluded:

"Failure to do so will lead me to believe, and presume, that you have resigned your position." (page 67 of the hearing bundle).

Whatever the frustrations and challenges of managing the claimant, I do not consider it was appropriate to write to the claimant in those terms.

52. The claimant failed to report to work on 17 July 2017. Ms Carr's evidence was that comments were starting to be made by other members of staff who felt, rightly or wrongly, that the claimant was coming and going as he pleased. I accept Ms Carr's evidence that staff morale was being affected, though equally they would not have known the extent of the claimant's health issues or that he had previously felt suicidal.

The second disciplinary proceedings and grievance

53. On 18 July 2017, Mr Schilling wrote to the claimant inviting him to attend a further disciplinary hearing at 2:30 pm on 24 July 2017. He confirmed that Mr Thompson and Ms Carr would "also" be in attendance. Certainly as far as the claimant was then concerned, his grievances in relation to them were still outstanding. Mr Schilling's letter was based upon his previous disciplinary hearing invite letter, though on this occasion the respondent's specific concerns were set out in the final paragraph of his letter. The claimant was provided with a copy of the respondent's disciplinary code. As on the previous occasion, he was not provided with any statements or other evidence in support of the respondent's concerns, consistent with what I have already described as a lack of robustness in the respondent's approach to disciplinary and grievance issues. In the event, the disciplinary hearing did not go ahead as Mr Schilling's letter coincided with a short period during which the claimant had not been opening his post. The disciplinary hearing was therefore adjourned to 27 July 2017.

54. The hearing on 27 July 2017 was chaired by Mr Thompson, with Ms Carr acting as a note taker. Under cross-examination Ms Carr acknowledged that her and Mr Thompson's presence on 27 July could "potentially" be perceived as biased and unfair, though she was unaware that the claimant had not received a response to his outstanding grievance. Mr Schilling was not present on 27 July notwithstanding his letter of 18 July had suggested he would be. When asked by Mr Thompson why he was absent on 13 and 14 July 2017 the claimant said he had Borderline Personality Disorder, had not felt his usual self when he awoke and felt for the safety of others. The meeting minutes kept by Ms Carr record that the claimant was stuttering and mumbling at this point. The notes do not indicate that they asked the claimant if he was alright or fit to continue with the meeting. Later in the meeting the claimant stated that he was a danger to himself and others. He was asked when he had last seen his doctor and confirmed that this was not for some time. He also disclosed that he had not taken his medication for a couple of days. Ms Carr's evidence at tribunal was that there was only

very limited discussion of the claimant's statement that he had Borderline Personality Disorder and no suggestion that a medical professional should be consulted.

55. The disciplinary hearing notes (bottom of page 72 of the hearing bundle) indicate that the respondent's concerns in relation to the claimant's attitude were regarding his failure to wear a tie, a matter that had in fact been dealt with previously on 11 July and in respect of which the claimant had already received a verbal warning. Mr Thompson also asked the claimant about his alleged failure to respond to Mr Thompson's email of 9 June 2017. However, this overlooked that the claimant had sought in his grievance to engage with Mr Schilling on the subject of his working arrangements. Apart from these two issues, I cannot identify anything else in the disciplinary hearing notes that pertains to the claimant's general attitude, as the other matters discussed concern his attendance and time-keeping, and his adherence or otherwise to company procedures. At the conclusion of the disciplinary hearing the claimant was issued with a written warning. The hearing notes record that the claimant challenged Mr Thompson's finding in relation to his attitude and that he was told by Mr Thompson that this would be explained in the hearing outcome letter. That letter is at page 75 of the bundle and the explanation given to the claimant was as follows:

"…general attitude is across your whole demeanour with regards to your attitude to work and your failure to abide by basic company rules and procedures."

The explanation is both circular and unsatisfactory, and it adds nothing to the other two expressed concerns.

56. By an undated letter received by the respondent on 3 August 2017, the claimant appealed the written warning and raised a second grievance (pages 76 – 79 of the hearing bundle).

57. The claimant's second grievance was stated to be, *"a grievance against the whole of The Best Connection".* The claimant complained about the way in which a parking fine had been dealt with, which I will return to below, but otherwise the grievance is effectively either a restatement of his first grievance (pages 57 and 58 of the hearing bundle). In his letter the claimant referred to his first grievance having not been acknowledged.

58. Ms Carr gave evidence that the claimant was exceptionally rude to Mr Thompson on 10 August 2017. However, she also gave evidence that he was often muttering to himself at this time and that he came to work "*looking a mess with un-ironed shirts and on occasions had an unpleasant odour*". This suggests that the claimant was experiencing ongoing mental health issues. Questioned by Counsel for the claimant, Ms Carr accepted that the steps taken to help the claimant in terms of his health issues were limited.

59. The claimant's appeal and second grievance were acknowledged by Mr Recci on 11 August 2017. Mr Recci responded substantively to the claimant

by letter dated 24 August 2017. He did not meet with the claimant before issuing his decision, again contrary to the Acas Code of Practice on Disciplinary and Grievance Procedures. In addressing the claimant's general attitude, Mr Recci detailed alleged performance issues around the claimant's call to client ratio, an issue in respect of which there is no evidence before me that it was discussed with the claimant on 27 July 2017 and which Mr Recci certainly had not discussed with the claimant. In my judgment, Mr Recci's response on the grievance was not entirely constructive and indeed in places it comes across as aggressive. I am particularly unimpressed by the way in which Mr Recci approached the claimant's health issues. Mr Recci was critical of the claimant for suggesting in his second grievance letter that the respondent was aware of his mental health issues. Mr Recci wrote,

"We are therefore, extremely concerned that you believe that we were fully aware of your depression / mental state, when no professional body has informed us of this, which is quite an accusation, particularly when stating the fact that you were suicidal. Mental Health is something that TBC always take seriously. On the four doctor's notes that you have given us, one states anxiety and the other three, anxiety symptoms with no reference to depression or you being suicidal. This does cause us serious concern as to whether you have stated being suicidal to your doctor at any time."

60. I consider that Mr Recci's comments were ill-informed and insensitive. The claimant had informed the respondent in each of his grievance letters that he had experienced suicidal ideation. Had Mr Recci troubled to meet with him he might have found out more about this and the claimant's underlying health issues. Assuming he spoke with Mr Thompson or Ms Carr he would have been aware of the claimant's distressed and dishevelled state in early June and that he was believed to be hearing voices in his head. Ms Carr would also have been able to tell him that the claimant had been muttering at work in August and that there had been a noticeable deterioration in his personal hygiene. Assuming he read the notes of the disciplinary hearing held on 27 July 2017 Mr Recci would also have been aware that the claimant had stuttered and mumbled during that meeting and had described himself as a danger to himself and others. Rather than seeking to understand why the claimant may have been suicidal or demonstrating any empathy or understanding, Mr Recci instead wrote,

    "This does cause us serious concern as to whether you have stated being suicidal to your doctor at any time".

    That was a crass comment for him to make.

61. Mr Recci went on to state in his letter that the claimant had failed to provide a recommended working schedule to accommodate a phased return to work. That was not correct. The claimant had written to Mr Schilling on 30 June 2017 to suggest temporary changes to his working arrangements while he adjusted to his new medication and he had also asked to not work Fridays until further notice. Mr Schilling failed to respond to these proposals;

even when Mr Schilling's letter of 11 July was finally posted to the claimant on or around 24 August 2017, the letter did not address the claimant's proposed working arrangements.

62. I deal briefly with the claimant's complaint regarding the way in which a parking fine was dealt with. On 29 June 2017 the respondent's Fleet manager informed Ms Carr that the claimant had incurred a parking fine whilst driving his company car. The details were forwarded to the Milton Keynes office and Ms Carr informed the claimant about the fine and reminded him that, in accordance with the respondent's established documented procedure, the fine would be paid in the event of a second reminder and that the claimant would be charged an administration fee of £20. That is precisely what then happened. There is clear evidence at page 108 of the hearing bundle that the claimant received a copy of the respondent's Company Car Driver's Handbook when he took possession of his company vehicle in 2015. The Handbook sets out how fines will be dealt with. The respondent dealt with the matter in accordance with its Handbook and the claimant can have no complaint about this even if, which I accept, Mr Thompson was somewhat brusque with the claimant when he asked to see any documentation he had signed.

63. The claimant was on annual leave on 25 August 2017. By email dated 31 August 2017 addressed to Ms Carr, he gave notice resigning his employment. His final day of employment was 29 September 2017, though he was certified unfit for work on 11 September 2017 with work related depression and did not return to work after that date.

64. In his Form ET1, the claimant referred to the "results" of the disciplinary hearings and grievances as leading him to conclude that, *"the employer was trying to drive me out by harassing me to cause anxiety attacks".* By the *"results"* I find that the claimant was referring to both the outcome of the proceedings as well as how they had been handled. In particular, I accept that the two undated letters that the claimant handed to Ms Carr on 30 June 2017 and his subsequent undated letter of appeal and second grievance, together with his second witness statement, evidence the matters that informed his decision to resign and in this regard, as confirmed in his second witness statement, that the claimant resigned in response to the delays in the respondent's response to his first grievance and the absence of any meeting or hearing to discuss his appeal and each of his grievances.

Law and Conclusions

65. Subject to any relevant qualifying period of employment, an employee has the right not to be unfairly dismissed by his employer (s.94 of the Employment Rights Act 1996).

66. 'Dismissal', for these purposes includes, *"…where the employee terminates a 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"* (s.95(1)(c) of the Employment Rights Act 1996).

67. The claimant claims that he resigned by reason of the respondent's conduct. It is not every breach of contract that will justify an employee resigning their employment without notice. The breach must be sufficiently fundamental that it goes to the heart of the continued employment relationship. Even then, the employee must actually resign in response to the breach and to not delay unduly in relying upon the breach as bringing the employment relationship to an end. S.95(1)(c) of the Employment Rights Act 1996 recognises that an employee may elect to resign on notice in response to the employer's conduct and still be entitled to bring a claim of unfair dismissal. However, the employer's conduct must be such as to warrant summary termination.

68. It is an implied term of all contracts of employment that the parties will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to seriously damage or destroy the essential trust and confidence of the employment relationship – Malik v Bank of Credit and Commerce International S A [1997] ICR 606, HL.

69. In W A Goold (Pearmak) Ltd. v McConnell and Another [1995] IRLR 516, the Employment Appeal Tribunal held that it is an implied term of a contract of employment that the employer will *"reasonably and promptly afford a reasonable opportunity to [its] employees to obtain redress of any grievance they may have".* Subsequently, in Hamilton v Tanberg Television Ltd. the EAT suggested that W A Goold (Peermak) Ltd. is of limited scope as the case indicated that no procedure was available to the employees whereas in Hamilton the criticism was of the quality of the employer's investigation.

70. It will be apparent from my findings above that the claimant's complaints as summarised at paragraphs 8(b), (c), (d) and (i) above are well-founded. I do not consider that individually they amount to a repudiatory breach of contract. As regards the conduct and outcome of the grievance and disciplinary proceedings, I am mindful not to elevate the Acas Code of Practice on Disciplinary and Grievance Procedures so that it has contractual force and effect. Likewise, the respondent's disciplinary and grievance procedures did not form part of the claimant's terms and conditions of employment. The question is whether the respondent's handling of the disciplinary and grievance issues, as found by me, of itself or in combination with the other matters referred to strikes at the heart of the essential trust and confidence of the relationship. In my judgment it does. The claimant experienced unjustified hostility and aggression from Mr Thompson on 28 June 2017. Over the next couple of months, notwithstanding an accumulation of events which ought reasonably to have put the respondent on notice that something was seriously amiss in terms of the claimant's health, including being informed by the claimant on 30 June 2017 that he had experienced suicidal ideation, the respondent failed to explore the claimant's health issues with him or to contact his doctor or refer him to its own nominated practitioner. It failed to deal with the claimant's doctor's recommendation of a phased return to work and the claimant's own suggestions as to the form this might take. As well as being crass and

insensitive, Mr Recci's letter of 24 August 2017 illustrates just how ill-informed the respondent was in the matter of the claimant's health. Its failings in this regard were compounded by the unsatisfactory way in which it handled the disciplinary proceedings, including Mr Recci's failure to meet with the claimant to discuss his appeal against his second disciplinary warning, and also by its inept handling of his grievances. The fact that the respondent did (eventually) respond to his grievances and address his appeal against his second disciplinary warning does not, in my judgment, lessen the seriousness of the various failings which I have identified above. In my judgment, the respondent's conduct as a whole was such as to destroy the essential trust and confidence of the relationship. I consider that the respondent acted without reasonable and proper cause and that the claimant resigned in response to the breaches as found by me and did not delay in resigning such that he can be said to have waived any of the breaches.

71. In the circumstances I conclude that the claimant was dismissed for the purposes of s.95(1)(c) of the Employment Rights Act 1996. There was no reason for the respondent to treat the claimant as it did, certainly no reason within s.98(2) of the 1996 Act. In the circumstances I conclude that the claimant was unfairly dismissed.

72. The claimant's conduct in this matter is not above criticism. In particular, I have set out in my findings above a significant pattern of absences and poor time-keeping on his part over a period of three months, as well as a failure to report these in accordance with the respondent's sickness absence reporting requirements. This is undoubtedly a case in which the claimant's conduct has been a significant contributory factor in his constructive dismissal and it would be just and equitable to make a reduction in the basic award and any compensatory award to reflect such conduct. In my judgment the percentage reduction should be the same for each award. I take into account that the claimant's, at times, erratic attendance, time-keeping and absence reporting were, as I find, directly related to his ill-health. But for the claimant's health issues I would have said that there was particularly significant contributory fault on his part. I also take into account that various of his grievances were ultimately unfounded, though also acknowledge his perception of events was impacted by his health. I also have regard to the fact that the respondent sought to deal with his attendance and time-keeping issues through the imposition of lower level disciplinary warnings and that it did not fail to address his grievances entirely, even if it did not meet with him to discuss them. In all the circumstances I consider that it would be just and equitable to reduce the basic award and any contributory award by 55%. I shall list the matter for a remedy hearing at which the parties' representatives can address me further on any other matters relevant to remedy in this case. I shall make further case management orders in respect of the remedy hearing which will be notified separately.

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Employment Judge Tynan

Date: …05.03.19..…………………….

Sent to the parties on: .06.03.19.........

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For the Tribunal Office