



EMPLOYMENT TRIBUNALS

Claimant: Mr Robert Savage

Respondent: Northern Education Trust

Heard at: Newcastle Employment Tribunal

On: 30 and 31 March 2022

Before: Employment Judge L Robertson (sitting alone)

Representation

Claimant: In person

Respondent: Mr K McNerney (Counsel)

RESERVED JUDGMENT ON LIABILITY

The Claimant's claim for unfair (constructive) dismissal brought under Part X of the Employment Rights Act 1996 fails and is dismissed.

REASONS

CLAIMS

1. The Claimant brought a claim for constructive unfair dismissal, which is a claim for ordinary unfair dismissal under Part X of the Employment Rights Act 1996 ("the ERA").
2. The issues to be decided in relation to the Claimant's claim of unfair (constructive) dismissal were summarised by Employment Judge Johnson at the preliminary hearing on 16 December 2021. As the List of Issues attached to the Orders made at that preliminary hearing remained in draft, I further discussed the issues with the parties at the start of the hearing. The parties agreed a List of Issues which I set out below (except that I have moved the 'last straw' incident relied upon by the Claimant to higher up in the list for obvious logical reasons, and I have re-inserted issue 2.5 which was included in the original draft List of Issues and relied upon in the Respondent's submissions, but omitted from the List of Issues agreed at the start of the hearing). The issues to be considered are as follows:

- 2.1. The actions of the Respondent that are alleged to amount to a fundamental and repudiatory breach of the implied term of trust and confidence are:
 - 2.1.1. Starting the Informal Support Plan;
 - 2.1.2. During the currency of the Informal Support Plan, holding the Claimant to a higher standard than was expected of teachers normally;
 - 2.1.3. Using minor failings by the Claimant during the Informal Support Plan as a breach of that standard;
 - 2.1.4. The Informal Support Plan being a sham and not a genuine attempt to seek improvement;
 - 2.1.5. Not implementing the Informal Support Plan fairly; and
 - 2.1.6. Being told that he would fail the Informal Support Plan when it was still on-going, advised that the consequences would be capability procedures with consequences for future references and could involve dismissal within a matter of weeks, and put under pressure about what to do about his employment.
- 2.2. It is alleged by the Claimant that he was given the information and advice at 2.1.6 by Emma Thornton, his NEU representative, and that Mrs Moody echoed the information which Mrs Thornton had given to him, and that this was the last straw in a series of breaches.
- 2.3. Do the above acts, either individually or cumulatively, amount to a breach of the implied term of trust and confidence?
- 2.4. Did the Claimant resign because of the alleged acts at 2.1 above?
- 2.5. Did the Claimant delay before resigning and affirm the contract?
- 2.6. If there was a constructive dismissal, was the Claimant dismissed by reason of capability?
- 2.7. In the alternative to no dismissal, did the Respondent act reasonably in dismissing the Claimant?
- 2.8. As to remedy, the Claimant is not seeking reinstatement or re-engagement and seeks compensation only. The issues relating to remedy are as follows:
 - 2.8.1. What financial loss, if any, has the Claimant suffered as a result of any unfair dismissal?
 - 2.8.2. If the Claimant has suffered financial loss, what financial compensation is appropriate in all of the circumstances? In assessing this:

- 2.8.2.1. Should any compensation awarded be reduced in terms of *Polkey v AE Dayton Services Ltd* [1987] ICR 142 and, if so, what reduction is appropriate?
 - 2.8.2.2. Should any compensation awarded be increased on the grounds that the Respondent unreasonably failed to comply with the ACAS Code of Practice, and, if so, what increase is appropriate?
 - 2.8.2.3. Has the Claimant mitigated his loss? Should any compensation awarded be reduced on the grounds that the Claimant has failed to mitigate his losses and, if so, what reduction is appropriate?
3. For completeness, Mr McNerney proposed to make an application to amend the Response to seek a reduction in any compensation on the basis that the Claimant had sent email correspondence and sensitive information to his personal email address prior to his dismissal. I did not receive this application before the end of the hearing but in any event, as it related to issues of remedy, decided not to consider any such application until after liability had been decided. If the Claimant were to succeed in his claim, this application (if pursued) would need to be decided.

PROCEDURE

4. This hearing was held in person.
5. Although the issues include issues of both liability and remedy, I only heard matters of liability at this hearing and made it clear that a separate remedy hearing would be required if the Claimant were to succeed in his claim.
6. The parties provided an agreed joint bundle of documents of 351 pages. I explained to the parties that I would only read documents to which I was referred in the statements or in evidence.
7. I also considered witness statements and oral evidence from:
 - 7.1. The Claimant, who had submitted an original witness statement and a supplementary witness statement which appeared at page 348 of the bundle;
 - 7.2. Mrs S Moody (Deputy Head Teacher at Walbottle Academy, which is part of Northern Education Trust and is where the Claimant previously worked); and
 - 7.3. Mr M Wood (Principal of Walbottle Academy).
8. I also considered oral submissions made by the Claimant and Mr McNerney.
9. During Mr Wood's evidence, an issue arose for the first time concerning the Claimant having requested copies of his pupils' examination results and a spreadsheet listing incorrect information on the centrally produced teaching resources. Neither had been disclosed to the Claimant. There was a brief discussion about these documents, and it became clear that the Respondent

had not been granted permission by the external examination board to release the first document, and in any event did not have either document to hand. The Claimant was content to proceed without these documents, and I was satisfied that they were not necessary to resolve the issues before me.

10. Mrs Thornton had not produced a witness statement, and did not attend the hearing to give oral evidence. Prior to the hearing, the Claimant had asked her to be a witness for him but, after consideration, she had not been prepared to do so. The Claimant was prepared to proceed in her absence.
11. At the end of two days of hearing, judgment was reserved. Based on the evidence heard, and insofar as relevant to the issues that must be determined, I make the findings set out below.

RELEVANT LAW

Constructive dismissal

12. The right not to be unfairly dismissed is set out in s94 of the ERA. In order to bring a claim for unfair dismissal under s111 of the ERA, the Claimant must first show that his resignation amounted to a 'dismissal', as defined under s95(1) ERA:

"s95 - Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only 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. The decision of the Court of Appeal in *Western Excavating (ECC) Limited v Sharp* [1978] IRLR 27 has stood the test of time for over 40 years. It is well-established that to satisfy the Tribunal that he was indeed dismissed rather than simply resigned, the Claimant has to show four particular points as follows:

- 13.1. The Respondent acted (or failed to act) in a way that amounted to a breach of the contract of employment between the Respondent and the Claimant.

- 13.2. If so, that breach went to the heart of the employment relationship so as to amount to a fundamental or repudiatory breach of that contract.

- 13.3. If so, the Claimant resigned in response to that breach.

- 13.4. If so, the Claimant resigned timeously and before doing so he had not by his actions or inaction affirmed the contract.

Implied term of mutual trust and confidence

14. To establish such a breach of contract, the Claimant relies upon a breach or breaches of the term implied into all contracts of employment that the parties will show trust and confidence, the one to the other. As was said in *Woods v WM Car Services (Peterborough) Limited* [1981] IRLR 347,

“... it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: 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 The conduct of the parties has to be looked at as a whole and its cumulative impact assessed.”

“... the conduct of the employer had to amount to repudiation of the contract at common law. Accordingly, in cases of constructive dismissal, an employee has no remedy even if his employer has behaved unfairly, unless it can be shown that the employer’s conduct amounts to a fundamental breach of the contract.”

“Any breach of that implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of contract”

15. The decision in *Malik v BCCI* [1997] IRLR 462 is summarised by Hale LJ in *Gogay v Hertfordshire County Council* [2000] IRLR 703 thus:

“This requires an employer, in the words of Lord Nicholls of Birkenhead in Malik v BCCI [1997] IRLR 462, at p 464, 13 and 14,

‘. . . not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages. . . . 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’.

Lord Steyn emphasised, at p471, 70, that the obligation applies ‘only where there is “no reasonable and proper cause” for the employer’s conduct, and then only if the conduct is calculated to destroy or seriously damage the relationship . . . ’”

16. Unreasonable conduct alone will not suffice: see *Claridge v Daler Rowney Ltd* [2008] ICR 1267, EAT.
17. In general terms, a breach of the implied term of trust and confidence *“will mean, inevitably, that there has been a fundamental or repudiatory breach going necessarily to the root of the contract”*: see *Morrow v Safeway Stores plc* [2002] IRLR 9, EAT.
18. Employees sometimes rely on a particular act or omissions as being the ‘last straw’ in a series of events. In the case of *Omilaju v Waltham Forest London Borough Council* [2005] IRLR 35 it was held that the last straw may not always be unreasonable or blameworthy when viewed in isolation. But, the last straw must contribute or add something to the breach of contract.

19. Once there is a breach of contract that breach cannot be cured by subsequent conduct by the employer but an employee who delays after a breach of contract may, depending on the facts, affirm the contract and lose the right to treat him/herself as dismissed - *Bournemouth University Higher Education Corpn v Buckland* [2010] IRLR 445.
20. The test to be applied is not what is the principal or effective cause of a resignation, but it is whether the Claimant resigned at least in part by reason of some or all of the conduct which is said to amount to a repudiatory breach. The breach of contract need not be the only reason for the resignation providing that it is a reason for the resignation: *Wright v Ayrshire Council* [2014] IRLR 4. The employee need not spell out or otherwise communicate his reason for resigning to the employer and it is a matter of evidence and fact for the tribunal to find what those reasons were: *Weathersfield Limited (trading as Van & Truck Rentals) v Sargent* [1999] IRLR 94.
21. The proper approach was considered by the Court of Appeal in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978 per Underhill LJ at paragraph 55 and held that the Tribunal must consider the following questions:

“(1) 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?”

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) 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 the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation...)

(5) Did the employee resign in response (or partly in response) to that breach?”

Unfair dismissal provisions

22. If the Claimant was found to be dismissed by the Respondent, s98(1) ERA requires the employer to demonstrate that the reason or, if more than one the principal reason, for the dismissal was for one of the potentially fair reasons listed in s98(2) ERA or for ‘some other substantial reason justifying dismissal’. In this event, the Respondent will seek to rely on ‘capability’ as a potentially fair reason for such dismissal under s98(1)(a) of the ERA, namely that the Claimant’s performance was falling short of the required standards.

23. *For the purposes of s98(1)(a), ‘capability’ is defined as follows:*

S98(2) A reason falls within this subsection if it -

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

s98(3) In subsection (2)(a) -

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

24. In that event, the Respondent would need to demonstrate that it dismissed the Claimant due to capability. The Tribunal must then consider the fairness of the dismissal for that reason under s98(4) of the ERA, taking into account the guidance in *British Home Stores Limited v Burchell* [1980] ICR 303 and *Iceland Frozen Foods Limited v Jones* [1983] ICR 17.

25. The burden here is neutral. Section 98(4) of the ERA states as follows:

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

SUBMISSIONS

26. After the evidence had been concluded, both parties made submissions which addressed the issues in this case. I have set out the key points in the parties’ submissions below. It is not necessary for me to set out those submissions in detail here. Suffice it to say that I fully considered all the submissions made, and the parties can be assured that they were all taken into account in coming to my decision.

Respondent’s submissions

27. Mr McNerney made oral submissions first. He submitted that the Claimant was not expressly dismissed; he decided to resign, and it was for the Claimant to prove that he did so in circumstances which amounted to constructive dismissal. Mr McNerney submitted that the Claimant must show that the Respondent’s actions identified in the List of Issues amounted to a fundamental, repudiatory breach of contract and further submitted that, globally, the Claimant had not done so and had made assertions without evidence. As to the List of Issues:

27.1. Starting the Informal Support Plan: Mr McNerney submitted that the concerns identified at pages 120-121 of the bundle alone justified the decision to start the Informal Support Plan, but in any event he did not think that I would see a more translucently honest witness than Mrs Moody;

27.2. During the currency of the Informal Support Plan, holding the Claimant to a higher standard than was expected of teachers normally: Mr McNerney submitted that the Claimant had not touched on this issue

meaningfully, but Mrs Moody's clear evidence was that the Claimant had been held to the required standards, which were set out at the beginning of the Informal Support Plan (pages 56 and 64 of the bundle) and known by those involved in the Informal Support Plan. Mrs Moody's clear evidence as the decision maker was that the Claimant had not been held to a higher standard.

- 27.3. Using minor failings by the Claimant during the Informal Support Plan as a breach of that standard: Mr McNerney submitted that Mrs Moody was an honest witness and a thorough professional who had given a comprehensive and analytical explanation as to how she came to give red 'RAG' ratings during the Informal Support Plan and there was no evidence that she had based her decision on flimsy or arbitrary evidence. He also submitted that the evidence at pages 120-1 contained concerns which were not minor, such as that relating to the register.
- 27.4. The Informal Support Plan being a sham and not a genuine attempt to seek improvement: Mr McNerney submitted that the amount of support provided by senior management and the care taken by Mrs Moody in documenting the Informal Support Plan and her meetings with the Claimant, and agreeing the minutes, was such that this allegation was not proven;
- 27.5. Not implementing the Informal Support Plan fairly: Mr McNerney submitted that Mrs Moody's evidence was that she had an open mind, wanting the Claimant to succeed, and that was evidence that a fair informal process had been followed;
- 27.6. As to the allegation that Mrs Moody had told his union representative and the Claimant following the end of week 4 that he was going to fail the Informal Support Plan when it was still on-going, Mr McNerney submitted that Mrs Moody had given clear and unequivocal evidence that that was not the case and asked that her evidence was accepted on the balance of probabilities.
28. Mr McNerney submitted that none of the above allegations amounted to a breach of contract and, as such, did not entitle the Claimant to resign. As to the Claimant's reason for resigning, Mr McNerney submitted that the Claimant's evidence in relation to the capability procedure and that he felt that he should resign on that day was not credible. Mr McNerney submitted that 15 June was just another day in Mrs Moody's fair operation of the Informal Support Plan, without any sense that the Claimant had to make a decision that day: the reality was that two further lesson observations were scheduled for the following day; the Informal Support Plan still had two weeks to go; an extension of two weeks could be considered; if there was still no improvement there was the possibility of the formal capability procedure being commenced, with possible warnings, but also the possibility that the Claimant's performance improved. He submitted that there was neither a probability nor an inevitability that it would lead to the Claimant's dismissal. Mr McNerney also submitted that Mr Wood's extensive coaching note at page 182 of the bundle was evidence that Mr Wood was not against the Claimant, as put forward in the Claimant's second witness statement.

29. Finally, Mr McNerney submitted that if (which was denied) the commencement of the Informal Support Plan was a breach of the mutual duty of trust and confidence, the Claimant affirmed that by four weeks' active participation in it.

Claimant's submissions

30. The Claimant then made his submissions.

31. The Claimant submitted that, if the small sheet of reasons for starting the Informal Support Plan had been addressed with him properly, the Informal Support Plan could have been avoided. He submitted that Mrs Moody had given minimal reasons and sparse justification for the Informal Support Plan in her evidence.

32. The Claimant submitted that Mrs Moody's evidence made it clear that his performance was expected to be 'mint' because he had had all of the support, such that he was held to a higher standard than was expected of teachers normally.

33. The Claimant submitted that it was clear that "faults were found without faults" the goalposts were moved, and the Informal Support Plan involved support in name only and was not designed to help him to succeed but to find reasons for him to fail. He submitted that the Informal Support Plan put pressure on him and contributed to mistakes he made. He accepted that some of the individual red RAG ratings, and the reasons for them, were correct but others were not and were just professionals doing things in a different way. The Claimant accepted that he had missed carrying out the register on three occasions, but once was in the last week, when pressure had been starting to build on him and other than that he had taken the register in every lesson. He submitted that other individuals made errors without being on an Informal Support Plan.

34. The Claimant acknowledged the time that Mrs Moody had spent on the Informal Support Plan but submitted that she had done so because she had to meet the expectations of the Informal Support Plan and was not to support him.

35. The Claimant submitted that he had been treated unfairly, led by Mr Wood whose evidence was that he had felt nothing when the Claimant had resigned. Noting the contents of his (the Claimant's) second witness statement, the Claimant submitted that Mr Wood had considered that the Claimant was no longer a team player, perhaps because of the Claimant's discussion with him about the choice of font. The Claimant submitted that something had happened (but he did not know whether it was his discussion with Mr Wood about fonts) and that had been the motivation for not wanting the Claimant to work in the academy.

36. The Claimant submitted that he had resigned because he was told that he was going to fail the Informal Support Plan, would be placed on capability procedures and that could lead to his dismissal within weeks. He submitted that there was no way that he would have resigned if he had not believed that to be the case. Whether correct or not, the Claimant submitted that it was his firm belief that that was the truth because the information had come from his

union representative and so he had not checked the Respondent's procedures. He submitted that he had only been put in that position because of the Respondent's actions in putting him on an Informal Support Plan, and operating it unfairly so as to ensure that he would fail it. He did not accept that would be because of his failures but rather because of the way that things were spun. He submitted that he had been successful for over 20 years as a teacher, and is seen as an asset in his current school. He believed that the Respondent's standards had been rigged in its favour and individuals had chosen to see him as failing because they no longer wanted him to work in the academy.

37. The Claimant submitted that Mrs Moody had been an eloquent witness, but had referred to academy policy rather than answering the questions he asked her.
38. Finally, the Claimant responded to Mr McNerney's submission that the Claimant had affirmed his contract by four weeks' active participation in the Informal Support Plan. The Claimant submitted that, in the first few weeks of the Informal Support Plan, he had thought that it was going to be fair and had only realized that it breached trust and confidence as the Informal Support Plan proceeded. However, he could not stop it at that point. He submitted that his resignation was the result of an inappropriately and unfairly handled Informal Support Plan.

FINDINGS OF FACT

Context

39. This case is dependent to an extent on evidence based on people's recollection of events that happened some months ago. In assessing the evidence relating to this claim, I have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.
40. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the *Gestmin* case: *'Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.'*
41. I wish to make it clear that simply because I do not accept one or other witness' version of events in relation to a particular issue does not mean that I consider that witness to be dishonest or that they lack integrity.

42. Having taken into consideration all the relevant evidence before the Tribunal (subject to the point made at paragraph 6 above) (documentary and oral), the submissions made by or on behalf of the parties at the hearing and the relevant statutory and case law, I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

Claimant's employment

43. The Claimant was employed as a Teacher at Walbottle Academy to teach mathematics. His continuity of employment began on 1 September 2014 and, following a transfer of his employment to the Respondent on 1 September 2020, he remained employed by the Respondent until its termination on 31 August 2021.

Starting the Informal Support Plan

44. In early 2021, the Respondent identified several concerns relating to the Claimant's performance in his role as a teacher which are summarised in a document which appears at pages 120-122 of the bundle. The Claimant said that he had not been given this document at the time, but his retrospective view (as explained in oral evidence) was that some concerns were extremely minor but he accepted that others were of greater concern, and he disputed certain details in relation to other concerns. Although the Claimant's evidence was that, taken as a whole, they would not constitute a failing teacher and that there would be other teachers (not subject to an Informal Support Plan) whose performance fell short in these respects, I preferred the cogent and persuasive evidence of Mr Wood and Mrs Moody which was consistent with the documents.

45. The academy, which was in special measures at the time, operated an 'open door policy' such that academy leaders dropped into lessons to observe the teaching without prior arrangement. Concerns had been raised about the Claimant's performance, including following such observations.

46. The leaders in the Maths department had provided initial informal support to the Claimant (prior to the commencement of the Informal Support Plan). As they did not believe that this input had successfully resolved the issues that had been identified with the Claimant's performance, they had raised concerns with Mrs Moody's team.

47. The table at pages 120-122 of the bundle had been produced to summarise the concerns. The table reflected Mrs Moody's genuine concerns that the Claimant's performance at that time was not meeting certain of the Respondent's Teaching Standards. Several of her concerns were potentially significant shortcomings, including failures to complete the register at the start of lessons which could have posed a safeguarding issue. Mrs Moody discussed these concerns with Mr Wood prior to the decision being taken to start the Informal Support Plan.

48. Although there was documentation in the bundle and I heard some evidence as to earlier concerns regarding the Claimant's performance (prior to 2021), I was satisfied that no account was taken of these concerns in reaching the decision being taken to start the Informal Support Plan.

49. On 22 April 2021, Mrs Moody sent a letter to the Claimant which advised that, following recent discussions about his standard of performance, there remained concerns about his performance under Teaching Standards 1, 4 and 7 and summarized the nature of those concerns.
50. With that letter, Mrs Moody enclosed a bespoke support plan in draft for discussion at a meeting on 30 April. The Claimant was given the opportunity to be accompanied by a trade union representative at that meeting.
51. At that meeting, the Claimant was accompanied by his trade union representative, Emma Thornton (NEU lead representative). The Respondent's capability policy was shared with the Claimant at this meeting. The Informal Support Plan which appears at pages 56-63 of the bundle was agreed between Mrs Moody, the Claimant and Mrs Thornton following this meeting.
52. Although the Claimant had not agreed with the need for the Informal Support Plan at the beginning, he did not object to it. He was confident in his ability to do his job and ability to achieve whatever professional standards were required of him, he had not wanted to "rock the boat", and he had been given reassurance by Mrs Thornton. The Claimant accepted in submissions and evidence that, at the start, he had believed that the Informal Support Plan would be operated fairly.
53. The Claimant accepted that, on the face of it, the Informal Support Plan put in place a supportive package but, as the weeks progressed, he believed that it was a sham and that there were other reasons for putting the Informal Support Plan in place. He was not sure what those other reasons were but thought it possible that academy leaders thought that his face did not fit, perhaps related to his age or because he had queried Mr Wood's decision to change the font for materials provided to dyslexic students, but he believed that a decision had been taken that they no longer wanted him to work in the academy. I preferred Mr Wood's cogent evidence in this regard, and find that the decision to require teachers to use the comic sans font was taken following expert advice from Ms Bownes (Regional SENDCO for the Respondent) who was the SEND expert and did not impact on the decision to start the Informal Support Plan. I also find that the Informal Support Plan was put in place because of Mrs Moody's genuine concerns that the Claimant's performance was not meeting certain of the Respondent's Teaching Standards. As noted above, the Claimant accepted that some of the concerns identified were genuine and more significant than others. I also accept Mr Wood's evidence that he had not decided that he did not want the Claimant to work at the academy any longer.
54. It was common ground that the Claimant had not lodged a formal grievance either at the beginning or during the currency of the Informal Support Plan.
55. Finally, as noted above the Claimant informed the Tribunal that he had asked for information about exam results. However, Mrs Moody confirmed in her oral evidence that the Informal Support Plan was implemented because of concerns that the Claimant's performance against Teaching Standards 1, 4 and 7 and exam results were not a factor. I accept her evidence in this regard.

Informal Support Plan

56. The Informal Support Plan was scheduled to last for 6 weeks. The Informal Support Plan set out, for each week, the support that the Claimant was going to receive and the other steps that were due to take place (such as observation of the Claimant's lessons by academy leaders). The Informal Support Plan was progressive such that, by week 4, the Informal Support Plan was for academy leaders to 'drop in' to different lessons to observe the Claimant's performance. At the end of each week, there was to be a review meeting between Mrs Moody and the Claimant. Mrs Moody was aware that being on such a plan was intense and she provided support to help the Claimant throughout the Informal Support Plan. There had been training such that the requirements of the relevant Teaching Standards were clear to all involved.
57. Week one of the Informal Support Plan involved support sessions being provided to the Claimant by academy leaders, including co-planning lessons, a plan to "team teach" a lesson and a lesson visit for the Claimant to see good practice. These sessions were successfully completed and accordingly the Claimant was graded 'green' against these objectives, indicating that the required standard had been met.
58. Week two of the Informal Support Plan involved a support session being provided to the Claimant in connection with SEND students by Ms Bownes, a 'book look' session for the Claimant to view examples of good practice in pupils' books with Mrs Moody and Mr Cass, Head of the Mathematics Department, and one of the Claimant's lessons being observed by an academy leader. The first of these two sessions were successfully completed and graded 'green' accordingly. The observation of the Claimant's lesson was graded 'red' as the feedback was that the Claimant had not met the required standards of performance, noting amongst other things that students had not grasped what they were being taught about positive and negative numbers in the lesson but this has not been satisfactorily addressed by the Claimant, and the needs of a SEND student had not been met. This was carefully documented at the time, and suggestions for improvement given. The weekly meeting between the Claimant and Mrs Moody was summarised in the minutes of the 17 May meeting which the Claimant subsequently agreed. Those minutes document the Claimant accepting at the time that the lesson had been less structured, he had become flustered and he had made suggestions for areas of improvement.
59. Week three involved Mr Wood providing a support session to the Claimant, an observation of one of the Claimant's lessons and a 'book look' session for Mrs Moody and Mr Cass to look at a selection of some of the Claimant's students' books with a view to assessing whether they met the relevant standards. The Claimant chose the books to be viewed in this session. His first selection of books did not meet the relevant standards as, in particular, there was insufficient work in the students' books to demonstrate progress, there was insufficient evidence of live marking and live marking was not clearly targeted towards Learning Plans or 4i intervention. Although this session had been planned in advance, the Claimant indicated that he had felt rushed in selecting the books. Mrs Moody and Mr Cass took this into account and gave another opportunity for the Claimant to pick different books, which he accepted. The second selection of books were of a better standard, but the

genuine assessment of Mrs Moody and Mr Cass was that compliance with the relevant standards remained inconsistent and did not adequately meet the needs of the SEND and 4i students. As such, Mrs Moody considered it appropriate that the 'book look' was given a red rating. The feedback from the lesson observation was also mixed; positives were noted but there were also several areas in which the Claimant was still not performing to the relevant standards consistently, and Mrs Moody considered it appropriate to give this a red rating.

60. Week four involved a subject knowledge support session by Mr Cass, a support session with Ms Freya Stone (the academy's DEEP Learning Lead), a further support session with Ms Jodie Urwin (Vice Principal DEEP Support) and an academy leader 'dropping in' to several of the Claimant's lessons to observe whether the Claimant's performance was consistently achieving the Teaching Standards. As to the lesson observations during this week, the positive improvement in the Claimant's performance was noted but, as he was still not performing consistently to the required Teaching Standards, Mrs Moody considered it appropriate that this aspect of the Informal Support Plan was given a red rating.
61. Week five would have involved two lesson observations on 16 June and, towards the end of week five, a full review of feedback from weeks 1-5 to maximise the prospect that the Claimant's lessons in week 6 met the required standards.
62. The Claimant accepted that he had engaged with the Informal Support Plan, and explained that he had wanted to give the academy no reason to say that he had not met the requirements of the Informal Support Plan even though he did not agree with it. The Informal Support Plan involved support from Mrs Moody, Mr Wood, Ms Stone, Ms Urwin, Helen Bownes (Head of SEND), and Mr Cass. The Claimant accepted that he had received support from these individuals, and that he had thanked them for their support at various points. The support sessions were carefully documented and the Claimant benefitted from a significant amount of support from academy leaders which, I find, was aimed to help him to achieve the relevant Teaching Standards.
63. Although the Claimant believed that those involved in the Informal Support Plan must have been asked to find fault, I preferred Mrs Moody's evidence that those involved were not asked to find fault; rather, they were asked to find evidence relating to the Claimant's performance against Teaching Standards 1, 4 and 7 (those being the areas identified at the start as being those in which the Claimant was under-performing) and that they would have been professional in doing so and not taken it upon themselves to find fault. Positives and non-positives were found and documented.
64. As noted above, the Respondent had an 'open door policy' such that academy leaders observed lessons informally. I accepted Mrs Moody's explanation that those not involved directly in the Claimant's support plan were unaware of the Informal Support Plan and had raised concerns with her arising from their observations of the Claimant's lessons, independently of the Informal Support Plan (such as the entry relating to 'CMO' on 27 May 2021).
65. During the Informal Support Plan, the Claimant and Mrs Moody met weekly to review progress over the preceding week. At each meeting, they discussed

the feedback which the Claimant had received for the previous week; discussed what he had learnt about good practice; Mrs Moody attributed a rating of red, amber or green (known as a “RAG rating”) to each of the ‘targets’ for the previous week depending on whether the area still needed improvement; and the next steps were discussed. Mrs Moody provided significant support to the Claimant.

66. As to the RAG ratings, it was for Mrs Moody, as the individual running the Informal Support Plan, to decide which rating was appropriate in the circumstances. She discussed one ‘red’ rating with Mr Wood and he agreed with her decision. Mrs Moody gave a ‘red’ rating if a teacher was not meeting the relevant Teaching Standards highlighted in the Informal Support Plan; a ‘green’ rating if they were being met; and an amber rating if an event in the Informal Support Plan could not take place for reasons outside of the teacher’s control (and as such was not a judgement of performance in itself). As each aspect of the Informal Support Plan for weeks one to four had been completed, Mrs Moody considered it appropriate to award red or green ratings to the Claimant, and not amber ratings.

67. The Claimant believed that the Respondent was looking for fault, and had relied upon minor concerns to give him a ‘red’ RAG rating. In particular:

67.1. He did not accept that getting the date wrong (such that the session was stated to have been on a Sunday) demonstrated that he was failing to achieve the Teaching Standards; however, I was persuaded by Mrs Moody’s cogent explanation that the Claimant’s role included planning lessons, part of which was adapting materials and ensuring that the correct information was put on the board in lessons. I find that she was entitled to consider anything relevant to the assessment, and she viewed his progress in the round in order to reach her decision as to which RAG rating he would be given in their weekly meeting. It was not the case that the Claimant was given a red RAG rating simply because the date was wrong on his materials on an isolated occasion.

67.2. He did not accept that the decision of a pupil to put up their hand should be taken as evidence that he was not meeting the Teaching Standards and noted that it had happened in another teacher’s lesson which he had observed. However, I preferred Mr Wood’s evidence that pupils putting their hands up to ask a question is appropriate, but not to answer a question. Mrs Moody’s evidence that, if a pupil puts their hand up in response to a question in the Claimant’s class, that is a concern as it shows that the academy’s staff training has not become embedded in the Claimant’s teaching and it is for teachers to challenge pupils’ behaviour. An isolated issue would not have been treated in this way.

68. I find that all teachers were subject to the same standards. Decisions to commence an Informal Support Plan were taken on a case by case basis and isolated errors did not lead to the commencement of such a plan. Several other teachers were subject to an Informal Support Plan during the same academic year, some of whom successfully achieved the required standards as a result of the support it entailed. Although Mrs Moody had indicated to the Claimant that his performance should be ‘mint’ and higher than average in view of the support which he had received, she clarified that the expectation was that teachers met this ‘mint’ standard all of the time. I find that the

Claimant was not held to higher standards than other teachers; he was only required to consistently meet those standards.

69. The Claimant submitted letters written by former and current colleagues which each gave positive views of his teaching performance. However, those individuals did not observe the Claimant's performance at the relevant time against the Respondent's Teaching Standards and they are not therefore directly relevant to the issues to be determined in this case. In any event, they did not give oral evidence at the hearing and so limited weight could be attached to their evidence.
70. Although the Claimant's position was that the Respondent did not want him to successfully complete the Informal Support Plan, I preferred Mrs Moody's persuasive evidence that she "absolutely" wanted the Claimant to succeed as that was, "[her] whole purpose of running this plan." Mrs Moody's evidence was consistent with the Respondent's academy leaders providing a significant amount of support to the Claimant, and Mrs Moody's meticulous approach to the process. I find that neither she nor Mr Wood had concluded that the Claimant had failed his Informal Support Plan at any stage.
71. Following each meeting, Mrs Moody sent draft minutes to the Claimant which she believed to accurately summarise their discussion, and which the Claimant agreed. Although the Claimant's oral evidence was that he had simply agreed the minutes as being a record of what had been discussed (rather than his agreement to the Informal Support Plan and the RAG ratings generally), the agreed minutes only record the Claimant having queried one of the proposed RAG ratings in week four. As a result, Mrs Moody had discussed her proposed red RAG rating with Mr Wood and subsequently confirmed her belief that it was appropriate. Other than that, the minutes do not record that the Claimant disagreed with the Informal Support Plan or RAG ratings in the weekly meetings. I find that the Claimant did not raise with Mrs Moody that he believed the Informal Support Plan to be a sham or that the RAG ratings were unfair other than on this occasion as it would have been documented in the minutes if he had done so. If he had disagreed with the contents of the minutes, I find that he would have raised this with Mrs Moody and would not have agreed the minutes.
72. By the end of week 4, the Claimant had been given 12 green and 4 red RAG ratings. The Claimant accepted in his oral evidence that, at this point, he had known that it was not going well and that, if he were to fail the Informal Support Plan, that would lead to the formal capability procedure being commenced. He was aware that, in turn, that would have had adverse consequences for future references which the Respondent might provide for him, which he had wanted to avoid.
73. The next week, week 5, was to involve two lesson observations and a review meeting of weeks 1-5 so that his week 6 lessons met the required standard. The observations were to be carried out by Mr Cass and Mrs Moody on 16 June 2021.

15 June 2021

74. There was a significant dispute about discussions which took place on or before 15 June 2021 (see issue 2.1.6 above).

75. It was accepted that: Mrs Thornton spoke to Mrs Moody about the Claimant's progress on the Informal Support Plan; that discussion was followed by a discussion between Mrs Thornton and the Claimant; and there was then a further discussion between Mrs Moody and the Claimant.

The discussion between Mrs Moody and Mrs Thornton

76. It was not clear from the evidence whether the discussion between Mrs Thornton and Mrs Moody took place on 15 June 2021 but, given that it took place after the end of week four on the Informal Support Plan, their discussion must have taken place either on 15 June or in the days immediately before that.

77. The discussion took place because Mrs Thornton had, as the Claimant's union representative supporting the Claimant in this situation, asked to discuss the Claimant's progress on the Informal Support Plan with Mrs Moody. Mrs Moody recalled their conversation as having been very brief. In her oral evidence, Mrs Moody gave an account of that discussion: Mrs Moody had explained that, at the end of week four, the Claimant was still being given 'red' RAG ratings and so there was a risk that he would not successfully complete the Informal Support Plan if an improvement were not seen in the next two weeks. However, Mrs Moody had also noted that there were two weeks remaining on the Informal Support Plan and so, the following week (week 5), they needed to go through every point up to that week to ensure that the Claimant would be successful in week 6.

78. Although the Claimant understood that Mrs Moody had told Mrs Thornton that he would fail the Informal Support Plan, I preferred Mrs Moody's evidence as to this discussion and find that that was not the case. To have said so would have been entirely inconsistent with her views on, and approach to, the Informal Support Plan. Mrs Moody wanted the Claimant to succeed and, although a swift improvement would be needed, it was too early to say that the Claimant was going to succeed or fail the Informal Support Plan with two weeks to go. I also find that Mrs Moody was open to extending the informal plan by a further two weeks in line with the capability policy. Mrs Moody did not see that there was any time pressure; as far as she was concerned, the Informal Support Plan had at least two more weeks to go and she was working towards the Claimant successfully completing the Informal Support Plan so as to avoid the need to start any formal capability procedure. Taking into account the Claimant's oral evidence that he believed that the advice to resign was that of the trade union, I also find that Mrs Moody did not advise Mrs Thornton that resignation was the best course of action.

79. I also find that Mrs Moody did not advise Mrs Thornton that, if formal capability procedures were commenced, that could lead to dismissal within weeks. I preferred Mrs Moody's clear and persuasive evidence that she did not have a discussion with anyone about the Claimant being at risk of dismissal within weeks. Mrs Moody did not believe that was what the policy says. Indeed, the capability policy provides for several stages before dismissal could be considered. It would appear that (if the Claimant's performance did not improve in the meantime) that would be likely to take several months rather than weeks, and the approaching Summer holidays would also have delayed any formal process.

The Claimant's discussion with his union representative

80. Following the discussion between Mrs Moody and Mrs Thornton, on 15 June 2021, the Claimant spoke to his union representative Mrs Thornton. Mrs Thornton did not attend the hearing to give evidence and so my conclusions are based on evidence from the witnesses who did attend.
81. Mrs Thornton was the lead NEU representative whose role, as the letter of 22 April 2021 makes clear, was to provide advice and support to the Claimant as one of its members.
82. In his oral evidence, the Claimant said that Mrs Thornton had told him unequivocally that he would fail the Informal Support Plan. I do not find that to be the case as that does not reflect the earlier discussion between Mrs Thornton and Mrs Moody, or my finding as to the Claimant's discussion with Mrs Moody about Mrs Thornton's advice to him (as to which, see below). Rather, I find that Mrs Thornton explained that there was a risk that he might fail the Informal Support Plan.
83. Mrs Thornton, as the Claimant's union representative, presented options to him: these included an option to resign and take sick leave, or to continue with the Informal Support Plan and, if he did not successfully complete the Informal Support Plan, the formal stage of the capability procedures would be commenced (with implications for future references and the possibility of dismissal). The ET1 states that Mrs Thornton advised that resignation was the best course of action as he would receive an unblemished reference. In oral evidence, the Claimant said that he believed that the advice to resign was that of the trade union.
84. As set out below, the Claimant reached the decision to resign after having had this discussion. As to the timing of his resignation, he recalled Mrs Thornton having said (in the context of two observations being scheduled for the following day), "why put yourself through it?" and I accept the Claimant's evidence in this regard.

The Claimant's discussion with Mrs Moody

85. Following the discussion between the Claimant and Mrs Thornton, the Claimant approached Mrs Moody.
86. The Claimant conceded in oral evidence that Mrs Moody had not told him that he would fail the Informal Support Plan. As to whether the Claimant told Mrs Moody that Mrs Thornton had made it clear that he was going to fail the Informal Support Plan, I find that he did not. I prefer Mrs Moody's evidence that she only recalled the Claimant saying that Mrs Thornton had advised him that he might fail the Informal Support Plan. This was consistent with Mrs Moody's views at the time and the discussion she had had with Mrs Thornton.
87. As to whether Mrs Moody provided any advice to the Claimant as to the option to resign, the Claimant's ET1 states that he was advised by the SLT member overseeing his plan (Mrs Moody) and his union representative that resignation was the best course of action as he would receive an unblemished reference. The Claimant's witness statement gives a different

account, stating that Mrs Moody agreed with what Mrs Thornton had said and also said that resignation that day followed by sickness was an option worthy of consideration. In oral evidence, the Claimant agreed with the description of the conversation that he had with Mrs Moody which appears at paragraph 21 of her witness statement. That account does not include any advice provided by Mrs Moody to the Claimant: quite the contrary; Mrs Moody made it clear that she could not advise him and that he should listen to his union's guidance as the union's role is to support members in such a situation.

88. Although the Claimant conceded in oral evidence that he did not recall Mrs Moody advising him to resign, he said that Mrs Moody had said that he should listen to his union's advice. He also gave evidence that Mrs Moody agreed with the union representative, and later said that she had not disagreed with her and that it had felt to him as though Mrs Moody was agreeing with the union's advice, and then said that he thought Mrs Moody had said the union had given good advice.

89. I find that Mrs Moody did not provide any advice to the Claimant about his future employment, his options or the possibility of resigning. I preferred Mrs Moody's clear and cogent evidence that, because of her leadership role and her role in running the Informal Support Plan, she could not advise him and had to defer to the union. I was not persuaded by the Claimant's evidence in this respect as he gave inconsistent accounts of his discussion with Mrs Moody.

90. I accept Mrs Moody's evidence as to the Claimant's discussion with her (which took place shortly after his discussion with Mrs Thornton) and find that he did not mention his concern about being dismissed "within weeks" to Mrs Moody. I accept Mrs Moody's clear and cogent evidence that she had no discussion about the Claimant being at risk of dismissal within weeks; she did not believe that was what the capability policy said and she was clear that the Respondent follows that policy.

The Claimant's resignation

91. The Claimant resigned by letter on 15 June. He accepted that it had been his decision to resign, and he did so after receiving advice from his trade union, speaking to his wife and weighing up his position.

92. I have found that the Respondent had not told the Claimant or Mrs Thornton that the Claimant was going to fail the Informal Support Plan. The Respondent had placed him under no pressure to resign, either that day or at all. As far as Mrs Moody was concerned, she described the Claimant's resignation as "unexpected". He did not need to make a decision that day as he had at least two further weeks before the Informal Support Plan would be concluded, possibly a further four weeks. He knew this at the time because he discussed the timing of his proposed resignation with Mrs Thornton, who had said "why put yourself through it?"

93. Although he said in his oral evidence that he thought he had to make a decision that day, he conceded that no-one had required him to resign on 15 June. He took the decision to resign that day so as to avoid the observations scheduled for the following day. In other words, he knew that he did not have

to resign that day and he chose to do so. He took sick leave the following day, 16 June.

94. It was common ground that the Respondent agreed to the Claimant's request to shorten his notice period and his employment terminated on 31 August 2021.

DISCUSSION AND CONCLUSIONS

95. Applying the law to my findings of fact, I reach the conclusions set out below.

Did the Respondent breach the implied term of mutual trust and confidence in the Claimant's contract?

96. I have set out the law in detail above. However, I note again that the legal test requires the Claimant to provide evidence from which the Tribunal can find that the Respondent's conduct was "calculated or likely to destroy or seriously damage" the relationship between the parties. The legal test also requires me to take an objective view of the Respondent's conduct. I have concluded that the Respondent's conduct did not breach the implied term of mutual trust and confidence for the reasons set out below.

Starting the Informal Support Plan

97. The Informal Support Plan was put in place because the Respondent had genuine and reasonable concerns that the Claimant was not meeting the requirements of Teaching Standards 1, 4 and 7. As such, the Respondent had reasonable and proper cause for its decision to start the Informal Support Plan. Although the Claimant argued that the concerns that had been identified did not justify its inception, for the above reasons I found that the Respondent's concerns were genuine and reasonable and these led the Informal Support Plan to be put in place. I note that the Claimant accepted that there were failings on his part. Also, for the above reasons, I have found that Mr Wood's conversation with the Claimant about the decision to use a particular font did not play a part in that decision. No decision had been made at this point that the Claimant's employment with the Respondent needed to come to an end, whether because his 'face didn't fit' or for any other reason. The Informal Support Plan was carefully documented to set out each stage of the Informal Support Plan, involving a substantial amount of support being given to the Claimant by senior academy leaders with a view to helping him to meet the required standards. The Respondent had reasonable and proper cause for starting the Informal Support Plan. Starting the Informal Support Plan did not amount to a breach of the implied term of trust and confidence.

During the currency of the Informal Support Plan, holding the Claimant to a higher standard than was expected of teachers normally

98. From my findings, I conclude that the Respondent required the Claimant to meet its Teaching Standards which was reasonable and proper and he was not held to a higher standard.

Using minor failings by the Claimant during the Informal Support Plan as a breach of that standard

99. From my findings, I conclude that the Respondent carried out a genuine assessment of the Claimant's performance in each week of the Informal Support Plan which was reasonable and proper. The Respondent reasonably concluded that the Claimant was failing to achieve the required standards consistently. It was reasonable for the Respondent to conclude that the red RAG ratings were appropriate. The Respondent acted reasonably, only took into account relevant considerations and viewed the Claimant's performance against each target in the round. I note that the Claimant accepted that there were failings on his part. The Respondent did not give a red rating based on isolated minor failings. The Respondent had reasonable and proper cause for its actions.

The Informal Support Plan being a sham and not a genuine attempt to seek improvement

100. This overlaps to an extent with the other issues. I conclude that the Informal Support Plan was not a sham. I conclude that it was a genuine and reasonable attempt to seek improvement. It documented the areas in which the Claimant was not meeting the required standards of performance (which were clear to those involved), provided for a significant amount of support from senior academy leaders to help the Claimant to meet those standards, including detailed feedback from lesson observations, and a weekly review meeting at which Mrs Moody ensured that the Claimant was clear about the points he had learnt from the previous week and the areas still requiring improvement. I conclude that Mrs Moody was keen for the Claimant to successfully complete the Informal Support Plan and wanted to help him to achieve that. In particular, she and Mr Cass allowed the Claimant a second opportunity to choose books for the 'book look' in week three, which was inconsistent with the Claimant's position. There was no evidence that the expectations of the Claimant changed during the Informal Support Plan.

Not implementing the Informal Support Plan fairly

101. Again, this overlaps to an extent with the other issues. I conclude that the Informal Support Plan was implemented reasonably and fairly. The Respondent had genuine and reasonably held concerns that the Claimant's performance was not meeting the relevant Teaching Standards at each stage of the Informal Support Plan and attributed red ratings (indicating that the Claimant was not meeting the required standard) against the relevant parts of the Informal Support Plan which were reasonable and justified. Mrs Moody was not looking for fault on the Claimant's part, and those involved in the Informal Support Plan were not asked to look for fault. Mrs Moody wanted the Claimant to successfully complete the Informal Support Plan. She was aware that being on such a plan was intense and provided support to help the Claimant throughout the Informal Support Plan. Neither she nor Mr Wood reached the conclusion that the Claimant would fail the Informal Support Plan at any stage. Only four weeks had been completed by the time of the Claimant's resignation. There were two weeks remaining, possibly four weeks if a two week extension were to be given. The Claimant's performance needed to improve, but significant support was provided to enable him to meet the required standards and successfully complete the plan. The Respondent was operating an Informal Support Plan which was designed to improve the Claimant's performance and avoid formal capability procedures.

There was reasonable and proper cause for the Respondent's actions at each stage.

Alleged last straw incident

102. In this case the Claimant relies in part upon cumulative conduct on the part of the Respondent and what is sometimes referred to as the 'last straw' doctrine. It is alleged by the Claimant that the last straw in a series of breaches was being told that he would fail the Informal Support Plan when it was still on-going, advised that the consequences would be capability procedures with consequences for future references and could involve dismissal within a matter of weeks, and put under pressure about what to do about his employment. By the time of the hearing, the Claimant's allegation was that he was given this information and advice by Mrs Thornton, his NEU representative, and that Mrs Moody echoed the information which Mrs Thornton had given to him.
103. As set out above I found that the Claimant was not told by the Respondent (whether via Mrs Thornton or directly) that he would fail the Informal Support Plan when it was still on-going. I found that no decisions had been taken, and Mrs Moody was keen for the Claimant to successfully complete the Informal Support Plan.
104. As set out in my findings of fact above, I find that he was advised by his union representative that there was a risk that he might not successfully complete the Informal Support Plan at the end of the 6 weeks and, if he did not successfully complete the Informal Support Plan, the formal stage of the capability procedures would be commenced (with implications for future references and the possibility of dismissal). Mrs Thornton advised the Claimant as to his options. However, the role of a union representative is to support and advise its members. That is what Mrs Thornton did here.
105. I have also found that the Respondent did not tell the Claimant or Mrs Thornton that, if the formal capability procedures were commenced, the Claimant risked dismissal within weeks. I found that Mrs Moody was keen that the Claimant's performance improved. There was neither a probability or an inevitability that the Claimant would be dismissed if formal capability procedures were to be commenced. I accept that the Claimant discussed the timing of any resignation with Mrs Thornton, but conclude that it was his decision to resign to avoid the lesson observations which were scheduled for the following day. He was aware that any time pressure resulted from any desire he might have had to avoid the next day's lesson observations, rather than from any pressure from the Respondent.
106. Also, the Respondent did not put the Claimant under any pressure to make a decision about his employment or to resign, and did not advise the Claimant to resign that day. There was no time pressure; there were at least two further weeks remaining of the Informal Support Plan. The Claimant could have successfully completed that plan and, in that event, the formal stage of the capability procedures would not be commenced and there would be no implications for any future references. As set out above, I conclude that Mrs Moody did not advise the Claimant as to his future employment and directed him to seek the advice of his trade union as its role was to provide support and advice to its members in such a situation. That was a reasonable

position for her to take and did not amount to her agreeing with the trade union.

107. In view of my findings of fact, the Respondent is not responsible for any advice provided by the Claimant's trade union in which it played no part. In some circumstances it might be argued that an employer is under a duty to correct any misinformation given by a union about its position, but in this case the Respondent was not aware of any misinformation to correct here, for the reasons I have given.
108. Standing back and looking at my findings of fact as a whole, I have concluded that the Respondent did not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence with the Claimant. I have also concluded that the Respondent had reasonable and proper cause for its actions. The Respondent did not repudiate the Claimant's contract of employment.
109. I have therefore concluded that the Claimant was not dismissed for the purposes of section 95(1)(c) of the ERA. I do not need to consider whether the Claimant affirmed his contract before resigning or the reason for the Claimant's resignation. I also do not need to consider whether the Claimant was unfairly dismissed under section 98 of the ERA because I have concluded that the Claimant was not dismissed.
110. For the above reasons, I have concluded that the Claimant's claim for constructive unfair dismissal fails and is dismissed.

L Robertson

Employment Judge Robertson

Date 28 April 2022