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constructive unfair dismissal under s.95(1)(c) Employment Rights Act 1996, disability discrimination, wrongful dismissal, unlawful deduction of wages and a redundancy payment.

2. All the claims with the exception of constructive unfair dismissal have been withdrawn by the claimant, the last being the disability discrimination complaint dismissed on withdrawal on the first day of this hearing.

3. At the case management hearing held on the 26 May 2021 the claimant's claims were discussed and it was recorded that the final straw relied upon was the outcome of the appeal against his grievance. The draft list of issues record the individual breaches of contract alleged by the claimant, which were subsequently amended on the first day of this final hearing. It is notable that the last allegation is requiring the claimant to return to working under Samirah Ashraf. The claimant confirmed that this was the last straw he relied upon, changing the last straw incident. During closing submissions the claimant changed to the last straw for the third time to the original last straw, namely the grievance appeal outcome. I have dealt with both last straws individually and cumulatively taking into account the fact the claimant is a litigant in person.

4. The claimant seeks reinstatement or re-engagement if successful.

5. With the Equal Treatment Bench Book in mind the claimant was offered and took breaks whenever he required. To further assist the claimant case law was emailed to him by the respondent with reference to the relevant legal principles the night before and by 9am before the hearing started on day 4 and oral submissions were to be made written submissions were exchanged. The claimant also had a break between counsel's oral submissions and making his own oral submissions in order to prepare further. Early on in the hearing I referred the parties to Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1, CA.

6. The claimant at the outset of the hearing indicated he wished to amend his claim to include a health and safety complaint. When it became clear that the hearing will need to be adjourned to a later date if the claimant's application was successful, on the basis that the evidence to be given by Chris Spence would become relevant, the claimant indicated that he did not want to proceed with the amendment application and withdrew it so as not to delay the hearing of his claim.

Agreed issues

7. Following an amendment by the claimant to the agreed issues, the parties agreed amended issues for the Tribunal to determine as follows:

1. Can the Claimant prove that there was a dismissal?
2. Did the Respondent do the following things:

Samirah Ashraf

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- 2.1 Subject the Claimant to sustained bullying behaviour by Samirah Ashraf.
- 2.2 In November 2018 Samirah Ashraf shared the Claimant's mobile phone number without consent.
- 2.3 Subject the Claimant to a 1-2-1 meeting with Samirah Ashraf where she shouted and banged her hands on a table in an Asda café and demanded medical evidence.
- 2.4 In January 2019 Samirah Ashraf accused the Claimant whilst in the cafe in Asda, that he was trouble.
- 2.5 Repeated the same comments in the cafe in Asda in February 2019.
- 2.6 Samirah Ashraf referred the Claimant to Occupational Health in June 2019 without full authority and wrote unfavourable comments about the Claimant in a request for an occupational health report.
- 2.7 Being accused by Samirah Ashraf of not following management instruction to work in Wigan store.

Neeta Patel

3. Neeta Patel failed to investigate the Claimant's grievance of 5 December 2019, or deal with the Claimant's grievance in a timely manner.

Michael Whan

4. Michael Whan failed to properly investigate the Claimant's subsequent complaints about the manner in which the grievance had been investigated and conducted.
5. Michael Whan failed to uphold the Claimant's appeal into his grievance as above.
6. Michael Whan required the Claimant to return to working under the same line manager against whom he had raised his complaints.
7. Did the final act listed above (paragraph 2J) occur and did it amount to a 'final straw'?
8. Did the listed acts breach the implied term of trust and confidence? Taking account of the actions or omissions, individually and cumulatively, the Tribunal will need to decide:

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- 8.1 whether the respondent had reasonable and proper cause for those actions or omissions, and if not
 - 8.2 whether the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.
9. Was the fundamental breach of contract a reason for the claimant's resignation?
10. Did the claimant affirm the contract before resigning, by delay or otherwise? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

Reason

11. Has the respondent shown the reason or principal reason for the fundamental breach of contract?
12. Was it a potentially fair reason under section 98 Employment Rights Act 1996?

Fairness

13. If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

REMEDY

REINSTATEMENT

1. Does the claimant wish to be reinstated to their previous employment?
2. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
3. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
4. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
5. What should the terms of the re-engagement order be?

COMPENSATION

6. What basic award is payable to the claimant, if any?
7. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
8. If there is a compensatory award, how much should it be? The Tribunal will decide:

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- a. What financial losses has the dismissal caused the claimant?
- b. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
- c. If not, for what period of loss should the claimant be compensated?
9. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
10. If so, should the claimant's compensation be reduced? By how much?
11. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
12. Did the respondent or the claimant unreasonably fail to comply with it?
13. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
14. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
15. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
16. Does the statutory cap of fifty-two weeks' pay apply?
17. What basic award is payable to the claimant, if any?
18. Would it be just and equitable to reduce the basic award because of
19. any conduct of the claimant before the dismissal? If so, to what extent?

Evidence and the bundle

7 The bundle consisted of 429 pages in addition to witness statements and documents produced during the final hearing. A neutral chronology was produced by the respondent, case law and written closing submissions were received from both parties which have been taken into account.

Witnesses

8 The Tribunal heard evidence from the claimant on his own account and on his behalf, David Walton an ex-employee of the respondent, and Terence McKay who had worked with the claimant during the relevant period. David Walton's evidence is marked "character reference" and was not relevant.

9 I found Terence McKay was not a credible witness. His written evidence goes into detail concerning allegation 2.3 the alleged incident in Asda including the words overheard by him at the time. He did not witness Samirah Ashraf banging her hands on the table and there is no reference to this in the witness statement. At the grievance investigation meeting held on the 10 April 2020 when asked whether he had sight of an occupational health referral at the claimant's stand or recall any discussions around occupational health Terence McKay stated he could not remember. In oral evidence under cross-examination Terence McKay explained that he was better able to remember the incident in 2022 approximately two years after the grievance investigation and approximately four years after the event. Terence McKay was trying his very best to support the claimant's case, however, his evidence could not be relied upon.

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10 Turning to the claimant I found his evidence was not credible and could not be relied upon when he described his version of the relationship with Samirah Ashraf. Taking into account the factual matrix coupled with the contemporaneous documents I concluded the claimant had little respect for her as a new manager, she was much younger in age and in his view did not possess the managerial experience the claimant had accumulated whilst working in companies other than the respondent. It is notable in the first grievance investigation meeting referred to in detail below, the claimant referred to Samirah Ashraf as a “girl” and explained in oral evidence at this final hearing that he was not in fact referring to Samirah Ashraf but to a work colleague called Rose. On a straightforward reading of the grievance investigation notes giving the words used their common-sense meaning and interpretation, the claimant was clearly referring to his manager Samirah Ashraf and nobody else. This led me to conclude that the claimant, who remained adamant that he was referring to Rose, was not a credible witness and this raised a question mark over the evidence he gave on other matters.

11 On behalf of the respondent I heard from Samirah Ashraf, regional team leader and claimant’s line manager, Neeta Patel, regional manager (South East and London) grievance officer and Michael Whan, head of performance based in Glasgow, appeal officer. The witnesses gave credible evidence that was in large part supported by contemporaneous documentation. When it came to the conflicts in the evidence I preferred the evidence given by the respondent’s witnesses to that given by the claimant and Terence McKay especially when it was supported by the contemporaneous documentation in the bundle.

12 On behalf of the respondent I was provided with a witness statement from Chris Spence, regional manager for Northern Ireland and North West of England, who was ill and unable to attend this hearing, the respondent having previously requested an adjournment on this basis which was refused. Chris Spence largely deals with his responsibility for resolving the claimant’s complaint about health and safety/heating, which does not form part of the complaint before the Employment Tribunal.

13 I invited the parties to make submissions on the weight Chris Spence’s witness statement. I took the view that much of the evidence given by Chris Spence was not within the knowledge of the claimant as it reflected Chris Spence’s assessment of Samirah Ashraf in her new role and the assistance which he had given to her. This was supported by Samirah Ashraf. The witness statement was given some weight in that respect.

14 The Tribunal was referred to an agreed bundle, which it has taken into account. It took into account written submissions together with oral submissions made on behalf of both parties, which the Tribunal does not intend to repeat, it has attempted to incorporate the points made by the parties within the body of this judgment with reasons and has made the following findings of the relevant facts resolving the conflicts in the evidence where possible.

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Facts

15 The respondent is a national satellite broadcasting, broadband and telephone services company that has outlets throughout the United Kingdom including “stands” in shopping centres. The country is divided into areas which include a “central region” and employees are managed by line managers responsible for a specific area. The claimant’s new line manager was Samirah Ashraf who had been employed by the respondent for 14-years. Samirah Ashraf was promoted to a regional team leader role and it is accepted she was an inexperienced manager when newly recruited into the role and first started to manage the claimant.

16 The respondent had separate disciplinary and grievance policies that included the usual provisions one would expect to find in compliance with the ACAS Code of Practice. The claimant was aware of the disciplinary and grievance procedure.

17 The claimant was employed as a sales advisor based within the central region which included Runcorn, Birkenhead and Trafford Centre initially from the 5 October 2015 to his resignation on notice. Prior to his resignation he worked in the Cockhedge Shopping Centre on a stand and met managers in a nearby Asda Café as the respondent did not have premises in the centre. The claimant was an experienced manager himself, although he had never held a managerial position with the respondent and was at all times employed as a sales advisor.

The employment contract.

18 The claimant was issued with a Contract of Employment which provides that he “may be required to work at, or be allocated to, other regions and/or areas at any time according to the needs of the business.” The claimant confirmed that he could be asked to work in other shopping centres/geographical areas in accordance with his contract of employment.

The claimant’s health and return to work

19 The claimant suffered from a stroke in September 2017 and his manager at the time commissioned an occupational health report before the claimant returned to work. A number of adjustments were recommended and it is undisputed these were put in place. There was no reference to the claimant being unable to travel/drive to a different geographical area or adjustments to travel as suggested by the claimant.

20 The claimant returned to work at the Cockhedge stand in the Cockhedge Centre based in Warrington. The claimant usually worked with one other Sky employee on the stand so cover could be provided for breaks. It was common practice for meetings with line managers to take place in the Asda café, for example, when the weekly “1-2-1” were conducted. Cockhedge Shopping Centre was close to the claimant’s home. The claimant worked with no issues with his male manager (although he raised other grievances against employees/managers as per the documents in the bundle) until his line management changed to Samirah Ashraf, a young female employee.

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Allegation 2: in November 2018 Samirah Ashraf shared the Claimant's mobile phone number without consent.

23 November 2018 Samirah Ashraf's new managerial role

21 On 23 November 2018 Samirah Ashraf took on the role of regional team leader for Wigan and Warrington area. She was completely inexperienced in the role of manager and took the decision to join the claimant to a work WhatsApp group using his personal telephone number without consent. The claimant did not have a work telephone and communications between line managers and employees took place through personal phones either orally, by text or email. Samirah Ashraf's intention was to enhance the communication between line manager and the whole team, including the claimant, and the claimant would have been aware of this as his personal number had been used before, but not by Samirah Ashraf .

22 The claimant objected to his personal number being used and he immediately came off the WhatsApp group. Samirah Ashraf apologised to the claimant. The claimant did not inform the respondent of the incident at the time and he did not raise a grievance until much later on 6 December 2019. The claimant continued working without objection remaining under the line management of Samirah Ashraf whose perception was that the claimant disliked her, was condescending and arrogant towards her and difficult to manage. Throughout the period she managed the claimant Samirah Ashraf sought advice from HR and Chris Spence, the regional manager she reported to. Chris Spence believed the claimant was a "tricky character to deal with from a management perspective."

23 With reference to allegation 2 I find in or around November 2018 Samirah Ashraf shared the Claimant's mobile phone number without his consent and the claimant continued to work as normal without complaint choosing to keep the contract alive.

Allegation 2.3 and 2.4: In January 2019 Samirah Ashraf accused the Claimant whilst in the cafe in Asda, that he was trouble. Repeated the same comments in the cafe in Asda in February 2019.

24 In the Grounds of Complaint the claimant alleges Samirah Ashraf "made slandering comments I was a trouble maker November 2018 witness Paul Bird customer." The first point to note is that this is the first occasion the claimant has disclosed the name of the alleged witness; which he failed to do throughout the grievance process conducted by the respondent having chosen not to do so, and so the Tribunal found.

25 In the claimant's witness statement at para.13 he referred to "the witnesses to Samirah's accusations of me being 'trouble'...were not interviewed." The claimant referred to Samirah Ashraf's as follows "over the time Samirah was my manager I experienced petulant and emotional outbursts from her. On more than one occasion whilst carrying out 1-2-1's in the Asda cafeteria she accused me of being 'Trouble.' This was overheard by Asda staff and Asda customers."

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26 In oral evidence the claimant confirmed Samirah Ashraf had stated she had been told he and Terence McKay were trouble and the claimant did not question who had said this. The claimant also confirmed on cross-examination this was the only incident of Samirah Ashraf's "petulant and emotional outburst" in the month of January. The claimant's allegation changed, and I did not find it credible. Had Samirah Ashraf said to the claimant that she was told he was trouble I am in very little doubt the claimant would have demanded who had said this and according to his oral evidence which contradicted the written statement, he did not. The fact the date and allegation has changed also undermined the claimant's credibility.

27 During this period the claimant took part in weekly 1-2-1's with Samirah Ashraf. The 18 January 2019 meeting is documented and reflects a number of positive comments were made about the claimant and the way he worked. There is no mention by the claimant that he was told by Samirah Ashraf that he was trouble, and I took the view had this been said the claimant would have made something of it in no uncertain terms, and at the very least, asked who had informed Samirah Ashraf of this.

28 The 1-2-1 form was signed by Samirah Ashraf and the claimant as was the usual practice and can be relied upon as a contemporaneous document reflecting what was taking place in that period of time..

29 The claimant raised no issue until lodging the 6 December 2019 grievance, 10/11 months after the event taking the dates in the list of issues as opposed to the different date set out in the Grounds of Complaint.

30 I concluded, on the balance of probabilities, that the words had not been used as alleged by the claimant in January or February 2019, preferring the evidence of Samirah Ashraf that she did not say this, as credible. I took the view that Samirah Ashraf was having difficulties managing the claimant, she was a new inexperienced manager and extremely unlikely to accuse the claimant of being difficult even if she thought or had been told that this was the case.

31 The claimant continued working under the line management of Samirah Ashraf without complaint. During this period Samirah Ashraf was raising issues concerning the claimant's behaviour towards her with her more experience line manager Chris Spence and HR for guidance.

Underperformance issues with the claimant

32 The form recording the 20 April 2019 1-2-1 refers to the claimant expressing his concern about being under pressure over sales in the future. Samirah Ashraf commented the claimant was a "hard worker. He has had a dip in sales but I'm confident that he will pick the sales back up." The claimant made no mention of the fact Samirah Ashraf had accused him in the past that he was difficult. The reference to the claimant's dip in sales was the precursor of the claimant's underperformance being managed for which he took further umbrage against Samirah Ashraf.

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Meeting 10 May 2019.

Personal Improvement Plan 10 May 2019

33 The claimant's sales target was reduced on the advice of Chris Spence and he was placed on a Personal Improvement Plan by Samirah Ashraf who was guided by her manager. The objective of the plan was discussed with the claimant by Samirah Ashraf who proposed he went to work on the Wigan stand buddying up with a high-performance sales advisor working on a high-performance stand with a view to the claimant improving his sales knowledge of mobile phones.

34 The record of the meeting on the respondent's system included the following; "I offered Stephen to have a shift in Wigan which is one of the highest performing stands in our area for mobile and sims and upgrade. Stephen refused this offer and would like to be a buddy up at the Warrington stand...I will also be coming to see Stephen once a week and observing him and coaching him..."

35 In oral evidence the claimant stated he had never refused because the shift at Wigan was an option and he had suggested the option of buddying a high performing sales advisor whilst remaining working on the stand at Warrington, and this had been accepted by Samirah Ashraf. I concluded Samirah Ashraf wanted the claimant to work a shift in Wigan and he was not given an option, the claimant refused the instruction and his suggestion that he was buddied up at the Cockhedge stand resulted in the high performing individual from Wigan travelling to Warrington in order to support the claimant. The actions of Samirah Ashraf in this respect were not those of a manager subjecting the claimant to "sustained bullying" but an understanding manager attempting to support a poorly performing employee, and so the Tribunal found. Had Samirah Ashraf intended to bully the claimant it would have been a straightforward matter for her to take action against him for ignoring a reasonable managerial instruction bearing in mind the flexibility clause in his contract, but she did not.

36 On some date during this period the claimant brought to Samirah Ashraf's attention the fact that he was unable to travel to Wigan due to anxiety around travelling and his health. He explained that his cognitive problems made driving difficult. The date of this discussion was unclear, but according to the record on the respondent's system, it appears to have taken place between the 14 and/or 22 May 2019, after which the claimant was buddied with the colleague from Wigan and coached by Samirah Ashraf. The discussion followed an email being sent to the claimant which referred to his refusal, and the claimant informing Samirah Ashraf that he had not refused and the reference to his refusal caused him depression and anxiety; threatening to commit suicide. Samirah Ashraf was concerned and took advice from Chris Spence and HR taking into account the contractual clause requiring him to travel and the claimant's health for which adjustments may be necessary.

37 The capability plan was put on hold pending occupational health advice.

38 On the 22 May 2019 a 1-2-1 meeting took place in the Asda café between the claimant and Samirah Ashraf leading to allegations 2.5, 2.6 & 2.7.

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Allegation 2.5: June 2019 subject the Claimant to a 1-2-1 meeting with Samirah Ashraf where she shouted and **banged her hands on a table** in an Asda café and demanded medical evidence [my emphasis].

Allegation 2.6: Samirah Ashraf referred the Claimant to Occupational Health in June 2019 without full authority and wrote unfavourable comments about the Claimant in a request for an occupational health report.

Allegation 2.7: Being accused by Samirah Ashraf of not following management instruction to work in Wigan store.

39 The claimant met with Samirah Ashraf in the Asda café on the 5 June 2019. There was discussion about an occupational health referral. The claimant agreed to an occupational health report being obtained. There is an issue as to what was said at this 1-2-1 and I preferred Samirah Ashraf's version of events to that of the claimant's. The claimant told Samirah Ashraf that he was experiencing mood swings as a result of his stroke, and asked her to inform the team of this so they could "treat him accordingly."

40 There was no mention by the claimant to the public being informed and Samirah Ashraf took it upon herself to make the connection as she was concerned about the impact the claimant's mental health issues would have on his dealings with the public despite there being no suggestion that the claimant had encountered any problems. There was confusion whether the claimant informed Samirah Ashraf before or after he had been mentored by the sales advisor from Wigan, a buddying up that had not gone particularly smoothly but nothing hangs on this. The confusion with the precise chronology arises because the claimant raised no issues at the time and due to the passage of time up to this liability hearing people's memories as to dates and precise chronology had faded.

41 The claimant disputes he had made the request that Samirah Ashraf inform the team of his mood swings. On the balance of probabilities I prefer Samirah Ashraf's more credible evidence that he had, she was taken by surprise and stopped the meeting to take guidance from Chris Spence as to what to do next. It is undisputed between the parties that Samirah Ashraf took time away from the meeting and had discussions over the phone, and I am satisfied Samirah Ashraf was told by her line manager occupational health should provide a report dealing with the claimant's mental health. Samirah Ashraf in short followed her manager's advice. It is unfortunate the occupational health referral she prepared was not checked over by Chris Spence or a member of the HR team at the time.

The Occupational health referral

42 Samirah Ashraf wrote on the occupational health referral "Stephen gets anxiety when I document things on his 121 or any support documents he feels it's not in his perception of his accuracy. Due to business needs I required Stephen to travel to other close stores as he is currently underperforming....Stephen declined due to health issues...currently displaying high levels of stress and anxiety...and communication sent by myself is aggravating his symptoms. Due to his condition I feel it necessary to

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offer support to this advisor...I will also offer him catch up meeting to see if he ok on regular basis. With all the mental health issues that Stephen has brought to my attention, **I am now deeply concerned for the wellbeing of Stephen, other advisors, myself and most of the general public. The main reason for my concern that Stephen has told me that I have to make other advisor working with him about his health issues, as they should speak to him in a certain manner, how this is feasible for me to also raise this with the general public?"** [my emphasis].

43 I do not seek to look behind the conclusions reached by Neeta Patel and Michael Whan in respect of what Samirah Ashraf wrote and how she consulted with the claimant over it, including failing to provide the claimant with a copy after he had been shown and read the referral. I do however note that the occupational health referral is a contemporaneous document recording what the claimant had said to Samirah Ashraf about his mental health problems which supports Samirah Ashraf's straightforward and cogent evidence given at this liability hearing as to what had been said by the claimant.

44 The claimant alleges Samirah Ashraf shouted and banged her hands on a table in an Asda café and demanded medical evidence. In closing submissions he maintains this complaint was upheld following the grievance hearing and therefore it must have happened. I do not agree given the claimant's evidence on this point at this liability hearing. On the balance of probabilities I do not accept the claimant's evidence as credible and conclude he is an inaccurate historian in his recollection of what took place that day. It is extremely unlikely Samirah Ashraf shouted and banged her hands on a table as alleged, bearing in mind the difficulties she had in managing the claimant, the fact she was seeking advice constantly from her manager and HR, the tenor of the contemporaneous documentation produced during this period, for example, the 1-2-1's, the fact she had gone along with the claimant's request to be trained in Warrington and not Wigan without subjecting the claimant to any processes for failing to obey a reasonable managerial instruction or threatening to do so. It is notable that on the claimant's own case he had agreed with Samirah Ashraf obtaining an occupational health report at the outset which raises a question mark over why Samirah Ashraf would bang her hands on the table and demand medical evidence. In response to questions put to him on cross-examination the claimant stated Samirah Ashraf **"with the sick notes she banged on the table**. She asked if I could travel on a plane" [my emphasis]. There is a difference between Samirah Ashraf banging her hands on the table and banging sick notes on the table, and I found the claimant's evidence was contradictory and confused because the incident did not take place.

45 The claimant amended the list of breaches he relied upon to include being accused by Samirah Ashraf of not following management instruction to work in Wigan for which there was no evidence whatsoever. The claimant had not included this allegation in the original Grounds of Complaint, there is no reference to it in the Case Management Summary or his witness statement. He was granted leave, bearing in mind his status as a litigant in person, to add the allegation as there was little prejudice to the respondent taking into account the balance of prejudice test. The claimant's evidence was confused and less than satisfactory, and I concluded he was an inaccurate historian and his evidence could not be relied upon. In short, Samirah

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Ashraf did not accuse the claimant of not following management instruction to work in Wigan store and so the Tribunal found. That she did not do so supports the fact that contrary to the claimant's case, he was not subjected to "sustained bullying behaviour" by Samirah Ashraf as alleged. The situation reflected that an inexperienced manager was having difficulties controlling the claimant and to some extent it appears she was controlled by him rather than the reverse.

46 There is an issue as to whether Samirah Ashraf completed the occupational health referral with the claimant present, and I concluded on the balance of probabilities that at the very least the claimant was present for part of the drafting. It is undisputed he was shown a copy when it was finished. There is an issue whether the claimant agreed with the contents or not, Samirah Ashraf being of the view that he had at the meeting and then changed his mind afterwards.

Allegation 2.1: Subject the Claimant to sustained bullying behaviour by Samirah

Ashraf

47 The claimant confirmed the last alleged breach of contract involving Samirah Ashraf was the 1-2-1 meeting in June 2019, and after this date there were no fresh complaints. With reference to allegation numbered 2.1, I find on the balance of probability there was no evidence the claimant was subjected to sustained bullying behaviour by Samirah Ashraf, the claimant was unable to give specific incidents with or without dates other than the allegations set out above, he was not a credible witness in this regard, and I find he was not subjected to the bullying as alleged and the reference to this was an attempt to bolster up a weak case.

48 In a letter dated 5 June 2019 from Dr Harker (occupational health) reference was made to the fact the claimant had not been provided with the occupational health referral and the claimant felt "it did not accurately reflect the discussions that he had with you." An occupational health was not provided.

The claimant's actions in assisting the respondent to obtain an occupational health report in the aftermath of the original referral which did not proceed.

49 I do not intend to record each and every piece of party-to-party correspondence and communication concerning the respondent's attempt to commission an occupational health report after Dr Harker's letter, following which the claimant had expressly agreed to assist with the respondent obtaining an occupational health report only to withdrawn from the process later for no good reason.

50 The claimant's evidence at this liability hearing was that he did not refuse which I did not find credible. In the claimant's email sent on 28 June 2019 to Chris Spence he wrote; "I feel now that this OH process has caused more harm than good for me, and at this stage I now wish to end it. I will deal with it on my own." It is clear from this communication the claimant refused to take any further part in the respondent obtaining an occupational health report and the fact of the matter is no report was ever obtained despite the respondent's best endeavours, for example, Chris Spence's email in response referring to the respondent's responsibility to support the claimant

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explaining the reason for occupational health intervention. I note that there were no consequences for the claimant flowing from his refusal to assist the respondent with a view to an occupational health report being obtained which provides further support that Samirah Ashraf was not guilty of sustained bullying as it would have been a relatively straightforward matter to take the claimant through a capability process, and she did not take the opportunity to go down either route.

The claimant's return to work after sickness absence and return to work meeting

51 Following the claimant's absence a return-to-work meeting took place on the 2 September 2019 with Samirah Ashraf and a colleague. It was a difficult meeting that resulted in Samirah Ashraf crying. The colleague immediately wrote an email to Chris Spence complaining about "the behaviours that Stephen displayed during the meeting as I feel this was borderline bullying towards his TL [Samirah Ashraf] and he was deliberately antagonising her to get a reaction." The claimant was accused of being deliberately confrontational and undermining "which reduced Samirah to tears after he left the room to take break...something needs to be done...he will keep purposely pushing Samirah until she breaks. I also feel even though doctors have deemed him fit for a phased return, Stephen's mental health may have deteriorated further as he displayed intense irate moments to then switching to smiling and laughing within seconds...he seems easily agitated and confrontational toward her."

52 A 1-2-1 took place with Samirah Ashraf after the claimant's return to work and the record signed by the claimant and Samirah Ashraf makes reference to a possibility of the claimant being put back on a support plan, which was the last thing the claimant wanted as he was concerned his job would be at risk and felt resentment towards Samirah Ashraf for the part she played in managing his performance issues.

53 A meeting took place between the claimant and Chris Spence on the 24 September 2019 (that was documented) to discuss why the claimant chose not to progress the occupational health referral, the claimant's health and the return-to-work meeting with Samirah Ashraf when the claimant acted in a confrontational manner blaming her for his ill-health and stress. The claimant accepted he was antagonistic towards Samirah Ashraf and a number of reasons were given including "slander" and "belittling me in the canteen." There was no specific reference to the allegations relied upon as breaches of contract referred to in these proceedings with the exception of the reference to "the slanderous accusation, 'she said I was trouble'". It is clear from the notes taken the claimant, who described Samirah Ashraf as "untrustworthy and a liar", was upset because he had been put on a capability plan believing "she wanted me out" and his job was "on the line." The possibility of mediation was discussed as Chris Spence concluded there was a breakdown in the relationship.

54 A record of the meeting was sent to the claimant that included "**upon receipt of your doctors confirmation we will review your travel limitations due to your health concerns with the aim being you work only in one store, currently Warrington being your home store.** Mediation...you have accepted to engage in mediation with Samirah Ashraf to improve your working relationship"[the Tribunal's emphasis]. It is notable that the claimant was seeking to work on the Warrington stand

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only and this restriction underlined the difficulties in changing his line manager when he was unable to work elsewhere.

Mediation

55 A successful mediation meeting took place on the 30 September 2019 during which a number of actions were agreed by Samirah Ashraf and the claimant. It did not last long on the claimant's part who explained at this hearing that he was unable to put aside the way he had been treated by Samirah Ashraf. The claimant was then invited by Chris Spence to set out who is preferred choice of manager was, which the claimant failed to do.

56 A discussion took place between the claimant and Chris Spence recorded in notes dated 4 December 2019 concerning the claimant's refusal to be managed by Samirah Ashraf which culminated in the claimant raising a grievance against Samirah Ashraf, some 6-months after the last alleged act of bullying. The discussion concerned a number of matters including the claimant's refusal to take part in 1-2-1's with Samirah Ashraf, the claimant's failure to inform Chris Spence of his preferred choice of manager and the decision that Brian Waite, another manager, would conduct the claimant's 1-2-1's from December 2019 together with "valuable coaching." In short, Samirah Ashraf remained the team manager but Brian Waite would deal with the claimant's 1-2-1's and training and this continued to be the case until the claimant's resignation on notice.

The claimant's grievance

57 The claimant submitted a grievance to Chris Spence against Samirah Ashraf on the 6 December 2019 referring to being slandered, bullied and humiliated. Chris Spence responded, "I will update you in due course however request your patience as we approach year end and the seasonal festivities will be a factor in sourcing a hearing matter." The claimant accepted there would be a delay. By this stage Samirah Ashraf was managing the team including the claimant on a day-to-day basis and another manager, Brian Waite, conducted the 1-2-1 and training whilst the grievance was ongoing.

58 Chris Spence had difficulty finding a manager to hear the claimant's grievance due to the festive period and the fact that some managers who worked in the claimant's area had been involved in grievances brought against them by the claimant. He arranged for Neeta Patel to hear the claimant's grievance as she was an independent manager from out of the area (based in the South East), would need to travel up to see the claimant and had no knowledge of the protagonists.

Neeta Patel

Allegation: Neeta Patel failed to investigate the Claimant's grievance of 5 December 2019, or deal with the Claimant's grievance in a timely manner.

59 The first communication Neeta Patel had with the claimant was on the 3 February 2020 when she invited him to attend a grievance meeting on the 5 February 2020 referring to receiving his grievance on the 2 January 2020 and summarising the

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grievance. The meeting took place on the 5 February 2020 and the claimant was accompanied by a trade union representative.

60 I have referred above to the meeting notes on the issue of the claimant's credibility. The notes were sent to the claimant after the meeting. They record the claimant asked Neeta Patel why it had taken her so long to start the investigation to which she responded "today was the earliest I could get here..." which the claimant did not question.

61 The claimant was asked about the first point of his grievance, namely, "dealings with your team leader Samirah, during previous 1 to 1 meetings" and "how is your relationship with Samira in general?" The claimant responded; "**New role for the girl**, very supportive of everything...Samira I believe was out of her depth. Adam Kewely [claimant's previous line manager] said to me if you need any support don't ask anyone but me. Didn't bode well with Samira. She felt a little tetchy as she could not answer my questions...on one of the first 121 her first words out of your mouth was you and Terry were trouble. **This was November 2018**...I asked who said that. She wouldn't tell me but she said it was a manager" [my emphasis]. There are three observations arising from the contemporaneous document. The first is the conflict in the claimant's dates, the second the conflict in the claimant's allegation and finally, the third is the conflict in the claimant's oral evidence that when he referred to "the girl" it was not Samirah Ashraf. The claimant's evidence is confused and as previously recorded it cannot be relied upon.

62 The notes record a different version of events when compared to the claimant claims in this litigation and oral evidence given by him on cross-examination. In response to questions the claimant stated Samirah Ashraf called into question his professionalism, bullied and humiliated him "when she turned round and said I'm trouble and sent me home. **With the sick notes she banged on the table**. She asked if I could travel on a plane" [my emphasis]. The claimant's union representative suggested Samirah Ashraf had not obtained the consent of the occupational health referral when he had. The claimant was sent copies of the meeting notes which he amended on the 22 February 2020 alleging Samirah Ashraf had acted "in a very aggressive manner hitting the table ...**it was witnessed by a member of the public...and two workers from Scottish power...I'm not giving you names** because I would need to approach those people to ask their permission" [my emphasis]. The claimant never obtained or provide the names of any of the alleged witnesses during the grievance process, and the name of the member of the public was mentioned for the first time in the Grounds of Complaint, and yet this is one of the breaches of the implied term of trust and confidence relied upon by the claimant.

63 It is notable the claimant did not complaint Samirah Ashraf said "I'm trouble and sent me home", and the claimant's version of what was said is completely different and he was never sent home, yet another contradiction in the claimant's evidence that raised a question mark over credibility. The claimant's allegation changed from Samirah Ashraf shouting and banging her hands on the table to banging the table with the claimant's sick notes, which are two very different allegations further underlining the less than credible evidence given by the claimant, the fact he was an inaccurate historian and pointing away from the alleged incident ever taking place.

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64 Neeta Patel carried out an investigating and interviewed a number of employees including Samirah Ashraf and Terry McKay who was referred to her by the claimant as a witness. She was not in a position to interview a member of the public or employees of other companies, and the claimant did not provide names or produce any witnesses statements from these individuals at any stage of the grievance process. Throughout the claimant was supported by the union, had the assistance of an experienced regional union representative and it was a straightforward matter for him to produce the names of witnesses if not their statements at the very least but he chose not to do so.

The claimant voluntary joining the WhatsApp team.

65 It is worth noting that by 21 March 2020 the Covid Pandemic was a major issue for businesses including the respondent who continued to employ the claimant and other employees on full pay working from home. No 1-2-1's were carried out and during this period the claimant asked Samirah Ashraf if he could join the WhatsApp team using his private number (the WhatsApp team he had complained about previously) and communicated with Samirah Ashraf without issue. The relationship appeared to be more positive and the claimant proactive in his dealings with the team.

66 In an email sent to the claimant on the 1 March 2020 Neeta Patel apologised for the delay (from 22 February to 1 March) referring to operational issues, confirming she had included the claimant's amendments and would be carrying out the investigation, which she did. I do not intend to record the extent of the investigation other than to record that it was objective, in full and complied with the ACAS Code. Chris Spence was spoken to on the 5 March 2020 who referred to the claimant challenging Samirah Ashraf's management after a 6-month period when Warrington had no management, concluding the "turning point" in the relationship was the claimant being placed on a performance improvement plan and asked to work shifts in Warrington and the guidance he had provide. Chris Spence confirmed he had "fully agreed" with the occupational report referral.

67 Chris Spence made it clear that if any action was to have been taken, it would not be against Samirah Ashraf but the claimant who was "obstructive." Chris Spence explained that he had spent "a number of weeks trying to find a hearing manager which was to prove difficult task as Stephen had previously raised a grievance against a number of our current RMs...I ruled myself out as I thought it best to have a fresh pair of ears." Reference was made to the number of managers on leave, the claimant going on annual leave from 21 December to 5 January 2020 and the fact the claimant had "sat on this allegation for a year before choosing to act."

68 Terence McKay was interviewed on the 10 April 2020 and asked about the occupational health referral and discussions "around occupational health whilst Samira was present" to which Terence McKay responded, "**I can't remember if I be honest I am not 100%**" [the Tribunal's emphasis]. He did refer to "a couple of lads from Scottish power and said she was shouting". Terence McKay refused to give names and did not mention or provide the name of the member of the public who the

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claimant stated, for the first time when giving evidence at this liability hearing, was a customer of the respondent.

69 Numerous emails were exchanged between the parties concerning the grievance outcome report during this period, which I do not intend to repeat in full other than to note that due to the Covid19 pandemic the business and managers were operating in very difficult circumstances. Time frames were agreed between Neeta Patel and the claimant's union representative which ended on the 14 April 2020, and the claimant's representative emailed Neeta Patel expressed her disappointment on that date despite being made aware of the circumstances surrounding the delay.

70 . By the 7 April 2020 Neeta Patel had a death in the family and she was hospitalised with Covid. The investigation was complete but she found it difficult to focus and prepare the draft report before taking annual leave. It was clearly a difficult period and in an email sent on the 15 April 2020 Neeta Patel informed the claimant's union representative of this referring to her "awful experience...it is not anyone's problem except mine...I am now back at work and looking to prioritise Stephen as I have always done however I am finding it hard to control what I face in these unprecedented circumstances...I am on annual leave next week..."

71 The claimant emailed Neeta Patel directly on the 21 April 2020 complaining about the time it had taken for his grievance to be completed and the toll it was taking on his health, stating Neeta Patel's communication has been "poor" and "another delay, I now wish for you to take it to another level." It was as if Neeta Patel had not suffered a death in the family, been admitted to hospital with Covid during the grievance investigation and kept in touch with the claimant and his union representative. I concluded that the claimant could not have reasonably thought Neeta Patel was breaching the implied term of trust and confidence during this period or when she took annual leave.

72 In an email sent on the 12 May 2020 to the claimant Neeta Patel confirmed she was "close to concluding your grievance however I am currently using quite a bit of annual leave. Upon reviewing my outcome I do want to speak to a couple more witnesses which I am very close to completing. I am hoping to deliver the outcome early next week..."

73 On the 21 May 2020 the claimant was issued with a first written warning by another manager at a conduct meeting which he unsuccessfully appealed.

Grievance outcome 12 June 2020

74 The grievance outcome sent to the claimant on the 12 June 2020 ran to a detailed and thorough 11-pages. The claimant had raised a number of complaints (including the mediation) and I have dealt with those that are relevant to these proceedings only. Neeta Patel reached a number of conclusions as follows:

74.1 Samirah Ashraf had informed her she used the claimant's telephone number from a previous WhatsApp group he was part of and added him onto her WhatsApp group without consent. Neeta Patel concluded Samirah Ashraf

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should have consulted with the claimant and the entire team first before adding them and him to the group. The claimant's grievance was upheld.

74.2 With reference to the allegation that Samirah Ashraf had "for the 2nd time...said again that you were trouble" Neeta Patel had "two different versions of events and no other witnesses that I can call upon and so I am unable to conclude on this point further." She referred to speaking with Terry McKay "who confirmed he was never advised by Samira that he was 'trouble.'" The claimant didn't refer Neeta Patel to any other witnesses by name and nor did he or his union representative produce any statements from them. I concluded that the claimant could not have reasonable thought Neeta Patel was breaching the implied term of trust and confidence when she failed to interview unnamed possible witnesses who were members of the public or employees of Scottish Power.

74.3 With reference to Samirah Ashraf including the "insulting comments" written on the occupational health referral, Neeta Patel concluded this was Samirah Ashraf's first occupational health referral she had completed in a leadership role, she needed guidance on the claimant's request that the team at Wigan was to be made aware of personality changes and "felt it important to check the impact this may have on customers." Neeta Patel concluded "I do not feel the referral was in line with the companies guidelines on what a good occupational report should look like and I do feel that Samira should have shown the content to HR or Chris...I have no proof Terry saw the content of the referral **I do have concerns about the content and I will ensure recommendations are made moving forward. I will ensure Samira gets full support on any future referrals to ensure these are line with the company expectations. Therefore, I part uphold this point to your grievance**" [the Tribunal's emphasis].

74.4 With reference to the allegation that the claimant had been bullied and humiliated in a public cafeteria, Neeta Patel referred to the 1-2-1 when the claimant had been put on a personal improvement plan and when he refused to go to Wigan "she banged the table and challenged you by asking if you could travel on a plane....you were unable to provide any other names however did allude to lots of people witnessing these meetings and specifically referred to employees of Scottish Power, Asda and members of the public." Neeta Patel set out in detail Samirah Ashraf's reasoning as to why she held meetings in the Asda café and asked the claimant to work in Wigan in accordance with the support plan. She wrote "When I spoke to Terry I found that he did validate one occasion that he was approached by two members of the team at Scottish Power and they did say Samira was shouting and it was unprofessional...Terry was unable to provide any more on this point...I found no evidence that your professionalism had been called into question, I do have reasonable belief that Samirah did bang the table and raise her voice during your meeting. Therefore, I partly upheld this point."

74.5 With reference to the final issue relevant to these proceedings Neeta Patel dealt with the length of time it had taken for the claimant's grievance to

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be dealt with, a concern raised by the claimant at the grievance investigation. Neeta Patel confirmed the chronology I have set out above leading to her contacting the claimant by email on 10 January, concluding the claimant's grievance was not upheld.

74.6 Finally, it is notable the claimant informed Neeta Patel as recorded in the outcome letter that Samirah Ashraf had not obtained his consent to the occupational health meeting and he wished to end the occupational health process. The claimant's grievance was not upheld. In evidence at this liability hearing the claimant did not dispute he had agreed to the occupational health referral, his issues was the way the referral was produced and its contents.

Grounds of appeal

75 Despite substantial trenches of the grievance being upheld or partly upheld the claimant appealed. The grounds of appeal are set out in an email sent on the 15 June 2020 was that the respondent's grievance policy was a "tad ambiguous...it wasn't carried out in line with Policy. The reason being Neeta never attempted to interview any of the witnesses from the public who were there when the incidents took place. This is a major failing in the investigation...the purpose is to discover all facts in a fair reasonable and unbiased manner. Not attempting to interview witnesses failed in discovering all the facts and I believe it wasn't unbiased." No other grounds were set out.

Appeal Hearing 14 July 2022

76 An appeal hearing took place on the 14 July 2020 with Michael Whan, the claimant and TU representative. The notes taken reflect the claimant was given an opportunity to discuss his grounds in full and bring into the discussion additional complaints. The meeting was recorded in 10-pages that included the alleged delay, the WhatsApp Group allegation, the bullying and failure by Neeta Patel to "draw a definite conclusion," the "biased nature" language she used and her failure to "interview a gentleman who shops in Asda...I just know him as Mr B from Asda that's all...I've not been asked for them. I don't know their names." The claimant confirmed he could not provide further details of any witnesses. He also alleged that in the occupational health referral Samirah Ashraf "said I was a danger to the public" and "insulted my family and people who were helping me" when this was not the case as recorded in the occupational health referral cited above.

77 Michael Whan explained Samirah Ashraf had "put the occupational health in as a means of support" to understand how the claimant could be helped with an adjustments in place. The claimant complained Samirah Ashraf had "put down that I refused another occupational health. **I said I am more than happy to do another occupational health and I asked for HR to be there...**" [the Tribunal's emphasis].

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The last straw incident

78 With reference to the alleged last straw incident the claimant asked, “where do I go from here now” to which Michael Whan responded, “wait for me to conduct an investigation and provide an outcome.”

79 The claimant responded; “I am very unhappy about Samira continuing to be my manager and I want to know what will happen because I can’t go back to work whilst she is my manager...I’ll not be in work on Friday” to which Michael Whan stated; “I can’t answer that question without conducting an investigation into your case.” The position was made clear to the claimant and he was aware no decision had been made concerning Samirah Ashraf’s management and a further discussion was necessary after the grievance outcome. The claimant made his position clear, which was despite there being no issues with Samirah Ashraf since June 2019, he would not return to work and he would not be managed by Samirah Ashraf; “As of Friday I cannot have Samira as my manager.” The claimant was informed that he was expected to be in work and he refused stating “it will cause me real issues, and I can’t afford my well being affected.”

80 The claimant stated later “the manager should have no dealings with me during the grievance” to which Michael Whan responded “no, they should be dealing with you as normal...whilst a grievance is underway your manager will still be your manager; we won’t move you away from them.” The reference to “them” plural is to the claimant’s two managers; Samirah Ashraf who managed the team and Brian Waite the male manager who managed the claimant including his 1-2-1’s and training. The position had not changed and there was no indication one way or another what would happen in the future. On the balance of probabilities I preferred Michael Whan’s more credible evidence supported by the contemporaneous agreed notes of the meeting that the claimant was not required to work under Samirah Ashraf only, and in any event, he refused to return to work for which no action was taken against him.

81 Michael Whan took part in an investigation meeting with Neeta Patel on the 20 August 2020 concerning the delays and the fact the grievance took 6 months from the start to finish. A grievance timeline was subsequently provided. Neeta Patel explained her position and commented on the fact that the occupational health referral was “the biggest point in the grievance...it was just a really poor OH referral. It felt emotionally driven on her part with comments about being concerned...there was no questioning or justification of why she was concerned or why she was asking those questions.” Neeta Patel’s strong criticism of Samirah Ashraf underlines her objectivity and lack of bias with which she approached the grievance investigation and outcome.

Grievance appeal outcome

82 In a letter dated 15 September 2020 the claimant was sent a 5-page grievance appeal outcome that dealt with 7 points raised by the claimant, which I do not intend to record in their entirety. Regarding the length of time it had taken to her the claimant’s grievance Michael Whan concluded “whilst I appreciate that this case has taken longer to conclude than I would expect...there were a number of things which unfortunately delayed the progress of your case, including some personal circumstances

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experienced by Neeta specifically which you acknowledged in our meeting...I do acknowledge your concerns with the length of time...**I will make recommendations in order to ensure a more efficient, smoother process for cases of this nature is followed in the future. I therefore uphold this point of your appeal**" [the Tribunal's emphasis].

83 With reference to the claimant's allegation that not all witnesses were interviewed Michael Whan concluded a "comprehensive" investigation had been conducted by Neeta Patel "this included statements from regional managers, team leaders and a number of advisors from your team...Neeta used the information in thorough and unbiased nature to answer every grievance point...neither Neeta or I can investigate an anonymous individual so I was unable to explore this further. This is the only witness referenced by you out with those already investigated...I do not uphold this point. The decision taken at the initial grievance was upheld, having reviewed the full grievance process from end to end." There was no reference in the grievance appeal outcome letter to the next step, which was the claimant returning to work and whether he would remain under the general management of Samirah Ashraf with another manager carrying out the 1-2-1's, training and other face to face communications. The position was not clear and the claimant did not seek clarification instead he chose to resign on the 2 October 2020, the effective date of termination.

Resignation

84 In an email sent to the respondent on the 2 October 2020 the claimant resigned as follows "I believe my position due to recent circumstances is now untenable and wish to resign my position in the company. I will be taking further action going forward."

85 The claimant applied to the respondent to claim under the Income Protection Insurance relating to his sickness absence which was declined after his resignation.

Constructive unfair dismissal

86 Section 95(1)(c) of the Employment Rights Act 1996, as amended ("the ERA") states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employer's conduct.

87 In "Harvey on Industrial Relations and Employment Law" at paragraph D1 "In order for the employee to be able to claim constructive dismissal, four conditions must be met:(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach. (2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law. (3) He must leave in response to the breach and not for some other, unconnected reason. (4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract."

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88 The Tribunal's starting point was the test laid down by the Court of Appeal in Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221 whether the employer was guilty of conduct which is a repudiatory/significant breach going to the root of the contract. The issues to be decided upon in this respect were: Was there a fundamental breach on the part of the employer? Did the claimant terminate the contract by resigning? Did the claimant prove that the effective cause of her resignation was the respondent's fundamental breach of contract? In other words, what was the effective cause of the employee's resignation? Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as an end? The Court of Appeal "made it clear that questions of constructive dismissal **should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer'**" [my emphasis]. This is relevant to Mr McNicholas as a grievance may be delayed 6-months in total from start to end to be delay, which could be deemed reasonable depending on the circumstances, but the claimant being kept updated about its progress and informed of the genuine issues delaying the grievance reflects the fact that the respondent did not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between it and Mr McNicholas looking at the period of delay as a whole. Viewed objectively, Mr McNicholas could not properly conclude that the respondent was repudiating the contract.

The implied term of trust and confidence

89 There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of Appeal judgment in the case of Paul Buckland V Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, and this is an objective test.

90 The House of Lords in Malik v Bank of Credit; Mahmud v Bank of Credit [1997] UKHL 23, held that the breach occurs when the proscribed conduct takes place. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which "a balance has to be struck between an employer's interests in managing his business as he sees fit, and the employee's interest in not being unfairly and improperly exploited," and to the impact of the employer's conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to the relationship between

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employer and employee. If it is found to be so, then a breach of the implied obligation may arise.

Last straw

91 A course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a “last straw” incident. The last straw itself does not need to amount to a breach – Lewis v Motorworld Garages Limited [1986] ICR 157 CA. Glidewell LJ said at para 169F “The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each individual incident may not do so. In particular, in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?”

92 The Court of Appeal in Omilaju v Waltham Forest London Borough Council [2005] ICR 481 held that the act constituting the last straw need not be the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive on his or her own trust and confidence in the employer.

Employee must resign in response to repudiatory breach

93 The employee must leave in response to a breach committed by the employer. This breach may be an actual breach or an anticipatory breach, it is not enough that the employee expects the employer to repudiate the contract and leaves in anticipation. In the case of Mr McNicholas the proscribed conduct took place between November 2018 and June 2019 in relation Samirah Ashraf yet the claimant remained in employment until resignation on 2 October 2020, during this period he requested Samirah Ashraf admit him into the Group WhatsApp and had regular contact with her without any issues being raised.

94 In the well-known EAT case of Walker v. Josiah Wedgwood & Sons Ltd [1978] ICR 744, IRLR 105 the EAT held “... it is at least requisite that the employee should leave because of the breach of the employer’s relevant duty to him, and that this should demonstrably be the case. It is not sufficient, we think, if he merely leaves ... **And secondly, we think, it is not sufficient if he leaves in circumstances which indicate some ground for his leaving other than the breach of the employer’s obligation to him**” (per Arnold J) [my emphasis].

Waiver of breach

95 Weston Excavating cited above; The employee “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”.

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96 In the well-known EAT case of W.E. Cox Toner (International) Ltd v. Crook [1981] ICR 823 IRLR 443, EAT an employee censured by employer in July 1980 for taking leave without previously advising the employer. He demanded the withdrawal of the censure letter. He was informed on 6 February 1981 that the letter would not be withdrawn. He left four weeks later. The EAT held that he was precluded from claiming for unfair dismissal because he had remained for four weeks after it had become clear that his grievance would not be remedied and consequently must be taken to have affirmed the contract.

97 Da'Bell v National Society for the Prevention of Cruelty to Children [2010] IRLR 19, an EAT decision also relevant to whether a delay in resigning following a repudiatory breach may indicate that the claimant has affirmed the contract. It may alternatively indicate that the repudiatory breach is not the effective cause of the resignation. In Da'Bell the EAT upheld an employment tribunal's finding that an employee had not been constructively dismissed when she resigned three months after her employer's fundamental breach of contract. The EAT reasoned: '[A] person who reacts to offensive conduct by an employer by writing a letter the next day will easily be adjudged to have acted by reason of it. But someone who leaves it for a year, who will not let bygones be bygones, who digs it up again, is likely to be acting for a reason which is not directly related to the breach. Those are matters of fact for an employment tribunal, to determine what the reason was.' On the facts, the claimant's delay indicated 'a detachment of that event from the reasoning of the claimant when she resigned.'

Conclusion – applying the law to the facts

98 With reference to the first issue, namely, can the Claimant prove that there was a dismissal, I found there was no dismissal, the claimant resigned and his claim for constructive unfair dismissal is not well founded.

99 With reference to the issue, namely, did Samirah Ashraf do the following things I found on the balance of probabilities:

99.1 Samirah Ashraf did not subject the claimant to sustained bullying behaviour for the reasons stated above.

99.2 In November 2018 Samirah Ashraf had shared the Claimant's mobile phone number without consent.

99.3 Samirah Ashraf had not to a 1-2-1 meeting shouted and banged her hands on a table in an Asda café and demanded medical evidence for the reasons stated above.

99.4 In January 2019 Samirah Ashraf had not accused the claimant whilst in the cafe in Asda, that he was trouble and nor had she repeated the same comments in the cafe in Asda in February 2019.

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99.5 Samirah Ashraf had referred the claimant to Occupational Health in June 2019 but not without his authority as the claimant had agreed that an occupational health report should be provided. Samirah Ashraf wrote unfavourable comments about the Claimant in a request for an occupational health report arising out of what he had told her about his mental health issues and his request that she should inform the team. As indicated above, the words written by Samirah Ashraf in the occupational health referral support her version of events. She referred to the claimant's underperformance, being required to travel to a close by store which was "declined due to his health issues...Due to his condition I feel it necessary to offer support...with all the mental health issues that Stephone has brought to my attention, **I am now deeply concerned for the wellbeing of Stephen, other advisors, myself and most of all the general public.** The main reason for my concern that Stephen has told me that I have to make other advisor working with him about his health issues as they should speak to him in a certain manner, **how is this feasible for me to also raise this with the general public**" [my emphasis]. The reference to how the claimant's mental health condition could affect Samirah Ashraf and the public was not an issue for anyone other than Samira Ashraf. The claimant, who felt proud of the way he got on with members of the public, was understandably upset and undermined by his line manager's comments.

99.6 The claimant was not accused by Samirah Ashraf of failing to follow a management instruction to work in Wigan store.

100 With reference to the issue, namely, did Neeta Patel do the following things I found on the balance of probabilities:

100.1 Neeta Patel had not failed to investigate the claimant's grievance of 5 December 2019. It was a full and thorough investigation, objectively assessed with the result that the conclusion she made may not have been found by another manager, for example, relying on second hand hearsay evidence (the unnamed Scottish power employees) that the claimant had been shouted and banged her hands down on the table by Samirah Ashraf.

100.2 Neeta Patel failed to deal with the Claimant's grievance in a timely manner, however, there were mitigating circumstances not least the Covid19 pandemic and the consequences on Neeta Patel who was admitted to hospital suffering from Covid, the death in the family, holidays and the general difficulties of managing in a Covid pandemic when the country and most of the world were suffering under lockdowns. It is apparent from the documents in the bundle, and communications between the claimant, his union representative and Neeta Patel that she tried to keep them informed of her progress and the reasons for the delay, which were genuine and not disputed given the acknowledgment at various meetings to the problems she faced. Neeta Patel made it clear in her communications that she was giving the claimant priority, despite the fact that his grievance related to allegations that went back to 2018 and 2019 when no complaint was made, undermining the claimant's assessment of their seriousness to him at the time. It is unfortunate the

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claimant did not raise his grievance soon after the events alleged, and his failure to do so reflects the fact that they were not as important to him as he made out in his grievance which was an attempt to manipulate the situation in order to avoid being put back on the personal improvement plan by Samirah Ashraf. The personal improvement plan had been stayed during the claimant's sickness absence and grievance, and he was concerned with job security should the personal improvement plan remain in place.

101 With reference to the issue, namely, did Michael Whan do the following things I found on the balance of probabilities:

101.1 Michael Whan had not failed to properly investigate the claimant's subsequent complaints about the manner in which the grievance had been investigated and conducted. He carried out a full and objective investigation.

101.2 Michael Whan had not failed to uphold the claimant's appeal into his grievance as above. He upheld and acknowledged the claimant's "concerns with the length of time...I will make recommendations in order to ensure a more efficient, smoother process for cases of this nature is followed in the future. I therefore uphold this point of your appeal." He also upheld Neeta Patel's conclusion reached in favour of the claimant, despite reservations, for example, Samirah Ashraf shouting and banging her hands on the table. Michael Whan's reservations had a firm basis as reflected in this liability hearing and the contradictions in the claimant's evidence, particularly the change in the allegation from banging hands on the table to banging records on the table.

101.3 Michael Whan did not required the claimant to return to working under the same line manager against whom he had raised his complaints. When the claimant made it clear that "I am very unhappy about Samira continuing to be my manager and I want to know what will happen because I can't go back to work whilst she is my manager...I'll not be in work on Friday" Michael Whan responded; "I can't answer that question without conducting an investigation into your case." The claimant stated later "the manager should have no dealings with me during the grievance" to which Michael Whan responded "no, they should be dealing with you as normal...whilst a grievance is underway your manager will still be your manager; we won't move you away from them." As indicated above, the claimant remained off work on sick leave, the investigation had concluded and there was no discussion about when and where the claimant would return to work. The problem for the claimant is that he had made it clear he would not be working in any other centre due to anxiety over travelling and the only way forward for him would be for Samirah Ashraf to be removed as manager for the team/area and there was no discussion not this effect. In oral closing submissions the claimant attempted to introduce the fact that Samirah Ashraf had been removed from the team and he could have returned. This was not dealt with by the claimant in cross-examination and as the claimant resigned on his own volition it is difficult to understand the relevance. Taking into account the factual matrix and the way in which the claimant treated Samirah Ashraf, his demeaning and judgmental reference to

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her at meetings and treatment of her at a return-to-work meeting which reduced Samirah Ashraf to tears resulting in a formal complaint being made by the colleague who accompanied her, it was clear that the claimant who was aware of the complaint could have been the subject of a disciplinary process and yet no action was taken against the claimant for his behaviour before he resigned.

102 With reference to the issue did the final act relied upon by the claimant, namely requiring him to return under the management of Samirah Ashraf, I found this did not occur and nor did it amount to a ‘final straw’ taking into account the sequence of events as set out by the claimant.

103 It is a well-known legal principle that the last straw itself does not need to amount to a breach – Lewis v Motorworld Garages Limited cited above. The Court of Appeal in Omilaju also cited above, held that the act constituting the last straw need not be the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct but it must **contribute “however slightly, to the breach of the implied term of trust and confidence”**. On the balance of probabilities, I found Michael Whan’s reaction to the claimant stating he could no longer work with Samirah Ashraf “entirely innocuous act on the part of the employer” and cannot be a final last straw, and it could not reasonably be interpreted as a hurtful and destructive act on the claimant’s own trust and confidence in the respondent, bearing in mind the investigation was still ongoing and the claimant was unable to move to another area.

104 During the liability hearing I referred the parties to the Court of Appeal decision in Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1, CA that individual grievances do not need to breach the contract of employment on their own for the claim to be established: the employee can resign in response to a ‘last straw’ and base his or her claim on the totality of the employer’s conduct. If the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee’s right to resign. Applying this principle to the claimant’s case, as he had affirmed the contract by continuing to work after Samirah Ashraf had breached the implied term of trust and confidence by some of the contents in the occupational health referral, had I accepted Michael Whan’s act contribute to the breach of the implied term of trust and confidence “however slightly” I could have then looked at the totality of the respondent’s actions.

105 For the avoidance of doubt taking into account the legal principles referred to above, Michael Whan’s actions did not constitute unreasonable or blameworthy conduct, and his reference to waiting until the investigation and grievance appeal outcome before a decision could be made on whether Samirah Ashraf would continue as the claimant’s manager was entirely innocuous act on his part and it cannot be a final last straw. Taking into account the fact the claimant changed the final straw he relied upon, I concluded in any event that he did not genuinely but mistakenly interpret what was said to him as hurtful and destructive on his trust and confidence in the respondent, had he thought that the claimant, as was his habit,

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would have emailed his objection in no uncertain terms and he did not mention it in any emails or communications which followed, including the resignation letter.

106 The Court of Appeal in Kaur offered guidance to Tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:

106.1 What was the most recent act (or omission) on the part of the employer which the claimant originally said it caused, or triggered, his or her resignation, to which the answer in Mr McNicholas' case was originally the grievance appeal outcome dated 15 September 2020, just under 3-weeks before the claimant's resignation. There is nothing in the grievance appeal outcome which could be described as blameworthy conduct in the terms referenced in Omilaju.

106.2 The claimant changed the last straw incident to Michael Whan required the claimant to return to working under the same line manager against whom he had raised his complaints.. On a careful reading on the Grievance Appeal notes, a copy of which had been sent to the claimant as part of the grievance procedure, which he amended on the 20 July 2020 and at no stage did he query whether Samirah Ashraf would be his manager and the male manager who carried out his 1-2-2's and training would no longer be his direct manager.

106.3 Has he or she affirmed the contract since that act, to which the answer is that the claimant had checked the notes amended, sent them back and waited for the grievance appeal outcome and beyond his receipt of that before resigning.

106.4 If not, was that act (or omission) by itself a repudiatory breach of contract, to which the Tribunal found it was not.

106.5 If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence, to which the Tribunal found that was not.

106.6 Did the employee resign in response (or partly in response) to that breach, to which the Tribunal found he did not.

106.7 An important point to draw from Kaur is that, where there is a genuine last straw that forms part of a cumulative breach of the implied term of trust and confidence, there is no need for any separate consideration of a possible previous affirmation because the effect of the final act is to revive the right to resign. The focus of enquiry should be on whether the act that precipitated the employee's resignation was part of a cumulative breach (as opposed to a one-off), rather than on whether past breaches had been waived. That is not to say that an employee's response to past breaches is completely irrelevant: it is part of the background information that a tribunal should take into account when determining whether the last straw incident was a sufficient trigger to revive earlier acts in the series. In Mr McNicholas' case I found there was not a

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genuine last straw and there was no cumulative breach.

- 107 With reference to the issue, namely, did the listed acts breach the implied term of trust and confidence, I found that they did not. There was only one act that may have given rise to a breach of the implied term of trust and confidence, and that was the reference in the occupational health referral to the claimant's mental health and members of the public in June 2019. Lack of experience is no excuse for Samirah Ashraf making unfavourable comments about the Claimant in a request for an occupational health report arising out of what he had told her about his mental health issues and his request that she should inform the team. The reference to how the claimant's condition could affect the public was insensitive, and the claimant was understandably upset by it. The claimant delayed raising his grievance 6-months after the event for no good reason which suggests he was not as upset by it as he made out during the grievance process and this litigation.
- 108 In November 2018 Samirah Ashraf sharing the Claimant's mobile phone number without consent was not a breach of the implied term of trust and confidence, it was an act of an inexperienced manager who wanted the best for her team that was put right immediately only for the claimant to request being put back into the same WhatsApp group when it suited him later on during the Covid19 Pandemic.
- 109 With reference to the next issue, namely, taking account of the actions or omissions, individually and cumulatively, in relation to Samirah Ashraf's actions when completing the occupational health referral I found she did not have a reasonable and proper cause and behaved in a way that when viewed objectively the reference to the claimant's mental health and his dealings with the public was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. The seriousness of Samirah Ashraf's actions was recognised by Neeta Patel who informed Michael Whan during his investigation into how she had dealt with the grievance when she commented on the fact that the occupational health referral was "the biggest point in the grievance...it was just a really poor OH referral. It felt emotionally driven on her part with comments about being concerned...there was no questioning or justification of why she was concerned or why she was asking those questions."
- 110 When it came to the grievance outcome and grievance appeal outcome it was made very clear to the claimant that the occupational health referral was "not completed to the expected standards" (grievance appeal outcome) and "I do not feel the referral was in line with the company's guidelines on what a good occupational report should look like and I do feel that Samira should have shown the content to HR or Chris... I do have concerns about the content and I will ensure recommendations are made moving forward. I will ensure Samira gets full support on any future referrals to ensure these are in line with the company expectations. Therefore, I do not uphold this point to your grievance" [grievance outcome].
- 111 Before his resignation the claimant was aware (a) his grievance was upheld in respect of the occupational health referral content, and (b) Samirah Ashraf had completed the occupational health referral for the first time as an inexperienced

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manager and would be supported in the future to ensure that she complied with “Company expectations.” This was borne out by what transpired after the occupational health referral was withdrawn and Samirah Ashraf attempted to follow due process when attempting to compile a second occupational health referral with the claimant’s assistance, with the result that the claimant ultimately decided he would no longer take part in the process.

112 With reference to the issue, namely, was the fundamental breach of contract a reason for the claimant's resignation, I found that it was not and had it been the claimant would have resigned much sooner following the event when he did not even raise a grievance until 6-months after. The claimant resigned for a number of reasons, he had been issued with a first written warning by another manager, taken down the performance management route which had been stayed and Samirah Ashraf would reignite the performance improvement plan which the claimant though would result in his dismissal on the grounds of capability.

113 With reference to the final issue, namely, did the claimant affirm the contract before resigning, by delay or otherwise, I found the claimant continued in his employment without objection for a period of 6-months and by his words or actions showed that he chose to keep the contract alive even after the breach. I was reminded of the legal principle set out in Western Excavating (ECC) Ltd v Sharp (above) by Ms Rumble that “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.” Ms Rumble submitted the claimant continued in employment until 5 October 2020 and then proceeded to accept his notice period. It was, she argued, “clearly a case where even if the claimant satisfies the tribunal of any such repudiatory breach, he has subsequently affirmed the contract due to both time lapse and lack of any indication that either party was no longer fulfilling the contractual relationship.” I agree, disagreeing with the claimant’s oral submissions that the outcome of the grievance appeal was the final straw, changing the basis of his claim back to the original last straw incident, when he argued he affirmed the breach by resigning and providing the contractual months’ notice.

114 In conclusion, the claim of unlawful disability discrimination is dismissed on withdrawal. The respondent was not in breach of contract and the claimant’s claim of constructive unfair dismissal is not well-founded and is dismissed.

25.10.22
Employment Judge Shotter

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JUDGMENT AND REASONS SENT TO THE PARTIES ON
7 November 2022

FOR THE SECRETARY OF THE TRIBUNALS