Case No: 3306519/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr B Nicholas	**v**	**Caretower Limited**

Heard at: Amersham **On:** 11 and 12 November 2019

Before: Employment Judge Milner-Moore

Appearances:

For the Claimant: Mr P Ward, Counsel
For the Respondent: Mr Henry, Advisor

JUDGMENT having been sent to the parties on 25 November 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and issues

1. This case was listed before me to deal with issues of liability and remedy arising from a complaint of unfair dismissal.

2. At the start of the hearing, I agreed with the parties that the issues that arose for determination were as follows:

   2.1 Was the claimant dismissed by the respondent?

      2.1.1 Was there an act or omission or a series of acts or omissions on the part of the respondent which amounted to a fundamental breach of contract.
      2.1.2 The claimant asserted that there had been a breach of the implied term of mutual trust and confidence in relation to the matters set out in the ET1. In summary, the claimant complained that
         2.1.2.1 He had been unjustifiably singled out in being subjected to disciplinary meetings regarding issues of performance and

time keeping, in particular in relation to the meeting of 17 August

2.1.2.2 The respondent had failed to reply promptly to a subject access request

2.1.2.3 The respondent had failed to deal properly with his grievance due to: delay, fixing a grievance hearing at short notice, the participation in the process of an HR official who was the subject of the grievance, failure to make available the recording of the grievance hearing, and the dismissal of the grievance by reference to new evidence obtained after the grievance hearing.

2.1.2.4 Picking on the claimant for bring a grievance, including a comment that the Respondent would be watching the claimant, delays in conducting one to one meetings with the claimant and a failure to make work emails available on his mobile phone.

2.1.3 Did the events complained of occur as described.

2.1.4 If so, did the respondent have reasonable and proper cause for its actions?

2.1.5 If not, were such actions calculated or likely to cause a breakdown in trust in confidence between employer and employee?

2.2 Were the respondent's actions a cause of the claimant's resignation?

2.3 Did the claimant affirm any breach of contract before resigning?

2.4 If the claimant was dismissed,

2.4.1 Has the respondent shown a potentially fair reason for dismissal?

2.4.1.1 The potentially fair reason for dismissal relied on is conduct or performance.

2.4.2 Did the respondent act reasonably in all the circumstances (within the test set out at section 98(4) Employment Rights Act 1996?

2.5 Should any compensatory award be reduced to reflect contributory fault on the part of the claimant.

3. I received a bundle of evidence of some 360 pages and received witness evidence from the claimant; from Eleni Pandelis, (a recruitment and HR administrator at the respondent), Phydos Neophytou, (a director and shareholder of the respondent), George Neophytou (a director and shareholder of the respondent) and Christadoulous Neophytou (who is the controlling shareholder of the respondent)

Matters arising during the hearing

4. I should record two matters that arose during the course of the hearing. First, an application was made by the respondent at the end of the claimant's evidence that the case should be struck out on the basis that it had no reasonable prospect of success. I considered the guidance in the authorities, in particular Logan v Commissioners of Customs & Excise, and the summary and guidance set out in Clark v. Watford Borough Council. The authorities confirm that, whilst which there is no inflexible rule that the tribunal must hear from both sides, this should normally be done and the power to strike a case out part way through a hearing should be exercised only with caution even where the burden of proof is on the claimant. It is only likely to be right to exercise that power in exceptional cases. There are a number of reasons for this. I considered the following factors to be of particular importance here. Even when the burden of proof is on the claimant the claimant may legitimately expect to be able to extract useful evidence from the respondent's witnesses. It is also important to the appearance of justice that there has been a full hearing with the evidence of both sides being tested. Having considered the authorities, I did not consider it appropriate to strike the case out and declined to do so.

5. At the start of the second day, Mr Ward raised a concern, rather, that some discussion had taken place between Mr Henry and others with Mr Phydos Neophytou in relation to the evidence that he was giving. Mr Phydos Neophytou was at that point half way through his witness evidence. It was said that the claimant's partner had overheard Mr Henry saying that "it was a mess" and had seen all of the respondent's witnesses in conversation with Mr Henry. That was the highest that the evidence could be put. Mr Henry and Mr Neophytou both denied that there had been any discussion of the case or the evidence that Mr Neophytou was giving. Mr Henry explained that he had used these words to describe his travel arrangements following the last minute switch of venue. On that basis the matter was not pursued any further by Mr Ward.

Findings

6. Having considered the evidence, I made the following factual findings.

7. On 1 February 1999 the claimant began his employment with the respondent. The respondent is a company which sells cyber security software and products. It has around 50 employees and a turnover of around £250 million per annum. The respondent had two directors, Phydos Neophytou and George Neophytou and a controlling shareholder, Mr Christadoulous Neophytou. The respondent had no dedicated HR advisor, Ms Pandelis performed some HR administration functions but had no particular training or qualifications in HR matters. The respondent therefore relied for more complex issues on advice from external HR advisors.

8. The claimant was employed by the respondent as a sales manager. In that capacity he was responsible for administering existing client relationships, attempting to gain new sales from existing clients and for attempting to gain new clients from cold calling. During his lengthy period of employment with the respondent, the claimant has been the subject of a number of

performance and conduct concerns which have resulted in his being spoken to, or subject to disciplinary action, on ten occasions for matters including aggressive behaviour, unauthorised or excessive absence and for performance issues.

9. The claimant asserts that he was singled out unfairly in relation to these matters but has produced no detailed evidence in support of this contention. The respondent's evidence was that these issues of concern were justified and were all properly raised with the claimant at the time. I have concluded that the respondent's evidence on this point is to be preferred for the following reasons. Although the claimant took issue with the process that was adopted on two of the occasions, he produced no detailed evidence to suggest that any of the prior criticisms were unfair in substance, or to support the argument that he was unfairly singled out for criticism. It is also clear from the way that the claimant responded to matters raised with him in 2017 that he was not someone who was always readily able to accept criticism of his performance, or to recognise the justness of concerns expressed about, for example, levels of absence. It is also clear from the documents that the respondent's approach to performance management in 2017 was that targets set for the claimant were more lenient than those set for other members of staff. Again, this is not consistent with a case that the respondent singled the claimant out for adverse treatment.

10. It is relevant to record this history because the events in 2017 represented the culmination of a number of occasions in which concerns had been raised with the claimant about his performance or conduct. In early 2017, concerns were raised with the claimant regarding his performance against business targets. These were raised with the claimant informally in discussions. There were also concerns about the claimant's level of absence from the work place. The respondent was informed that the claimant's father had health issues and that the claimant himself had some child care responsibilities and the respondent agreed some flexibility as to the claimant's start and finish times to try to accommodate this.

11. The respondent had an employer absence management system. Absence which related to annual leave or meetings or personal appointments would be requested by inputting the relevant details onto the system. The system generated automatic requests which went to the line manager to approve or decline. The individual would then be notified by the system of the management response and would either take leave, or not, depending on whether or not it had been authorised. Sickness absence was differently treated. It was entered on the system by the employee but was automatically marked as authorised.

12. The respondent has produced a record of the absences by the claimant which were recorded during 2017. There were 41 occasions of absence in the period January to August, which averages out to about a day a week, although not all of the periods of absence were full days. There were periods when the claimant's absences were very frequent. For example, in the month of March, there were three full days of absence and five occasions

of half days or shorter periods of absence. All of these absences were marked on the respondent's system as sickness absence but it does not appear that the claimant was, in fact, sick on these occasions. The record was used to show occasions of lateness/leaving early beyond the flexibility that had previously been authorised, or absence for personal reasons, not falling into any other category.

13. The respondent produced a printout from its system which shows these absences as "authorised" but this was a feature of the fact that they had been recorded as sickness absence. The claimant subsequently placed reliance on the record showing his absences as authorised. However, the claimant did not suggest in his evidence that any of the absences had been explicitly authorised through discussions with his line management. He simply placed reliance on their description as authorised in the records produced by the system. I find that the absences were not positively authorised by his line management in advance, and that they were not, in reality, authorised.

14. When giving his evidence the claimant did not recognise the negative implications of being absent to such a degree on his performance or on the respondent's business. He did not appear to recognise that an employer has a valid interest in ensuring regular and consistent attendance and that, even if there are from the employee's perspective good reasons for absence, the extent of absence may be unsustainable for the employer.

15. By May 2017, performance concerns were still being raised with the claimant. The claimant was by this time significantly behind his annual revenue target. He was, asked to generate £28,000 in revenue a month and to generate sufficient "pipeline", ie identifying potential new clients, or potential new business from existing clients, through sales calls but was failing to do so. A specific objective was set that he should make 30 calls over three mornings a week, so 90 calls a week in total. The rest of the team was expected to make between 250 and 500 such calls. The respondent planned to review after four weeks whether this level of calling had been effective in generating new business for the claimant. The claimant, failed to comply with the respondent's expectations as to revenue generation and failed to make the level of calls that were expected of him.

16. On 7 July 2017, Mr Phydos Neophytou made a request that the claimant produce a business plan by 17 July 2017. I note here that this was a request that was also made of other staff and that the claimant was given a week longer than others to do this. Phydos Neophytou explained that the claimant was down 55% on his target at that point in the year and that he wanted the claimant to produce a specific plan of action, including measurable targets against which he could be held to account. He and the claimant discussed what was required. On 24 July 2017, the claimant e-mailed to explain that the business plan that had been requested had not been supplied. His email acknowledged that he had not performed as well as "I know I can" over the last seven months. It was also apparent from the email that there had been some previous discussion of levels of absence as the claimant

said that he had "really taken on what was said" about absence levels. The claimant eventually produced a business plan on 18 August 2017 but there were a number of exchanges between the claimant and Phydos Neophytou about the lack of detail in the plan and the lack of any specific targets.

17. By 15 August 2017, the claimant was still not meeting targets set for him. A meeting took place between Phydos Neophytou and Husseyn Mehmed, who was the claimant's immediate line manager, to discuss the concerns about his performance. An email recording action points for the claimant's attention was sent to him shortly after the meeting. The claimant took issue with this and an email sent by him in response showed no readiness to address the performance concerns. Subsequently Phydos Neophytou instructed Mr Mehmed and Ms Pandeli to conduct an investigation into issues regarding the claimant's performance, attendance and certain other conduct issues, including the claimant's compliance with dress codes and failure to complete tasks that had been set for him.

18. On 17 August 2017, Mr Mehmed called the claimant on a number of occasions to ask him to come down to his office for a 'word'. He intended to conduct an investigative meeting with him as the start of a disciplinary process. However, he did not inform the claimant that this was the purpose of the meeting nor did he give any advance notice as to the points that he wished to discuss. When the claimant arrived for the meeting, Ms Pandelis was present and it became apparent to him that it was a disciplinary investigation meeting. The claimant was aggrieved at being, as he saw it, ambushed. In consequence, the meeting was unproductive and it did not prove possible to investigate the matters of concern to the respondent because the claimant left the meeting prematurely. The claimant sent an email complaining that he had not been given advance notice of the nature of the meeting, saying that his absences were authorised and that he considered that he was being singled out as he was not the only underperforming individual.

19. On 18 August 2017, Mr Mehmed wrote to the claimant saying that the purpose of the meeting was to investigate the respondent's concerns and to see whether these could be resolved without any disciplinary process. This had not been possible because the meeting had been unsuccessful. Mr Mehmed stated that he felt that the claimant was unlikely to change his attitude. He explained that there were concerns relating to absence levels, performance and conduct (in particular, his work ethic), his failure to adhere to a dress code, his refusal to complete tasks set in a timely fashion and his conduct in leaving work early without authorisation. The claimant was told that the respondent intended to conduct an investigation but would confirm the position at the end of August. During a subsequent informal discussion with Mr Mehmed, the claimant indicated that he would not bring a grievance about the events of 17 August if no disciplinary process was pursued.

20. However, Mr Phydos Neophytou did wish the disciplinary process to take place and he decided to investigate matters for himself. He obtained reports of the claimant's absences and lateness and he obtained evidence in

relation to the claimant's performance against targets (the numbers of calls made and the sales figures). He did not, however, attempt to interview the claimant or elicit any further information from him.

21. Phydos Neophytou subsequently produced a letter inviting the claimant to a disciplinary hearing to discuss concerns in relation to unacceptable absence levels, under-performance, refusal to improve work ethic, refusal to adhere to a dress code, refusal to complete tasks asked in a timely fashion and leaving work early without authorisation. He provided some supporting evidence to the claimant: a list of dates of absence, e-mails regarding target setting and business plans in which concerns had been raised regarding the claimant's performance and absence levels and a statement from Mr Mehmed saying that the claimant would frequently leave early without authorisation, that he had failed to comply with expectations set as to the number of calls to be made, failed to produce work on time, consistently refused to do work in a way tasked by management and that he was not complying with the dress code by, for example, wearing a track suit on non-dress down days. The letter stated that, given the allegations, a written warning might be issued. The claimant was informed of his right to be accompanied and given two days' notice of the hearing but the letter made clear that it could be rescheduled if necessary.

22. The claimant asked to have the hearing rescheduled and the respondent agreed to do so. However, the claimant was then signed off sick with stress and depression, which was said to be work related, and he remained absent from work until 4 December 2017. The claimant said that he intended to bring a grievance, although he did not provide any specific grounds of the grievance at that point.

23. On 18 September 2017, the claimant made a subject access request (SAR). The respondent had 40 days to reply to this, so a reply was due by the end of October. The respondent appears to have been under the impression that some sort of formal request was necessary or that matters could be delayed due to the claimant's sickness absence. It was necessary for the claimant to be persistent in pursuing his SAR. The ICO became involved, following which the respondent produced the information which had been requested. The claimant was offered an opportunity to view the information on 17 November 2017 and was eventually sent a copy of it on 23 November 2017.

24. On 9 November 2017 the claimant submitted a grievance complaining of a number of matters including:the failure to give him notice of the issues to be discussed on 17 August 2017 and the alleged misrepresentation of his position subsequently as challenging the company's right to conduct an investigation when in fact he was simply complaining of the manner in which it was being done. He complained that the disciplinary hearing had been convened by Mr Neophytou without his ever having been spoken to as part of any investigation. He complained of being given two days' notice of the disciplinary hearing. He complained that the company had not complied with the ACAS code and that the company had been wrong to take

disciplinary action in relation to absence which he considered to have been authorised. He complained of the delay in relation to the provision of his personal data. He also complained about the respondent's having contacted him during his absence to explain the approach that it would take regarding the payment of commission and handling of his cases.

25. On 13 November 2017, Mr George Neophytou replied saying that most of the concerns raised related to the disciplinary process and could be dealt with as part of that process. He said that the SAR was being dealt with and he offered a meeting to discuss the remaining points. The claimant wrote in return saying he had no objection to the concerns on disciplinary matters being dealt with as part of that process as long as they were all addressed and contended that the disciplinary invitation letter provided little specific detail for him to go on.

26. On 4 December 2017, the claimant returned to work and had a return to work interview. That interview records that, although hurt by the respondent's actions, he was eager to return and to try and repair the relationship and get back to normal. Following his return from work the claimant had conversations with management but those were difficult conversations and each party felt intimidated by the other. The claimant was viewed, on occasion, as behaving in an aggressive manner. The claimant alleges that at around this time a comment was made by Mr Neophytou that he was watching him. I think it is likely that a comment along
these lines was made because the claimant was under scrutiny at this time given that the concerns about his performance and conduct remained unresolved. The claimant has complained that he was adversely treated in relation to one to one meetings. However, the evidence shows that a number of one-to-one meetings took place after the claimant's return to work and there is nothing to suggest that the claimant was being singled out if these were delayed. It appears that the claimant did not have access to work emails on his phone at this time but that he raised a concern about this only shortly before his resignation.

27. On 14 December 2017, a grievance meeting took place (having been rescheduled at the claimant's request to enable him to be accompanied). The grievance meeting was conducted by George Neophytou and Ms Pendelis and an HR advisor were also present. The meeting took almost two hours and covered the points raised by the claimant. It was agreed that the meeting would be tape recorded and transcribed and the claimant subsequently made a request not only for the transcript but also for the audio recording. After the meeting George Neophytou conducted some further investigations, taking statements from Ms Pandelis and Mr Hamed and also obtaining further information from Phydos Neophytou (though no record of the information provided by the latter was produced). He did not offer the claimant any opportunity to comment on the further information that he had obtained before reaching his decision.

28. On 21 December 2017, Mr Neophytou wrote dismissing the grievance. He concluded that although there had been an attempt to hold an investigation meeting with the claimant, it not been necessary to give him notice of the nature of the meeting. He relied on the fact that the claimant was broadly on notice of performance concerns. He also considered that it was not material that the claimant had not been interviewed as part of the investigation because he would have had a chance to respond at any disciplinary hearing. He considered that 48 hours' notice for a disciplinary hearing was not unreasonable but noted that it had in any event had been rescheduled. He did not accept that the claimant's absences were authorised. He noted that the SAR request had now been dealt with. He recorded that contact during the claimant's absence had not been intended to cause stress but merely to explain what would take place. He notified the claimant of his right of appeal.

29. On 28 December 2017, the claimant wrote asking for the audio recording and the transcript so he could prepare his appeal and he asked for a full response by 10 January 2018. On 8 January 2018, the claimant got the transcript and was told that arrangements were being made for him to access the audio recording, which was a large electronic file. He was sent a link with audio that day but was unable to access without specialist software. He was eventually supplied with the recording on a USB stick on 10 January 2018. On 16 January 2018, the claimant wrote to the respondent saying that he considered himself to have been constructively dismissed and was giving notice that his last working day would be 5 February 2018. He also submitted a grievance appeal on that occasion which appeal was heard by Christadoulous Neophytou. That appeal was unsuccessful but I do not propose to make any further detailed factual findings on the appeal given that these were all matters that post-dated resignation and so not directly relevant to the complaint of constructive dismissal.

The Law

30. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that a dismissal occurs "*where the employee terminates the contract (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct"*. The burden is on the employee to show that a dismissal has occurred.

31. Section 98 ERA deals with unfair dismissal and states that in deciding whether a dismissal is fair it is for the employer to show a potentially fair reason, ie one of the reasons listed at section 98(2) of the ERA. If the employer shows a fair reason for dismissal, then it is necessary to consider section 98(4) ERA which states that in determining whether a dismissal is fair the question is "*whether in the circumstances, (including the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating it [the reason shown] as a sufficient reason for dismissing the employee, and this shall be determined in accordance with equity and the substantial merits of the case*". In a case

of constructive dismissal, the employer's reason for dismissal will usually be the reason for which the employer acted in breach of the contract of employment.

32. Where a dismissal is unfair then s.123 of the ERA states that a compensatory award shall be such amount "*as is just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*", so that an award may be reduced to reflect the likelihood of a fair dismissal occurring following a fair process. S.123(6) of the ERA deals with contributory conduct and provides that "*where the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it consider just and equitable"*. Section 122(2) of the ERA provides that the basic award may be reduced where it would be just and equitable to do so in light of any conduct of the claimant which occurred before dismissal.

33. The principles of law relevant to constructive dismissal may be summarised as follows. The burden is on the claimant to show that he has been dismissed. A constructive dismissal will only occur if the employer is in fundamental breach of contract. It must be a significant breach which goes to the root of the contract of employment or which shows that the employer no longer intends to be bound by one of the essential terms of the contract Western Excavating v Sharp. There must be something that is sufficiently important that resignation is objectively justified. The breach may take the form of a single act or omission or it may result from the cumulative effect of a series of acts or omissions. Where, as in this case, reliance is placed on a breach of the implied term of mutual trust and confidence, it is necessary to identify whether the conduct complained of occurred and to consider whether the employer had reasonable and proper cause for that conduct and, if the employer did not, consider whether the conduct was calculated to, or likely to, destroy or seriously damage the relationship of trust and confidence, Malik v BCCI.

34. Where reliance is placed on a series of incidents culminating in the last straw, the last straw need not itself be a breach of contract or a blameworthy act provided that viewed objectively, it is capable of contributing something to the breach of the implied term of mutual trust and confidence. It cannot therefore be a wholly innocuous or trivial act Waltham Forest v Omilaju. Where there has been a repudiatory breach of contract, an employee must accept the breach and resign promptly or it may be said that the contract has been affirmed. What promptness requires and whether or not there has been an affirmation will depend on the circumstances, but it is likely to require action within a month of any breach. Where a contract has been affirmed, following previous breaches, an innocuous last straw cannot revive that repudiatory breach. Breach of contract need not be the sole, or principal reason, for resignation as long as it is one of the reasons for which the employee resigned.

35. When considering a reduction to the compensatory award on grounds of contributory conduct, it is necessary to consider whether there was blameworthy conduct on the part of the employee, whether it caused or contributed to the dismissal and whether a reduction in compensation is just and equitable. When deciding on the degree of reduction, the case of Hollier v Plysu suggests the following approach (although this is not to be equated to a hard and fast rule) that in cases where a claimant is wholly to blame, a 100% reduction may be appropriate, where a claimant is largely to blame a 75% reduction may be appropriate, where blame is equally to be shared between employer and employee a 50% reduction and where the claimant is only to blame to a lesser degree then a 25% reduction may be appropriate.

36. I should record that I received oral submissions from both parties and I will not rehearse the details of these here but I have endeavoured to address the key points in my conclusions.

Conclusions

Did the respondent carry out the acts alleged by the claimant to amount to a breach of the implied term of trust and confidence. If so, was there reasonable and proper cause for the respondent's acts?

37. The claimant complains that he was unjustifiably singled out for criticism, that he was unfairly treated in the disciplinary process, in matters of performance and timekeeping being treated as disciplinary issues, in being being invited to an investigation meeting without sufficient notice and in being given short notice of a disciplinary hearing.

38. I do not consider that the evidence suggests that the claimant was unfairly singled out by management in relation to his conduct or performance in the years preceding 2017. I have found that the respondent raised genuine concerns with the claimant over the years regarding conduct and performance. There is no evidence that the claimant ever challenged the substantive fairness of these concerns and yet it is clear that he is somebody who is well prepared to defend his corner when he feels unfairly criticised.

39. As to the matters raised with him during 2017, again there is no evidence of the claimant being unfairly singled out for criticism. It is clear that there were significant and justified concerns regarding the claimant's performance and attendance. The claimant himself accepted that his performance was below standard in the July e-mail that I have referred to. The respondent therefore had reasonable cause to take the action that it took by setting specific objectives for the claimant. The objective setting had been done in an attempt to encourage him to improve his performance and the claimant's call targets were lower than those set for other staff. However, the claimant did not comply with the targets set and failed in other respects to comply with management instructions. The respondent had therefore to take further action. I have considered whether the respondent behaved unfairly or unreasonably in treating these matters as disciplinary issues rather than

capability matters. However, I consider it reasonable, in light of the facts found, for the respondent to have formed the view that the claimant was not a willing employee who was doing his best to comply with instructions, but falling short despite efforts, but rather someone who was refusing to comply with instructions. Having formed that view it was reasonable to approach the issue as a potential disciplinary matter, provided that a fair and reasonable process was adopted.

40. However, I consider that in a number of respects, the respondent failed to adopt a fair and reasonable process. In particular, I consider that the respondent behaved unreasonably in inviting the claimant to a disciplinary investigation meeting without giving any advance notice of the nature of the meeting or the issues that were going to be raised. Whilst it is not a requirement of the ACAS code that there should be advance notice of an investigatory meeting, the ACAS guidance makes clear that it is good practice to do so. Whilst the claimant may have known that there were concerns about his performance and his levels of absence, he was not aware that these matters were going to be dealt with as disciplinary issues or that he would be required to address these matters in detail at a disciplinary investigation. There is no good reason why the respondent could not have given the claimant advance notice of the nature of the meeting or of the issues that it wished to discuss at the meeting. Had it done so, then the claimant would have been in a better position to explain his side of things.

41. I also consider that the respondent departed from a fair process in failing to attempt to arrange a further investigatory meeting with the claimant before convening a disciplinary hearing. No reasonable explanation for the respondent's failure to do this has been advanced. Whilst the respondent may have had concerns that the meeting might be difficult that does not discharge the respondent's obligation to conduct a proper and balanced investigation and to allow the claimant an opportunity to provide his point of view as part of the investigative process. I also consider that the respondent departed from fair process in that Mr Phydos Neophytou acted as investigator and also proposed to conduct the disciplinary hearing.

42. The claimant complains of being given short notice of a disciplinary hearing in being allowed only two days' notice. I consider that the respondent did not behave unreasonably in this respect. Two days' notice is a short interval but not unreasonable and the respondent had in any event, agreed to give further time for the disciplinary hearing to take place.

43. The next matter complained of was the failure to reply properly to a SAR.It is not disputed that there were delays in responding to the SAR and that the claimant had to be persistent in ensuring that the respondent complied with its legal obligations and to involve the ICO before information being provided with his personal data. I consider that the respondent unreasonably failed to fully appreciate its responsibilities in relation to the SAR and did not take the matter as seriously as it should have done.

44. The claimant also complains in relation to the handling of his grievance, asserting that: there was delay, that the grievance meeting was fixed at short notice, that participation in the process by Ms Pandelis was inappropriate, that there were was an unreasonable delay in making the recording of the grievance meeting available and that the respondent behaved unfairly by dismissing the grievance by reference to new evidence which it had obtained after the grievance meeting and which was never put to the claimant.

45. I consider that the delay in fixing the grievance meeting was not unreasonable, a meeting took place within 10 days of the claimant's return from sick leave. Nor do I regard the delay in the provision of the recording of the grievance hearing as unreasonable. The hearing took place on 17 December. Given the intervening Christmas period some delay in getting the transcript typed was unsurprising. The claimant had the transcript by 8 January and the audio recording itself by 10 January. It does not appear that such delay as there was caused any disadvantage to the claimant given that he had both in time for lodging his appeal. I have found that George Neophytou conducted further investigations with Ms Pandelis and Mr Mehmed and indeed with Phydous Neophytou after the hearing. He obtained statements from the first two individuals but there is no record of the information that he obtained from Phydous Neophytou. The claimant had no opportunity to respond to the new information before the grievance decision was reached. I consider that in fairness the claimant should have been supplied with the information that Mr Georgios Neophytou had obtained after the grievance hearing had taken place so that he had an opportunity to be heard about it and to raise any points of dispute. Instead, Mr Neophytou simply proceeded to make his decision without allowing the claimant that further opportunity.

46. The claimant complains that he was picked on for bringing a grievance. He relied on a comment alleges to have been made by Mr Phydos Neophytou that the he was being watched. He complained that he had to ask for one-to-ones and that there was a failure to make work emails available on his mobile. I consider it likely that the claimant was told that his performance would be under scrutiny but I do not consider that this was unreasonable in circumstances where there remained concerns about his performance. I did not find that there was any evidence of the claimant being adversely treated as regards his one to one meetings. It appears that the claimant did not have access to work emails on his phone but there was nothing to suggest that this was a deliberate act by the respondent in response to the filing of the grievance. The claimant raised an issue regarding this only shortly before resigning and I do not consider that the respondent was unreasonable in having failed to resolve the matter before then.

Were such actions likely to cause a breakdown in trust and confidence between employer and employee?

47. I consider that the respondent did have reasonable and proper cause for initiating a disciplinary process regarding conduct and absence concerns given what appeared to be a case of a willful refusal to comply with

management instructions. However, I have found that the respondent did not have reasonable and proper cause for a number of its subsequent actions.

48. Whilst I would not regard any individual actions as a serious breach of contract in its own right, I consider that, viewed as a whole, these matters were such as would, viewed objectively, be likely to give rise to a breakdown in trust and confidence. Whilst this may not have been the respondent's intention, the cumulative effect of these matters was such as to give rise to doubt that the claimant would receive a fair hearing in relation to the disciplinary and grievance issues. He was given insufficient notice of an investigation meeting then, when that meeting broke down, no further attempt to interview him took place, the failure to separate the investigative and disciplinary decision making functions meant that there was no independent scrutiny of the disciplinary case against him before a hearing was convened. This failure was exacerbated when the was not provided with all the material which Mr Neophytou had considered in reaching his decision on the grievance. These actions culminated with the making of the grievance decision on 21 December 2018.

49. The claimant relies on a "last straw" in the form of delay in making the transcript and the audio recording available to him. I consider that failure to make available the transcript within the period desired by the claimant was innocuous. There was some delay but there is nothing to suggest that the respondent was trying to be obstructive in any way and the delay was not unreasonable in length. The respondent was trying to get both transcript and audio recordings to the claimant. It simply happened more slowly than the claimant would have wished and there was no disadvantage to the claimant as he had the benefit of seeing it before he lodged his appeal.

Did the claimant affirm the contract

50. I have concluded that the delay in providing the transcript and audio recording of the grievance hearing are not matters capable of amounting to a last straw. However, I do not consider that it is necessary for the claimant to rely on such matters. I consider that he resigned sufficiently quickly after the grievance decision was issued on 21 December, resigning as he did on 16 January 2018. I have borne in mind the intervening Christmas period and the fact that the claimant would have needed some time to consider his position in relation to the grievance decision. I do not consider that he affirmed the contract by remaining employed for a few weeks (discounting the Christmas period) following the issuing of the grievance decision, particularly given that he was making it clear in pressing for the transcript and recording that he did not accept the grievance outcome and wished to challenge it.

Did the respondent's actions cause the claimant's resignation?

51. I do not understand it to be a matter of dispute that the respondents actions were a cause of resignation.

If the claimant was dismissed, has the respondent shown a potentially fair reason for dismissal?

52. I consider that the matters which led to the breach of the implied term of trust and confidence arose from the respondent's reasonable wish to address conduct and performance issues with the claimant and that these were potentially fair reasons for dismissal.

Did the respondent act reasonably in all the circumstances?

53. I have detailed the areas in which I consider that the processes followed by the respondent were wanting and unreasonable. It follows therefore that I consider that the claimant has been constructively and unfairly dismissed.

Contributory Conduct

54. The respondent did not contend that a Polkey reduction should be made in this case, but it did argue for a reduction for contributory conduct. I have concluded that a reduction should be made to the basic and compensatory awards on grounds of contributory conduct. It is clear from the documents that the respondent had justified grounds for concern regarding the claimant's conduct and performance. The claimant was significantly under target for the year and had high levels of unauthorised absence. The respondent had set targets for improvement for the claimant which had gone unmet. The claimant had refused to accept management instructions as to how he should perform his work. The claimant had also taken a significant amounts of unauthorised absence. When giving his evidence the claimant did not recognise the negative implications of being absent to such a degree on his performance or on the respondent's business. He did not appear to recognise that an employer has a valid interest in ensuring regular and consistent attendance and that, even if there are from the employee's perspective good reasons for absence, the extent of absence may be unsustainable for the employer.

55. I consider that the claimant contributed to his own dismissal by failing to take the opportunity to improve his performance and to respond to targets set for him and in failing to respond to concerns about the extent of his unauthorised absence.

56. It was suggested in submissions by Mr Ward, in reliance on Nixon v Coates, that this was a case in which no reduction on grounds of contributory conduct could be made. I have reviewed the decision of the EAT in that case but considered it to be a case on an entirely different footing. There the conduct which was said to be contributory did not in fact cause the dismissal. However, in Nixon v Coates the EAT expressly accepted that, had the claimant been disciplined in an unfair way for conduct that had given rise to dismissal, then a contributory conduct reduction may well have been appropriate.

57. I consider that the claimant bears the large part of the responsibility for dismissal given the conduct that I have described. However, the respondent

also shares some responsibility given that its actions resulted in a constructive dismissal. For these reasons I consider that a 75% reduction in compensatory and basic awards is just and equitable.

Employment Judge Milner-Moore

Date 31 January 2020……

Judgment sent to the parties on

11/02/2020

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For the Tribunal office