Case No: 2301452/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr M Jones

Respondent: Hastings Insurance Services Limited

Heard at: **London South (Croydon)** **On: 12 & 13 February 2018**

Before: **Employment Judge John Crosfill**

Representation

Claimant: By his sister Ms T Jones
Respondent: Mr J Mitchell of Counsel

JUDGMENT

1. The Claimant's claim for unfair dismissal under part X of the Employment Rights Act 1996 is not well founded and is dismissed.

REASONS

1. The Claimant was, at the time of his resignation, employed by the Respondent as an "Intel Operative" researching individuals who had made or were associated with insurance claims. The Claimant says that, following complaints raised by him about a fellow employee making racist remarks in April 2016, he was singled out for poor treatment from his managers culminating in disciplinary actions during December 2016. He says that a consequence of these actions he resigned on 13 January 2017 and was entitled to treat himself as having been dismissed.

2. In his ET1, received by the Tribunal on 7 June 2017, the Claimant has brought a claim of unfair dismissal under Part X of the Employment Rights Act 1996. It is that claim that I had to determine. The parties had agreed a list of issues in advance of the hearing. That list of issues set out, in summary form, a list of the factual matters that the Claimant relied upon to establish that the Respondent was in serious breach of contract.

3. At the outset of the hearing the parties confirmed that they had agreed the contents of a joint bundle and had prepared witness statements. The

Claimant's mother had provided a witness statement but was unwell and could not attend. In addition, the Claimant provided statements from a colleague, Mr Kaminarides who had not attended to give evidence. I read both of their statements and agreed that they should be admitted in evidence and given such weight as was appropriate in the circumstances.

4. The Claimant was represented by his sister Ms T Jones who said that she was unfamiliar with the tribunal procedure. I therefore explained the procedure that was ordinarily followed by the Tribunal. In the event, Ms Jones proved herself very able indeed and presented her brother's case with great skill and moderation. Having explained the process the parties returned to their waiting rooms whilst I read the statements and the documents referred to within them. This took me until 1:15pm when the parties returned having been warned that they should have taken lunch by that time.

5. As the Claimant bore the initial burden of he called his evidence first. I heard from:

   5.1. The Claimant;

   5.2. Mr Marsh and Mr D Brady both of whom were colleagues of the Claimants and still worked for the Respondent; and

   5.3. Mr Ian Williams, who had joined the Respondent in 2016 and had been asked to investigate the Claimant's internet usage and conduct; and

   5.4. Susie Hall an HR Advisory Manager who gave evidence about her dealings with the Claimant following his attendance in the HR department on 5 January 2017; and

   5.5. Linda Conde, and HR Advisor who had advised the Claimant's managers towards the end of 2016 in relation to their concerns about the Claimant's performance and e-mail usage; and

   5.6. Graham Edwards who had investigated the Claimant's grievance after his resignation.

6. At the outset of the second day of the hearing I agreed to admit additional documents which had been omitted from the hearing bundle. These had formed "appendix 8" to the bundle of documents prepared by Ian Williams for the purposes of a disciplinary hearing.

7. At the conclusion of the evidence both parties made oral submissions. Mr Mitchell had prepared a skeleton argument together with a bundle of authorities which he had supplied as marked copies to Ms T Jones. I shall not set out those submissions in full but have had regard to what was said when reaching my decision. Regrettably, the process of hearing the evidence and submissions left insufficient time for me to be able to fairly deliberate and deliver an oral judgment. I therefore reserved my decision.

The law

8. Section 94 of the Employment Rights Act 1996 (hereafter "the ERA 1996") sets out the right of an employee not to be unfairly dismissed by her or his employer.

9. For the Claimant to be able to establish his claim of unfair dismissal he must show that he has been dismissed. Dismissal for these purposes is defined in Section 95 ERA 1006 and includes in Sub-section 95(1)(c) *"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".*

10. ***Western Excavating (ECC) Ltd and Sharpe*** **1978 IRLR 27** established that in order for the circumstances to entitle the employee to terminate the contract without notice, there must be a breach of contract by the employer, secondly that that breach must be sufficiently important to justify the employee resigning; the employee must leave in response to the breach not some unconnected reason; and that the employee must not delay such as to affirm the contract. The breach relied upon can be a breach of an express or implied term.

11. In ***Mahmood v BCCI*** **1997 ICR 607** it was confirmed that every contract of employment contains an implied term that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is implicit in the case of ***Mahmood v BCCI*** that any breach of the implied term will be sufficiently important to entitle the employee to treat himself as dismissed and the reason for that it is necessary do serious damage to the employment relationship. That position was expressly confirmed in ***Morrow v Safeway Stores Ltd*** **2002 IRLR 9**.

12. Where the breach alleged arises from a number of incidents culminating in a final event, the tribunal may, indeed must, look at the entire conduct of the employer and the final act relied on need not itself be repudiatory or it even unreasonable, but must contribute something even if relatively insignificant to the breach of contract see ***Lewis and Motor World Garages Ltd*** **1985 IRLR 465** and ***Omilaju v Waltham Forest London Borough Council*** **2005 IRLR 35**.

13. The test to be applied in assessing the gravity of any conduct is an objective one and neither depends upon the subjective reaction of the particular employee nor the opinion of the employer as to whether its conduct is reasonable or not see ***Omilaju v Waltham Forest London Borough Council*** and ***Bournemouth University Higher Education Corpn v Buckland*** **[2011] QB 323**.

14. Once there is a breach of contract that breach cannot be cured by subsequent conduct by the employer but an employee who delays after a breach of contract may, depending on the facts, affirm the contract and lose the right to treat him/herself as dismissed - ***Bournemouth University Higher Education Corpn v Buckland***.

15. The breach of contract need not be the only reason for the resignation providing the reason for the resignation is at least in part because of the breach ***Nottinghamshire County Council and Meikle*** **[2004] IRLR 703**.The employee need not spell out or otherwise communicate his reason for resigning to the employer and it is a matter of evidence and fact for the tribunal to find what those reasons were ***Weatherfield v Sargent*** **1999 IRLR 94**

16. If dismissal is established sub-section 98(1) ERA 1996 requires the employer

to demonstrate that the reason, or if more than one the principal reason, for the dismissal was for one of the potentially fair reasons listed in sub-section 98(2) of the ERA 1996 or for "some other substantial reason". If it cannot do so then the dismissal will be unfair.

17. If the employer is able to establish that the reason for the dismissal was for a potentially fair reason, then the employment tribunal must go on to consider whether the dismissal was actually fair applying the test set out in section 98(4) of the ERA 1996 which reads:

'*(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.'

18. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

"any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."

The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

Findings of fact

19. Having heard the evidence, I make the following general findings of fact. These are not exhaustive but are my primary findings of fact. I have not dealt with every contested fact but only those matters necessary for me to determine the issues that the parties invited me to decide.

20. The Claimant was recruited by the Respondent on or around 26 November 2012 as a Claims Advisor (Recovery). He was successful in that role and was later promoted twice latterly to the role of an "Intel Operative". The Job description for that role [136] describes that work as including handling and reviewing results from counter fraud controls, investigation and validation of claims, providing background information and reports. In short, what the Claimant did within his team, was to play a part in investigating the validity of insurance claims. Amongst the techniques used was searching online for information about drivers and passengers involved in road traffic accidents. Having achieved promotion to that role the Claimant was content to tread water and sought no further advancement. In addition to this employment the Claimant worked as an Osteopath.

21. The Claimant worked within a team. The work was principally "computer facing". The Claimant's team was supervised by a team leader, Olivia O'Toole

and an assistant team leader Ryan Cruikshank who in turn were managed by Dave Woods. The team, and their managers all worked in close proximity.

22. The Claimant gave evidence that in April 2016, on an away day, a fellow employee, had made remarks about policy holders which he considered were racist. A description of the policy holder included saying he was ‘a man of colour’, that he was ‘from one of those African countries, what’s the one that had the genocide?’ Finally describing Coventry as a dump. His evidence was supported by the untested statements of Chris Kaminamdes and Claud Woodman. Ryan Cruikshank acknowledged during the Grievance procedure that the remarks had been made. I conclude that the Claimant’s account of the events in April 2016 is correct.

23. The Claimant gave evidence that he considered that these remarks were unacceptable and was concerned that a manager, Dave Wood, was present who took no steps to intervene. He was further concerned that the statements were made in front of Claud Woodman, who comes from Namibia and Chris Kaminamdes who is mixed race. The Claimant said that he ‘repeatedly expressed my disgust concerning the comments made’ to Olivia O’Toole and Ryan Cruikshank. This last fact was not accepted by the Respondent. That said the Respondent did not call any direct evidence from either manager. It was explained that Olivia O’Toole was on maternity leave.

24. The Claimant was taken by Mr Mitchell to a series of documents evidencing one-to-one or appraisal meetings between himself and Olivia O’ Toole or Ryan Cruikshank [64, 65, 89, 221 and 223]. It was put to the Claimant that in none of these meetings was it recorded that he had made any mention of this matter. I accept that that is the case. It is also the case that those meetings were not grievance meetings but management meetings to look at the Claimant’s standards of work. I do not consider it surprising that they contain no record of a complaint.

25. I note that whilst Claud Woodman and Chris Kaminamdes both recall the events of April 2016 neither of them suggests that they were sufficiently affronted to join the Claimant in bringing a complaint. It was not the Claimant’s case that a formal grievance was lodged. When Ryan Cruikshank was interviewed in the course of the grievance process he has a clear recollection both of the incident itself and of the matter later being discussed in general terms by “Chris” and “Beth”. He suggested that Chris found it funny but that Beth was shocked. He said that he did not know if any action had been taken as the individual worked in another team.

26. Whilst I consider that the Claimant was an honest witness I find it more likely than not that he is still struggling to comprehend the events at the latter stages of his employment and is looking back in the hope of finding an explanation. That said, I accept that the Claimant would have mentioned the events of the away day to his managers as did others. I conclude that this would not have been raised “repeatedly” although perhaps more than once. I find that he did not go any further then express his personal discomfort about the language used. I consider whether this marked a turning point in the relations with his managers below.

27. The Claimant says that from about this time the attitude of his managers changed and he cites a number of instances where he was criticised. The first

matter relied upon by the Claimant is that he says that Ryan Cruikshank singled him out for excessive criticism of his work. In that regard he was supported by Mr Brady who gave examples of Ryan Cruikshank being curt with the Claimant. Again the Respondent called no evidence to rebut these suggestions and I find that it was more likely than not that on occasions Ryan Cruikshank was curt with the Claimant. In fact when interviewed as a part of the later grievance process, Ryan Cruikshank frankly accepted that on one occasion, which corresponds with Mr Brady's statement, he rolled his eyes when approached by the Claimant. He says that he had recognised that he had been impolite and apologised promptly when asked to do so by Olivia O'Toole.

28. The Claimant says that he was criticised for being 1 or 2 minutes late starting his shift when he got a coffee from the canteen before starting work. The Respondent does not dispute that this was the case but suggested that the Claimant was expected to start work on time. The Claimant suggested that others were more leniently treated during the day. The issue is recorded in an "Informal coaching & guidance" record dated 19 August 2016 [221]. That shows that the Claimant accepted that he had been late on occasions. He blamed the canteen staff for being slow. He also accepted that he had failed to "click" the system indicating his whereabouts on occasions. The document does disclose a reasonable basis for encouraging the Claimant to improve his timekeeping habits.

29. The next matter complained of is that the Claimant says that he had put a lot of work into "operation Cindy" during the summer of 2016. The Respondent agreed that he had worked on this but said that he was not a major contributor. The Claimant is aggrieved that his colleagues Beth Murray and Martina Spencer had received an award whereas his efforts were not recognised. He says that when he congratulated Martina she indicated that his efforts also merited reward. I am satisfied that whilst the Claimant did some, no doubt valuable, work on Operation Cindy the reason why he was not offered an award was that he was not one of the major contributors. Martina Spencer was the file handler and did the lion's share of the work. I am also satisfied that the reason Beth Murray was singled out was her contribution. When Ryan Cruikshank was asked about this during the grievance process he was prepared to acknowledge that at the earlier stages the Claimant had put effort into this project but thereafter it had been scaled back to a level commensurate with other members of the team. I do not find on the evidence I have seen that the Claimant was unfairly overlooked.

30. It is clear from the 1-2-1 reports, the interview records with Olivia O'Toole, Ryan Cruikshank and Mike Winterflood and from the direct evidence of Linda Conte that there were some aspects of the Claimant's performance that were giving cause for concern in the late summer of 2016. There was no significant complaint about the quality of the Claimant's work but there was concern about the output. I have seen computer generated reports where the Claimant's average time for report writing is compared to others. On any view the Claimant can be seen to be slower than his colleagues. On 1 June 2016 the Claimant was placed on a formal Performance Review Plan. A meeting was held between the Claimant and Ryan Cruikshank to discuss his performance. The notes of that meeting show that the only matter of significant concern is the time that the Claimant is taking to write reports. Two further issues are alluded to in the form but then are not discussed further in the narrative notes. It is further clear from the reports for the whole year that, whilst there was a marked

improvement in the Claimant's times in June 2016, the picture is patchy thereafter.

31. On 11 August 2016 Olivia O'Toole e-mailed Linda Conde asking for a review of the Claimant's internet history. Her e-mail indicated that she had information that the Claimant was making personal use of the internet. She said that if that was the case then that would explain his average handling times [73]. Linda Conde said, and I accept, that this was a perfectly normal request in the context of performance management for the Respondent. Linda Conde then sat with Olivia O'Toole and reviewed the Claimant's internet use on 12 December 2016. In the course of that review there were three aspects of the Claimant's activity that caused Olivia O'Toole some concern. It appeared that the Claimant had visited websites with no apparent link to work; he has offered his services as an Osteopath to members of the Respondent's staff using the e-mail system and he had circulated "humorous" e-mails to other staff members which concerned customers.

32. In the period from August to November 2016 the Claimant had regular 1-2-1 meetings. The fact that the Claimant was taking longer than average to complete his reports is noted on many if not all of those records. On 4 November 2016 the Claimant's time to complete a report was 8h 32m hours as against a team average of 5h 28m. His average time per party was 1h 57m which was also higher than average. At a review on 25 November 2016 there had been some improvement although the average time per party was still higher than average.

33. Linda Conde gave un-contradicted evidence that the Claimant's activities caused Olivia O'Toole to consult with Dave Wood about the next steps. In fact, I find that the question of what to do next was widely discussed. In the course of the grievance process Mike Winterflood, a member of the HR Department, was interviewed. He said that he had been approached by Dave Wood about this issue and that it was suggested that Ian Williams conduct an investigation. As Ian Williams was a new employee Mike Winterflood thought he ought to be supported by an experienced note-taker.

34. Ian Williams is a former police officer. As such he had experience of carrying out investigations although in a very different context to an internal disciplinary process. He spoke with Olivia O'Toole who informed him about the performance review process and that in her view the Claimant's standards had slipped after an initial improvement. Olivia O'Toole had come to the conclusion that the Claimant's use of the internet did not disclose sufficient information to suggest that there was any significant misconduct. The investigation was therefore to focus on the e-mails.

35. Ian Williams says in his witness statement that he decided to meet with the Claimant on '*a very informal basis'* on 19 December 2017. This is a complete miscatagorisation of the meeting. It was plainly always intended to be formal in the literal sense that a note-taker was present and a record was taken. It was preceded by discussions at a managerial level about the appropriate course of action and the potential gravity of the suspected misconduct. The reality was that it was an initial investigatory meeting held to decide whether there was a basis for any disciplinary action.

36. The Respondent had a Disciplinary and Appeals Policy. It was not suggested

by the Claimant that the policy was of contractual effect. That policy provided as a "Main Principle" that an employee was entitled to be accompanied at any meeting during the disciplinary process. The policy provided for the possibility of an investigation meeting. It states that where there was to be an investigatory meeting an invitation letter would be sent which would contain a summary of the issue leading to the investigation. No particular period of notice is specified but the policy acknowledges that postponements of up to 5 days might be required to facilitate the employee arranging representation. The right to be accompanied is repeated in that section (where it is pointed out that this goes beyond the basic statutory right).

37. The notes of the meeting disclose that, at an early stage, the Claimant said that he was stressed by the fact that the meeting had been sprung upon him. Later on he said that the meeting felt as if it was a disciplinary hearing. Ian Williams presented the Claimant with a number of e-mails that he had circulated or received from fellow employees. The Claimant described these as banter and suggested that he was not alone in circulating e-mails. The Claimant was then asked about a number of e-mails which showed him responding to and making osteopath appointments for fellow employees. Ian Williamson then moved on to discuss whether other e-mails suggested that the Claimant and other employees had, in effect, cheated in passing an assessment. Ian Wiliams then dealt with the Claimant's internet use. At this juncture, Lauren Bechley, who had been taking notes, asked Ian Williams to take notes whilst she returned to asking questions about the "banter" e-mails. The Claimant suggested that the questions were hostile. I note that only a couple of questions were asked at this stage. There seems to me to be nothing aggressive about the questions themselves. I would accept that the second question recorded was challenging.

38. At the conclusion of the meeting the Claimant was informed that a decision would be taken whether or not to proceed to disciplinary action. The Claimant was not, at that stage, provided with a copy of the notes.

39. The interview with Mike Winterflood during the grievance process discloses that, 'from Director level down' there was e-mail traffic discussing whether there was a reasonable basis for suspending the Claimant. Assuming that to be correct, which I do, I am surprised that so many people were involved at that stage.

40. Ian Williams was concerned that the Claimant had not appeared to grasp the fact that some of his "humorous" e-mails had made reference to and/or attached photographs of customers and that this might be construed as a misuse of their personal data. He says, and I accept that this was his view, that this appeared to be "lads having a laugh" and that there was nothing explicitly offensive in his e-mails. He concluded that there was no evidence of improper outside business activity (the Osteopath issue) and that there was insufficient evidence to suggest that the Claimant had been "cheating" in the assessment (or helping others to do so).

41. Ian Williams decided that he should have another meeting with the Claimant to deal with the "humorous" e-mails and the concerns that this might breach the Data Protection Act. In some respects, this was a thorough approach but it might fairly be considered that many of the issues had already been covered in the first meeting.

42. In common with the meeting on 19 December 2016 the Claimant was given no notice of the second meeting which took place on 21 December 2016. Again he was not provided with the opportunity to be accompanied in line with the policy. On this occasion he expressly raised the point but was told that the right to be accompanied did not extend to investigatory meetings. The meeting focused entirely on the "humorous" e-mails. The Claimant accepted that he had attached pictures of customers with jokey comments. He also accepted that in one case, obliquely referring to a woman as a "cougar", was a poor example of banter. In the meeting the Claimant was asked to sign the notes of that and the previous meeting. At that he protested that it was unfair that he had not been given the notes at the time. He did sign the earlier notes after making some corrections making it clear that he was unable to recall the detail.

43. Following the meeting on 21 December 2016 Ian Williams prepared a report. The report ultimately compiled was however a composite document including information and assertions made by Olivia O'Toole relating to the Claimant's general performance and about his general attitude at work. Together with documents relating to the Claimant's general performance, she had listed a number of communications which were said to show a flippant or inappropriate attitude. In terms of the recommendations in the report these related exclusively to the "humorous e-mails" and were written by Ian Williams. Ian Williams recommended that the Claimant should face a disciplinary process and catagorised the sending of the e-mails as "gross-misconduct". Somewhat in contrast to what might be expected Ian Williams, in his evidence before the Tribunal, stated that he had not anticipated that the disciplinary proceedings would result in dismissal.

44. The Claimant says that between the meeting on 21 December 2016 and the break for Christmas he heard from another employee that Olivia O'Toole and Ryan Cruikshank had been discussing the disciplinary proceedings in front of other staff members. I accept that that occurred as the Claimant says. Given the proximity in which the managers worked with their team it is quite likely that some private discussion may have been overheard. The Claimant did not suggest that the detail of the allegations or the possibility of dismissal was discussed.

45. The Claimant visited his mother in Gibralta for Christmas. His mother's evidence, supported by him, was that, in his distress, he had missed his flight and had not dressed suitably for the journey. I find that when the Gibralta, surrounded by what appears to be a close and supportive family, the Claimant explained the difficulties he was facing at work. He would have known that there was at least a possibility that he would be invited to a disciplinary meeting. He was advised to and did attend a GP's surgery on 29 December 2016 and obtained a letter suggesting that he was suffering from work related stress/anxiety and depression and should refrain from work until 2 January 2017. It seems from the Claimant's witness statement that the GP saw fit to give some ad hoc legal advice but that is immaterial to what I need to consider. I accept that the pressure of what the Claimant realised was pending disciplinary proceedings had caused him to be unwell.

46. In fact, the Claimant did not return to work until 3 January 2017 which was after his medical certificate expired. He handed the certificate to Mark Winterflood he says so that the Respondent would be aware of his condition.

47. In the afternoon of 3 January 2017 the Claimant was called to a meeting with Olivia O'Toole and Dave Wood and told that it had been decided that he would be invited to a disciplinary meeting on a date to be confirmed. The Claimant complains that he was not accompanied at that meeting although that was unsurprising given its' nature. During the meeting, the Claimant complained of the conduct of the investigation meetings and indicated that he would seek legal advice. Olivia O'Toole related those concerns to Mike Winterflood. It is clear from the e-mail exchange that the issue of the disciplinary process was being widely discussed between HR and several managers.

48. The Claimant says that during that week he observed a number of his fellow employees gathered around a PC laughing at images which showed a Third Party Claimant showing partial nudity. He says this was distributed around the team. The Claimant's evidence was supported by David Marsh and David Brady both of whom said there had been other occasions where such emails had been distributed. David Brady refers to the instance of partial nudity in his witness statement. David Marsh was able to give a description of the events and said that the image showed a customer or third party was at a hen do at the time that she said she was incapacitated When cross-examined both of these witnesses acknowledged that there had been a tightening up of the Respondent's policies. Neither employee was prepared to accept that they had ever sent such an email and both were prepared to accept that it was unprofessional.

49. On the morning of 4 January 2017 the Claimant asked Olivia O'Toole whether he could take time off on Monday the 9th and Tuesday the 10th of January. He wanted to take time off in the afternoons only and in particular wanted to make an appointment with his GP. Olivia O'Toole checked the team calendar and informed him that the holiday would be approved. Ordinarily the next step would have been to enter the holiday dates onto the TESS computer record which would then send an automated email to the Claimant. No email was generated and the Claimant approached Olivia O'Toole to ask why. Her initial response was that the TESS system was locked. Very shortly after that the Claimant was asked to come to a meeting room where Olivia O'Toole and Ian Williams presented him with an invitation to a disciplinary meeting that was to take place at 4 PM on 9 January 2017. He was informed that he could not have the time off that had previously been agreed.

50. The Claimant believes that Olivia O'Toole had not been truthful about the TESS system. I do not accept that that was the case. In the agreed bundle there was an email timed at 16:19 from Olivia O'Toole to two individuals in the HR Department. She asks: *'I have just spoken to Ian who advised you would like to arrange the hearing for Monday afternoon. Mike has requested 1/2 days holiday for both Monday and Tuesday next week-shall I advise him he cannot take it off or will it be rearranged?'.* What I conclude from that is that Olivia O'Toole at 16:19, and some time after the holiday had been agreed, had only just learnt herself of the meeting time and that it is more likely than not that any previous reference to the TESS system being locked was truthful. That is consistent with the fact that no automated email was sent a point recognised by the Claimant in an email from him to Olivia O'Toole sent on 11 January 2017.

51. The documents handed to the Claimant on 4 January 2017 included an invitation to a disciplinary meeting. That document is in fairly conventional form in that it identified the person conducting the meeting as Gary Cook, the Head

of Business Analysis. It also set out the allegations that were to be discussed and which ones were not. The allegations that had been ruled out included the allegation of "cheating", conducting a business whilst in employment time (the osteopath business). The issue that is to be moved to the disciplinary process was defined as "inappropriate emails and Internet usage" this was then expanded over four bullet points. The Claimant was however provided with a disciplinary pack which commenced with the composite investigation report compiled by Olivia O'Toole and Ian Williams. Attached to that pack were 13 appendices containing documentation in relation to the performance improvement procedure, emails in respect of the "cheating" and "osteopath" issues. In other words, whilst the allegations were fairly narrow, the entirety of the materials considered during investigation were included. As a consequence, the bundle was in the order of 200 -300 pages.

52. The invitation letter set at the time of the meeting as 16:00. As the Claimant finished work at 17:00 he assumed that only one hour had been set aside for the meeting. In a conventional way Claimant was informed of his right to be accompanied at the disciplinary meeting and a right to seek an adjournment if his chosen companion was unavailable. He was warned that the "outcome of this meeting could result in a formal warning up to and including depending on the severity, summary dismissal".

53. On Thursday, 5 January 2017 the Claimant went into the HR Department where he encountered Susie Hall who is a manager in that department. He was in a distressed state and poured out his concerns about his perception of how he had been treated. In this conversation he relayed his belief that his managers had turned against him following the incident took place in April 2016. He was most concerned that the note taker in the first investigation meeting had asked him some questions and consider that to be a fundamental flaw. He suggested that would be sufficient to stop the disciplinary process in its tracks. He used the language of "bullying and harassment". He expressed a particular concern that the hearing would only last an hour and suggested that the matter was predetermined. There was no reasonable basis for that latter suggestion. Finally, he expressed concern about the proposed timing of the meeting interfering with his pre-booked holiday.

54. Susie Hall responded to the Claimant's concerns immediately. She informed him that she would treat his complaint as a formal grievance. She agreed to move the disciplinary meeting to 16 January 2017 extending the time to a two-hour hearing. She advised him of the existence of an Employee Assistance Programme. On 10 January 2017 Susie Hall wrote to the Claimant summarising her understanding of the Claimant's grievance and indicating that the matter would be dealt with under the Respondent's formal grievance procedure.

55. On 9 January 2017 the Claimant visited his general practitioner. He was issued with a form Med3 (a “statement of fitness for work”) which advised the Respondent that the Claimant was unfit for work and gave the reason as being "Work Related Stress". The Claimant did not present the medical certificate until 11 January 2017. When he did so he collected all of his personal possessions before leaving the building.

56. Following the rescheduling of the disciplinary hearing a further letter of invitation was sent to the Claimant on 11 January 2017 inviting him to the

meeting which was to take place on 16 January 2017 at 2pm. Other than the revised date the letter was in the same form as the previous letter and set out the allegations in the same way.

57. On 13 January 2017 the Claimant wrote to Susie Hall resigning from his employment. His resignation letter is extensive. It sets out his belief that he was subjected to bullying and alleges that that flowed from the incident that took place in April 2016. Thereafter he complained of the matters set out above. Whilst the Claimant resigned upon one months notice, he provided medical certificates for his notice period and did not as a matter of fact return to work again.

58. On 27 January 2017 Linda Conde, sent an email to the Claimant's sister in response to an earlier communication in which she sought to persuade the Claimant to withdraw his resignation and to allow the grievance process run its course she indicated that depending on the outcome of the grievance process the Respondent would be in a position to see whether it was necessary to continue with the disciplinary proceedings. The Claimant's sister responded on 29 January 2017 indicating that the Claimant and did not feel matters can ever be resolved and that the he did not see any way forward with the Respondent.

59. The Claimant's grievance was thereafter dealt with by Graham Edwards. Given that the events took place after the decision to resign the grievance process could neither provide a reason for the resignation nor indeed a cure to any earlier breach by the Respondent. I should say that I consider that the investigations that took place as part of the Grievance Procedure were thorough. Whilst the Claimant did not attend in order to participate in a hearing he had the opportunity of doing so and in lieu provided written input into the process. It is sufficient to say that Graham Edwards came to the conclusion that there probably had been some racist remarks made in April 2016 but that any expression of concern by the Claimant had not been the cause of any subsequent difficulties. He did not uphold any of the allegations of bullying or harassment or any suggestion that the Claimant had been singled out for disciplinary action. He did however agree with the Claimant that there had been a failure to follow the disciplinary policy in respect of the investigatory meetings where he had not been offered adequate notice or right to be accompanied. His investigation showed that the policy had been widely ignored on the assumption that there was no such right at an investigatory meeting. Graham Edwards wrote to the Claimant setting out his conclusions by letter dated 16 March 2017. In accordance with the relevant policy he offered the Claim to right of appeal. The Claimant declined to appeal but instead brought the present proceedings.

Discussion and conclusions

60. The key question in the present case is whether the conduct of the Respondent amounted to a serious breach of contract. It is necessary for me to consider the conduct complained of both individually and cumulatively in order to assess its gravity. I have done so with regard to all of the evidence I have heard even where I have not made specific mention of that evidence in my factual conclusions above.

61. I should deal first with the matter of the use of racist language in April 2016. As I have indicated above I am satisfied that racist language was used. I am also

satisfied that this was a talking point amongst the Claimant and his colleagues and that they expressed some surprise that Dave Woods who was present and not to their knowledge taken any action. It was also quite clear to me that neither the Claimant nor any other colleague raised this matter in any formal way. I have not accepted that the Claimant repeatedly referred to this. An employer can be expected to take robust action to stamp out the use of racist language. Indeed, the language that was used was plainly offensive. Had there been an express complaint or formal grievance advanced by the Claimant or others which was simply ignored by the Respondent I would have been persuaded that in itself might amount to a serious breach of contract. However, that is not the case here. There was no formal complaint. As such what can be complained of is that the managers did not take it upon themselves to take action against the employee concerned. I consider that they ought to have done if they had heard and understood the words in the same way. I also consider that the other employees could be genuinely aggrieved that nothing had been done. However, absent any formal complaint or grievance, whilst poor, the failure to do so in my view would not amount to a sufficiently serious breach of contract to breach the implied term of trust and confidence in itself. I consider below whether it does so in combination with other events.

62. I turned to the question of whether or not the Claimant's actions in raising this issue in the manner that he did caused either Olivia O'Toole or Ryan Cruickshank to single him out for adverse treatment. It is necessary in this regard to refer to my primary findings of fact set out above as to which treatment I found was made out.

63. I have concluded that at least on one occasion Ryan Cruickshank rolled his eyeballs when approached by the Claimant. That was something he apologised for at the time and which was clearly inappropriate. I noted that in the course of the grievance investigation process Graham Edwards interviewed Zahide Huseyin an individual who the Claimant has said was broadly supportive of him. She was asked about the general management style of Olivia O'Toole and Ryan Cruickshank. What she said was instructive. She said that the Claimant was indeed singled out for monitoring and that she was encouraged to report occasions when he was late. she suggested that the Claimant's previous team leader had been lenient whereas, in contrast, Olivia O'Toole and Ryan Cruickshank were more strict. She suggested that both of them lacked management experience. I find that latter comment is likely to be the case.

64. What I take from the evidence of the 1-2-1 meetings and performance review process together with the spreadsheets of the average times taken by employees is that a key performance indicator for this particular business was the speed at which the Intel Operatives could produce reports. That is self-evident from the fact that the pre-printed forms had sections for the time taken to complete these tasks. It is also quite clear that the Claimant, throughout the period in question, was slower than an average employee. He says that was in part due to the fact that he did more complex cases and the may be some truth in that but nevertheless his performance was such that I find it reasonably likely that it attracted the attention of his managers.

65. The Claimant's colleagues and particularly those who attended to give evidence on his behalf but also others who are interviewed during the grievance process all attest to the fact that the Claimant was knowledgeable and helpful. I find that was the case and that he was popular amongst his fellow employees.

I also consider that there was a somewhat rebellious streak which Olivia O'Toole found irksome. That is best illustrated by the Claimant including song lyrics in a response to a questionnaire and sending round a flippant email criticising his colleague, albeit in humorous terms, for setting off a fire alarm.

66. I find that in instigating the performance improvement plan in June 2016 Olivia O'Toole and Ryan Cruickshank were simply responding to the fact that the Claimant was taking longer than they expected to complete reports. It seems to me to be an almost inevitable result of placing such importance on this KPI that the Claimant would be asked to improve.

67. The Claimant has referred to the conduct of Olivia O'Toole and Ryan Cruickshank in this period as being harassment and bullying. I conclude that the was a specific focus on the Claimant. In particular, I consider that it is likely that his lateness was subjected to somewhat greater scrutiny than others. I do not find that this had anything whatsoever to do with the events of April 2016. A key reason why am confident this conclusion is that it was not simply the Claimant who talked about this event. Others employees in the same team appear to have been equally as animated as the Claimant although none took any formal action. For this reason, I cannot accept that the Claimant was singled out because of any involvement that he had in raising this issue. I do however find there were other reasons which are capable of explaining why the Claimant was singled out. The first of these is that the Claimant was indeed slow to produce reports. In addition, his general conduct including matters such as lateness and flippancy towards certain matters was such that Olivia O'Toole, who I find to be a strict manager, would become irritated in dealing with him. These do provide a good reason for treating the Claimant more strictly than others in some respects.

68. In respect of this matter, I conclude that Olivia O'Toole and Ryan Cruickshank did pay particular attention to the Claimant but the reason that they did so was that his performance overall had become a matter of concern. In placing him on a performance improvement plan in June 2016, I conclude they had reasonable and proper cause to do so. The Claimant does not suggest that when he was pulled up on issues such as lateness there was not some genuine cause for complaint merely that he was singled out. His real complaint should be that he was admonished when others were not. I do not consider that that amounts to a serious breach of contract in itself but I have regard to it and assessing overall whether there has been such a breach.

69. The Claimant has referred in somewhat generic terms to bullying and harassment. Viewed objectively I heard no evidence of anything that could reasoning have been perceived as bullying and harassment. It is correct that on one occasion Ryan Cruickshank rolled his eyeballs. He should not have done. He recognised he should not have done and he apologised. Apart from that the Claimant gave little detail about what he said amounted to bullying and harassment. Having regard to the totality of his evidence I reject the suggestion that the environment was anywhere approaching as hostile as he suggests. I would accept that there is a degree of friction and exasperation with the Claimant and that spilled over in the way that on the limited number of occasions I have heard about. In particular, Ryan Cruickshank rolled his eyebrows and was once or twice was dismissive of the Claimant's IT questions. This level of conduct is not sufficient that it could be said to seriously damage the employment relationship. It is however a matter which I will have regard in

assessing the conduct overall.

70. The Claimant contended that his performance had improved before 19 December 2016 when he was called into a meeting with Ian Williams. The first thing to note is that Olivia O'Toole had asked for the Claimant's IT usage to be monitored on 11 August 2016. In June 2016 the Claimant had had report writing times which were broadly average. In July there was a sliding back. I accept the evidence given by the Respondent that monitoring of IT usage was not uncommon when there were performance issues. I can understand the temptation for any person tasked with using Internet research to get sidetracked by other matters. In the light of that I conclude that Olivia O'Toole had good cause to request that the Claimant's Internet and email usage was monitored. It is right to say that in between that request being made and the report being produced and examined by Olivia O'Toole and Linda Conde there had been an improvement in the Claimant's average report writing times and he received, both from Olivia O'Toole and from Ryan Cruickshank favourable one-to-one reviews. If anything this demonstrates that they were being fair in their approach.

71. I further consider that when the IT report was compiled and reviewed by Olivia O'Toole and Linda Conde it did disclose matters of genuine concern. There was certainly evidence of the Claimant's only jocular emails in work time to colleagues. There was evidence at least to a small degree that he was making arrangements for his own business using his work email and finally there was evidence that he was circulating "humorous" e-mail which made reference to customers or third parties in terms which could be perceived as derogatory. Viewed objectively these emails can best be described as puerile. In my view, perhaps the worst email attached a picture of middle-age woman which was sent to the Claimant's colleague Chris Kaminarides and others with a subject line "Chris's latest Tinder match-he likes the Cougars". There were several other emails of a like vein.

72. In 2014 Respondent had introduced an Acceptable Use Policy and had widely circulated amongst the employees including the Claimant. I consider that it is a well written and clear document giving practical guidance to employees of what is and was not acceptable. Under a heading "email usage" the following guidance is given:

> *"the following are considered unacceptable use of email and are prohibited:*
>
> *Using profanity, obscenity's or derogatory language or pictures*
>
> *The discussion of employees, customers, competitors or others. Even remarks made in jest can create legal problems such as libel and defamation of character.*
>
> *Sending or forwarding open brackets offensive or otherwise) jokes, stories, video, audio or picture files. Messages that are of harassing or threatening nature. Emails can constitute harassment and bullying. You must not post or download information that insults or harasses others on the basis of their gender, sexual orientation, race, age, disability or religion, and you must take all reasonable steps avoid accessing such information"*

73. I consider that when Olivia O'Toole examined the Claimants IT usage she could, and did quite reasonably, conclude that a further investigation was

necessary. I therefore find that there was reasonable and proper cause for asking Ian Williams to carry out a disciplinary investigation. I do not find that the decision to progress the matter was caused by any personal animus whatsoever.

74. The Claimant was particularly upset by the fact that the notetaker in the first meeting asked a number of questions. It seems to me but here the Claimant it is being unduly sensitive. There were only a couple of questions and the notes would not suggest they were in any sense inappropriate. I accept the evidence of Ian Williams that the disciplinary meeting was conducted in an ordinary and civilised way. I reject the Claimant suggestion that he was subjected to aggressive or inappropriate questioning. there is nothing in the content of the meetings that was by itself or could contribute to a breach of contract.

75. There was no dispute that the failure to inform the Claimant of the nature of the investigator meetings in advance and the further failure to permit him to be accompanied was a breach of the disciplinary policy adopted by the Respondent. As I have said above it was not contended by the Claimant that the disciplinary policy was a part of his contract of employment. Indeed, when I have regard to its terms many parts, but perhaps not all, are not apt for incorporation as contractual terms. Nevertheless, I would accept that in many cases a failure to follow an agreed policy without good reason could be something capable of impacting on the trust and confidence between employer and employee. The circumstances appear to have been that the Respondent had adopted a disciplinary policy which put a significant gloss on the basic statutory right to be accompanied. It also provided for advance notice of what was to be discussed. Quite surprisingly, it seems that the human resources Department were blindly unaware of their own policy. It seems that the Claimant's case was not the only case where it was not followed. I note that there is a difference between the statutory ACAS code of practice and the guidance which is non-statutory. The code of practice envisages the possibility of an investigator meeting and certainly foresees the possibility of a right to be accompanied depending on the employer's policy. The guidance does not differ in that respect but does say that where there is an investigatory meeting *“give the employee advance warning and time to prepare”.* I consider that is a sensible and fair approach.

76. This is a situation where a policy gave perhaps greater rights to the employee than fairness strictly demanded but where the Respondent appears to have been blindly unaware of its own policy. I remind myself that what is required for a breach of the implied term of trust and confidence is that objectively it is calculated or likely that the employment relationship will be seriously damaged. I take the view that a reasonable employee standing in the shoes of the Claimant would not have felt that the failure to follow the policy in this regard was sufficiently serious a failure to seriously damaged trust and confidence. I accept however that this was a matter about which the Claimant in effect protested at the time and about which nothing was done. I consider the greater failure was the lack of notice of the meetings rather than the point that there was no right to be accompanied. Having rejected the contention that the conduct of the meeting was by itself a serious breach of contract I shall go on to weigh this matter up with the other matters when I approach the question on a cumulative basis.

77. I have accepted that it is likely that Olivia O'Toole and Ryan Cruickshank were

overheard discussing the Claimant's disciplinary process. By itself I do not consider this a serious breach of contract. It may have been more significant had it been suggested the Claimant was likely to be dismissed or the nature of the allegations discussed in public. However, I do accept that it is inappropriate to discuss these things in an open plan office and I weigh this up when looking at these matters in the round.

78. The Claimant complains of dishonesty by Olivia O'Toole in agreeing that he could have time off and informing him there were difficulties with the TESS system whereas he alleges that she deliberately did not log his holiday because of the disciplinary hearing. I have rejected that as a matter-of-fact and there is nothing in that conduct that could amount to a breach of contract.

79. I considered whether, given that Ian Williams himself did not believe that the Claimant would be dismissed as a consequence of what he had uncovered during the investigation it was appropriate to categorise the forthcoming disciplinary hearing as being one considering "gross misconduct". I take the view that there is nothing inconsistent with the belief that somebody would not actually be dismissed and referring to an allegation as capable of amounting to gross misconduct. There was no actual finding by Ian Williams that there was any gross misconduct. Indeed that was not his role. His role was to recommend the process should be followed. I see nothing wrong with an investigating officer recognising that the may be different views about whether the conduct amounts to gross misconduct or not. It was the Respondent's case that it takes data protection and use of its client data very seriously. It had introduced a policy in 2014 expressly forbidding the sort of humorous emails circulated by the Claimant. In its disciplinary policy it includes in its definition of gross misconduct a serious breach of any policy. It was in my view perfectly proper to categorise the emails sent by the Claimant in that category and leave it to the good sense of the disciplinary officer to decide whether or not in the light of anything the Claimant had to say his action should be treated as gross misconduct. I do not therefore consider that telling the Claimant he was facing allegations of gross misconduct was by itself a breach of contract or in any way improper. Had it been necessary for me to state my own opinion I would have concluded that the Claimant's actions in sending the "humorous emails" were foolish, that the emails were capable of causing offence, that the customers would undoubtably have been rightly indignant at their photographs being used in this way but, that on a first offence, I agree with Ian Williams that I would not have expected the Claimant to have been dismissed.

80. I do not accept the argument advanced by the Claimant that because some others had engaged in the same conduct it made it unfair to bring disciplinary proceedings against him. I am not satisfied that Olivia O'Toole or Ian Williams knew that others had engaged in similar conduct. I find that, if they had been, they would have taken it just as seriously as they did the Claimant's conduct. I would accept but it might be the case that Ryan Cruickshank had turned a blind eye to employees giggling over an inappropriate email but he was not the team leader. That email had not come to the attention of the human resources Department or senior management. I heard evidence that other employees had been disciplined in the past and I accept that evidence.

81. I do not consider that it was incumbent upon the Respondent upon receipt of the letter from the Claimant's GP in Gibraltar to place the disciplinary process on hold. Nothing in that letter suggested that the Claimant was unfit to attend

work after 2 January 2017. I consider that it was perfectly proper to present the Claimant with the invitation to the disciplinary meeting. I do not consider that the time period for preparation was necessarily short. The Claimant already knew about the emails that were the main issue. If that was the matter that was to be discussed then I consider that 4 clear days notice would have been adequate.

82. Where I have sympathy for the Claimant is that the invitation to the Disciplinary meeting did make the allegations that remained reasonably clear but the disciplinary pack contained all of the documentation including documentation relevant to matters which were no longer going to be considered. I do not consider the number of documents excessive. They do not take long to read. The problem is, as the Claimant says, is that it becomes unclear what questions might be asked and what the likely area to be covered during the disciplinary hearing is. It interferes with his preparation. This is particularly true given that the investigation report was attached to the pack and is substantially more far ranging than the disciplinary invitation letter. That said I do not think this by itself amounts to a serious breach of contract. The Claimant also suggested that there were inaccuracies in the report. He may be right but I find that there was no dishonesty and had he attended the disciplinary hearing he would have had every opportunity to comment upon them. I do not consider there was any serious breach of contract. In common with some of the matters discussed above I believe that it is a matter to be weighed when assessing the cumulative effect of the other conduct I have found wanting.

83. I am conscious I have not dealt with every single point raised by the Claimant but have sought to identify the major issues he had with the Respondent's conduct. I considered each of the more minor matters two had no significant effect on the employment relationship. I have also carefully disregarded anything that happened after the employment relationship had ended.

84. I have rejected a major plank of the Claimant's case that everything that he complained of flowed from a response to him raising the issues around the events of April 2016. I consider that the difficulties on the latter part of the year were caused by Olivia O'Toole's reasonably held belief that the Claimant was not performing as well as he could. It was whilst looking at that issue that the more serious issue of the emails came to light. Given the culture in the Respondent organisation I find it unsurprising that upon discovering that pictures of its customers are being circulated amongst its employees with what might reasonably be perceived as derogatory comments the Respondent thought it appropriate to instigate disciplinary action.

85. I have identified above a number of failings where I believe the Claimant can justifiably complain that he was not treated as well as he ought to have been. Far and away the most serious in my view are the failure of management to respond to concerns about racist language and the later failure to follow their own disciplinary policy. I consider that the other complaints are minor and many employees would have recognised that this is just the rough-and-tumble of the employment relationship. I do not consider that there was any failure to have regard to the Claimant’s indication that he was suffering from stress. He was encouraged to visit his GP and referred to the employee assistance program. It was not incumbent on the Respondent to stop the disciplinary process in its tracks.

86. Given that the Claimant resigned only 23 days after the second investigatory meeting I do not consider that there is any question of him affirming any breach of contract (if there was one). The question for me is whether the conduct that I have found wanting cumulatively was sufficient that it was likely to seriously damage the employment relationship. As I have said above the test is objective. Whilst I am not wholly unsympathetic to the Claimant's position I do not believe that the failings I have identified are either individually or seriously sufficient to seriously damage the relationship of trust and confidence. I bear in mind that at the latter stages there was what I find to have been a quite proper disciplinary investigation. Almost inevitably perceptions are likely to be heightened during that process. The Claimant's decision to resign was undoubtably fuelled by his own perception but I do not agree that a reasonable employee would have viewed the Respondents conduct in the same way.

87. As I have concluded that there is no serious breach of contract it follows that I conclude that the Claimant was not dismissed for the purposes of section 95 of the Employment Rights Act 1996 and therefore he cannot succeed in any claim of unfair dismissal.

88. The Claimant’s claim is therefore not well founded and is dismissed.

Employment Judge John Crosfill
Date 19 April 2018