EMPLOYMENT TRIBUNALS

Claimant:	**Mr Madris Ali**		
Respondent:	**Voice Marketing Ltd**		
Heard at:	**Sheffield**	**On:**	**22, 23 and 24 July 2019**

Before: **Employment Judge Brain**

Representation

Claimant:	In person
Respondent:	Mr S Birch, in-house human resources operation partner

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant's complaint that he was constructively unfairly dismissed by the respondent succeeds.
2. It is just and equitable for the respondent to pay to the claimant a compensatory award of £1,874.76.
3. The respondent shall pay to the claimant a basic award in the sum of £513.00.
4. The payments at 2 and 3 shall be made within 14 days of the date of promulgation of this judgment unless the *Employment Protection (Recoupment of Benefits) Regulations 1996* apply in which case the parties shall follow the directions at paragraph 127 below.

REASONS

1. The Tribunal heard evidence in this matter on 22 and 23 July 2019. After receiving helpful submissions from both parties on 24 July 2019, the Tribunal reserved its Judgment. The Tribunal's reasons for the Judgment reached now follow.

2. The claimant worked for the respondent as a telesales advisor between 10 August 2015 and 28 January 2019. The respondent is part of Capita Plc. The grounds of resistance filed by the respondent in answer to the claimant's claim describe the respondent as *"an outsourcing organisation employing around 800 employees across two sites in Sheffield ".* Paragraph 4 of the grounds of resistance goes on to say that, *"the respondent works for several large national and international companies*

carrying out ingoing and outgoing call centre operations". The activities or operations carried out by the respondent on behalf of its clients are known as *"campaigns".*

3. The claimant resigned from his position with the respondent in a letter dated 28 December 2018. This is at page 80 of the hearing bundle. The claimant resigned with one month's notice. The effective date of termination of his contract of employment was therefore 28 January 2019.

4. After going through a period of mandatory early conciliation with ACAS (as required by the Employment Tribunals Act 1996) the claimant presented his claim form on 14 February 2019. He brings a complaint of constructive unfair dismissal pursuant to Part X of the Employment Rights Act 1996.

5. The Tribunal shall set out the findings of fact. Then after setting out the issues in the case and the relevant law the Tribunal will then go on to set out its conclusions.

6. The Tribunal heard evidence from the claimant. Evidence was received from the following witnesses on behalf of the respondent:

   6.1. Chris Endersby. He is employed by the respondent and holds the position of operations manager.

   6.2. Joseph Wragg. He is employed by the respondent as an operations manager.

   6.3. Helen Bailey. She is also employed by the respondent as an operations manager.

   6.4. Andrea Whitehead. At the material time of her involvement in the matters with which the Tribunal is concerned she held the position of operations director. She now holds the post of regional delivery director.

   6.5. Diane Monaghan. She is employed by the respondent and holds the post of chief operating officer.

Findings of fact

7. The claimant works for the respondent at its premises at The Mount, Glossop Road, Sheffield. This is known as the *"Sheffield V2 site".* The other premises in Sheffield (known as the *"Sheffield V1 site"*) are based at Woodseats in Sheffield. The two premises are approximately three miles apart.

8. For a period of around three years or so from his date of commencement the claimant worked at the V2 site upon what he described (in paragraph 1 of his grounds of claim) as an *"outbound business to customer"* campaign. (The Tribunal pauses here to say that the claimant did not prepare a separate witness statement. His grounds of claim were treated as his witness evidence).

9. The claimant said that the domestic and general business to customer campaign had been a success. (These are known as *'D and G campaigns').* However, this came to an end in August 2018. No issue was taken by the respondent about the claimant's work upon the domestic and general campaign.

10. When that campaign came to an end, the claimant moved on to a new campaign. This was on behalf of EDF. It was a business to business campaign. In paragraph 1 of his grounds of claim/witness statement the claimant says that the campaign upon which he had *"worked for more than three years* [being the D and G campaign" "*involved 5% admin/pc skills and 95% talking to customers. The EDF campaign was business to business and involved 30% admin/pc skills and 70% talking. The training we had was over four days. It was very poor and lacked any help with my new job role. I was confident with my previous experience that I could pick up what was involved in the role when I started dialling".*

11. The respondent assigned six employees (including the claimant) to the EDF campaign. The claimant says, in paragraph 2 of his witness statement that, *"once we started the campaign the six new agents were put to the grad bay where we are supposed to get help when we need or further support while on calls, then eventually we move on to the main floor".* Mrs Whitehead explained that the *"grad bay"* is a training environment where new employees or reassigned employees may obtain assistance from floorwalkers.

12. Page 1 of the bundle is a record of a discussion which the claimant had with Daniel Winterbottom, line manager, on 19 September 2018. The reason for the discussion was *"PCI breach".* None of the respondent's witnesses gave any evidence about this breach. The claimant's evidence, given under cross-examination, was that the breach in question was leaving his computer (PC) unattended. The claimant complained in the note at page 1 of the bundle that he had received inadequate training. In evidence given under cross-examination he complained about a lack of help and support from Safeea Ali, sales advisor, whom the claimant had asked to assist him.

13. At paragraph 6 of his witness statement, Mr Endersby says that *"on 22 October 2018 I had reason to have a discussion with the claimant with regard to his behaviour. A record of this discussion is on page 2 of the bundle".*

14. The reason for the discussion was that the claimant had a disagreement on 18 October 2018 with Alison Longden who was employed by the respondent at the material time as EDF team leader. In a subsequent interview with Alison Longden carried out by Andrea Whitehead on 21 November 2018, Miss Longden says (at page 64) that the claimant *was "putting a sale through. Safeea went to help him and then it wouldn't go through on the system. He stood up and said he was going outside on a break. I listened to the call as it was a sale but he said he'd lost the sale. I asked him to phone the customer back so it could be put through as a sale. He refused and then started being confrontational at my desk".* (As will be seen in due course, the interview took place as part of Mrs Whitehead's investigation into a grievance raised by the claimant).

15. In evidence given under cross-examination, the claimant said (about the incident of 18 October 2019) that, *"I'd got the sale. The helper was hovering around. A sale takes 45 minutes to process. She said I'd done it wrong and I needed to call them back. This was Alison* [Longden]. *I was on my lunch-break. I said Alison had made a mistake".* The claimant fairly

accepted, when it was put to him by Mr Birch, that his error was that he had failed to read out a mandatory regulatory statement to the customer.

16. It was recorded, in the note at page 2 of the bundle (being the record of the discussion about the incident of 18 October 2019) that the claimant was to be furnished with additional support. This would consist of somebody sitting with him upon his next two sales. The claimant was asked to make Alison Longden aware that she was to furnish this support in order that it may be facilitated. The claimant did not do so.

17. The final paragraph of the note at page 2 reads, *"As also discussed* [between the claimant and Mr Endersby who completed the record] *any behaviour either verbal or physical deemed to be confrontational or aggressive will be classed as gross misconduct and managed alongside Capita disciplinary process as abusive behaviour, discrimination or harassment or serious insubordination or disobedience of management instruction".*

18. A further incident then occurred involving Alison Longden and the claimant on 23 October 2018. Mr Endersby was made aware of the incident late on 23 October 2018. He therefore investigated the matter the next day. Mr Endersby interviewed the claimant at 15:45 on 24 October 2018. Mr Endersby was accompanied by Mr Wragg. The claimant availed himself of the opportunity of having a representative. Darren Rock therefore attended the meeting in that capacity (joining the meeting part way through).

19. Before meeting with the claimant held at 15:45 on 24 October 2018, Mr Endersby had interviewed a number of others. He interviewed:

    19.1. Jack Hepworth.

    19.2. Safeea Ali.

    19.3. Ross Petifer.

    19.4. Ruari Scates.

    19.5. Alison Longden.

    19.6. Jennifer Woodward.

20. The notes of interview are at pages 5 to 16. Mr Endersby also obtained statements from Danielle Ellis (on 25 October 2018) and Patricia Scott (on 31 October 2018). These are at pages 17 and 18. The Tribunal now sets out a summary of what each interviewee said.

21. Mr Hepworth said that he was helping the claimant put through a sale. Mr Hepworth says that the claimant "*was having problems with his Word document. I took his keyboard and mouse to help try and fix it. Alison asked me to let Madris do it himself so he learns and he said it was an IT issue. Alison explained this was not the case and he needed to reboot his system. Madris got irate and started raising his voice and threatening Alison saying, "he would end up in a room with her again".* Mr Hepworth described the claimant's tone and behaviour as *"absolutely vile".* Mr Hepworth was also critical of the approach taken by the claimant during the incident on 18 October 2018.

22. Miss Ali says that she did not witness anything. However, she did see that Miss Longden was upset. She said it "*looked like Madris was being rude to Alison and Alison looked in shock/disbelief".* She said that she had heard the claimant being rude *"on a number of other occasions and he will not take on board manager's instructions".*

23. Mr Petifer saw little of the incident. He said, *"there was a point where Madris and Alison arguing early on then it happened later on and there was a point where Jack and Safeea was with Madris. To be honest I try not to pay attention when people talk like that to each other. I believe it was a sale that was not done right. Madris was on about he hadn't been trained and wasn't good with it".* He said that the claimant seemed really frustrated as was Miss Longden.

24. Ruari Scates said, *"there was a conversation between Alison and Madris. Now there has been tension previously and there was raised voices between both of them. On this occasion I tried to block it out. Alison was quite argumentative from the get go. She was wanting an answer from Madris. Madris seemed very defensive."*

25. Alison Longden said that she was encouraging Mr Hepworth to allow the claimant to undertake the process himself. She accused the claimant of becoming confrontational and aggressive. She said that the claimant was not listening and was speaking over her. She said that the claimant threatened to take her into a room. (Mr Hepworth had made a similar observation to this effect). Mr Endersby asked Miss Longden what she understood the claimant to mean by that remark. Miss Longden replied*, "he just said I would be dragged into another meeting where I think it is following on from last week where he threatened to put in a grievance against me".* Miss Longden also made reference to the event of 18 October 2018. She said that she was *"made aware at the time he had got the sale but didn't disposition it as a sale. I questioned him and he said he lost it and just walked out on his lunch".* She said that when she spoke to him later following his return from lunch the claimant had become aggressive.

26. Miss Woodward said the claimant was complaining that he had not had sufficient training. Miss Woodward appeared to have some sympathy with what the claimant was saying. She said, *"I was in the same training. It was very basic and we learnt a lot we didn't need. … I feel there is a knowledge gap."* She offered the opinion that the claimant *"seems to blame other people and not himself and he tends to come across as angry and agitated. I feel he is frustrated but he won't give other people the chance to and interrupts them a lot."* She went on to add, "*he just gets frustrated by not knowing what he is doing. Its basics he should know but he doesn't".*

27. Miss Ellis said that the claimant was encouraged by Miss Longden to watch another advisor but the claimant did not appear to be interested. Miss Longden eventually prevailed upon him to sit at his computer to see what was happening. Miss Ellis described the claimant as *"dismissive at first as though it was beneath him and then became argumentative/confrontational with [Miss Longden]".*

28. Patricia Scott said that Alison Longden was encouraging the claimant to process the sale under the guidance of Mr Hepworth. She says that the claimant's *"body language became aggressive and confrontational."* Miss Longden became tearful.

29. The notes of Mr Endersby's interview with the claimant of 24 October 2018 may be found at pages 3 to 5. Mr Wragg attended the meeting as notetaker.

30. Mr Endersby said that, *"the underlying theme from the witness statements* [about] *yesterday was that Alison was asking you to complete a simple task. The general theme was that you were coming across aggressive and confrontational."*

31. The claimant maintained that the problem that occurred was a systems issue. He said that while Mr Hepworth was attempting to resolve the matter Miss Longden had told him to sit down and *"learn how to log on in a loud manner".* The claimant said that the incident *"happened over 60 seconds and both sides were unprofessional".* The claimant denied being aggressive and confrontational.

32. Mr Wragg noted that Mr Endersby asked the claimant to stop raising his voice and talking over him. He also noted that the claimant at one point stood up and raised his voice in an aggressive manner. It was at this point that Mr Rourke joined the meeting. After Mr Rook had joined the meeting the claimant said that the incident had as its root cause a lack of training and support on the floor. He also said that Mr Rook would vouch for him and that his behaviour was out of character. Mr Endersby took the decision to suspend the claimant. He said, *"my concern is that you do not see the error in your outburst and as such I am suspending you on full pay until further notice".* The claimant refused to sign Mr Wragg's record of the meeting.

33. At paragraph 9 of his witness statement Mr Endersby says that, *"the investigation meeting was a difficult meeting due to the claimant's behaviour. He was confrontational, aggressive and what I considered to be abusive and at one point the claimant was out of his seat waving his arms about with a raised voice. He also seemed to find it very difficult to give me eye contact during the meeting and despite my position as the investigating manager the claimant provided his response to Mr Wragg whose role in the meeting was as note taker".* Mr Endersby says that following the adjournment to allow Mr Rook to join the meeting the claimant continued to be aggressive *"to the extent that I felt I had no option other than to suspend him."*

34. Mr Endersby justifies the decision to suspend the claimant later on in his witness statement. At paragraphs 11 and 12 he says, "*his behaviour gave me serious cause for concerns in particular I asked him to reassure me that he would not behave like this in the future and he failed to give me any reassurance. I was therefore concerned as an incident such as this could occur again during the investigation procedures and as I have a duty of care to other employees on the operational floor, I felt I had no other option than to suspend".* The claimant was escorted off the premises pending further action.

35. Mr Wragg gives evidence corroborative of Mr Endersby's account. He says at paragraph 7 of his witness statement that, *"during the meeting the claimant became angry and was shouting. At one point he was standing up, waving his arms around in an aggressive manner."* He goes on at paragraph 8 to say that, *"both Mr Endersby and I asked the claimant to calm down more than once."* Mr Wragg says that the claimant's behaviour continued to be unacceptable after Mr Rook had joined the meeting. He says that as he and Mr Endersby were "*unable to calm him down, the decision was taken that there was no other option to suspend the claimant for his behaviour in the meeting pending disciplinary."*

36. Mr Endersby's evidence about the claimant's behaviour during the investigation meeting of 24 October 2018 was challenged by the claimant. This was upon the basis that Mr Endersby had only noted two incidents of the claimant raising his voice and talking over him. Mr Endersby explained that the notes were not *verbatim.*

37. A similar point was made by the claimant when he had the opportunity of cross-examining Mr Wragg. Mr Wragg said that the claimant *"talked over us all the time".* Mr Wragg accepted that once Mr Rook joined the meeting the claimant's behaviour subsided. However, Mr Wragg went on to say that *"you continued to talk over us."*

38. The Tribunal accepts the evidence of Mr Endersby and Mr Wragg as to the claimant's behaviour during the course of the investigation meeting. During the course of the hearing before the Tribunal, the claimant talked over Mr Bray and the Employment Judge upon a number of occasions (notwithstanding that the Employment Judge told him not to do so on several occasions). Indeed, it may fairly be observed that the claimant demonstrated to the Tribunal the very behaviour of which the respondent complained. Having witnessed the claimant's demeanour in the hearing, the Tribunal finds credible Mr Endersby's and Mr Wragg's evidence of the claimant talking over them and behaving aggressively. The claimant is correct to point out that Mr Wragg only noted two instances of inappropriate behaviour. However, the Tribunal must set that against its own observations of the claimant's behaviour during the course of the hearing and Mr Endersby's evidence that the note is not a *verbatim* record.

39. Mr Endersby handed over the investigation notes that he had compiled to Miss Bailey. She was instructed to chair a disciplinary meeting.

40. On 1 November 2018 Miss Bailey wrote to the claimant. The letter of invite is at page 19. The claimant was invited to attend the disciplinary hearing to take place on 8 November 2018. She said in the letter that, *"The purpose of this hearing is to discuss in detail the alleged gross misconduct and ensure that you are able to fully state your case and inform us of any explanation you feel may assist you in your defence. Enclosed are copies of all the supporting evidence and witness statements that form the basis of the investigation. I also enclose a copy of Capita's disciplinary procedure for your information."*

41. It is perhaps unfortunate that Miss Bailey did not specify the nature of the gross misconduct alleged against the claimant. A failure to give any such particulars may operate unfairly against an employee. However, upon the fact of this case there was no procedural unfairness. The claimant fairly

accepted that he knew that the disciplinary hearing was to deal with the incident of 23 October 2018 involving him and Alison Longden.

42. Miss Bailey was accompanied by Emma Wilkinson, team leader, who was acting as note taker. The claimant declined the opportunity that was offered to him by Miss Bailey to be accompanied by a colleague.

43. The notes of the disciplinary hearing are at pages 20 to 27 of the bundle. Miss Bailey says, at paragraph 9 of her witness statement, that *"the meeting itself was difficult due to the claimant's behaviour during the meeting, which he later apologised for as captured in the notes from the disciplinary meeting. This is on page 26 of the bundle."* We can see that the relevant note at the top of the page, records the claimant as saying, *"I do apologise for being intense. It is an intense situation."* For the same reasons as in paragraph 38 above, Miss Bailey's evidence as to the difficulties which she encountered during the course of the disciplinary hearing with the claimant are credible and accepted as fact by the Tribunal.

44. Miss Bailey put it to the claimant that *"this started on 23 October, Alison Longden discussed a process of a sale".* The claimant said that the matter had started with an IT issue in respect of which he had sought to enlist the help of Jack Hepworth. Miss Bailey asked the claimant if he considered that he had behaved professionally. The claimant said that he had *"no comment to your question."* Miss Bailey warned the claimant that if he declined to answer her questions then she would make a decision upon the basis of Mr Endersby's investigation. The claimant said *"well you're going to anyway. This is a hearing with the outcome. I've not been here to be cross intimidated. I refuse to answer anymore. I want to know the outcome."*

45. Miss Bailey therefore adjourned the meeting for approximately 20 minutes. Upon the resumption, she said that as the claimant was unwilling to answer questions then she would have to make a decision upon the basis of what was uncovered in Mr Endersby's investigation. The claimant said, *"as I told you, I don't agree to the investigations therefore I won't comment on it I'm not agreeing."* Miss Bailey then said that the claimant was being issued with a written warning.

46. The warning was recorded in the letter at page 28. This is dated 8 November 2018. Miss Bailey said, "*I'm writing to confirm that I'm issuing you with a formal written warning concerning your conduct of abusive behaviour towards a manager."* The warning was to apply for a period of 12 months.

47. The claimant said that Miss Bailey had handed the letter to him at the end of the meeting. Miss Bailey said that she had posted the letter to the claimant. Upon this issue, the Tribunal prefers the evidence of the respondent. The respondent produced, during the course of the hearing, a receipt showing that the claimant signed for the letter on 10 November 2018. However, even if the Tribunal were to accept the claimant's case that the letter was handed to him by Miss Bailey at the end of the meeting, this does not denote pre-determination in any event. The letter at page 28 is short. Miss Bailey adjourned for a period of 20 minutes in the light of the claimant's refusal to engage with the process. It is perfectly possible for her to have typed a letter of that length during the course of the

adjournment. (There would have been merit in the claimant's position had there been no adjournment and he had been handed a pre-prepared letter. However, the Tribunal finds that is not what happened in this case).

48. After Miss Bailey announced her decision, the claimant appeared to start to engage with the process and took issue with what was being said about the events of 23 October 2018. Miss Bailey said that she stood by her decision upon the basis that *"six of the eight* [witnesses] *said* [the claimant] *was arguing."* Shortly after she had indicated her position the claimant said that he had already sent a grievance to the respondent. This had been sent to Andrea Whitehead.

49. The grievance, dated 6 November 2018, is at pages 29 and 30 of the bundle. The claimant raised a grievance about Patricia Stott, Mr Endersby, Miss Longden and Miss Ali. He complained about being expected to work upon the EDF campaign. He said that he had had *"very minimal training filled with unrelated subjects over four days ie watching an episode of Jeremy Kyle."* He took issue with the decision to suspend him. He also complained that he had been subjected to a systematic campaign of harassment and bullying. He mentioned that he had been invited to a disciplinary hearing to take place on 8 November 2018.

50. Mrs Whitehead acknowledged receipt of the claimant's grievance on 13 November 2018. He was invited to a grievance hearing to take place on 19 November.

51. Mr Birch put to the claimant that he had not appealed against the written warning issued to him by Miss Bailey. Miss Bailey had afforded him a right of appeal within seven days of the date of his receipt of her letter. The claimant said that he had lodged an appeal. The claimant's evidence was that he had been told by Miss Bailey to send his appeal to Laura Walker who works in the respondent's human resources department. The Tribunal accepts the claimant's evidence upon this issue. Towards the end of page 26 the issue of an appeal is discussed. Miss Bailey is recorded as instructing the claimant to send his appeal to *"Laura".* It is not in dispute that Miss Bailey was referring to Laura Walker.

52. Upon further investigation during the course of the hearing, the respondent discovered the letter of appeal addressed to Laura Walker. The claimant had sent the letter of appeal in on time. No-one within the respondent was in a position to say what had become of the letter of appeal and why the respondent had not actioned it. Mrs Whitehead was shown the claimant's letter of appeal. She said that she had not seen it before the Tribunal hearing and as far as she was concerned she was dealing only with the claimant's grievance.

53. The claimant raised the following issues in his letter of appeal:

    53.1. That he contested the evidence against him upon the issue of alleged abusive behaviour.

    53.2. That he has been subjected to a campaign of harassment.

    53.3. That he was unfairly suspended.

53.4. That he had been signed off by his general practitioner as unfit for work. He said that he felt unable to return to what he described as an *"intimidating environment".*

54. Notes of Mrs Whitehead's meeting with the claimant to discuss his grievance may be found at pages 32 to 35. The claimant was again accompanied by Mr Rook. The claimant raised the following issues:

54.1. That he was finding it difficult to accommodate working upon the new campaign for EDF. He said that it was *"something new and different which I was looking forward to"* but went on to say that, *"right at the start we had four days training in the training room and then the rest was completed on the call centre floor due to systems".*

54.2. He made reference to the issue involving Safeea Ali of 19 September 2018 and then the incident involving Alison Longden of 18 October 2018. He said he felt humiliated by the latter incident because Mr Endersby had shouted at him across the room.

54.3. He then spoke about the incident involving Alison Longden of 23 October 2018.

54.4. He then complained that the matter had been escalated by Mr Endersby, culminating in him being suspended at the end of the investigation meeting of 24 October 2018.

54.5. The claimant said that he had no issues during his employment with the respondent prior to August 2018.

54.6. He then complained that Helen Bailey had issued a written warning against him. He said that he had told her during the course of the disciplinary hearing that he would be raising a grievance.

54.7. The claimant returned to the issue of his perception that the training that he had been given was inadequate.

55. Mrs Whitehead interviewed the 18 individuals mentioned in paragraph 10 of her witness statement. It is not necessary to list them all. The notes are at pages 36 to 74 of the bundle. It is not necessary to summarise each of the interviews. The salient ones appear to the Tribunal to be the following:

55.1. Ross Jones, training lead, (pages 41 and 42) said that the group undertaking the EDF campaign were, in his view, capable of *"going live at the end of the training."* He maintained that the group had plenty of floor support. He also observed that the claimant would not have "*gone live without passing the EDF knowledge checks."*

55.2. Mr Endersby said that the group undertaking the EDF campaign *"was set up to fail as they had a lot of pre-arranged holidays. However, there was plenty of support for them. The other people in that group have done really well such as Andrew and Jenny,"* [presumably Andrew Wardle and Jennifer Woodward]. Mr Endersby was therefore attributing the problems within the group not to the inadequacy of the training but the fact that many of the group were on annual leave.

55.3. Jennifer Woodward said about the training that, *"we learnt basic things about G and D things we didn't need to know, we did charts and stuff on the wall, we watched a You Tube video, we watched a video on Chernobyl. There were only five/six people on the floor. I took notes on the floor as we didn't learn anything from training. Nothing against Ross but we didn't learn anything about the systems, there were bits and bobs but it's not easy to learn with all the systems on EDF. The training was basic and quite a lot of a struggle, even now some people don't fully know what they are doing".*

55.4. Andrew Wardle said that he *"didn't feel the training was good, you learn more when you're on the floor. On D and G you had floorwalkers, you weren't doing a sale on your own, everything got checked after you'd done it. It was two weeks before you would put a sale through on your own, you felt more comfortable, watching what you were doing. It felt more isolated downstairs – it wasn't quite as nice going into it as you don't have your systems straight not having the hands on. It got better when we got access to the systems. The mandatorys – this was hard to get on with being word to word. On D and G the floorwalker did them for you – on that there was a lot to get into. I'm only just getting comfortable"*: (pages 65 and 66). Mr Wardle went on to say (at page 66) that he "*decided to move out of the grad bay. I felt it was a bit too crowded. You weren't getting the one to one support you could need. I moved near Trent because he was more experienced, Jade and Rita behind, I had more people to ask in grad bay this wasn't the case.*

56. On 5 December 2018 Mrs Whitehead wrote to the claimant. Her conclusions (at pages 75 to 79) were as follows:

56.1. She accepted that the training for the EDF campaign was not of the standard that she would have expected. She said that *"Ross Jones* [the training lead] *had stated that he was not familiar enough with the material and your colleagues have confirmed that they did not feel well enough equipped to do the role when they joined the grad bay. At that time, it was felt that by having floorwalking support when you joined the team, you would be able to pick up the work quickly but in hindsight I believer further support was needed and that is something that I will speak with the training team about. With regard to the issue raised regarding watching Jeremy Kyle during training, I understand from your colleagues that this was just a fun activity which followed a break when someone had watched an amusing video and it was not intended to be part of the training nor detract from it".*

56.2. She noted that the claimant had undergone a training session with Jack Hepworth on 19 September 2018 and that the claimant had signed to confirm he understood the systems. Nonetheless, Mrs Whitehead accepted that the claimant was still unsure of what was required. In support of this, she noted the report at page 1 of the Tribunal's bundle which recorded the claimant's concern about the inadequacy of the training. She also noted that the respondent was responsible for failings in the processes following the 19

September meeting. Mrs Whitehead said, "*as you are aware, this documented discussion* [at page 1 of the bundle] *was not conducted by an EDF team leader, and he* [Daniel Winterbottom] *passed the details to your operational managers anticipating that they would address this and unfortunately this did not happen. I can only apologise for this oversight and assure you that it has been addressed."*

56.3. Mrs Whitehead noted that the claimant did not raise any issues until he spoke to Mr Wragg about the incident of 18 October 2018. She also noted that provision had been made for extra support following the discussion of 22 October 2018 (page 2 of the bundle). Mrs Whitehead found no evidence of the claimant formally raising concerns about his role or the support for him in role between 19 September and 18 October 2018.

56.4. Mrs Whitehead concluded that the claimant was known to be a passionate individual according to colleagues to whom she spoke who worked for him on D and G campaigns. Essentially, she concluded that those who had worked for the claimant upon the D and G campaigns for several years knew him. This was not the case when the claimant started working upon the EDF campaigns and problems therefore surfaced. Mrs Whitehead said that it was her belief that the difficulties were borne out of the claimant's frustration with his lack of understanding of the role but that could not excuse the claimant's behaviour.

56.5. Mrs Whitehead said that, *"in summary, from our meeting and my investigations I believed that this is the underlying situation; you were struggling to understand everything that you had to do, and you don't believe the support you were receiving was adequate, which is stated above, in relation to your initial training, I agree with, and this caused you to react in a way which led to situations being inflamed."*

56.6. Mrs Whitehead then turned to the issue of Helen Bailey's handling of the disciplinary proceedings. Mrs Whitehead said that, *"Helen has stated that, unfortunately she didn't pick up on* [the fact that the claimant had raised a grievance] *in the meeting* [of 8 November 2018] *which is why it wasn't adjourned for her to take further advice on the process. This is an error for which I apologise but Helen did state that she found it quite difficult at times to follow everything you said as you became agitated and talked over her. However, had Helen adjourned at this point, it does not necessarily mean that the disciplinary would have been postponed until after the grievance, or that the outcome would have been materially different. The disciplinary hearing was in relation to your conduct and whilst I believe some of the details in your grievance provide some mitigation for your conduct this can be dealt with as part of a disciplinary appeal; but the other issues raised still require a separate grievance hearing to be conducted."*

57. Mrs Whitehead therefore partially upheld the claimant's grievance. She upheld his grievance as it pertained to a lack of training and support in his role. She rejected it in so far as it pertained to alleged bullying and harassment of him by his colleagues. She said that the following actions

were to be carried out and concluded with the observations at 56.4 and 57.5 below:

57.1. That the training material for the EDF campaign would be fully reviewed with a competency test at the end of the training to assess trainees' readiness for calling upon campaigns.

57.2. Miss Bailey would receive feedback regarding her handling of the disciplinary proceedings.

57.3. She acknowledged that the claimant did not intend to be confrontational and that he had enjoyed good relations with colleagues in D and G.

57.4. Mrs Whitehead wanted to discuss with the claimant the possibility of repairing the relationship. She said, "*we do have a number of campaigns, including teams at our other site in Woodseats if it is felt that a fresh start would be more beneficial for you. I am aware that you are currently absent from work so please let me know when you'll feel well enough to see me and I will organise a mutually convenient meeting."*

57.5. Mrs Whitehead afforded the claimant a right of appeal. He exercised this right in a letter dated 28 December 2018 (page 80). The claimant took issue with Mrs Whitehead's finding that he had not been the subject of harassment and bullying upon the part of colleagues. He complained that her investigation was done in haste and without carrying out a proper investigation. He complained again about lack of training (while acknowledging that Mrs Whitehead had partially upheld his grievance upon that issue).

58. The final paragraph of the claimant's letter of 28 December 2018 (at page 80) says, *"I feel that I will be left in a vulnerable position as a call operator. The only way I can see myself returning to work with Capita is in a different job role within the business which I have been working for the last 3 and a half years. Due to the fact that all this is causing me significant amounts of stress and time I will have no options but to hand in my resignation. I hope you understand my position in this matter and I will be grateful for an early resolution to may appeal."*

59. Mrs Whitehead acknowledged receipt of the claimant's resignation on 3 January 2019 (page 80a). Notwithstanding that the claimant's appeal was submitted outside of the respondent's timescales, the appeal was progressed. This was conducted by Mrs Monaghan. She invited the claimant to a grievance appeal hearing which took place on 23 January 2019.

60. The appeal notes are at pages 81 to 84. The claimant went through his grounds of appeal.

61. The appeal also turned to a consideration of alternative work. Mrs Monaghan raised the issue of working at the V1 site doing the O2 campaigns. The claimant said that he had concerns about the shift pattern at V1 and also the limitations of working only for O2: (it appears that the V1 site deals only with O2 campaigns). The claimant said that he would like to work for the respondent but not in an advisor role where he may be

answerable to Patricia Stott, Mr Endersby, Miss Ali or Miss Longden. Mrs Monaghan said that she would endeavour to ensure that that was not the case. She said*, "I guarantee that whilst I'm here we'd accommodate for you."* Mrs Monaghan suggested to the claimant the retraction of his resignation and his return to work for the respondent but at the V1 site.

62. This suggestion did not appear to find favour with the claimant. The notes record that he said, *"I don't want to exhaust my options with ACAS and I don't want to miss out on my day in court."* When asked about this during cross-examination, the claimant said that meant that he was fearful of losing his right to pursue his unfair dismissal complaint by presenting his claim outside the relevant limitation period. Mrs Monaghan said that she did not understand that this was the message that the claimant was seeking to convey and that he appeared determined to *"have his day in court."*

63. Mrs Monaghan reached no conclusions upon the claimant's appeal. This is because the claimant did not retract his resignation and the contract expired on 28 January 2019.

64. In evidence given under cross-examination, Mrs Whitehead was asked further about what improvements there were to be for the training. She said that it was to be revamped but this had not been done before the claimant's resignation.

65. Mrs Whitehead took issue with the claimant's scepticism about his prospects were he to go to work at V1. She said that were it to be the case that the shift patterns were an issue for the claimant then he could have made a request for flexible work and that would have been reviewed. It may have been considered sympathetically were the claimant to have good reason for making the request. She said there was no different career path or progress as between the V1 and V2 sites. She said there were several lines of business in V1 with different campaigns being conducted on behalf of O2.

66. Mrs Whitehead said that she could not recall whether the claimant raised with her the issue of a pending appeal against Miss Bailey's decision to issue him with a warning. This is credible evidence. The Tribunal notes from Mrs Whitehead's record of the meeting of 19 November 2018 (pages 32 to 36) that there was discussion about Miss Bailey's handling of the disciplinary proceedings. This is reflected in Mrs Whitehead's decision letter (in particular at pages 77 and 78). However, conspicuous by its absence is any complaint by the claimant that the respondent had not progressed his appeal against Miss Bailey's decision. His complaint was focused upon her (Miss Bailey) not having reconsidered matters when he raised the fact that he had brought a grievance arising out of his treatment.

67. When she gave evidence before the Tribunal, Mrs Monaghan said that she had offered the claimant a personal guarantee that he would not find himself being managed by those within V2 with whom the claimant had had difficulties. She offered him a personal guarantee to that effect coupled with an undertaking that should she leave the employment of the respondent she would ensure that on her handover her successor honoured that agreement or guarantee.

68. The claimant now works as an assistant chef for an Indian restaurant in Bakewell. He has no catering or cookery qualifications. He told the Tribunal that it is 20 years since he last worked in a restaurant having spent the ensuing 15 years running a newsagents' before going to work for the respondent. The claimant said that he works 23 hours per week upon a part-time basis. He said that there was no prospect of increasing his hours due to his health. Sadly, he has a heart condition and has recently suffered a heart attack. Further, he said that the environment within the Indian restaurant was not conducive to working any more than 23 hours per week. His salary is £10,368 *per annum.*

The issues in the case

69. It is unfortunate that this case did not benefit from a case management hearing in order to clarify the issues in the case. Some time was spent upon the first morning of the hearing clarifying them. The claimant said that his case was brought upon the basis that the respondent was in fundamental breach of the contract of employment. It is the claimant's case that the respondent was in fundamental breach because it had acted without reasonable and proper cause in a manner calculated or likely to destroy or seriously damage mutual trust and confidence. The claimant's case therefore is that the respondent was in breach of the implied term of mutual trust and confidence which is a fundamental breach. The Tribunal shall refer to this as *'the implied term.'*

70. The claimant then particularised the ways in which he said the respondent was in breach of the implied term. Broadly, this was because:

70.1. The respondent had failed to provide adequate training, resources and support for him to do his work upon the EDF campaign.

70.2. The respondent had failed to safeguard him against bullying and harassment from colleagues.

70.3. The respondent had acted contrary to its own procedures and the *ACAS Code of Practice on Disciplinary and Grievance Procedures* in that: it had inappropriately suspended the claimant; and it had failed to carry out a full investigation at stage 2 of the respondent's grievance procedure. It had failed to stop disciplinary action even though the claimant had raised a grievance before the disciplinary hearing and had failed to follow its own disciplinary procedures.

71. Mr Birch confirmed that the respondent was in a position to answer the claimant's case following its clarification upon the first morning of the hearing. He did not seek an adjournment of the case.

The relevant law

72. The Tribunal now turns to a consideration of the relevant law. It is the claimant's case that he was constructively dismissed and that the constructive dismissal was unfair. Whether an employee is entitled to bring his contract of employment to an end must be determined in accordance with the law of contract. An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be

bound by one or more of the essential terms of the contract. It is not in dispute that the implied term of trust and confidence is an essential term of any contract of employment. If a breach of that implied term is established then the employee is entitled to leave without notice or to give notice and claim unfair dismissal.

73. Conduct is repudiatory if, viewed objectively, it shows an intention no longer to be bound by the contract. Neither the intentions of the party nor their reasonable belief that their conduct would not be accepted as repudiatory are determinative.

74. Once repudiation of the contract by the employer has been established the proper approach is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It is enough that the employee resigns in response at least in part to a fundamental breach by the employer. An acceptance of repudiation must be unequivocal. The employee alleging constructive dismissal must communicate to the employer whether by words or conduct the fact that they are terminating their employment.

75. The employee must make up his mind to leave soon after the conduct of which he complains. If he continues for any length of time without leaving he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged because of the breach.

76. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract but if it is prolonged it may be evidence of implied affirmation. Provided the employee makes clear his objection to what is being done he is not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time even if his purpose is merely to enable him to find another job. An employee does not affirm the contract by delaying a few weeks before acting upon the breach in order to find alternative employment.

77. In order to establish a claim of constructive dismissal, there is no requirement as a matter of law that an employee must state that he is leaving because of the employer's repudiation. Whether there has been an acceptance of a repudiation of a contract of employment is for the Tribunal to determine on the facts and evidence in each case, although where no reason is communicated to the employer at the time, the Tribunal may readily conclude that the repudiatory conduct was not the reason for the employee leaving.

78. The *ACAS Code of Practice on Disciplinary and Grievance Procedures* has this to say about concurrent disciplinary and grievance procedures: *"Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related, it may be appropriate to deal with both issues concurrently."*

Conclusions upon the merits of the claim

79. The Tribunal has made detailed findings of fact and set out the issues in the case. The Tribunal has also set out a summary of the legal principles

upon constructive dismissal. The Tribunal therefore now turns to the conclusions reached.

80. The Tribunal starts with a consideration of the procedural issues raised by the claimant (at paragraph 70.3). Mutual trust and confidence can be destroyed or seriously damaged by the way in which an employer carries out a disciplinary procedure. Employers need to exercise caution when suspending an employee. The question is whether there is reasonable and proper cause for suspension. Suspending an employee as a knee jerk reaction may be a breach of the implied term as it may lead to employees feeling demoralised and de-skilled by an exclusion from work.

81. Where an employer has a reasonable basis for suspecting an employee of misconduct, it is unlikely that taking disciplinary action on that basis will cause the implied term of trust and confidence to be breached. While proceeding with disciplinary action is likely to damage mutual trust and confidence such a course of action will not be a breach of the implied term if there is reasonable and proper cause for it.

82. In the Tribunal's judgment, there was no breach of the implied term by respondent in the conduct of the disciplinary proceedings as a whole. Mr Endersby had reasonable and proper cause to suspend the claimant from work: *see paragraphs 32 to 38.* The claimant's behaviour at the investigation meeting of 24 October 2018 corroborated the complaints made to Mr Endersby by others the same day about the claimant's conduct: *see paragraphs 19 to 28 above*. Mr Endersby had reasonable cause to believe that if permitted to remain in the workplace the pattern of behaviour displayed by the claimant may continue. Mr Endersby's suspension of the claimant was not a knee jerk reaction. It was done with reasonable and proper cause in order to protect the interests of the claimant himself (by safeguarding him against further accusations from others), to guard against a repetition of his behaviour and in the interests of those others (in safeguarding them from further instances of inappropriate behaviour on the claimant's part).

83. The respondent had reasonable and proper cause to bring disciplinary proceedings against the claimant. Again, Mr Endersby's investigation formed the basis of a reasonable suspicion that the claimant had behaved inappropriately towards Alison Longden on 23 October 2018. While doubtless damaging of trust and confidence from the claimant's perspective the respondent acted with reasonable and proper cause in proceeding to take disciplinary action against him. Thus, there was no breach of the implied term by Mr Enderby's decision to progress matters to a disciplinary hearing.

84. The Tribunal now turns to Miss Bailey's conduct of the disciplinary proceedings. The difficulty here for the claimant is that he had not engaged with the disciplinary hearing chaired by Miss Bailey until after she gave her decision that she was going to issue him with a warning for his conduct on 23 October 2018: *paragraphs 43 to 48.* That was a decision which was a reasonable one for her to make based upon the evidence presented to her by Mr Endersby and the claimant's refusal to engage in the process up to the point that her decision was announced. There was

plainly a basis for her to reasonably believe that the claimant had acted inappropriately and should be warned about his behaviour.

85. The claimant did not raise the fact that he had raised a grievance until after Miss Bailey had given her decision. Had Miss Bailey been aware of the claimant's grievance before making her decision and then proceeded nonetheless the Tribunal would have held the respondent to have been in breach of the implied term of trust and confidence. The grievance covered the same ground as the disciplinary proceedings with which Miss Bailey was concerned. The grievance effectively constituted the claimant's mitigation, that being that the inappropriate behaviour was borne of frustration at experiencing difficulties undertaking his new role attributable at least in part to a lack of training and support. For Miss Bailey to have ignored the fact of the claimant's grievance when it was inextricably linked to the disciplinary proceedings would have been a breach of the *ACAS Code.*

86. As the Tribunal has said, the difficulty for the claimant is that Miss Bailey was unaware of the fact of the grievance until after she had pronounced her decision. The question then is whether her failure to rescind her decision was in breach of the implied term. The Tribunal has little doubt that some disciplinary officers would have agreed to a rescission of the decision and a recommencement of the disciplinary hearing in the circumstances. However, others would take a different view, taking the harsher line that the employee had the opportunity of engaging with the process and did not do so in the knowledge that the employee has the safety net of an appeal in any event where the mitigation points may be raised.

87. The respondent's disciplinary procedure is in the bundle at pages 157 to 161. It is not clear whether an appeal against a disciplinary sanction is by way of a re-hearing by the appeals officer or simply a review of the disciplinary officer's decision: in other words, to determine whether or not the disciplinary officer's decision was within the range of reasonable responses. However, it may be taken that the respondent adheres to the *ACAS Code* which provides that a previous decision may be overturned if it becomes apparent that it is not soundly based. Therefore, an appeals officer taking into account the claimant's mitigation may have justifiably overturned Miss Bailey's decision if he or she felt it appropriate.

88. The Tribunal therefore finds that Miss Bailey's decision not to rescind or revoke her own decision taken on 8 November 2018 and start again upon her finding out about the claimant's grievance after the decision had been pronounced was not an act in breach of the implied term. It was not an act showing that the respondent did not intend to be bound by the implied term of mutual trust and confidence. The claimant had his right of appeal (which he exercised). It was open to him to advance new material not considered by Miss Bailey (including his mitigation). There was reasonable and proper cause for Miss Bailey's decision to issue a written warning and to refuse to rescind it as the claimant had not engaged with the process to the point at which her decision was announced.

89. In the Tribunal's judgment, the respondent was in breach of the implied term in failing to progress the claimant's appeal against Miss Bailey's

sanction. There was no satisfactory explanation in the evidence as to why the appeal was not actioned. In fact, there was simply no evidence at all upon this issue. Plainly, not taking any action upon an employee's appeal is in breach of the implied term because it shows an intention upon the part of the employer not to be bound by a fundamental term of the contract, being that of mutual trust and confidence. There can be no reasonable and proper cause for failing to action an employee's appeal. It is also in breach of the *ACAS Code* and a breach of the respondent's own disciplinary procedures.

90. It is for the claimant to show that he resigned from his employment in response (at least in part) to what the Tribunal has determined to be a fundamental breach of contract upon the part of the respondent. The Tribunal finds that the respondent's failure to advance the claimant's appeal was not causative of his resignation.

91. The issue of the disciplinary procedure was, as has been said, remarked upon during the course of the claimant's grievance hearing with Alison Whitehead: *paragraph 54*. However, this was in the context of Miss Bailey having disregarded the fact of the claimant raising a grievance and not rescinding her decision. That is a different issue to the question of the respondent's failure to act upon the claimant's appeal. If the matter had been of such concern to the claimant one would have expected him to have said so quite clearly during the course of the grievance hearing. (The Tribunal accepts that the claimant could not have been expected to say this is in the grievance letter because of course that pre-dated the date of the disciplinary hearing before Miss Bailey). It is also striking that the claimant did not raise the issue of his appeal with Miss Monaghan: *paragraphs 61 and 62.* Although of course the claimant had tendered his resignation by that point if it was a pressing concern one would have expected the claimant to have raised it. In addition, he did not raise the issue in the final paragraph of the letter of 28 December 2018 when tendering his resignation: *paragraph 58.*

92. It is of course not the case that a failure to mention a reason for resignation in a resignation letter is fatal to a complaint of constructive dismissal based upon a reason not mentioned. However, particularly given the content of the notes of grievance meetings before Mrs Whitehead and Mrs Monaghan, the Tribunal determines that the respondent's failure to progress the claimant's appeal was not an operative cause of his decision to resign. The evidence is that the non-progressed appeal was of no concern to him.

93. There is also some merit in Mr Burgess' point that the respondent had pleaded (at paragraph 33(c) of its grounds of resistance) that the claimant had failed to appeal Miss Bailey's decision. As we know, factually this was incorrect. However, as Mr Birch rightly says, had the issue been at the forefront of the claimant's mind one would have expected the claimant to have presented evidence in the form of a witness statement disputing what was said by the respondent. That he did not do so shows, in the Tribunal's judgment, that the issue of the respondent's failure to progress the appeal was of little or no concern to him.

94. In conclusion therefore, the Tribunal determines that while the respondent was in fundamental breach of contract in the way in which it handled the claimant's appeal that was not an operative cause of his resignation. Therefore, his complaint of constructive unfair dismissal upon this basis fails.

95. The Tribunal then turns to the next limb of the constructive dismissal complaint (at paragraph 70.2) which is that the respondent had exposed him to bullying and harassment. This complaint fails on the facts. There is simply no evidence (or at any rate no sufficient evidence) upon which the Tribunal may conclude that the claimant was being bullied and harassed by his fellow employees or those who had managerial responsibility for him.

96. Mrs Whitehead in particular carried out a thorough investigation involving interviewing around 18 colleagues: *paragraph 55.* There were difficulties within the workplace. In the Tribunal's judgment, Mrs Whitehead's conclusion that the claimant's new colleagues were taking time to adjust to his passionate character and personality was entirely justified. It is consistent with the claimant having experienced little or no difficulty with his erstwhile colleagues in domestic and general. However, personality clash is a different thing from sustained bullying and harassment of an individual. There is insufficient evidence for the Tribunal to safely conclude that the claimant was subjected to bullying and harassment at the hands of his colleagues in EDF.

97. Even if the Tribunal were to be wrong in that conclusion, then in the Tribunal's judgment the respondent would not be in breach of the implied term by reason of such actions on the part of its employees in any event. An employer can only act upon being informed of an issue by the employee concerned and being allowed the chance to investigate. In this case, the employer did that and offered the claimant an opportunity to work in a different location away from the putative bullies and harassers. In the Tribunal's judgment therefore, the respondent was not in fundamental breach of the implied term in relation to this limb of the constructive dismissal complaint.

98. This then leaves the third and final limb which is that of training and support (referred to in paragraph 70.1). Plainly, an employer that fails to provide the employee with inadequate support and inadequate training to fulfil a demanding role without proper and reasonable cause may be in breach of the implied term. In the light of Mrs Whitehead's conclusions and her evidence, the Tribunal finds that the respondent was in breach of the implied term given the inadequacies of the training afforded to the claimant and the support given to him once he started working upon the EDF campaign. Only on 5 December 2018 did the claimant receive acknowledgement from the respondent that this was the case. There was no evidence that the training issue had been remedied. Even if it had been remedied the claimant was not told about the training improvements.

99. On the contrary, the respondent told the claimant that the position would be remedied. This was a statement of future intent. Once there has been a repudiatory breach (as there was in this case) it is not open to an employer, by curing the breach, to preclude the employee from accepting

the breach as terminating the contract. In other words, the respondent continued to be in breach of the implied term by reason of a failure to provide adequate training and support and the intimation of an intention to cure the problem after 5 December 2018 would not prevent the claimant from resigning in response to that breach.

100. In the Tribunal's judgment, the claimant did not wait too long before accepting the breach. Mrs Whitehead confirmed the breach to have continued right up until 5 December 2018 at the earliest and the claimant intimated an intention to resign 23 days later. The claimant was off work through ill health. There was nothing to indicate that the claimant was waiving his right to resign in response to the breach and no conduct on his part that constitutes affirmation.

101. The letter of 28 December 2018 demonstrates that the training issue was a reason for the claimant's resignation. The training issue loomed large in the claimant's discussions with Mrs Whitehead. Indeed, the claimant's position was vindicated (and was supported by at least two of his colleagues: *paragraphs 55.3 and 55.4*). He referred to the training issue again in the letter of 28 December 2018.

102. Upon this basis therefore, the claimant's complaint that he was constructively dismissed by reason of the poor provision of training and lack of support while working upon the EDF campaign succeeds. The claimant having been constructively dismissed, it is for the respondent to show a potentially fair reason for the claimant's constructive dismissal. In such a case, it is for the employer to show that the reason for the fundamental breach of the contract of employment is a potentially fair reason for the purposes of section 98 of the 1996 Act. Such a potentially fair reason may be demonstrated in an appropriate case: for example, an employer deciding to unilaterally reduce an employee's wages may be a fundamental breach but which has as its foundation a potentially fair reason because of the need to reduce business cost. No potentially fair reason was advanced by the respondent for failing to provide the claimant with adequate training and support in the EDF role. It is also difficult to envisage the basis upon which a potentially fair reason for this constructive dismissal could be advanced anyway.

The relevant law on remedy

103. It therefore follows that the claimant's complaint of constructive unfair dismissal succeeds. That being the case, the Tribunal turns its attention to remedy. The primary remedy upon an unfair dismissal complaint is re-employment. However, that is not sought by the claimant in this case. Therefore, the Tribunal must consider the making of a basic award and a compensatory award.

104. The basic award is calculated by reference to the mathematical formula set out in section 119 of the 1996 Act. The basic award may be reduced in certain circumstances. The first of these is where the employee has unreasonably refused an offer by the employer which (if accepted) would have the effect of reinstating the employee in his employment in all

respects as if he had not been dismissed. The second is where the Tribunal considers that any conduct of the employee before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, that the Tribunal shall reduce or further reduce that amount accordingly. The first provision only applies in circumstances where an offer is made after the employment has ended. However, an employee's refusal to accept an offer of an alternative job made before the effective date of termination may warrant a reduction in the basic award on the ground of the employee's conduct. There need not be a causal link between the conduct on the one hand and the dismissal upon the other to warrant a reduction of the basic award upon just and equitable grounds.

105. A compensatory award is in such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the employee, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. In contrast to the basic award, a causal link between the conduct on the one hand and the dismissal upon the other needs to be shown to warrant a reduction in the compensatory award.

106. In ascertaining the loss for the purposes of the compensatory award, the Tribunal must apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law. The question is whether the employee's conduct in mitigating loss is reasonable upon the facts of the case. The duty to mitigate at common law does not arise until the employee has actually been dismissed. Upon the facts of this case, the claimant refused the offer of alternative employment in V1 before the effective date of termination. Therefore, there is no scope for a reduction in the compensatory award in this case upon account of failure to mitigate.

107. In principle, a reduction of both awards for contributory conduct may be made in a case of constructive unfair dismissal.

Conclusions on remedy

Basic award

108. In the Tribunal's judgment, the claimant acted reasonably in refusing the respondent's offer to work at the V1 site. The Tribunal is satisfied from the evidence of Mrs Whitehead that the claimant's career prospects were no worse at the V1 site than at the V2 site notwithstanding that the former only services campaigns for one client. Further, there was no significant difference in travelling time as far as the claimant was concerned. There was in reality little chance of the claimant coming across those with whom he had difficulties while at V2. Mrs Monaghan went so far as to offer a personal guarantee that he and his erstwhile colleagues in V2 will be kept apart (together with an undertaking from her to ensure that her successor

if and when she leaves the respondent, would do likewise). In the Tribunal's experience, it is unusual for a manager to offer such a personal guarantee to an employee.

109. However, the claimant had undergone an unhappy experience when moved from the D and G campaign to the EDF campaign. This was the consequence of the respondent's acknowledged failure to train the claimant and properly prepare him for his new role. In the Tribunal's judgment the claimant reasonably took the view that this failure had destroyed or seriously damaged his trust and confidence in the respondent such that he could not contemplate working for them into the future.

110. That said, the Tribunal's judgment is that the claimant's conduct warrants a reduction in the basic award. The Tribunal accepts, as was fairly acknowledged by Mrs Whitehead, that the training and support issue mitigates the claimant's position to some degree. However, there can be no justification for the claimant conducting himself towards colleagues as he did culminating him in him receiving a written warning for his conduct towards Alison Longden on 23 October 2018. If he had difficulties because of lack of training then the appropriate step was to raise the issue through proper channels. It was inappropriate to subject colleagues to the type of conduct referred to at paragraphs 14 to 28 and 32 to 38. Indeed, the claimant's inappropriate conduct extended to the disciplinary hearing (paragraphs 43 to 48).

111. There need to no causal link between the conduct on the one hand and the constructive dismissal on the other. The Tribunal has determined that the respondent did not act in breach of the implied term in giving the claimant a written warning for that conduct. Although damaging of trust and confidence it was a step taken with reasonable and proper cause. The respondent was compelled to take disciplinary action against the claimant which plainly soured the relationship from the claimant's point of view. He also raised a grievance about having been suspended. Again, suspension was a reasonable decision upon the part of the respondent. The suspension was caused by the claimant's conduct during the investigation meeting with Mr Endersby of 24 October 2018. Had the claimant not so behaved, and he conducted himself appropriately in the pursuit of his training concerns he would not have been suspended and the temperature as far as the claimant was concerned would have been lowered.

112. In the circumstances it is just and equitable to make a reduction of 50% to the basic award. This is upon the basis that the parties bear equal culpability in the unhappy situation which arose. While the claimant behaved inappropriately this may be explained at least in part by reason of the respondent's admitted failure to train and support him in a new role.

Compensatory award

113. Although the principle discussions about alternative employment were with Mrs Monaghan, Mrs Whitehead made earlier overtures to the claimant about him working at V1 in Woodseats in her letter of 5 December 2018 (page 78). She invited the claimant to see her to discuss matters. The

claimant did not do so. Instead, he resigned his employment by way of his letter dated 28 December 2018.

114. The claimant's failure to conscientiously consider a position at Woodseats cannot strictly speaking be a failure to mitigate because the suggestions were made by Mrs Whitehead and Mrs Monaghan before the employment ended. However, an employer's offer made before the end of employment can of course be taken into account when considering what it is just and equitable to award by way of compensatory award upon a successful unfair dismissal complaint.

115. The first question that arises is whether there should be a reduction to the compensatory award on account of culpable or blameworthy conduct upon the part of the claimant. The issue of culpable or blameworthy conduct is to be determined by reference to the Tribunal's findings upon the employee's conduct. The Tribunal must find that there was conduct on the part of the employee which was culpable or blameworthy which can include perverse actions, foolhardiness or bloody mindedness. The Tribunal has so found. In addition, the conduct must also have caused the constructive dismissal to a material extent.

116. The constructive dismissal was because of the failure by the respondent to provide training and support for the EDF campaign. The claimant's conduct was because of that failure. His conduct did not bring about the poor provision of training and support (which led to the constructive dismissal). The respondent's fundamental breach of contract was not caused by claimant's conduct. On the contrary, the claimant's conduct was caused by the respondent's fundamental breach. The constructive dismissal of him was because of this breach. The breach preceded the claimant's conduct and indeed was the cause of it. There shall be no reduction to the compensatory award on account of the claimant's conduct accordingly

117. A difficult issue arises upon the question of the alternative employment at Woodseats. As has been said, that cannot be a failure to mitigate because the suggestion was made by Mrs Whitehead and the offer made by Mrs Monaghan before the contract of employment came to an end. In the Tribunal's judgment, it is not just and equitable to reduce the compensatory award for not accepting the respondent's offer to discuss continued employment with the respondent for the reasons given in paragraphs 108 and 109.

118. The respondent shall pay to the claimant a basic award of £513. This is calculated by reference to the claimant's gross weekly wage of £342 which is multiplied by three to reflect the claimant's complete years of service. (Part years are not included in the calculation of the basic award). This is then divided by two to reflect the reduction on account of the claimant's conduct. The formula is thus: 3 x £342/2 = £513.

119. The Tribunal now turns to the compensatory award. There is no suggestion let alone any evidence that the claimant's heart condition referred to in paragraph 68 above was caused or exacerbated by the respondent's constructive dismissal of him. The claimant said that there was no prospect of an increase in his hours of work because of his heart condition. From this the Tribunal concludes that the claimant would have

been unable to return to work for the respondent on a full-time basis had he not been constructively dismissed.

120. The claimant was a salaried employee (according to the contract of employment commencing at page 169). Had he returned to work then he would have done so part-time. The Tribunal received no evidence as to how much the claimant would have been paid had he been able to work only 23 hours per week. On a *pro-rata* basis, the claimant's gross salary would have reduced from £17,784 to £10,907.52: (£17,784/37.5 (hours) x 23= £10,907.52).

121. The claimant is currently earning £10,368 in his work at the Indian restaurant. There is therefore a net loss of £539.52 *per annum*. (The incidence of tax and national insurance may be ignored for earnings at this level).

122. The claimant was out of employment for a period of 41 days; this is 30 working days. There was no evidence form the respondent that the claimant has failed to mitigate his loss and the Tribunal is satisfied that the claimant acted reasonably quickly to obtain an alternative position. There was no evidence that the claimant was unable to work because of ill health after 28 January 2019. The Tribunal accepts that he was fit to work from the end of that month.

123. The respondent shall pay to the claimant compensation for loss of earnings between 29 January and 10 March 2019 being a period of 30 working days in the sum of £1,258.50 calculated at £41.95 per day assuming a five days' week: (£10,907.52/52 (weeks) /5 (days)). The respondent shall pay to the claimant compensation from 11 March 2019 to 10 September 2019 in the sum of £266.26: (£532.52/52 x 26 (weeks).

124. In the Tribunal's judgment, in the absence of any evidence form the respondent of positions for which the claimant may have applied but taking into account judicial knowledge of the local job market an individual of the claimant's experience and ability ought to be able to obtain a position such as to replace the earnings that he enjoyed with the respondent by mid-September 2019.

125. The respondent shall compensate the claimant for the loss of his statutory right not to be unfairly dismissed in a conventional amount of around a week's gross pay.

126. There shall be no award made for any breach of the ACAS Code, the Tribunal finding as a fact there to have been none.

127. The Tribunal has no information as to whether the claimant was in receipt of any state benefits which would trigger the application of *the Employment Protection (Recoupment of Benefits) Regulations 1996.* Should the claimant have been in receipt of jobseekers' allowance, income-related employment and support allowance, universal credit or income support then the Regulations may apply if such benefits were paid consequent upon the dismissal. If such was the case then the parties must inform the Tribunal within 14 days of the date below whereupon the Tribunal will issue a judgment upon reconsideration varying this judgment. Otherwise, the award shall be paid to the claimant within 14 days of the date below.

128. In summary, the Tribunal considers it just and equitable in all the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as that loss is attributable to action taken by the employer to make a compensatory award as follows:

Loss of earnings 29/1/19 to 10/3/19	£ 1,258.50
Loss of earnings 11/3/19 to 10/9/19	£ 266.26
Loss of the statutory right	£ 350.00
Total	£ 1,874.76

Employment Judge Brain

Date 22 August 2019