EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

MEMBERS **Ms N Christofi**
Ms I Sood

BETWEEN: **SR** **CLAIMANT**

AND

LM **RESPONDENT**

ON: **7-10 and 13-14 June 2022**

Appearances

For the Claimant: **In person**
For the Respondent: **Mr S Murray, counsel**

JUDGMENT

The Judgment of the Tribunal is that:

(i) the Claimant's claims of direct age discrimination and age-related harassment fail and are dismissed.

(ii) the Claimant's claim of constructive unfair dismissal succeeds.

(iii) the issue of remedy is adjourned to a date to be fixed.

(iv) The parties are encouraged to seek to agree terms as to remedy but, in the meantime, they should send the Tribunal dates to avoid in the period October - December 2022 within 14 days of the date of receipt of this Judgment.

REASONS

Given at the request of the Respondent following oral reasons delivered in Tribunal

1. In this case the Claimant was employed as a production engineer for the Respondent from October 2008 until 4 March 2021.He now brings claims of constructive unfair dismissal and age discrimination. The Respondent resists the claims.

2. The issues were set out in an agreed list of issues. The Claimant claims that he was constructively unfairly dismissed by reason of a series of actions (as set out in the Claimant's schedule). He relies on those same matters as direct age discrimination (in the case of the treatment of his PfDR assessment) and harassment relating to age in the case of a number of other acts (set out in paragraph 3 of the list of issues) from September 2020 until his resignation.

3. When the Claimant resigned on 26 February 2021, he gave 3 months notice to expire on 31 May 2021. On 4th March, the Respondent summarily terminated his employment by exercising their contractual right to pay him in lieu of notice. We accept that in those circumstances, following the cases of Marshall (Cambridge) v Hamblin 1994 ICR 362 and Fentem v Outform 2022 EMEA Ltd EAT 36 the Respondent is not to be treated as having terminated the Claimant's employment.

The law

4. Section 39 of the Equality Act 2010 prohibits an employer discriminating against its employees by dismissing them or subjecting them to any other detriment. Section 13 defines direct discrimination as follows: -

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favorably than A treats or would treat others.

Age is a protected characteristic.

5. Section 5(1) of the Equality Act states that a reference to a person who has the protected characteristic of age is "a reference to a person of a particular age group" and "a reference to persons who share a protected characteristic is a reference to persons of the same age group" Section 5(2) defines an "age group" as a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.".

6. Section 13 focuses on "less favourable" treatment. A Claimant must compare his or her treatment with that of another actual or hypothetical person who does not share the same age group. In comparing whether the employee has been treated less favourably than another, section 23 of the Equality Act provides that "on a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the

circumstances relating to each case." It is not necessary for all the circumstances to be the same, provided that the circumstances are materially similar. In other words, for the comparison to be valid, like must be compared with like.

7. Section 40 prohibits an employer from harassing its employees. Section 26 defines harassment as follows

> (1) A person (A) harasses another (B) if—
>
> (a)A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

If it is not reasonable for the conduct to be regarded as violating the Claimant's dignity or creating an adverse environment for him, then it should not be found to have done so. (Pemberton v Inwood [2018] ICR 1291)

8. The Equality and Human Rights Commission's Code of Practice on Employment ('the EHRC Employment Code') notes that unwanted conduct can include '*a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour*' — para 7.7. The conduct may be blatant — (for example, overt bullying) — or more subtle (for example, ignoring or marginalising an employee).

9. However not every adverse comment or conduct may constitute violation of a person's dignity etc. In Richmond Pharmacology v Dhaliwal 2009 ICR 724 The EAT said this "*While it is very important that employers, and Tribunal, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."* In Grant v Land Registry 2011 IRLR 748) the EAT also said this "*Tribunals must not cheapen the significance of these words"* [i.e., the meaning of the words used in the statute (i.e., intimidating, hostile, degrading etc.]. *They are an important control to prevent trivial acts causing minor upsets being caught in*

the concept of harassment. Being upset is far from attracting the epithets required to constitute harassment." It is not enough for an individual to feel uncomfortable to be said to have had their dignity violated, or the necessary environment created. Even if there is conduct which is sufficient to attract the necessary epithets, the conduct must still be related to the protected characteristic.

10. The burden of proof is set out at Section 136. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of an adequate explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts he will fail. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise.

Constructive Dismissal

11. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be dismissed by his employer if "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

12. It is established law that (i) conduct giving rise to a constructive dismissal must involve a fundamental breach of contract by the employer; (ii) the breach must be an effective cause of the employee's resignation; and (iii) the employee must not, by his or her conduct, have affirmed the contract before resigning.

13. If a fundamental breach is established the next issue is whether the breach was an effective cause of the resignation, or to put it another way, whether the breach played a part in the dismissal (Nottingham County Council v Miekle and Abbey Cars Ltd v Ford EAT 0472/07). In United First Partners Research – v – Carreras 2008 EWCA Civ 1493 the Court of Appeal said that where an employee has mixed reasons for resigning, the resignation would constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons.

14. In this case the Claimant claims breach of the implied term that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and the employer. Both limbs of that test are important: conduct which destroys trust and confidence is not in breach of contract if there is reasonable and proper cause.

15. It is irrelevant that the employer does not intend to damage this relationship, provided that the effect of the employer's conduct, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it (Woods – v- Car Services (Peterborough) Limited*)* [1981] ICR 666. It is the impact of the employer's behaviour (assessed objectively) on the employee that is significant - not the intention of the employer (Malik v BCCI *[*1997] IRLR 462. It is not however enough to show that the employer has behaved unreasonably although "reasonableness is one of the tools in

the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach". Buckland v Bournemouth University Higher Education Corporation 2010 IRLR 445

16. A breach of the implied term of trust and confidence is necessarily a repudiatory breach of contract (Morrow v Safeway stores 2002 IRLR 9 and Ahmed v Amnesty International 2009 ICR 1450).

Relevant facts- background and overview.

17. The Claimant was, as we say, employed as a production engineer for the Respondent. Over the period of his employment he was managed by a number of different managers. We accept the evidence of the Respondent, and particularly that of BA, that the Claimant was good at his job in terms of technical ability but was difficult to manage, and that he had a tendency to refuse to accept any feedback or appraisal rating that he did not like.

18. The Respondent operates a system of yearly appraisals (PfDRs). This places employees in various categories. Originally the top rating was "Highly Effective" followed by "Effective." This was replaced in 2016/17 by "outstanding" "successful" and "must improve." With the exception of one year (when BA was on maternity leave in 2000 and 2011), BA line managed the Claimant from the start of his employment until 2015.

19. In 2011 DB (who was line managing the Claimant during BA's maternity leave) gave the Claimant a "highly effective" rating for that appraisal year. On her return BA continued to give the Claimant highly effective ratings for the next 4 years. She says, and we accept, that she did so because she could not face a conversation with the Claimant about putting him back down to effective.

20. From 2015 to 2018 the Claimant was line managed by DB who gave him effective/successful ratings. He and DB fell out and DB was subsequently the subject of an unsuccessful grievance brought by the Claimant against him

21. CB took over as the Claimant's line manager for the last 2 months of the appraisal year 2018/2019. In his 18/19 appraisal the Claimant was graded "effective". A comment was made by the counter signing manager (PB) that the Claimant's strong views had, at times, been detrimental when working in a team environment. In June 2019 the Claimant was removed from a project he had been working on as the working relationship between the Claimant and the team had broken down. Those issues were not before us, but they are evidence of the Claimant's difficult relationships with others.

22. RB took over as the Claimant's counter signing manager in February or March 2020. From September 2020 through to February 2021 the Claimant took issue with a number of management actions taken by RB which he said amounted to age related harassment and treatment contributing to a breach of trust and confidence.

23. At the time of the Claimant's resignation he was 63. At that time there were 13 members of the Production engineering team. The Claimant was the only one in his 60s, but 6 of the remaining members were within the 50 to 60 age bracket. Of the 4 individuals who were managed by CB, one (the Claimant) was in his 60s, and two were in their 50s. (GoR)

24. Having heard evidence from all the witnesses, and for the reasons set out below, the Tribunal does not accept that any of the matters relied on as age-related harassment (and set out in paragraph 3.1 of the list of issues) amounted to harassment related to age, or conduct which contributed to a breakdown of trust and confidence. Nor do we accept that the Claimant's PfDR assessment either in October 2020 or February 21 amounted to less favourable treatment because of his age, for reasons which we explain below.

25. However, we have also found that the way in which the Respondent handled the Claimant's PfDR for the 19/20 appraisal year did amount to a fundamental breach of contract entitling the Claimant to resign without notice and amounted to a constructive dismissal.

26. For that reason, these reasons are set out in 2 distinct parts – the first dealing with the various complaints set out in paragraph 3 of the list of issues, and the second dealing with the PfDR process.

Age related harassment

27. Project Z. In September 2020 the Claimant was tasked with sourcing some components for another team which would be using them. The Claimant managed to sort out the sourcing problem, but the parts were in a different format from that which the team was expecting (5 short strips rather than one long strip). The Claimant informed the purchasing department TSD (copying in RB and CB) but the using team was not aware until the parts arrived. As a result, there was a delay in being able to make the product as a specialist jig needed to be created before the work could be done.

28. RB raised this matter in a team meeting in September 2020 as an example of why it had become particularly important during the pandemic to ensure that any changes in specifications were highlighted as effectively as

possible. (RB believed that the Claimant should have told the users in good time.) The Claimant considered that this was a criticism of him and became defensive and talked at length in his defence. We accept he did not wish to have any discussion about how, with the benefit of hindsight he might done things differently, and that as a result, the meeting became tense. While he was speaking RB began to shake her head and was clearly annoyed.

29. The Claimant complains that RB's headshaking and open annoyance with him amounted to age related harassment and created an intimidating and hostile environment. In evidence before us he said that he had told the purchasers (TSD) that the parts were in a different format, and it was for them to tell the using team. There would be no issue if others had passed the information on. He had done nothing wrong. RB's view was that it was for the Claimant to tell the users.

30. It is not for the Tribunal to say whose responsibility it was to tell the users. However, we are satisfied that it was legitimate for RB to raise the matter as a learning point at a team meeting. While the Claimant may have been upset that RB was shaking her head while he was speaking and by her open annoyance, there was nothing to suggest that this irritation was in any way related to his age. We accept that RB had been irritated because the Claimant was talking at length about what he had done and was not allowing discussion. In any event this was a trivial incident that is a long way from meriting the epithets in the definition of harassment set out above.

31. Project Y. The Claimant complains that he was (i) unassigned from a task relating to Project Y without warning and that (ii) RB did not reply to his email of concern (93) which stated that he would not sign off the task.

32. The Claimant had been given documents to review, to see if something was suitable for manufacture or whether there was anything missing, or not understood by the manufacturing team. In the course of that review the Claimant raised a health and safety concern. The Claimant wanted the assembly guidance document to include some health and safety information. The technical manager did not agree. The Claimant then told RB he would not sign off on the document.

33. At the time there was a stock shortage, which had led to a time pressure to get the design document finalised and out to the subcontractor. When the Claimant reported that he was unable to sign off on the document, RB reassigned the work to herself, agreed a compromise with the technical manager whereby the health and safety wording would not appear in the assembly guidance document. Instead, some brief wording would be

included directing staff to refer to local procedures and health and safety guidelines. (C91)

34. The Claimant's case is that RB should not have taken over the task assigned to him without further discussion with him and that this was unsupportive and created an intimidating environment. We do not agree. In the Tribunal's view this was an entirely reasonable management action in the circumstances. It was neither "harassment" nor was there any evidence to suggest it was related to his age.

35. The Claimant subsequently referred to the project Y and Project Z matters in his PfDR grievance as examples to evidence RB's "negative behaviour" towards him which he believed was age-related

36. Project W. In November 2020 Claimant volunteered to be a team member to work with team TSD on project W. When RB told the senior team lead (ND) the names of those who had volunteered to do the work, ND reported to RB that a key member of staff within his team, who would be working on the project, was an administrator who had expressed concerns about working with the Claimant. ND told RB that the Claimant was considered to be too rigid, domineering and they were concerned that he would not collaborate effectively.

37. On 25 November 2020 RB took the Claimant into a separate meeting room and told him that TSD had asked that the Claimant not be assigned to the task and fed back to him the reasons which had been given to her by ND. RB asked him to reflect on what he could do to improve the situation. The Claimant was affronted. He did not believe RB then, and he does not do so now. He told RB that the comments were untruths and slanderous allegations. He said he had many years experience, and no one had made such comments before. In evidence to the Tribunal, he said RB had been lying when she provided that feedback. He asked for the identity of those who had made the comment and for evidence that they had done so.

38. We do not accept that RB was lying; it is a serious accusation to make, and none of the evidence suggested that she would do such a thing. It may be that the Claimant was unduly sensitive at this juncture because it followed shortly after the Claimant had received his PfDR rating of "must improve" (see below). It was a reasonable management action to provide this feedback to the Claimant so that he could reflect on it and avoid problems in the future. We also find that it was reasonable of her not to provide the names of those individuals who had made those comments. Those staff members were junior to the Claimant, and it was reasonable for RB to believe that the Claimant might confront them if he knew who they were. We see this as a reasonable management instruction. It was

not a violation of his dignity. It did not create an intimidating, hostile degrading humiliating or offensive environment for him. Moreover, it had nothing to do with his age.

39. Security breach – personal safety risk. On 6 January 2021 RB produced a document on the Respondent's "low side system" which identified areas within which the team could be vulnerable for business continuity purposes. This was sent to the production engineering team to review. In that document reference was made to any specialisms which were only held by one member of the team. The Claimant had such a specialism. In that document the Claimant was identified by his first name and by a single word summarising the area of his expertise. The Claimant considered that this amounted to a security breach and that it put his personal safety at risk. He amended the document by applying black highlighter so that the area of expertise could not be seen. RB then re-amended the document by removing the black highlighting, but substituting the full title of the Claimant specialism with its first letter followed by asterisks, so that it read "H****". (RB said that black highlighter was not appropriate in any event as it was possible to see the words underneath.) The Claimant then escalated the matter directly to the security team and the outcome was that the document was moved to the high side.

40. The Claimant complains that RB had put his personal safety at risk and removed his redactions without consulting him. He says he felt harassed when he read the document.

41. We accept RB's evidence that she did not consider this to be a security risk and that it was important for the team to understand that the Claimant had a particular niche capability. The document was to be circulated to the team only and the niche capability was only identified by a single letter followed by asterisks.

42. While the Claimant may have genuinely felt the document jeopardised his safety, the matter was resolved within a few days. The email exchanges at the time evidence that different individuals had different views as to what is and is not a security breach. We do not accept that circulating the document or amending it in the way RB did amounted to harassment within the definition set out in 26 of the Equality Act nor do we accept it had anything to do with his age.

43. Hospital treatment During the lockdown in early 2021 staff were predominantly working from home. Staff were also told that they might be required to attend on site from time to time, and that they should inform their line management if they were unable to attend work on site for any particular reason.

44. On 24 January 2021 the Claimant informed CB and RB that he was not able to attend work on site on 4 February as his wife had a hospital appointment. On the 2 February 2021 CB asked the Claimant to attend site the following day - 3 February 2021. (203) The Claimant responded that he could not do so as he needed to isolate pending his wife's medical appointment (203). CB did not require the Claimant to attend but emailed back as follows "*I am very disappointed that you haven't mentioned previously that you need to self isolate. You must inform us of this requirement in writing as soon as you are aware of it*."

45. The following day CB sent the Claimant an email detailing some tasks where the Respondent's expectations had not been met. It continued "*Regarding yesterday's urgent request to work on site, you refused to come on site on the basis that you are isolating as your partner is about to have an operation. You had failed to mention this requirement to isolate previously. I must remind you that you need to notify me as soon as possible if your ability to work on or off-site is affected*."

46. The Claimant was aggrieved by these communications. He considered that they were reprimands, and that they were insensitive and unfeeling in circumstances. He says that he did not himself know he had to isolate until the last minute, and it was therefore unreasonable to reprimand him for something about which he was unaware. He says this demonstrated a dismissive attitude towards his and his wife's personal circumstances at the time, and created an offensive environment for him. In cross examination the Claimant went further and said that the request that he attend work the day before his wife's operation was a deliberate act in the knowledge that the Claimant's wife had an operation the next day. We do not accept that.

47. We accept that it was disruptive to staff planning to hear about the Claimant's needs so late in the day. It was not unreasonable to remind the Claimant of the policy. The Claimant had chosen to identify only that he could not come into work on 4 February. We had no evidence that he had fully informed the Respondent of his wife's personal circumstances. This was ordinary and proper management, and amounted neither to harassment nor was it related to the Claimant's age

48. Desk move. As a consequence of the pandemic the Respondent's policy (159) was that, when working on site, "*an overall aim is to ensure no one sits nearer than 2m from other staff. This will involve sitting in a chequerboard pattern – no one in front of, behind or next to anyone else. Most of the site already does this but we will be enforcing this rigorously.*" The Claimant's desk, which was next to the window, faced the desks of another team. As RB had no control over when members of the other team

would be attending site RB decided that the row of desks which included the Claimant's usual desk would not be utilised. She said, and we accept, that she did not want to have to liaise with the other team about who was going to be using which desk each day, and they had plenty of other desks which could be used. The Claimant had previously expressed concern about sharing desks with other members of staff in the pandemic.

49. CB, RB and the Claimant had discussed the desk move. RB allocated the Claimant a desk for his sole use, which was one desk away from the window. It was also diagonally opposite RB's desk. The Claimant commented that this had less natural light than his old desk but did not suggest that he had any specific lighting requirements. On 11 January 2021 RB emailed the Claimant to the effect that when next on site he would need to relocate his desk, and the new desk would be left solely for his use.

50. The Claimant complains that RB's prime reason for instructing him to move was to move him near to RB and allow RB to harass him. He has arrived at this conclusion because of what happened later see below. We do not accept that. We accept RB's explanation as to why she had asked the Claimant to move his desk and we do not consider that it amounted to a either harassment, nor was it age-related.

51. Project T rebuke. On 12 February 2021 when both RB and the Claimant were working on site, RB was due to attend a meeting with the Claimant with another team. She had been told, by that other team, that a document which the Claimant had written had not been well received by the team and had been described as "pointy". RB wanted to relay those concerns to the Claimant before meeting, so that the Claimant adopted a constructive approach, rather than apportioning blame at the meeting. She stood up from her desk in order that she could speak to him over the top of the Perspex screens, and told the Claimant that there had been concerns about the tone of the document.

52. RB's evidence was that while this was in the open plan office, other colleagues were at least 8 metres away and could not hear. She says that the Claimant became angry and wanted further details and demanded "line by line" feedback on the document. He implied that she was making it up. He said he had never had that type of feedback before. She said he went on to make disparaging comments about her line management skills, and demanding to know what she meant by the use of the word tone.

53. The Claimant's evidence, on the other hand, is that RB was publicly rebuking him in an open plan office and talking to him in a raised voice. While he remained calm, she was irritable when he asked for details.

54. We do not accept that RB was publicly rebuking the Claimant in the office, or that others could hear. This was simply feedback on a day-to-day task. We also accept that the Claimant got angry and implied that RB was making it up. While it is evident that RB did get irritated, we are satisfied that she did so in response to the Claimant's response to that feedback. We do not accept that this was a deliberate attempt to be confrontational or to humiliate the Claimant. Her irritation related to his reaction, and not to his age.

Conclusions relating to the issues in paragraph 3 of the list of issues

55. Age discrimination. We have considered each of the allegations of age-related harassment identified by the Claimant, individually and we have looked at them collectively. All of the matters about which he complains and set out above were perfectly proper and reasonable management actions. There was nothing in the evidence which we heard to suggest conduct which had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading or offensive environment for him. The Claimant was extremely sensitive to anything which he regarded as criticism. Matters which others would have seen as every normal everyday management, were the source of offence to the Claimant.

56. That finding alone is sufficient to dispose of the Claimant's claim for age-related harassment but for completeness we would add that there was no evidence from which we could infer that any of the actions about which the Claimant complains were related to the fact that he is over 60. In support of his allegation that the actions that RB took related to his age the Claimant refers to BA's email of 22 January 2021 (189/191) - see below- as material from which the Tribunal should infer that the Respondent's actions were influenced by his age. We do not accept that. The actions set out above were management actions taken by RB and not by BA. (While we have no doubt that members of management did privately discuss the Claimant's conduct, we do not accept that there was a conspiracy to hound him out of his job which was influenced by the fact that he was over 60.) The Claimant refers to BA's remark that "He [the Claimant] continually refers to his 35+ years experience and management training from the 80s. He won't take any part in training which would update his skills (management for example) where methods and ways of managing/leading might have evolved or changed."

57. We do not consider that we should infer age discrimination from this sentence, or from the email as a whole. We accept that as a matter of fact the Claimant often did refer to his long experience as a way of resisting further management training. He referred to his years of experience a number of times during the course of the hearing. It is a legitimate criticism to make of someone who refuses to attend further management training on

the grounds that they have had training a considerable time ago and because they have long experience, with the implication that it has that the individual's performance cannot be enhanced by a further training.

58. Further, as we have said (and with the exception of the PfDR process which we deal with below,) the matters about which the Claimant complains were legitimate and reasonable management actions in the circumstances which, whether regarded individually or looked at as a whole could not be said to contribute to a breach of trust and confidence.

PfDR process

59. The Respondents PfDR year runs from the beginning of April to the end of March in each year, though surprisingly perhaps, the Claimant's objectives for the 19/20 appraisal year were not agreed until September 2019. Before that in June 2019, CB had removed the Claimant from a project he had been working on after complaints about his work. In his witness statement (para 9) CB says "*I had to tell the Claimant that he was being taken off the project. I tried to make these tricky messages positive as possible by telling the Claimant that if the team did not want to work with him that I would be happy to have him back to complete work where others would value his input. We spoke in person, and I followed up in writing*." We do not have a copy of that email. The Claimant then made a formal complaint about the project manager who had complained about his work. That complaint was investigated but not upheld. We have had no evidence about that investigation.

60. The proper practice (32) would be to have objectives in place by 30th June, to have a mid year review in September/October and to have a year end meeting in April following the end of the PfDR year at which the individuals progress against objectives would be assessed. The PfDR forms would then be finalised and uploaded. The line manager should continually review an individual's progress against objectives in 1 to 1s.

61. In 19/20 the year end review was impacted by the first national lockdown in March 2020. The guidance provided by the Respondent for completing the PfDR for the performance year 19/20 (C27) suggests that normal one-to-one conversations should be continued, and that the line manager should collate a short summary overview to be updated on the system once they were back in the office - to be discussed with the individual but keeping a light touch. In the Claimant's case, as CB accepted in evidence, this light touch approach did not happen.

62. CB's evidence was that initially it was thought that PfDR process for 19/20 would be dispensed with. The Claimant's objectives were set in September 2019 halfway through the year. Three of those objectives were generic to the other individuals who were line managed by CB. A fourth objective

"delivering greater than 80% of tasks on time and ensuring visibility of all tasks" was specific to the Claimant because CB and other managers in the team had a perception that the Claimant didn't deliver on time and didn't maintain a visible workload, so that it was not clear to those managing the Claimant what tasks he was actively engaged on.

63. In September 2020 line managers were advised that PfDR process for 19/20 was to be completed by the end of October. Effectively, because of the pandemic, the process that should have been completed in April 2020, was now some 6 months after the event. At that time CB line managed 4 individuals, the Claimant, two other engineers in their 50s and a probationer who was not covered by the same appraisal process as the others.

64. In a normal year, as set out above, managers would have had a meeting with their line reports to discuss their performance before giving the employee their final overall rating.

65. However, CB did not do this. Instead, he sent each of his line management reports a PfDR form for each of them provide a self-assessment. It was CB's evidence that this written self-assessment was not part of the normal process, but was a step which he had added. It was intended to take the place of the PfDR end of year meeting (when the individual's performance would have been discussed with his manager). Once the individuals had completed that self-assessment, CB filled in his assessment and the relevant rating and uploaded it to the system without further discussion. CB says that he did not have a meeting with his direct reports to discuss their performance because of the site covid policy and open plan offices but we do not accept this. Meetings could have been arranged via teams or other video means.

66. The Claimant had in any event filled in his self-assessment in mid-June 2020 (see his grievance page 99). CB did very little with this because it was not clear at that time whether the PfDR process needed to be completed. CB told the tribunal that once it became clear that the PfDR process needed to be done, he completed his assessment of the Claimant's performance on the PfDR form on 12 October 2020.

67. At that point CB told RB that he was planning to grade the Claimant as "successful". RB asked CB if he had read the company guidance on appraisal gradings. Her clear implication was that she did not consider that the Claimant should be graded successful. She told the Tribunal that, while she was not a hundred percent sure, she did not think that when she made that observation, she had seen CB written assessment.

68. CB says that as a result of this he went away and, having looked at the guidance, specifically appendix C, concluded that the Claimant should be given a "must improve" rating. He noted in particular that, according to the guidance, a rating of "must improve" could be awarded, even to staff who produced very good work, where there had been "unacceptable costs in terms of poor morale" or where an employee was "brusque or dismissive of colleagues/customers/stakeholders". In other words, the Claimant's behaviours were unacceptable – as well as outcomes which needed to be improved. It was also CB' evidence that, following RB's intervention he did not change the wording of his written assessment - or his conclusions on the original objectives and competencies - only the overall rating.

69. We did not accept that evidence. It would, however, appear that CB had assessed Claimant's achievements as follows:

> Objective 1 Efficiency savings. Achieved
> Objective 2 Knowledge sharing within the team. Partially Achieved
> Objective 3 feedback. Not achieved
> Objective 4 timeliness of tasks and transparency of progress. Not achieved
> PDP1 skill development not fully achieved
> PDP 2 learning and change. not fully achieved
> The line manager's overall assessment (57) is largely critical

70. It seems most unlikely that if these had been the markings he would have been graded as successful. We find, on the balance of probabilities CB amended the assessment after he had spoken to RB. Once he had amended his assessment, he again discussed the Claimant's grading with RB.

71. CB uploaded the Claimant's PfDR with the "must improve" rating to the Respondents system on 13 October 2020. He then sent it to the Claimant without any prior discussion but with a short message in a Teams chat that the Claimant "might not like" his comments. CB sent appraisal assessments to his other direct reports, ZP and CA, shortly afterwards on 19th and 23rd October respectively. They both received a successful rating.

72. The Tribunal has not had the benefit of seeing the version of the PfDR which was sent to the Claimant on 13 October 2020. What appears in the hearing bundle is a version of the PfDR which was subsequently amended. When the Tribunal enquired about the start of the hearing, we were told that the original version had been overwritten - and there was no record of the original.

73. Mr Murray informed the Tribunal that his instructions were that (i) the principal change was that the rating for objective 2 had been changed from not achieved to partially achieved, (which appears incorrect) (ii) more text

was added to CB's assessment of objective 4 which remained "not achieved" (we do not know what text) (iii) that PDP1 had been changed from "not fully achieved" to "partially achieved" and (iv) the 5th paragraph on page 57 had been amended to identify that there had been "three" individuals who had expressed concerns about working with the Claimant (as opposed to some individuals) and that (v) the line manager's overall assessment had been "revisited". However, when reviewing the documents in chambers it became apparent that (i) was not a change that had been made from the old version to the new as, in the Claimant's grievance, he had complained that he had only received a "partially achieved" assessment for objective 2 (see paragraph 75 below). We had no documentary evidence by way of a note taken by CB or HR at the time as to what the changes were. CB explained in his witness statement that he had to rewrite the PfDR document, but he does not explain what those changes were or why he made them.

74. On 5 November 2020 the Claimant emailed a grievance to the head of HR (99-107). In his grievance he states that he felt that it was not a fair assessment and that he had been discriminated against. In his grievance he set out a number of reasons why he considered that his PfDR was unfair. In particular he says that:

(i) He had drafted some notes on his PfDR and shared them with CB during lockdown and that CB's response was only 5 sentences.

(ii) Despite bi-weekly one-to-ones during the previous 4 months he did not recall any further PfDR conversations, which he would have expected if CB had concerns that his overall PfDR assessment would be a "must improve".

(iii) The only other PfDR comment CB made was a comment, on Teams chat, that the Claimant might not be best pleased with it.

(iv) He had had no adverse feedback from CB regarding his PfDR during the 19/20 reporting year or during the last 6 months. If CB had such concerns, then he would have expected him to discuss those topics with him and provide clear guidance at one to ones to getting back on track.

(v) He had not been given the opportunity to read through the manager's PfDR draft to discuss the content and raise points of concerns prior to it being finally formally sent to him.

(vi) He explained why, in his view, the performance ratings of "partially achieved" in relation to objective 2 and "not achieved" for objectives 3 and 4 were incorrect.

(vii) He provided his own response to, and rebuttal of, the line manager's performance overview.

75. It was put to the Claimant in cross examination that his grievance was one of process, not substance. The Claimant denied this he said the process was secondary. "If I had had an effective rating we would not be here today. The "must improve" was unfair. He said that in all other PfDRs he had a discussion with the line manager before it was uploaded and, in this case, there had been no such discussion. Reading the grievance (summarised above) it is clear that the grievance is partly about process (i.e. not having the chance to discuss matters with his manager) but also about the unfairness of the ratings.

76. On receipt of the grievance VA and a wellbeing representative of HR met the Claimant 17th November. There are no notes of this meeting. They suggested using the services of a mediator to resolve his grievance. In an email dated 19th November (111) the Claimant declined this proposal, saying that his preference would be to avoid going straight to the grievance process and proposed that

"As a first action toward avoiding instigation of the grievance process, my request is that the PfDR sent to me is fully retracted, along with a written acknowledgement that the PfDR process has not been followed and include an apology for the distress caused. It is only at that point do I feel it will then be possible for my manager and me to talk about the matter like adults as you alluded to during Tuesday's meeting. Hopefully starting with a clean slate will enable us to reach agreement and avoid the grievance process"

77. In her witness statement VA describes this communication as the Claimant stating that he did not want to continue with the formal grievance process. She says he had told them that his grievance would be withdrawn if the PfDR was retracted with an acknowledgement and an apology that the process had not been followed. In cross-examination she said that *"I read it if we agreed to everything, he would retract the grievance*." VA said she would get back to him.

78. The Claimant says that he had agreed with HR, when he was told that his PfDR would be retracted and rewritten, that if it was still inaccurate and unfair after the rewrite, he would continue to progress his grievance through the formal process. We accept that on the balance of probabilities, and inline with his patterns of behaviour.

79. VA met RB on 25th November and CB on 26th November 2020 to discuss the Claimant's grievance. We have no notes of these meetings. VR, RB and CB do not deal with what was discussed in those meetings in their

witness statements. In answer to questions from the Tribunal CB said that "I was never given the content of the Claimants grievance". He said that VA had given him "a couple of points" which he should change in the PfDR such as "he did some training with an individual in my team" and that he should identify how many people had expressed concerns about working with the Claimant. CB told VA that he was not willing to change his overall assessment or rating as a "must improve".

80. VA told the tribunal that during her meeting with CB she had his grievance on her lap and that she flagged up with CB the areas where she thought that there was need for change, but she was vague and unspecific about which changes she had suggested. In any event, beyond explaining where more clarity/explanation might be needed it was not for VR to dictate where CB should make changes.

81. On 14th December VA wrote to the Claimant referring to his request for the PfDR to be retracted. She says: "*I can confirm that I have now met with CB, RB and BA. They agreed that the PfDR process has not been followed and they agree that your PfDR should be fully retracted. I have asked our IT team to return your PfDR to CB's control as soon as possible and then to arrange a meeting with you to go through this with you. Due to the Christmas break this will now not take place until the middle of January 2021. I would like to apologise on behalf of the organisation for any distress the actions of CB may have caused you and I hope we can resolve the matter informally."*

82. In questions from the tribunal, VA said that the Respondent could not "retract" the PfDR but that the employee could set out on the appraisal form why they did not agree with it. In the Claimant's case she had asked IT to "roll it back into CB's control so that he could amend it". This is of no consequence provided that CB was able to amend it.

83. At some point between November 2020 and 24th February 2021 CB made some minor changes to the Claimant's PfDR assessment but, as he had indicated to VA, the overall assessment did not change. (As we have said there is no record of what these changes were, and we only have Mr Murray's submissions on the point as set out in paragraph 73 above.)

84. On 21 January 2021 a meeting took place between RB, CB and the Claimant. This meeting was intended to give the Claimant feedback on a number of matters that had arisen recently. Two related to particular tasks and about which the Respondent had concerns. A third issue was a criticism that the Claimant had raised a grievance about his PfDR rather than raising his concerns directly with his line manager. It appears from

CB's note of that discussion (195) that the Claimant had got angry, and CB had had to call a stop to the meeting. CB subsequently emailed RB, and VA copying in BA, to the effect that he did not consider that he could continue to be the Claimant's line manager as he was becoming "increasingly unmanageable, requiring more of my time to the expense of the rest of the team…. I am increasingly feeling like I'm in over my head."."

85. On 22 January 2021 BA, who was at that time the head of the Department sent a lengthy email to CB, RB and VA. In that email she expresses regret that they were "*having to deal with such a difficult individual"* and said that she felt that it had *"come to the point where a different direction needs to be taken."* She then goes on to be highly critical of the Claimant, stating how difficult he had been to manage. She criticises his behaviour, saying he was unable or unwilling to accept any constructive feedback, or to self reflect. Amongst other criticisms she said that he would "*continually refer to the 35+ years of experience in management training from the 80s. He won't take part in any training which will update his skills (management for example) where methods and ways of managing/leading might have evolved or changed*." She concludes by saying this: "*The amount of management time, team destruction and the fact that many development teams and PMs refuse to work with [the Claimant] means that the benefits he brings to the business are greatly reduced. What can we/should we do next as I can't watch any other manager going through this stress and wasted effort when it appears that [the Claimant] is unlikely ever to change?!"*

86. On 24th February a telephone video conference was organised between the Claimant and CB at which VA was present. There is no written record of this meeting. CB's management log records that at the meeting CB "read out in detail his assessment as well as the Claimant's assessment and that a discussion then took place on the next steps and how the Claimant could respond." The Claimant did not engage with CB at that meeting and did not comment on the management assessment, saying he needed time to digest it once he had seen the written version. A copy of the amended PfDR was forwarded to him later that day. The Claimant had clearlty anticipated a discussion with CB about his 19/20 appraisal, - rather than what happened – which is that CB simply read out a "slightly" revised assessment, and in which there was no discernible change.

87. In his witness statement the Claimant cross refers to his claim form (A12) which states refers to the fact that the redrafted PfDR had not changed. He says he was relying on his memory of the original PfDR as it was only available on site and he was working from home)*but that "regardless of any changes, the fact is that much of the content was still inaccurate and unfair. The separate objective assessments and overall assessment of must improved had not been changed from the original. "*

88. 2 days later on 26th February 21 the Claimant resigned with notice stating that he intended to leave on 31 May 2021. He referred to previous grievances and to the project Y and "Projects T rebuke" matters.

Conclusions

89. As we have said we do not consider that the various matters referred to in paragraphs 27-54 above amount to any more than reasonable management of the Claimant. None of those matters could be said to contribute to the breakdown of trust and confidence.

90. However, the handling of the PfDR process and the subsequent grievance appear to be little more than window dressing.

91. The Tribunal was concerned that CB, having assessed the Claimant as successful, then changed his provisional rating of the Claimant to "must improve" following the intervention by RB. We have no issue with a more senior manager providing an opinion as to the Claimant's performance. However, the nature of, and reasons for, RB's intervention were opaque.

92. CB would certainly have been aware that the "must improve" rating would come as a shock, not simply because the Claimant did not take critical feedback kindly, but because CB had not provided any feedback to the Claimant during the 19/20 appraisal year which would have indicated to the Claimant that he was on course to receive such rating. The Claimant had been told that he'd been taken off a team but evidently CB had tried "make this tricky message as positive as possible".

93. CB said he did not provided feedback because in the first 6 months of the appraisal year "managers were being told not to bother with PFDR's in that year". However, the national lockdown only occurred at the very end of that appraisal year, so CB would not have been aware during that year that the PfDR process might be dispensed with.

94. If CB genuinely considered that the Claimant was failing, then he should have provided clear and regular feed back to that effect. No bad appraisal should take an employee by surprise. It was at best unsatisfactory that many of the criticisms levied at the Claimant in CB's 19/20 assessment had not been discussed with him in his previous one-to-one's. We accept that the Claimant was quick to take offence, but he still required proper management.

95. In addition, while CB told the Tribunal in evidence that his overall assessment of "must improve" related to the Claimant's behaviours (see paragraph 22) that is not clearly spelled out in the PfDR. Having considered the PfDR carefully the only paragraph which clearly critiques the Claimant's behaviours is the 5th paragraph, (Page 57 of our bundle), where the Claimant refers to "individuals across the engineering community who had expressed concerns about working with him." We heard no evidence that these matters had been properly discussed with the Claimant (and examples of his behaviour explained) during the 19/20 performance year in his 1-1s.

96. On its own, a less than adequate appraisal process may be poor management but would not usually amount to a breach of trust and confidence. However, we consider that these matters, coupled with the way in which the Respondent handled the Claimant's subsequent grievance, and the "rewrite" did amount to a breach of trust and confidence.

97. The clear implication of VA's letter to the Claimant of 14 December 2020 was that there would be a complete rewrite of the PfDR, and that the Respondent intended to change the Claimant's overall assessment. However, CB told the tribunal that he had never intended to change the assessment, and that he made this clear to VA. In answer to a question from the Tribunal VA accepted that when she sent the letter of 14 December, she was aware that the overall assessment would not be changed. We consider that it would have been obvious to the Respondent that the Claimant did not intend to avoid the grievance process unless he could "reach agreement" as to the PfDR - and that he did not intend to withdraw his grievance if all that happened was that the PfDR was retracted and reissued 3 months later in very substantially the same form.

98. Given that, the email of 14 December 2020 was disingenuous. The Respondent retracted the PfDR knowing that it would be reissued in substantially the same form. VA issued an apology "*for any distress the actions of CB may have caused you"* - but it was hard to see that such an apology issued by VA for (i) the actions of CB and (ii) in respect of which CB himself had not expressed regret was in good faith.

99. The Claimant had said he would withdraw the grievance if the PfDR was retracted. By retracting the PfDR – but intending to reissue it in substantially the same form – the Respondent was simply dodging its obligation to deal with the Claimant's grievance. This is what the Claimant perceived, in our view correctly, when he received the revised PfDR and found that it had not changed, and that the points that he had made in his grievance had not been addressed. VA says that they were not addressed

because the Claimant had decided to drop the grievance, but we do not accept that. The Claimant wanted his points addressed via the PfDR process, rather than through the grievance process and it must have been clear to the Respondent that he wanted those matters addressed. In failing to do so and in stringing the Claimant along for some 2 months, (4 months from the date when the Claimant was first sent his performance rating in October) without any intention to address the Claimant's points, the Respondent was not acting in good faith and had destroyed the necessary degree of trust and confidence between the parties.

100. VA had not provided a copy of the Claimant's grievance to CB, so that CB did not deal with the numerous points that the Claimant had set out at some length in his grievance. It may be well have been that the Respondent disagreed with, or did not accept, the Claimant's points. However, on an issue which is as important as a PfDR, an employer has a responsibility to deal carefully with those points and to say why they have rejected them, and to explain why the employee has merited a must improve rating. This is particularly so where, as here, the employee had previously been successful or highly effective, and had not had a clear warning during the course of the appraisal year that his failings were likely to lead to a must improve rating. We bear in mind that, for nearly all of the appraisal year 19/20, the Claimant was at work and attending regular 1 to 1s with his line manager.

101. We also considered, on the balance of probabilities, that when RB had asked CB to think again as to whether the Claimant merited a successful rating, and when CB acceded to that request, both RB and CB had been influenced by matters (set out above) which properly fell into the 20/21 performance year, and had those matters not been improperly taken into account the Claimant was likely to have got a successful rating, as originally suggested by CB to RB.

102. For whatever reason, the Respondent had misled the Claimant for some 2 months over the action that they had been prepared to take and had failed to address his grievance.

103. The failure to discuss and deal with the points raised by the Claimant's grievance, to properly explain the rating received and why, the length of time the Claimant was required to wait before he was given his revised PfDR, and more fundamentally the misrepresentations made to the Claimant about what would happen following the "retraction" of his PfDR amounted to a breach of trust and confidence, taken without reasonable or proper cause, and entitled the Claimant to resign without notice,

104. The Claimant resigned 2 days after he received the marginally revised PfDR so there is no question that he delayed such as to affirm the contract. Although the Claimant did not refer to the PfDR in his resignation we have no doubt that it was an effective cause of his resignation, (although the Project T rebuke and Project Y matters also played a part.)

105. For the avoidance of doubt, while we are highly critical if the Respondent's handing of the PfDR and grievance process we make no finding that those matters were influenced by the Claimant's age. .

106. The Tribunal does accept that the Claimant was difficult to manage. He has done himself no favours by raising the many complaints detailed in paragraphs 27 – 54 above, which as we have said we regard as straightforward reasonable management. When considering remedy, issues of contributory conduct and the length of time that the Claimant was likely to remain in employment with the Respondent may arise.

107. A one day remedy hearing will be fixed following receipt of the parties' dates to avoid. If the parties are able to arrive at terms of settlement in advance, they should inform the Tribunal at the earliest opportunity so that the date can be vacated

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Employment Judge Spencer
20th July 2022

JUDGMENT SENT TO THE PARTIES ON

26th July 2022

FOR THE TRIBUNAL OFFICE