EMPLOYMENT TRIBUNALS

Claimant: Mr A Curran

Respondent: Department for Work and Pensions

Heard at: Manchester **On:** 1-5 July 2019

Before: Employment Judge Slater

REPRESENTATION:

Claimant: In person
Respondent: Mr S Lewis, Counsel

JUDGMENT having been sent to the parties on 14 July 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The claimant claimed constructive unfair dismissal. The matters complained about and relied on as cumulatively forming a breach of the implied duty of mutual trust and confidence were described under eleven headings in the claim form. The legal issues were identified at a Preliminary Hearing on 10 July 2018 as being as follows with some slight amendment agreed at this hearing to issues at paragraphs 3 and 6 of the list identified at that preliminary hearing.

1.1. Was the claimant dismissed? In order to decide this issue, the Tribunal must decide:-

1.1.1. Did the respondent commit a fundamental breach of the claimant's contract of employment by any of the eleven allegations made in the grounds of claim and/or was there a cumulative breach of the claimant's

contract of employment, the final straw in relation to which is as set out above? The only breach relied upon is a breach of the implied term of trust and confidence.

1.1.2. Did the claimant resign in response to that breach.

1.1.3. Did the claimant affirm the contract?

1.2. [If there was a dismissal, what was the reason for dismissal? This was no longer an issue since, in closing submissions, Mr Lewis said he was not relying, in the alternative, on an argument that a constructive dismissal, if there was one, was fair].

1.3. [Was dismissal a fair sanction i.e. within the reasonable range of responses for a reasonable employer? This was no longer an issue since the respondent did not rely on an argument that a constructive dismissal was fair.]

1.4. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct and should the basic award be reduced because of the claimant's conduct?

1.5. Does the respondent prove that, if it had adopted a fair procedure, the claimant would have been fairly dismissed in any event?

2. The last straw relied upon was identified at the Preliminary Hearing as follows:

"Making the allegation of breach of security against the claimant on 3 October by Ann Gee, the claimant's line manager. This was a perceived final straw by the claimant in light of previous discussions with Anne Gee on 26 June 2017 and at a desk assessment by Ann Gee which took place on Friday 29 September or Monday 2 October."

Facts

3. The claimant began employment with the respondent on 17 November 2014. The claimant worked 18 hours per week over three days per week beginning his contracted hours at 12 noon, unless special arrangements were made, e.g. because of training. The claimant underwent induction training. This included training on handling difficult calls.

4. As part of the process, when starting work, the claimant completed a medical questionnaire, dated 27 November 2014. On this form, he said he had no disabilities. In answer to a question as to whether he had difficulty with any of a number of listed matters that interfere substantially with normal day to day activities, he ticked no for all of them. In answer to a question whether he was aware of any medical problems that may affect his ability to work regularly or effectively that he had not already told them about, he listed migraine, lower back and upper back, shoulder and neck problems, hands, wrist problems, knee and ankle problems, hernias, stomach and bowel problems. The claimant also completed a consent form at the same time, giving permission for the respondent's occupational health

advisers, ATOS Healthcare, to contact his GP if they considered this necessary. There is no evidence to suggest that they did.

5. The claimant moved between a number of sections during his employment and had a number of different line managers, both permanent and acting line managers.

6. The claimant successfully passed his probationary period and continued employment until his resignation in October 2017, which was treated as taking effect in early November 2017.

7. I will deal with the facts which relate to each of the eleven incidents relied upon.

Facts relating to incident one

8. This relates to a first written warning given to the claimant in a letter dated 28 July 2015 by the claimant's then manager, Mark Sullivan.

9. The warning was triggered by the clamant hitting the trigger point of five days in the period 16 February to 13 July 2015. The final absence which caused the claimant to hit this trigger point was an absence of one day on 13 July 2015 for flu symptoms and dizziness. The other absences which contributed to the claimant hitting the trigger point were 16 to 20 February 2015 and 15 May 2015. The February absence was self-certified sick leave, with the nature of the illness being described by the claimant as stomach and bowel problems.

10. The claimant was informed by his then line manager, Donna Curtis-Robbins, on 23 February 2015, that, as his sick level was then at three days within his probationary period, the level of his absence was a cause for concern and, should it go any higher, this may lead to formal action. In his welcome back discussion on that day, the claimant explained that the condition was something he had been suffering from for a long time, the condition being chronic disease of the gullet and Irritable Bowel Syndrome (IBS). The absence on 12 May 2015 was self-certified, being because of bowel and stomach problems. In the welcome back discussion, the claimant again explained that the condition was something he had been suffering from for a long time, being chronic disease of the gullet and IBS. The claimant was recorded as saying that the doctor had prescribed medication for the condition and that he was awaiting further tests and going to see a Dietician to try and help with the condition. Donna Curtis-Robbins reminded the claimant in that meeting that he could utilise the services of the Employee Assistance Programme, the occupational health adviser and the Live Well Work Well Lifestyle Management programmes and the physio advice line.

11. In the welcome back discussion after the absence on 30 July, the claimant informed Mr Sullivan that there were no underlying conditions that affected him for that absence. They discussed that the claimant had hit the trigger point of five days and had a separate discussion of his absence levels and the procedure for supportive action. In the separate discussion, Mr Sullivan advised the claimant that he had reached his trigger of five days in the last twelve months and that he would be issuing him with an invitation letter to a written warning investigation meeting. The claimant told Mr Sullivan that, although the current illness had no underlying causes, his previous absences were due to underlying issues he had with his

digestive system and IBS. Mr Sullivan told the claimant that he would ask the advice of managing absence experts and colleagues and that they might refer him to occupational health services as part of the supportive process.

12. By letter dated 17 July 2015, the claimant was invited to a meeting on 24 July 2015. Mr Sullivan enclosed a copy of the attendance management procedure and information on occupational health referrals with his letter and suggested to the claimant that he read these before they met as it would help him to understand the action and next steps. The claimant did not have any work time to prepare for the meeting, but did not ask to have this, or complain about not having this at the time.

13. The claimant attended an Attendance Review Meeting with Mr Sullivan on 24 July 2015. I accept the notes of the meeting, which were taken by a note taker during the meeting, as an accurate reflection of what was said, although not a verbatim record. Mr Sullivan referred to having already discussed the underlying conditions during the welcome back discussion: IBS, chronic fluid reflux of the gullet and two hernias. The claimant said he had an appointment to see the dietician in September. He confirmed that his GP and Consultant were carrying out investigations to try to help the claimant. The claimant referred to having received letters previously mentioning OHS referrals when he was being screened for other Civil Service jobs that he had applied for before this one. Mr Sullivan asked to have a look at the letters to see what they said and check if anything needed doing as regards the claimant's health. The claimant did not provide these to Mr Sullivan until after the warning had been issued. They were simply letters inviting the claimant to complete a healthcare questionnaire and provided no information about the claimant's conditions.

14. In the meeting on 24 July, Mr Sullivan referred to the attendance management procedures and the claimant said that he had read those. Mr Sullivan suggested that they could do another OHS referral, incorrectly understanding from what the claimant had said about letters that there had been previous OHS referrals. Mr Sullivan said that he was not sure it was necessary to do an OHS referral at that time; he suggested they might do this when all the investigations were complete, asking for advice as to how to support the claimant more. Mr Sullivan said he would take away the information gathered at that meeting and decide whether or not it was appropriate to issue a first written warning. He said that the claimant did not fall under 3.2(A) or (B), which is when they would support certain absences and he had had five days in the review period. The reference to 3.2(A) is to part of the procedures for manager in the attendance policy. This provides that managers should not give a first written warning at the meeting if either one of the circumstances detailed in a list in (A) applies or (B), for other reasons, they believe that a first written warning would be inappropriate. The list of circumstances included in 3.2(A) includes that the employee is disabled, the absence is directly related to the disability and it is reasonable to increase the trigger point.

15. The respondent did not seek an occupational health assessment to assist the respondent in deciding whether the claimant had a disability which was the reason for the earlier absences. The claimant did not ask for an occupational health assessment and Mr Sullivan did not suggest this would be useful and invite the claimant to provide his consent for such an assessment. Mr Sullivan issued the

warning in accordance with his understanding of the policy, which is that he should do so within the required five-day period, and that, if they later got an occupational health assessment which suggested the claimant was disabled, the warning could be revoked.

16. Mr Sullivan issued the claimant with a first written warning by letter dated 28 July 2015. He noted that the claimant had said that there was no underlying condition contributing to the flu which was the most recent absence. He recorded that the claimant told him that he was undergoing medical investigations, including blood tests, assessment by a dietician and that he watched what he ate. Mr Sullivan recorded that the claimant had been diagnosed with IBS and Chronic fluid reflux of the gullet and had two hernias. He noted that the claimant was awaiting the results of further investigative tests. He wrote: "We discussed whether an OHS referral would be appropriate at this stage and agreed that we would await your results and consider a referral at a later date if necessary".

17. Mr Sullivan wrote that they would monitor the claimant's attendance for six months from 24 July 2015 to 23 January 2016, which was the review period. Mr Sullivan, in evidence, said that, since the letter was dated 28 July 2015, the review period should have started on 28 July 2015. However, the earlier start and conclusion to the review period was to the claimant's advantage. The claimant was advised that, if his attendance was satisfactory during the review period, his attendance would be monitored for a further twelve months starting on 24 January 2016 and ending on 23 January 2017. If his attendance became unsatisfactory during this sustained improvement period, he may be given a final written warning. Mr Sullivan advised the claimant of his right of appeal. The claimant did not appeal.

18. The claimant signed a copy of the letter, acknowledging that he had received this and agreeing that it was a fair summary of the meeting. The claimant says he was not given time to read the letter. I find, on a balance of probabilities, that the claimant would not have signed the letter unless he had had an opportunity to read its contents.

Facts relating to incident two

19. This relates to the respondent's actions when the claimant reported an abusive call from a client on 8 December 2015.

20. As noted previously, the claimant, as part of his induction training, had received training on dealing with difficult calls. The claimant's line manager was not present when the claimant received the call so the claimant informed Hugh Meaney, who was responsible for the wider area the claimant worked in, about the call. I accept Hugh Meaney's evidence that he asked the claimant if he was all right and whether he needed a break, this being normal practice. I accept that the claimant said he was fine. I accept that Mr Meaney did not perceive that the claimant was unduly upset by the incident. Mr Meaney came across to the claimant's desk and was present while the claimant completed most of the form for unacceptable customer behaviour. I accept that Mr Meaney understood that the claimant needed guidance as to what to do, since the claimant had approached him about the unacceptable behaviour, and that Mr Meaney told the claimant to complete the form to go to the respondent's unacceptable customer behaviour (UCB) team.

21. Mr Meaney left the claimant while he was completing the details of what had happened. He told the claimant that, when emailing the form, he should copy in the Business Premises Manager and the Trade Union Health and Safety Representative and gave the claimant their names. I prefer Mr Meaney's evidence that he did tell the claimant who the people were to whom the form should be copied. It seems more likely than not that Mr Meaney would do so and that the claimant would have asked if this information had not been volunteered.

22. In accordance with standard practice, the form goes to the employee's line manager, who has to complete a section on the online form. The form then goes to the UCB team. When the individual employee has completed their part of the form, the UCB team receives an alert about this so that they can chase up the line manager if they do not receive the form completed by the line manager. In accordance with standard practice, the line manager will listen to the call. The UCB team will decide what, if any, action is required in relation to the customer, for example, issuing them with a warning. I accept Mr Meaney's evidence that, often, the UCB team does not give any feedback to the individual who has reported the matter.

23. After completing the form, the claimant went on his break and then returned to his normal work. The claimant did not approach his line manager to say that he needed any additional support. I accept the claimant's evidence that his acting line manager did not call him in to a meeting about the report.

Facts relating to incident three

24. This relates to a final written warning the claimant was given by Hugh Meaney on 5 January 2016 for breaching the department's information security policy and standards by accessing CIS, the respondent's information system, on 13 November 2015, using his own name and postcode.

25. The respondent has strict rules about unauthorised access of information. This includes an employee accessing their own information. I accept the evidence given on behalf of the respondent that there are posters prominently displayed around the workplace, reminding employees about these rules, and that they could be dismissed for accessing their own information or that of other people and that employees are met with a requirement to confirm security rules when logging onto their computers. Employees are required to complete mandatory training about security procedures.

26. The claimant said, under cross examination, that he was unsure about standards relating to data security and whether an employee who does not comply with it may face disciplinary action. I do not find this evidence credible. I find it more likely than not that the claimant was aware of the importance placed on security of information and that seeking to access one's own information was a disciplinary offence. The claimant confirmed in the disciplinary hearing with Mr Meaney that he had completed the department's security e-learning on 30 October 2015. I find that it is more likely than not that the claimant would have been continually reminded of the security rules by the posters around his workspace and information on the computer screen when logging in.

27. The respondent has a monitoring team which monitors access to records on the DWP system and flags up what appears to be unauthorised access. Mr Meaney was sent an email from the security team explaining that there had been an audit trace showing that the claimant had accessed, or attempted to access, his record on the DWP system on 13 November 2015.

28. By a letter dated 21 December 2015, the claimant was required to attend a disciplinary hearing with Hugh Meaney on 4 January 2016. The letter informed the claimant of the allegation and reproduced a copy of the trace of the unauthorised access the claimant was alleged to have made of the departmental system. The letter advised the claimant of his right to be accompanied. It informed the claimant that, if he or his companion could not reasonably attend the meeting, they should propose a new date to allow the meeting to take place within five working days of the original meeting date. The letter advised the claimant that the allegation concerning a single incident of inappropriately accessing departmental records without a business justification could result in a final written warning. The claimant did not seek to have the meeting postponed to allow him more time to prepare. He did not ask for official time to prepare.

29. The disciplinary hearing went ahead on 4 January 2016. The notes of the meeting incorrectly record the date as 4 January 2015. However, this is clearly an error and does not appear to have resulted in any adverse consequences. I find that the notes, taken by a note taker, are an accurate reflection of what was said, although not a verbatim record. At the meeting, Mr Meaney confirmed the allegation and gave the claimant an opportunity to respond to the allegation. Mr Meaney asked if he understood that he must not access or browse his own information or those of friends, family or celebrities on the department's corporate systems. The claimant said he did not think what he had done was browsing his information as he did not go any further in the system but, as of now, he did understand. He confirmed that he had completed the department's security e-learning on 30 October 2015. He said he had used his name and postcode to confirm that CIS was working as CIS hardly ever worked when trying to search customer records and he wanted to confirm the system was working. The respondent's policy guidance to managers is that, when an employee accesses or browses through customer data and records without legitimate business reasons or appropriate authorisation, including accessing their own record on one single occasion, this is serious misconduct. It states that a final written warning would normally be appropriate if the employee has no legitimate reason or reasonable justification for accessing the record. It states that a first written warning may be appropriate if the employee can provide some reasonable explanation as to why they may have accessed the record, or some other mitigation.

30. Mr Meaney decided that the explanation that the claimant was testing the system was not a reasonable explanation or mitigation. If employees are having IT difficulties, there are systems to report the difficulties.

31. Mr Meaney issued the claimant with a final written warning by letter dated 5 January 2016. He advised the claimant of his right of appeal.

32. The claimant appealed to Louise Gabrielides. One of the grounds of appeal was that the claimant was not given the minutes of the disciplinary hearing until he

was given the outcome. There is no requirement in the respondent's disciplinary procedure that an employee be given the minutes to approve before the outcome.

33. The claimant had some correspondence with Louise Gabrielides, prior to the appeal hearing, asking for a copy of the original minutes. The claimant, as it appears now, meant the handwritten notes made in the meeting. However, this was not clear to Mrs Gabrielides. She thought that the claimant meant the typed notes which he had already been sent.

34. By letter dated 23 February 2016, the claimant was invited to attend an appeal hearing on 1 March 2016. On the day of the appeal hearing, the claimant left a letter on Mrs Gabrielides' desk when she was away from her desk for a short time. The letter said that the claimant would not be attending the appeal hearing; he said that he wanted the appeal hearing to go ahead but would not attend. Mrs Gabrielides knew that the claimant was in the office so went to see him to ask why he did not want to come to the meeting. I accept that the email she later sent correctly reflects the discussion. I prefer the evidence of Mrs Gabrielides to that of the claimant about this conversation. Mrs Gabrielides' evidence is supported by the near contemporaneous record made by her. The claimant made no record at the time. In particular, I accept that Mrs Gabrielides offered the claimant the opportunity of a five-day postponement. She correctly informed the claimant that the appeal she was to hear was his last opportunity to put across why he believed Mr Meaney's decision was wrong. Mrs Gabrielides was unable to persuade the claimant to attend the meeting. However, she told him that she would wait for five minutes in the meeting to see if he changed his mind and attended. The claimant sent an email confirming that he would not be attending but wished the meeting to go ahead.

35. Mrs Gabrielides convened the meeting. She waited five minutes, as promised, but the claimant did not attend. She, therefore, closed the meeting. She subsequently made a decision, after careful consideration of the material available to her. She informed the claimant, by letter dated 4 March 2016, that his appeal was unsuccessful. She considered that Mr Meaney had followed correct processes. She considered that the penalty of a final written warning was appropriate, since the explanation the claimant had provided for his actions did not constitute proper mitigation.

<u>Facts relating to incident four</u>

36. This relates to a final written warning given to the claimant by Hugh Meaney for unacceptable levels of sickness on 16 February 2016.

37. Notes of meetings, prior to this warning, indicate that there was an OHS report dated 27 January 2016. Unfortunately, the respondent has been unable to find this. The claimant alleges, at this hearing, that he never saw this OHS report. However, I do not consider this evidence to be credible. There are references in notes of meetings to discussions with the claimant about the OHS report. In none of the notes is the claimant recorded as saying that he has not seen the report, including in the claimant's own annotations of the notes of the meeting on 15 February 2016 dated 19 February 2016. It seems highly unlikely that the claimant would not have protested at the time that he had not seen the report, if this was the case, and that this protest would not have been recorded. If decisions were made without the

claimant seeing the OHS report, I would also have expected the claimant to appeal against the warning, giving this as one of the reasons for appeal. I accept that it was normal practice for the respondent to provide the individual with a copy of the report. I find, on a balance of probabilities, that the claimant was shown the OHS report at the time. I find that the OHS report was in the terms reported in the notes of meeting, i.e. most significantly, it expressed the view that the claimant's condition did not meet the definition of disability in the Equality Act because the condition was not sufficiently long term.

38. Following a number of absences, the claimant was invited, by a letter dated 8 February 2016, to an Attendance Review Meeting on 15 February 2016. The last absence was a period of absence from 22 January 2016 to 5 February 2016. The claimant said, at the welcome back discussion, that his absence was due to a bowel problem, diarrhoea and nausea/flu symptoms. The claimant's note from his GP, relating to this period, referred only to breathlessness. The welcome back discussion on 8 February 2016 noted that they had already referred the claimant to Occupational Health Services and the report had been discussed with the claimant. The claimant was informed, in the letter of 8 February 2016, that Mr Meaney wished to meet with him because he had been absent for seven days during the sustained improvement period, which meant he had not met the standard expected of him during this period.

39. Mr Meaney met with the claimant on 15 February 2016. A note taker took minutes. I accept these notes are an accurate reflection of what was said at the meeting, although not a verbatim report. The claimant said he suffered from an ongoing bowel condition but said that the absence in February was due to a virus. Mr Meaney referred to the OHS report and that, in accordance with this, his bowel condition was not covered under the Equality Act. The claimant said that his health problems had been ongoing for several years. Mr Meaney said he would have to follow the advice of the OHS Advisor. The claimant asked why the Occupational Health Advisor had not contacted his GP. Mr Meaney said they had to follow the advice given by the OHS Advisors as they were the medical experts. Mr Meaney said he did not feel the claimant's absence was covered by any of the exceptions in the attendance management procedures and he would be issuing a warning.

40. Mr Meaney issued a letter confirming his decision to issue a final written warning. In error, the letter was dated 16 February 2015 rather than 2016. The claimant made much of this during the Tribunal hearing. However, I have no evidence to suggest that anyone was misled by this obvious error. The text of the letter referred to a meeting on 15 February 2016. The letter referred to discussion of the OHS report dated 27 January 2016, stating that the claimant's conditions were unlikely to be considered a disability under the Equality Act because they had not lasted consistently longer than twelve months, nor were they likely to. The claimant was given a final written warning. He was advised of his right to appeal. The claimant did not appeal.

41. The claimant says he later found out, from attending a meeting with Ann Gee in June 2017, that the OHS Assessor had requested a follow up three-month review but this was not done. As noted below, I find that Ann Gee suggested a further referral to OHS when she was managing the claimant but the claimant refused.

There is no evidence that the claimant sought a further OH referral before this suggestion was made by Ann Gee.

Facts relating to incident five

42. This is an allegation that managers did not provide the service expected of them in the period January 2016 to November 2017.

43. The claimant has not clearly identified in what ways he considers that the service provided by various managers fell short of the standard that was expected. The burden of proof is on the claimant to prove the facts that he relies on. The claimant has not satisfied me, on a balance of probabilities, that the service provided by his various managers fell short of an acceptable standard. I will deal with some specific allegations made by the claimant.

44. The claimant referred to a number of managers in this context. The first was Mr Meaney. The claimant complains that he was not given a copy of his End of Year Review, although the claimant accepted that the review was held and discussed with him. Mr Meaney said it would be normal to give everyone a copy. The claimant has not satisfied me, on a balance of probabilities, that a copy was not given to him at the time. With the passage of time, he may have forgotten receiving this and there is no evidence of him complaining at the time that he did not receive a copy.

45. The claimant complained that he did not receive a DSE Assessment. Mr Meaney, referring to a transfer handover stencil, said that, since he had written that there was one, there would have been one current at this time. I prefer the evidence of Mr Meaney, supported by this contemporaneous document, to that of the claimant. I find that there was a current DSE assessment at the time Mr Meaney transferred management to the claimant to the new manager on 1 June 2016.

46. The claimant referred to Lee Scott-Brimilow, who managed the claimant from June 2016 until sometime in September 2016. The claimant appeared, in his witness statement, to allege that the Performance Action and Learning Plan (PAL) was never put in place by Mr Scott-Brimilow at the time. However, under cross examination, he denied that he had ever alleged that Mr Scott-Brimilow had fabricated the notes of the PAL. The claimant alleged that Mr Scott-Brimilow did not meet with him on 9 September 2016 to discuss his performance. I prefer the evidence of Mr Scott-Brimilow that he put this informal plan in place since this was the only way, at the time, he could obtain more mentoring time for the claimant, and that he did the same for another employee who had gone through training at this time. Although we do not have a copy of the version signed by the claimant, I accept Mr Scott-Brimilow's evidence that the copy in the bundle is the one retained by him personally, rather than the one which went to the claimant's file. I prefer the evidence of Mr Scott-Brimilow that the meeting referred to in the notes as taking place on 9 September 2016 did take place. I accept Mr Scott-Brimilow's evidence that he had frequent conversations with the claimant, providing support, and that he arranged for others to be available to provide support to the claimant.

47. The claimant has complained of not being able to attend regular team meetings in the period October 2015 until July 2017. Where he was not able to attend team

meetings, this was because of his working hours and days. I find that there were alternative ways the claimant could obtain information if he was not able to attend his own team meetings e.g. there were shared folders with information and emails sent with important information. Even if the claimant had not been able to attend team meetings before Ann Gee became his manager, there were arrangements made, from June 2017, for meetings to be held at a time when he could attend.

Facts relating to incident six

48. This relates to an allegation of unacceptable levels of training within the department.

49. The claimant worked on a number of different types of claim during his employment and received training on these different types of claim. The burden is on the claimant to prove the facts on which he relies. The claimant may have been dissatisfied with the training provided. However, he accepted in evidence, that he was able to do a good job. I infer from this that the training was adequate. Mr Scott-Brimilow accepted that the training on ESA new claims could have been better. The members of the team the claimant was part of were all being trained at the same time and received the same training. The claimant questioned whether the trainer had sufficient skills and experience for the task. However, there is no evidence to suggest that the training on the ESA claims, or any other sort of claim, was so lacking that the claimant was unable to do the job after training. The claimant has not satisfied me, on a balance of probability, that the training was of an unacceptable level.

Facts relating to incident seven

50. This relates to the permanent contract which the respondent asserts that the claimant accepted in 2017. The claimant said he never accepted or signed a permanent contract. Unfortunately, the respondent has been unable to produce a copy of the contract itself.

51. It is common ground that the claimant started work on a fixed term contract which was subsequently extended. The last extension was until the end of March 2017, which was confirmed by a letter dated 26 June 2016. It is common ground that the claimant continued working and being paid after 31 March 2017. Although the permanent contract itself cannot be found, there is documentary evidence in the bundle supporting the respondent's understanding that a permanent contract had been offered and accepted by the claimant. I accept the oral evidence of Mrs Gabrielides that she had seen a copy of the permanent contract signed by the claimant and had retained a copy of this for her own records until she destroyed it in preparation for the new GDP rules. This is supported by an email of 14 February 2017 to Christine Galligan, the claimant's manager at that time, in which the writer writes that Mrs Gabrielides has confirmed that the claimant was made permanent on 27 June 2016 and that she had a copy of his acceptance letter. The claimant forwarded this email from his DWP email address to his home email address on 11 April 2017. He was aware, therefore, by no later than 11 April 2017 that the respondent was saying he had accepted a permanent contract. There is no evidence that he took any issue with this. If he had, I would have expected him, at the least, to request at that time a copy of the contract he now denies that he signed.

If he had requested it at that time, he would have been able to obtain it from Louise Gabrielides. The claimant did not request it. The claimant says he was shocked to see this email which Christine Galligan sent to him. In his claim form, he wrote that Christine asked him if everything was ok and he said no, but he would have to accept this.

52. The claimant gave evidence that he would never accept a permanent contract with the DWP. The claimant did not explain why this would be the case or why, if he did not wish to be permanently employed by the respondent, he did not leave after the expiry of the fixed term contract on 31 March 2017.

Facts relating to incident eight

53. The claimant entitles this "Reconstruction of my annual leave sheet (constructed by Victoria Ross). June 2017". However, in the course of his evidence, the claimant said he was grateful to Victoria Ross for reconstructing his annual leave sheet for him at this time. It appeared, from what he said in evidence, that his complaint was not about reconstruction but that he had not been given an annual leave sheet in the first place. The claimant says he was never given an annual leave sheet by any manager prior to Victoria Ross reconstructing this at Ann Gee's request after Ann Gee took over as his manager.

54. If the claimant was not given an annual leave sheet when he started employment, there is no evidence that he asked any manager about this before Christine Galligan told him that there was no annual leave sheet in his file and that she was going to have to construct a new annual leave sheet for him. Christine Galligan did not complete this task since she fell ill and sadly died. Victoria Ross started this task afresh and completed it.

55. In cross examination of Victoria Ross, the claimant began to question her on what he said were errors in her reconstruction which he said he had discovered in June 2019. Since this discovery was not made until long after his resignation, it could not have formed any part of his decision to resign. I, therefore, stopped this line of questioning, explaining this. I make no finding of whether there were any errors in the sheet produced by Victoria Ross since this is irrelevant to my decision.

Facts relating to incident nine

56. This relates to what the claimant says was a lengthy meeting with Ann Gee on 26 June 2017, looking into various issues with his personal file and bowel condition and the time he had taken off work. I am left unclear after the claimant's evidence cross examination of Ann Gee and submissions, what it is that the claimant says that Ann Gee did or failed to do which he says led to a loss of trust and confidence between them.

57. It appears that, in a meeting or series of meetings, Ann Gee was attempting to understand the claimant's history of warnings. She considered that an error had been made on dates in the first written warning about absence. She sought advice from HR as to what to do. However, as the error was in the claimant's favour, she was advised to do nothing. It appears that, had the error not been made, the

claimant would have triggered further absence management proceedings which could have led to his dismissal.

58. I accept the evidence of Ann Gee that she suggested that the claimant be referred for another OHS referral but the claimant declined. The claimant accepts that she asked whether he wanted another referral doing. In his witness statement, he wrote that it was not up to him to make that decision, it should be instigated and done by his line manager and the department if they felt it was appropriate. He does not record any response from him to Ann Gee's suggestion. I accept Ann Gee's evidence that she told the claimant that she could not increase the trigger point unless this was supported by occupational health.

Facts relating to incident ten

59. The claimant gives this the title "First written warning of breach of security and the flexible working policy decision date 1 November 2017".

60. The giving of the warning came after the claimant's resignation. Anything that happened after the claimant's resignation, which was given on 3 October 2017 orally and confirmed in writing on 6 October 2017, cannot be relevant to whether the claimant was constructively unfairly dismissed. I do not, therefore, make any findings of fact relating to matters following the resignation.

61. I deal here, however, with what was clarified at the Preliminary Hearing to be the "last straw". This was recorded as being as follows:

> "Making the allegation of breach of security against the claimant on 3rd October by Ann Gee, the claimant's line manager. This was a perceived final straw by the claimant in light of previous discussions with Ann Gee on 26 June 2017 and at a desk assessment by Ann Gee which took place on Friday 29th September or Monday 2nd October."

62. There was some possible confusion as to chronology in Ann Gee's witness statement by the reference to the office move in the summer of 2017 and then moving on to the events on 2 and 3 October 2017. However, there was no doubt that the tackling of the claimant about the alleged security breach happened on 3 October 2017. I accept Ann Gee's evidence that the observation of the claimant on 3 October 2017 occurred because she had a concern, on seeing papers on the claimant's desk on 2 October 2017 that she had not seen when moving his equipment, that the claimant may have taken this material out of the building.

63. On 3 October 2017, Ann Gee and another colleague observed the claimant entering the building and taking papers out of his back pack. She took the claimant to a private room and explained her concern that he may have been taking material out of the building in breach of security rules. She went to get the papers and numbered these in front of the claimant. She was concerned from what she saw that the papers included internal guidance and also some documents with what appeared to be clients' personal data e.g. national insurance numbers. She told the claimant she would need to start an investigation.

64. There is a dispute as to how the claimant reacted when Ann Gee raised the potential breach of security with him. The claimant accepts that he was upset and that he said he was resigning. He accepts that Ann Gee told the claimant that he would need to give his resignation in writing, Ann Gee believing at the time that this was required. The claimant denied in cross examination that he told her "you can stick your job and you can shove the job up your arse". The claimant's witness statement did not address what was said on 3 October. I prefer the evidence of Ann Gee that the claimant did make the comment "you can stick your job and you can shove the job up your arse". This is supported by the recorded telephone call when Ann Gee was seeking advice from HR.

65. Ann Gee gave the claimant a letter, notifying him that an investigation was required, before he left the building. The claimant returned on 6 October, his next working day, and gave Ann Gee a resignation letter. This stated only "please find my letter of resignation as verbally informed at preliminary investigation meeting dated Tuesday 3rd October 2017".

66. The claimant gave evidence, which I accept, that he resigned because he felt he could not go through the disciplinary process again. The claimant said in evidence that he did not know whether they would do this properly.

67. Although the claimant had not verbally, or in writing, sought to give notice of termination, as opposed to resigning with immediate effect, the respondent paid the claimant for what would have been his notice period. They accepted his resignation as taking effect on 3 November 2017, although not requiring him to attend work during the notice period.

Facts relating to incident eleven

68. The claimant refers to matters to do with the keeping of his personal file throughout his employment. The claimant refers to his personal information being in a number of different files, in different locations and to missing documents.

69. It appears that there was a lot of documentation relating to the claimant and that this may have been held in a number of different files in different places. However, there is no evidence to suggest that the respondent did not handle the claimant's personal data appropriately. It appears that, by the time the claimant was making a request for his personal data following his resignation, some relevant information was missing, most notably the OHS report and the permanent contract. The respondent has not been able to provide an explanation for this.

Submissions

70. Mr Lewis, for the respondent, produced written submissions on the law and made additional oral submissions relating to the application of the law to the facts in this case. Mr Curran chose not to make any oral submissions but handed me some written submissions which I have read.

The Law

71. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 98(1) of this Act provides that an employee has a right not to be unfairly dismissed by his employer.

72. Section 95(1)(c) provides that an employee is to be regarded as dismissed if 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. An employee will be entitled to terminate a contract of employment without notice if the respondent is in fundamental breach of that contract and the employee has not waived the breach or affirmed the contract by their conduct. An implied term of an employment contract is the term of mutual trust and confidence. This is to the effect that an employer will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. In **Woods v W M Car Services Peterborough Limited** 1981 ICR 666, Brown-Wilkinson J said that the Tribunal must look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

73. A course of conduct can cumulatively amount to a fundamental breach of contract, entitling an employee to resign and claim constructive dismissal following a last straw incident, even though the last straw is not by itself a breach of contract. The last straw does not have to constitute unreasonable or blameworthy conduct, but it must contribute however slightly to the breach of the implied term of trust and confidence. This was confirmed in the case of **Omilaju v Waltham Forest London Borough Council** 2005 ICR 481 CA.

74. In the case of **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978, the Court of Appeal reasserted the orthodox approach to affirmation of the contract and the last straw doctrine i.e. that an employee who is a victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts, notwithstanding a prior affirmation. The Court of Appeal set out the questions the Tribunal must ask itself in a case where an employee claims to have been constructively dismissed.

(1) What was the most recent act (or omission) on the part of the employer which the employee said caused or triggered his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term? (If it was, there is no need for any separate consideration of a possible previous affirmation because the effect of the final act is to revive the right to resign.)

(5) Did the employee resign in response (or partly in response) to that breach?

Conclusions

75. I deal first with the alleged last straw. This was the making of the allegation of a breach of security against the claimant on 3 October 2017 by Ann Gee. I have described the circumstances leading to this allegation (see paragraphs 62-64). The claimant was observed bringing papers into the building which contained some material which appeared to be of such a nature that it would be in breach of the respondent's rules on security to take out of the building e.g. client's personal data. I conclude that Ann Gee clearly had reasonable and proper cause to question the claimant about this and tell him that there would need to be an investigation. The respondent was, quite correctly, starting a disciplinary process. Applying the test in **Omilaju,** I conclude that the making of the allegation cannot contribute, however slightly, to a breach of the implied term of mutual trust and confidence. The claimant will, therefore, fail in his complaint for this reason, unless there was an earlier breach of the implied duty of mutual trust and confidence where the contract had not been subsequently affirmed by the claimant and this earlier breach played a material part in the claimant's resignation.

76. I agree with Mr Lewis's submission that the opening of the formal disciplinary process was the dominant and sole effective reason for the claimant's resignation and that earlier matters formed only part of the history by the time of the claimant's resignation. There is no evidence which suggests the claimant was intending to resign, prior to the events of 3 October 2017. The way I have found the claimant reacted on 3 October 2017 (see paragraph 64), indicates that he was reacting to the accusation of the security breach and prospect of disciplinary proceedings. Nothing he said on that day, or in his letter of resignation, suggests that there was any reason for his resignation, other than his wish to avoid the impending disciplinary process. Even if earlier incidents did, individually or cumulatively, amount to a breach of the implied duty of mutual trust and confidence, I conclude that these matters did not play a material part in the claimant's resignation. The claim fails for this reason.

77. Although the claim fails for these reasons, I go on to consider the earlier incidents relied upon and whether, if there was a breach of contract, the claimant subsequently affirmed the contract, losing the right to resign in response to those matters.

<u>Incident One</u>

78. This relates to a first written warning given to the claimant in the letter dated 28 July 2015 by the claimant's then manager Mark Sullivan. There was reasonable and proper cause for taking action relating to the claimant's absences and proper procedures were followed. I consider, however, that it would have been better to obtain an OHS report before deciding whether to issue a warning, given the possibility that the claimant might be disabled and the earlier absences related to disability. If this had been the case, the trigger points would have been adjusted so the claimant would not have reached the stage for formal action. I do not consider that this failure on the part of the respondent was sufficiently serious, in all the circumstances, to amount, by itself, to a breach of the implied duty of mutual trust

and confidence. However, I conclude it could potentially have formed part of a breach of contract if taken together with other matters. Unless there are later matters which, taken together with this, constitute a breach of contract and which would reactivate this incident, I would find that the claimant had affirmed the contract by not appealing the warning.

Incident Two

79. This relates to the respondent's reaction to the reporting of unacceptable customer behaviour. I have found that Hugh Meaney assisted and advised the claimant in making a report. I conclude that appropriate support was provided on the day. The claimant did not demonstrate to Mr Meaney that any further assistance was required. The claimant did not approach his line manager to say he required any further support. Although it may have been courteous of the line manager to acknowledge receipt of the report, and good practice to speak to the claimant about this when they were next both in, I do not consider that the failure to do so was, in the circumstances, conduct capable of forming part of a breach of the implied term.

Incident Three

80. This related to the final written warning in respect of the claimant tracing his own details on the information system. I conclude that the respondent clearly had reasonable and proper cause for taking action against the claimant and imposing the penalty of a final written warning. Proper procedures were followed. I conclude this is not capable of forming part of a breach of the implied term.

Incident Four

81. This relates to the final written warning for unacceptable levels of sickness on 16 February 2016. I conclude that the respondent had reasonable and proper cause for taking action and issuing the warning, given the claimant's absences during the relevant monitoring period. The respondent had obtained an OHS report. This had given advice that the claimant would not be regarded as disabled within the meaning in the Equality Act because the condition was not sufficiently long term. The claimant questioned this view in the review meeting. I consider it would have been preferable to go back to the Occupational Health Advisor to query the conclusion, given the information from the claimant about the duration of his condition. I do not consider the failure to do so to be sufficiently serious to amount, by itself, to a breach of the implied term. However, potentially, if taken together with other matters, this could form part of a breach of the implied term.

82. The claimant did not appeal against the decision. Unless there are later matters which, taken together with this constitute a breach of contract, and which would reactivate this incident, I would find that the claimant had affirmed the contract by not appealing the warning and continuing to work for about nineteen months before resigning.

Incident Five

83. This allegation is that managers did not provide the service expected of them. I found that the claimant had not satisfied me on a balance of probabilities that the service provided by his various managers fell short of an acceptable standard.

Incident Six

84. This allegation is about alleged unacceptable levels of training. The claimant did not satisfy me on a balance of probabilities that the training was of an unacceptable level.

Incident Seven

85. This related to the permanent contract. I have found that the claimant was offered and accepted a permanent contract.

Incident Eight

86. This related to the annual leave sheet. The complaint did not, from the claimant's evidence, appear to be about the reconstruction but about the failure to provide one in the first place. Even if the claimant was not provided with an annual leave sheet before June 2017, this failure was remedied at this point. I am not satisfied that the original failure, if there was one, was so serious as to cause the claimant to lose trust in the respondent. Even if there had been a breach, I conclude that the claimant affirmed the contract by accepting the reconstructed leave sheet and continuing to work for months after the problem had been resolved.

Incident Nine

87. This related to the meeting, or meetings, with Ann Gee around 26 June 2017. As noted above, I was left unclear about what it is that the claimant says that Ann Gee did or failed to do, which he says led to a loss of trust and confidence between them. From the claimant's evidence about what happened, he has not satisfied me that Ann Gee did, or failed to do, anything, around June 2017, which constituted a breach of the implied term or was capable, together with other matters, of constituting a breach of the implied term.

Incident Ten

88. I have dealt with this when considering the last straw. This is not capable of contributing in any way to a breach of the implied term.

Incident Eleven

89. This related to the claimant's personal files. I conclude that there were no failures which constitute a breach of the implied term. If there were, the claimant affirmed the contract by continuing to work for months after he discovered from Ann Gee the apparent plethora of files relating to him. The claimant's complaints about missing documents appear to relate to discoveries he made after his resignation so can have formed no part of his reason for resigning.

Summary of Conclusions

90. I have concluded that none of the incidents relied upon were individually a breach of the implied duty of mutual trust and confidence. I have expressed the view that incidents one and four, insofar as they relate to the failure to obtain an occupational health service report in incident one and the failure to question the occupational health provider about their conclusions in incident four, would potentially, taken together with other matters, be capable of constituting a breach of the implied duty of mutual trust and confidence. However, there were no other matters which I conclude could, taken together, constitute a breach. I conclude that these two matters I have identified are not, taken together, sufficiently serious to constitute a breach of the implied term. Even if they were, I conclude that the claimant affirmed the contract by not appealing against the warnings and continuing to work for many months after them, before his resignation. I also conclude that these matters did not play any material part in the claimant's decision to resign.

91. I have concluded that the incident relied upon as the last straw, the instigation of a disciplinary investigation into the security matter on 3 October 2017, is not capable of contributing in any way to a breach of the implied term. I concluded that matters prior to the last straw did not contribute in any material way to the claimant's decision to resign.

92. For all these reasons I conclude that the complaint of constructive unfair dismissal is not well founded.

Employment Judge Slater

Date: 20 November 2019

REASONS SENT TO THE PARTIES ON

21 November 2019

FOR THE TRIBUNAL OFFICE