EMPLOYMENT TRIBUNALS

Claimant: **Mr E Phipps**

Respondent: **NLA Media Access Limited**

Heard at: London South Tribunal **On:** **25, 26, 27th October 2021**

Before: **Employment Judge Clarke (sitting alone)**

Representation
Claimant: Ms King (Counsel)
Respondent: Mr Williams (Counsel)

RESERVED JUDGMENT ON LIABILITY

(1) The complaint of constructive unfair dismissal is not well-founded. This means that the Claimant was not unfairly dismissed by the Respondent.

REASONS

Introduction

1. The Claimant was employed by the Respondent. He resigned with immediate effect on 17th April 2020, which resignation was formally accepted by the Respondent on 20th April 2020. He notified ACAS under the early conciliation procedure on 21st April 2020. The ACAS certificate was issued on 13th May 2020.

2. By a claim received on 18th June 2020 the Claimant seeks compensation for constructive unfair dismissal and notice pay. The Claimant relies on the Respondent's breach of the implied term as to trust and confidence. The agreed list of issues summarises the actions of the Respondent that he relies upon as being in breach of that term.

3. The Respondent resists the claim denying that the Claimant was dismissed or that the Respondent was in breach of the Claimant's contract of employment and asserting that he Claimant had voluntarily resigned.

4. The case was listed for a 3 day final hearing to deal with both merits and quantum. At the outset of the hearing, it was apparent that it was unlikely that there would be sufficient time for evidence, submissions, judgment and remedy and I indicated that I would hear evidence and submissions in respect of liability only and reserve judgement.

The Evidence

5. At the Hearing, the Claimant was represented by Counsel, Miss King, and gave sworn evidence.

6. The Respondent was represented by Counsel, Mr Williams, who called sworn evidence from Harriet Allonby (Account Executive and the Claimant's immediate line manager), Josh Allcorn (Licensing Operations Manager and Ms Allonby's senior manager), Victoria Blaney (Director and Principal HR Consultant at HRx and disciplinary hearing chair), Natasha Smith (Senior HR Consultant and Employment Law Advisor at HRx and appeal hearing chair) and Henry Jones (the Respondent's Managing Director).

7. I was also referred to, and considered, witness statements from each witness who gave oral evidence and documents contained in a bundle comprising 561 pages.

8. I also viewed extracts from the zoom recording of the disciplinary appeal hearing which took place between the Claimant and Natasha Smith on 3rd April 2020 **[transcript: 426A – 426AB]**.

9. I also had the benefit of a chronology prepared by Respondent and written closing submissions on liability from both Claimant and Respondent's Counsel to supplement the oral submissions they each made at the end of the evidence. During submissions I was referred to the case of *Phoenix House Ltd -v- Stockman 2019 IRLR 960,* which I have read and considered.

10. Throughout this judgment, text in bold within square brackets refer to the pages of the trial bundle.

Relevant Law

11. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") confers on employees the right not to be unfairly dismissed. Enforcement of that right is by way of complaint to the Tribunal under section 111.

12. The Claimant must show that he was dismissed by the Respondent under section 95. Where there is no express dismissal, then the Claimant needs to establish a constructive dismissal. Section 95(1) states that an employee is dismissed by his or her employer for the purposes of claiming unfair dismissal if:

“(c) 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.”

13. *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221* set out the approach to be taken when considering whether there has been a constructive dismissal:
“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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.”

14. In order to claim a constructive dismissal, the employee must therefore show that:
(i) there was a fundamental breach of contract on the part of the employer;
(ii) the employer’s breach caused the employee to resign; and
(iii) the employee did not lose the right to claim constructive dismissal by delaying too long before resigning and thus affirming the contract.

15. Whether there has been a repudiatory breach is an objective test, the employer’s subjective intention is irrelevant: *Leeds Dental Team Ltd -v- Rose 2014 ICR 94, EAT.*

16. A fundamental breach may either be a one-off breach or a course of conduct on the employer’s part which cumulatively amounted to a fundamental breach (providing that the final act adds something to the breach): *Omilaju v Waltham Forest LBC [2005] IRLR 35 CA).*

17. In *Woods -v- WM Car Service (Peterborough) Ltd [1981] ICR 666, EAT* it was said “The Tribunals function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it”. An employee is not therefore justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably.

18. Where an employer breaches the implied terms as to trust and confidence that is inevitably fundamental: *Morrow -v- Safeway Stores plc [2002] IRLR 9, EAT*. However, the Employment Appeal Tribunal has held, in *Croft v Consignia plc [2002] IRLR 851*, that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. It is for the Tribunal to determine the gravity of any suggested breach of the implied term. In other words, whether a breach is fundamental is essentially a question of fact and degree.

19. An employee will be regarded as having accepted the employer’s repudiation only if his or her resignation has been caused by the breach of contract in issue. Whether an employee left employment in response to his/her employer’s breach of contract is essentially a question of fact for the Tribunal.

20. If there is another reason for the employee's resignation, such that he or she would have left anyway irrespective of the employer's conduct, then there has not been a constructive dismissal. Where there are mixed motives, a tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation. However, the employer's breach will be an effective cause of the resignation if it is one of a number of reasons contributing to the decision to resign, it need not be the only effective cause. As Mr Justice Elias, then President of the EAT, stated in *Abbycars (West Horndon) Ltd v Ford EAT 0472/07*, 'the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon'.

21. The Court of Appeal in *Kaur -v- Leeds Teaching Hospitals NHS Trust 2019 ICR 1*, offered guidance to tribunals, suggesting that it will normally be sufficient for the Tribunal to ask itself:
    (i) what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
    (ii) has he or she affirmed the contract since that act?
    (iii) if not, was that act (or omission) by itself a repudiatory breach of contract?
    (iv) if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?
    (v) did the employee resign in response (or partly in response) to that breach?

22. If an employee has been dismissed, either constructively or expressly, then the Tribunal must go on to consider the fairness of the dismissal.

23. It is open for an employer to argue that, despite a constructive dismissal being established by the employee, the dismissal was nevertheless fair. The employer will have to show a potentially fair reason for the dismissal and that will be the reason why the employer breached the employee's contract of employment - see *Berriman v Delabole Slate Ltd 1985 ICR 546 CA*. The employer will also have to show that it acted reasonably. If an employer does not attempt to show a potentially fair reason in a constructive dismissal case, a Tribunal is under no obligation to investigate the reason for the dismissal or its reasonableness - see *Derby City Council v Marshall 1979 ICR 731 EAT*.

24. Section 98 of the 1996 Act deals with the fairness of dismissals. There are 2 stages that the Tribunal must consider.

25. Firstly, the Respondent employer must show either that it had a potentially fair reason for the dismissal within section 98(2) or that it dismissed for some other substantial reason ("SOSR") of a kind such as to justify the dismissal of an employee holding the position which the employee held (s.98(1)). The burden of proving the reason for the dismissal is placed on the Respondent.

26. Secondly, having established the reason for the dismissal, if it was a potentially fair reason, or SOSR the Tribunal has to consider whether the Respondent acted fairly or unfairly in dismissing for that reason.

27. Section 98(4) of the 1996 Act deals with fairness generally and provides that the determination of the question of whether or not the dismissal was fair or unfair, having regard to the reason shown by the employer:
    (a) depends upon whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee; and
    (b) shall be determined in accordance with equity and the substantial merits of the case.

28. There is a neutral burden of proof in relation to the general test of fairness.

29. What is reasonable within s. 98(4) depends on the particular circumstances of the case but will generally require a reasonably fair procedure to be followed (though not necessarily one which accords with the ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code") – see below).

30. In considering all aspects of the case, including those set out above, and in deciding whether or not the employer acted reasonably or unreasonably within section 98(4) of the 1996 Act, the Tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances.

31. It is also immaterial how the Tribunal would have handled events or what decisions the Tribunal would have made. The Tribunal must not substitute its own view for that of the reasonable employer – ***Iceland Frozen Foods Limited –v- Jones [1982] IRLR 439***, ***Sainsbury's Supermarkets Limited –v- Hitt [2003] IRLR 23***, and ***London Ambulance Service NHS Trust –v- Small [2009] IRLR 563***.

32. Procedural reasonableness is usually assessed by reference to the ACAS Code and unreasonable failure to follow the Code may result in an adjustment of compensation under S.207 and s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992. Whilst the Code may not be applicable to all SOSR dismissals, where the substance of the dismissal falls within the intended remit of the Code (misconduct or capability) and in cases where the employer relies upon the breakdown of mutual trust and confidence (in particular where the employer had initiated disciplinary proceedings relating to conduct prior to the dismissal) the ACAS Code will apply but it may not be appropriate to impose a sanction for failure to comply (see ***Hussain -v- Jurys Inns Group Ltd EAT 0283/15 EAT, Phoenix House Ltd -v- Stockman 2017 ICR 84, E*****AT** and ***Lund -v- St Edmund's School, Canterbury 2013 ICR D26***).

33. In any event, the ACAS Code is be had regard to but is not a prescriptive list of actions which must be followed in all circumstances. The ACAS guidelines themselves specifically indicate that that the Tribunal may take the size and resources of the employer into account and that it may not be practical for all employers to take all of the steps set out in the Code.

34. The law governing flexible working requests is contained in sections 80F – 80L of the 1996 Act and The Flexible Working Regulations 2014. ACAS also produce a

guide and Code of Practice. In summary, a company must deal with a flexible working request in a reasonable manner. This requires them to assess the advantages and disadvantages of the application and hold a meeting. They should also offer an appeal process. However, the company is under no obligation to grant the request, whether or not the employee has a compelling reason for making it, if they have a good business reason for refusing the request as set out in s.80G of the 1996 Act.

35. If an employee has made an application for flexible working, he cannot make a further application within a period of 12 months beginning with the date the previous application was made – section 80F(4)of the 1996 Act.

The Issues for the Tribunal

36. At the start of the hearing the issues were agreed to be those set out in the detailed list of issues prepared by the Respondent and entitled “Draft Statement of Issues for full merits hearing”. A copy is attached hereto.

Relevant Findings of Fact and Associated Conclusions

37. There was no dispute between the parties about the majority of the facts. Where relevant dispute did occur, I have indicated and made my own findings as to what occurred.

38. The Respondent is an organisation which issues copyright licences for organisations that wish to reproduce articles from newspapers, magazines & websites. It operates from 2 sites in Central London and Tunbridge Wells and employed around 71 people at the time of the events this case concerned, roughly half on each site.

39. The Respondent has an internal management structure but no internal human resources department. It outsourced the majority of its human resources requirements to HRx, a consultancy service which it used as and when the need arose. Two of the witnesses, Natasha Smith & Victoria Blaney, worked for HRx, and had handled the most significant human resources aspects of the Respondent’s disciplinary interactions with the Claimant.

40. The Claimant commenced employment with Respondent on 6th February 2006 and was based at the Tunbridge Wells site. Initially he held the role of Account Executive for new business [**44-54**]. On 1st April 2017 he became a Licensing Manager within the Respondent’s New Business Team. This was a new role in the company created specifically for the Claimant to enable him to receive an increase in salary, in exchange for higher targets but no additional management responsibilities [**59-60**].

41. In both roles the Claimant was required to identify, contact and advise unlicensed organisations on use of copyright material and to actively licence those organisations requiring copyright cover. The Respondent had particular

rules/guidance about how its staff operated as regards the leads they used to chase new business. Although the appropriateness and fairness of these rules and whether or not they were abused by the Respondents employees was a matter of contention between the parties these were not matters which went to the issues in this case and I make no finding about this.

42. The Claimant's roles came with targets that the Claimant was expected to meet. These targets were reviewed and increased annually.

43. The Claimant's renumeration was based on a combination of a basic salary plus commission. The level of commission depended upon whether or not he met his targets and, if so, also on the extent to which he exceeded them.

44. At time of relevant events the Claimant was one of 3 Licensing Managers within the new business team. The Claimant was working full time whereas the other 2 licensing managers were each working 3 days per week.

45. On 17th April 2020 the Claimant resigned stating that his resignation was with immediate effect.

46. His resignation letter [**442 - 449**] stated that he was resigning as a result of the Respondent's repudiatory breach of contract. His resignation was accepted by Henry Jones who wrote to the Claimant on 20th April 2020 confirming the same and that the effective date of termination of his employment would be 17th April 2020 [**450-451**].

47. The Claimant's resignation letter referred to numerous matters which had occurred over the previous 8 months. Broadly those matters can be categorised as relating to:
    (i) The refusal of a flexible working request and the informal way in which it was dealt with;
    (ii) Being ignored by management following the refusal of his flexible working request;
    (iii) Stress at work and the Respondent's management of this;
    (iv) Disciplinary proceedings brought against the Claimant;

    I will address those matters individually below under these sub-headings.

48. In his evidence to the Tribunal the Claimant also complained about a number of things which he discovered in the documents that were disclosed pursuant to the Tribunal directions but of which he was unaware at the time of his resignation. These matters did not underpin his decision to resign and I did not find them illuminative in respect of those matters which did. Whilst some of the internal correspondence between the Respondent's management and/or HRx consultants is unattractive in its language and content, I did not find that it undermined the evidence those witnesses gave about the matters which led to Claimant's resignation nor did I find that they disclosed some hidden agenda as contended for by the Claimant.

49. Further, although they formed no part of the resignation letter or the list of issues, I also heard evidence a number of other matters that the Claimant took issue with

and felt constituted unfair treatment or attacks on him by the Respondent which I will deal with below under the sub-heading “other matters”.

50. So far as the oral evidence I heard is concerned, I find the Claimant did his best to give an accurate account to the Tribunal. However, it was apparent from the evidence that his account was not wholly reliable (for example he accepted that matters in paragraph 15 of his witness statement were not accurate) or consistent (as for example his reasons for his flexible working request). Also, that his perception of events was coloured by his personality and mental health difficulties such that he ignored relevant facts, read things into situations which no reasonable person would have done, and became unduly aggrieved when he did not get what he expected or wanted. An example of this is his failure to acknowledge things the Respondent did to assist him over this 8 monthperiod, including allowing him to leave early for an extended period so that he could visit his father in hospital on a daily basis and accommodating last minute leave requests.

51. I also find that the Respondents witnesses were broadly reliable and credible, gave evidence which accorded with the contemporaneous documentation and largely corroborated each other. They were willing to accept where matters had been conducted imperfectly and (in the case of Ms Smith) accept blame for erroneous actions (recording the disciplinary hearing without consent).

52. On balance, where there was a factual disagreement between the Claimant and the Respondents witnesses, I preferred the evidence of the Respondents witnesses.

Flexible working request

53. On 4th September 2019 the Claimant submitted a flexible working request asking to change from 5 days per week to 4 days per week from 1st Jan 2020, working Tuesday to Friday [**76-77**] pursuant to the Company Policy on Flexible working [**111-112**]. The request stated that he didn’t think the request would impact business as he would still have to hit targets and he would be able to access e-mails/nav from his laptop if need be. The request contained no reasons why the request was being made

54. In a further e-mail on 5th September 2019 the Claimant sought to amend his request to 4 days being Monday to Thursday but stated that he needed to discuss with his parents to confirm which day was better for them. No other reference was made to the reasons for the request.

55. The Claimant did not expect there to be any issue with his request being granted. He had never previously applied for flexible working and felt entitled to it because other less long-serving staff in his team had been granted flexible working: both the other licensing managers were working part-time and an account manager had also been granted a flexible working request about 3 months previously. Indeed, the Respondent had not, to his knowledge, ever refused such a request from someone working in his team.

56. The Claimant's oral evidence was to the effect that the main reason for his flexible working request was to care for his father who by August 2019 was elderly and in deteriorating health. He was consequently becoming more involved in the lives of both his parents, providing them with support and assistance such as shopping and cleaning and using his weekends, holiday and unpaid leave to do so.

57. The Claimant also gave evidence that a secondary reason for the request was because he was finding his workload unmanageable and his targets unrealistic and excessive.

58. In discussions with the Respondent, the Claimant gave both reasons but raised them or placed different emphasis upon them at different times.

59. In an e-mail sent to Harriet Allonby on 6th Sept 2019 as part of discussion regarding flexible working requests stating that he felt his targets were too high and they were making him feel under pressure [**83**]. However, although a reduction in his working days would lead to a pro rata reduction in his targets, it would not make the targets more achievable within the working hours available to him.

60. As part of the Respondent's consideration of the Claimant's flexible working request Josh Allcorn liaised with Harriet Allonby and Alison Moore (the finance director) to ascertain the impact of the request on the Claimant's salary and commission targets. Although the Claimant has sought to criticise these communications, I find nothing wrong with them. In order to consider the request Mr Allcorn clearly needed to understand the impact on both the Respondent company and on the Claimant.

61. A meeting about the request took place on 17th September 2019 between the Claimant, Josh Allcorn and Henry Pettit (Head of Sales & Licensing). The reasons for the request were briefly discussed with the Claimant at this point stating that the primary reason for his request was to care for his parents on Fridays and the target reduction was secondary. The Claimant did not appear to be placing a substantial emphasis on stress or targets at this point.

62. The Respondent did not accept that the Claimant's request would have no impact on its business, something that was clearly the case as a reduction in the number of days and consequently targets would be likely to mean that the Claimant would be undertaking less business for the Respondent and generating less revenue. The Claimant was told during the meeting on 17th September 2019 that the new business department was not currently set up resourcing wise to allow further flexible working requests to be granted and that his request was not financially viable for the company. The tenor of the meeting was that his request could not currently be agreed but that it would be reconsidered following the anticipated recruitment of new staff (which was pending and imminent).

63. On 19th September the Claimant had a tense meeting with Harriet Allonby, where he expressed his dissatisfaction that his flexible working request had been declined [**102**]. He did not however repeat his claims that his targets were unachievable or were causing him substantial stress. Ms Allonby suggested that the Claimant requested every Friday as annual leave as a way of achieving what

the Claimant wanted, namely a shorter working week and a day to assist his parents, but this only further aggravated the Claimant who struggled to understand why the Respondent could accept this but not grant his flexible working request. Ms Allonby's suggestion did not of course change the Claimant's overall annual working hours or targets and was therefore quite different in terms of the impact on the Respondent.

64. On 20th September Josh Allcorn wrote to the Claimant confirming that his flexible work request would most likely have been declined but that it had been treated informally and could be renewed within 12 months and explaining the reasons for doing so [**109-110**].

65. Although the Respondent was unhappy with this outcome, he did not object to it, raise a grievance or insist on his request being dealt with formally.

66. The Claimant's resignation letter however cited the refusal of his first flexible working request and the informal manner in which it was treated.

67. The Claimant was angry and aggrieved about the indication that his request would not be granted and also because he felt that the Respondent had not treated the request as a formal one.

68. He also did not feel that his reasons for the request or the impact of the request were fully aired, or that the meeting was sufficiently formal. He concluded that company had made a decision before the meeting and that policy had not been followed. He felt that he was being treated differently from colleagues whose requests had been granted despite having similarly personal reasons for the request.

69. The Claimant was also suspicious that the refusal was because he was a top earner and a "cash cow". However, Josh Allcorn told me, and I accept, that it was precisely because others had been granted flexible working that the Respondent was not able to grant the request at that time. Each grant of flexible working had had an inevitable impact on the Respondent and it had insufficient personnel resources to enable it to be able to afford to grant another request until it had recruited new team members. At this time only the Claimant and one other in his department (an Account Manager) were working full time.

70. Whilst being unable to grant the request at the time it was made, the Respondent clearly did not wish to simply refuse it. Consequently, the Respondent did not say a flat "no" to the request, rather it said "not now". It was embarking on a recruitment exercise and it was made clear to the Claimant that whilst his request could not be granted at that time the Respondent might be in a position to grant it in future after recruitment.

71. It was for this reason that the Respondent decided to treat the application informally. Although this was not in accordance with their policy regarding flexible working requests and deprived the Claimant of a right of appeal, and ultimately the ability to challenge the decision at a tribunal, they were seeking to assist the Claimant.

72. As the legislation and the Respondent's policy only entitles the Claimant to make 1 application for flexible working per year, had they treated the application formally and made a formal decision the Claimant would not have been entitled to apply again within a short period of time and would not therefore have been able to renew his application and have it considered as soon as the additional staff were recruited and fully up to speed.

73. Although the Respondent concentrated on its position, not the Claimant's reasons for the flexible working request, their position was nevertheless a valid one and within the reasons for refusing set out in their policy [**112**] which reflected s.80G of the ERA 1996. The policy also made clear that agreeing to one employee's request does not set a precedent or create a right for another employee to be granted the same or similar change in working pattern.

74. As the basis of the refusal was the Respondent's resources and financial viability, a legitimate reason for refusal, it is unlikely that even had the Respondent followed its policy and had the Claimant appealed, the outcome would have been any different. The Respondent was in effect simply seeking to defer the Claimant's application to a time when it was more likely to be granted rather than refuse it. It was therefore to advantage the Claimant not to disadvantage him that it was treated informally.

75. For all these reasons I find that the Claimant was not justified in considering this to be an adverse action of the Respondent. On the contrary, in all the circumstances, including the failure of the Claimant to object, I find this was an entirely reasonable and helpful way for the Respondent to deal with the situation.

Ignored by Management

76. The Claimant asserted that he had been ignored and/or slighted by senior staff on a number of occasions following the decision not to grant his flexible working request.

77. The substance of this complaint is that they failed to acknowledge him and/or failed to say hello and/or failed to enquire about his wellbeing or that of his father.

78. Having heard the evidence of both the Claimant and the Respondents witnesses, I do not find that there was any deliberate ignoring or slighting of the Claimant. It may well have been the case that inadvertently on an odd occasion someone failed to respond to a greeting they had not heard in circumstances where they were busy but I do not accept that the occasions relied upon by the Claimant occurred in the manner perceived by him. I also do not accept that any failure to acknowledge him was intentional, malicious or comprised part of a course of conduct.

79. The Claimant also asserted that the Respondent failed to enquire of his welfare either on 28th October 2019, 3rd January 2020 or on other occasions. I do not find this was the case. There is clear evidence in the form of e-mails, from Ms Allonby to the Claimant on 28th and 29th October 2019 that she made enquiries about the

Claimant's welfare. She was his immediate line manager and point of contact for such matters. There are also other internal e-mails which refer to the Respondent's attempts to support the Claimant. Further, as set out in more detail below, on each occasion that the Claimant had time off as a result of his own health, Ms Allonby conducted a back to work interview on his return. Additionally, there was discussion with the Claimant about his mental health by Josh Allcorn, Harriet Allonby and Henry Pettit in the context of his need for time off for CBT and the Respondent requested medical information and sought and obtained an occupation health report.

80. I did not consider any of the instances the Claimant complained about were accurate. In any event, his complaints were very minor matters which no reasonable person would have considered undermining, humiliating or offensive. I bear in mind that the Claimant was suffering from mental health problems at the time and that this may have impacted his perception.

Stress at work/Support following sickness absences

81. I have no doubt that from at least August 2019 worry about the poor health of his father and the impact of that on his family placed the Claimant under a significant degree of stress. This was not however caused by the Respondent's actions.

82. By about September 2019 the Claimant was however also aggrieved that the Respondent had not investigated or considered further the issues that he had raised with both Harriet Allonby and Josh Allcorn regarding his workload level, the targets placed on him, and the pressure and stress that he had indicated that he felt he was under.

83. The Claimant had the highest targets in his group and he viewed this as being unfair. He did have the highest targets, but I find that this was not unfair. He was a Licensing Manager. People in this role received a higher basic pay than the Accounts Managers and had correspondingly higher targets. The Claimant was the only one of the 3 Licensing Managers who worked full-time. Therefore, he was the only Licensing Manager who had a full time (rather than a pro rata reduced) target.

84. Objectively viewed, the Claimant had consistently far exceeded the targets set by the Respondent year on year, including in 2019 when he had apx 3 months off from stress and still reached 119% of his target [**204-205**]. It is therefore clear that the Claimant had no difficulty whatsoever in achieving the minimum target set by the Respondent.

85. I find that much of the stress felt by the Claimant in respect of his targets was self-inflicted. It arose as a result of his desire to achieve the higher levels of commission applicable when he exceeded his target by a prescribed amount. The Respondent only required him to meet the target but the Claimant set himself a self-imposed target, being the amount necessary to achieve the highest level of commission.

86. Additionally, although the Claimant had mentioned being stressed by targets in his e-mail to Harriet Allonby he had subsequently placed little emphasis on this during the meetings with Josh Allcorn and Henry Pettit on 17th September 2019 and with Henry Pettit on 16th January 2020 to discuss his flexible working request and in his meeting with Harriet Allonby on 19th September 2019.

87. Notwithstanding this, although unable to grant the request for flexible working that the Claimant felt would assist, the Respondent had offered 2 alternative options to alleviate the stress problems the Claimant had described:
    i. Revert to being an Account Manager with lower basic pay and lower targets. I find that this suggestion was put in a non-contentious and non-pressured way and was a reasonable response to the Claimant's expressed desire to decrease his targets; or alternatively
    ii. Take every Friday off as annual leave.
    This would not reduce the Claimant's targets or (across the course of the year) the time available to meet those targets but would give him the greater freedom in the week to care for his parents that he said he needed to alleviate his stress.

88. Further to the meeting on 17th September 2019 at which the Claimant was told that his flexible working request would not be granted, the Respondent offering these options and being given details as to the financial and target impact of going back to an Account Manager, on 18th September 2019 the Claimant e-mailed Josh Allcorn indicating that he wished to revert back to being an Account Manager [**97**]. However, on 19th September 2019 the Claimant e-mailed Mr Allcorn again retracting that request [**100**].

89. On 10th October 2019, shortly after having a conversation with Henry Pettit regarding a grievance that had been raised against him by another the Respondent's employees (see paragraphs 153 - 157 below) the Claimant left the office, stating that he had been sick and felt faint [**127**]. He subsequently obtained a fit note from GP for the period 11th October 2019 to 25th November 2019 stating that he was not fit for work because of anxiety due to stress [**131**].

90. On his return to work on 28th October 2019 Harriet Allonby carried out a "return to work" meeting [**143-144**]. After realising that she had not asked all relevant questions, followed this up with an e-mail asking the Claimant whether there were any adjustments that could be made to help his return and whether he felt fit to return to work [**146**]. The Claimant did not raise any matters in response but stated that although he was not feeling great if he did feel under pressure he would talk to her straight away [**145-146**]. Ms Allonby responded by further encouraging him to contact her if he felt unwell or needed a break or a chat or if there was anything she could do [**145**].

91. On 29th October the Claimant e-mailed Harriet Allonby to say that he was not feeling great, was anxious about work and not sleeping and that he would see what the doctor said [**151**]. Ms Allonby responded asking if there was anything she could do to help with his feelings of anxiety [**151**] and the Claimant raised the refusal of his flexible working request and a deduction from his salary as matters

contributing to his stress and anxiety but acknowledged that both these things were out of her hands [**151**].

92. The deduction from his salary came as a result of his having been taken out of a sick pay package (he was still receiving statutory sick pay). This in turn was as a result of the large number of short duration absences and the application of the Bradford Scale [**158 & 317-319, 321-329**] and was in accordance with the Respondents policy and the Claimant's contract.

93. The Claimant was again signed off from work due to anxiety secondary to stress at work from 30th October 2019 until 23rd December 2019 [**fit notes: 160 & 184**].

94. Whilst off work in this period the Claimant received an e-mail purporting to be from Respondent's HR department but which was clearly spam and the Claimant recognise the possibility that it was. This prompted him to e-mail Allison Moore on 22nd November 2019. In that he e-mail he requested details about the HR department as well as documentation "…so I may forward this to my employment lawyer". He also requested a date/time to meet to and discuss his mental health on his return to work and noted that he would shortly be requesting to work from home for a period of time [**176**].

95. The Respondent replied confirming that the e-mail he had received purporting to be from HR was spam and had not originated from the Respondent and responding to his other queries. As well as providing documentation, it referred the Claimant to the flexible working policy in relation to the work from home request.

96. Further to contact with his GP, the Claimant was offered a place on a cognitive Behaviour therapy (CBT) course starting on 08th January 2020 on one afternoon a week for a period of 6 weeks. He advised Harriet Allonby of this in a whatsapp message (to her private phone) at 09:36 on 8th January 2020. That message did not ask any question or appear to require any immediate response. After becoming aggrieved at her failure to reply he sent a further sarcastic and unpleasant message to her via whatsapp at 23:20 in which he threatened Tribunal proceedings. He subsequently sent a further message the following morning in which he apologised for the 23:20 message. [**191 & 198**].

97. Although the Claimant was due back to work on 2nd January 2020 (the office being shut for Christmas after the expiry of his last fit note on 23rd December 2019) he made a very last-minute holiday request at 16:55 on 1st January 2020 for 2nd January 2020. This was granted by the Respondent and when he returned to work on 3rd January 2020 Harriet Allonby conducted a return-to-work interview. During that interview the Claimant was advised that new staff had been taken on. His desire for flexible working was discussed along with the CBT course. He was also asked whether his doctor had recommended a phased return to and that he intended to request flexible working again but he did not say that a phased return had been recommended or indicate that he needed an immediate change in his work pattern [**209-110**]. It was agreed that he would be able to take the relevant afternoons off as holiday in order to attend his CBT sessions and that he would submit a new flexible working request.

98. At a meeting with Josh Allcorn on 6th January 2020 the Claimant showed Josh Allcorn a copy of a letter from Think Action dated 16th December 2019 confirming that he had been diagnosed with moderate to severe depression and severe anxiety [**202-203**] but asked him not to share that information. He also said that his GP had advised a phased return to work, with a 3day week (Wednesday to Friday) to give him a consecutive break from work. The Claimant did not convey that he was unable to return to work full-time and perform his normal working days and hours. The Claimant was asked to provide confirmation from his GP regarding the phased return to work but in the event, that confirmation was not immediately forthcoming.

99. The Claimant's first CBT appointment took place on 8th January 2020. He was paid for the time during which he was absent from work for this appointment and was not required to make the time up.

100. His second CBT session was however attributed to his annual leave as he had opted to take it as holiday after being formally told that he would either have to make up time or take it is leave [**224**]. This aggrieved the Claimant as he inaccurately perceived that he was being treated differently from another colleague who took time off for CBT and who he believed was paid for the time but not required to make it up. I accepted the evidence of Josh Allcorn and find that this was not in fact the case and that the colleague had elected to be paid but to make the time up and did so. The Claimant's perception was therefore inaccurate and there was no difference in treatment.

101. A further meeting took place between the Claimant and Henry Pettit on 16th January 2020 during which the Claimant raised a number of dissatisfactions dating back over a lengthy period but stated that he had not raised any formal grievances and did not want to go down that route. The stress of the Claimant's targets was discussed as was the refusal of the Claimant's previous flexible working request. The Claimant ultimately stated that he didn't want lower targets and was confident he could meet his existing targets. He also confirmed that he was not a carer to any family member and he left Mr Pettit with the impression that the 3 day working week he had requested was a preference not a necessity.

102. At a further meeting on 17th January 2020 between Josh Allcorn and Claimant the Claimant's absence for his CBT appointments was further discussed. The Claimant advised that he wished to make up the time that he was absent whilst attending his CBT appointments in future rather than take the time as holiday.

103. Overall, the impression the Respondent gained was that the Claimant wanted to reduce his working hours without any reduction in his earnings.

104. By e-mail on the afternoon of 24th January (a Friday) the Claimant advised the Respondent of his GP's recommendation for a phased return to work and requested an occupational health assessment as per his GP's suggestion. On Monday 27th January the Claimant also submitted a further flexible working request (again suggesting there would be no impact on the business) along with a fit note from his GP [**257-258**]. The fit note covered the period 24th January 2020

to 6th March 2020 and confirmed the adjustments required by the Respondent (namely a phased return to work, altered hours, workplace adaptations and amended duties) [**248**].

105. On 30th January 2020, pursuant to the GP fit note, the Respondent notified the Claimant that his phased return to work had been approved at 3 days (Tuesday, Thursday and Friday) and advised him of the consequent amendments to his salary and targets to reflect that adjustment. Also, that his flexible working request would be considered separately [**293**].

106. There was a delay in implementing the phased return to work between 6th January 2020 (when it was first mentioned by the Claimant) and 30th January 2020 (when it was implemented). It is apparent from internal messages (that the Claimant was not privy to at the time) that the Respondent was less than delighted about implementing the phased return. Nevertheless, I do not find it unreasonable for the Respondent to have delayed implementing such a significant and substantial measure until they received confirmation that it was both appropriate and necessary from the Claimant's GP and I find they acted promptly on receiving that.

107. On 4th February the Respondent wrote to Claimant with details of an occupational health ("OT") assessment appointment on 14th February 2020 to obtain a report on his current state of health and to gain an opinion on the impact on his future health in view of his flexible working request [**301**].

108. The OT appointment did not take place on 14th February 2020 as the Claimant required time off in connection with his father's illness and hospitalisation on 20th January 2020, 7th February 2020 and 14th February 2020, which time off was readily given by the Respondent. Additionally, the Claimant was first suspended from work on 17th February 2020 until 26th February 2020 (see paragraphs 120 - 128 below for further details), then had 2 further days absence due to his father's ill-health before he was again signed off work from 3rd March 2020 to 28th March 2020 as being unfit. Consequently, the OT assessment did not take place until 17th March 2020 (during the Claimant's sick leave).

109. There was therefore a delay in the Claimant being seen by occupation health but I find that this was due to the first assessment having to be cancelled as a result of the Claimant's absence due to his father's illness rather than any delay on the Respondent's part.

110. Following the OT assessment, a report dated 22nd March 2022 was provided to the Respondent [**415-417**]. The report set out the Claimant's history and the treatment the Claimant had had/was receiving for his anxiety and depression. It stated that the Claimant would not be regarded as having a disability under the Equality Act and commented that the Claimant was keen to resume his job. However, it also referred to the Claimant's wish to reduce his working days with a concomitant reduction in his targets, outlining the reasons for the desired changes to his working practices and noting that the Claimant's wishes had some medical weight behind them. It recommended a phased return to work after the operational issues (regarding his workload and working hours) had been resolved together with regular reviews with his line manager.

111. The Claimant returned to work (albeit remotely due to the pandemic) on 31st March 2020 when a further return to work interview was conducted [**424**]. During this interview the Claimant stated that he had no ongoing medical or CBT appointments and felt ready to return to work on the phased return previously agreed. The Respondent implemented this phased return despite not having received a further fit note covering the future period and recommending the same.

112. A meeting was scheduled on Monday 6th April 2020 (to take place by Zoom due to the COVID pandemic and the government restrictions imposed at the end of March 2020) to discuss the contents of the OT report and the details of the Claimant's second flexible working request. In the event this meeting did not happen as the 6th April, was one of the Claimant's non-working days and the Claimant was again signed off sick from work on 7th April 2021 and did not return prior to resigning his position on 17th April 2020.

Disciplinary proceedings

113. In February 2020 the Claimant had a Facebook page which was publicly accessible and identified him as an employee of the Respondent. A number of the Respondent's employees and former employees were at that time "friends" of the Claimant on Facebook and would be alerted to posts made on this page.

114. On the evening of 13th February 2020, the Claimant uploaded a series of posts onto this publicly accessible Facebook page which included a cartoon captioned "In school they call it Bullying but at work they call it Management" and another cartoon depicting a male holding his chin with a female standing behind, above and to the side of him and the words "Bang" and "My Pervert Boss"

115. These posts were seen by an employee of the Respondent who drew them to the attention of Josh Allcorn. After viewing the post Mr Allcorn contacted Harriet Allonby (who as well as being the Claimant's immediate line manager was also his only female line manager). All 3 of these people concluded that that the posts were aimed at the Respondent and Ms Allonby. The posts significantly upset Miss Allonby, causing her shock, upset and distress. She raised the matter with the Respondent in correspondence on Friday 14th February 2020.

116. The Respondent took the view that these posts were capable of being read and understood to refer to Harriet Allonby as a "Pervert Boss" and a bullying manager, additionally or alternatively that the Respondent bullied its employees. I agree. To a reasonable outside observer they were more than capable of being interpreted in that manner, particularly by anyone who knew that the Claimant's immediate line manager was female. The implicit suggestion from the posts was that the Respondent's management was bullying and that Ms Allonby was a pervert boss. If interpreted that way, they could potentially damage the Respondent's reputation and bring the Respondent into disrepute. The suggestion implied by the posts was not merely untrue, it was offensive, derogatory, intimidating, insulting and potentially humiliated, bullied and undermined Ms Allonby.

117. In 2020 the Respondent's Social Media policy specifically said that it related to Facebook (among other social media platforms) and stated (as regards social media use in personal life) that "employees must be aware that they can damage the company if they are recognised as being one of our employees" and that any communications that employees make in their personal capacity through social media should follow the same principles of acceptable use as set out in the policy when making posts in a professional capacity.

118. The principles of acceptable use for posts made in a professional capacity state that employees must not bring the company into disrepute by making defamatory comments about individuals or other organisations or groups or by posting images that are inappropriate or links to inappropriate conduct. Also, that employees must not do anything that could be considered discriminatory against, or bullying or harassment of, any individual for example by making offensive or derogatory comments relating to sex, or sexual orientation, by using social media to bully another individual or by posting images that are discriminatory or offensive. Finally, the policy also clearly states that breach of the policy may lead to disciplinary action and that serious breaches, for example bullying colleagues or social media activity causing serious damage to the Respondent, may constitute gross misconduct and lead to summary dismissal [**348-349**].

119. The Respondent also had an Anti-Harassment and bullying policy which described harassment as any unwanted physical, verbal or non-verbal conduct which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. It defines bullying as offensive, intimidating, malicious or insulting behaviour involving the misuse of power that can make a person feel vulnerable, upset, humiliated, undermined or threatened and further states that it can include inappropriate and/or derogatory remarks about someone's performance. [**350-352**].

120. As a result of the posts, and the Respondent's view that there was a need to protect Ms Allonby, the Respondent instructed HRx to advise them and assist them in dealing with the situation. Victoria Blaney, on behalf of the Respondent, wrote to the Claimant on 17th February 2020 notifying him that he was suspended and would be required to attend a disciplinary hearing on 21st February 2020 which would be chaired by her [**339-341**]. The letter referred to the posts and stated that the reason for these actions was allegations of breach of the Social Media Policy, harassment/bullying of a colleague and asserted that the Claimant's actions may have caused damage the Respondent's reputation and/or breached the implied term of trust and confidence. It also referred to the previous sarcastic and unpleasant whatsapp message to Ms Allonby of 5th December 2020 as context, although no action had previously been taken in respect of this.

121. I find that under the terms of the Respondent's policy and the ACAS Code of Practice, the suspension was justified to avoid the possibility of pressure being placed on Ms Allonby by the Claimant and to protect her.

122. Further, although no formal investigation took place prior to the decision to initiate a disciplinary hearing, a formal investigation was unnecessary. The Respondent had the posts themselves and some information as to Ms Allonby's reaction to

them. Although Victoria Blaney did not speak to Miss Allonby directly, it is difficult to see that any further investigation was likely to result in additional relevant information. Neither the Claimant's motivation for, and intention in relation to, the posts nor Harriet Allonby's precise feelings about or reaction to the posts could be relevant to the primary charges as they did not change how the posts would or could be viewed by others. Further, it was not outside of the range of reasonable responses for the Respondent to consider the posts to be damaging to the Respondent, and to be offensive and to amount to bullying or harassing of Harriet Allonby, regardless of how she herself felt about the posts.

123. I find the Respondents actions and the letter of 17th February 2020 were in accordance with the Respondent's disciplinary procedure [**345-347**]. That procedure stated that an employee may be suspended where the Respondent had reasonable grounds for concern that evidence might be tampered with, destroyed or other witnesses pressured before the disciplinary hearing or where there is a potential risk to the business other employees or third parties in allowing him to remain at work. It further stated that suspension does not carry the implication of guilt and none should be inferred and that the Respondent reserved the right to dispense with an investigatory interview and proceed directly to a formal disciplinary hearing based on the circumstances [**345**].

124. After receiving the letter of 17th February 2020, the Claimant wrote to Victoria Blaney stating "This would be laughable if what I'm being accused of wasn't so serious" and providing background to the post which explained that it had no relation to the Respondent or Harriet Allonby. The Claimant also stated that "Harriet is the least perverted person I could possibly think of and I'm perplexed and saddened to think she would believe my post had anything to do with her".

125. The Claimant asked that Josh Allcorn act as his companion for the disciplinary meeting. Mr Allcorn declined to so act on the basis that he was on annual leave and it would in any event be a potential conflict of interest given that he was Ms Allonby's line manager. In the event the Claimant was accompanied by a different work colleague instead.

126. The disciplinary hearing took place on 21st February 2020. Victoria Blaney took notes of hearing [**372-381**]. The allegations considered were that the Claimant had
(i) Breached the Respondent's social media policy;
(ii) Breached the Respondent's anti-harassment and bullying policy;
(iii) Caused damage to the reputation of the company; and
(iv) Damaged the implied term of trust and confidence.

127. Discussions during the hearing included the reason for the posts and the way they were intended as well as the way in which the posts could be perceived. The Claimant said he understood how the "my pervert boss" post could be perceived as relating to Harriet Allonby and also accepted that the post referring to bullying managers could be assumed to be about the Respondent and that others reading it could not know from the posts themselves that they were intended for a friend (who did not at that time work for the Respondent) and were solely a reference to her current working situation.

128. Victoria Blaney did not reach a decision on the disciplinary matters at the hearing. She subsequently made her findings and a recommendation on the outcome, which was then agreed by Neil O'Brien of the Respondent. After receiving Mr O'Brien's approval, she wrote to the Claimant on 26th February 2020 to notify him of the outcome of the disciplinary hearing. She concluded that the posts constituted a breach of the social media policy and the anti-bullying and harassment policy (for reasons that are clearly set out in the letter and not repeated here). Further, although she accepted that the posts were not intended to cause Miss Allonby upset and offence, or to expose the company to reputational damage, they had nevertheless done so. She concluded that although the trust and confidence between the Claimant and Respondent had been damaged, she believed this could be repaired. Having taken into account the Claimants comments, accountability and contrition, she imposed a sanction of a final warning to be effective for 12 months and required a "clear the air" meeting between the Claimant and Harriet Allonby in the presence of a senior manager which she scheduled to take place on 27th February 2020. The letter further gave the Claimant details as to how to appeal the decision.

129. The anticipated "clear the air" meeting did not occur as the Claimant 's father's health took a turn for the worse and he notified the Respondents he would not be at work on 27th and 28th February 2020. The meeting was rescheduled for 3rd March 2020 but the Claimant provided a fit note that day indicating that he as unfit for work due to work related stress and anxiety and he was signed off work again until 28th March 2020 [**396**]. Despite previously contacting Ms Allonby on her personal phone via whatsapp, and undertaking a return to work interview with her on 31st March 2020, at no point prior to Tribunal proceedings did the Claimant ever seek to apologise to Harriet Allonby for the impact that his posts had had upon her.

130. Although the Claimant complained about how his last-minute request for leave on 27th and 28th February 2020 was handled by the Respondent, having reviewed the correspondence I find nothing unreasonable or inappropriate about the polite and carefully worded correspondence to the Claimant asking for further information and noting the Respondent's intention to discuss this with him on his return to work [**389**].

131. As the Claimant did not feel that a final written warning was reasonable justified and exercised his right to appeal on 20th March 2020 [**408-409**] which he was permitted to do by the Respondent despite his request being substantially outside the prescribed time for an appeal.

132. In his appeal the Claimant asserted that there had been a number of procedural failings, that the allegations of gross misconduct were not listed as such in the policy, that no reasonable hearing officer could have reached the conclusions Victoria Blaney did on the evidence before her, and that sanction was not justified and alternative sanctions were not considered. He also requested a copy of the letter of instruction between the Respondent and Victoria Blaney.

133. The Claimant was not provided with the letter of instruction as none existed specific to this matter. He asserted before the Tribunal that the letter of instruction

was necessary in order to address the question of impartiality. However, whilst HRx were an outside agency, they were essentially the Respondent's agents acting in the same manner and on the same information as an internal HR department would have done. I do not find that the letter of instruction was necessary for the preparation of his appeal or the failure to provide it in hampered the Claimant's preparation for the disciplinary appeal hearing in any meaningful way or that a failure to provide it was capable of amounting to, or contributing to a finding that there had been a breach of the implied term of trust and confidence.

134. The Claimant was invited to a disciplinary appeal hearing on 3rd April 2020 to be chaired by Natalie Smith. Due to the COVID pandemic and the lockdown imposed by the UK government at the end of March 2020 the hearing took place by Zoom [**426A – 426AB**]. It was the first time Ms Smith had used Zoom and it is apparent that there were some difficulties setting up the hearing via Zoom at both ends resulting in the meeting starting late.

135. The Claimant complains that during this hearing Ms Smith's conducted herself in an aggressive and unnecessarily high-handed way. I do not find that to have been the case. Neither the transcript of the hearing nor the extract of the recording which I viewed discloses any such conduct. The transcript shows she was inquisitory and open to listening to and exploring the Claimant's points but that she was also firm in providing explanations and alternative perspectives. Ms Smith's demeanor and manner when giving evidence to the Tribunal did not lend any credibility to the Claimant's suggestion that she behaved in such a manner.

136. About 1.5 hours into the hearing, after the Claimant and Ms Smith had discussed 5 of the 8 grounds of appeal, the Claimant asked Ms Smith whether the hearing was being recorded as there was a red record button in the top right-hand corner. She acknowledged that it was, said that she had not realised, and immediately apologised and offered to either delete the recording or continue recording according to the Claimant's preference [**426AB**]. It was common ground that Ms Smith had not asked the Claimant's consent to record and had not informed him that the meeting would be recorded prior to that point.

137. The Claimant was extremely unhappy about the meeting being recorded and indicated that he wished to seek advice before making a decision or carrying on. This request was readily granted by Ms Smith and the hearing was paused at 12:15 for the Claimant to contact his legal adviser by telephone. The transcript reflects that both the Claimant and Ms Smith expected that the hearing would recommence after a short break to permit this.

138. As the Claimant did not re-join the meeting or contact her, at 12:49 Ms Smith e-mailed the Claimant to ask him when he would be ready to re-join the Zoom meeting and what he wanted to do about the existing recording.

139. She received no response or other contact from the Claimant so at 14:03 (by which time nearly 2 hours had elapsed since the hearing was halted) Ms Smith sent a further e-mail to the Claimant. She asked him to confirm his decision so that the appeal could be reconvened and noted that it was a working day and he was required to be available for the hearing. She repeated her offer to either delete the

recording, which she said she "now understood is an automatically activated function on the zoom video conference product" or retain it as an accurate record of the hearing. She further advised that if she did not hear from him by 2.30pm she would have no option but to terminate the hearing and deal with the remainder of his appeal points in writing [**425**].

140. Having received no response to her second e-mail either, shortly before 14.30 Ms Smith tried to call the Claimant on his mobile but received no answer. She followed that call by another e-mail indicating that she had left him message on his voicemail and asking if he had received her previous e-mails. She did not receive a reply.

141. After Ms Smith contacted the Respondent, Mr Allcorn also made efforts to contact the Claimant, to which the Claimant did not respond.

142. Although the Claimant asserts that he was pressured to continue with the appeal hearing on 3rd April 2020, I do not find any of the e-mails sent to the Claimant regarding the resumption of the hearing sought to exert pressure or were inappropriate. They merely sought a response as to when he would be available and warned as to how she would proceed if he did not make contact. The hearing took place on a working day when the Claimant was expected to be available. At the point when the hearing was suspended both the Claimant and Ms Smith anticipated it being resumed after a short period. The Claimant did not contact Ms Smith or the Respondent to indicate why he was not re-joining the meeting or to ask for further time or for the hearing to be postponed to another day and it is self-evident that Ms Smith could not leave the hearing open indefinitely.

143. Ms Smith subsequently went on to determine the appeal without a further hearing, as she had indicated that she would do if she did not hear from the Claimant. Henry Jones of the Respondent approved her determination and she notifed the Claimant of the outcome of the appeal by e-mail at 17:56 on 6th April 2020, enclosing a link to the recording of the hearing [**430**]. Although this link did not ultimately direct the Claimant to the full recording (only a part of it), I find this was not intentional but was merely an error which arose as a result of unfamiliarity with both Zoom and the technology through which the recording was saved and accessed. The Claimant was later provided with the complete recording.

144. The outcome letter dealt carefully with each ground of appeal but rejected each of them for the detailed reasons set out in the letter [**431-437**].

145. Despite accepting in the disciplinary hearing that his Facebook posts could be interpreted as being about Harriet Allonby or the Respondent, during the appeal hearing the Claimant did not accept any responsibility for his actions. He could not accept being disciplined for them as he did not think he had done anything wrong because the posts were not in fact about Harriet Allonby as far as he was concerned. He could not, and it is apparent from his evidence to the Tribunal he still does not, accept that it was irrelevant as to whether the Facebook posts were in fact about Harriet Allonby. I find that he was disciplined not because he had posted something that he intended to be about his manger and/or the Respondent

but because he had posted something which others might reasonably have seen and understood to have been about the Respondent and/or Harriet Allonby.

146. The Claimant also complained that Ms Smith applied the wrong test when considering the appeal and conducted the appeal in the nature of a judicial review of Victoria Blaney's decision rather than as a reconsideration.

147. This was the tenor of Ms Smith's evidence but I can find nothing to suggest that the outcome would have been any different even if Ms Smith had conducted a wholly fresh reconsideration. The appeal outcome letter shows that all the points raised by Claimant were fully considered. There was no issue that the posts had occurred or as to their contents. The Claimant's actual motives for the posts were largely, if not wholly, irrelevant and were in any event accepted by both Ms Blaney and Ms Smith. Nevertheless, the Respondent reasonably viewed the contents of the posts as breaching both the Social Media and Anti-harassment policies and took the view that they had potential or actual serious consequences not merely for Harriet Allonby but also for the Respondent itself. The Disciplinary policy gave examples of gross misconduct which included "Serious or repeated acts of discrimination or harassment" and "Accessing, downloading or circulating pornographic or other material of an offensive nature" but does not specifically refer to either the Social Media or Anti-Bullying policies. It does however state that the list of examples of gross misconduct is not exhaustive and the Social Media and Anti-Harassment policies make clear that serious breach might be considered gross misconduct and lead to dismissal. The sanction imposed reflected the findings, which were essentially either uncontentious or, taking all of the above into consideration, were entirely within the range of reasonable responses.

148. Although the Claimant asserted that as Ms Smith was determining an appeal against a decision made by her boss, Ms Blaney, she was bound to uphold Ms Blaney's decision, I do not find that to be the case. Having heard Ms Smith's evidence as to the culture within HRx, I am satisfied that, had she thought it warranted, she would have had no difficulty in making a different decision on the appeal and would not have faced repercussions for doing so. Merely the fact that she had not in fact overturned a decision of Ms Blaney is not, in my view, compelling evidence that she could not, or would never, have done so.

149. One oddity regarding the disciplinary proceedings about which much was sought to be made in evidence is that neither immediately after the posts were discovered nor at any stage during the disciplinary proceedings did anyone ask the Claimant to take down the offending posts. Having heard from the witnesses for the Respondent, I find that this failure was merely an oversight rather than being something from which I could conclude that the Respondent was in fact unconcerned about the posts.

150. So far as the recording of the disciplinary appeal hearing without the Claimant's consent is concerned, I accept Ms Smith's evidence that she had not intended to record the meeting and had not realised that she was doing so until it was pointed out by the Claimant. I found her to be a reliable and honest witness in respect of these matters. I also find that the explanations she gave the Claimant in respect

of the recording were not deliberate lies but the truth so far as she understood it at the time the explanations were given.

151. The Claimant asserted that the explanation given by Ms Smith as to the reason for the recording, namely that it was automatically activated, was in fact untrue and a deliberate lie and that the recording function can only be activated by the host. On the evidence before me I am unable to make that finding. Although Ms Smith, in giving her evidence appeared to accept that Zoom did not automatically record and she must have started the recording, she was unable to provide an explanation as to how she did so or how she failed to know that Zoom was recording. I find that this was because she simply does not know or understand herself how it came to happen, and her apparent admission was as a result of what others had told her subsequently. No evidence was produced before me as to whether or not the Zoom package being used by Ms Smith at the time was or was not automatically configured so as to record the meeting. Although I was asked to take judicial notice of the fact that Zoom did not automatically record, this was not something that I considered that I was able to do.

Other Matters

152. Although they formed no part of the resignation letter or the list of issues, I also heard evidence a number of other matters that the Claimant took issue with and felt constituted unfair treatment or attacks on him by the Respondent which I will deal briefly with as follows:

Grievance against the Claimant

153. At the same time as the Claimant's flexible working request was being considered and concluded in August/September 2019 another employee in the team, Donna Marie Skoyles, complained to Harriet Allonby about the way in which she felt the Claimant scrutinised and investigated her sales and the leads she obtained.

154. It was an unfortunate co-incidence that this issue arose in such close proximity to the Claimant raising issues regarding stress and the refusal of his flexible working request. However, after this grievance was raised, the Respondent could not fail to investigate it and did so, albeit informally, reaching the conclusion that there was insufficient evidence to support the grievance.

155. Nevertheless, as the Claimant had a history of regularly, but largely unsuccessfully, challenging others about such matters the Respondent took the view that he should be made aware of the issue and spoken to informally. Accordingly, on 9th October 2019 a meeting took place between the Claimant and Henry Pettit [**124-125**]. During that meeting the Claimant was advised that the Respondent had become aware that he had been questioning/challenging whether other people leads were within the rules. His attention was drawn to the potential negative consequences of this and, particularly of the manner in which he was doing so. He was asked to focus on his own sales and not those of others and given a suggested alternative way of approaching any concerns he had.

156. This was followed by further e-mail correspondence between the Claimant and Henry Petit regarding this matter in which the Claimant became defensive and sought to justify his actions.

157. I find that the Respondent's approach to this issue was a perfectly reasonable one in all the circumstances and that there was no basis for the Claimant to consider that the Respondent's treatment of him in respect of this matter was unfair, unjust or a breach of the implied term of trust and confidence.

Pay Issues

158. I also heard evidence regarding various pay issues that had arisen in connection with the Claimant's absences. Although these understandably added to the Claimant's impression that he was being badly treated, some pay issues arose as a result of simple error and were resolved once brought to the Claimant's attention and no pay issues have formed part of the Claimant's claim. I do not therefore consider that any issues not specifically mentioned and addressed above were sufficiently serious as to be capable of amounting to a breach of the implied term of trust and confidence or a repudiatory breach of contract either in their own right or as part of a course of conduct.

Respondent wanted to get rid of the Claimant

159. It was suggested by the Claimant that the Respondent wanted him out of the business as he was taking up too much management time. He based this partially on an internal e-mail dated 31st October 2019 that he received during disclosure in which Josh Allcorn said that he thought it best for the Claimant and the business to part ways now as he was not sure how he can come back from this [**161**].

160. Not only is the Claimant's assertion inconsistent with one of his other claims, namely that the Respondent wanted him working as much as possible as he was a "cash cow", I found no reliable evidence to support it.

161. The e-mail from Josh Allcorn was sent following the Claimant having complained unjustifiably about a lack of support from the Respondent, as well as a deduction from pay, and having impliedly threatened litigation against the Respondent. It was in the same paragraph as Mr Allcorn expressed how upset he was at the suggestion that he had failed to support the Claimant and that he felt he had lost a mate over it. In evidence he expanded on the context of this comment, noting that the business was changing.

162. More importantly, the Claimant had been subject to disciplinary procedures for something the Respondent considered to be gross misconduct and could have led to his summary dismissal. However, the Claimant had not been dismissed at the conclusion of those proceedings.

Conclusions on the Legal Issues

163. The most recent act of the Respondent which the Claimant says caused or triggered his resignation was the determination of his disciplinary appeal without further input from him following the suspension of the hearing.

164. This was known to the Claimant on 6th April 2020 when he received the disciplinary appeal outcome letter.

165. He also cited other complaints about the disciplinary hearing on 3rd April 2020 which contributed to his resignation, namely the manner in which it was conducted, the recording of the hearing without consent and his perception that Ms Smith had lied about the reason for the recording. These were closely related in time and events to the most recent act.

166. The Claimant did not resign until 17th April 2020, some days after the disciplinary hearing and 11 days after he received the disciplinary appeal outcome letter. I must therefore consider whether or not the Claimant affirmed the contract following these acts. If he did, then his claim to have been constructively dismissed must fail.

167. Had the Claimant been attending work during this period from 6th to 17th April 2020 I might have considered that he had waived any breach and affirmed the contract as a result of the delay. However, as the Claimant was not working during this period but had again been signed off work with stress and anxiety from 7th April 2020 until after his resignation, and was clearly suffering from mental health difficulties, I do not make such a finding.

168. I must therefore consider whether the most recent act, or given their proximity in time and events, any of the acts he complains of related to his disciplinary hearing, were, by themselves a repudiatory breach of contract. On the basis of my findings and conclusions as set out above, I conclude that the Respondent acted reasonably in all the circumstances in determining of the disciplinary appeal hearing without further input from the Claimant, and there was nothing inappropriate, unreasonable or objectionable about the manner in which Ms Smith conducted the disciplinary appeal hearing. These acts could in no way be considered to be acts which breached the implied term of trust and confidence.

169. So far as the recording of the disciplinary appeal hearing without consent is concerned, this was a matter which was wrong and was capable of damaging the relationship of trust and confidence between the Claimant and the Respondent. However, taking into account all the circumstances, objectively this was not such a serious event as to destroy trust and confidence and did not amount to a repudiatory breach.

170. Although it was the Claimant's perception that Ms Smith lied about the reason for the recording, and, if it were correct that she had deliberately sought to mislead him, this would also amount to a breach of the implied term as to trust and confidence, I have not found that to be the case. Nor have I found that the

information provided to the Claimant was in fact untrue. Accordingly, I do not find this to be a breach of the implied term

171. Even if I am wrong about this, I do not consider that either individually, or collectively with the recording of the hearing, it was sufficiently serious as to amount to a repudiatory breach of contract entitling the Claimant to consider the contract to be at an end and justifying his resignation and a claim for constructive dismissal. Rather, they were “lesser blows” which the Claimant would have been expected to absorb.

172. I have however also considered whether the recording of the disciplinary appeal hearing without consent and the explanation for the same given by Ms Smith (if I am wrong about this), although not repudiatory of themselves, could nevertheless be considered to be part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence.

173. I conclude that they could not. For the reasons set out in detail above I do not accept that the Respondent’s actions in relation to the Claimant’s first flexible working request, the grievance raised against him, or the manner in which the Respondent dealt with his health difficulties, absences, return to work and complaints of stress at work were such as to give rise to any breach of the implied term of trust and confidence and I have not found that the Claimant was ignored by management in the manner he described or that the Respondent wanted to get rid of him and used a series of lesser acts to drive him out.

174. Although I found there were errors in relation to the Claimant’s pay and added to the Claimant’s impression that he was being badly treated, these were subsequently resolved and were relatively minor. These were also “lesser blows”. That the Claimant considered them so is evidenced by his failure to bring any grievance related to them or to rely on them in his resignation letter, or to include them in his claim to the Tribunal. They were neither sufficiently substantial or occurring so frequently as to elevate them to matters which viewed cumulatively or together with the recording of the disciplinary appeal hearing, amounted to a repudiatory breach.

175. I not therefore find that there were any acts of the Respondent which, either individually or cumulatively when taken as a whole as part of a course of conduct, were objectively serious enough to damage or destroy the relationship of trust and confidence between the Respondent and the Claimant when judged reasonably and sensibly.

176. Whilst I do not find that there was in fact any repudiatory breach, I do find that the Claimant resigned at least partly in response to actions of the Respondent which he perceived as being repudiatory breaches. His resignation letter clearly sets out the reasons for his resignation. It details many actions of the Respondent which the Claimant considered had contributed to his conclusion that the Respondent’s treatment of him was affecting his health and he could not go on and his consequent decision to resign.

177. In view of the obvious impact that his father's deteriorating health was having on the Respondent at that time, I think it likely that there were factors relating to this which may have also contributed to his resignation. However, I am satisfied that even if this were the case, his perception of the Respondent's conduct was an effective cause of his decision to resign.

178. Nevertheless, as there was in fact no repudiatory breach, for the reasons set out above, I find that the Claimant was not unfairly dismissed by the Respondent within section 98 of the Employment Rights Act 1996.

179. Further, as the Claimant resigned with immediate effect and I have not found that he was dismissed by the Respondent, he was also not wrongfully dismissed and is not therefore entitled to notice pay.

180. It follows from my findings above that I need not consider the other issues relating to remedy. However for the avoidance of doubt, I make the following observations:

181. For the reasons set out above, I would not have uplifted any award for breaches of the ACAS code as I have found none.

182. Had I been required to consider the question of whether any award should be adjusted to reflect contributory fault by the Claimant, I would have made an adjustment to both the basic and contributory awards by reducing them by 50% for the Claimant's undisputed Facebook postings which led to the disciplinary proceedings.

183. I also wish to say a few words on the alternative case advanced by the Respondent, namely that if the Claimant was in effect dismissed, there was a potentially fair reason for the dismissal and the dismissal was fair in all the circumstances. Alternatively, that the Claimant would have been dismissed fairly in any event, probably within 6 months.

184. There was limited evidence, either in the statements, the bundle of documents or the oral evidence, to support these contentions.

185. There were no ongoing disciplinary proceedings at the time of the Claimant's resignation. The disciplinary proceedings that had been brought had been concluded with a final warning and the Claimant's undisputed evidence was that this was his first disciplinary matter in 14 years. There was no evidence of any subsequent conduct which could have led to further disciplinary proceedings for misconduct.

186. Although the Respondent suggests that the Claimant might have been dismissed for capability reasons, there is little evidence to support that assertion. Whilst the Claimant had undoubtedly had a significant amount of time off work, he had nevertheless comfortably exceeded his targets in 2019 when he had had apx 3 months off work as a result of stress related illness and had still reached 119% of his target [**204-205**]. Prior to this he had far exceeded his target year on year. In addition, by April 2020 he had undertaken a course of CBT, which he had found helpful, and the Occupational Health report indicated that the Respondent had

shown a willingness to support the Claimant and try to accommodate him. Further, measures had been put in place in accordance with the Claimant's GP's recommendation for a phased return to enable him to transition back into work following his absences. Finally, additional staff had been recruited and the Claimant had an outstanding application for flexible working which, based on the previous indications given to him, had good prospects of being granted and which would have alleviated some of the stress he felt and reduced his targets.

187. Additionally, the managing Director, Mr Jones, said he did not have any concerns that the Claimant was not capable of meeting his sales targets [**W/S: para 19**] and that that the Claimant "had a future" at the Respondent company [**W/S: para 24**].

188. I have therefore concluded that there are no grounds on which I could reasonably conclude that the Respondent had a potentially fair reason for dismissing the Claimant at 17th April 2020, that his dismissal was fair in all the circumstances, or that the Claimant was likely to have been dismissed in any event either within 6 months or any longer period.

Employment Judge Clarke
Date: 2nd March 2022.