



EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT

MR W VAUGHAN

V

RESPONDENT

TALBOT UNDERWRITING
SERVICES LIMITED

HELD AT: LONDON CENTRAL

ON: 25-27 AUGUST 2020

EMPLOYMENT JUDGE: M EMERY

REPRESENTATION:
FOR THE CLAIMANT
FOR THE RESPONDENT

Mr T Wilding (Counsel)
Mr S Crawford (Counsel)

JUDGMENT

The claim of constructive unfair dismissal is well founded and succeeds.

REASONS

The Issues

1. The claimant resigned from his employment. He alleges that his resignation was the culmination of acts of unfair treatment by his employer. The claimant submitted a grievance alleging bullying by a senior manager "B"; this grievance was upheld and his manager was changed, but he alleges that thereafter his employer wanted to manage him out of his employment.

2. The claimant argues that the following conduct by the respondent amounts to conduct which was likely to destroy, and did destroy, the implied term of trust and confidence in his employment contract:
 - a. Being given additional work including populating the TOM spreadsheet,
 - b. Being given extra work arising from review points spreadsheet including items with short-time limits meaning he could not complete in time,
 - c. Being subjected to passive-aggressive behaviour from the senior management in the Finance Team, Mr Nigel Wachman and Mr Sean Callaghan
 - d. Being wrongly informed that he was underperforming and being subject to a formal capability process
3. The respondent accepts that the claimant was subject to bullying conduct by B, and that appropriate management action was taken after his grievance was upheld, including changing his line manager to Ms Matute, whose view after several months managing him was this work was not always to the proper standard, he was informally given feedback and assistance his work did not improve and he accordingly informed he would be put in the capability stage one process. The respondent denies that its actions can amount to a repudiatory breach of contract.
4. Did any of the above amount to a fundamental breach of contract entitling the claimant to resign and consider himself dismissed?
5. Did the claimant resign in response to the above alleged breaches of contract? The respondent alleges he resigned because he did not wish to undergo a formal process.
6. Did the claimant affirm his contract after any breach or waive any alleged breach by delaying his resignation?
7. If the dismissal was unfair, would the claimant have been dismissed under a fair process, had one been followed, if so when? Alternatively, under a fair process, what was the percentage prospect of the claimant being dismissed at some point? (The Polkey issue).
8. If the dismissal was unfair, did the claimant contribute to his dismissal by way of his conduct, and if so would it be just and equitable to reduce compensation by any extent? (The compensatory fault issue).

The relevant legal principles

9. The following paragraphs contain summaries of the relevant legal principles, as set out in *Harvey on Employment Law*.
 - a. What is the nature of the employer's conduct which entitles the employee to leave and claim that he has been dismissed? *Western Excavating (ECC) Ltd v Sharp [1978] QB 761 CA*: questions of constructive dismissal should be determined according to the terms of the contractual relationship.

- b. *Malik v Bank of Credit and Commerce International SA*[1997] IRLR 462: "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."
- c. *Baldwin v Brighton and Hove City Council*[2007] IRLR 232, EAT considered whether a breach had to be calculated and likely to destroy the relationship of confidence and trust, or whether only one or other of these requirements needed to be satisfied. The EAT stated that it was one or other – i.e. it should be 'calculated or likely'.
- d. *Leeds Dental Team Ltd v Rose* [2014] IRLR 8, EAT: 'The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of...'
- e. *Omilaju v Waltham Forest London Borough Council* [2005] EWCA Civ 1493: There will be no breach simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail.
- f. *British Aircraft Corp v Austin* [1978] IRLR 332: Trust and confidence is of potentially wide scope and can extend to extremely inconsiderate or thoughtless behaviour 'so intolerable that it amounts to a repudiation of the contract; this behaviour by the employer does not need to be repudiatory in nature in order for there to be a breach of the implied term of trust and confidence;
- g. *Morrow v Safeway Stores Ltd* [2002] IRLR 9, EAT: a public and unjustified telling off can cause serious damage to the employment relationship which may in itself be repudiatory.
- h. *United Bank Ltd v Akhtar* [1989] IRLR 507: the duty not to undermine trust and confidence is capable of applying to a series of actions by the employer which individually can be justified as being within the four corners of the contract.
- i. *Buckland v Bournemouth University* [2010] IRLR 445, CA the range of reasonable test only comes into its own at the fairness stage; at this constructive dismissal stage any questions of the reasonableness or otherwise of the employer's actions are at most issues of fact to be weighed with all the other facts.
- j. *The 'last straw' doctrine - Omilaju v Waltham Forest London Borough Council* [2005] EWCA Civ 1493: where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. It followed that although the final act may not be blameworthy or unreasonable it had to contribute *something* to the breach even if relatively insignificant. However an employer who acts appropriately in instituting a disciplinary process, following its own earlier potential breaches of contract, would not be committing a 'last straw' breach - *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978.

- k. *Lewis v Motorworld Garages Ltd*[1985] IRLR 465: the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence.
- l. *Millbrook Furnishing Industries Ltd v McIntosh* [1981] IRLR 309: The tribunal must decide objectively whether there is repudiatory breach by considering its impact on the contractual relationship of the parties. The fact that the employer may genuinely believe that the breach is not repudiatory is irrelevant.
- m. The employee must leave in response to a breach committed by the employer. However (*Weathersfield Ltd v Sargent* [1999] IRLR 94) the employee need not tell the employer they are leaving because of the employer's repudiatory conduct. While a failure to give reasons may lead a tribunal to conclude that the repudiatory conduct was not the reason for the employee leaving, this is a question of fact for the tribunal to determine.
- n. *Jones v F Sirl & Son (Furnishers) Ltd* [1997] IRLR 493: The repudiatory breaches need not be the sole cause for resignation provided they are an effective cause. *Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859: "The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer."

Witnesses

- 10. I heard evidence from the claimant. For the respondent I heard evidence from Ms Tendani Matute, and accountant and the claimant's line manager towards the end of his employment, Ms Charlotte Walsgrove, an HR Manager, Ms Marie Penberthy, B's manager, Mr Sean Callaghan the Deputy Finance Director, and Mr Nigel Wachman the Chief Finance Officer. Prior to hearing the evidence, I read all witness statements and the documents referred to in the statements.
- 11. I do not recite all of the evidence I heard, instead I confine the findings to the evidence relevant to the issues in this case, all of which was known to the parties during the investigation and disciplinary process. This judgment incorporates quotes from my notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The relevant facts

- 12. The claimant was employed as an Accounts Assistant. There were no formal performance issues raised by his employer during the first four years of his employment. His performance was appraised by his manager (B) as "good" in 2017 (88) and 2018 (102); he was praised for his approachability and for taking on new challenges; his weakness was putting off unfamiliar tasks and the need

to take ownership of his time, occasional close supervision (99, 109), the need to flag up issues and plan. Improvements in his work were noted during this period (112). Ms Penberthy accepted in her evidence that the claimant's performance was on the whole good, that there were *"the odd frustrations"* but he performed *"reasonably well"* during his employment.

13. From end August 2017, a member of staff in the team was on long-term sick leave and the claimant was undertaking additional work, some of which he was inexperienced dealing with. As his 2018 appraisal states, the addition of an accountant to the team should help this process (115). However, one replacement left in 2018, meaning that despite a reorganisation of work within the team he again had additional work he was not experienced in undertaking and in relation to which he was not always sure what was being asked of him as he was not always given complete instructions, one including a financial year end consolidation (paragraph 25 claimant's statement); I accepted this evidence. It was also the opinion of two members of staff in the Finance Team who were interviewed as part of the claimant's subsequent grievance, both of whom believed that the claimant had not been given appropriate training or guidance. I accepted this as a considered viewpoint of members of the Finance Team who worked with and nearby the claimant and who were aware of how he was coping at work. I accepted also that Ms Matute was not aware when she became his line manager that the claimant had taken on new work, that he was not trained in all aspects of it.
14. On 7 February 2019 the claimant was asked by B to go to a table in the middle of the open plan floor where he was, as he puts it in his claim, *"berated"* in front of his colleagues. His grievance to his employer following this incident says that B went through *"errors on the financial statements ..."* that while B may have had a good reason to raise issues *"However the manner and tone ... was extremely shocking and belittling.... This is not the first time I have been subject to this behaviour With this continuous ridicule I am left in a vulnerable position which undoubtedly has an impact on the work I produce."* (125). The claimant's description of the issue of concern to B, which I accepted, was that in updating financial statements the word doc went out of kilter, meaning page 1 became page 2 etc, that he said he would sort it, that there was plenty of time to sort the problem, but she *"blew it"*. At a further meeting that day the claimant offered to resign, his view in his statement is that *"with the benefit of hindsight given what happened afterwards I should have resigned at that point."* Following this incident, the claimant was signed off work with anxiety, tension and poor sleep and was off work for some weeks.
15. Following his grievance, the claimant was interviewed by Mr Callaghan and an HR manager. He described the encounter with B, that he was spoken to in an angry patronising manner, *"...on this occasion I felt it had gone too far."* He said that his first instinct when speaking to B after this incident was that he should resign. He described B, who *"could be okay and an hour later you could be in deep water... She does lose it"* and that this conduct was consistent with B's previous behaviour. The claimant made it clear he considered B to be *"fundamentally decent"*, but that he could not work with her.

16. Witnesses to the event and prior incidents were interviewed. B's manager confirmed that B could be "*sharp*" with the claimant, on one occasion she had "*gone on and on*" to him, and the claimant was often upset as a consequence; that while she had not witnessed the incident giving rise to the grievance, other members of staff had and their feedback was "*They didn't like the way Liam was spoken to and the fact it was essentially in the middle of the office*" (148-150, 153). One interviewee said that the encounter lasted 3-4 minutes, that B "... kept asking him the same thing over and over again.... It made me feel uncomfortable and sorry for Liam that he had to go through that in public..."; and referenced a further incident the same day where the claimant was "*being talked to like a child... It isn't the first or second time, he has been pulled up and it's always ... in an open office*" (159). Another described the claimant being told off "... it carried on ... she was still talking to him ... she kept repeating the same thing over and over. We could all hear it. It was a bit embarrassing. His name was being called constantly.... As I said this is not the first time it happened, there were other occasions. I remember his face, he was red, totally embarrassed" (166). Another described the incident as "*not pleasant. [B's] voice was raised. It was like telling off a child ... Liam was very upset*" (169).
17. The claimant's evidence, which I accepted, was that while B was often correct, she was not always right when she got angry; he gave an example of a y/e trial balance for an overseas office where Ms Matute said she could not approve this quickly, that Ms Matute had started on this process when B criticised him for the delay, "*I took it on the chin*". Another example was the fact that Trial Balances can have exchange rate differences which require manually updating, meaning a deadline may be missed – her view was "*I've gone a deadline and you've missed it. No willingness to see why unable to make deadline.*"
18. Messrs. Wachman and Callaghan shared an office with a glass wall overlooking the main office where the Finance Team worked. It is the claimant's case that he had been subject to public adverse comments for several months, that "*Shaun and Nigel could not have not noticed, and could have said 'We've seen and we'll sort' - it did not happen.*" I accepted the claimant's evidence that they would have been aware of B's conduct in general terms, that she clearly felt she could engage in this behaviour despite their office being in close proximity to these events.
19. The claimant asserts that on his return to work after several weeks absence, Messrs Wachman and Callaghan's attitude towards him changed, both ignored him when beforehand they would have acknowledged him. I accepted that their behaviour towards him changed, and that the claimant considered it to be "*passive aggressive*" conduct (paragraph 12 statement). I did not accept that this was deliberately designed to make the claimant uncomfortable, but I accepted he regarded it as "*coldness*" towards him. I considered that Messrs Wachman and Callaghan at best did not care whether the claimant was adversely affected by this change of behaviour. I accepted that this behaviour was a significant factor in determining the claimant's point of view, that his grievance complaint was causing the senior management of the Finance Team to have an adverse view of him.

20. The claimant's grievance was upheld, B had spoken to the claimant in a bullying manner; there was evidence of similar past behaviour; a recommendation was made that as the claimant could no longer work with B. His reporting line be changed to Ms Matute. The claimant was informed in writing of this outcome on 24 April 2019 (178). Disciplinary action was recommended against B, as was training and monitoring of her behaviour. B underwent a disciplinary process and was given a final written warning having been found to have committed an act of "*harassment (intimidation and bullying)*" and that this may have been "*a systemic behaviour*". B was given details of various courses to assist her at a difficult time, including one of dealing with positivity and resilience.
21. The claimant's case is that when a senior manager in the team, Ms Penberthy, returned from maternity leave in March 2019, he was told to fill in additional forms – in particular the TOM spreadsheet a time management tool used to identify training needs and smarter ways of working; he says that other members of the Finance Team were not required to fill this in and that this had been used in the past to manage out team members. He took the view following his grievance, based on the difference in managers' approach towards him that he was being forced out of the company. His evidence was that the TOM was used when the Finance Team management wanted to manage a member of the team out. I noted that Ms Matute was also filling in this form at the time.
22. The claimant's case was that Ms Matute who was a new hire (November 2018) was in a difficult position, she was "*in the firing line*", being expected to manage the claimant while B remained in a senior position, having been "*protected*" in the business. He agreed that he enjoyed working with Ms Matute, that she had no ill-will towards him and he accepted in his evidence that if she had a genuine view that he was not performing, he would accept this. There were regular meetings between the two of them, sometimes Ms Matute would query why a task was taking so long, and the claimant would, as described by Ms Matute in her evidence, explain why it was not simple or easy; Ms Matute in her evidence accepted that she was getting to know the processes when she first started line managing him.
23. The evidence of Ms Penberthy was that the claimant's performance had in some respects slipped following his grievance; that there appeared to be a "*lack of understanding arounds tasks he had previously performed without problems*"; in her evidence Ms Penberthy stated that some jobs the claimant had performed well before were now causing problems; that before she went on maternity leave she was not concerned about his performance but that his "*standards had slipped*" in the meantime, in particular with the number of review points that needed to be put right. Mr Wachman characterised it in his evidence as follows: "*... the error log - there were a large number of errors coming through ... he had done less well than previously - so a requirement was to for him to get back to his old self... a number of actions come out of pack on list are actions I would not have expected from Liam.*" It was suggested to Ms Penberthy that the reason for this could have been the bullying conduct and its aftermath: that the claimant had said to her that he had been off sick that "*things were not under control*" when she was on maternity leave. I noted that at no time was the issue

raised with the claimant as to why his standards may have dropped, whether this was a work-related issue, a health issue, etc.

24. By 5 August 2019, Ms Matute was raising concerns about the claimant's performance. For the claimant, many of these performance issues were unfair: his statement references the quarter end review process which was time-consuming to complete, tight deadlines did mean errors occurred. I accepted Ms Matute's advice that she did have some genuine concerns about the claimant's performance. HR was involved, and advice was given that Ms Matute should raise informal concerns using SMART objectives, to clarify standards, identify areas of concern, establish likely causes, identify training needs, set targets for improvement and agree a timescale for review (199); a view was expressed that the claimant did not always understand what was being asked of him; the claimant's view was that he did understand it was just that he was being told it was not done correctly when he believed it had been completed properly.
25. On 7 August 2019 there was an informal meeting between the claimant and Ms Matute, the email following titled 'catch-up' with some of the areas of concern/improvement required. I accepted that at this time while the claimant was aware of Ms Matute's concerns, this was not being dealt with, as far as he was concerned, under a capability process whether formal or informal. All parties agree that Ms Matute was saying that she was trying to assist him achieve in the role, and that the claimant was saying he was not prepared to undergo a capability process, that he would rather resign than do so.
26. The claimant had several conversations in this period with HR and with Finance Team managers in which he indicated his wish to resign, that he felt that he was not being treated fairly after his grievance and he was being set up to fail. In a meeting with on our around 21 August 2019, Ms Penberthy told him that this was not the case, he would receive guidance and help, he was asked to reflect on his stated wish to resign. The claimant was persuaded not to resign and he withdrew his already written resignation letter. The claimant's evidence, which I accepted, was that he believed coming away from these conversations that the company would not pursue a formal capability process, there was talk of his getting training, he felt he would be *"given a chance on a fairer playing field"* and it was for this reason he decided he would not resign.
27. On 28 August the claimant was given a letter inviting him to a *"stage 1 capability meeting"*. Ms Matute was asked why, if the first informal meeting with the claimant was in 5th August, a decision was taken two weeks later to put him on a formal capability process. Ms Matute's evidence was that the claimant was *"not happy with the informal process, he was not engaging with it very week, he did not like the process, ... there was no improvement from what I had seen.... His attitude and negativity through 2 -3 weeks of August ... there was no improvement thus far."* Ms Matute stated, and I accepted, that it was Ms Penberthy's decision to proceed to a formal process.
28. The claimant remained suspicious of his employer's motives; his settled view was that anyone who crossed B *"did not survive ... they all end up leaving. I*

did not want to go through this process". His view now was that his employer did not accept his resignation because "... There was an element of control - I felt that were not accept my resignation because they needed to get some form of written warning - to prevent my going down [the tribunal] route. I had offered to resign, and they had performance issues, so why not accept? ... they wanted me out on their terms not mine, I had been talked out of resigning on basis of training being offered, but all this done in a short period of time and no training was provided at all. They were just going through the motions". The claimant was also of the view that the date of the capability meeting, 3 September, meant he would not have completed all outstanding issues on the month-end, he was being set up to fail and he would receive a written warning. His statement described his anxiety levels and low self-esteem, "I think the continuous chipping away by my work colleagues was the main driver behind this."

29. On 30 August the claimant met with Ms Walsgrove; in her email that followed she said that the claimant *"would like to resign as expected..."* the reason he gave to Ms Walsgrove was that *"he didn't want to put himself through the capability procedure and felt he needed a fresh start..."* (214).
30. It was put to the claimant that he had not resigned because of a lack of trust and confidence: his answer which I accepted was that *"I had I felt been talked out of resignation, this was deceitful, and to put me on a capability process, I did not understand why they did not let me go.... I tried to resign and was talked out of it and I had no idea why. They took advantage of me..."*
31. While the claimant initially offered to work 3 months' notice, his letter of resignation dated 2 September stated, without reasons given, that his resignation was *"effective the 3rd September 2019"* (218), in an email the next day he says he is entitled to one month's notice pay (219) and he supplied medical certificate for one month. Ms Walsgrove's email on 5 September accepts his last date of employment would be 2nd November, deals with some of the leaving formalities, and also asks whether he wishes to come to say goodbye, asking if he was okay and enclosing details of the employee assistance policy – 'Your wellbeing matters' dealing with financial wellbeing and mental wellbeing (223-4). He was also sent a card and gift from the team, for which he emailed his thanks to Ms Penberthy. On a receipt for a reference from a prospective employer, the respondent sent its standard wording reference. The claimant obtained a fixed-term and latterly a permanent role, commencing 2 March 2020.

Submissions

32. Mr Crawford for the respondent asked whether the conduct alleged by the claimant was conduct without reasonable and proper cause, and whether this conduct was calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (*Malik v BCCI*). Whether the respondent's actions are likely to destroy trust and confidence is an objective test – there is no breach simply because the claimant believes there has been a breach. And the tribunal must be satisfied that the claimant resigned because of any breach of trust and confidence as alleged.

33. Mr Crawford argued that the claimant's claim is confusing, referring to a last straw - the invite to a stage 1 meeting; he also asserts that the appointment of Ms Matute was a decoy or smokescreen for the respondent's wish to manage him out of the business. And this is because he raised a grievance. But paradoxically he accepts that Ms Matute was an honest individual who assessed him as not meeting the requirements of the role. The claimant asserts that the respondent wanted him out of the company, but Ms Penberthy said he should not resign, similarly he was persuaded not to resign earlier.
34. The claimant is arguing that the capability procedure is a smokescreen, there is no substance for it. Underpinning this is his view that his performance was not substandard. If this was a smokescreen the claimant is implicitly saying is that nothing wrong with performance. What if there were genuine performance concerns? The tribunal will have to ask itself why the claimant resigned. If the tribunal accepts he resigned as a consequence of the capability process, and accepts that there were performance concerns, and accepts there was no smokescreen, there can be no repudiatory breach because there is no act which is likely to erode trust and confidence.
35. What about the fact that the claimant had said he would resign if he was put under a formal process and was persuaded to withdraw his resignation – this was not an erosion of trust. Inviting an employee to a stage 1 hearing would not reasonably cause an employee to think that trust and confidence was being eroded: this is the construction that the claimant has put on that act. There was in fact reasonable and good cause for the acts of the respondent relied on as repudiatory acts:
- a. TOM spreadsheets – it was agreed that these were used before during and after. The evidence was that use of Toms is a necessary method of analysing business working and how workloads are spread, they're commonplace and it's not a breach, not a weapon or mechanism to undermine the claimant, this is his construction. The evidence suggests this tool has a rational objective/purpose - analysis of who does what, a support tool.
 - b. Increased spreadsheet referrals – this was to remedy irregularities in files. Consistently used and not evidence that extra work given to the claimant: if you had been involved you needed to fix the issue. This is rational and not a breach of contract.
 - c. Passive aggressive behaviour – not all issues were put to Mr Wachman, this conduct cannot get to the heart of the contract – the vagueness of it is at its highest is that it may have happened but relevant witnesses were unaware of it and the claimant has construed it in a particular way, it was *“not grave enough behaviour ... These are observations by the claimant with a mindset who construes actions accordingly.”*
36. Mr Crawford argued that this was not a case here performance deteriorated to extent where the claimant was unwanted as an employee. The criticisms of his work was reasonable and some of these criticisms were repeated over time “so

the context of how the claimant worked is very important”, the work he did was pressurised and cyclical, and there were legal and regulatory pressures “...So *getting things done efficiently is important*”. The claimant was showing a reluctance to engage which meant Ms Matute had to spend significant time with him.

37. The claimant “*was not viewed as beyond getting up to speed – in fact the opposite*”. The respondent accepted that the claimant “*was not in a great place*” and was “*sensitive to his predicament*”. But underpinning the claimant’s views “*are assumptions that are wrong*”. The performance issues were not linked to his grievance, the evidence not support this. While there were issues with B, “... *it’s possible that there were issues with the claimant’s performance which existed regardless of management style*”. The claimant was also wrong in his assumption that performance issues were linked with his allegations of bullying – “*this is not supported by the evidence*”.
38. Pursuing performance issues - was this reasonable, as there a good or sufficient cause to do so? The emotional state of the claimant, the argument that this was not taken into consideration and there was an insensitivity in requiring him to engage on this process after the grievance. But he was told he could get HR support, his line manager was changed to someone he likes and he trusted. And the claimant accepts there were issues and errors and it’s right that these should be brought to his attention. So the issue is manner in which the performance issue was undertaken; but the claimant still has a still hill to climb to show this is conduct likely to destroy the relationship of trust.
39. Also, capability is a legitimate process. They are undermining of the employee by their nature – being told not up to scratch. This will always test the relationship. The way it was introduced was gentle - 3 months after change in line manager.
40. The claimant’s case is that Ms Matute did not know what she was doing. First this is inconsistent with the claimant’s acknowledgement that there were legitimate issues with his performance; also she is a qualified accountant; and the criticisms were not technical, it was issues which had not been actioned. This was not setting up the claimant to fail, it was not heavy handed, it was trying to get the claimant back on track, and he was given d 3 months to see whether the concerns were not repeated; but they were.
41. The respondent underwent an informal process because it wanted the claimant to remain in post; this was a reasonably and rationally conducted process, the tasks were reviewed regularly and were reviewed with the claimant’s input. He was entitled to explain where he felt time-limits were too short and these were changed.
42. Of significance is the claimant’s refusal to engage; he says that he did not know he was under an informal process, but he then accepted this tacitly. He accepted there were conversations with Ms Matute, and the list of issues and areas of training are consistent with this. The substance of the concerns show

that there are constructive concerns, it's not capricious, not mean, and it's tailored to meet areas of failings in the claimant's performance.

43. Unfortunately the claimant construed this irrationally – but the respondent's actions was not consistent with the idea that this was a pre-destined result. The claimant's attitude scuppered attempts to do this informally – a reluctance by the claimant to engage and he had a consistent view that this was the respondent trying to get rid of him. This culminated in the meeting on 13 August when he gave his resignation. Copious evidence that Ms Penberthy and Ms Matute tried their best to get the claimant to engage but his mind was made up and this informed how the respondent was going to manage the situation thereafter.
44. The claimant's comments – that he had bit the hand that fed him meant that he was fixated with the grievance; but he accepted that Ms Penberthy had sought to convince him that this was not the case, that he wouldn't be treated differently. But the claimant ever saw it this way so the respondent has a performance issue, they're trying to address but claimant not engaging with, so a formal process commenced.
45. The 13 August 2019 meeting: the claimant did not accept assurances that he was not being managed out even though there were performance issues. Ms Penberthy did not accept his resignation; but this cannot convince the claimant that the respondent wants to assist him. But he did not engage and the respondent had to take a view on performance and how this affecting members of staff. So the claimant's sensitivities were taken into consideration, he was told not to resign as the performance issues could legitimately and reasonably be dealt with. The invite was to discuss a process, it was not a warning.
46. The claimant also significantly contributed to his dismissal; he affirmed any breach by delaying his decision to resign.
47. For the claimant, Mr Wilding argued the following: the issue is - what happened in August 2019 to the claimant which led to resignation. The context is longer - and it's clear from all evidence that we have heard from 2018 onwards there was a long-running issue which was relevant in August 2019.
48. The respondent has compartmentalised the claim to argue that separate elements could not be a repudiatory breach. But this is wrong - all of the incidents are part and parcel of ongoing treatment. The claimant relies on previous actions as indicators. Even if the tribunal does not conclude that the respondent is pushing him out, there was a collection of several actions by the respondent which amounted to a repudiatory breach; the trust and confidence had gone.
49. The claimant's position is that there was a significant breakdown "*as a whole*", and what triggered his decision to resign was what occurred in August 2019. The formal process was a trigger or final straw is informed by what had happened before, and what the claimant was saying throughout August 2019.

50. A capability exercise is not in itself an issue of trust and confidence. But the circumstances surrounding what had happened. Why is the formal process a breach? The informal process is designed for him to fail - because he could not complete the work in time. The claimant's evidence is that the work asked of him and the criticisms he got were because he was having to go away and talk to people and find out what being asked of him – he was doing the work and then being criticised. See paragraph 25 of his statement - the FA consolidation work which when he completed this work it was not what Ms Matute wanted.
51. The respondent had a “hot-cold” attitude and this affected the claimant's state of mind - don't resign, then start a formal process. The respondent knew that the claimant had been struggling - he had offered to resign several times including in August and had been persuaded out of it. This is all relevant to whether a repudiatory breach occurred.
52. The final act which the claimant say is the final act of several acts which made him lose trust and confidence. The incident with B was not a one-off incident – it's a culmination of a series of run-ins over a significant period of time. Colleagues were aware, B's unpleasantness, also that he was doing work he did not understand, covering another's duties. The respondent knew about this.
53. On the claimant's return to work the respondent's senior managers showed a lack of empathy - and the claimant's interpretation was that this showed he had done something wrong. His complaint was that he felt that the senior managers felt this - and this in an objective sense that demonstrates how trust and confidence could be broken. It is an act - viewed with other acts can cumulatively demonstrate trust and confidence being lost.
54. And shortly after his return to work his work is being picked-up on; not unfairly the claimant says this is continuing as it was before. There was no engagement with the claimant or acknowledgement of the issues he had faced: it's understandable why the claimant considered there was no engagement from the respondent into what his issues were: the overarching point is that the claimant had had difficulties with how B was treating him at least a year. No wellbeing of support was offered to the claimant until after his resignation, whereas wellbeing support had been offered to B. The treatment of the claimant carried on as before; he regarded the appointment of Ms Matute as a “smokescreen” with Ms Penberthy driving a process.
55. On his return to work in March 2019, his “confidence was chipped away”. The evidence was the TOM was used to micromanage him, Ms Penberthy insisted on reinstating this on his return to work “and there was little engagement with what he had been through”. The claimant reasonably considered that this was as a result of a business decision to manage him out.”
56. The Points review spreadsheet – the claimant's position was that if there were errors he fixed them, but what he was being asked to do differed from what he had earlier been asked to do. So the claimant found himself “in a vicious cycle”.

57. Applying Malik, what the claimant endured on his return to work was a breach of trust and confidence and he resigned as a result of this breach.

Conclusions on the evidence and the law

58. I concluded that following the claimant's grievance and on his return to work no steps were taken by the respondent to check the claimant's wellbeing after what had been significant incidents of bullying towards him. No wellbeing support was offered, contrary to support offered to B. While this lack of a wellbeing check and support is not an allegation of a breach of trust and confidence, this, coupled with what I accepted was a change in attitude – a "coldness" - from the senior management in the Finance Team, contributed to the claimant's view that the respondent was not happy with him following his grievance, and it contributed to his view that the respondent no longer wanted him to work for them. In the circumstances, I concluded that this change of attitude and conduct of the senior management in the Finance Team towards the claimant did amount to conduct which was both likely to, and in fact did, seriously damage the relationship of confidence and trust between the claimant and the respondent.
59. On the use of the TOMS. I concluded that this did not amount to conduct which was likely to destroy the relationship of trust and confidence. The reason? Firstly a version of TOMS had been used before; secondly while the TOM was not being used by members of the wider Finance Team, it was being used by Ms Matute. I concluded that the respondent failed to explain to the claimant why this was being used and it failed to generally provide support to the claimant on his return from sick leave at a time when the claimant was demoralised and fearful for his role. As a consequence the claimant did in fact believe that this was part of an attempt to get him to leave his employment.
60. I concluded that the issue of the increased spreadsheet referrals was not in itself an issue of a breach of confidence, as these referrals were part of the claimant's role. However, this issue was tied with the decision to move in late August 2019 to a formal capability process; the claimant's view was that he would have no time to complete the work prior to this meeting, so he was bound to face a formal capability process. While I concluded that the provision of this work to the claimant was not a breach of the term of trust and confidence, the decision to take into account uncompleted work in the decision to move to a formal process was, for the reasons set out below.
61. I finally considered whether being subject to a formal capability process amounted to a breach of trust and confidence. It is very unusual to make a finding that subjecting someone to a process, where there is some underperformance as I found that there was, amounts to a breach of confidence. However, I found in the circumstances, that this decision did amount to a breach of trust and confidence. The reason was as follows: the claimant made it very clear indeed that he was demoralised, he had been bullied over a period of time and publicly humiliated at work, he believe his managers were being deliberately cold towards him and he believed that he was being set up for dismissal. The claimant made it expressly clear that he could not stay in the

role if he was subjected to this process, he stated he would rather resign than doing so, and he attempted to resign. He was persuaded out of resigning, on the basis that he would receive assistance and training and he was reassured that the respondent wanted him to remain in post. Contrary to what he had been told, very shortly after a decision was made to put him through the capability process – the very thing he wanted to avoid. Thereafter, as stated by Ms Penberthy. He decided to resign “as expected”; the respondent clearly understood that this was the likely outcome. I concluded that this was, in these particular circumstances, conduct which was undertaken without reasonable cause because the respondent had expressly told him not to resign as there would be no formal process. I concluded that in these circumstances – the claimant being bullied, his clear expression on his return that he could not deal with a formal process and he would rather resign than go through this - was conduct by the respondent likely to destroy or seriously damage the relationship of trust and confidence.

62. I concluded that the claimant resigned as a consequence of the decision to impose a formal process, which was coupled to the view he had that his employer wanted him out, which was significantly contributed to by the attitude of Messrs. Wachman and Callaghan.

Polkey

63. I next considered what would have happened under a fair process. I concluded that a fair process would have given him the time he sought to finalise the outstanding issues on the spreadsheet, and he would have continued to gain on the job assistance from Ms Matute and further training. I accepted that there was a prospect that this would have not been enough to improve the claimant’s performance sufficiently and there was a prospect a formal process may have been instigated fairly at some point in the future. I concluded that the claimant was clearly very unhappy in his role, he was demoralised and he was suspicious of his employer’s motives. I concluded that the following was more likely than not to occur: either the respondent would have fairly commenced a formal process within 2 months of the claimant’s date of dismissal, at which time the claimant would have resigned; or even absent a formal process the claimant would more than likely have resigned by the same date; in both cases the resignation would have been on notice.

Contributory fault

64. Did the claimant contribute at all to his dismissal? I considered he did not. His demoralisation was in large part because he had been bullied and on his return to work because he was not treated appropriately by Messrs. Wachman and Callaghan. While his performance had dipped, this was not a fault of his, it was in part because of what he was put through and in part because he genuinely was finding some of the new parts of his role difficult.

Remedy

65. If the parties are unable to settle the financial elements of this claim they are asked to write to the tribunal within 14 days of the date of this judgment with their dates to avoid for a ½ day remedy hearing.

EMPLOYMENT JUDGE M EMERY

Dated: 8th November 2020

Judgment sent to the parties
On: 11/11/2020

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For the staff of the Tribunal office