EMPLOYMENT TRIBUNALS

Claimant: Mr D P Kilburn

Respondent: Drivers Vehicles Standards Agency (Office of the Traffic Commissioner)

Heard at: Manchester **On:** 10-12 December 2019 (in person)
6-8 April 2021 (by CVP)

Before: Employment Judge Ainscough (sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr Wilkinson, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claim of constructive unfair dismissal, contrary to section 94 of the Employment Rights Act 1996, is unsuccessful and is dismissed.

2. The claim for a redundancy payment in accordance with section 135 of the Employment Rights Act 1996 is unsuccessful and is dismissed.

REASONS

Introduction

1. The claim was brought by way of a claim form dated 28 January 2019 in which the claimant claimed he had been constructively dismissed from his role as a team leader with the respondent.

2. The respondent denied that the claimant had been constructively dismissed in the grounds of resistance submitted on 1 March 2019. The respondent denied having breached the claimant's contract of employment.

The Issues

3. The claimant conceded that subjecting him to an excessive workload was not a reason for which he resigned and should not be included in the issues for the Tribunal to determine.

4. The issues for the Tribunal to determine were as follows:

Unfair Dismissal – Part X Employment Rights Act 1996

Dismissal

1. Can the claimant establish that his resignation should be construed as a dismissal under section 95(1)(c) Employment Rights Act 1996 in that:

   (a) The respondent committed a fundamental breach of the implied term of trust and confidence through the following alleged matters, whether taken individually or cumulatively:

      (i) In the handling of the claimant's grievance lodged in March 2017;

      (ii) Bullying and harassing the claimant in the period from September 2017 onwards;

      (iii) In the handling of his grievance lodged in February 2018;

      (iv) In making the claimant work in an office away from his colleagues and in not allowing him to do his normal work, thereby effectively demoting him, in the period from April 2018 onwards, and/or

      (v) In the failure to conduct a stress risk assessment despite Occupational Health advice from April 2018 onwards, culminating in the meeting in Leeds on 22 December 2018 which was conducted in an improper manner?

   (b) That breach was a reason for the claimant's resignation; and

   (c) The claimant had not lost the right to resign by affirming the contract after the breach, whether by delaying or otherwise?

Fairness

2. If the claimant's resignation was a constructive dismissal, can the respondent show a potentially fair reason for dismissing the claimant?

3. If so, was the dismissal fair or unfair under section 98(4)?

Redundancy Payment

4. If the claimant establishes that his resignation should be construed as a dismissal under section 136(1)(c) (issue 1 above), was the reason or principal reason for that dismissal redundancy as defined in section 139?

Remedy

5. If any of the above complaints succeed, what is the appropriate remedy? Issues likely to arise include:

   (a) Whether the claimant contributed to his dismissal by his own conduct;

   (b) Whether it would be just and equitable to reduce or limit the compensatory award for unfair dismissal;

   (c) The amount of a redundancy payment due to him.

Evidence

5. I heard evidence from the claimant, in person, on 10 and 11 December 2019. On 12 December 2019, I heard evidence from Eleanor McKenzie, the Deputy Head of Compliance. I was unable to complete the evidence of Eleanor McKenzie because the claimant required further disclosure from the respondent after Eleanor McKenzie confirmed in evidence that she had further documentary evidence that was not within the bundle. The hearing was adjourned to allow the respondent to make that disclosure to the claimant.

6. On 6 April 2021 I resumed the hearing part-heard, via Cloud Video Platform, and completed the evidence of Eleanor McKenzie. I also heard evidence from Nicola Mortimer, the first grievance appeal officer, and Colin Maddock, the second grievance decision officer. On 7 April 2021 I recalled Nicola Mortimer to deal with a version of the grievance procedure that had been disclosed that morning, and also heard evidence from Nick Longhurst, the second grievance appeal officer.

7. The parties agreed a bundle which ran to 874 pages.

Relevant Legal Principles

8. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed, and the circumstances in which an employee is dismissed are defined by Section 95. The relevant part of Section 95 was Section 95(1)(c) which provides that an employee is dismissed by his employer if:

> **"The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

9. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. It was held that unreasonable conduct is not enough, there must be a breach of contract which led to the constructive dismissal. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

10. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed 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."**

11. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

12. The EAT in **Leeds Dental Team Ltd v Rose [2014] IRLR 8**, EAT said:

> **"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…"**

13. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

14. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

15. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA 21 July 2015** the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
>
> > **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.**
>
> **15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."**

16. In some cases the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal recently reaffirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.**

17. There is also an implied term that an employer will reasonably and promptly give employees an opportunity to seek redress for any grievance: **Goold WA (Pearmak) Ltd v McConnell [1995] IRLR 516**. Alternatively, failure to handle a grievance properly might amount to breach of the implied term as to trust and confidence if serious enough to be repudiatory.

18. In the case of **Assamoi v Spirit Pub Company (Services) Limited (formerly known as Punch Pub Co Limited) UKEAT/0050/11/LA** the Employment Appeal Tribunal confirmed that (paragraph 36):

> **"There is a fundamental distinction which, it is perhaps more easy to recognise than to define, between there being a fundamental breach of contract that an apology by an**

> **employer cannot cure and there being action by an employer that can prevent a breach of contract taking place."**

19. In the case of **Blackburn v Aldi Stores Limited [2013] IRLR 846** the Employment Appeal Tribunal determined that a failure to adhere to a grievance procedure was capable of amounting to or contributing to a fundamental breach. However, not every failure to adhere to such procedure will constitute a fundamental breach. The Employment Appeal Tribunal was clear that this is a question for the Tribunal to assess in each individual case.

Relevant Findings of Fact

Claimant's employment

20. The claimant began his employment with the respondent on 9 March 2015 as a Team Leader in the Golborne office. The respondent is a Government Department which facilitates the workings of the office of the Traffic Commissioner. The claimant was responsible for his own caseload and management of colleagues.

21. The respondent operated a grievance policy, initially from 28 September 2016 to 1 February 2018. That policy was updated on 1 February 2018. A PowerPoint presentation entitled "Grievance Gateway for Managers" accompanied both versions of the policy, which in particular stated in both versions that if there was to be an investigation of a grievance, the identity of the investigating officer should be different to the identity of the decision officer.

22. Both policies provided for pro formas to be completed to initiate a formal grievance. Both policies required a decision officer and an appeals decision officer to make decisions within five working days of any meeting with an employee. If there was to be a delay, the policy required the decision officer/appeals officer to give a reason for the delay and a timeframe for the final decision. The grievance policy is restricted to events that occurred less than three months ago.

23. The respondent also operated a procedure whereby there could be a completion of a stress risk assessment questionnaire in order to measure the capacity of an employee in the workplace. Once a stress risk assessment questionnaire was completed, there was then the completion of a stress risk assessment.

24. From March 2015 until August 2016 the claimant's line manager was Corrina Bielby. From August 2016 until November 2017, Deborah Crosby was the claimant's line manager. From November 2017 until April 2018, Amanda Feasey was the claimant's line manager. From April 2018 until February 2019, Deborah Kavanagh was the claimant's line manager. From June 2018, Eleanor McKenzie was the Deputy Head of Compliance and Amanda Feasey's line manager.

March 2017 grievance

25. On 26 March 2017 the claimant raised a grievance. The claimant complained that he had been subject to bullying and harassment for a period of two years. The claimant also complained about the condescending manner of his line managers and

colleagues being allowed to get away with poor behaviour. The claimant complained about staff shortages and excessive workload.

26. On 28 March 2017 the claimant asked that an independent manager be appointed to deal with the grievance. On 13 April 2017, Stephen Moore from the Operational Recruitment Department was appointed to deal with the claimant's grievance.

27. On 3 May 2017 the claimant met with Stephen Moore to discuss his grievance. During that meeting the claimant told Stephen Moore that the grievance was his last option before he resigned. Stephen Moore asked the claimant whether he could give specific examples of meetings or dates when things happened. The claimant complained about the management by Corrina Bielby and Deborah Crosby. The claimant also named specific caseworkers who had, in his view, behaved inappropriately. Corrina Bielby left the respondent's employment in August 2016. The claimant informed Stephen Moore that he suffered from a hiatus hernia and had asked for a stress risk assessment to be completed.

28. The claimant was asked what he wanted out of the grievance and he informed Stephen Moore that he wanted recognition that this should not happen again to anybody else. When the claimant was asked who he was raising the grievance against, he said the department and the failure to deal with poor performance of managers. The claimant was asked whether he was raising a formal grievance against his line managers. The claimant said he would have to or else it would not be dealt with and he wanted the line managers to be told that their behaviour was not acceptable.

29. In September 2017 the claimant suffered a heart attack.

30. On 18 September 2017 Stephen Moore notified the claimant of the grievance decision. Stephen Moore decided that he was not able to uphold the claimant's grievance because the claimant had been unable to specify an actual grievance of either a particular event or something done by a particular individual. Stephen Moore found that Corina Bielby had left the office more than six months before the grievance was submitted and this complaint was "out of time".

31. Stephen Moore was of the view that the claimant's grievance was against "the department". Stephen Moore recognised that there were issues in the department and made a suggestion for informal resolution which included changes to the working environment, and mediation between colleagues.

<u>March 2017 Grievance appeal</u>

32. On 18 September 2017 the claimant submitted a grievance appeal. Stephen Moore had identified his line manager, Nicola Mortimer, as the appeals officer. The appeal document was submitted to Nicola Mortimer on 25 September 2017.

33. In the appeal, the claimant complained about a lack of interest by Stephen Moore, the delay, his disagreement with the outcome and the admission by Stephen Moore that he had lost his original notes and would "put something together". In his disagreement of the outcome, the claimant stated that he had identified a number of

individuals - but maintained that the department was responsible for their behaviour and the issues were systemic.

34. On 2 October 2017 the Occupational Health department advised that the claimant was fit to continue in his role but that a stress risk assessment should be completed.

35. On 31 October 2017 the claimant met with Nicola Mortimer to discuss his appeal. During that meeting the claimant reiterated his grounds of appeal and also told Nicola Mortimer that his wife thought he should go to an Industrial Tribunal for constructive dismissal. When the claimant was asked whether he thought the issue was resolved, he said he was “almost there now”. The claimant asked if his new manager was more supportive and the claimant commented that his new manager (Amanda Feasey) talked things through and appreciated hard work. The claimant concluded by telling Nicola Mortimer that Stephen Moore had not completed the grievance properly and he wanted a proper investigation.

36. On 4 December 2017 Nicola Mortimer sent the grievance appeal decision letter. In that letter Nicola Mortimer did not uphold the appeal because the claimant had been unable to provide any additional information or details of specific events to support his appeal. The claimant was told that the decision was final.

37. Instead, Nicola Mortimer acknowledged that the concerns the claimant had raised about his working environment and management needed to be addressed, and she too made recommendations. Nicola Mortimer also acknowledged that the grievance had not been dealt with in a timely manner and that the decision officer had acknowledged the delay. Nicola Mortimer was satisfied that the delay had not changed the content of the report and that the decision officer had taken on board the lessons learned. Nicola Mortimer also apologised for the delay in producing the appeal outcome due to unforeseen personal circumstances.

<u>December 2017 – March 2018</u>

38. On 12 December 2017 the claimant sent a letter setting out his concerns with the grievance process and asked that it be directed to the right person. The HR Department agreed to carry out a review of the points the claimant had raised.

39. On 15 December 2017 the HR Department asked for a review by a senior manager. On 18 December 2017 Caroline White, a HR Case Manager, agreed to review the matter.

40. On 21 December 2017 Nicola Mortimer emailed Amanda Feasey asking her to carry out the stress risk assessment.

41. On 9 January 2018 the Senior HR Business Partner, Jake Stapleton, agreed to review the claimant's concerns about the grievance process.

42. On 6 February 2018 Jake Stapleton informed Caroline White that he had reviewed the papers and did not feel it was appropriate to take the matter further.

43. On 9 February 2018 Jake Stapleton provided a response to the claimant. In that response the claimant was informed that because he had exercised his right of

appeal it was not appropriate for HR to consider the complaint further. The claimant was informed that timescales cannot always be met, but the HR Department was satisfied that both officers had carried out their duties correctly. The claimant's request for a transfer out of the department was acknowledged and he was asked to provide further information.

44. On 12 February 2018 the claimant responded. The claimant formed the view that there had been a whitewash of his grievance.

45. On 12 February 2018 the claimant complained to Jake Stapleton and Amanda Feasey that he had yet to complete a stress risk assessment.

46. On 13 February 2018 Jake Stapleton provided links to the stress management policy, personal stress risk assessments and the stress management guide for line managers and urged the claimant to discuss the matter with Amanda Feasey. The claimant responded saying he wanted out of the department. The claimant also took the view that the stress risk assessment links were poor.

47. In September 2017 the claimant had raised a complaint that his manager and colleague had disclosed his health condition to his second employer, Manchester City. In email correspondence the claimant accepted that there had been no ill will intended and agreed to drop it. The claimant however raised the issue again when asking the HR Department to review his grievance.

48. In February 2018 the claimant agreed he would not pursue the data breach further. Despite this, the claimant's line manager, Amanda Feasey, refused to accept the claimant's decision to drop the matter.

49. On 13 February 2018, the claimant met with Amanda Feasey and Deborah Kavanagh to discuss the stress risk assessment. On 14 February 2018 Amanda Feasey sent an email to the claimant's personal email account.

50. On 20 February 2018 the claimant agreed to engage in mediation with Amanda Feasey. The mediation was unsuccessful and on 24 March 2018 the claimant submitted his second grievance.

<u>March 2018 grievance</u>

51. As well as submitting the grievance, the claimant asked to return to a different place of work. The claimant's second grievance was about the meeting he had had with Amanda Feasey and Deborah Kavanagh on 13 February 2018.

52. On 11 April 2018 the grievance terms of reference were established. Tony Walker was appointed as the investigating manager and Colin Maddock was appointed as the decision manager.

53. The claimant was off work from February 2018 – April 2018 with work-related stress.

54. On 12 April 2018 the Occupational Health department advised that the claimant may be fit to work in his role with relevant support.

55. On 25 April 2018 the claimant met with Tony Walker. At that meeting Tony Walker told the claimant he would not comment on previous grievances. However, during that meeting the claimant did complain about the conduct of the first grievance. The claimant informed Tony Walker that he was leaving anyway but wanted to establish a relationship until he left. At the end of the meeting the claimant was told that because other colleagues had to be interviewed, it was not possible to give a date when the grievance outcome would be known.

56. On 9 May 2018 Tony Walker interviewed Amanda Feasey.

57. On 14 May 2018 the claimant agreed a phased return to work with Deborah Kavanagh. Deborah Kavanagh agreed to complete the stress risk assessment.

58. On 16 May 2018 Deborah Kavanagh confirmed that the claimant was on the priority mover list.

59. On 15 May 2018 Tony Walker sent the notes from the meeting with Amanda Feasey to Amanda Feasey to agree. Amanda Feasey did not respond to Tony Walker until 7 June 2018.

60. On 12 June 2018 the HR Department informed Deborah Kavanagh that she would need to get the claimant's consent to share the stress risk assessment questionnaire with her.

61. On 27 June 2018 Tony Walker sought confirmation from HR as to the chronology of the stress risk assessment. HR informed Tony Walker that an assessment questionnaire had been sent to the claimant in October 2017 but never returned. HR had a questionnaire completed in February/March 2018.

62. On 13 July 2018 Deborah Kavanagh sent the claimant a number of live vacancies.

63. On 6 August 2018 the claimant responded to a letter he had received from the respondent's solicitor. In that response, the claimant made reference to a job offer being held up as a result of the DVLA checking information. The claimant signed off the letter stating that he would be leaving his job once the checks were complete and would be pursuing the matter through the Tribunal.

64. On 16 August 2018 the claimant met with Eleanor McKenzie to discuss his role. During that meeting the claimant informed Eleanor McKenzie that he would not be working with the respondent within the next five years.

65. Tony Walker concluded that there were no grounds for the grievance. He was of the view that it was six of one and half a dozen of the other between Amanda Feasey and the claimant. It was acknowledged that the document produced on 13 February 2018 was not a stress risk assessment. It was acknowledged that the claimant had valid concerns but they did not warrant a grievance.

66. On 31 August 2018 Colin Maddock contacted the claimant to inform him he had been appointed as the decision officer for his grievance.

67. On 21 September 2018 the claimant met with Colin Maddock. During that meeting the claimant expressed concern about the quality of the investigating officer's report. The claimant informed Colin Maddock that he had been working in isolation since April 2018 in Chadderton in a temporary role. The claimant also informed Colin Maddock that he had considered leaving the DVSA, and whilst he did not want to leave, he did not feel he could rebuild trust with staff. The claimant was concerned at the delay of the production of the investigating officer's report.

68. On 5 October 2018 Colin Maddock provided his outcome to the claimant's second grievance. Colin Maddock apologised for the delay in reaching this conclusion. Colin Maddock also explained that he agreed that the investigating officer's report was not up to standard, but rather than seek a reinvestigation, he had decided to supplement the information he needed by discussing the matter with the claimant.

69. Colin Maddock apologised for the lack of communication with the claimant. Colin Maddock concluded that he had concerns about the situation at Golborne and would pass on his comments to the Director of Enforcement. Colin Maddock recommended that the managers at Golborne receive training in regard to the completion of the stress risk assessment. Colin Maddock agreed that staff needed to be reminded of the use of IT system. Colin Maddock was unable to say why Amanda Feasey would not accept the claimant's apology and could not uphold that part of the grievance. Colin Maddock also recommended that should Amanda Feasey seek to bring another manager into a meeting with the claimant he should understand her reasons for doing so. Colin Maddock felt he was unable to comment on the earlier grievances. It was also Colin Maddock's view that the claimant would return to his substantive place of work or have more suitable support arrangements in place. It was noted that the claimant was willing to mediate.

<u>March 2018 Grievance appeal</u>

70. On 5 October 2018 the claimant spoke with Eleanor McKenzie about the grievance outcome. On the same date the claimant appealed against the outcome of the grievance. The claimant was clear that he did not want to criticise Colin Maddock but felt Colin Maddock was left in a difficult situation by Tony Walker.

71. The claimant spoke again with Eleanor McKenzie on 9 October 2018, during which he was advised that she thought it best he remain at Chadderton as a result of his appeal. The claimant was assured that he was a priority mover and that Eleanor McKenzie would do what she could to assist with a move. Eleanor McKenzie asked the claimant to bring the original stress risk assessment questionnaire to their meeting in November so that she could ascertain what was required prior to completing a fresh one. A meeting was arranged between the two on 22 November 2018 in Leeds to complete a fresh stress risk assessment.

72. On 2 November 2018 Nick Longhurst contacted the claimant to advise he was the appeal decision officer.

73. On 9 November 2018 the HR Department provided Nick Longhurst with answers to questions about the claimant's appeal.

74. On 19 November 2018 the claimant and Nick Longhurst met to discuss the appeal. During that meeting the claimant set out his concerns about the first grievance and the delay, he set out his problems with his colleagues, he set out the phased return to work and the lack of stress risk assessment, he set out the difficulties with Amanda Feasey, and finally the claimant complained about the delay and the outcome of the second grievance. The claimant asserted that he intended to leave the department and go to a Tribunal.

75. On 17 December 2018 the claimant received the grievance appeal decision letter. Nick Longhurst agreed that the claimant had not been subject to a proper stress risk assessment, that he had received an inappropriate email from Amanda Feasey, that the claimant had tried to de-escalate the situation by apologising, that Amanda Feasey had showed lack of judgment and poor decision making, that she had inappropriately asked another manager to sit in on a meeting, and made recommendations in regard to the investigation of grievances.

76. However, Nick Longhurst did not agree that the second grievance had not been sufficiently investigated because Colin Maddock had made up any shortcomings in the investigation report. Nick Longhurst agreed that the stress risk assessment had not been carried out and therefore there had been a failure to manage the claimant's health. Nick Longhurst revealed that Amanda Feasey had been subject to management action but had not intentionally treated the claimant in such a way and therefore that part of his grievance would not be upheld. Nick Longhurst recommended that there would be a further investigation to establish the behaviour and practices in the Golborne office, that a stress risk assessment be carried out and that action would be taken in regard to his current role.

<u>22 November 2018 onwards</u>

77. On 22 November 2018 the claimant attended a meeting with Eleanor McKenzie in Leeds. During that meeting the claimant and Eleanor McKenzie discussed the completion of a stress risk assessment questionnaire.

78. On 28 November 2018 the claimant was offered employment as a trainee driver with the First Bus Group.

79. On 3 December 2018 Eleanor McKenzie was emailed by First Bus and asked to provide a reference for the claimant.

80. On 2 January 2019 the claimant submitted his letter of resignation. The letter stated that the claimant was resigning with one month’s notice and the last working day would be 1 February 2019.

81. On 16 January 2019 the claimant attended an exit interview with Eleanor McKenzie. During that discussion the claimant confirmed that he never really knew what disciplinary action had been taken against any of the staff involved. The claimant was asked if he would ever consider coming back to the respondent’s employment and he said no.

82. In the claimant's exit questionnaire, he stated that the reason for leaving was because he had been bullied and harassed for his three years of service and it had

had a bad effect on his health. The claimant complained about a lack of training and support from his managers. The claimant complained that for the last nine months he had been isolated and that despite a heart attack the behaviour had continued.

Submissions

Respondent's Submissions

83. It is accepted by the respondent that both grievances took too long to resolve. However, the respondent contends that otherwise, the respondent's grievance procedure was followed. In particular, it is contended that Mr Moore was not both investigatory officer and decision officer, but rather that there was no need for an investigatory officer as there was no investigation. The respondent contends that the claimant submitted a generic grievance and was happy to approach the grievance on that basis. The respondent maintains that Ms Mortimer was the right person to hear the claimant's appeal that that there was no conflict of interest.

84. The respondent submits that there is no evidence that the claimant was subjected to bullying and harassment, in particular by his line manager, Amanda Feasey or Eleanor McKenzie. The Tribunal was asked to note the way the claimant gave his evidence in a forceful and argumentative way. The respondent submits that the claimant sees ill intention where none exists and there is no evidence that he was orchestrated out of the business. The respondent maintains that the claimant was placed on the priority mover list rather than an "at risk" register and he was happy with this action.

85. The respondent submits that Colin Maddock was correct to deal with any inadequacies in the investigating officer's report by taking details from the claimant rather than starting a fresh investigation in light of the delays. The respondent acknowledges that whilst the grievance took too long there was a thorough and fair outcome. The respondent submits that the claimant had no problem with Colin Maddock or Nick Longhurst – the issue he took was with the investigating officer's report which the respondent submits, was remedied by Colin Maddock.

86. The claimant had no complaint about the type of work he performed once he moved to Chadderton. It was the evidence of Eleanor McKenzie, the respondent submits, that the claimant remained in that role whilst he appealed against the outcome of his second grievance. The respondent submits that the claimant was on the priority mover list and had an opportunity to move when a suitable vacancy arose.

87. The respondent submits that the evidence of Eleanor McKenzie should be accepted about the meeting on 22 November and the completion of the stress risk assessment. The respondent contends that the claimant believes it is his way or the wrong way, and there is no real evidence to say that Eleanor McKenzie did anything wrong. The respondent contends that this cannot be the last straw that causes the resignation because the claimant had already applied to join First Bus and was merely awaiting his checks with the DVLA. The respondent asked the Tribunal to note that the meeting of 22 November does not even feature in the claimant's ET1 and therefore cannot possibly constitute the final straw.

88. The respondent contends that the claimant did not resign in response to any breach because there is no mention of a breach in his resignation letter. It is the respondent's case that the claimant resigned as a result of earlier issues, particularly when in May 2017, he was contending that the grievance was his last option. The respondent submits that the claimant only resigned once the checks had been made by the DVLA, and anything that happened after 6 August when he contended that he would be leaving, is immaterial.

89. The respondent submits that the claimant has affirmed any breach, if in fact there was a breach. If it is agreed that the 22 November meeting was not a breach, the respondent submits that the next potential breach could be 5 October 2018, but the claimant does not resign until 4 January 2019. The respondent submits that the claimant expected the respondent to meet the obligations of his contract for well over two months after 22 November, and well over three months after 5 October.

90. Finally, the respondent submits that even if it is deemed that there was a constructive unfair dismissal, the claimant's remedy should be reduced to zero because he had applied to First Bus Manchester in February/March 2018 and was merely working until his DVLA checks had been completed.

Claimant's Submissions

91. The claimant contends that he has been at a procedural disadvantage as a result of the respondent's conduct throughout the proceedings. It is the claimant's position that the respondent has included irrelevant evidence in the bundle and delayed complying with directions. In particular, the claimant submits that Eleanor McKenzie has withheld evidence.

92. The claimant submits that the respondent is only asking the Tribunal to consider part of the picture. The claimant contends that he has given evidence of continuous breaches and there has been no rebuttal evidence. It is the claimant's submission that the respondent has presented a case of smoke and mirrors and that this has gone on for three years.

93. The claimant submits that he did not resign immediately because he needed a job, he needed a reference, and after the holiday in November/December 2018 he still wanted to come back and give them a chance. The claimant explained that he deferred his new job until February in the hope that the respondent would do something.

94. The claimant accepts that the decisions made in the grievances were good if they were followed up, but they were not. The claimant is concerned that Eleanor McKenzie has destroyed evidence and that this has been withheld from the Tribunal. The claimant does not understand why no manager attempted to go through the questionnaire with him and reach an agreement.

95. The claimant submits that Eleanor McKenzie was not interested in helping him sort things out and used the ongoing grievance to avoid doing anything. The claimant contends that the isolation in the final role was a huge issue and he was put there on purpose.

Discussion and Conclusions

96. If there is a breach of the implied term of trust and confidence, any such breach will be fundamental and one that would permit a claimant to resign in response.

97. In the List of Issues, the claimant asserts that there were five causes of his resignation that either amount to a fundamental breach on their own or a fundamental breach of that term on a cumulative basis.

98. **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27** established that there must be such a significant breach going to the root of the contract or which shows that the employer no longer intends to be bound by the employment contract.

99. **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** established that the employer must not, without reasonable and proper cause, conduct itself in such a manner that it is likely to destroy or seriously damage the relationship of trust and confidence.

March 2017 Grievance

100. The respondent's grievance procedure, applicable in 2017, provides for an informal resolution of a grievance directly with the decision officer, or a formal resolution following an investigation by an investigating officer whose identity is different to that of the decision officer. The claimant agreed in evidence that this was the process.

101. The claimant took issue with the fact that Stephen Moore was the investigating officer and decision officer. Whilst I did not hear evidence from Stephen Moore, Nicola Mortimer explained that the route taken by Stephen Moore was the informal resolution route and therefore, there was no need for a separate investigating officer.

102. At the meeting between Stephen Moore and the claimant on 3 May 2017, Stephen Moore set out that he wanted to establish what the claimant was complaining about and what needed to be redressed. There was no mention of a separate investigation. At the end of the meeting Stephen Moore informed the claimant that he would advise the claimant of the next steps after the notes had been agreed. It is the respondent's case that due to the generic nature of the claimant's grievance, it was not possible to investigate the matter further.

103. The respondent's grievance policy provides for a resolution of matters that occurred less than three months ago. The vast majority of the complaints raised by the claimant were outside this time limit. The ACAS Code of Practice on Grievances at Work (2019) encourages parties to deal with issues fairly, which includes raising and dealing with issues promptly. I therefore find that it is not unreasonable for the respondent to limit a grievance to incidences that took place less than three months ago.

104. The claimant said on numerous occasions in the meeting in May 2017 that his complaint was really against the department and the failure by the department to

hold his managers to account. The claimant did not confirm that he wanted to raise grievances against individual colleagues.

105. There was, however, a delay in the provision of the outcome of the grievance and the appeal. The respondent's policy recommends five working days in each instance. It took Stephen Moore approximately 14 weeks to provide the claimant with the outcome. The respondent acknowledges that this was unacceptable.

106. The delay in providing the appeal outcome was shorter, but went beyond the five working days anticipated.

107. It is likely that the delay caused by Stephen Moore damaged the claimant's relationship with the respondent. The damage appears to have been such that the claimant was unable to accept the recommendations made by Stephen Moore to resolve his issues in the workplace.

108. However, the claimant's complaint that Nicola Mortimer, as Stephen Moore's line manager, was an inappropriate appeals officer, is not accepted. I accept Nicola Mortimer's evidence that she did not discuss the claimant's grievance with Stephen Moore and only became aware of the content of the grievance after the claimant appealed. In this sense, Nicola Mortimer was an independent appeals officer. Unforeseen personal circumstances led to the three week delay, of which the claimant only learned about on 22 November 2017. It is likely this compounded the damage caused to the claimant's view of the respondent and his acceptance of the outcome of the grievance appeal.

109. Whilst this was clearly a breach of the respondent's grievance policy, it is not a fundamental breach of the claimant's contract. This is evidenced by the fact that the claimant did not consider it so, because he did not resign in response to this breach but rather attempted to work with the recommendations by mediating with his colleagues and seeking the completion of the stress risk assessment. In addition, the claimant was content to give the HR Department a chance to review the grievance process, the conclusion of which was conveyed to the claimant in February 2018.

Treatment of the claimant from September 2017 onwards

110. Unfortunately, in September 2017 the claimant suffered a heart attack. There was a disclosure of the claimant's health status to his second employer, Manchester City Football Club, by colleagues including his line manager, Amanda Feasey, in an effort to get the Football Club to provide the claimant with good wishes. The claimant acknowledged that no harm had been done and it had been a nice thought. However, this issue was resurrected when the claimant sought a review of the grievance procedure in December 2017. The claimant subsequently agreed to drop the matter.

111. The claimant's decision to drop the matter coincided with the meeting he had with Amanda Feasey and Deborah Kavanagh on 13 February 2018, during which the claimant alleges that Amanda Feasey lied about the production of a stress risk assessment. I have not heard evidence from Amanda Feasey or Deborah Kavanagh

but I am aware of the content of the claimant's second grievance produced in March 2018.

112. The claimant also complains about the conduct of Stephen Jordan. Similarly, I did not hear evidence from Stephen Jordan. The claimant's second grievance does not detail a complaint about Stephen Jordan.

113. In his evidence, the claimant said that all had been well with Amanda Feasey until the email to Manchester City. It is clear from Amanda Feasey's email of 14 February 2018 that she was upset about the claimant's conduct. It is also clear that the claimant was upset that Amanda Feasey did not accept his apology.

114. In light of the claimant's earlier concession, it is understandable that Amanda Feasey felt disgruntled that the matter had been raised directly with HR. It cannot be said that Amanda Feasey was conducting herself without reasonable and proper cause when sending the email on 14 February 2018, albeit to the claimant's personal email address. Whilst this interaction no doubt damaged the claimant's relationship with the respondent further, it was a position Amanda Feasey was entitled to take.

115. Neither the grievance nor the claimant's witness statement detail any particular incidents with Stephen Jordan. The claimant made assertions in evidence that Stephen Jordan was responsible for the treatment of the claimant in general terms, but this is not enough to establish that Stephen Jordan was responsible or that these events in fact happened.

116. Following the meeting on 13 February 2018 the claimant attended mediation with Amanda Feasey that was unsuccessful. Whilst there was disagreement between the two, this was not sufficient to amount to a breach of the claimant's contract.

March 2018 Grievance

117. The claimant's appeal of this grievance set out that he was not critical of Colin Maddock but rather the investigation that had been conducted by Tony Walker. In evidence the claimant accepted that Colin Maddock had not produced a bad report and he did like what was said. The claimant qualified this by saying that a report was only good if it was acted upon. Similarly, the claimant complained about the delay in the conclusion of this grievance.

118. I can see from the chronology that following the meeting with the claimant on 25 April 2018, Tony Walker met with Amanda Feasey on 9 May 2018. Within a week, Tony Walker had sent his notes from that meeting to Amanda Feasey who did not return them to Tony Walker until 7 June 2018. It appears by the end of June Tony Walker was seeking clarification from HR about the stress risk assessment before completing his report some time in August 2018. By the end of August 2018 Colin Maddock had arranged a meeting with the claimant.

119. Whilst there was a slippage of time of a matter of weeks in parts of the timeline, none of this was conveyed to the claimant. Colin Maddock apologised to the claimant for the delay. In addition, Colin Maddock sought to rectify any

deficiencies with the investigating officer's report by holding a detailed meeting with the claimant.

120. Following this meeting, Colin Maddock upheld a number of the claimant's complaints, but not all. The claimant appealed the very same day. In general terms the claimant asserted that the report was incorrect because there had not been a proper investigation by Tony Walker.

121. The respondent followed the correct procedure, albeit with some slippage of time, and provide outcomes it was entitled to reach. The claimant disagreed with some of those outcomes and wanted to move to the next stage of the process, without reflection. I find that, unless there had been complete agreement with all that the claimant had said, he would always have disagreed with the outcome of the report and appealed. The claimant accepted in evidence that the appeal decision given by Nick Longhurst was fair, albeit based on a flawed investigation.

122. If there were deficiencies in the investigating officer's report, both Colin Maddock and Nick Longhurst took the view that they had been rectified by the meeting Colin Maddock had with the claimant. The second grievance was conducted in accordance with the respondent's policy. Objectively, the reaching of a decision with which the claimant did not agree, but which the respondent was entitled to reach, is not a breach of the implied term of trust and confidence.

Claimant's role at Chadderton

123. On the claimant's return from sick leave, and following the submission of his grievance about his line manager, he was asked to move to Chadderton whilst the grievance was investigated. During this time Deborah Kavanagh took over line management of the claimant. In his first grievance and in the review sought from HR after the first grievance, the claimant intimated that he wanted to move departments. By 16 May 2018 Deborah Kavanagh had placed him on the priority mover list, which is a list maintained by the respondent for those who have first choice of any vacancies for various reasons. This was not a "at risk" list, which has an altogether different meaning if a person is put on notice of possible termination of employment. In July 2018 Deborah Kavanagh sent the claimant a number of vacancies for which he could apply.

124. The claimant met with Eleanor McKenzie in August 2018 and discussed future roles.

125. Whilst the grievance concluded in October 2018, there was no opportunity for the respondent to deal with the recommendations made by Colin Maddock because the claimant immediately appealed. The purpose of the claimant's posting was to allow the grievance to be properly investigated without the interested parties working together in the same department. The appeal was a continuation of the grievance and I find that it was acceptable to leave the claimant in that post until the outcome of his appeal was known and the recommendations had been acted upon. I do not accept that Eleanor McKenzie left the claimant in that post to manage him out of the organisation.

The stress risk assessment and the meeting on 22 November 2018

126. From May 2017 the claimant complained that he has not been subject to a stress risk assessment. By October 2017 following the claimant's heart attack, the Occupational Health department recommended that there be completion of a stress risk assessment. The respondent asserts in evidence that the questionnaire was sent to the claimant that month but he did not return it. It is the claimant's evidence that he did return it, but it was never actioned.

127. Within the bundle there is a stress risk questionnaire completed by the claimant. It is undated. This document was forwarded to Eleanor McKenzie on 21 November 2018 by Deborah Kavanagh in preparation for the meeting with the claimant on 22 November 2018. Within that email Deborah Kavanagh explained that the actual assessment had not been completed at the request of the claimant, because he did not feel it would be appropriate until he returned to his substantive post.

128. A stress risk assessment questionnaire was completed by the claimant at the end of 2017/beginning of 2018, but the actual assessment was not completed by his line manager prior to the claimant being moved to his temporary role at Chadderton. As a result, the claimant and Eleanor McKenzie agreed that they would complete it in November 2018.

129. There is a complete dispute of fact between the claimant and Eleanor McKenzie about what occurred at the meeting on 22 November 2018. The claimant contends that Eleanor McKenzie disagreed with the answers he had given in the questionnaire and began to complete them herself. The claimant denies he was aggressive but acknowledges that he left the room to use the toilet to cool down. The claimant asserts that when he returned to the room Eleanor McKenzie had finished the questionnaire on his behalf. The claimant contends that Eleanor McKenzie became aggressive when he would not complete the questionnaire the way she wanted.

130. It is Eleanor McKenzie's evidence that the claimant was frustrated in general terms and he had to leave the room. Eleanor McKenzie gave evidence that she could not complete the questionnaire because the claimant would not engage. Eleanor McKenzie said the claimant wanted to go back over old ground from 2015/2016.

131. I find that there was a dispute between the parties as to the completion of the questionnaire, and as a result it was not completed.

132. The assessment had been recommended by Occupational Health since 2017 and despite the claimant completing a questionnaire at the end of 2017/early 2018, the assessment had not been progressed. I find that the assessment was not progressed in early 2018 due to the breakdown in the relationship between the claimant and his line manager. The claimant's temporary line manager, Deborah Kavanagh, records that she was asked by the claimant not to complete the assessment until he returned to his substantive post. In preparation for that, Eleanor McKenzie attempted to complete the questionnaire with the claimant, but they were unable to agree how this would be done.

133. There was a failure by Amanda Feasey to complete the stress risk assessment on the claimant's behalf but there were attempts to do so by Deborah Kavanagh and Eleanor McKenzie. The claimant disagreed with the way Eleanor McKenzie wanted to complete the questionnaire, and it was not completed. I do not find that there was a deliberate attempt not to complete the questionnaire such that that would amount to a breach of the claimant's contract. I accept the evidence of both the claimant and Eleanor McKenzie that the claimant was frustrated in that meeting and had to leave the meeting to cool down. Eleanor McKenzie ended the meeting because she had to attend another meeting. I do not find that Eleanor McKenzie conducted that meeting in an improper manner.

Claimant's Resignation

134. The claimant's resignation letter does not detail the reason for his resignation. However, the claimant does set out the reasons for the termination of his employment in his exit questionnaire.

135. In his witness statement, the claimant asserts that the last straw for him was the meeting with Eleanor McKenzie on 22 November 2018. This is not mentioned in the claim form. In evidence the claimant admitted that he would have left the respondent's employment in November but for the outstanding grievance appeal. I find that once the claimant had received this outcome, he decided to leave the respondent's employment.

136. In making this finding, I have concluded that whilst the claimant was upset following the meeting on 22 November 2018 with Eleanor McKenzie, he was not sufficiently upset to resign on that date. The claimant was of the view that the respondent may be able to redeem itself should the appeal outcome go his way. Whilst the claimant did not take particular issue with Nick Longhurst or his report, the fact that it relied upon a "flawed investigation" was enough for the claimant not to agree with the overall result.

137. As early as May 2017 in the meeting with Stephen Moore, the claimant asserted that he was going to leave the respondent's employment. Following the outcome of the first grievance, the claimant applied for a job with First Bus. In the investigation meeting with Tony Walker he informed Tony Walker that he was leaving anyway. In response to a letter that had been sent by the respondent's solicitor, on 6 August 2018, the claimant informed the solicitors that he had a job offer (from First Bus) and was awaiting the outcome of DVLA checks. In the grievance meeting with Colin Maddock, the claimant informed Colin Maddock that whilst he did not want to leave, he did not feel he could rebuild trust with the staff. At the grievance appeal meeting with Nick Longhurst on 19 November 2018, the claimant told Nick Longhurst that he intended to leave the department and go to a Tribunal.

138. I find that the acts about which the claimant complains were not a fundamental breach of the implied term of trust and confidence, either individually or cumulatively. The delay in the first grievance was a breach, but not so fundamental to cause the claimant to leave his employment. The claimant remained in employment for a further period of 12 months, despite applying for and receiving a job offer, in order to try and resolve his issues with the respondent through the

grievance process. He still had trust and confidence in the respondent up until the outcome of his second grievance appeal.

139. Neither the meeting with Eleanor McKenzie on 22 November 2018 nor the appeal outcome on 17 December 2018 amounted to a breach of the claimant's contract. Instead, the claimant disagreed with his managers about how he had been treated and the way forward. The respondent was entitled to take the position in both instances, and it was not such that they did so without reasonable and proper cause. The respondent did not act in such a way that it no longer intended to be bound by the employment contract.

140. For this reason, the claimant's claim for constructive unfair dismissal fails and is dismissed.

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Employment Judge Ainscough

Date 12 April 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

14 April 2021

FOR THE TRIBUNAL OFFICE