EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr C Jenkins	AND	Compass Group UK & Ireland Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 27 and 28 June 2022

EMPLOYMENT JUDGE J Bax

Representation

For the Claimant: Mr C Jenkins (In Person)
For the Respondent: Ms J Loombe (Employment Law Partner)

JUDGMENT

The Claimant's claim of constructive unfair dismissal is dismissed.

REASONS

1. In this case the Claimant, Mr Jenkins claimed that he has been constructively unfairly dismissed. The Respondent contended that the Claimant resigned, that there was no dismissal, and in any event that its actions were fair and reasonable.

Preliminary matters and the issues

2. On 11 January 2022, after disclosure had been undertaken, the Claimant sought specific disclosure of a document titled 'Compass COVID-19 Safety Procedure.' The Respondent provided a written response that it had disclosed all of its documents and there was not a document titled

'Compass COVID-19 Safety Procedure'. On 31 January 2022, Employment Judge Gray directed: "The Claimant's application for specific disclosure has been considered and is refused, because the Respondent has confirmed that "there is no document titled Compass COVID19 Safety Procedure", and from this confirmation the Tribunal understands there is no written COVID19 Safety Procedure that the Respondent has adopted or relies upon."

3. The issues were discussed with the Claimant and he identified 7 alleged breaches of contract as set out below, although during the hearing it appeared that there was an eighth, listed at number 3.

   (1) On 4 January 2021, refused the Claimant's request dated 3 January 2021to be put on furlough.
   (2) On 11 January 2021, informed the Claimant that the Respondent could not facilitate the Claimant's request of 9 January 2021to be furloughed.
   (3) On 15 April 2021 Ivan Blasco sent an e-mail about a colleague coming to work when their wife was coughing instead of isolating.
   (4) On 26 April 202, Nina Currin invited the Claimant to a meeting at which he was issued with a recorded warning, which included:
      a. Failing to follow the disciplinary policy for the hearing on 26 April 2021.
      b. On 26 April 2021, issued a 12 month warning when the policy said it should be for 6 months.
   (5) On 28 April 2021, after appealing against the warning, rescinded the warning and informed the Claimant that he would be investigated by another manager, which included:
      a. No appeal hearing was heard.
      b. He was told he had won and reinvestigated when the outcome of an appeal was final.
   (6) On 4 May 2021, invited the Claimant to attend an investigatory meeting in relation to failing to follow Compass COVID-19 safety procedure on 15 April 2021.
   (7) On 7 May 2021, failed to provide the Claimant with the safety procedure or any documents in advance of the meeting and there was not a proper investigation.
   (8) On 10 May 2021, issued the Claimant with a serious letter of concern and informed the Claimant that there would not be a review meeting.

4. Discussion took place about the amount of intended cross-examination for each witness. The Claimant said he had 250 questions for Ms Taskunaite and 91 questions for Mr Law. It was observed that the number of questions seemed excessive given the number of issues to be determined. The Claimant was advised that he needed to address the issues and that there was a limited amount of time. The Claimant agreed to review his questions.

When the Claimant cross-examined the Respondent's witnesses he asked his questions and appeared to have consolidated them and was focused in what he was asking. There was no need to suggest to the Claimant that he was running out of time to ask his questions. The Claimant was given time to consider his closing submissions before making them at the end of the first day.

5. At the start of the hearing the Claimant applied for documents at pages 65 and 119 to be excluded from the bundle. The document was a KPMG document titled, "Coronavirus COVID-19 "The Way Back" Re-Opening Guidance Catering Units". It was provided to the Claimant as part of the disclosure exercise for the preparation of the final hearing. After it had been received the Claimant sought specific disclosure of the 'Compass COVID-19 Safety Procedure' document. The Claimant then made the application referred to above. The Claimant sought to exclude the document on the basis it could not be relevant due to the Respondent's position. The document appeared to be relevant because it concerned what KPMG were requiring at its sites at the time of reopening. The Claimant said that it would take up too much time. The application was dismissed, the document had been properly disclosed in accordance with the orders and it was in the interests of justice for it to remain in the bundle.

The evidence

6. I heard from the Claimant, and I heard from Mr Law and Ms Taskunaite on behalf of the Respondent.

7. I was provided with a bundle of 266 pages and some additional documents by both parties. Any reference in square brackets is a reference to a page in the bundle.

The facts

8. There was a degree of conflict on the evidence. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

9. The Respondent is a company which provides contract catering and support services to various businesses and organisations.

10. The Claimant commenced employment with the Respondent as a Chef Manager on 29 October 2018. He worked at KPMG, Southampton.

11. The Claimant's duties included preparing food for staff dining and hospitality and vending services. The Respondent employed the Claimant and a Hospitality Supervisor at the site.

12. The Respondent's disciplinary policy provided:

    (a) 2. Minor breaches would be dealt with in the first instance by counselling the employee. Such a discussion may be recorded on the employee's file. If there is no improvement the formal process may apply.
    (b) 3. Where necessary a full investigation will be completed before proceeding to a disciplinary hearing. The Company reserved the right to investigate and have investigatory meetings without giving notice or allowing an employee to be accompanied.
    (c) 5. "There are four levels to the disciplinary procedure and it is possible to enter the procedure at any level, depending on the severity of the offence …" there were 3 levels of recorded warning and level 4 was dismissal.
    (d) 5.1 In relation to a level 1 recorded warning. "If an employee's conduct does not meet acceptable standards a Level 1 Recorded Warning will be issued. The employee will be advised in writing of the reasons for the warning, the consequences if there is no satisfactory improvement and the right of appeal. This warning will remain live for 6 months…"
    (e) 5.2 in relation to a level 2 warning, if there was further unsatisfactory conduct or the offence was more serious a level 2 recorded warning would be issued. The warning would remain live for 12 months.
    (f) During a disciplinary hearing an employee was entitled to have a companion present.
    (g) 9. "If you feel that the action taken at any level of the disciplinary procedure was unjustified, an appeal may be made in writing within five working days of receipt of the meeting outcome letter. The outcome of the appeal can include the decision being upheld, the reduction or removal of the sanction imposed … This list is not exhaustive. The outcome of the appeal hearing will be final."

13. The Prime Minister's statement of 16 March 2020 on Coronavirus, said if anyone or anyone in their household had symptoms they should stay at home for 14 days.

14. On 17 March 2020, the Claimant tried to contact his manager, Ms Taskunaite by e-mail, to find out if he needed to self-isolate, because his daughter had developed a cough. Ms Taskunaite was on holiday. At 0839 the Claimant received an automated response from the Respondent's Coronavirus e-mail address. The response had questions and answers. In relation to what to do if they were worried they or a family member had Covid-19, they were told to stay indoors and inform their manager immediately and await further instructions before returning to the

workplace. The Claimant contacted the KPMG national account manager and his manager's manager, Mr Dorey, at about 0930 and 1030. The Claimant was at KPMG until 2 pm before he was told what to do. I accepted that at this time companies were not sure how to deal with the emerging situation.

15. On 23 March 2020, KPMG closed its offices, due to the national lockdown in response to the COVID-19 pandemic. The Claimant was furloughed. The Claimant's colleague was shielding due to her diagnosis of cancer.

16. Prior to KPMG's offices re-opening the Respondent agreed working arrangements and infection control measures [p65-84 and 85-94]. The written arrangements, of which the Claimant was given a copy and read. included:

    (a) Safety Conversation [p69 & 94], which set out what was being learnt and covered matters such as social distancing. Under the section 'Symptoms and What To Do' it said:

    "The virus that causes COVID-19 spreads easily by close person to person contact. Symptoms include: a new continuous dry cough…

    If you are experiencing any of the above symptoms:
    - Do not come to work
    - Notify your manager
    - Self-isolate for 10 days if you have symptoms of COVID-19 and have tested positive, have had an unclear test result or have not had a test.
    - …
    - Self-isolate for 10 days if you live with or in a support bubble with someone who has symptoms of COVID-19 and tested positive, had an unclear result or did not have a test."

    The Claimant signed that he had received the document on 3 November 2020 and had been given an updated version on 26 January 2021. In the Claimant's witness statement he acknowledged that The Safety Conversation was on the notice board in the kitchen.

    (b) Under the section, Minimise the spread of Covid-19 [p72], under self-isolate it said: … "If any member of your household has any symptoms contact your manager and you should isolate for 14 days."

17. On 6 November 2020, the Claimant was placed on flexible furlough with effect from 1 November 2020, whereby he worked part of his contracted hours and was on furlough for the remainder.

18. During the lockdowns the vending machines needed to be maintained to prevent legionella bacteria building up. By early January 2021 the machines needed to be flushed 3 times a week, which took half an hour. Employees were to be paid for four hours each time they attended the site. By the time the Claimant spoke to Ms Taskunaite in January 2021 the requirement had reduced to twice a week.

19. On 3 January 2021, the Claimant sent a message to his line manager, Ms Currin. In which he said that he had been informed two of his children's school was likely to be shut for 2 weeks from the next day and he already had 2 children home-schooling. It was not possible for his wife to teach 4 children and he asked to go on full furlough while the schools were shut to help educate his children.

20. The Claimant did not receive a reply and sent a further message to Ms Currin on 4 January 2021 and a message to Ms Taskunaite. Ms Currin responded that they could not do it because he was needed to do the vending. Ms Taskunaite responded that furlough was not something he could request and the business needed him to be at work, but they were happy for him to manage his time to make home-schooling easier. The Claimant, when giving evidence, accepted that he was seeking paid leave under the furlough scheme.

21. The Claimant suggested that his line manager could have covered him or that someone else on furlough could have been used instead. I accepted Ms Taskunaite's evidence that, before lockdown, Ms Currin would visit the Southampton and Gatwick sites once a month and that she was based in Reading. Ms Taskunaite checked the government website and noted that furlough was at a manager's discretion. The cost to the client for Ms Currin to travel to Southampton was an additional £160 per trip. It involved a journey of 90 minutes each way. She considered that furlough was a way to keep people on when there was not work for them to do. The Claimant did not request unpaid time off. Ms Taskunaite did not consider it was viable to require Ms Currin to undertake the Claimant's duties at Southampton. She further did not consider that it was viable to use someone else who was on furlough. A replacement would need to be fully trained, however the Claimant gave less than a day's notice. I accepted that Ms Taskunaite considered the stressful nature of the situation for the Claimant and that finance was important. I accepted that when the Claimant was on leave, Ms Currin and Ms Taskunaite, once each, carried out the Claimant's duties. The hospitality supervisor was shielding at the time and sadly died in July 2021.

22. The Claimant was later told by Ms Taskunaite that the only option would be for him to use his holiday.

23. On 9 January 2021, the Claimant e-mailed Mr Dorey and said he had 4 children at home, two were suffering from anxiety, one had suspected autism and his wife suffered from depression. He referred to being told that he could not be furloughed to home-school his children. He asked if someone else could flush the vending machines and if he could be placed on furlough.

24. On 11 January 2021, the Claimant attended a conference call with Ms Taskunaite and Mr Dorey. He was told that his request could not be facilitated. He was told that the needs of the business had changed and the requirement to be in the office had changed from 5 days per week to 2 days. The rationale for the decision remained the same.

25. On 15 April 2021, the Claimant attended work. At about 1210, the Claimant's wife telephoned him and said he had to self-isolate, because she had Covid-19 symptoms. The Claimant informed KMPG's receptionist that his wife had covid symptoms and left immediately. I accepted that he intended to call Ms Taskunaite at a stage after he had got home. The Claimant had a mobile telephone.

26. Ms Taskunaite received a telephone call from the receptionist, informing her that the Claimant had left and he had said his wife had been coughing all night and she suspected she had Covid-19. KPMG was concerned that they had not been informed of the potential infection and the Claimant had attended site when his wife had potential symptoms.

27. Ms Taskunaite called the Claimant 15 minutes after he arrived home. The Claimant told her that he was not aware his wife was unwell, until she called him. He was reminded of the process. The Claimant was told that he should have contacted her immediately so precautions could have been taken to protect others in the building. Ms Taskunaite noted that the Claimant had all of his covid related training and would expect him to inform management immediately of any actual or suspected cases [p134].

28. At 1755 on 15 April 2021, Mr Blasco sent an e-mail to a number of colleagues which said: "*One of our colleagues came to work today after his wife was coughing all night (Covid-19 symptoms) instead of isolating for 10 days or until the wife would get a negative result after receiving a covid test. He did not contact his line manager either. Something similar happened before on another site and it does not look in front of the client as the procedures and steps seems like they are not sinking in."* Employees were asked to do a refresher on Covid-19 safety. [p135]

29. The Claimant suggested that the e-mail was written to make an example of him. I rejected that evidence. The Claimant was not named in the e-mail

and the location of the incident was not specified. I accepted Mr Law's evidence that there were many employees.

30. Ms Taskunaite asked Ms Currin to carry out an investigation. Although Ms Currin was an experienced manager she was new to the Respondent. Ms Currin was advised to speak to HR about the process, however unfortunately she did not.

31. On 26 April 2021Ms Currin asked the Claimant if he was free for a meeting a couple of hours later by Teams. At the meeting the Claimant was taken by surprise and was told that he was being issued with a level 1 recorded verbal warning.

32. After the meeting the Claimant was sent an e-mail with a confirmation of a verbal warning. The warning set out that the Claimant had failed to meet the standard of conduct by:
    a. On 15 April 2021 he attended KPMG. Before the end of his shift he told the receptionist that he was rushing home because his wife had been coughing a lot last night and she believed she had covid-19 related symptoms and decided to do the test.
    b. He failed to contact management to let them know of the potential risk

    The importance of communication was stressed. The Claimant was informed that the warning would be disregarded after 12 months satisfactory conduct and performance.

33. The confirmation letter [p146] also added that Ms Taskunaite had contacted the Claimant after a call from the client. It was said that the warning was a level 1 recorded warning. He was informed of his right to appeal.

34. On 28 April 2021, the Claimant appealed against the warning [p148-150] on the basis that the disciplinary procedure was wrong and unfair and set out how the meeting was a complete surprise and that the disciplinary procedure had not been followed. He disputed his conduct failed to meet the standard required by the Respondent and that the sanction was too severe.

35. Ms Taskunaite read the appeal letter and immediately realised that the disciplinary process had not been followed. She telephoned HR and was advised to cancel the level 1 warning and instigate an investigation.

36. Ms Taskunaite e-mailed the Claimant the same day and said:

    "After reading your e-mail send (sic) earlier today, I understand that you are questioning the Verbal Warning issued to you by your line manager on 26.4.21 on the grounds of you not following Covid-19 process set by

Compass Group and failing to communicate sensitive covid related information to your line manager in timely manner potentially putting other people at risk. Therefore I made the decision to cancel Verbal Warning dated 26.06.21 (sic), this will be removed from your file. Following cancellation of Verbal Warning shortly you will be invited to attend investigation meeting conducted by independent manager."

37. Ms Taskunaite did not consider it was necessary to have a hearing because it was clear the procedure had not been followed and the appropriate course of action was to restart the process. The Claimant suggested that the course of action was undertaken to remove him from the business, I rejected that suggestion. I accepted Ms Taskunaite's evidence that after the Claimant's resignation a position was advertised with fewer responsibilities because KPMG considered that there were not enough staff members to warrant a chef manager, however the position later changed.

38. Ms Taskunaite asked Mr Grant, another manager, if he could identify an independent manager to undertake the investigation. He suggested Mr Law.

39. On 4 May 2021, Mr Law, Scotland Regional Manager, sent the Claimant an e-mail inviting him to attend an investigatory meeting to discuss an allegation of failing to follow Compass COVID-19 safety procedure on 15 April 2021.

40. The Claimant responded by saying that the warning had been cancelled. Mr Law replied by saying that the warning had not been cancelled due to his appeal, but due to not adhering to the company procedure as the Claimant had set out in the appeal letter.

41. On 7 May 2021, the Claimant attended a video investigatory meeting with Mr Law. The Claimant was not provided with a Safety Procedure prior to the meeting. The meeting notes recorded the following:
    a. The Claimant confirmed that Ms Taskunaite's account sounded correct as to her involvement and what she had been told.
    b. The Claimant confirmed he was aware of the Covid safety Conversation Document and he had signed it on 3 November 2020 and 26 January 2021.
    c. The Claimant confirmed that he understood the procedure for when someone had covid-19 to be, "if you have symptoms, don't come to work. If in this instance where it was my wife, as soon as you know I need to go home and isolate wait until she has a test results and there should be some contact to the manager to inform that is the situation." He referred to the conversation document not being specifically clear if it was his wife, that he should contact his manager straight away. His initial thought was to get home and once his

children had lunch he would have called. Mr Law agreed it was not 100% clear if you were at work. The Claimant said if the situation arose again he would contact his manager before leaving work.

d. The Claimant said that he had left for work before his wife woke up and he was not aware of her coughing in the night and she told him on the telephone that she had cold symptoms.
e. Reference was made to the appeal letter in which the Claimant said he did not see it as a problem not contacting Ms Taskunaite because he was not due to return to work for 4 days. He explained that it was not a case that cover was required. Mr Law pointed out that the longer it is left more people could have been in contact.

42. Mr Law considered that the Claimant had said he was not aware his wife was unwell and if he was in the same situation again he would call his manager. Mr Law did not consider it was necessary to interview the KMPG receptionist because she could not say whether the Claimant heard his wife coughing and he had said he had not, which Mr Law accepted. He recognised that the Claimant said he would contact his manager if similar circumstances arose again. Mr Law concluded a disciplinary sanction was not appropriate.

43. On 10 May 2021, Mr Law sent the Claimant a letter, titled serious letter of concern. The nature of unsatisfactory performance was a failure to follow Compass Safety procedure. The improvement required was to notify his line manager when potential contact with persons who had Covid-19 symptoms or tested positive. He was told that formal disciplinary action may be taken should his conduct/performance not improve. There was no suggestion in the letter that it was a disciplinary sanction or that it would be kept on the Claimant's file. It was said, "There will not be a review meeting, as this is in regard to failure to follow procedure and you have agreed that you knew of the procedure." If there were any queries he was told to ask.

44. I accepted Mr Law's evidence that the reference to a review was not to an appeal. The reference to a review was in the context of there having been a procedural issue and the example of food labelling was given. The word review referred to a check a few weeks later to make sure processes were being followed and Mr Law considered it was unnecessary in the Claimant's case.

45. The Claimant sought clarification on how he had breached the process. Mr Law responded by saying it was the failure to notify his manager.

46. On 11 May 2021, the Claimant resigned with immediate effect. The reasons given it the letter were: (1) allegations of failing to follow Compass Safety procedure, which were unfounded, (2) unreasonable or unfair treatment relating to 15 April 2021, and (3) failure to follow the disciplinary policy.

47. On 17 May 2021, Mr Smith wrote to the Claimant and said he was concerned that the Claimant had been hasty and gave him an opportunity to reconsider his resignation . The resignation letter was treated as raising a grievance and the Claimant was invited to attend a meeting. The Claimant responded saying he had not resigned in haste, a meeting would not change the breakdown in relationship, and the letter could be used for a grievance because it was detailed. On 19 May 2021, the Claimant was told that his resignation was accepted.

The law

48. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he 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.

49. If the claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. 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".

50. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").

51. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "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 his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will

lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

52. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."

53. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. In need not be the predominant, principal, major or main cause for the resignation.

54. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "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".

55. This was been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA.

56. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).

57. In Kaur-v-Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, the Court of Appeal reviewed cases on the 'last straw' doctrine and Underhill LJ formulated the following approach in relation to the Malik test;

"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself 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 (applying the approach explained in Omilaju) 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, for the reason given at the end of para. 45 above.)
(5) Did the employee resign in response (or partly in response) to that breach?"

58. If the suggested last straw was entirely innocuous, further guidance was given in Williams v The Governing Body of Alderman Davies Church in Wales Primary School UKEAT/0108/19/LA at paragraph 33. "If the most recent conduct was not capable of contributing something to a breach of the Malik term, then the Tribunal may need to go on to consider whether the earlier conduct itself entailed a breach of the Malik term, has not since been affirmed, and contributed to the decision to resign."

59. In addition, it is clear from Leeds Dental Team v Rose that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties,

if there is reasonable and proper cause for the same then there is no fundamental breach of contract.

60. A claimant cannot rely upon a breach of contract which he/she has been taken to have affirmed. Affirmation can, of course, have been express, but it can also be implied by inaction and delay, although simple delay is rarely enough. In Chindove-v-Morrisons UKEAT/0201/13/BA, Langstaff J said this (paragraph 26);

> "*He [the claimant] may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time….. It all depends upon the context and not upon any strict time test."*

61. S. 57A ERA Time off for dependants, provides

[(1) An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary—

(a) to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted,

(b) to make arrangements for the provision of care for a dependant who is ill or injured,

(c) in consequence of the death of a dependant,

(d) because of the unexpected disruption or termination of arrangements for the care of a dependant, or

(e) to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him.

(2) Subsection (1) does not apply unless the employee—

(a) tells his employer the reason for his absence as soon as reasonably practicable, and

(b) except where paragraph (a) cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be absent.

(3) Subject to subsections (4) and (5), for the purposes of this section "dependant" means, in relation to an employee—

(a) a spouse [or civil partner],

(b) a child,

(c) a parent,

(d) a person who lives in the same household as the employee, otherwise than by reason of being his employee, tenant, lodger or boarder.

(4) For the purposes of subsection (1)(a) or (b) "dependant" includes, in addition to the persons mentioned in subsection (3), any person who reasonably relies on the employee—

(a) for assistance on an occasion when the person falls ill or is injured or assaulted, or

(b) to make arrangements for the provision of care in the event of illness or injury.
(5) For the purposes of subsection (1)(d) "dependant" includes, in addition to the persons mentioned in subsection (3), any person who reasonably relies on the employee to make arrangements for the provision of care.
(6) A reference in this section to illness or injury includes a reference to mental illness or injury.]

62. The right under s.57A is not a right to paid time off.

63. The EAT in Qua v John Ford Morrison [2003] ICR 482, held the right is for employees to take a reasonable amount of time off work to take necessary action in respect of 'a variety of unexpected or sudden events affecting their dependants' and to make 'any necessary longer-term arrangements for their care'. The right is a right to a "reasonable" amount of time off, in order to take action which is "necessary". In determining whether action was necessary, factors to be taken into account will include, for example, the nature of the incident which has occurred, the closeness of the relationship between the employee and the particular dependant and the extent to which anyone else was available to help out. In determining what is a reasonable amount of time off work, an employer should always take account of the individual circumstances of the employee seeking to exercise the right. It may be that, in the vast majority of cases, no more than a few hours or, at most, one or possibly two days would be regarded as reasonable to deal with the particular problem which has arisen (paras 15-18).

64. The right to time off is dependent on the employee informing the employer of the reason for his or her absence as soon as reasonably practicable and how long he or she expects to be absent (although this does not apply where the employee informs the employer of the reason on his or her return to work). It may not always be reasonably practicable to tell the employer the reason for the absence until the employee has returned to work. Where this is the case, the employee must tell the employer the reason for the absence on his or her return and the obligation to tell his or her employer how long he or she expects to be absent does not apply. This is a question of fact. If notice is not given the right to time off is lost.

65. A request can be reasonably refused if the time off is not necessary or the amount of time requested is unreasonable

66. S.76 ERA provides that the Secretary of State makes regulations in respect of parental leave. The right is to unpaid parental leave (s. 77(2)(b) ERA). The right is set out in the Maternity and Parental leave etc Regulations 1999 ("MAPL"), which provide:

13 Entitlement to parental leave
(1) An employee who—
(a) has been continuously employed for a period of not less than a year [or is to be treated as having been so employed by virtue of paragraph (1A)]; and
(b) has, or expects to have, responsibility for a child,
is entitled, in accordance with these Regulations, to be absent from work on parental leave for the purpose of caring for that child.
[(1A) . . .]
(2) An employee has responsibility for a child, for the purposes of paragraph (1), if—
(a) he has parental responsibility or, in Scotland, parental responsibilities for the child; or
(b) he has been registered as the child's father under any provision of section 10(1) or 10A(1) of the Births and Deaths Registration Act 1953 or of section 18(1) or (2) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965

14 Extent of entitlement
[(1) An employee is entitled to eighteen weeks' leave in respect of any individual child.]

67. To take unpaid parental leave, the employee must give their employer notice (para 1(b) sch. 2 MAPL. The notice must specify the dates on which leave is to begin and end and must be given 21 days before the date on which leave is to begin (para 3 sch. 2 MAPL).

68. The Claimant referred me to the decision in British Home Stores v Burchell [1980] ICR 303. The case sets out the test to be applied in a claim of unfair dismissal, when an employee has been dismissed on the grounds of conduct. The Claimant was not dismissed by the Respondent on such grounds. The Claimant resigned and therefore the appropriate tests were those as set out above.

Conclusions

69. It is necessary to deal with a general point, which is relevant to the majority of the allegations, in relation to the Respondent's Covid-19 safety procedure. The Claimant is correct that the Respondent did not have a document with the specific title of 'Compass COVID-19 Safety Procedure'. The Claimant based his claim on the proposition that if such a procedure did not exist then he could not have been in breach and therefore all of the action was in breach of his contract. Procedures are not just created by the title of a specific document. They are also created by the use of the other documents and practices. The Respondent's practice from the start of the pandemic was that if an employee or family was worried they had covid they

should stay indoors and contact their manager immediately and await further instructions before returning to the workplace. When KPMG was reopening, it agreed with the Respondent re-opening guidance, which included in relation to members of household of an employee having covid-19 symptoms, that the employee was to isolate and contact their manager. There was also a safety conversation document which the Claimant read and signed and was also displayed in the KPMG kitchen. Under the 'What To Do Section' it was clear that if an employee experienced symptoms they should not come into work and contact their manager. The Claimant submitted that it was not clear what the position was regarding members of the household. The safety conversation required self-isolation, the natural reading of the section was that the employee should not got to work and notify their manager, this was supported by the other references in the guidance.

70. The Claimant's case was that the safety conversation was not clear what to do when at work and it was discovered a family member had symptoms. Mr Law accepted it was not 100% clear. The 'What To Do Section' did not specifically refer to it. However, by this stage the country had been in the grip of the pandemic for over a year and people were concerned about coming into contact with those who had covid-19 and it was apparent that symptoms were not necessarily displayed immediately. The Claimant said that it was not clear, due to what had happened in March 2020 and the Respondent was being inconsistent, I rejected that submission. The situation in the run up to the first lockdown was not clear to many people and businesses, however by April 2021 the isolation requirements were understood. The Claimant knew he had to isolate. The Claimant would also have been aware of the need to trace people in the event of a positive test and the need to minimise risk of spread. The Claimant was also aware of what he should do, as demonstrated by what he said in the investigatory meeting on 7 May 2021. In order to manage the risk of an employee who is a suspected contact of someone with Covid and is in the workplace, an employer needs to know about the situation immediately. I concluded that The Claimant was aware that he needed to make contact with his manager. I accepted that there was a procedure, namely to immediately self-isolate and inform a manager.

Was the Respondent in fundamental breach of contract by:

On 4 January 2021, refused the Claimant's request dated 3 January 2021 to be put on furlough. On 11 January 2021, informed the Claimant that the Respondent could not facilitate the Claimant's request of 9 January 2021 to be furloughed (allegations 1 and 2).

71. The rationale was the same for both refusals and therefore I considered them together.

72. The Claimant operated under a misapprehension that he had a right to furlough. The furlough scheme was an arrangement between the government and an employer to reimburse up to 80% of wages paid to an employee, who was on a leave of absence because there was no work for them to do as a result of the covid-19 pandemic.

73. The Claimant sought to rely on a refusal to permit him to take dependents leave under s. 57A ERA. The right is to take unpaid leave. The Claimant was seeking to be furloughed and therefore be on leave with pay and he was not seeking to take dependents leave. The Claimant was not seeking to take time off for a short period to enable measures to be put into place or deal with a short term emergency, but longer term leave. The Claimant was seeking paid leave which was inconsistent with the right relied upon. In the circumstances there was not a breach of his statutory right and consequently there was not a breach of his contract.

74. The Claimant sought to rely on a refusal to permit him to take parental leave as a breach of his rights and therefore a breach of his contract. The right to parental leave is a right to unpaid leave. The Claimant was not seeking unpaid leave, he was seeking to be furloughed so that he remained in receipt of pay. Further the Claimant did not say when the end was to be or give 21 days' notice in accordance with sch. 2 of MAPL. The Claimant did not give the correct notice and was not entitled to parental leave in any event. The Respondent was not in breach of his rights to parental leave and there was not a breach of his contract as a result.

75. The Claimant submitted and suggested during cross-examination that the Respondent should have given greater consideration to whether someone could cover him whilst he was on furlough. The Respondent had to consider how to manage its resources and the cost to KPMG. The cost of sending Ms Currin was an additional £160 per trip. It was also relevant that the Claimant was not seeking a permanent change and that in order to train someone more notice was required. The Claimant asked to be furloughed the day before he wanted it granted. The Claimant did not have a right to be furloughed. I accepted that the Respondent genuinely considered the situation and concluded that the Claimant's role was necessary and that in the circumstances it had reasonable and proper cause to refuse the Claimant's request. The Respondent was not in breach of the Claimant's contract in this respect and it was not something likely to seriously damage or destroy trust and confidence.

On 15 April 2021 Ivan Blasco sent an e-mail about a colleague coming to work when their wife was coughing instead of isolating (allegation 3).

76. The e-mail sent by Mr Blasco did not name the Claimant nor the location of the employee. It was not possible to identify who the individual was. It was notable that Mr Law, regional manager of Scotland, was included in the recipients. The Respondent had many employees. Covid-19 safety measures were very important and I accepted that clients of the Respondent needed to have confidence that they were being followed. The e-mail made reference to client concern. I accepted there was reasonable and proper cause to draw the issue to peoples attention. I rejected the Claimant's assertion that it was a pre-determination of the later proceedings involving him. The drawing of the wider workforce's attention to an important issue was a reasonable thing to do and I accepted that it was unrelated to the investigation that followed. The e-mail was not something likely to seriously damage or destroy the Claimant's trust and confidence in the Respondent. The Respondent had reasonable and proper cause for its actions and this was not a breach of contract.

On 26 April 202, Nina Currin invited the Claimant to a meeting at which he was issued with a recorded warning, which includes: (a) Failing to follow the disciplinary policy for the hearing on 26 April 2021, and (b) On 26 April 2021, issued a 12 month warning when the policy said it should be for 6 months (allegation 4).

77. Ms Currin did not give the Claimant warning that he was attending a meeting to discuss the incident on 15 April 2021. She did not inform him that it was a disciplinary meeting, what evidence was to be relied upon, or that he had a right to be accompanied at a disciplinary meeting. The Claimant was asked to attend an investigatory meeting and was issued with a level 1 warning at the end. The Respondent did not follow its disciplinary policy. The Claimant was informed of his right to appeal and he did so promptly and was able to cite the procedural failings. The time for the warning was also in excess of the time for a level 1 recorded warning.

78. I accepted that this was something which could be damaging to trust and confidence and there was not reasonable and proper cause for failing to follow the procedure. However the sanction imposed was the lowest possible under the disciplinary procedure and the Claimant was informed of his right of appeal which he exercised and he continued to participate in the process. The appeal process was present to remedy defects in process or re-examine decisions taken and sanctions imposed. In the circumstances I rejected the Claimant's submissions and concluded that he failed to prove that the breach was such that it was likely to seriously damage or destroy trust and confidence in the Respondent.

On 28 April 2021, after appealing against the warning, rescinded the warning and informed the Claimant that he would be investigated by another manager. This included: (a) no appeal hearing was held, and (b) He was told he had won and reinvestigated when outcome of appeal was final (allegation 5).

79. Ms Taskunaite immediately identified that the disciplinary procedure had not been followed. The outcomes available on appeal referred to in the disciplinary procedure were non-exhaustive. They did not exclude the possibility of the decision being set aside and the process re-started. Such an approach would mean that if there was a disciplinary hearing, a second time round, that there would be a right of appeal. This is something giving extra protection to the employee. I accepted Ms Taskunaite's evidence that there was not a hearing because it was clear the procedure had not been followed. In such circumstances I accepted that she had reasonable and proper cause in not holding a hearing in order to reset the process.

80. The allegation was put on the basis that the Claimant was told he had won and that he would be re-investigated. The Claimant suggested that it was not clear that the reason was because of the procedural failings. I rejected that submission. The Claimant engaged in semantics on the issue, the main focus of his appeal letter was on the procedural failings and that letter was specifically referred to in Ms Taskunaite's e-mail. It was objectively apparent that the reason for cancelling the warning was because of the procedural failings. The Claimant also said it was not clear what the investigation would be in relation to. The Claimant was unaware of any other incidents he could be investigated for and the e-mail was sent in direct response to his appeal. It was objectively apparent that the investigation related to 15 April 2021.

81. The issue under consideration was serious, as it related to notification of cases of covid-19, which at the time was a serious concern to the population.

82. Ms Taskunaite re-set the procedure and cancelled the warning so that it could be properly followed. It enabled the Claimant to have a right of appeal to any decision following a disciplinary hearing. The Respondent had reasonable and proper cause for the decision and it was not something likely to seriously damage or destroy the trust and confidence the Claimant had in the Respondent.

On 4 May 2021, invited the Claimant to attend an investigatory meeting in relation to failing to follow Compass COVID-19 safety procedure on 15 April 2021(allegation 6).

83. It appeared on the face of the information provided to Ms Taskunaite that the Claimant's wife had been coughing all night and the Claimant had attended work and then left without immediately informing his manager as to the situation. The significance of what had happened was increased by the concern displayed by KPMG. The Respondent had reasonable and proper cause to investigate what had happened. It was necessary to

maintain confidence of the client and the people who worked at the site. If the Safety Conversation and safety processes were not being followed it was important to identify it and remedy the situation. It was not a breach of the Claimant's contact of employment or something capable of damaging trust and confidence to invite him to attend an investigatory meeting.

On 7 May 2021, failed to provide the Claimant with the safety procedure or any documents in advance of the meeting and there was not a proper investigation (allegation 7).

84. The Claimant relied upon not being given the safety procedure in advance of the meeting. Mr Law accepted that the Claimant was not given documents before the meeting. He was informed, in the letter inviting him to the meeting, that discussion would involve failing to follow the procedure on 15 April 2021. The Respondent's disciplinary policy did not require that documents were given in advance and neither does the ACAS code of practice. The purpose of the meeting was to discuss what happened. At the meeting, the safety conversation document was discussed and the Claimant confirmed he had signed receipt of it on two occasions and it was displayed in the kitchen. An investigatory meeting is the start of a process to see whether there needs to be a disciplinary hearing. Mr Law was following the disciplinary policy by having an investigatory meeting and was not required to provide documents in advance. Mr Law had reasonable and proper cause for the way he arranged and conducted the meeting and it was not something likely to seriously damage or destroy trust and confidence in the Respondent and was not a breach of the Claimant's contract.

85. The Claimant also relied upon there not being a proper investigation, in particular that the KPMG receptionist was not questioned. I accepted that the first stage is to speak to the Claimant. Mr Law understood and accepted from what the Claimant said, that the Claimant was not aware his wife had been coughing all night until he was telephoned at work. The Claimant also accepted that he did not notify his manager immediately. Mr Law considered that the receptionist would not have been able to assist with whether the Claimant had known his wife was coughing all night before he attended work and therefore nothing could be gained from speaking to her. This was a reasonable conclusion to reach and I accepted that it was with reasonable and proper cause. This was not something likely to seriously damage or destroy the relationship of trust and confidence, in particular because a disciplinary sanction was not imposed.

On 10 May 2021, issued the Claimant with a serious letter of concern and informed the Claimant that there would not be a review meeting (allegation 8).

86. The Respondent's disciplinary policy identified four levels at which it can be entered. Level 1 is a recorded warning and was at a verbal warning stage. It is the lowest disciplinary sanction possible within the Respondent's procedure. The purpose of the investigatory meeting was to ascertain whether disciplinary action should be taken. Mr Law decided that it was not appropriate in the circumstances and the Claimant's case did not continue within the disciplinary procedure.

87. It was relevant that the Claimant did not immediately inform his manager of the situation. The Claimant suggested that he was going to do it when he got home. He had a mobile telephone and could have made the call when walking to the car. Such a call would have taken less than a minute.

88. I accepted that a disciplinary sanction was not imposed. The serious letter of concern told the Claimant of the improvement required and that if it was not improved formal disciplinary action could be taken. This part of the letter demonstrated that a disciplinary sanction was not being imposed. Further there was no suggestion within the letter that it would be held on the Claimant's file or that it constituted a formal warning. I accepted it was important to underline the need to follow the process and in the circumstances it was reasonable to send a letter. I accepted that Mr Law had reasonable and proper cause for doing so. I did not accept that this was something likely to seriously damage or destroy trust and confidence in the Respondent.

89. The Claimant also relied upon being informed that there would not be a review. The Claimant suggested that he should have had a right of appeal because the investigatory meeting formed part of the procedure. The outcome of the investigation was that disciplinary action should not be taken. The right of appeal attached to findings following a disciplinary hearing and sanction under the procedure being imposed. I accepted the Respondent's position that there was not a disciplinary sanction to appeal against. In any event the review referred to in the letter related to reviewing whether the Claimant was complying with policies. I accepted that Mr Law considered it was unnecessary to have a such a review, because the Claimant understood what was required of him and it was not the same as other performance issues. I concluded that it was not a breach of the procedure not to refer to the right of appeal, because a disciplinary sanction had not been imposed. In the circumstances this was not something which was likely to seriously damage or destroy trust and confidence. I was satisfied that Mr Law and reasonable and proper cause for his actions and this was not a breach of the Claimant's contract of employment.

<u>Overall effect of the alleged breaches and whether there was a final straw</u>

90. I concluded the Respondent had reasonable and proper cause for refusing the Claimant's request for furlough. The remaining issues related to what happened on 15 April 2021 and the way it was dealt with by the Respondent. The significant event was the imposition of a warning without a disciplinary hearing, however that of itself was insufficient to amount to a fundamental breach. The Respondent immediately remedied the situation and was acting with reasonable and proper cause in the events that followed. The Claimant was not issued with a disciplinary sanction. I was not satisfied that the Claimant had proved that taking all of the matters together that the Respondent had breached the implied term of trust and confidence and there was not a fundamental breach of contract.

91. I also considered whether there was any affirmation of the breach in relation to the level 1 warning being imposed. The Respondent said that the Claimant had not waited too long. However I also considered that with questions of affirmation it is not just time, which is relevant, but the actions of the innocent party. In this case the Claimant appealed and engaged with the investigatory process which followed. There was not a statement saying that he was continuing under protest. In the circumstances I would have been satisfied that he had affirmed the breach.

92. The Claimant did not resign in response to a fundamental breach of contract by the Respondent. Accordingly the claim was dismissed.

_____
Employment Judge Bax
Dated 28 June 2022

Judgment sent to Parties on
07 July 2022 By Mr J McCormick

For the Tribunal Office