EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr M Stringer	**v**	Sondrel Ltd

Heard at: Reading **On:** 27 and 28 January 2020

Before: Employment Judge George (sitting alone)

Appearances
For the Claimant: Mr R Wayman of Counsel
For the Respondent: Miss J Kerr of Counsel

JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

REASONS

1. In this three-day hearing, I have heard from three witnesses giving oral evidence. The claimant gave evidence with reference to a witness statement. He provided a signed witness statement which he had signed on 27 January 2020 which he adopted in evidence. It emerged during the course of cross-examination that there were a couple of paragraphs in the witness statement that had been exchanged that were additional to those in the signed witness statement dated 27 January and, furthermore, that there were some additional matters set out in the final paragraphs of his most recent witness statement. However, it was accepted by counsel that the additional paragraphs were not material to the core facts that I had to decide and the paragraphs at the end were more in the nature of setting out the claimant's case than providing evidence. He was cross-examined on the signed witness statement.

2. The respondent called three witness who all adopted written statements which had been exchanged: Andrew Miles, who, at the relevant time, was employed by the respondent as a senior engineering manager; Hilary Ricoh, who is still employed by the respondent as the global operations director; and Jackie Cullen, who, at the relevant time, was employed as the human resources manager from EMEA. Ms Cullen was still human resources manager at the time of signing her statement on 28 May of last year but is no longer in the respondent's employment and returned to give

her evidence. Mr Wayman indicated that he had no questions for Hilary Ricoh and therefore her statement has been taken as read but Mr Miles and Ms Cullen were cross-examined upon theirs. Ms Ricoh's role was solely concerned with events after the claimant's resignation. Although I took into account her evidence, with the exception of one email sent to her by Ms Cullen, it was not relevant to the factual matters which it was necessary for me to decide to reach conclusions on the issues in the case. For that reason, I do not recount her evidence in these reasons. I also had the benefit of a joint bundle of documents and took into account those documents which I was taken to in statements, oral evidence or submissions.

3. The claimant, whose employment with the respondent as an engineering consultant started on 3 February 2014, resigned from the respondent's employment and his contract terminated on 25 August 2017. After a period of conciliation that lasted between 16 October and 16 November 2017, he presented a claim form on 14 December. The respondent defended the claim and its ET3 was received by the tribunal on 18 January 2018.

4. Unfortunately, it was not possible for there to be a final hearing of this case until the early part of 2020. That is in part because Ms Cullen, who was a material witness for the respondent, was on maternity leave, but in part because an original listing had to be postponed through non-availability of judicial resource and for that I apologise.

THE ISSUES

5. It was agreed at the outset of the hearing that the list of issues to be decided were as follows:

    (1) Did the respondent act so as to breach a term of the claimant's contract of employment by:

        (a) Creating a hostile working environment allowing a culture of shouting and verbal attacks on staff;

        (b) Refusing to consider moving him to another working environment;

        (c) Imposing an unreasonable workload;

        (d) Retaliating following his request to move to another working environment;

        (e) Subjecting him to bullying behaviour;

        (f) Falsifying poor performance following his request to move;

        (g) Making threats of dismissal following his request to move;

(h) Sending threatening emails;

(i) Making false statements about unapproved absence from the workplace.

(2) It was suggested by the respondent that it was possible that the claimant was relying on some additional matters that Miss Kerr had set out in her draft list of issues but since the claimant's counsel said that those were not matters relied on, I have not taken them into account.

(3) If the respondent did act in that way, did those acts amount to a breach/breaches of the implied term of trust and confidence and were those breaches repudiatory?

(4) If there was a repudiatory breach, did the claimant waive the breach whether by delay or otherwise?

(5) If there was a repudiatory breach, did the claimant resign in response to the breach? If the answer to this question was "yes" then the claimant was dismissed.

(6) If the respondent dismissed the claimant, what was the reason for dismissal? The respondent relied on capability and conduct as set out in paragraphs 23 and 25 of the ET3.

(7) If the claimant was dismissed, then was the dismissal fair or unfair in all the circumstances applying the test out in section 98(4) of the Employment Rights Act 1996?

(8) If the claimant was unfairly dismissed, what compensation should he receive? The respondent argues that there should be a deduction for contributory conduct, in particular, a failure to comply with reasonable instructions by not sending the daily check lists and refusal to engage in performance management.

(9) Finally, if the claimant is to be awarded compensation should any deductions be made in accordance with Polkey v AE Dayton Services to take account of the chance that the claimant would have been dismissed in any event.

THE LAW

6. Section 95(1)(c) of the Employment Rights Act 1996 makes it clear that a dismissal includes the situation where an employee terminates the contract of employment (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is commonly referred to as constructive dismissal and the leading authority is Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA. If the employer is guilty of conduct which goes to the root of the

contract or which shows that he no longer intended to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance of it. The employer's conduct must be the cause of the employee's resignation and thus the cause of the termination of the employment relationship. If there is more than one reason why the employee resigned, then the tribunal must consider whether the employer's behaviour played a part in the employee's decision.

7. In the present case the claimant argues that he was unfairly dismissed because he resigned because of a breach of the implied term of mutual trust and confidence; a term implied into every contract of employment. The question of whether there has been such a breach falls to be determined by the authoritative guidance given in the case of Malik v BCCI [1998] AC 20 HL. The term imposes an obligation that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. One question for the tribunal is whether, viewed objectively, the facts found by me amount to conduct on the part of the respondent which is in breach of the implied term as explained in Malik v BCCI. Whether the employment tribunal considers the employer's actions to have been reasonable or unreasonable can only be a tool to be used to help to decide whether those actions amounted to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence and for which there was no reasonable and proper cause.

8. If that conduct is a significant breach going to the root of the contract of employment (applying the Western Excavating v Sharp test) and the employee accepted that breach by resigning then he was constructively dismissed. The conduct may consist of a series of acts or incidents which cumulatively amount to a repudiatory breach of the implied term of mutual trust and confidence (see Lewis v Motorworld Garages Ltd [1986] ICR 157).

9. Once he has notice of the breach the employee has to decide whether to accept the breach, resign and claim constructive dismissal or to affirm the contract. Any affirmation must be clear and unequivocal but can be express or implied.

10. Mr Justice Langstaff discussed the concept of affirmation in the case of Cockram v Air Products plc [2014] ICR 1065, EAT paragraphs 11 to 25. Mere delay in resigning is unlikely to amount to affirmation by itself although delay can be taken as evidence that the employee has affirmed the contract and decided to carry on working under notwithstanding the breach. Langstaff P also gave the example of a situation where an employee has called for further performance of the contract and that might lead to affirmation being implied from that conduct if it is consistent only with the continued existence of the contract. Cockram involved a situation where the first instance finding of fact was that the employee had given

significantly more than his contractual notice period solely for his own financial reasons. The claimant's counsel had argued that such "post-resignation affirmation" could not be relevant but Langstaff P saw no reason in principle why that should be the case,

"Where he gives notice in excess of the notice required by his contract, he is offering additional performance of the contract to that which is required by it. That additional performance may be consistent only with affirmation of the contract. It is a question of fact and degree whether in such circumstances his conduct is properly to be regarded as affirmation of the contract." ([2014] ICR 1065 @ para.25)

11. Once the tribunal has decided that there was a dismissal they must consider whether it was fair or unfair in accordance with s.98 ERA 1996.

"Section 98 Employment Rights Act 1996

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) Relates to the conduct of the employee,

(c) Is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer

acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

12. If the tribunal finds that the dismissal was unfair and has to go on to consider whether there should be deductions from compensation then, on the authority of Polkey v A E Dayton Services Limited [1987] IRLR 503, compensation may be reduced on the basis that had the employer taken the appropriate procedural steps which they did not take then that would not have affected the outcome.

13. The provisions of s.122(2) and 123(6) of the Employment Rights Act 1996 set out the powers of the tribunal to reduce any basic and compensatory awards because of conduct or contributory fault respectively which we are asked to use in the event that we conclude that the dismissal was unfair.

FINDINGS OF FACT

14. I make my findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. I do not set out in this judgement all of the evidence which I heard but only my principle findings of fact, those necessary to enable me to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts I have done so by making a judgment about the credibility or otherwise of the witnesses I have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

15. The nature of the work that the claimant and some of his colleagues carried out for the respondent was project work. The claimant reported to Mr Miles who acted as project manager in relation to a project that had been referred to by the claimant in his witness statement as "Project B". The team was located in Swindon which was the site of the client company. The team comprised DL, CM, the claimant and two others each working on elements of the project which have been referred to as 'blocks'.

16. It is relevant to note that Ms Cullen had only arrived in post in January 2017 and it appears that she attempted to introduce to some extent a different reporting process so far as the setting of individual performance objectives or KPIs was concerned.

17. According to the claimant, in May 2017 he started work at Project B and it is clear that Mr Miles wanted and needed CM, the claimant and DL to provide daily emails to him, daily share point updates and status updates. He indicated this in an email dated 27 June 2017 (page 168 of the bundle). He also stated in that email that he is working on block checklists and

stated: *"So more (unfortunately) necessary bureaucracy is coming your way shortly"*.

18. I accept that this was information that it was necessary for Mr Miles to have in order to be able to plan for the timescales of the project to keep the project on track; to update the client and to reassure the client that the project was going according to schedule. However, it can be seen that this was a topic that Mr Miles returned to very regularly, in fact repeatedly, over the course of the next four to six weeks. He sent a further guide (page 169 of the bundle) on 29 June to how to prepare these reports. He sent reminders again on 30 June (see page 172) and at page 175 on 5 July, he indicated that all members of the team who had to provide the checklist - which were CM, DL and the claimant, Max, - would fail an audit.

19. At this point, the claimant emailed Gareth Davies, who was senior to Mr Miles, asking for a discussion to discuss his current work situation and was asked to discuss it in the first instance with his line manager. There was then another email from Mr Miles on 7 July (page 179) to the whole team setting out ways in which he has improved their spreadsheet. The same day, he sent a reminder for the checklists to be completed saying most had *"not been touched since Wednesday ([DL] is the only exception). I don't want to have to keep moaning about this but I will"*. Then in a Skype call covering the whole team (page 181 and 182) dated 13 July, he reviewed the checklists and comments that: *"[DL] is excellent, Max good – some minor stuff we need to address; [CM] awful – needs urgent attention."* The checklists were chased again on 13 July (page 183).

20. On 20 July, there was a telephone meeting between the team members. The common ground about the contents of this call is that Mr Miles asked the three team members each individually to promise that they would submit their checklists daily. CM and DL said they would. The claimant said he could do it every other day.

21. Part of what happened in this telephone meeting is disputed and I will return to the disputed matters below (see para.57.1) but it was common ground that, following a comment from Mr Miles and further conversation about some problems that the team were encountering, the claimant asked to be removed from Project B. He followed that up with an email to Gareth Davies (page 213) making that request. He then had a 1-to-1 Skype conversation with Mr Miles that did not lead to any resolution or change of the claimant's position.

22. At this point, Mr Miles emailed Ms Cullen, Head of HR (page 212), and her evidence was that this is the first formal involvement that she had had; that this was the first occasion on which Mr Miles had felt it necessary to explain that he had a problem with his management of the claimant that he desired to set out in writing.

23. Mr Miles followed up on the request by the claimant to be removed from the team and a number of other matters - which had come out in the

Skype conversation (see page 214-215) and which are listed as the claimant's "gripes" – in a face to face conversation between the two men.

24. The claimant gave evidence about that face to face conversation in paragraph 149 of his witness statement. Again, there are significant disputes about what happened during that meeting – see paragraph 5.2 below – but it is common ground that CM was invited to join the meeting and expressed his view to be the same as that of the claimant namely that the request to provide daily reporting with the detail required by Mr Miles meant that the extent of the daily reporting was too onerous. It is also common ground that this led Mr Miles to agree to reduce the amount of project reporting and frequency with which the team were required to send checklists.

25. The new reporting regime was set out in an email to the team (page 223) on 21 July at 3.18. This was a Friday. The claimant emailed Mr Miles on Sunday 23 July saying that he was sick and needed to take sick leave between 24 – 26 July.

26. Mr Miles had updated Ms Cullen on 21 July with his account of the face to face conversation (page 225). It is clear on point 6 of his account that he conveyed to Ms Cullen that CM had been brought into the meeting and he had also said the reporting requirements were too much and that he could not do his job. Mr Miles then says to Ms Cullen: *"I think I may have pushed the level of reporting too hard, but I also believe engineers wish to take the easiest route."* It seems clear to me that when Mr Miles said in this email: *"Unfortunately after two hours I failed to reach a resolution"* what had not been resolved were the complaints of the claimant that he had articulated in his Skype conversation and that were set out in the email at page 212. Complaints that were contributing to the claimant having decided he wanted to be removed from the project.

27. I accept that the respondent needed to be able to direct its workforce to carry out the tasks that were necessary to complete the contract that they were working on and I accept that the claimant was not entitled to choose what work he was and was not to do.

28. Ms Cullen accepted in her oral evidence that the reasonable inference from the email to her at page 225 was that there were outstanding unresolved complaints by the claimant, including a request to be removed from the project. Her response, which is at the top of page 225, was to ask Mr Miles to send her *"a copy of what a daily checklist looks like and what is involved. Please also send me (1) any written correspondence mentioning Max's performance (2) Any emails from Max stating that he cannot fulfil his role and why.*"

29. Mr Miles responded to that (page 224). He set out in the initial part of the email what the checklist and the daily status involved and the comments from as he puts it Max/CM. In other words, in his email he did not distinguish between the claimant's criticism of the reporting as it had been

hitherto and CM's criticism. He concluded, at the end of the email, by saying: *"I've not had or made any written correspondence on Max's performance/ability to fulfil his role in recent times"*.

30. As a slight aside, where Mr Miles says in that email that he explains what the activity would involve for each block, at this point in time, it is common ground that CM was responsible for one block and the claimant was responsible for three. It also seems to be common ground that this had been as a result of the claimant agreeing to relieve pressure of work on CM. The claimant's account of the incident which led to that - which had taken place sometime earlier - is at paragraph 109 and 110 of his witness statement in which he describes an incident at which Mr Miles was present and witnessed CM standing over him shouting and being hostile as a result of which Andrew Miles instructed CM to stop.

31. This incident then led to support being given to CM by removing part of his work and the claimant agreeing to take it on. Mr Miles's evidence about that incident is at paragraph 19 of his witness statement. It contrasts with that of the claimant in that he casts the incident slightly differently, but he does say that CM shouted at the claimant saying that it was because the claimant had not done something yet. He also described the incident as the claimant having an argument with CM despite his account being that CM shouted at the claimant and not that they were shouting at each other.

32. Whatever the cause of CM's upset, it is not claimed by the respondent as being a problem that was been caused by the claimant. Therefore, it seems to me that, broadly speaking, what Mr Miles says supports what the claimant says about that incident. Certainly, it seems to be common ground that CM shouted at the claimant and that there was a reallocation of work from CM to the claimant as a result of pressure of work on CM.

33. While the claimant was off sick between 24 and 26 July, Ms Cullen and Mr Miles had a Skype conversation (that is at pages 234 and 235 of the bundle – better copies over two pages were produced by the claimant's representative and I have used the numbering 234, 234A, 235 and 235A for those pages). It seems to me that at the time of the Skype conversation, Ms Cullen and Mr Miles viewed performance management of the claimant to be necessary and that disciplinary action and dismissal were a potential outcome. There was no recognition in that conversation that the claimant had not had the opportunity to comply with the reduced reporting regime.

34. The claimant returned to work on 27 July on the Thursday and this was his first working day after the revision of the reporting requirements. The order of events on that day is that when he arrived at work, Mr Miles told him that there was to be a meeting between them at which he was to be set HR objectives, as in performance objectives. There is an issue between the parties as to whether Mr Miles handed the claimant the draft objectives and key performance indicators (page 238) in preparation for the meeting or at the meeting itself. I prefer the claimant's evidence that he received a

paper copy before the meeting with Mr Miles (see paragraph xx50 below for my reasons for preferring the evidence of the claimant).

35. At 09.35, the claimant sent an email of resignation to Ms Cullen and copied it to another person in the HR department who was unfortunately absent. He did not copy that email to Mr Miles. In it, he said:

"I understand from Andy that I am being subjected to HR objectives. I find this unnecessary and therefore I am putting in notice for termination of contract. Please calculate my leave remaining and contract terms and provide me with the last day of employment with Sondrel."

36. At 11 am, there was a meeting between the claimant and Mr Miles. It is common ground that the claimant left part way through that meeting. Then he returned and told Mr Miles that he was sick and unable to remain at work. Mr Miles's oral evidence was that his response had simply been the word: *"OK"*. I accept that Mr Miles intended that to be neutral but he did not object, he did not say to the claimant: *"If you go, you'll be regarded as being absent without leave"* and Mr Miles accepted that the claimant might understand that when he said the word *"OK"* he was giving permission.

37. At 11.18 for the first time, Mr Miles emailed Ms Cullen with the draft objectives and I pause there to comment that as a learning point for the respondent company, it needs to be brought home to managers that it is unwise not to engage with HR in drafting the objectives prior to having the meeting.

38. Page 243 is an email timed at 12.27 which Mr Miles sent to Ms Cullen setting out his discussion in the 11 am meeting with the claimant. It includes at the penultimate bullet point that the claimant told him (quote): *"that he had no alternative but to resign and there was no point continuing this meeting"* and then he began to leave the room. By 16.55 in the evening, Mr Miles must have known that the claimant's last day was to be 31 August (page 250).

39. It is also notable that in the 12.27 email (page 243) Mr Miles said that he needs to make particular statements. They are numbered 1 to 4. In the first statement he states: *"Max is endangering my project by refusing to complete the checklists to the quality that I need to ensure the project is successful. Following my team discussion on the need for checklists, other team members are now performing this task to my satisfaction."* In fact, the claimant had been off sick since the discussion, so it was unfair to say by implication that the team were performing and the claimant was not. At least CM, one of the two other members of the team subject to the requirement, had not been performing and the claimant had simply not been at work in order to show compliance with the new reporting process.

40. As far as the particular statement number (2) is concerned, Mr Miles said: *"I am unable to plan a project where a team member disappears at a moment notice"*. If one looks at (2) and (4), it might be an implication that

Mr Miles's doubted that the claimant had in fact been sick when he left on 27 July. That would be an issue for investigation (not presumption) and Mr Miles did not in the email to Ms Cullen that his reaction had been "OK".

41. It is clear that Ms Cullen received and read this email notwithstanding the fact that she was very busy that day with interviews. Her oral evidence was that she could not remember in what order she sent her emails in. She was consistent in denying that she had seen the claimant's resignation email timed at 09.50. However, I find that she acted upon Mr Miles's email on page 243 because by 12.37, she sent a first draft to her HR colleague of a letter informing an employee they are the subject of an investigation (page 245). It went through one further draft (page 247) and by 16.27 (page 248) a signed letter had been emailed to the claimant. In it he was informed that he was going to be subject to an investigation in relation to performance at work and delivery of expected objectives and conduct at work *"by walking out of the workplace during a meeting with your line manager to set your expected objectives and refusing to do so*". She could not have known that the claimant was alleged to have done that had she not read and acted upon the email from Mr Miles timed at 12.37.

42. It is difficult to understand how Ms Cullen could have acted upon that email and not picked up on the point that Mr Miles had been told orally that the claimant was resigning.

43. I come on to a key matter upon which I need to make a judgment and that is the credibility of the respondent's witnesses' oral evidence as against the credibility of the claimant's oral evidence. The respondent argued that the claimant has a tendency to overreact and that an example of this was his belief that Ms Cullen used the might of HR department to victimise him because of a perceived slight at his handling of a request from HR to the social committee that was rejected. He does appear to believe that that was Ms Cullen's motivation. It was not put to her as being her motivation and one might think it is essentially improbable. However, it seems to me that the claimant's evidence, whilst it may sometimes be described in slightly heightened terms is essentially truthful. He expresses himself loquaciously and I can accept that he may be difficult to manage or that that characteristic may be difficult to manage in a high-pressured environment. Mr Miles and Ms Cullen came across as having been provoked by him. Perhaps it is hard for the claimant to know when he had that effect on others but that is not the same as him being untruthful in his account of what happened at particular meetings.

44. I do take into account that in the Skype call (page 214) between him and Mr Miles which took place after the telephone conversation at which Mr Miles is said to have sworn at him, there was no reference by the claimant to that allegation of swearing and one might have expected that there would be. However, he was not specifically asked about that in cross-examination.

45. On the other hand, when one looks at Mr Miles's evidence concerning the Skype call, there are some unexplained discrepancies. Page 287 postdates the crucial period: it is dated 2 August, and it is a response to Ms Cullen when she asked Mr Miles for anything prior to the Skype conversation which he could say was a disagreement. He listed matters that he said were disagreements with himself and others and put four bullet points at the end. There is no mention during his account in the third paragraph on page 287 of what he himself said on 20 July.

46. That contrasts with his account to her on page 225. On page 225, he did inform Ms Cullen that: *"Yesterday I managed to accuse him of sitting on his arse all week"* but there was no recognition in that email that his behaviour may have reasonably upset the claimant. At page 212, which is the email nearest in time to the call, Mr Miles listed the claimant's 'gripes'. He reported the claimant asking to come off Project B when Mr Miles expressed surprise at the major issues with the claimant's blocks that he had been told about. My assessment is that that is essentially what the claimant says happened. The significant difference between the accounts of the claimant and Mr Miles is that the former says that the immediate reaction of Mr Miles to being told there were issues with the blocks was to swear at him. These three emails from Mr Miles give three slightly significantly different accounts of the same conversation. At the very least, he was not openly explaining that the claimant may have had cause to be upset. At the worst, he was minimising his own behaviour.

47. I reject Mr Miles's evidence that there was no pressure at that early stage in Project B. That evidence is at odds with the frequency of his reminders for checklists which is not explained only by the need for good practice. At the very least, he himself was imposing pressure in order to keep the project up to speed and Ms Cullen certainly had that impression. It also seemed to be a pressured environment in which CM was working.

48. In his statement at paragraph 57, Mr Miles said that the notes Ms Cullen made (page 291-292) were a fair reflection of their meeting in the course of the grievance investigation apart from that he had never specifically said that the claimant was the only person not complying.

49. However, there are other matters that are inconsistent with his evidence on other points. He says in the third paragraph that all the team members received the same message and the team apart from Max continue forward making improvements on the process and delivering these reports to him. No account is apparently given of the fact that the claimant was absent during that period. Mr Miles recorded that Max had said that he was not able to do the reports when in fact it is accepted that he said he could do them every other day. In fairness to Mr Miles, his oral evidence was that the notes at page 292(1) did not in fact amount to a fair reflection of what he said but, in that case, his witness statement is not consistent with his oral evidence.

50. I have come to the conclusion that, because of the inconsistencies in Mr Miles's evidence compared with contemporaneous documents (as set out in paragraphs 45XX TO 49XXX above), where it is necessary to do so, I prefer the evidence of the claimant over Mr Miles's in relation to the key events.

51. Had there been a suspicion that the claimant was malingering, then the respondent should have asked for GP evidence or consulted the relevant policy. The conclusion that I draw from the oral evidence is that Ms Cullen, at least, presumed that he was malingering and that that affected her view of the claimant. She seemed to me to have a poor attention to detail in relation to this matter which may be understandable in the context of the other commitments that she had at the time, but it led to her acting on the basis of an impression without checking that that impression was accurate. It also caused her to overlook important factors that tended to suggest that there was more than one side to this story. That seems to me to be a fairly significant failing in an HR manager who, after all, ought to be looking for the employee's side of the story as well as the manager's. She claimed at some points in her oral evidence that she thought that it was a possibility that she might be investigating Mr Miles, but her actions belie that. In particular, she drafted or arranged the very rapid drafting of the invite to the disciplinary action in respect of the claimant. This was despite the fact that she knew or ought to have known that the claimant had resigned or stated that he had no option but to resign since that information was contained in the same email from Mr Miles which appears to have led to the disciplinary invite. When the disciplinary invite was sent at 16.27, it led to the claimant questioning whether Ms Cullen had in fact received his resignation.

52. I also consider the timeline that she outlined in her email to Ms Ricoh on page 294. Even taking into account that this was written "off the cuff" as it were, in haste on the way to leaving for the airport on 6 August, it contains several errors and cumulatively those errors do give the distinct impression that the claimant resigned after he had been served with the investigation notice which is not the case. Ms Cullen should have known it was not the case at the time she emailed Ms Ricoh on 6 August.

53. She gave generalised evidence to the tribunal about the history of the claimant refusing to do things and not accepting direction, not accepting criticism, leaving meetings; and she tried to suggest that the lack of evidence might have been to do with gaps in the record. She said that she had completed one to ones with all the staff and it was clear that there were issues with the claimant, but none of this has been specified in her witness statement, the tribunal has not been told of anyone else apart from Mr Miles who had had issues with the claimant and it is contrary to Mr Miles's evidence that the only outstanding issue between them was project reporting. That was something he accepted on more than one occasion.

54. When Mr Miles wrote to Ms Cullen in his email at page 287, he listed particular disagreements which do not, in my view, amount to very much.

He complained that the claimant left early to attend a swimming lesson in May 2016; he complained about the call to Kevin Steptoe on 24 January 2016; that the claimant refused to accept his APR in December 2015 (page 85) because he disagreed with the score and walked out of the appraisal meeting; and he refers to the claimant not attending a one to one with Ms Cullen when she arrived in January 2017. The claimant has an explanation for these but it is not necessary for me to go into the detail of those four specific incidents. The point is that none of them are later than the question of whether the claimant should or should not attended a one to one with Ms Cullen and they were not brought up in performance reviews; there is no evidence in the bundle that they were ever viewed as more than passing irritations, normal in managing a team. The claimant does not appear to have been directed to attend a one-to-one with Ms Cullen and no steps had been taken to warn him or rebuke him about it in the 6 months which followed.

55. When Mr Miles was asked specifically for written evidence about performance, he said there was none and yet looking at the Skype conversation (between pages 234 and 235A), it suggests that Ms Cullen and Mr Miles viewed performance management as necessary and that a potential outcome would be disciplinary action and dismissal.

56. It seems to me in the light of what they said in that exchange on 25 July that it is more than likely that Mr Miles had explained that potential trajectory to the claimant in the face to face meeting on 21 July.

57. My findings of fact about the key events are that:

57.1. On 20 July Mr Miles said to the claimant during a team telephone call, in response to the news that there was a major problem with his blocks, *"you've been sitting on your fucking arse for a week".* Even if he had not sworn, it would have been inappropriate; the claimant was not the only one affected by the problem, he was the person telling Mr Miles about it. It was that outburst that led to the claimant's request to leave the team and the background to it was an argument with CM.

57.2. On 21 July Mr Miles tried to talk the claimant out of his decision to leave Project B. It is consistent with that that he said to the claimant that if he was not on the project, he would be vulnerable to layoffs. I find that he did warn the Claimant of that and that he also told him that dismissal was a potential outcome of an unsuccessful performance management program (see para.56 above).

57.3. The claimant was handed a copy of the draft objectives for the proposed performance management process before his meeting with Mr Miles and therefore had them before he resigned.

57.4. The attitude of Mr Miles and Ms Cullen betrays an assumption that the claimant's complaints were baseless and an over-reaction but that assumption was based on inadequate evidence and contrary to some of

the information that they had in front of them. The depiction of the claimant as the only defaulter was unreasonable when one looks at all the circumstances.

58. The fact that the objectives put forward by Mr Miles in the proposed performance management process were not in the claimant's written KPIs (in his appraisal) and that they did not actively address the problem identified by Mr Miles raises questions about the reason for them. Ms Cullen was clear in her oral evidence that she did not take the claimant's resignation from the project seriously and she took the manager's side without considering other possibilities. This led her to encourage Mr Miles to put in place objectives, and, as she explained, to get the claimant back in line. I accept that what she meant by that included getting him to stay on the project. They wanted him to report regularly and that in itself is not unreasonable, but the claimant had not been in work to try the new reporting process and setting objectives singled him out and was extremely heavy handed.

59. It is alleged that there was an ulterior motive, seeking to force the claimant to buckle down and carry on with his project role where he was believed to be vulnerable because of his wife's immigration status. That is a serious allegation and I do not take it lightly; the more serious an allegation, the more weighty the evidence required to satisfy the standard of proving something to on the balance of probabilities. The Skype exchange and the lack of satisfactory explanation by Mr Miles and Ms Cullen of the difference in treatment of the claimant compared with CM and of the imposition of performance process without giving him an opportunity to comply with the new requirements lead me to accept that conclusion. It was in Mr Miles's interests that he deliver the project and the claimant was persistent in saying he did not wish to remain on it. The claimant was merely one member of the team; but he was a member of the team who was shouldering a larger share of the work than some others and Mr Miles needed to force him back into line.

CONCLUSIONS ON THE ISSUES

60. So, turning to the particular issues that I am asked to decide, I am first asked to decide whether the respondent acted so as to breach a term of the claimant's contract of employment in various ways (see paragraph 5(1)(a) above).

Paragraph 5(1) (a)

61. In relation to para.5(1)(a) above, my conclusion is that the respondent did not create a generally hostile working environment allowing a culture of shouting and verbal attacks on staff but there were two specific incidents that I have found proven: one where CM shouted at the claimant and the second one where Mr Miles swore at the claimant.

Paragraph 5(1) (b)

62. In relation to para.5(1)(b), the respondent did refuse to move him to another project but they had valid business reasons for that and I therefore do not take that particular matter into account when considering whether overall there was a breach of the implied term of mutual trust and confidence.

Paragraph 5(1) (c)

63. Reporting by way of a daily checklist was acknowledged by Mr Miles to be perhaps too much and reduced but overall, I do not find that the reporting imposed an unreasonable workload on the claimant.

Paragraph 5(1) (d) – (i)

64. I consider the remaining allegations together, that of retaliation, bullying, falsifying poor performance, threats of dismissal and threatening email because they are all aspects of the same series of events and allegations.

65. My conclusion is that the respondent instigated a series of objectives for the claimant when none had been set for the other team members at least one of whom was in a similar position regarding alleged defaults in reporting and where the claimant had not been given a reasonable time to show adherence to a new reporting regime. That was against the background of him being told on 21 July that he would face potential performance management, disciplinary action and potential dismissal.

66. If there is reasonable cause for performance management, it cannot be said that it is a breach of the implied term of mutual trust and confidence to instigate it. Nor can it reasonably be said that an employer who warns someone who is facing performance management that if they do not comply with it, if they do not succeed in improving their performance, a possible outcome is dismissal. That is not inevitably a breach of the implied term of mutual trust and confidence. Performance management is a reasonable management tool and, in many circumstances, there is reasonable and proper cause for it but in this specific case it is alleged there were no reasonable grounds for the performance management that was introduced by Mr Miles and I accept that. Beyond that, I have found that the performance management process was introduced in order to force the claimant back onto the project from which he had resigned because of his concerns about Mr Miles having sworn at him and the level of work.

67. To impose an unjustified performance review for the ulterior motive of avoiding addressing the claimant's concerns about his work environment and to force him back into line and resume work on the project was in my view a repudiatory breach of contract. It does not matter, in my view, whether the claimant knew of the detail of the objectives before resigning but I have, in any event found that he received the paper copy before going into the meeting.

68. I therefore conclude that the claimant resigned in response to knowing that he was being put under performance management and that that was unjustified because it was for an ulterior motive; it was not being used as a reasonable management tool.

69. I have to go on to consider what the reason for the dismissal was and I have concluded that the respondent has not made out either conduct or capability, essentially because Ms Cullen and Mr Miles did not have reasonable grounds for concluding that the claimant had done anything that would be grounds for a fair dismissal. There is no evidence that he would have been dismissed, in fact on the contrary, the evidence is that the respondent was attempting to keep him in employment because of the difficulty of recruiting engineering consultants.

70. The matters that are relied on in relation to contributory conduct - the alleged refusal to engage in performance management - came after the resignation and therefore cannot have contributed to it. I do not find that there was contributory conduct in relation to a failure to comply with the reporting structures because the claimant was not in a different position to anybody else.

71. It is not just and equitable to make a deduction from compensation for the prospect that the claimant would have been fairly dismissed in the future for the same reasons that led to my conclusion that the respondent has not proved the reason for dismissal (see paragraph 69 above).

72. Following my conclusion that the claimant was unfairly dismissed, I directed that the remaining issues relevant to remedy be determined at a remedy hearing on a date to be fixed.

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Employment Judge George

Date: 17 March 2020 ..……..

Judgment and Reasons

Sent to the parties on: 19.03.20.....

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For the Tribunal Office

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