



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. S Carrera

**Respondents:** Kyndryl UK Ltd

**Heard via Cloud Video Platform (London Central) On:** 13,14 October 2022

**Before:** Employment Judge Leonard-Johnston

## **Representation**

**Claimant:** In person

**Respondents:** Ms. E Misra of Counsel

# JUDGMENT

The claim of constructive unfair dismissal is not well-founded and is dismissed.

# REASONS

## **The hearing**

1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The parties agreed to the hearing being conducted in this way.
2. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties. The participants were told that it was an offence to record the proceedings.
3. Evidence was heard from the claimant and Mr P Kirkpatrick and Mr P Martin for the respondent. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.
4. There was a bundle of documents before the tribunal running to 565 pages. I have note there are some documents in the bundle disclosed to the claimant in advance

of the hearing that were not in the knowledge of the claimant at the time of his resignation and cannot therefore have contributed to his decision to resign.

**Issues**

5. The issues in the claim were limited to whether there was a constructive dismissal arising out of a repudiatory breach of contract on the part of the respondent. No discrimination claim was pursued. The conduct amounting to the alleged breach was clarified at the beginning of the hearing. The issues before the tribunal were as follows.
6. Did the respondent commit a breach of the implied term of trust and confidence by the following course of conduct?
  - a. Complaints about the Claimant's conduct was communicated to him by his line manager relating to incidents with third party colleagues in February 2021, May/June 2021 and October 2021, and that these complaints were not handled adequately.
  - b. Between 13 August 2021 to 22 March 2022, the claimant did not receive any or any sufficient response to messages he placed on an internal software tool called 'Checkpoint'.
  - c. The Claimant was denied the opportunity to move to a new role in the Respondent's new Security and Resilience practice for approximately seven months up to the date of his resignation taking effect on 22 March 2022.
  - d. A telephone call and email interactions between Paul Martin of the Respondent and the Claimant; namely a phone call on 11 November, a company-wide email on 22 December 2021; and
  - e. The claimant's grievances were not addressed adequately.
7. If so, was the breach a reason for the claimant's resignation?
8. Had the claimant lost the right to resign by affirming the contract whether by delay or otherwise?
9. If so, can the respondent show a potentially fair reason for dismissing the claimant?
10. If so, was the dismissal fair?

**Application for specific disclosure**

11. At the outset of the hearing the claimant renewed an application for specific disclosure, seeking evidence of phone calls from May/June 2021 which he asserts would help to establish his bullying claims. The respondent objected on the basis that the documents related to matters which were not in the knowledge of the claimant when he resigned and were not therefore relevant. The claimant was seeking documents which the solicitors for the respondent say do not exist, after they had carried out a reasonable disclosure exercise. I refused the application. I determined that such disclosure was not necessary to dispose of the claim because it was open to the claimant to cross examine the respondent's witnesses in respect of those matters, to the extent that they were relevant.

## Facts

12. I find the facts to be as follows on the balance of probabilities.
13. The respondent is a subsidiary of Kyndryl Holdings Inc which is a global technology corporation. It is a large corporation employing approximately 1,500 employees within the United Kingdom. Until 4 November 2021 the respondent was the Global Technology Services arm of IBM United Kingdom Ltd. It became an independent company on 4 November 2021. During the events in dispute, it was undergoing a significant reorganisation of its business.
14. The claimant is an IT professional, and his role was a Security Consultant working in the Cloud Advisory Service (CAS) part of the organisation. He was previously employed by IBM, having been transferred to IBM by his previous employer Verizon under the Transfer of Undertakings (Protection of Employment) Regulations 2006 on 1 September 2017. It was not in dispute that the claimant was a valued member of the team. He had specialist skills and performed the technical aspects of his role very well. The claimant was line managed by Mr Kirkpatrick and his second line manager was Mr P Martin.
15. The claimant relies on a number of incidents in support of his allegation that he was bullied and treated unfairly. These include allegations that occurred prior to 4 November 2021 when the respondent was still IBM. The relevant workplace policy on bullying was at page 120 of the bundle and contained the following definition of bullying:

“Workplace bullying can be defined as offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means intended to undermine, humiliate, denigrate or injure the recipient.

Examples of bullying may include:

- humiliation by being shouted at, particularly in front of others
- bad tone and bad language
- continuously side-lining, ignoring, marginalising, dismissing as unimportant or irrelevant people, ideas, work, performance or contributions
- deliberate and consistent undermining of somebody's position or profession
- use of a threat or implied threat.

These examples are not exhaustive or exclusive and offences of a similar nature will be dealt with under this procedure.”

### **23 February 2021**

16. The claimant alleges that he was bullied and treated unfairly when his manager Mr Kirkpatrick gave him feedback in a performance review on 23 February 2021. A colleague had made a complaint about how the claimant had behaved on a phone call on 18 February 2021, namely that he had been behaving unprofessionally by arguing with colleagues in front of customers. The claimant did not dispute that the disagreement on the call had happened, and he agreed to address the issue going forward. The claimant explained that the other person involved had since apologised to the claimant. Mr Kirkpatrick's record of the meeting states that *“another (discussion) was around the 30 min scope discussion with Chris where he was arguing. He took exception to this his view was this ‘Discussion’ was necessary. He eventually got the point it may have been but not in front of Clients...”*

17. The claimant's key complaint is that Mr Kirkpatrick did not properly establish the facts before raising the issue with the claimant at the review meeting. His view was that others were trying to undermine him.
18. I find that raising the issue of the phone call with the claimant in the claimant's performance review was legitimate management feedback. The claimant was in part responsible for the disagreement being conducted in an inappropriate forum, but regardless of whose "fault" the argument was, Mr Kirkpatrick told the claimant that he should not be having those discussions in front of customers.
19. The claimant alleges that he was given no "right of reply". However, the claimant was given an opportunity to explain his point of view in the meeting on 23 February 2021 and on his own evidence he told his line manager that the other party to the argument had in fact subsequently apologised. Mr Kirkpatrick decided not to take further action. The claimant did not raise this matter as a bullying incident at the time.

### **28 May 2021**

20. This incident was referred to as 28 June 2021 in the grievance, but it is clear from the documentary evidence that the claimant is referring to 28 May 2021. The claimant says that on 28 May 2021 he received a call from Mr Kirkpatrick in which he was "reprimanded" following a complaint about the claimant's behaviour on a call with a client on or around 26 May 2021. It was alleged that the claimant and another colleague had had a discussion for far too long on a particular topic which took over the meeting to the detriment of others on the call and the intended outcomes. The claimant's view was that the basis of the complaint was factually incorrect, and that while the call had been challenging, it was the fault of the project manager for not managing the call properly. The claimant's view was that again Mr Kirkpatrick had failed to establish the facts before reprimanding him and he felt bullied. The claimant viewed this as a pattern of unfair treatment.
21. Mr Kirkpatrick's recollection of the phone call was that he did not reprimand the claimant rather he viewed it as having provided feedback to the claimant and raising it as a learning point. He says did not warrant the matter as being that important and he decided not to take the matter to the next stage. His view was that he did investigate the facts by talking to the claimant and other colleagues involved.
22. This conversation was followed up by an email in which the claimant stated that the issues being raised were unfair, to which Mr Kirkpatrick replied: "*the feedback I was given the discussion went on for far too long. And in retrospect the discussion should have been better managed by Chris. A learning point, I would suggest, please manager these meeting to the agenda. Don't get dragged into these discussions where the majority of folks get lost. I would suggest making sure that the leader of the call has achieve what was set out...I'll also make sure our PM's manage to the same. As you highlight below we've talked earlier this year about some thing similar on this account. As we're meeting completion I would suggest you take not of my point above. Address what is in our remit and manage your input closer.*" And then "*None of this is personal, the feedback I get across our team and from account folks is fed back to you as it's presented to me. Have two reasons one is to ensure the performance of our organisation is high and that individuals get feedback as learning. There is no underlying vendetta as you suggested on Friday and below, and I was surprised at your suggestion that you feel excluded from our CAS team. It's the first time I've heard this. Happy to discuss how we can address this..*"

23. Following this email the claimant replied, stating that *“I do not feel there is a vendetta against me or excluded from the CAS team. My feeling is feeling is (sic) based on the conduct towards me by an individual since I have been at IBM. The account you provided me of the call on Friday described by the this (sic) individual was incorrect (as framed by your description below) and I found this concerning and frustrating.”*
24. Whilst the claimant was not wholly responsible for the mismanaged call he did contribute to the problem and as a result the CAS team were not invited to the next project call. Mr Kirkpatrick addressed this as a learning point, not as a disciplinary matter. I prefer Mr Kirkpatrick’s version of events that this was not a reprimand, because this view is corroborated by the email correspondence and because I found Mr Kirkpatrick to be a reliable and forthcoming witness. No further action was taken by the respondent after this incident.

### **August 2021 checkpoint conversations**

25. The respondent uses a management tool called Checkpoint. There was a dispute about what the Checkpoint “conversation” tool was meant to be used for. Mr Kirkpatrick’s evidence was that they were aimed at capturing conversations that had taken place, rather than being a separate messaging tool. The claimant’s view is that they were the place to start and to have conversations.

26. One of the claimant’s concerns was that he was not being sufficiently supported to develop by his manager. He felt that his manager was ignoring his career development. On 13 August 2021 the claimant recorded the following questions on the Checkpoint “conversations” tool:

*“How will my role change moving to Kyndryl?  
What do you think are my strengths and weaknesses?  
Do you think I am suited to a different role?  
Please can we move our monthly chats from monthly to weekly? Having monthly calls meetings means that if a call is missed and not rescheduled, it can be over two months until we speak, and I feel this is insufficient. I also feel slightly disconnected due to the current working conditions, and I feel our working relationship would improve more with more direct dialogue.”*

27. The claimant says that these questions were ignored and there was never any formal reply. However, the evidence shows that Mr Kirkpatrick sent the claimant an email on 16 August 2021, specifically asking the claimant to review and update his checkpoints. He added *“also the conversation items you raised don’t make sense...a Bunch of questions. That section is for capturing Conversations..what are you trying to capture with your comments.? I’ve set up a 9am call on Mondays for the next few weeks to go through this and the other questions you pose...”* The claimant found this response to be disrespectful.

28. On 2 September 2021 the claimant and Mr Kirkpatrick had a management review, in which the Checkpoint tasks were discussed, and the regular weekly meeting was confirmed. I do not know how many of these meetings the claimant attended but I did hear evidence from both the claimant and Mr Kirkpatrick that the claimant sometimes missed these management meetings.

29. Mr Kirkpatrick gave evidence that the claimant was not using Checkpoint properly and that he had been raising these issues as performance issues with the claimant regularly since his previous annual review and had been asked to

undergo training. The claimant was failing to input “goals” as expected by the company, and regularly failed to input achievements and feedback from peers. The claimant gave evidence that he thought the Checkpoint tool did not have any value to him and was a tick box exercise. I find that the claimant did not attempt to improve his use of Checkpoint and that despite attempts by Mr Kirkpatrick to explain the purpose of the tool, he did not engage with it in the way the respondent was asking him to do. There followed a miscommunication between the claimant and Mr Kirkpatrick based upon a misunderstanding of the use of Checkpoint on the part of the claimant.

**26 October 2021**

30. On 26 October 2021 the claimant sent an instant message to Mr Kirkpatrick stating that a colleague had just been quite rude to him. Mr Kirkpatrick then received a complaint about the claimant’s behaviour from that colleague who complained that the claimant was not being sufficiently supportive on a project. Mr Kirkpatrick supported the claimant in responding to that colleague and the complainant replied that *“the upset was caused by Stuart’s aggressive and rude attitude, besides the point blank refusal to answer questions.”* The complainant said that the matter was however now resolved. Mr Kirkpatrick escalated the complaint to his line manager Paul Martin and informed him that the claimant had since addressed the persons questions. No action was taken against the claimant.
31. It is not in dispute that Mr Kirkpatrick stood up for the claimant in the exchange with the complainant. However, the claimant’s view is that this was another incident in which his line manager acted unfairly, because he forwarded the complaint to Paul Martin without explaining the context, that is, the person having also been rude to the claimant. Mr Kirkpatrick did not take any disciplinary or any management action as a result of this incident, however it was raised by Mr Martin in a discussion on 11 November 2021 (further below).

**Failure to move him into new job**

32. In August 2021 the claimant applied for and was successful in gaining a job offer within another part of the respondent’s organisation, known as TSM. The claimant informed Mr Kirkpatrick of his intention to move roles on 7 September 2021, which he said was because he wanted to move into security work, and he required more challenge in his career. Mr Martin then contacted the claimant and advised him that for career development purposes it would be better for the claimant to remain in CAS part of the business. Mr Martin told the claimant that there would be a new security practice in that part of the business following the Kyndryl split from IBM, and that the claimant would be able to become a Security Consultant within a more prestigious part of the business. The claimant decided not to move into the TSM team, but to stay and pursue the Security Consultant role.
33. The offer was to work in a new security practice that had not yet been set up. On 16 September 2021 when enquiring about formalising this role and attempting to agree start date, the claimant was told by Mr Martin over their instant message service: *“it’s all part of the overall design for Kyndryl A&IS, also Scott won’t officially onboard for another 5 weeks, so in the short term let me right (sic) to you ‘officially’ but nothing changes for some weeks..btw as you know Workday is already up to date – normally the last thing that happens.”*

34. An email from Mr Martin on 16 September 2021 stated that *"I can confirm that we would like you to become of the Kundryl Security Consulting Team"* and confirmed that the organisation structure of A&IS is still being concluded and will be released *"in the near future"*. The claimant was asked to *"please continue working with enthusiasm in your current role for a bit longer, but I will encourage Scott to start involving you in planning and developing opportunities as soon as he is able to do so."* The claimant said he understood this and wrote to Mr Martin on 17 September that *"it's business as usual, until I move."*
35. The new team did not come into existence until February 2022, although the team leader Scott McAvoy commenced his role on 1 November 2022. The respondent at no point agreed a specific start date with the claimant. He was only told that the start date would be at the end of a particular contract he was working on and then he was told that he would move when there is enough work and billable opportunities in the new role to justify his move. The claimant was told that there would be no "hard break" starting the security role, but that it would be a graded transition to the new role.
36. Over the next few months, the claimant became frustrated at the perceived lack of action on the part of the respondent in moving him in to the new role. I saw evidence of numerous examples of discussions of the matter between the claimant and Mr Kirkpatrick or Mr Martin. For example, on 1 October 2021 Mr Kirkpatrick wrote on instant messenger, *"Stuart the new organisation isn't announced yet...so things remain as they are until that is announced and we know what's what."* I have not referenced all the correspondence about this in this decision but have taken it into account. The evidence shows that the working relationships became increasingly strained but remained effective.
37. There was a disagreement over who would be the claimant's line manager in the new role. The claimant had expected to be managed by the new team leader Scott McAvoy but the respondent decided that the claimant would remain with his current line manager Mr Kirkpatrick, because there were not enough people reporting to Scott McAvoy to warrant him having line management responsibility. This was an approach called "span of control" that was adopted across the business. The claimant was told about this but was not happy about it because he was frustrated with Mr Kirkpatrick's management style, and he perceived it to be symbolic of a lack of change in his role.
38. On 11 October 2021 the claimant emailed Mr Martin for an update, trying to agree a start date. Mr Martin explained that the delay was being caused by the significant organisational change the business was going through at that time. Mr Martin's focus at that point was on the business spin off planned for November 2021. The claimant replied saying *"I am also aware my currency is very strong now in terms of skills and experience and it's a real key moment in my career. The issue I have (and this is not your problem by the way) is I am moving house next year; I have two very young kids and I have agreed this plan with my wife. If it gets into Nov/Dec and I have still not moved, then I am going to have to reassess my position here."*
39. On 4 November 2021 Mr Martin contacted the claimant about work in a Vodafone project which he thought had a security component so thought it would be appropriate for the claimant to get involved in. Mr Kirkpatrick also instant messaged the claimant that day about the same project saying, *"sounds perfect"*

*for you in your new role.*”. The claimant was asked to take a call with the relevant contact to see what the project is, but the claimant initially said he was too busy to take the call. He was in the last few days of finalising another project. Mr Kirkpatrick encouraged the claimant not to push back too much *“especially in this first Security engagement.”* Thereafter the claimant did engage with the new project.

40. On 8 November 2021 Mr Kirkpatrick sent the claimant an email, acknowledging that the claimant had been raising questions about the new role over the past weeks, and setting out as much information about the role as he believed he could. That email confirmed the new role was still anticipated, but because the organisation structure had not been released only high-level information was provided. No start date was mentioned. Mr Kirkpatrick confirmed that whilst the practice would be managed by Scott McAvoy, the claimant would still report to him for the foreseeable future. The same day the claimant replied expressing multiple concerns and disappointment at the way the move was being handled. He said *“all that seems to be happening is my job role has changed in Workday and I have actually been offered an accepted an undefined role that does not exist. I have zero contact with Scott, am not involved in discussions, strategy or made to think in any way that I will be a valued part of this new structure moving forward.”* He further wrote that *“this is simply not acceptable for me and not what I understood/agreed when I was offered the new role.”* The Claimant made numerous informal complaints to Mr Kirkpatrick and Mr Martin about his disappointment in the handling of his move, but he did not raise an informal or formal grievance until the day he resigned.

#### **11 November phone call**

41. On 11 November the claimant and Mr Martin spoke on a phone call. This was the same day that Mr Kirkpatrick had forwarded an email from a colleague to Mr Martin containing a complaint against the claimant (see the 26 October 2021 paragraph above). There was a dispute about the nature of this phone call. The claimant said he felt under attack and bullied, and that his personal character had been called into question. He claims that Mr Martin said that he had received two complaints about the claimant and that this is the first time in his career that that had happened, which left the claimant feeling attacked. Other than this statement, the claimant did not elaborate on why he felt bullied and attacked on this phone call.
42. Mr Martin cannot remember much of the phone call but admitted that from the follow up email he must have given the claimant some feedback about how the Vodafone opportunity could have been handled better. Mr Martin did remember the claimant being frustrated about the situation and he recalled thinking that the claimant was not behaving in his view as a “considered and mature individual” and that it was not unreasonable to ask the claimant to be patient about the move in the context of the business reorganisation. Mr Martin also suggested changing the claimant’s line manager to Mr Mather, but the claimant declined this offer. I note that Mr Mather had been the subject of a previous disagreement with the claimant.
43. Much later that evening the claimant emailed Mr Martin an example of his good work and told Mr Martin that he felt really deflated when he left the call that day. Mr Martin did not reply to that email. He says it was because he was trying to disengage from the conversation, which he considered was more appropriate for



the claimant's direct line manager, Mr Kirkpatrick. The claimant informed Mr Martin that he was upset about the phone call but did not seek to raise an informal or formal grievance at the time.

44. Still on 11 November 2021 Mr Martin messaged a Mr Kulhalli (TSM), as follows: *"...some weeks ago one of my architects was given the role of a security TSM by David, as I wanted to retain him, I suggested he could move into the consulting side of my organisation and Security consultant. We have given him two chances to engage as a security consultant, and nether (sic) had been a success – I am concerned he does not have the client facing, relationship building skills I thought he had. He might be able to grow these, but I was wondering if I made the right decision stopping his move to be a TSM. Are you still looking for a TSM? If so, I think I think (sic) skills may be suited in the back office. Stuart had a good reputation as an architect, so he is not "damaged goods. I am trying to shed but I need to recognise when I have made a mistake rather than force a square peg into a round hole. Please let me know your thoughts."* In oral evidence it was averred there was an obvious error in that email, and it should have read "I am not trying to shed", which I accept.
45. I note that the claimant had not seen this email when he resigned, and it cannot have contributed to his decision to resign. However, the Claimant had guessed that Mr Martin had been in touch with Mr Kulhalli because Mr Kulhalli contacted him on 11 November to see if the claimant was still interested in the role. This evidence shines light on those circumstances, which made the claimant feel like he was being managed out, and on the respondent's intentions. The claimant declined the offer in the TSM role because he had helped interview external candidates and he felt it would be unacceptable for him to now accept it.

#### **23 December 2021 email**

46. On 23 December 2021 Mr Martin sent a team-wide email reflecting on the past year and wishing staff a Merry Christmas. In that email he wrote *"on rough count I think I have had >100 notes in praise of the team, and 2 complaints. I am not a perfectionist so that's just brilliant!"* In evidence Mr Martin acknowledged that this reference had been to the claimant although he pointed out that the claimant had not been named. He acknowledged that he did not consider the impact on the claimant when he wrote the email.
47. On 31 December 2021 the claimant sent Mr Martin a reply to that email wishing him a happy new year. Mr Martin did not reply. However, he did at a later stage apologise to the claimant for those references in the email. Mr Martin was shocked and upset when he received the 23 December 2021 email and when he did not get a response from Mr Martin. However, he did not make an informal or formal complaint at the time.

#### **21 January 2022 emails**

48. On 21 January 2022, the claimant posted the following comment on checkpoint *"I have moved to new role. I accepted the offer in September. However I have not actually moved to this role as of yet"*. On that day the claimant also emailed Mr Kirkpatrick referencing the conversations he registered on checkpoint on 13 August 2021, stating that they remained unanswered. Mr Kirkpatrick replied on the same day, stating that he had responded on 16 August 2021 to the

comments raised on 13<sup>th</sup> August, and stating that his comments from August were still valid.

49. The claimant replied on 26 January 2022, stating that he believed that after 6 months Mr Kirkpatrick had not replied to the questions he raised. Mr Kirkpatrick did not reply further, because he considered that he would just be repeating what he said previously, and that he was concerned that it would not achieve anything. The claimant's case is that Mr Kirkpatrick's failure to respond to his email of 21 January 2022 was the "last straw" that caused him to resign.

### **Resignation**

50. The claimant resigned on 22 February 2022 giving one month's notice such that his last date of employment would be 22 March 2022. The reasons given were: *"due to the issues laid out on my informal grievance dated 22 February I feel I have no other option but to resign from my position. Due to Kyndryl's behaviour as outlined in this grievance, I believe the employment relationship has irrevocably broken down and I resign because of the fundamental breach of the employment contract. I consider this to be a fundamental breach of the employment contract on Kyndryl's part, in particular the duty of trust and confidence."* The informal grievance was sent on the same day and was attached to his ET1 as his particulars of claim, although he later provided further particulars.
51. On the same day as his resignation Mr Martin held a video call with the claimant to address the grievance. The claimant told Mr Martin to refer to his written grievance. Mr Martin replied to the grievance on 16 March 2022. Overall, the grievance was not upheld, but Mr Martin did acknowledge at that point that he had not considered the impact his email of 23 December 2021 had on the claimant, and he apologised. The claimant had an opportunity to pursue a formal grievance at that point but chose not to pursue it.
52. It was unclear to me on the evidence provided by the claimant when he applied for and received a job offer from his new employer. The claimant did not address this in his witness statement and became evasive when asked questions about his new job. He did not give the date he started his new job until pressed. He first gave a vague reference to starting a few weeks after he left the respondent, and then changed his answer to the day after his notice period finished, when he confirmed he walked straight into a new job. He confirmed that he had an interview whilst he was still working at the respondent and applied for the new job in December or possibly November. The claimant gave evidence that during his time at Kyndryl he was always applying for job, partly because he had come up for redundancy and partly because of the nature of the market. The claimant's new job had a salary greater than at his role at the respondent. It is more likely than not that the claimant had a job offer from his new employer when he resigned from the respondent.

### **The Law**

53. . Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be dismissed by his employer if *"the employee terminates the contract*

*under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".*

54. It is well established that the conduct giving rise to a constructive dismissal must involve a fundamental breach of contract by the employer, that the breach must be an effective cause of the employee's resignation, and that the employee must not, by his or her conduct, have affirmed the contract before resigning.
55. The assessment of the employer's intention is an objective one, to be judged from the point of view of a reasonable person in the position of the claimant. The employer's actual (subjective) motive or intention is only relevant if "it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person": *Tullett Prebon v BGC Brokers LLP and ors* [2011] EWCA Civ 131, [2011] IRLR 420 at [24] per Maurice Kay LJ, following Etherton LJ in *Eminence Property Development Ltd v Heaney* [2010] EWCA Civ 1168, [2011] 2 All ER (Comm) 223, at [63].
56. In this case the Claimant claims breach of the implied term recognised in *Malik v Bank of Credit and Commerce International* [1998] AC 20 that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and his employer. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract because the essence of the breach of the implied term is that it is (without justification) calculated or likely to destroy or seriously damage the relationship: see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A and *Morrow v Safeway Stores* [2002] IRLR 9.
57. In *Kaur v Leeds Teaching Hospital NHS Trust* [2018] EWCA Civ 978, [2019] ICR 1 the Court of Appeal held (at [55] per Underhill LJ, with whom Singh LJ agreed) that, in the normal case where an employee claims to have been constructively dismissed as a result of a breach of the implied term of trust and confidence it is sufficient for a tribunal to ask itself the following questions:
- "(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
  - (2) Has he or she affirmed the contract since that act?
  - (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
  - (4) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of mutual trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation because the final act revives the employee's right to resign in response to the prior breach.)
  - (5) Did the employee resign in response (or partly in response) to that breach?"

58. In determining whether a course of conduct comprising several acts and omissions amounts to a breach of the implied term of trust and confidence, the approach in *Omilaju v Waltham Forest LBC* [2004] EWCA Civ 1493, [2005] ICR 481 is to be applied: see *Kaur* at [41]. The approach in *Omilaju* is that a breach of the 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, though each individual incident may not do so, and the ‘final straw’ may be relatively insignificant, but it 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 straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his or her trust and confidence in the employer.
59. If a fundamental breach is established the next issue is whether the breach was an effective cause of the resignation, or to put it another way, whether the breach played a part in the dismissal. In *United First Partners Research v Carreras* [2018] EWCA Civ 323 the Court of Appeal said that where an employee has mixed reasons for resigning, the resignation would constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons.
60. Finally, an employee who affirms the contract in response to a fundamental breach (or series of incidents amounting to a fundamental breach) loses the right to resign and claim unfair dismissal. In the employment context an employee will not necessarily affirm a contract by remaining in post and not resigning immediately. As the EAT stated in *Quigley v University of St Andrews* UKEATS/0025/05/RN at [37]:

*“...in the case of an employment contract, every day that passes after the repudiatory conduct will involve, if the employee does not resign, him acting in a way that looks very much like him accepting that the contract is and is to be an ongoing one: if he carries on working and accepts his salary and any other benefits, it will get harder and harder for him to say, convincingly, that he actually regarded the employer as having repudiated and accepted the repudiation. The risk of his conduct being, as a matter of evidence, interpreted as affirmatory will get greater and greater. Thus, if he does stay on for a period after what he regards as repudiation has occurred he would be well advised to make it quite clear that that is how he regards the conduct and that he is staying on only under protest for some defined purpose such as to allow the employer a chance to put things right. It needs also, however, to be recognised that even that might not work if it goes on too long; it is all a matter of assessing the evidence.”*

61. If an employee establishes that he or she has been dismissed, the dismissal will be unfair unless the employer can show the reason for dismissal and the tribunal must be satisfied that the employer acted reasonably in treating that as a sufficient reason for dismissing the employee.

## **Conclusions**

62. The claimant’s case is that over the course of months before his resignation he had been treated on a number of occasions so unfairly by his employer that the course of conduct amounted to a breach of the implied term of trust and

confidence. He relies on unfair management decisions in dealing with complaints against him, failure to answer his Checkpoint questions, being reprimanded and bullied on occasions by Mr Kirkpatrick and Mr Martin, the delay in moving him to a new role, and a failure to deal properly with his grievance.

63. The respondent's case is that it has not engaged in conduct that amounts to a repudiatory breach. The respondent says that the claimant wanted a change in role for career development reasons; his expectations of the move to the new security role were unrealistic; he became frustrated with the delay and accordingly the causative reason for his resignation was that he had obtained another job offer. The respondent also says that the claimant failed to comply with reasonable instructions to comply with its policies around Checkpoint and that its management of the claimant was in fact light-touch and reasonable.
64. Following the approach in *Kaur*, the first question to be determined is identifying the most recent act or omission that the claimant says caused or triggered his resignation.
65. The claimant's case is that it was Mr Kirkpatrick's failure to reply to his email and related checkpoint comments on 21 January 2021 that was the last straw for him. I note first that Mr Kirkpatrick did reply by email to the claimant both when the comments were first made on Checkpoint in August 2021, and then again to the email on 21 January 2022. This is inconsistent with the claimant stating that the "last straw" for him was a failure to reply on 21 January 2022 because there was in fact a reply from Mr Kirkpatrick on that date. The claimant must mean that there was an insufficient reply to the claimant on 21 January 2022 in addition to no reply after 26 January 2022. However, there were in fact many communications in person, by email and by instant messenger between the claimant and his line managers concerning his career progression between August 2021 and January 2022.
66. As to whether there was a failure to reply on Checkpoint itself, I note that Mr Kirkpatrick had twice replied to the specific questions raised on Checkpoint on 13 August by email and both times had told the claimant that he had misunderstood the use of Checkpoint. I prefer the respondent's evidence as to how Checkpoint should be used. On his own evidence the claimant considered it to lack value and did not consider it worthwhile. It was the claimant's wilful failure to engage properly with the Checkpoint tool that led to a misunderstanding about the purpose and effect of Checkpoint conversations.
67. Accordingly, the complaint that the respondent did not sufficiently reply to his email of 21 January 2022 is misconceived and not made out on the facts. Even insignificant matters can trigger a resignation, however given that this perceived omission was based on a misunderstanding on the part of the claimant, I find it to be an innocuous act of the kind described in *Omilaju*. Matters that are trivial are not sufficient to amount to a "last straw" for the purposes of constructive dismissal and I find that the perceived failure to reply to the claimant of 21 January is not sufficient to amount a "final straw".
68. The second question is whether the claimant has affirmed the contract since that perceived omission on 21 January 2022. I note that the claimant worked for another month after this omission. Delay in itself is not sufficient to amount to affirmation, but I note that the claimant also gave one month's notice. The claimant therefore continued to work and be paid for two months after the perceived

omission. He made no further complaint or gave any indication that he was working under protest. He did not file an informal grievance until the day he resigned. On balance and considering all the circumstances I find that the claimant affirmed the contract subsequent to the perceived omission of 21 January 2022.

69. The next question is whether the omission of 21 January 2022 was by itself a repudiatory breach of contract. For the reasons given above I find it was not.
70. The next issue to be determined is whether the perceived omission was nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of mutual trust and confidence.
- a. In relation to the first allegation that complaints against the claimant were handled unfairly and constituted bullying, I find that it was reasonable for Mr Kirkpatrick to raise the complaints with the claimant himself in the way that he did. The claimant's key concerns were that he was being "reprimanded" without his manager having undertaken a fact-finding exercise first. It is telling that when pressed on what he meant when he used the word "reprimand" the claimant explained that he had a meeting request to discuss the incident, and then within that meeting "he was disagreeing with me". These meetings were feedback within a reasonable management sequence and did not constitute bullying or unfair treatment.
  - b. In relation to the claim that he was denied the opportunity to move to a new role in the Respondent's new Security and Resilience practice for approximately seven months up to the date of his resignation taking effect on 22 March 2022, I do not agree that the claimant was denied this opportunity. There was a delay on the part of the respondent in setting up the new practice, but this was due to the wider organisational changes which were not insignificant. The claimant understandably became frustrated with the delay. In particular, there was a lack of clarity at the time the offer was made about the timeframe for the role or how he would transition at the time the offer was made which resulted in the claimant's expectations differing from that of his managers. But the respondent never reneged on its offer to the claimant, nor do I agree that the claimant was being "managed out". The evidence indicates that the respondent was intending to proceed with the move at some point in the future. At the time of the resignation the respondent intended the claimant to move into the role, albeit gradually, according to the business requirements. The delay, given the context of the organisational change, is not a breach of the implied term of trust and confidence.
  - c. Turning to the claim that between 13 August 2021 and 22 March 2022, the claimant did not receive any or any sufficient response to messages he placed on an internal software tool called 'Checkpoint', I have dealt with this above in relation to whether the lack of reply to the email of 21 January 2022 was the last straw. For the reasons above I find that the claimant's messages were neither ignored procedurally nor substantively.
  - d. In relation to the way the respondent handled the claimant's grievances, I find that he only made one grievance, on the day he resigned. The way it was handled could not have contributed to his resignation. In any event it was in accordance with company procedures for an informal grievance to

be dealt with by the senior manager in that part of the organisation: in this case Mr Martin. If the claimant had pursued a formal grievance, I would expect that to have been dealt with by an independent third party. But the claimant had already resigned and chose not to pursue a formal grievance procedure.

- e. I turn next to the telephone call with Mr Martin on 11 November 2021. It is clear that the claimant found this conversation to be genuinely upsetting. However, the only evidence that this meeting went beyond a management meeting in which the claimant was given constructive criticism and tipped into inappropriate behaviour is the claimant's own subjective evidence. I found the claimant's evidence to be selective and myopic. Whilst the claimant may have been genuinely upset at receiving feedback from Mr Martin, on balance I do not find this incident amounted to unreasonable or bullying behaviour and applying the objective test, I do not find that it breached the respondent's bullying policy.
- f. Turning to the team wide email on 23 December 2021; Mr Martin accepted that the indirect reference to the claimant was ill judged, and he apologised to the claimant. I take into account that the email did not refer to the claimant by name, that it was an accurate statement, and that the claimant did not raise the issue until his date of resignation, rather he sent a message in reply wishing Mr Martin a happy new year. This email was genuinely upsetting for the claimant, but there is insufficient evidence to convince me that it falls within the respondent's bullying policy. It was not objectively sufficiently significant so as constitute a breach of the implied term of trust and confidence.

71. I now look at the circumstances as a whole to determine whether cumulatively they amounted to a course of conduct which was sufficient as to amount to a breach of the implied trust and confidence. I find that they did not. The respondent was actively managing the claimant and attempting to move him into the role he wanted. His managers were starting to get frustrated with the claimant, as he was with them, but the working relationship did not deteriorate entirely, and they were still able to carry on working effectively together.

72. I accept that the claimant was genuinely disappointed in his employer. He disagreed with Mr Kirkpatrick and Mr Martin's management style and the relationships were strained by the delay in the claimant moving to a new role. Both the November and December incidents were particularly upsetting for the claimant and the claimant would have benefitted by more careful management by Mr Martin on those occasions. But the claimant viewed the situation only from his own perspective and was unwilling to accept the respondent's point of view. The test I must apply is an objective one. I do not consider that a reasonable person in those circumstances would have thought the same course of behaviour was sufficiently serious so as to constitute a repudiatory breach.

73. Finally, I will determine whether the claimant resigned in response (or partly in response) to the alleged breach. I note that the claimant had a new job offer when he resigned and he had applied for the new role in around November or December, so must have already been considering resigning by that point. This aligns with his email to Mr Martin in October 2021 stating that if his position had not changed by November or December, he would reassess his position with the respondent. I find that the claimant's resignation was in part a response to his

dissatisfaction at the delay in moving him to a new role and his strained working relationships. However, as I have found that that did not amount to a repudiatory breach, the claimant's resignation was just that: a resignation on the basis that he was no longer happy with his employer and he decided to pursue opportunities elsewhere, where he would receive better remuneration. I find that the claimant resigned on 22 February 2022 because he had another job to go to.

74. As the claimant is claiming constructive dismissal, the burden of proof is on him to show that he has been dismissed. I find that the claimant has failed to discharge the burden of proof of showing that the respondent's behaviour amounted to a fundamental breach of contract, or that the conduct was the cause of his resignation.

75. The claimant's complaints are not well-founded and are dismissed.

Employment Judge Leonard-Johnston

Date 29 November 2022

SENT TO THE PARTIES ON

01/12/22

FOR EMPLOYMENT TRIBUNALS