



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Birtwistle

**Respondent:** J H Willis Ltd

**HELD BY:** CVP **ON:** 16<sup>th</sup> – 18<sup>th</sup> December 2020

**BEFORE:** Employment Judge T. Vincent Ryan  
Ms. J. Kiely  
Ms B. Roberts

## REPRESENTATION:

**Claimant:** Mr Millican, Lay Representative

**Respondent:** Ms Ormond, Solicitor

**JUDGMENT** having been sent to the parties on 22<sup>nd</sup> December 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. **The Issues:** the issues for the tribunal to decide were agreed at a preliminary hearing held before employment Judge Brace on 13<sup>th</sup> December 2019 as follows:

### 1.1. Time:

1.1.1. Were the claimant's discrimination complaints presented within the time limits set out in sections 123 (1) (a) and (b) of the Equality Act 2010 (EqA)?

1.1.2. Dealing with this issue may involve consideration of an extension of time based on justice and equity where any complaint that happened before 10 June 2019 is potentially out of time.

## **1.2. Constructive Unfair Dismissal:**

### 1.2.1. Was the claimant dismissed:

- 1.2.1.1. Did the respondent breach the implied term of mutual trust and confidence i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant?
- 1.2.1.2. If so, did the claimant “affirm” the contract of employment before resigning? (To “affirm” means to act in a manner that indicates the claimant remains bound by the terms of the contract.)
- 1.2.1.3. If not, did the claimant resign in response to the breach of contract (was the breach a reason for the claimant’s resignation – it need not be the only reason for the resignation)?

### 1.2.2. The conduct the claimant relies on as a breach of trust and confidence is:

- 1.2.2.1. removal of the duties of transport manager in December 2018
- 1.2.2.2. bullying and harassment in the management of the office of transport managers from that time including:
  - 1.2.2.2.1. moving the claimant’s desk away from other transport managers;
  - 1.2.2.2.2. being shut out from the “shift database”;
  - 1.2.2.2.3. being excluded from meetings;
  - 1.2.2.2.4. comments from line manager claimant;
  - 1.2.2.2.5. “witch hunt” regarding a problem with a spreadsheet.
- 1.2.2.3. failure to follow the correct disciplinary procedures including:
  - 1.2.2.3.1. flawed disciplinary investigation;
  - 1.2.2.3.2. no notice of a disciplinary meeting on 4 August 2018;
  - 1.2.2.3.3. investigation meeting conducted in a bullying and aggressive manner;
  - 1.2.2.3.4. line manager was not involved in investigation;
  - 1.2.2.3.5. HR manager should not have been involved in the investigation.

- 1.2.2.3.6. negative and derogatory comments, not factual comments, made at the investigation meeting;
- 1.2.2.3.7. no minutes and/or legible minutes of the investigation meeting provided;
- 1.2.2.3.8. no opportunity to respond to allegations before the invitation to the disciplinary hearing on 12 September 2018.
- 1.2.2.4. The “final straw” relied on was the making of serious allegations without conducting a proper investigation.
- 1.2.2.5. If the claimant was dismissed: what was the principal reason for dismissal (s.98 (1) and (2) of the Employment Rights Act 1996 (ERA)); and, if so, was the dismissal fair or unfair in accordance with s. 98 (4) ERA, and, in particular, did the respondent in all respects act within the band of reasonable responses?

### **1.3. Disability/Age Discrimination – direct discrimination:**

- 1.3.1. Did the respondent remove from the claimant duties of transport manager in December 2018 and, if so, did that amount to “less favourable” treatment than the way in which the respondent treated comparator transport managers KL and IH?
- 1.3.2. If so was this because of:
  - 1.3.2.1. the claimant’s age (64 at the effective date of termination of employment), in circumstances where the respondent denies the allegation and does not rely on the statutory defence of justification.
  - 1.3.2.2. the claimant’s disability and/or because of the protected characteristic of disability more generally?

## **2. The Facts:**

- 2.1. The respondent: the respondent is a haulage company specialising the carriage of fresh milk. It is a medium-sized business with, by its own admission and at least until recently, antiquated and cumbersome management policies and procedures largely passed on by word-of-mouth or paper-based. In the period leading up to the matters described below it was actively seeking to modernise. More up-to-date policies and procedures were being adopted including increasing reliance on IT. It was historically a family business but it is now managed by a senior management team including members of the Willis family and SL as operations manager who was recruited externally. There was some confusion as to how many employees were engaged by the respondent at the material time but it appeared that the parties settled on there being somewhere in the region of 20 administrative and other ancillary staff, and up to a total complement of 60 including drivers.

## 2.2. The claimant:

2.2.1. The claimant was employed by the respondent as a transport manager from 2003 until his resignation (claimed constructive unfair dismissal) on 9<sup>th</sup> September 2019. The claimant commenced ACAS early conciliation on 9<sup>th</sup> September 2019; he presented his claim to the tribunal on 12<sup>th</sup> October 2019.

2.2.2. In 2009 claimant was diagnosed with laryngeal cancer requiring removal of part of his voice-box and the reconstruction of his windpipe; he says himself that he speaks with a “weak hoarse voice”. The claimant is a disabled person for our purposes by virtue of his diagnosis. In 2015 he was diagnosed with severe heart failure.

## 2.3. Incidents at work:

### 2.3.1. “removal of the duties of transport manager in December 2018”:

2.3.1.1. In July 2018 BP was recruited as a Planner, a role junior to that of Transport Manager (TM), and to be trained by the claimant and his fellow Transport Managers KL/IH. This involved a reduction in planning work for the TMs, although they were involved in training. In October 2018 the planning function was assigned to BP and this permanently reduced the claimant’s work, that is. the work more suitable for a planner than a manager, leaving the claimant as a TM dealing with what was left as regards invoicing and preparation of spreadsheets. He remained a TM, with that title, salary, status and the same duties bar the delegated (non-managerial) planning. Some of the claimant’s duties were removed as part of the re-structure, including the introduction of a planner to which he consented. We were not told of the impact of BP’s appointment as a Planner on the workload of the other two TMs.

2.3.1.2. SB was the Operations Manager at the time but she left the respondent’s employment for family reasons in December 2018. The claimant went to SB with some minor complaints at times but never raised a grievance. He raised concern at the reduction in his workload (and an issue about his desk – see below). Any other issues he had at work he said were minor and manageable by him as every day types of matters.

2.3.1.3. SL was recruited as Operations Manager in January 2019 with the brief to further modernise all aspects of the respondent’s business, introducing more technology and moving away from paper-based management; everything was to be reviewed. This caused uncertainty for the claimant and he felt that there was a toxic atmosphere at work. SL met the administrative/managerial staff and explained that he was conducting a review of the whole business operation and that all roles were to be examined. The claimant was absent from work when SL spoke to the other TMs. He met the

claimant separately with the same message; the claimant decided to wait and see how things developed without raising any issues or concerns of a serious nature with SL, He withheld complaint about the re-location of his desk (below) and concerns about his future; he also thought that his IT skills might give him an advantage over his TM colleagues such that it might be them that had a more uncertain future with the respondent. The latter factor indicated to us that in the claimant's view at the time, concern, uncertainty and feelings of insecurity were all shared by the TMs (although we did not hear evidence from them).

2.3.2. "bullying and harassment in the management of the office of transport managers (TMs) from that time including":

2.3.2.1. "moving the claimant's desk away from other transport managers": It was not wholly unusual for the desks to be moved around the general office over the years, for convenience; it happened occasionally when deemed appropriate and to be more efficient. In December 2018 after returning from leave the claimant found his desk had been moved by KL/IH; it had been facing an L shaped wall (it is an L shaped desk) and it was moved to the other side of the L shaped wall a matter of a few feet; the claimant felt that this further excluded him from the TMs. He complained initially to SB; she said she would deal with it but she then left the respondent's employment and the claimant put his concerns "on hold". He next mentioned it to SL along with later concerns in May 2018. He did not make a big issue over it or raise a grievance but he was unhappy with what had happened. The move was at least in part to accommodate BP and to place him appropriately as a Planner. We heard no evidence as to the other TMs' motivation. The respondent viewed it as one of the occasionally preferred moves for convenience and efficiency.

2.3.2.2. "being shut out from the "shift database"": KL/IH shut the claimant out of the database and the claimant complained. Without their evidence we can only say that it appears on the balance of probability from all the evidence that we heard, they wanted to work in it without his input; this was not a decision of the senior management team or any directors of the respondent company. The claimant asked KL to restore his access. KL said that he had forgotten the password and could not grant access without it. The claimant complained in conversation with BP who restored his access. His access was restored within 2 days. The matter did not involve senior management.

2.3.2.3. "being excluded from meetings": The claimant was on leave when there was a meeting of TMs with SL. The claimant found an agenda on his return to work and he took this up with SL. SL briefed him on progress with the reform review during which SL repeated what he had told the other TMs including "none of you are transport

managers”, and that he would hold individual meetings when he had dealt with other areas of the business; there was a discussion about the possibility of TMs (and maybe others) working from home at some unspecified date in the future. Everything discussed, which was the same as SL had discussed with the other TMs, increased the claimant’s uncertainty about his future. There is no evidence that the claimant was excluded from or missed any other meetings. It was coincidental that he was on, leave at the date of the meeting between SL and the other TMs; the same agenda was subsequently followed with him as with them.

2.3.2.4. “comments from line manager to the claimant”: Although allegations were made that SL made comments to the claimant such as that he could “go fishing” and that this (the review) would “end in tears”, SL denied saying those or similar words or expressing those sentiments in his evidence in chief and he was not challenged in cross-examination about those specific allegations. SL was a clear and credible witness in general, notwithstanding the tribunal’s overall findings. These specific allegations were not proven even on the balance of probabilities and after consideration of the global findings with consideration of drawing inferences. The claimant’s allegations reflect his state of mind and what he may, defensively, have believed was the implication of the review; he was wrong to think that the review was pointed at him or that he was being singled out for attention from SL. Whereas the tribunal find the claimant to be generally a reliable and honest witness, in all the circumstances these specific allegations and apparent quotation of exact words used in that meeting were not proved.

2.3.3. We find that there was an atmosphere of suspicion and competition between the TMs because of pending change and the obvious risk to the roles of TM, their likely final (post review and reform) number and job responsibilities. The claimant felt his IT skills gave him the edge over the other TMs if it came to selection for redundancy or demotion. We did not hear evidence from the other TMs but our findings of fact support the reasonableness of the claimant’s suspicion that they, the other TMs, were in cahoots with each other, defending their positions against him. There is no evidence, and we were unable to draw any inference, to the effect that the TMs were in cahoots with the senior management team or the respondent’s directors. The tribunal finds that the rivalry and suspicion was more than likely between the three TMs who probably believed they were three people competing for two roles (or even one) and it seems (again, without hearing from the other TMs) that they joined forces, or so it reasonably seemed to the claimant. In so far as this rivalry led to treatment by his fellow TMs to which the claimant took exception there is no evidence that senior management was involved in any way, and we find it was not.

## 2.4. Disciplinary proceedings:

2.4.1. “Witch hunt” over spreadsheet: The claimant had developed a particular spreadsheet used in recording work for clients, specifically one called County Milk. He considered that the other two TMs, KL and IH, made mistakes when using it. So that he could check on their work and so that he could work on it correctly himself, he created a hidden column(s) and a ghost spreadsheet. In his absence on 20<sup>th</sup>/21<sup>st</sup> July 2019 IH had a problem with the spreadsheet and asked the respondent’s IT Consultant, SM, to help him. SM just happened to be in the respondent’s office that day and was available. SM discovered the ghost spreadsheet and hidden column(s) and re-formatted the County Milk sheet. SM also reported this situation to SL and his suspicions as to why the claimant would have done as he did; we do not know his actual suspicion as to what the claimant had been doing, but it is clear that he said to SL the activity was suspicious. The tribunal finds that the respondent had reasonable grounds to query the claimant’s said actions and to have concerns as to why he acted as he did, possibly to the detriment of his colleagues and the business, but not apparently or obviously being helpful to either. Based upon this the respondent investigated the matter. The tribunal finds that the term “witch hunt” is misapplied in fact.

2.4.2. flawed disciplinary investigation: Owing to concerns with the claimant’s performance, such as above, the respondent investigated the claimant’s work more generally. It discovered issues over invoices (in particular with the account for N&C) and the N&P Weaver spreadsheet, Fueltek invoices and garage invoices signed off by C. The relevant administrative and accounting procedures were undocumented; they were historic and inherited by the claimant and the other staff, but nevertheless issues came to light as regards the claimant’s performance and/or conduct that gave grounds for enquiry by the respondent and explanation by the claimant. The respondent enquired of the other staff about the claimant and his work performance in the light of the above; several of the claimant’s colleagues provided condemnatory statements criticising the claimant and none was apparently supportive. The Senior Management Team (consisting of LB/NJ/SL) together visited professional employment law advisers and met AM, who was instructed to conduct an investigatory meeting with the claimant. The senior Management Team included the claimant’s line manager (SL), the intended disciplining officer (NJ), and the potential (most likely) appeals officer (LB). They all voiced to AM their individual concerns over the claimant’s performance and conduct as described above. NJ’s opinion of the claimant is clear from her written witness statement to the tribunal (evidence in chief); she considered him to be one of several “insubordinate and uncontrolled employees” and she is personally critical of him, alleging matters that were not the subject of disciplinary action either in the context of this claim or otherwise.

2.4.3. Under the stewardship of SL and with advice and assistance from AM, the respondent had either dismissed, disciplined or given letters of concern to 14 employees in Spring/Summer 2019. SL had introduced

AM's firm to the respondent. We find that the claimant was concerned about the number of dismissals of staff and the disciplinary action being taken against so many colleagues; this fuelled his general unease about his prospects with the respondent. SL was the metaphoric new broom; he was sweeping through the respondent's business, both its staff and practices.

2.4.4. No notice of a disciplinary investigation meeting on 14 August 2019: Towards the end of his shift on 14<sup>th</sup> August, the claimant was called into a meeting. That meeting was to put to him allegations about his performance and conduct. Present were AM (the professional adviser) and NJ, the intended disciplining officer. AM questioned the claimant about the said invoices and spreadsheets; he showed the claimant the relevant documents and asked for an explanation. The claimant was caught unawares and unprepared. He was given an on-the-spot opportunity to explain his actions but was not allowed then to take the documents away for a considered viewing and to give a reasoned explanation before any disciplinary hearing; in other words, there was no second investigatory. SL had never previously raised issues of conduct or performance with the claimant, who was taken by surprise and was unnerved.

2.4.5. The investigation meeting - conducted in a "bullying and aggressive manner": We did not hear evidence from AM. NJ denied that there was any bullying and harassment; she said very little at the investigation meeting which was conducted by AM. As stated above, the claimant was taken by surprise by the meeting and this was contributed to by the fact that he did not know AM and that the respondent had introduced an external professional to investigate him; one who was accusatory. The claimant was shocked by what was said to him in those circumstances. It was the first time that his conduct or performance had been raised as an issue. These were grounds for the claimant to believe, and he did, that this was an intimidating and hostile environment. He was suddenly and without warning being held to account by a stranger, a professional external adviser to the respondent, about documents that were sprung on him and all that in front of NJ who was a member of the senior management team, capable of hiring and firing. This was all at a time when the claimant knew colleagues were being dismissed or warned, and that there was uncertainty and rivalry amongst the TMs; all of that was in the claimant's mind as context.

2.4.6. The claimant's line manager was not involved in the investigation: SL was not at the meeting described above but was fully apprised of the Senior Management Team's (SMT's) concerns, as part of the SMT, because he shared them, and because he attended AM's office with NJ and LB for advice about them. SL was part of the initial internal investigation by the SMT, and had an input into deciding to pursue a disciplinary investigation by AM, and the decision to proceed to a disciplinary hearing. SL was closely involved in the investigation.



- 2.4.7. The HR manager (NJ) should not have been involved in the investigation: NJ was involved in raising concerns about the claimant over invoices; she was with the SMT when it visited AM for advice about the claimant and instructed AM to investigate; she attended the investigation meeting, albeit she said very little and mostly observed the meeting conducted by AM; she subsequently obtained witness statements and then amendments to statements which were critical of the claimant and unsupportive of him; she provided four witness statements of her own for the disciplinary proceedings; she was involved in the decision to take to the matters of concern about the claimant to a disciplinary hearing, having heard from AM about his enquiry and receiving his advice and recommendation. NJ admits to having drafted a questionnaire (pages 73 – 77 of the bundle), for the claimant to complete as part of the investigation when the claimant said he would not be attending the hearing to answer further questions. She drafted the questionnaire and sent it to him (see below 2.4.10).
- 2.4.8. Negative and derogatory comments, not factual comments, were made at the investigation meeting: NJ did not comment during the meeting but listened and observed. AM asked questions and put allegations.
- 2.4.9. No minutes and/or legible minutes of the investigation meeting were provided: Handwritten notes taken by AM at the investigation meeting recording what was said (but not verbatim) were sent to the claimant on 19<sup>th</sup> August 2019 along with all relevant documents. The notes were mostly legible to the tribunal.
- 2.4.10. No opportunity to respond to allegations before being invited to the disciplinary hearing: Following the investigation the respondent delivered to the claimant a bundle of documents, including statements from colleagues that the claimant found gratuitously offensive and irrelevant. There then followed was some email correspondence between the claimant's father-in-law Mr Millican, who was assisting him and is now representing him, and AM. The claimant refused to attend the disciplinary hearing complaining about all that had occurred. On 6<sup>th</sup> Sept NJ wrote to the claimant with an invitation to the hearing setting out the allegations facing him, and confirming that a potential outcome was dismissal. She sent a questionnaire for him to complete if he still did not intend to attend. That questionnaire is at pages 73 – 77 of the bundle. That questionnaire includes allegations, statements and opinions about the claimant and his conduct, and leading questions. The tribunal finds that by this time NJ's mind was made up about the claimant, and that she considered him to be guilty as charged; the tribunal finds that any reasonable reading of the questionnaire gave grounds for the claimant to believe that, and that he was bound to be dismissed by NJ.

2.5. Resignation: On receipt of the said questionnaire the claimant believed that he would not receive a fair hearing, that the outcome had been prejudged, and that he would be dismissed by NJ.

### **3. The Law:**

3.1. S.123 Equality Act 2010 (EqA) provides that proceedings on a complaint of discrimination may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. Time may start to run from the last in a series of continuous acts. Extensions of time under the principles of justice and equity are the exception and not the rule, requiring a balancing exercise as to the prejudice to one party of allowing an extension as opposed to the prejudice to the other party of refusing it. It is appropriate also to consider, where there has been a delay, the reason for the delay and general circumstances.

3.2. S. 95 Employment Rights Act 1996 (ERA) provides that an employee is dismissed by his employer if (subject to provisions that are not relevant in this case) the contract under which he/she is employed is terminated by the employer either with or without notice, or the employee terminates the contract under which he/she is employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct; the latter circumstance is described as a constructive dismissal. It is generally accepted that a breach of trust and confidence, being a repudiatory breach of contract, would amount to conduct by an employer entitling an employee to resign and claim a dismissal. The reason for dismissal would then fall to be determined by a tribunal although it will be a very rare case in which a breach of trust and confidence would be found to be a potentially fair reason and the dismissal to be fair and reasonable.

3.3. S.4 EqA includes in the list of protected characteristics for the purposes of anti-discrimination legislation, age and disability. Section 13 EqA prohibits direct discrimination where a person, A, discriminates against another, B, if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. In respect of the protected characteristic of age A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

### **4. Application of law to facts by reference to the agreed issues:**

#### **4.1. Time:**

4.1.1. *Were the claimant's discrimination complaints presented within the time limits set out in sections 123 (1) (a) and (b) of the Equality Act 2010 (EqA)?* The claimant alleges that his duties as transport manager were removed from him in the period between June and December 2018. The claimant commenced early conciliation on 9<sup>th</sup> September 2019 and presented his ET 1 claim form to the tribunal on 12<sup>th</sup> October 2019. The

claim in relation to alleged removal of duties was presented to the tribunal out of time, the primary limitation period expiring by no later than 30<sup>th</sup> March 2019 (three months after the end of December 2018 and the latest date for the alleged removal of duties). There has been no application to extend time and no evidence led or submissions made with regards to any just and equitable extension of time. In the event we have not found there to have been unlawful discrimination. The tribunal did not extend time. The discrimination claims were dismissed on the time issue but in any event and alternatively the tribunal was unable to find facts, even by inference, from which it could make a finding of unlawful age or disability discrimination. Insofar as there were any circumstances that could have led the tribunal to such a conclusion the tribunal was in any event satisfied that the respondent established it did not unlawfully discriminate against the claimant.

#### **4.2. Constructive unfair dismissal:**

##### **4.2.1. Was the claimant dismissed:**

*4.2.1.1. Did the respondent breach the implied term of mutual trust and confidence i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant?*  
Yes, by virtue of the involvement of NJ as disciplining officer as described above and the whole conduct of the disciplinary process. NJ then was too closely involved in every stage of the matter, from the initial raising of concern about the claimant, to obtaining advice and instructing AM, to informal and then formal investigation, to be an appropriate disciplining officer. She was not impartial. NJ's witness statement gives away her views of the claimant (albeit that the claimant not aware of her views at the time of his resignation save as they were displayed by her role in the investigation meeting and correspondence, including the questionnaire). The said questionnaire displayed a fixed opinion and finding of guilt before the hearing, and before the claimant had any proper chance to put forward a defence or mitigation. Upon receipt of the questionnaire it was apparent to the claimant that he could not expect a fair, reasonable and objective hearing. The conduct of the investigation and disciplinary process culminating in the provision of the questionnaire, destroyed the relationship of trust and confidence. The respondent had cause to investigate concerns about the claimant but it had no reasonable and proper cause to conduct the disciplinary proceedings as it did. The respondent's conduct of the disciplinary procedure was intended, and if not then it was extremely likely to, not only seriously damage but destroy the relationship. The respondent committed a repudiatory breach of contract in its handling of the disciplinary procedure.

*4.2.1.2. If so, did the claimant "affirm" the contract of employment before resigning? (To "affirm" means to act in a manner that indicates the*

*claimant remains bound by the terms of the contract.*) The respondent wrote to the claimant with its questionnaire on 6 September 2019. This was the last straw. It could not be described as innocuous and the tribunal finds that in itself it amounted to a breach of contract. It was the last in a series of breaches of contract in relation to the disciplinary process. The claimant resigned on 9 September 2019 without having returned to work (as he was suspended) and without in any way by word or deed affirming the contract and waiving the breach as described.

4.2.1.3. *If not, did the claimant resign in response to the breach of contract (was the breach a reason for the claimant's resignation – it need not be the only reason for the resignation)?* Yes. He had no trust and confidence in getting a fair hearing. He had reasonable grounds to believe that he would either have to resign or be dismissed for misconduct.

4.2.2. *The conduct the claimant relies on as a breach of trust and confidence is:*

4.2.2.1. *removal of the duties of transport manager in December 2018.* The claimant's duties of transport manager were amended between June and December 2018 with his consent, albeit at times reluctantly and with some concern as to his future career with the respondent. The allegation is that his duties were removed. They were not entirely removed. He remained transport manager until his resignation. The duties that were removed from him, and we believe other transport managers with the duties of a planner which is a subordinate role; this was part of a reorganisation which the respondent was entitled to make as it did affect the claimant's contractual standing, principal duties, pay and conditions.

4.2.2.2. *bullying and harassment in management of office of transport managers from that time including [and the Tribunal notes that this is not an allegation of unlawful discrimination in relation to a protected characteristic, but it is an allegation of breach of contract. To succeed therefore there must be unwanted conduct by the respondent having the harassing effect of creating a hostile or intimidating environment]:*

4.2.2.2.1. *moving the claimant's desk away from other transport managers:* The tribunal found as a fact that the respondent was not responsible for the claimant's desk being moved. The other TMs took this upon themselves. Senior management was aware of the move but considered it to be part of a fairly typical reorganisation to suit circumstances, those circumstances being the appointment of a subordinate planner. The claimant raised the matter; having done so he let it lie and considered it to be something he could manage without further complaint to

SL. He queried the desk move and initially did not want it. Having raised it initially he then accepted it, such that it became no longer “unwanted conduct”; it did not have a harassing effect upon the claimant. Having accepted it, despite initial reluctance, it would not be reasonable to conclude that the move had the harassing effect.

4.2.2.2.2. *being shut out from the “shift database”*: the tribunal found that this was not an action on the part of the respondent; it was an act of the claimant’s colleagues which another colleague rectified in short order. The TMs were not acting upon the instruction of, for or on behalf of the respondent or in fulfilling their duties when they excluded the claimant. The respondent did not engage in unwanted conduct.

4.2.2.2.3. *being excluded from meetings*: the tribunal found that the claimant was not excluded from meetings. He missed a meeting when he was on leave but in effect had a postponed meeting upon his return to work. There is no evidence of any other missed meeting. There is no evidence that the respondent “excluded” the claimant from any meeting. There was no unwanted act, despite the claimant’s suspicion.

4.2.2.2.4. *comments from line manager claimant*: the claimant failed to prove that SL made the comments that he alleged, or similar comments aimed at him. That matter was not put to SL who denied them in any event in his evidence in chief. There was no unwanted conduct upon which to base an allegation of harassment.

4.2.2.2.5. *“witch hunt” regarding a problem with a spreadsheet*: the tribunal found that there was no “witch hunt” as would generally be understood by that expression. The claimant’s conduct and/or performance reasonably gave rise to some concern and there were quite properly issues for management to look into by way of some form of investigation. This was most clearly true with regard to the spreadsheet where the claimant had aroused suspicion by hiding columns and creating a ghost spreadsheet. His actions had impeded one of his colleagues in the fulfilment of his role and duties, necessitating the intervention of an IT consultant. The claimant did not want any such enquiry but, given those circumstances, his perception of the harassing effect was unreasonable.

4.2.2.3. *failure to follow correct disciplinary procedures including:*

4.2.2.3.1. *flawed disciplinary investigation*: the investigatory process was deeply flawed. It was prejudged. The investigation was headed and managed, in fact, by people who should have

been involved in it including the disciplinary officer and likely appeals officer. On their instruction, and that of SL, AM ostensibly led the investigation but in such a way as to fulfil the instructions given and substantiating the respondent's belief of the claimant as evidenced in NJ's witness statement. It was not a full, fair, and object investigation. From the outset it drove at reaching the conclusion of dismissal, pre-empted only by the claimant's resignation. The claimant could not realistically have had any hope of a fair hearing and a just outcome based upon this investigation. The flawed disciplinary investigation amounted to a fundamental breach of contract, breach of the implied term of trust and confidence. For the claimant to enjoy a relationship of trust and confidence going into a disciplinary hearing, the disciplinary investigation would have had to be the absolute opposite of everything that it was.

4.2.2.3.2. *No notice of a disciplinary on 14 August:* the failure to give notice of the meeting on 14 August to raise questions about the claimant's conduct is not in itself a breach of contract. An employer is entitled to raise matters of conduct and performance informally with an employee and even to commence formal proceedings abruptly. The tribunal does not consider that to do so would amount to best practice but at the same time did not consider it to be unreasonable or justified conduct designed to, or likely to, destroy the relationship. What the tribunal considered problematic was not so much a failure to alert the claimant to the purpose of the meeting on 14 August sooner, but rather the failure to follow that meeting up with a more formal investigatory meeting on notice. Had the disciplinary hearing proceeded based on the investigation including the claimant's answers to questions on 14 August alone, then it is quite likely there would have been a finding that any outcome decision was not based upon a reasonable investigation (subject to any discussion of the disciplinary hearing itself).

4.2.2.3.3. *investigation meeting conducted in a bullying and aggressive manner:* the claimant failed to establish that the meeting was so conducted and the respondent denied. This does not amount to a breach of contract in itself or cumulatively.

4.2.2.3.4. *The line manager was not involved in the investigation:* the claimant's line manager was too much involved in the investigation. His role in it contributed to the tainting of the entire procedure and he was part of what made it flawed. Rather than the alleged lack of involvement amounting to a breach of the fundamental term, the Tribunal finds that the extent of SL's involvement breached the implied term of trust and confidence.

- 4.2.2.3.5. *HR manager should not have been involved in investing the:* for all the reasons previously stated the tribunal finds that NJ's involvement in the disciplinary procedure and investigation was conduct designed to, or likely to, seriously damage or destroy their relationship of trust. The questionnaire destroyed the relationship. At that point, even if the claimant had put aside earlier concerns and suspicion, he could not realistically or reasonably have had a belief in the prospect of a fair hearing. This was a breach of the implied term.
- 4.2.2.3.6. *negative and derogatory comments not factual comments made at the investigation meeting:* the claimant failed to prove the alleged comments or any such breach of contract. The tribunal was unable to infer or find on the balance of probabilities that such comments were made. The tribunal is unable to find that this was a breach of the implied term in this respect.
- 4.2.2.3.7. *no minutes and/or legible minutes of the investigation meeting provided:* the claimant was provided with legible minutes of the investigation meeting. They were not very good notes or minutes. In part they were barely legible to the tribunal. The provision of those minutes by AM however did not breach the implied term.
- 4.2.2.3.8. *no opportunity to respond to allegations before invitation to disciplinary hearing on 12 September:* the claimant was given an opportunity to respond to allegations before the hearing at had been scheduled for the 12 September 2019 but not before being summoned to a disciplinary hearing. He was not given a proper opportunity by way of a 2<sup>nd</sup> investigatory meeting to respond to allegations once he had prepared himself and considered the documentation provided. In the circumstances this amounted to a breach of the implied term even though there is no requirement for a second investigatory meeting. What is key here is that the claimant did not have an opportunity to respond to the allegations before NJ had made up her mind, and that was clear in the questionnaire that she sent to him for completion which contained accusations and judgements as well as leading questions giving away prejudice and bias.
- 4.2.2.4. *Final Straw relied on was the making of serious allegations without conducting a proper investigation:* this is a reference to the questionnaire that was sent to the claimant by NJ. It could not be described as "innocuous". The tribunal has set out above its various criticisms of that questionnaire and describe its effect on the claimant. It amounted not only to a final straw that in itself a breach

of contract, a breach of the implied term of trust and confidence. It was in fact the final straw. The claimant resigned in response to it. It was the clearest evidence available to him that he could not expect to receive justice at the disciplinary hearing.

4.2.2.5. *If the claimant was dismissed: what was the principal reason for dismissal and was it the default one or 98 (1) and (2) of the Employment Rights Act 1996 (ERA); and, if so, was the dismissal fair or unfair in accordance with s. 98 (4) ERA, and, in particular, did the respondent in all respects act within the band of reasonable responses?* The claimant was dismissed. It was a constructive dismissal. The respondent has established that it had reason to believe there were conduct and performance issues that justified an investigation. The investigation was so flawed however that the respondent has not proved that the actual reason for the dismissal was misconduct or poor performance rather than a prejudiced belief in the same. In acting as it did the respondent breached trust and confidence and it would only be in exceptional cases that a dismissal in such circumstances would amount to a fair dismissal. The tribunal finds that this constructive dismissal was unfair in all the circumstances, including the size and resources of the respondent. If the dismissal was for conduct and performance matters then the respondent did not act fairly and reasonably in all the circumstances in treating that reason as sufficient reason to dismiss.

#### **4.3. Disability/age discrimination – direct discrimination:**

4.3.1. *did the respondent remove from the claimant duties of transport manager in December 2018 and, if so, did that amount to “less favourable” than the way in which the respondent treated comparator transport managers KL and IH?* Some duties were removed from the claimant but only those commensurate with the role of Planner and subordinate to the duties of a Transport Manager. This was part of a reform of the business that affected the entire operation. The tribunal finds on the balance of probabilities that the duties of the claimant’s two TM colleagues were also reduced by the removal of planning functions, in accordance with training given to the Planner by the claimant himself. The tribunal was unable to find any facts from which it could conclude that the claimant was treated less favourably than his TM colleagues, his named comparators, when planning responsibilities were removed from him and them. Furthermore, the removal of the planning functions and reduction in payment role were not because of his disability.

4.3.2. *If so was this because of:*

4.3.2.1. *the claimant’s age (64 at the effective date of termination of employment) in circumstances where the respondent denies the allegation and does not rely on the statutory defence of justification?* The claimant has not proved facts, and the tribunal was unable to make findings of fact from all sources, including by inference, that



the adjustment of the claimant's duties was because of his age. No evidence was given as to the age of the comparators. In any event this claim was presented out of time in circumstances where it would not be just and equitable to extend time to the date of presentation of the claim.

4.3.2.2. *because of the claimant's disability and/or because of the protected characteristic of disability more generally?* The tribunal was unable to find facts, even by inference, from all sources including the claimant, upon which it could find that any adjustment to the claimant's role as transport manager was because of his disability, and in any event the claim was presented out of time in circumstances where it would not be just and equitable to extend time to the date of presentation claim.

Employment Judge T.V. Ryan

Date: 14.01.21

JUDGMENT SENT TO THE PARTIES ON 15 January 2021

FOR THE TRIBUNAL OFFICE Mr N Roche