



EMPLOYMENT TRIBUNALS

Claimant: Patrick Muyembe

Respondent: HGP Architects Limited

Heard at: Southampton Employment Tribunal
On: 30th November and 1st December 2022.

Before: Employment Judge Lang

Representation

Claimant: Mr. Muyembe, in person

Respondent: Mr. Bryon, Counsel

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal by constructive dismissal is not well founded and is dismissed.
2. The Claimant's claim for notice pay is not well founded and is dismissed.
3. The Claimant's claim for arrears of pay/ unlawful deduction of wages is not well founded and is dismissed.
4. The Claimant's claim for outstanding holiday pay is not well founded and is dismissed.
5. The Claimant's claim for other payments are not well founded and are dismissed.

REASONS

1. This is a claim brought by Patrick Muyembe by way of an ET1, dated 8th June 2022. The Respondent is his former employer HGP Architects Limited. The claim initially also included former employees and a HR consultant as Respondents two through four however, the claims against the second to fourth Respondents were struck out by Employment Judge Livesey on 22nd September 2022. The claims brought are for:
 - a. Unfair dismissal by way of constructive dismissal.
 - b. Wrongful dismissal for notice pay.
 - c. Outstanding holiday pay.
 - d. Arrears of pay.
 - e. Other payments.
2. The hearing was listed before me for a final hearing on 30th November and 1st December 2022. Mr Muyembe has represented himself, albeit has been supported by friends in the hearing room. The Respondent HGP has been represented by Mr Bryon of counsel. It was not possible to conclude the hearing within the two days and therefore I ordered written submissions and indicated I would provide written reasons.
3. At the start of the hearing, I went through and agreed a list of issues with the parties, it was agreed that the question of remedy, if appropriate, would be considered at a later date. The Claimant made an application to strike out the Respondent's witness statements, and I treated that also as an application to strike out its statement of case. That was on the basis that he considered the contents of those documents were untrue and he provided a document setting out the discrepancies in the evidence which he had identified. I refused that application, having noted that there is a factual dispute between the parties and the authorities emphasise the need to do that having heard evidence. No party has requested written reasons in respect of that application and save for recording it I make no further reference to it. I have however, had the benefit of the Claimant's document when hearing the evidence and also when considering my judgment and producing these written reasons.
4. I heard evidence from the Claimant on day one and into the morning of day two. I ensured that he had breaks during his evidence so to ensure fair participation given the mental health conditions he experiences. Towards the end of his evidence he, somewhat understandably, became upset and I provided him with a longer break so to gather himself until he was able to proceed. For the remainder of day two, I heard evidence from, Mr Francisco Lizcano on behalf of the Claimant. I then heard evidence of Mr Chris Callard, Mr Henry Evans and Mr Ed Hussey on behalf of the Respondent.
5. Originally the Claimant had indicated he had limited questions for the Respondent's witnesses, he told me he had approximately four questions for each. It transpired he had many more, and whilst I had timetabled the hearing on the basis of his limited questions, I allowed him to ask those questions he had.

Although his time with Mr Evans and Mr Callard was more limited, I am satisfied that he has put his case and the Respondent has had the opportunity to respond. I do not agree with the submission made on behalf of the Respondent that the elements of dishonesty were not sufficiently put. The Claimant challenged the evidence including the question of honesty, both in writing and orally, the Respondent had an opportunity to respond to those allegations (which it did, and the witnesses denied any dishonesty), and the points were also put to the relevant witness in examination in chief by Mr Bryon. I therefore have a clear understanding of their respective cases and I am satisfied that I can fairly consider those allegations made by the Claimant.

6. It had been envisaged that I would also hear oral evidence from Ms Sharilyn Arocho on behalf of the Claimant. She had provided a statement; however, I was told on the morning of day one she was unwell. An email was provided from her on the morning of day two explaining she was unwell. That email was dated 30th November 2022. The Respondent is right that correspondence only referenced day one but on the balance of probabilities I accept she was unable to attend due to ill health. No party sought a postponement for Ms Arocho to be called to give evidence. I have considered her evidence when arriving at my judgment and have explained within these reasons the weight which I attach to it and why.
7. In addition to the oral evidence, I have had the benefit of written submissions from both parties, both of which are dated 14th December 2022. I also have had the benefit of a bundle of documents running to 369 pages. I initially had been provided with a shorter bundle of 178 pages, however, was informed that was an incorrect bundle. It transpired that that contained only some of the correspondence which has been disclosed, however, I had the opportunity both before the evidence started and overnight to consider the additional pages which were not originally before me and have done so again when preparing these written reasons.
8. At this stage I wish to express my thanks both to Mr Muyembe and to Counsel for the Respondent for the careful and measured way in which they have put their respective cases and assisted me.

Disclosure

9. After the conclusion of his evidence the Claimant indicated that he wished to raise the issue of disclosure as he was concerned that there were documents which have not been disclosed. Those issues were considered by Employment Judge Smail as set out within the email of 19th October 2022. In that email Employment Judge Smail left the matter open to be considered again at final hearing if required, however, commented that the Respondent's assertion, that there was confusion over disclosure and a subject access request, appeared correct. At the stage in which I dealt with the application I noted that there was no evidence that the Respondent had not complied with its disclosure obligations, however, commented that if it arose, I would deal with it further at that stage.
10. The Claimant has, within his written submissions, commented about disclosure and drawn attention to his previous submissions to the Tribunal. However, I am satisfied from the documentation I have, that the Respondent has complied with its disclosure obligations, there is no evidence to the contrary. Whilst there has

been concern about the manner in which a subject access request under the General Data Protection Regulations has been handled, I have no jurisdiction in respect of those Regulations. I do not consider that I need to make a disclosure order.

11. Similarly, whilst, within his written submissions, the Claimant makes reference to the timing of disclosure, no party has made any application for a postponement and the Claimant has, in my judgment had a fair opportunity to consider, respond and comment upon the evidence which was disclosed. He was meticulously prepared for this hearing.

Race Discrimination

12. For completeness, at one stage during his evidence the Claimant was cross examined on comments he had made to his GP where race discrimination was mentioned. The Claimant confirmed that he was not making such an allegation within these proceedings, nor has his case been pleaded or case managed on that basis. No application to amend has been made to include such allegations. In those circumstances I do not need to consider this allegation any further.

Issues

13. A list of issues was agreed at the start of the hearing and should be read in conjunction with these reasons, they are annexed to them.

Findings of Fact

14. Having heard the evidence, reviewed my note of the same and having considered the bundle and written submissions I turn to the findings of fact which I make.
15. At the outset of these findings, I make a preliminary finding that I am satisfied that the Claimant and the witnesses I have heard from, which includes Ms Arocho, have done their best to assist me during the hearing and I do not consider any individual has sought to be dishonest or mislead me. There are differences in the evidence which I will address below, but I am satisfied that there is a proper explanation for those discrepancies, and it is not a case of any party or witness acting dishonestly.
16. The Claimant was employed by the Respondent as an Architectural Assistant. His employment commenced on 10th May 2018; it ended on 20th May 2022. I have had sight of his employment contract. At the time his employment ended he was paid £1,697.01 net per month. He would work 37.5 hours per week.
17. The Claimant's employment ended when he resigned, with immediate effect, by way of letter dated 20th May 2022.
18. The Respondent is a firm of Architects, it employs approximately 59 individuals and has two directors Matthew Williams and Chris Callard. The Respondent has a number of policies and procedures which I have been provided with, those documents are undated but were in place during the Claimant's employment. The relevant policies are as follows:
 - a. Anti-Harassment and Bullying Policy.
 - b. Grievance procedure.

- c. Equal opportunities policy.
- d. Stress policy.

I am also aware that there was a disciplinary policy in place although I do not have a copy of the same.

19. When the Claimant's employment commenced his manager was Ms Vivian Conway. Ms Conway is an Associate Director in the Respondent's company. Ms Conway initially managed the Claimant for a period of approximately three to four months. That was the evidence of both the Claimant and Mr Callard, and whilst from both it was an estimate, given the broad consistency in their accounts I am satisfied that is the likely initial period he was managed by her. The Claimant was then managed by a Mr Salter and Mr Taylor for a period of approximately 10 months before moving back to being managed by Ms Conway. Again, there was a degree of uncertainty from both the Claimant and the Respondent as to the exact periods of time, that was in part because the issue only arose during evidence but also because of the time which had elapsed. I am satisfied both the Claimant, and the Respondent's witnesses, were doing their best to assist me with those time scales. It is agreed that by July 2019 the Claimant had returned to be managed by Ms Conway.
20. It was accepted in the evidence of Mr Callard that Ms Conway was an important and valuable employee to the Respondent. Initially Mr Callard was reluctant to single her out and makes the point that all employees are valuable. I find that Ms Conway was a valuable employee, but I also find so was the Claimant. I accept the evidence of Mr Callard that all employees are valuable.
21. The vast majority of the Claimant's employment was unremarkable. As the Claimant identified both in his evidence and in his submissions, and as was accepted by the Respondent, he was never subject to any formal disciplinary or capability procedure in respect of his performance. I will return to the informal allegations of concern in respect of his performance in due course.
22. Similarly, until 3rd December 2021 the Claimant did not formally raise any issue with regards to the Respondent's treatment of him. There were occasions when he tells me that he spoke to Ms Conway about his treatment however, the dates and times of such were unclear, in part I have no doubt because of the time which has elapsed. I accept he had spoken informally to a friend, Mr Lizcano, as well as Mr Slater and his GP on occasions prior to December 2021 about his perception of his treatment by Ms Conway.
23. The focus of this hearing has been on the incidents from January, February and October 2020 and August and November 2021 and then the Respondent's response and conduct from December 2021 to the end of the Claimant's employment in May 2022. I will return to these incidents. I do, however, find that the appraisal, including self-evaluation forms in respect of the Claimant's employment showed he raised no concerns in respect of his treatment by the Respondent, including in respect of Ms Conway. In fact, his evidence was that in his May 2021 appraisal he suggested further 1:1 meeting between him and Ms Conway to assist with communication.

24. The alleged incidents were clarified at the start of the hearing, and I had ensured that they were set out so to cover the points which the Claimant relied on. The Respondent initially resisted that approach arguing that the incidents prior to November 2021 were, it was submitted, pleaded in a vague and unparticularised manner. I determined that there was a need to consider the earlier allegations the Claimant relied on given his case is that it is the cumulative impact of all the events that gave rise to his resignation. I consider that those points were set out within his ET1, and the Respondent was aware of them as that formed the basis of his grievance and the basis of his claim.
25. However, notwithstanding the approach I had taken, ensuring all points had been covered, the Claimant when challenged in cross examination on there being only five alleged incidents over a two-year period responded that *it could be many more. I did not add others as I have already spoken about, I don't really remember some incidents. I would just brush it off.* At the end of his evidence, he compared his position as being similar to having been in an abusive relationship, namely that one simply accepts what an abuser states. He also gave evidence the incidents he relies on, namely the five identified, are the ones which can be corroborated. The others could not.
26. On the balance of probabilities I do not make the finding sought in respect of the wider allegations. They have not been particularised, I have not been given any detail in respect of them, the Claimant in his own evidence recognised the difficulties in proving them given that they are not corroborated, which is why he had not included them earlier. There is also a contradiction in there being wider allegations and the contemporaneous documentation wherein no allegations were made by him to his employer prior to December 2021.
27. I have carefully weighed the evidence of Mr Lizcano and Ms Arocho, which Mr Muyembe relies on to support his contention that Ms Conway bullied him, and that was her approach to others. Mr Lizcano gave evidence and was thoughtful and considered when doing so. He accepted that Mr Williams was supportive, and he accepted that his employment with the company was mainly positive. He explained he would work with the company again. No negatives were raised at the point of his resignation. He is unable to assist with direct evidence of the events relied on by the Claimant however, I accept that the Claimant confided in him with his feelings. He has clearly been an invaluable support and friend to the Claimant, that much was evident from his attendance and support at the hearing.
28. Ms Arocho did not attend. It is right that the Respondent has not had the opportunity to cross-examine her, and when she left the company, no concerns were raised by her, she reapplied for a role after she had left her employment. She gives an account of what she describes as poor treatment from Ms Conway, not only to her but to others, but her evidence is more limited and non-specific. She does however give evidence in respect of the January and February 2020 incidents, which I will return to.
29. I have also not had the benefit of hearing from Ms Conway. It is submitted that I should place weight on the contemporaneous records produced as part of the investigation which have been provided. The Respondent notes that the Claimant does not allege that the account is incorrect. However, at best it is second hand

hearsay, and the Claimant has not had the opportunity to cross examine Ms Conway. There is no document from her which contains a statement of truth. It was within the gift of the Respondent to call her, having been aware of the allegations of the Claimant and her conduct. Therefore, whilst I can place some weight on what is said by her within the documentation that weight is in my judgment limited.

30. In January 2020 the Claimant alleges that when preparing a schedule, he spoke with Ms Arocho when he was challenged by Ms Conway who asked, *“how long is this schedule going to be?”* when he explained that he was double checking the information Ms Conway is alleged to have shouted *“this should not take this long, this should have been done a long time ago”*.
31. In evidence Mr Muyembe was challenged on this being the second time he was being chased for the schedule and whilst he accepted that was the case, he explained that it was because he had been told earlier that it was not required. The Claimant in support of that incident relies on the evidence of Ms Arocho. I note from the evidence provided for this hearing by Ms Arocho that she describes Ms Conway as having snapped and having raised her voice. She does not go as far as saying that she shouted.
32. However, I must treat Ms Arocho’s evidence with some caution. The Claimant in his evidence confirmed that he had spoken to Ms Arocho prior to her second statement provided in support of the investigation for the grievance. I accept his evidence that she did so because she wanted to see his statement first to corroborate what he had said. He confirmed a copy of the email was sent to her with her account of the January and February 2020 incidents. Even on the Claimant’s own account the account provided by Ms Arocho is not her own untainted account there is some influence from his recollection of events. Whilst that was for, I have no doubt genuine and innocent reasons, it does impact the weight I can place on what she tells me. Additionally, Ms Arocho has not given evidence within these proceedings due I am told in an email to illness, so she has not been able to be challenged by the Respondent, and I note from the evidence that she reapplied for a job through a recruiter with the company, and commented it was a good place to work. Save for the statements provided in these proceedings and part of the grievance I am not aware of any allegations made by Ms Arocho over her treatment at the company when employed by them. I therefore can attach some weight on what Ms Arocho has said but that is limited.
33. Returning to the specifics of the January 2020 incident, Ms Conway, in the investigation with Mr Evans commented that she acknowledged the incident but denied raising her voice and stated it was the second time she had asked for the schedule having previously checked that the Claimant had understood what was required and when.
34. On balance, I find that Ms Conway did shout and raise her voice when saying the words *“This should not take this long, this should have been done a long time ago”*. I make this finding on the basis of the Claimant’s consistent account, both in his oral and written evidence and in the documentation within the bundle. Ms Arocho’s evidence does not take me much further. The weight I can attach to Ms

Conway's account is more limited compared to the Claimant's evidence and I therefore I prefer his account on this event and find it happened as he described.

35. The next incident relied on by the Claimant was in February 2020 where he alleges that Ms Conway stood over his shoulder and aggressively asked "*how many have you done so far? How long is this going to be?*" When he replied, "*I'm going as fast as I can...*" before he finished in front of everyone she shouted, "*go faster go faster.*"
36. Ms Arocho's statement for these proceedings does not make reference to the specifics of this incident but notes how it left her feeling. She told me that it was the same tone and demeanour as which she had experienced when managed by Ms Conway. I apply the same caution and considerations in respect of Ms Arocho's evidence as I have set out above.
37. Ms Conway told Mr Evans as part of his investigation that she denies having raised her voice as alleged by the Claimant although accepts there was an incident, and states the comments were made in jest. She describes the need to have timescales and not just comments on going as fast as I can because of the need to organise team roles and ensure that deadlines are met.
38. I again prefer the evidence of Mr Muyembe in respect of this incident. His account is clear, credible and consistent. He has not sought to embellish or exaggerate this allegation. He does not allege that Ms Conway shouted, and there is no evidence she did, the oral evidence of the Claimant was she raised her voice. I accept his evidence over the unchallenged hearsay evidence of Ms Conway. It was also repeatedly suggested by Mr Callard that Ms Conway has an accent which may mean it is interpreted incorrectly, that was denied by the Claimant who I accept has had experience of communicating with her for some time and can differentiate between her speaking and raising her voice. I am unclear as to how such a comment was or would be made in jest given the context. I find that it happened as per the Claimant's account.
39. In October 2020 it is alleged that Ms Conway snapped aggressively at the Claimant stating, "*I am very disappointed, you need to think about where you place things, and this should be straightforward.*" This was in the context of Mr Muyembe placing sounder symbols on a fire strategy drawing. Again, it is accepted by Ms Conway that the event occurred, but it is said that recollections differed. Ms Conway described to Mr Evans *that the drawing had been marked up several times before and was not as neat as it should be*. That incident was said to have been witnessed by a Mr Shane Knight, I was told by Mr Evans that Ms Conway had agreed his involvement as set out by the Claimant, but he denied that she accepted snapping aggressively. I accept that Ms Conway said the words alleged and as appears to be accepted.
40. I do not find that she was aggressive or that she snapped. Mr Muyembe within his evidence started by stating that Ms Conway's behaviour towards him occurred behind closed doors. This was then contradicted by the description of this incident which is said to be in the open plan office in front of colleagues. Mr Muyembe also in his evidence accepted the proposition put to him that it was not what was said but how it was said before stating that it was both the words and

actions. I am not satisfied therefore that the aggressively snapping took place, I do however, find that Ms Conway was frustrated, and Mr Muyembe was aware of that frustration, which he construed as aggressively *snapping*.

41. In August 2021 when the Claimant was producing a slide show he alleges Ms Conway stood over his shoulder, drew a colleague's attention to his *jumping slides* before going on and the Claimant alleges Ms Conway as having intimidated and threatened him with dismissal by stating "*if Mr Williams knows this, he is going to put you on his next hit list*". The Claimant took this as meaning a hit list to be fired. It is accepted the words hit list were used but the Respondent says that it was a reference to a hit list of things Mr Williams does not like. That in broad terms was the position put by Ms Conway in the investigation when she spoke with Mr Evans. A Mr Edwards, who was also not called and has not given evidence within these proceedings, told Mr Evans that he remembered the incident vaguely, but he did not consider Ms Conway as being aggressive although jumping slides was a *pet hate of everyone's*.
42. The Claimant denied any comments of there being a hit list of things the company, or Mr Williams, did not like had been made previously, as in it was not a common phrase or comment, and he told me this was the first time he had heard those words. Again, I did not hear from Mr Williams but there is no evidence that he operated such a hit list in the manner alleged by the Claimant. In the context of when the previous allegation was some 10 months prior there is no explanation as why such a comment would be made on threatening to dismiss the Claimant. There is no evidence that is what the company wanted. The Claimant's account changed in the course of the evidence, at one stage suggesting Ms Conway was shouting. Whilst the contemporaneous report for the investigation notes snapping, nowhere other than his oral evidence was shouting alleged. Mr Edwards also did not regard Ms Conway as being aggressive, although again his account in the document can only carry limited weight.
43. The words were unfortunate, and I find they were said and that has caused the Claimant distress, but I am clear that there is a misunderstanding on what was meant by them. I do not find that Ms Conway was aggressive or shouting in this incident. I arrive at that finding taking account of the contemporaneous position of Mr Edwards that Ms Conway was not aggressive, although I have no formal evidence from him, and I can only attach limited weight to his account. There is also the inconsistency in the Claimant's written and oral evidence, with regards to shouting. Whilst Ms Conway did apologise in respect of this, I do not accept I can draw an inference that this was because she was admitting wrongdoing. I therefore find that the words hit list were used but it was not said in an aggressive or snapping tone as alleged, nor was it intended as a threat or form of intimidation to dismiss the Claimant.
44. The most recent allegation raised in respect of Ms Conway was in respect of an incident on 30th November 2021. The allegation raised was that Ms Conway compared the document the Claimant was working on to another member of staff stating "*I know comparing is not great but look at this...*" before going on to state "*yes you're great. I interviewed you and your portfolio was great but I just don't see it*". There is a broad level of agreement in respect of this allegation, save Ms Conway does not accept those were her exact words. Mr Robinson who was

spoken to by Mr Evans confirmed that Ms Conway probably did use those words or similar. Mr Muyembe was cross examined in detail on this, and his account remained consistent. That is supported by Mr Robinson's account to Mr Evans. I find that the event took place as described by the Claimant. It is of course right that Ms Conway did compliment the Claimant within that exchange as he accepts.

45. It is accepted that on 29th November 2021 at 23.21 an email was sent by Ms Conway to the Claimant, in respect of his performance. That email concerned the contents of the Parking Strategy document, which forms the context in which the allegation from 30th November 2021 arises. Ms Conway in that email criticises the document which she said was said to be *lacking in content, attention to detail, does not reflect what was asked or expected within the timeframe*. That email goes on to reference a discussion that took place that morning where it was said the Claimant *assured me you understood what was required, the timeframe in which it was to be completed and that you believed the task was achievable. However, it appears from running through the document there is little achieved beyond what we discussed in the meeting apart from the inclusion of precedent images. As such, there are a couple of items I feel it's important to raise with you*. The email goes on to set out concerns on the document being printed for review, concerns on detail and that *the time taken to get to the standard achieved by the end of today is in excess of that expected and in which similar has been completed by others or that is expected of someone in your role*. I do not need to go through the further details of the email, save to note Ms Conway envisaged discussing matters with the Claimant the next morning.
46. I was told and accept that the sending of that email followed a discussion which took place between Ms Conway and Mr Callard where she raised the issue. There is, as the Claimant identifies, ambiguity as to whether or not Mr Williams was part of that discussion. The written evidence indicated he was present compared to an email sent by Mr Williams as part of the investigation of Mr Evans on 27th January 2022 where he indicated he only found out afterwards. On balance I find he was present at that meeting on the basis of the email sent by Ms Conway to both Mr Williams and Mr Callard on 30th November 2021 at 08.46 where she notes the contents are what were sent to the Claimant. He also thanks her by way of a reply for doing so, if he was not part of the discussion, I find it unlikely he would respond in such a manner.
47. At no stage has that been suggested by anyone that the discussions which took place, nor the emails sent on the 29th and 30th November 2021 were the start of any formal disciplinary or capability process. The evidence of Mr Callard on behalf of the Respondent was clear and consistent in this respect when discussing the communication on 29th November 2021. He told me that he had not been aware of any previous performance issues and that the only concern he was aware of was in respect of deadlines, but they were raised *not in a formal manner*. I accept that evidence, and it corroborates the evidence of the Claimant.
48. It was pointed out by the Claimant that when concerns were raised on his performance with respect of deadlines that Mr Callard did not ask about the Claimant's wellbeing. That is correct and was accepted by Mr Callard, however, I accept the evidence that there was no indication at all, and nor am I pointed to

any evidence that any concern about his wellbeing was either known or ought to have been known to the Respondent.

49. I find that of the five incidents which are raised there is a common theme and that is where concerns have been raised in respect of the Claimant's work and he has been challenged about it. It is right and I have found there were no disciplinary or capability proceedings brought against him. For the avoidance of any doubt, I find Mr Muyembe was a good employee, but that does not mean that a manager is not entitled to bring up matters with an employee matters which fall below what they expect but do not amount to the use of a formal disciplinary process.
50. I find that the Claimant struggles when he is challenged on his performance. This was evident within cross examination. He was taken to the self-evaluation forms which were completed as part of annual appraisals. In particular he was taken to the form from 17th May 2021 where one of the weaknesses he identified in himself was time management skills. When asked about this he accepted he made the comment and stated that the form was completed by himself on his own. However, he then sought to deflect and minimise what had been said and became defensive. He then stated that what it really meant was that he wanted to work on multiple projects at the same time, as a colleague Kevin did. His answers in this respect were not credible, when I asked why he did not say working on multiple projects he was unable to answer but reiterated his position that he meant working on multiple projects. I find that when challenged he does take matters to heart. Whilst I have some sympathy for him, and it does not detract from the fact he was a good employee, nor does it detract that he is good at his job, it shows how personally he takes such criticism and concerns.
51. I accept as is documented within the investigation report what is said by Mr Robinson and appears accepted by the Respondent that at times Ms Conway can come across as blunt.
52. I do not accept that I can make any findings that Ms Conway has treated other employees including Ms Arocho in a poor manner or has bullied them. Those allegations are not particularised, were not raised at the time of her resignation, have not been subject to cross examination and she applied, albeit through a recruitment agent to work for the Respondent again. Her position is not supported by any contemporaneous records from her employment. Mr Robinson said to Mr Evans as part of the investigation he was not aware of any bullying from Ms Conway although recognised communication needed to be worked on. I am not satisfied that with the limited weight I can attach to her evidence I can make findings that Ms Conway behaved poorly to her other colleagues.
53. I shall return to this point further in my conclusions however, I am not satisfied there is any evidence of harassment or intimidation of Mr Muyembe. There are clearly elements of communication which should be worked on. There is no evidence of Ms Conway trying to force the Claimant out, name calling, nor using inappropriate language save for the hit list comment. I am not satisfied that either individually or collectively that there was bullying towards the Claimant by Ms Conway. Instead, I am satisfied that there were elements of his performance which fell below what was required but did not amount to formal disciplinary action. Nor does that mean that such action would have been implemented.

There are many occasions when employees will have issues addressed with them, just because it is raised does not mean that they are bad at their job or a poor employee. This is, however, a Claimant who struggled with any form of criticism and that was clear to me during his evidence when he was cross examined on his self-evaluation form.

54. On 3rd December 2021 it is accepted, and I find, that the Claimant spoke with Mr Williams about the concerns he had and his feelings. There is some disagreement between the parties as to whether it was a five-minute meeting as the Respondent has suggested or ten to fifteen minutes as the Claimant stated in his evidence. What is however, accepted by all is that it was an informal meeting and I make that finding.
55. During that meeting I accept and find that the Claimant raised concerns over how he was being managed. I accept, as was the evidence of the Claimant, that was the first time in which he raised those issues with Mr Williams or the Respondent. I do, however, accept that the Claimant confided in and sought support from Mr Lizcano, and his GP in respect of his concerns. Latterly that included Mr Slater who advised him to speak with Mr Williams. When speaking with Mr Williams I find that the Claimant only made reference to the 30th November 2021 allegation, and whilst I accept the evidence of the Claimant that he made reference to wider concerns, there was a contradiction in his evidence where he initially stated it was only the 30th November 2021 incident which was raised. I accept that he did go further than that in the discussions albeit I find he did not make specific allegations in respect of the previous incidents. I accept he used the word bullying when describing the allegations to Mr Williams. That has been his consistent complaint throughout.
56. Whilst Mr Williams did not respond as the Claimant would want, the evidence as given by Mr Lizcano was that he was a supportive Director. I accept the position put by the Respondent that three options were put to the Claimant by Mr Williams, (1) that he could continue to work day to day on the same projects with an individual known as Simon, (2) he could change teams which would include moving desks (3) he mentioned other employment but that he would be disappointed if it came to that. As I have already noted I have not heard evidence from Mr Williams, however, when taking account all the evidence, the positive perception of him by the Claimant and Mr Lizcano and the slight uncertainty from the Claimant within his evidence on what allegations were discussed, I am satisfied all three points were put forward by Mr Williams.
57. On 6th December 2021 the Claimant was unwell and off work before being formally signed off by his GP with work stress on 10th December 2021. On 6th December 2021 Mr Williams sent an email to Ms Conway asking her to hold off calling him as *I don't want him pulling the stress card*. The Claimant draws that as being an example of the company embarking on bullying him and not taking care of his wellbeing. No explanation is provided by Mr Williams in respect of that email, but I accept that the Claimant only became aware of it after he resigned and therefore it cannot be the cause or a contribution for him doing so.
58. Mr Muyembe instigated a grievance by way of an email to Mr Williams on 15th December 2021. Within that email he set out his allegations of bullying from the

incidents that have been considered within these reasons. He set out the company policies which he alleged had been broken, namely the equal opportunities policy, stress policy, anti-harassment and bullying policy. He concluded that email by noting that he considered Ms Conway's actions as harassment and or bullying and which have impacted his mental health. He sought for the company and himself to improve in all that is done with regards to the company policies and noted his wish to be moved team.

59. A Christmas bonus was paid to the Claimant, and I am told all staff, on 16th December 2021. The Respondent chose to communicate that bonus before acknowledging the grievance. Whilst the Claimant is concerned about the timing of such a bonus and alleges it is a bribe there is no evidence to support that. I accept it was a bonus paid to all staff, and I have no doubt the Respondent sought to maximise the goodwill from such a bonus, but there is no evidence that it sought to influence the Claimant's conduct in any way by providing such a bonus. In fact, had it given all staff a bonus of £500 and not him, the Claimant would no doubt have rightly raised objection to this.
60. On 21st December 2021 there was a message between Mr Williams and Mr Callard about not having responded to the Claimant's request to move team and the response was that firstly they needed to see if he wished to follow the grievance process. The Claimant considered this was an example of the Respondent not taking his welfare seriously, but I do not accept that, it was appropriate for the Respondent to ascertain the position before considering how to respond.
61. Mr Callard acknowledged the grievance on 18th December 2021, and it was agreed that as there was a complaint against Mr Williams all communication in relation to it should go through him. Mr Callard asked that Mr Muyembe to confirm that he wished for the matter to be considered as a formal grievance which he confirmed on 22nd December 2021 that he did.
62. The point was put several times by the Claimant during the evidence of Mr Callard that if he was impartial then why was his complaint not dealt with in a different manner. On exploring this with him he considered that his complaint should have been considered under either the equal opportunities, bullying and harassment and or disciplinary process. I explored this point, and I was told by Mr Callard, and I find, there is an equal opportunities and bullying and harassment policy, if an employee makes a complaint, then that would be explored under the grievance procedure with regard to those policies. The Respondent at no stage was disciplining the Claimant which is why the disciplinary procedure was not utilised and nor could the Claimant bring a complaint against Ms Conway under this process. The suggestion from the Claimant is that this was indicative of Mr Callard and the company not being impartial. I do not agree, the Respondent responded to the grievance in accordance with the appropriate process, that being the grievance procedure.
63. On 4th January 2022 Mr Muyembe confirmed that he wished, pending the conclusion of the investigation, to be moved teams. He asked that Mr Callard is not involved in the investigation due to a perception he would not be independent because of a close relationship with the person involved.

64. In January 2022 the Claimant was engaging with Talking Change and his GP with regards to his mental health and I have copies of those reports which document Mr Muyembe reporting bullying to the practitioners.
65. On 5th January 2022 Mr Callard confirmed that a temporary team move was approved, and Mr Evans was appointed to undertake the investigation. The Respondent has been criticised for not making this temporary move sooner, however, I accept their contention that it would have been premature given that the investigation had not yet started, and furthermore, that there was no temporary move sought within the initial grievance, it was sought at the conclusion of the process.
66. Mr Evans was an individual whom in the Claimant's evidence he accepted was independent and suitable. The Claimant's view on this changed when he saw the outcome of the grievance. When asked about this in evidence he commented that Mr Evans could have *used the guide, been objective, compared it with the policy, been thorough*. He also complains that Mr Evans should have spoken directly to his witnesses, namely Mr Lizcano and Ms Arocho. The Claimant accepted that Mr Evans was entitled to reach a conclusion different to what he sought but considered he could have looked at the bullying and harassment policy and historical events.
67. After being appointed Mr Evans made contact with Ms Conway to discuss the events raised. He also spoke with Mr Robinson, and Mr Edwards and Mr Williams before producing a report in table form with the respective accounts of the witnesses in response to the allegations.
68. Mr Muyembe had emailed Mr Evans with details of witnesses on 16th February 2022 and provided statements from two of them namely Mr Lizcano and Ms Arocho. Mr Knight was also a witness put forward but on another occasion.
69. Mr Evans did not speak with the Claimant's witnesses. He told me this was because they had taken the time to set out their account in writing and that he did not consider there would be anything to add. At one stage it was suggested this was because he did not have contact details for those who were not employed but Mr Evans clarified this, as above, and I accept his clarification. He explained that he did take account of what they said. He did not speak with Mr Knight who could assist with the October 2020 incident however, this was because he did not understand that there was any disagreement with what Ms Conway and the Claimant said about his involvement. He accepted with hindsight given there was not acceptance of aggressively snapping he probably should have spoken with Mr Knight.
70. Mr Evan's report was dated 9th March 2022. As part of that report the Claimant was met with and was accompanied to that meeting.
71. The evidence of Mr Evans was that whilst he did not make specific reference to the bullying and harassment policy, he did have regard to that policy. I find and accept that he did so. He was a credible and consistent witness. He was an individual who it was clear to me was trying his best. He accepted that he could

have done things differently and made that concession appropriately when asked and with no resistance. He told me and I accept this was his first investigation.

72. I find that the investigation undertaken by Mr Evans was reasonable, he was thorough, he was impartial, and he looked at documentation he considered was necessary including speaking with the witnesses he considered relevant. It was not a perfect investigation but nor does it need to be, it was reasonable, and it was balanced. I accept his evidence that save a work relationship he had no personal friendship with Ms Conway. I accept that he was not placed under any pressure from anyone but himself in respect of the outcome. The pressure he placed on himself was as he told me, to get it right. Given my findings, I find that the investigation complied with both the ACAS code of practice and the Respondent's procedure.
73. Within his report of 9th March 2022, he made recommendations, that included how constructive criticism is delivered and the impact that can have. Additionally, he recommended training for management on mental health issues and stress is undertaken. Furthermore, training for Mr Williams in approaching serious allegations even when informal was said to be useful, A recommendation that the move is made permanent was recommended. Mr Muyembe was said to be happy in his new team and I find that he was. If Mr Evans was not impartial nor independent of mind I find it unlikely he would have made recommendations against one of two of his directors. He made that recommendation because he took his role seriously and he was independent and impartial.
74. Mr Callard wrote to the Claimant on 9th March 2022 where he enclosed Mr Evan's report and outcome and accepted each of the recommendations, as well as including a further one for the Claimant to be supported by a Ms Ridley for as long as needed.
75. The Claimant appealed the grievance outcome on 23rd March 2022. In his letter he considers that relevant material was overlooked, that included a failure to consider the relevant policies, and various statutes, he considered that the investigation was tailored to suit Ms Conway's narrative and considered that the appeal should succeed on the basis of natural justice principles, fairness and reasonableness. He set out a detailed response in table format.
76. On 1st April 2022 Mr Callard wrote to confirm that as there was no alternative director a HR specialist would be appointed to the appeal and impartially report back with recommendations.
77. As the Claimant points out there is a contradiction in the evidence. I was informed that the Respondent's solicitors had referred Mr Hussey's company. The Claimant was then informed about that recommendation. It has since transpired that the Respondent and the HR company have worked together before. I was told by Mr Callard that this was initially in 2017 to draft contract documents and then in 2018 to recruit a finance controller. There was an email from their solicitors in which they recommended his services to consider the grievance. I accept that evidence. He explained that on the Claimant's appeal it would need to be considered by someone higher or at the same level as him. Mr Williams was unable to do so, due to the allegations against him. Two other

external individuals were put forward but were not available. I accept that the Claimant was unaware of this connection. However, I find that this connection does not mean that Mr Hussey was not independent nor impartial. I also find that the previous work was not at the forefront of Mr Callard's mind when discussions with the Claimant took place. It was unfortunate it was not raised before.

78. An appointment was confirmed for Mr Muyembe to meet with Mr Hussey on 12th April 2022 and he was written to on 5th April 2022 to confirm that, together with the procedure being used and the right to be accompanied. After further correspondence Mr Muyembe was unable to secure a companion however, he confirmed within his oral evidence that he was content to proceed without one.
79. At the commencement of the investigation and the meeting with the Claimant, I find as is accepted, that an agreed summary would be produced. I find that at the start of the meeting Mr Hussey indicated he would record the meeting and a transcript was produced, which I have been provided with a copy of. I find that from Mr Hussey's perspective that overrode the agreement for an agreed note as a transcript would contain a full accurate note of what was stated. I find the Claimant agreed to this, but also felt that he would have an opportunity to amend that transcript.
80. The meeting took place, and the transcript has been provided. It is not disputed that is an accurate reflection of the meeting. The issue is that the Claimant felt that he should be afforded an opportunity to put his case again so it came across as best as it could and ensure that it was clear, that is why he sought to amend and agree the note.
81. The Claimant wrote to Mr Hussey following the meeting with his preferred outcomes, those included addressing the grievance of bullying and harassment with the relevant policies, for the company and himself to improve in all that they do with regards to the policies, and to receive a written apology to the facts raised within the complaint.
82. On 20th April 2022 Mr Hussey wrote to Mr Muyembe setting out that Mr Callard was unwell with coronavirus and in the meantime attached his report and recommendations. On 21st April 2022 the Claimant acknowledged that position and asked for some time to come back with the transcript.
83. On 29th April 2022 Mr Hussey informed the Claimant that his report had been sent to Mr Callard and he would be in touch having had sight of the recommendations.
84. On 4th May 2022 Mr Callard responded to Mr Hussey thanking him for the report and noting that *I guess depending on how this goes will influence if we see this as good value or not!?! He goes on to note it has been good to work with you again despite the circumstance.* Again, that was challenged by the Claimant as being improper and evidence that Mr Hussey is not impartial. The comment I was told, and accept, was in relation to the Claimant's observation within his appeal that he may bring legal proceedings.

85. On 4th May 2022 Mr Callard was written to by Mr Williams who was cautious about the final recommendation and that recommendation, which in effect involved a survey from staff was removed.
86. On 5th May 2022 the Claimant sent through his notes of the transcript. He had made significant changes to the transcript. That was not because he felt that what was recorded was inaccurate, but because he did not feel that he had put his case as effectively as he would want. I find that the transcript as produced was an accurate transcription of the meeting, furthermore materially the changes made by the Claimant did not change the meaning or nature of the allegations raised.
87. On 5th May 2022 Mr Hussey responded to that email noting that any changes were for where the record of transcript was said to be inaccurate. On 6th May the Claimant responded objecting to the approach which had been taken, he highlighted that no timescales were put on when he was to respond to the transcript and he considered that Mr Hussey's report may not accurately reflect what he, the Claimant, had intended. In his oral evidence he accepted that at no stage was it suggested that the report was contingent on his agreed note being received.
88. Mr Callard became copied into the correspondence between Mr Hussey and the Claimant. That, the Claimant argues, is a further example of Mr Hussey not being impartial and Mr Callard tainting the impartiality of the investigation considering he was not to be involved. I find that Mr Callard was copied in, and at times Mr Muyembe replied including him in the email trail, I do not agree that means that Mr Hussey was not impartial, nor that Mr Callard had tainted the investigation.
89. The report, which is dated 3rd May 2022, is detailed, it accepts some but not all concerns raised and makes recommendations. That includes that the original outcomes stand with individual follow ups, that the training recommended is broadened to include bullying and harassment, a meeting is arranged with Mr Callard and Mr Muyembe to acknowledge feelings, workplace initiatives are implemented to emphasise the need for staff being treated with dignity and respect.
90. On 10th May, Mr Callard wrote to Mr Muyembe with the outcome of the grievance and reiterated the Respondent's commitment to reviewing the outcome and recommendations and offered an apology for *any negative emotions that you have experienced going through this process*.
91. On 13th May 2022 the Claimant wrote to Mr Hussey challenging again the breach of the agreement in respect of an agreed note, and the chronology of no timeframe having been given for him to return the transcript to him. He considered that may mean the report is based on inaccurate information. His concerns also included the failure to consider Ms Arocho's statement. It was accepted that had been overlooked and when Mr Hussey considered it on 13th May 2022 there was no change to his conclusions or recommendation. Mr Muyembe again challenged the position on the procedure on 16th May 2022 and noted his dissatisfaction of the same.

92. The Claimant alleges that Mr Hussey was not impartial, and the investigation was tainted by the involvement of Mr Callard in the final elements on whether the final recommendation should be accepted. I disagree. Whilst Mr Hussey has worked with the Respondent before there is no evidence other than a professional relationship and even that has been limited to 3 occasions, including this one since 2017. There is no evidence of any friendships, there is no evidence of collusion. I find that Mr Hussey was independent and undertook the role that was required of him as an independent investigator. The consideration of recommendations would be for Mr Callard, there was no complaint against him just the first investigation which was undertaken by Mr Evans. The final recommendation related to a survey rather than any change of the investigation. I do not agree it was not fair or reasonable.
93. Mr Callard made recommendations, which save for an apology for the treatment, which would have necessitated a finding of bullying, those recommendations mirrored those which were sought by the Claimant.
94. On the 17th May 2022 Mr Muyembe was signed off sick.
95. On 20th May 2022 Mr Muyembe wrote to Mr Callard and resigned. He noted that he rejected the outcome of the appeal, he set out again the bullying and harassment he alleged, he further noted the policies which he alleged were broken together with the elements of the professional Code of Conduct. He set out his allegations of unfair dismissal, wrongful dismissal and personal injury.
96. The Claimant's evidence throughout has been that the last straw was as a result of the failure to agree a common transcript combined which tipped the cumulative impact of his treatment by the Respondent to such a level, he felt he had no option but to resign. That behaviour involves, he alleges, a systematic coverup by the Respondent and, Mr Hussey, which in effect is a continuation of the bullying he experienced. He goes further and puts it as being a failure to maintain his safety at work, namely his emotional and psychological wellbeing.
97. I do not agree. I find that the Respondent has undertaken a fair and impartial appeal procedure, which was in my judgment reasonable. I find that the Respondent investigated and took on both recommendations and implemented them. I find the appeal took place in accordance with the ACAS code and the Respondent's procedures. Despite both evidence from the Claimant and the Respondent being that the Claimant was not seeking disciplinary action against Ms Conway, I find that is what he was looking for. He did not agree that positive findings were not made against her, and I find that he was unhappy disciplinary action was not taken. That is borne out with his response to both investigations both of which offered what he sought, a change in team and recommendations. The Claimant has also repeatedly pointed to the evidence which supports his allegations and was available and whilst saying he accepts that the investigators were entitled to take a different view, it is clear to me from both his evidence and the challenges he makes in writing that he does not agree to that and considers that it is only an outcome which is just if findings of bullying are made. That failure to agree his position, and the failure to agree a transcript was why I find he resigned.

98. There is no evidence that Mr Evans, Mr Callard nor Mr Williams are friends with Ms Conway, the only evidence is they have a professional relationship. I do not find that any of the witnesses have sought to cover up Ms Conway's behaviour.
99. The resignation was accepted on 22nd May 2022. No notice was given, nor worked by the Claimant.
100. In August 2022 the Claimant was working with Talking Change and his GP with regards to his mental health, including anxiety and depression which it is recorded stems from his treatment at work. The Claimant brought his claim in June 2022. I know that he was suffering with anxiety and depression, shown by medical evidence. It is for the Claimant to show that it was not reasonably practicable for him to bring his arrears of pay claim within the 3 month time period, and that he has brought it in a reasonable period. It is correct, as the Respondent, points out, this is a Claimant who is articulate and had set out his case in his resignation letter and earlier in his grievance, however, given the circumstances I find it was not reasonably practicable for him to bring his claim for arrears of pay before and he has brought the claim in a reasonable period.
101. I find that the holiday year for the Respondent runs from 1st April – 31st March. At the time of the Claimant's resignation 50 days of the leave year had passed. His annual leave entitlement was 21 days in accordance with his contract. Therefore, at the time of the termination of his employment he had accrued 2.87 days. In addition, the Claimant had carried over 3 days from the previous year. The timesheet provided during the hearing showed that 4 days of leave had been taken. The payslip for 21st May 2022 confirmed that 2 days' pay was made for unused holiday. These factors were all agreed by the Claimant in cross examination and are borne out by the documentation provided by the Respondent namely the payslip, the timesheet and the Claimant's contract. There is no evidence to the contrary.
102. In so far as the claim for arrears of pay, I find that the Claimant was paid the sums that he was owed. He was paid for a period of SSP, which was permitted in accordance with paragraph 7.4 of his contract. That was again accepted by the Claimant in his evidence. I have not been provided with any evidence that the Claimant is entitled to any higher level of pay that he received, nor did the Claimant allege so.

Law

103. I remind myself that when applying the burden of proof, the standard is the balance of probabilities, that is to say, what is more likely than not.

Unfair Dismissal by way of constructive dismissal

The principle

104. As with any unfair dismissal the starting point is section 94(1) of the Employment Rights Act 1996. That provides that *an employee has the right not to be unfairly dismissed by his employer.*
105. Section 95 of the Employment Rights Act 1996 provides for circumstances in which an employee is dismissed. Subsection (1) (c) provides the following:

- (1) *For the purposes of this Part an employee is dismissed by his employer if (and subject to subsection 2 only if)-...*
- (c) *the employee terminates the contract under which he is employed (with or without notice) in circumstances which he is entitled to terminate it without notice by reason of the employer's conduct.*

106. In a claim for constructive dismissal the burden of proof rests upon the Claimant, as set out in **Sandle v Adecco UK Ltd [2016] IRLR 941**

107. Within **Western Excavating (ECC) Ltd -v- Sharp [1978] ICR 221, CA** Lord Denning imported the common law concept of a repudiatory breach of contract into section 95(1)(c) of the Employment Right Act 1996. As Lord Denning MR. stated:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.”

108. Before I can consider whether there has been an actual breach I must identify what the terms of the employment contract are, both in respect of express and implied terms. The Claimant's case is that there is a breach of the implied term of trust and confidence. The case of **Malik and Mahmud -v- BCCI [1997] ICR 606** formulated the proposition of the implied term and set out that an employer shall not:

“Without reasonable and proper cause, conducted itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee.”

I remind myself that as per **Malik** the test to be applied is an objective one and I must consider all the circumstances of the case. Counsel for the Respondent emphasises that as per **Hilton v Shiner Ltd [2001] IRLR727** it was emphasised that *“the conduct which is complained of must be engaged in without reasonable and proper cause.”*

Bullying and intimidation

109. Counsel has taken me to **Mullen v Accenture Services Ltd [2010] EWHC 2336 (QB)** when considering the question as to what amounts to bullying. That is a decision of His Honour Judge Clark QC sitting as a Deputy Judge of the High Court. When considering the circumstances, it was considered [at 38] that the role of the Judge *is to go beyond the Claimant's perception and to assess the facts as objectively as possible*. Further, it was noted that *“an employee may have to accept some degree of unpleasantness from fellow workers”* and he noted that there is a fine line between strong management and bullying.

110. The High Court in **Horkulak v Cantor Fitzgerald International 2004 ICR 697, QBD**, recognised that an employment contract included obligations on the

employer in connection with the self-esteem and dignity of the employee, and the use of foul and abusive language can undermine trust and confidence. The fact that a manager frequently using foul language, nor that an employee uses such language diminishes the power to offend. Within that case the High Court rejected the Defendant's case that the behaviour was as a result of the director's frustration with the Claimant.

111. The Employment Appeal Tribunal in **McBride v Falkirk Football and Athletic Club 2012 IRLR 22, EAT**, emphasised that the test as to whether or not the implied term of trust and confidence has been broken is objective and warned against it being watered down by industry standard of bad management: '*An employer cannot pray in aid that he and others in his industry treat all employees badly and therefore treating an employee badly cannot amount to a breach of the duty to maintain trust and confidence.*'

112. The Employment Appeal Tribunal has shown that: Employers are under a duty to prevent bullying, **Abbey National Plc v Robinson EAT 743/99**; a failure to provide a suitable working environment if it allows bullying may also result in a breach of the implied term as occurred in **Moore v Bude-Stratton Town Council 2001 ICR 271, EAT**; and an inadequate response to a grievance where bullying has been raised has also been considered as breaching the implied term of trust and confidence as per **Price v Surrey County Council and anor EAT 0450/10**,

Last straw

113. Whilst Mr Muyembe relies on individual incidents, he relies on the cumulative impact arguing they are, within a series of events which is often referred to as the last straw test. I remind myself of the decision in **London Borough of Waltham Forest -v- Omilaju [2005] IRLR 35** where it was confirmed if the last straw was completely innocuous or trivial, and none of the preceding matters amount to a fundamental breach of contract, the claim will fail. The last straw must contribute to the breach of trust and confidence. In **Kaur -v- Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978** Underhill LJ proposed that the tribunal should ask itself the following questions:

- a. 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?
- b. Has he or she affirmed the contract since that act?
- c. If not, was that act (or omission) by itself a repudiatory breach of contract?
- d. If not, was it nevertheless a part ... of a course of conduct comprising several acts and omissions which, viewed cumulatively, amount to a (repudiatory) breach of the **Malik** term?
- e. Did the employee resign in response (or partly) in response to that breach?

114. If there has been a breach of an express or implied term, I must consider whether or not the breach is a fundamental one. In **Morrow v Safeway Stores Plc [2002] IRLR 9 EAT** it was confirmed that any breach of the implied term of trust and confidence is inevitably a fundamental breach. Whether a breach, other than of the implied term of trust and confidence, is fundamental is a question of fact dependent on the facts of each case and I must consider the impact on the

employee. The Employment Appeal tribunal in **Leeds Dental Team Ltd v Rose 2014 ICR 94 EAT**, confirmed the test is an objective one, and the decision of **Bliss v South East Thames Regional Health Authority 1987 ICR 700 CA**, confirmed that whether or not the employer intended to end the contract of employment does not make a difference as to whether a breach is fundamental.

115. The decision of the Employment Appeal Tribunal in **Frenkel Topping Limited v King UKEAT/0106/15/LA** emphasises the proposition that an employer acting in an unreasonable manner is not sufficient to breach the implied term of trust and confidence.

116. If there has been a breach of the contract, I remind myself that the employee must terminate the contract because of the breach, and the burden rests upon the employee to show that they have terminated the contract. **Wright -v- North Ayrshire Council [2014] IRLR 4** outlines that it does not have to be the only reason for the resignation.

Affirmation

117. In the event that there has been a breach, I must consider whether or not the employee has affirmed the contract after the breach. If the employee waits for too long a period or does something to accept the breach, they will lose the right to resign. This was outlined in **Chindove -v- William Morrisons Supermarkets PLC UKEAT/0201/13/BA** where Langstaff P stated:

“We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally, by continuing to work in the job from which he need not, if he accepted the employer’s repudiation as discharging him from his obligations, have had to do.”

118. Therefore, when considering this claim of constructive dismissal, I must consider whether there has been a repudiatory, or fundamental, breach of contract by the Respondent. If there has been such a breach, I must go on to consider if the employee has resigned because of that breach. Thirdly, I must consider whether there has been any affirmation of that breach, or to put it another way a delay by the employee such that she has accepted the breach of contract.

119. If I conclude that there has been a dismissal, I must then go on to consider whether the dismissal was fair in accordance with section 95 Employment Rights Act 1996. The fact that there is a constructive dismissal does not mean that it is an unfair one as per **Savoia v Chiltern Herb Farms Ltd 1982 IRLR 166, CA**.

Claim for outstanding holiday pay

120. The Working Time Regulations 1998 set out a statutory minimum period of holiday, and in the event that holiday is not taken in the leave year when an employment ends, for payments to be made in lieu. Regulation 13 and 13A provides for a statutory minimum of 5.6 weeks per annum. The starting date is the date the employment commenced unless there is a written relevant agreement between the employee and the employer provides for a different leave year.

121. In the event that the sums are outstanding the employee may bring a claim for breach of contract or pursuant to regulation 14 of the Working Time Regulations. A worker is entitled to be paid a week's pay for each week of leave. A week's pay is calculated in accordance with the provisions of sections 221-224 Employment Rights Act 1996, with some modifications in calculating a weeks' pay an average of pay over the previous 52 weeks is taken. In accordance with a series of cases including the Court of Appeal's judgment in **British Gas Trading Ltd v Lock and anor 2017 ICR 1**, all elements of a worker's normal remuneration, not just basic wages, must be taken into account when calculating holiday pay for the basic four weeks' leave derived from European Law but not the additional 1.6 weeks leave which is purely domestic in origin. The Court of Appeal in **Harpur Trust v Brazel (Unison intervening) [2019] EWCA Civ 1402**, confirmed that when calculating the sums appropriate calculation is 5.6 weeks as per the Working Time Regulations and not a calculation of 12.07% as commonly used.

Beach of contact/ unlawful deduction in wages

122. Pursuant to Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 the tribunal had jurisdiction to consider claims for a breach of contract. This includes wrongful dismissal, in other words, a claim where the Claimant has been dismissed without notice, as is argued here. I must consider what the term of the contact is before considering where there has been a breach of that term.

123. A breach of contract claim may also consider a breach to pay wages owed. Alternatively, I can consider this claim pursuant to section 13(1) Employment Right Act 1996, which provides the right of a deduction not to be suffered coupled with section 23 of the act which gives the worker the right to present the claim. **Bear Scotland v Fulton [2015] IRLR 15** provides that there must be a "sufficient frequency of repetition" for any series of deductions to be made in accordance with a claim pursuant to section 23 (3) Employment Rights Act 1996.

124. The time period for bringing such a claim is three months from the date of breach or when payment is owed in accordance with section 23 Employment Rights Act 1996 unless the *employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months*. The section goes on to provide that *the tribunal may consider the complaint if it is presented within such a further period as the tribunal considers reasonable*. The same test applies in respect of considering the claim as a breach of contract pursuant to Article 7 of the Extension of Jurisdiction Order.

Conclusions

125. I turn to my conclusions having regard to the list of issues, together with the findings of fact I have made and the law which applies.

Unfair constructive dismissal

Last Straw

126. The Claimant's case is that his resignation came about as a result of the cumulative impact of the allegations, it was the last straw. Accordingly, I must

firstly take the approach as set out by LJ Underhill in Kaur and ask myself the questions identified.

127. It is necessary for me to firstly consider the most recent act which Mr Muyembe argues caused his resignation. This was the 5th May 2022 when the report of Mr Hussey was submitted without having first obtained the agreed note in breach of the agreement between them. I have found that there was an agreement for there to be an agreed note, as per the evidence and the contemporaneous documentation. However, I have accepted that following discussion at the start of the meeting Mr Hussey proceeded on the basis that he would record the meeting and produce a transcript and that he considered that the transcript was sufficient, and Mr Muyembe considered that an agreed note was still required. This was a misunderstanding from both.
128. However, there was a breach in that agreement and Mr Muyembe has not affirmed the contract since then, he resigned on 20th May 2022, just over 2 weeks after the report was submitted and a week after the report was sent to him. Until 13th May 2022 he continued to email Mr Hussey setting out his objections. I am clear that there has been no acceptance of that breach.
129. Was the breach of the agreement in not producing an agreed note a repudiatory breach? In other words, was that action calculated or likely to destroy or seriously damage trust and confidence between the Claimant and Respondent and was it done without reasonable or proper cause? I do not consider that the failure to agree the note was calculated or likely to damage trust and confidence. The purpose of the agreed note was to record what happened at the meeting, that was the original purpose and why it was subsequently agreed there would be a recording and a transcript then provided. It is not a case of Mr Hussey having tried to alter the contents or disadvantage the Claimant in some way. Whilst the Claimant considered it was an opportunity for him to ensure his case was put as he would want, that was not the purpose of such a note. Nor was there any agreement that the report would not be provided until a note was agreed or Mr Hussey had heard back from the Claimant. Furthermore, Mr Hussey in my judgment had reasonable and proper cause for producing a transcript over a note it was to ensure the meeting was accurately and fairly recorded. It was therefore not a breach of the implied term of trust and confidence as is alleged, nor was it a repudiatory breach of any other term of the Claimant's contract whether implied or express.
130. Given the final breach was not in itself a repudiatory breach, was this part of a course of conduct which viewed cumulatively amounts to a repudiatory breach of trust and confidence? Herein is the allegation that it was part of the Respondent covering up the actions of Ms Conway. I do not agree that is the case. Mr Hussey was an independent professional and I do not consider that his limited previous involvement with the Respondent mean he was not independent nor impartial. He had no relationship with Ms Conway. He spoke with the Claimant and considered the relevant documentation. He produced a comprehensive report and provided recommendations. In large those recommendations mirrored those sought by the Claimant prior to the appeal. He met with the Claimant, the Claimant was entitled to be accompanied and was notified of that right. The investigation by Mr Hussey was reasonable. The fact

he did not agree with the substance of the Claimant's allegations does not mean he was seeking to cover for Ms Conway.

131. My findings that Mr Muyembe was not aware of the previous working relationship with the Respondent and Mr Hussey does not change my conclusions in respect of his impartiality, nor the fairness of the procedure. Nor does Mr Callard having been sent the report, nor commenting on the recommendations, or being copied into the emails. The fact the apology did not go as far as the Claimant sought and the change to the final recommendation in the report in respect of conducting a survey, and the nature of the apology recommended originally, does not mean that the investigation was not fair and impartial. It was for Mr Callard, who there was no complaint in respect of, to implement recommendations as appropriate. The grievance process followed the procedure, considered the policies of the Respondent, and those of ACAS. The conclusion arrived at was reasonably held by Mr Hussey following a reasonable investigation.
132. Similarly, I have found the investigation undertaken by Mr Evans, who undertook the original investigation, was reasonable and he arrived at conclusions which were reasonably held. There is no evidence that Mr Evans sought to cover up for Ms Conway, nor is there any evidence that he was anything but independent. I have found that he did consider the relevant policies and the statements of Ms Arocho and Mr Lizcano. Whilst it would have been beneficial to speak with Mr Knight, that in my judgment given the information available, does not mean that the initial investigation was not fair or full. Nor does it mean that Mr Evans was biased or supporting Ms Conway in some way, or covering up for her.
133. The fact that the Respondent did not agree with the allegations of the Claimant, does not mean it protected Ms Conway, nor does it mean it was an example of the company either continuing the bullying he experienced or impacted on his safe place of work. The Respondent implemented an internal grievance procedure which was reasonable, when the Claimant appealed it implemented a further investigation with a HR consultant. Both of those were reasonable. Mr Callard implemented recommendations which were suggested. Whilst Ms Conway was valuable so are all employees. I have not made any finding that there is a close relationship nor that the Respondent sought to protect Ms Conway. Disagreeing with the Claimant's account does not mean that the Respondent is either protecting or covering up for Ms Conway.
134. The Respondent moved Mr Muyembe teams as he sought, it may not have taken place as quickly as he would wish however, that is because the request was initially for a final move, the Respondent wished to then confirm that the grievance was being followed and then following a discussion with the Claimant it was confirmed he wished to move team on a temporary basis that is what happened.
135. I therefore do not accept that the breach of the agreement was part of a course of conduct, of the respondent either bullying Mr Muyembe or covering up for the alleged bully, which cumulated in a repudiatory breach of the implied term of trust and confidence. As outlined in **Price v Surrey County Council and anor**

EAT 0450/10, an inadequate response to a grievance where bullying is raised may amount to a breach of the implied term however, that is not the case herein. The response was reasonable and appropriate and was dealt with under the correct procedure with regard to the policies and procedures.

136. Similarly, the Respondent has an anti-bullying and harassment policy in place, together with an equal opportunities and stress policy. I have not found there was any evidence of bullying which took place and therefore this is not a Respondent who allows bullying such that would give rise to a breach of the implied term of trust and confidence.

137. In part the Claimant resigned due to the failure to agree the note but I do not consider that it was a fundamental breach of contract either individually or cumulatively.

Constructive dismissal earlier allegations

138. I shall firstly consider my conclusions in respect of the individual allegations, as set out within the list of issues, on Ms Conway's behaviour before considering if they amount to bullying.

Allegations against Ms Conway

139. *Did Ms Conway snap aggressively at the Claimant stating "I am very disappointed you need to think about where you place things, and this should be straight forward" in October 2020?*

140. I have found that Ms Conway was frustrated during this incident which the Claimant was aware of and that she did say the words "I am very disappointed you need to think about where you place things, and this should be straight forward". I have not found and was not satisfied on the balance of probabilities that she was aggressive during this incident. The difference between frustration and aggressive may well be one of interpretation but giving aggression its usual definition, I am not satisfied that is what has been described by the Claimant nor borne out in the evidence.

141. *In February 2020 did Ms Conway shout in front of everyone in the barn "go faster go faster!!" after standing over the Claimant's shoulder asking "how long is this going to be."*

142. I have found this incident occurred as alleged and as described by the Claimant. I struggle to see how such comments are made in jest as are asserted by the Respondent. I am satisfied and have found that the incident occurred as described having preferred his evidence to the documentary evidence of Ms Conway.

143. *In January 2020 did Ms Conway shout at the Claimant saying, "This should not take this long, this should have been done a long time ago".*

144. I have found that this incident occurred as alleged and described by the Claimant and I have preferred his evidence on this incident, compared to the hearsay evidence of Ms Conway as recorded in the report of Mr Evans.

145. *Did Vivienne Conway (threaten the Claimant with dismissal by saying "If Mr Williams knows this, he is going to put you on his next hit list".*

146. I have found that the term hit list was used, and that the Claimant has interpreted this comment as Ms Conway as having threatened him with dismissal. I do not consider that this was a threat of dismissal but is an example of poor communication. I do not consider that this was a threat for dismissal given there are no examples that Mr Williams operated such a list, that is borne out by the common evidence that Mr Williams was supportive, albeit informal in his approach. There is also no context as to why such a threat of dismissal would be made given that the previous allegation against Ms Conway and her behaviour towards the Claimant was some 10 months previous. Whilst I can appreciate why the Claimant interpreted the comment in the way he did, I do not consider that it was a threat for dismissal. Nor Ms Conway intimidating him.

147. *On 29.11.21, in a team meeting, did Ms Conway compare the document the Claimant was working on to another staff member's document, while acknowledging that comparing was not right, stating "I know comparing is not great but look at this" and also stating "yes, you're great, I interviewed you and your portfolio was great, but I just don't see it".*

148. This incident was largely accepted, it was corroborated by witnesses at the time as per Mr Evans' report and I have accepted the evidence of the Claimant in respect of it. He also accepted that there was no issue in principle to comparing one employees work with another.

Do the above incidents amount to bullying?

149. I now turn to whether the above findings mean that Ms Conway has subjected the Claimant to bullying and harassment for several months prior to November 2021 in accordance with the findings I have made and concluded as above. It is this allegation which the Claimant alleges breached the implied term of trust and confidence. It is an objective test which I must apply.

150. When I consider the five incidents there is a common theme and that is they all relate to events when concerns have been raised in respect of the Claimant's work and he has been challenged on it, even though the same has not amounted to any disciplinary proceedings. I have found that the Claimant struggles when he is challenged on his performance and that as I have found was evident within his cross examination on his self-evaluation form. The result of that has been that when he has been challenged by Ms Conway, he has taken it to heart, and which has caused him upset.

151. In considering whether or not objectively the findings amount to bullying it seems that I must consider the context of the allegations, what has been said and the how it has been said. The fact that the allegations all surround times when the Claimant's performance is being challenged is in my judgment relevant. The fact that there were such concerns was evidenced before the Claimant raised his complaint by way of the emails on 29th and 30th November 2021 and the discussions which took place between Ms Conway and the directors.

152. When considering the words which I have found to have been used on all of the occasions none of them are demeaning, nor insulting. They all relate to concerns of Mr Muyembe's performance and the expectations of him. The term hit list, was not appropriate however, as I have found there is no evidence that was intended or meant as he would be dismissed. There is no evidence that such a policy operated. Whilst it is unfortunate and emphasises the need for improved communication it does not mean there was such a threat.
153. Until 3rd December 2021 Mr Muyembe did not raise any concern with the Respondent in respect of Ms Conway and her treatment of him. The contemporaneous record of the appraisal documentation supports that.
154. Whilst Mr Muyembe did speak with his GP, Talking Therapies and Mr Lizcano about the treatment, I am satisfied that it was his perception of the situation borne out by the fact that he struggled with criticism. It does not follow simply because he raised it with his GP, Talking Therapies and Mr Lizcano that the same was bullying. Instead, I conclude what he was reporting in respect of his feelings was due to criticism which he did not agree with and considered unfounded. I must also look beyond the Claimant's subjective perception of the incidents and consider them objectively.
155. I have found that on two occasions Ms Conway has either raised her voice or shouted. That in accordance with the bullying policy, and being objective, can amount to bullying. They are on the evidence, and I find isolated incidents, and the words used must be looked at, which involved Ms Conway speaking about the Claimant going faster and that this should not take as long. The fact they are isolated must in my judgment be a relevant consideration in considering if it is bullying or not. The authorities make clear that common bad practice will not mean that what is acceptable will be watered down, for example poor behaviour or swearing does not become acceptable just because the parties work in a high pressure environment. Therefore, shouting as I have found in January and February of 2020 has the potential to amount to bullying, however, when looking at the circumstances and what is said and the Claimant's own feedback in the appraisals in my judgment, I concluded that there was no bullying on these occasions. Not every example of raising a voice is bullying and the comments made related to the Claimant's performance.
156. Ms Arocho's alleged experiences take me no further. I can make no findings in respect of her allegations. She did not raise the concerns in her resignation letter, she reapplied for a role, or a recruitment agent did on her behalf, and her evidence is untested. I have and can only place limited weight on her evidence which was produced after she had sight of Mr Muyembe's statement so to corroborate what was said. Mr Robinson said to Mr Evans that he has not observed bullying but remarks on communication strategies.
157. When considering the November 2021 incident Ms Conway complimented him saying he was great, whilst the Claimant turned this round in his evidence saying it was because she was repeating a comment, he had made about being great but not being able to work as efficiently because of the conduct of him by Ms Conway he accepted she did compliment him. He also accepted in evidence that it was acceptable to compare work. There is in my judgment nothing in the

November 2021 incident other than Ms Conway managing Mr Muyembe, the concerns having been raised in the email of 29th November and having been discussed with the directors before any allegation of bullying was raised by the Claimant with the Respondent. He also challenged the appropriateness of what was said in the email of 29th November 2021, again when considered objectively in my judgment there was nothing wrong with what was said. The fact that the Claimant considers these examples as bullying is in my judgment supportive of my conclusion that he sees any form of criticism and performance management which he does not agree with as bullying. I do not agree either were examples of bullying and this perception in my judgment supports my conclusions when considering the additional incidents.

158. I do not find any of the incidents, in January, February or October 2020 or August or November 2021 which I have found proven, either individually or collectively amount to bullying. The words used are appropriate, the context is in respect of performance management. Whilst there may be two examples of Ms Conway shouting, I do not consider given the limited incidents that this was bullying. It is an example of the need to improve on communication skills

159. I therefore do not consider that any of these incidents either collectively or individually amount to a repudiatory breach of contract, namely the breach of the implied term of trust and confidence. I do not consider that Ms Conway has behaved in a manner which was calculated or likely to undermine the implied term of trust and confidence. Her communication with the Claimant was also for a reasonable cause, namely to discuss his performance. No other term of contract is alleged to have been breached, but for the avoidance of doubt I do not consider there is any other breach. That includes Ms Conway's behaviour impacting the Claimant's safe place of work given my conclusions that she has not bullied him.

160. Even if I were wrong and the incidents in January and February 2020 and the hit list comment in August 2021 were examples of bullying the Claimant took no action with his employer, in respect of any of those allegations until he spoke with Mr. Williams on 3rd December 2021. He was aware of the policies available, and he did not use the grievance procedure which was available to him, and he subsequently used on 15th December 2021. He has therefore in all the incidents prior to November 2021 affirmed those breaches through continuing to work as normal.

The further alleged breaches

161. *On 03.12.21, when the Claimant spoke to Matthew Williams in his office, Mr Williams failed to show support or sympathy and instead suggested that the Claimant leave the company.*

162. Mr Williams did not respond as the Claimant wished. In part this was because of his informal style, which of course is what is seen as a strength in him. However, it is also because as I have found it was an informal meeting and this was the first time it had been raised. It is right that he should, however, have responded more proactively and when the grievance was made formal that is what the Respondent did. Whilst he did make reference to the Claimant leaving the

company I have found he mentioned he hoped that would not happen and he put forward two other options.

163. *The grievance investigation overlooked or ignored a critical piece of evidence.*

164. I do not accept that Mr Evans did overlook or ignore crucial information. I have accepted his evidence and found that whilst he did not speak with Ms Arocho or Mr Lizcano he did consider and place weight on their evidence. I accept that he did not speak with Mr Knight, I consider he should have done, however, I do not consider given the wider evidence available that has meant the instigation was not reasonable or fair.

165. Mr Hussey did overlook the statement of Ms Arocho, however, when brought to his attention he considered it and that did not change his recommendations nor his conclusions. I am satisfied therefore that he has considered and remedied any defect with that regard.

166. *The grievance report, in stating that "It would appear that the intention of the words and actions of Ms Conway was always meant in a positive manner to help the Claimant progress in his career", was intended to cover up Ms Conway's behaviour.*

167. I do not agree. This was the reasonably held belief of the Respondent following a thorough and detailed investigation which had taken place. I do not consider that there is any evidence that the Respondent has sought to cover up the actions of Ms Conway (which I have concluded did not amount to bullying in any event). The Respondent undertook an impartial investigation, implemented recommendations, and made adjustments to the Claimant's work by moving him teams. They did not agree with his allegations, however, that does not mean that they sought to cover up for her. Nor does it mean that they were biased. The investigation and process followed complied with their procedure and the ACAS code of practice.

168. *The Respondent failed, in the grievance and grievance appeal, to call Ms Conway to directly challenge Claimant's witnesses' statements.*

169. This is correct, but that is because they were dealing with a grievance from Mr Muyembe not from Ms Arocho. In addition, I have dealt with how the statements were considered by Mr Evans as part of the investigation.

170. *The Respondent failed to acknowledge or deny the bullying/harassment committed by Ms Conway, while making recommendations relevant to a situation in which bullying/harassment took place.*

171. Whilst this is of course correct that is because following both investigations, that the reasonably held belief of the Respondent was that the allegations were not proven. Therefore, whilst it is correct to note that the Respondent did not acknowledge or deny the bullying/ harassment whilst making recommendations, that was the conclusion of their reasonable investigation. Additionally, I am satisfied that both Mr Evans, who did not explicitly mention the relevant policy in

his recommendations, and Mr Hussey, who did refer to them, considered the policies when compiling their reports.

172. *The Respondent failed to apologise to the Claimant for the bullying/harassment committed by Ms Conway.*

173. Again, this is of course correct, however, as I have outlined above that is because the Respondent, following a reasonable investigation, did not find the allegations proven. They did apologise for the way in which the Claimant had felt within the process.

174. *On or around 05.05.22, Ed Hussey breached an agreement with the Claimant to produce an agreed written summary of the grievance appeal meeting.*

175. I have dealt with this allegation above under the last straw heading.

Were any of the findings either individually or when viewed collectively, a repudiatory breach?

176. I have dealt with the allegations of bullying above and have concluded that the Claimant was not bullied. I also do not consider that any of the allegations amounted to a breach of the implied term of trust and confidence nor any express term of contract. However, I must consider these further allegations in respect of the Respondent's processes and procedure as to whether they amount to a repudiatory breach, either individually or when taken collectively. That must also include consideration of the bullying allegations when I make my conclusions in respect of the cumulative impact.

177. Again, the term of the contract that the Claimant relies on as having been breached is the implied term of trust and confidence.

178. The Respondent implemented its grievance procedure and undertook a fair and reasonable investigation into the allegations. I have made no findings that the Respondent has sought to cover for Ms Conway, and whilst she was a valuable employee so was the Claimant. Following the investigations recommendations were made which were reasonable and largely in accordance with what the Claimant had sought. Both investigations were impartial and fair, and whilst Mr Hussey was known to the Respondent, professionally, before his investigation I am satisfied he was impartial. I also do not consider that the involvement of Mr Callard, in discussing the recommendations and nature of the survey and extent of the apology at the conclusion of Mr Hussey's investigation alters the impartiality or fairness of the procedure. It was for Mr Callard to consider how to implement any recommendations with regards to the report. It is not, in my judgment a case of the Respondent either failing to take the allegations seriously, nor trying to cover them up.

179. I do not consider the failure to obtain evidence from Mr Knight as being fatal to the first investigation, nor do I consider the absence of speaking directly to Ms Arocho or Mr Lizcano. Their evidence was considered, and the conclusions arrived at. Those conclusions were reasonably held.

180. I do not consider Mr Williams' response to the informal meeting as being a repudiatory breach of trust and confidence. It was the first time he heard the allegations he set out the options and whilst including alternative employment comment was inappropriate it was in the context of all options being set out and was caveated with the words that they would be disappointed if that happened. On balance I do not consider this response was a breach of the implied term of trust and confidence. I also note that the Respondent dealt with the grievance appropriately when formally raised.

181. I therefore consider that the Respondent's approach to the grievance and the allegations has been both reasonable and appropriate. The Respondent did not agree with the Claimant's allegations, following a reasonable investigation they were entitled to do that. The fact there is a disagreement does not mean that they are either covering for Ms Conway nor acting in an inappropriate manner.

182. I therefore do not consider any of the incidents, so far as they have been found either individually, or when taken collectively as amounting to a breach of the implied term of trust and confidence. This includes having regard to the allegations of bullying and my findings in respect of those incidents. Nor, so far as I have jurisdiction do I consider that any statute as referred to within the complaint of the Claimant, has been breached such to breach the implied term of trust and confidence. These allegations of breach of statute in any event stem from the behaviour he alleges he was subjected to by Ms Conway and I have addressed my conclusions and findings in respect of that. None of the incidents so far as found were examples of the Respondent acting in a manner that was calculated or likely to destroy or seriously damage trust and confidence between the Claimant and Respondent and none of the actions taken were done without reasonable and proper cause. All those involved were acting in good faith and I have found that none were seeking to cover up for Ms Conway.

Affirmation

183. None of the events since November 2021, inclusive, have been affirmed by the Claimant. He exercised his right to raise a grievance, he disagreed with the outcome of the first report and instigated his appeal, that was dealt with and was received on 13th May 2022, by the 20th of May 2022 he had resigned. He has not in my judgment accepted any breach since the 29th November 2021 had I found such a breach had occurred.

Wrongful dismissal

184. I have concluded that the Claimant was not unfairly dismissed and therefore he resigned with immediate effect which was accepted by the Respondent on 22nd May 2022. My conclusions and findings in respect of the unfair dismissal claims apply. The Claimant did not work any notice period having resigned with immediate effect. He is not therefore entitled to any notice pay and therefore his claim for wrongful dismissal does not succeed.

Holiday pay

Pre-resignation holiday pay

185. The Claimant's leave year was from 1st April – 31st March. At the point of his resignation 50 days had passed, meaning 2.87 days leave had accrued. He had carried over 3 days from the previous year. This was accepted by the Claimant within his evidence and as I have found, and as was supported by the time sheet provided. There is no evidence that this is incorrect. It was accepted that the Claimant had taken 4 days leave within the leave year, and again the Claimant confirmed he had no evidence to suggest that that was wrong.
186. At the point of termination there was 1.87 days leave which were untaken and unpaid. Two days were paid in the May 2022 final pay slip. The Claimant has therefore been paid the relevant amount for unpaid leave. Accordingly, his claim for unpaid holiday pay cannot succeed. The provisions of his employment contract, specifically paragraph 6.4 nor the working time directive alter this conclusion.

Post-resignation holiday pay

187. I am not aware of any power or statutory provision that would enable a claimant who is unfairly dismissed the ability to recover unaccrued holiday leave that would have been accrued had he remained employed. A claimant would of course be able to recover losses in accordance with the Employment Rights Act however, I do not consider even had I found the Claimant was unfairly dismissed that I would be able to make such an award.
188. In any event I have not concluded or found that the Claimant was unfairly dismissed by way of constructive dismissal, and therefore the claim as argued by Mr Muyembe for the recovery of these sums fails.

Arrears of pay

189. I have found that it was not reasonably practicable for the Claimant to have brought his claim for arrears of pay within the three months of the deduction. He was suffering with his mental health, specifically with anxiety and depression and he was receiving support for that from talking therapies and his GP. He brought his claim on 8th June 2022 that was a period of six months from the claim for arrears of pay from December 2021. On balance I am satisfied that in the circumstances and given his mental health, that it was not reasonably practicable for the Claimant to bring his claim within the three month time limit. I am further satisfied on the balance of probabilities that he has presented his claim in a reasonable time period. I therefore am satisfied that I have jurisdiction to consider this claim. Of course, it is right that in considering a series of deductions which is one way in which previous months can be considered, as per **Bear Scotland**, a break of three months would break a series of deductions. However, given my conclusions on it not being Reasonably practicable for the Claimant to have brought the claim sooner that enables me to consider the claim from December and January 2022. I do so under that provision as opposed to it being a series of deductions.

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190. The Claimant accepted within his evidence that he received his statutory sick pay which he was entitled to for the months of December 2021 and January and May 2022. His complaint is that he received statutory sick pay because of the treatment he received from his manager and the Respondent. He therefore claims the difference of the sums he was paid in accordance with SSP and what he would have received had he worked for those months.

191. The Claimant has accepted that the Respondent was entitled to pay him SSP, that was the sum which was properly payable for the periods of December 2021, January and May 2022. That is also provided for at paragraph 7.4 of his contract. The sums which were properly payable have been paid and therefore there is no deduction in wages.

192. In so far as the Claimant's claim amounts to a claim for breach of contract I am not satisfied that he has shown any breach of contract by the Respondent paying him the amounts it has. Similarly I have not found that the conduct of the Respondent was such to give rise to a breach of contract.

193. I therefore dismiss the claim for arrears of pay.

Conclusion

194. In the circumstances given the findings I have made and the conclusions I have reached I dismiss each of the Claimant's claims.

Employment Judge Lang
Date: 28 December 2022

Reserved Judgment & Reasons sent to the Parties:
29 December 2022

FOR EMPLOYMENT TRIBUNALS

Annex 1: List of Issues

Case No. 1401871/2022

IN THE BRISTOL EMPLOYMENT TRIBUNAL
SITTING AT SOUTHAMPTON

BETWEEN:

MR PATRICK MUYEMBE

Claimant

and

HGP ARCHITECTS LIMITED

Respondent

LIST OF ISSUES

Unfair (constructive) dismissal

Conduct relied on by C as breach of contract

1. The C claims that R acted in fundamental breach of contract in respect of the implied term of contract relating to mutual trust and confidence. The breaches alleged, are summarised as follows, Did R act in any or all of the following alleged ways?
 - 1.1. Did Vivienne Conway subject C to bullying and harassment for several months prior to November 2021 as set out.
 - 1.2. Did VC snap aggressively at the Claimant stating “I am very disappointed you need to think about where you place things, and this should be straight forward” in October 2020.
 - 1.3. In February 2020 Did VC shout in front of everyone in the barn “go faster go faster!!” after standing over the Claimant’s shoulder shulder asking “ how long is this going to be”
 - 1.4. In January 2020 did VC shout at the claimant saying “This should not take this long, this should have been a long time ago”.
 - 1.5. Vivienne Conway (threatened C with dismissal by saying “*If Mr Williams knows this, he is going to put you on his next hit list*”. [ET1, §8.2]
 - 1.6. On 29.11.21, in a team meeting, Ms Conway compared the document C was working on to another staff member’s document, while acknowledging that comparing was not right, stating “*I know comparing is not great but look at this*” and also stating “*yes, you’re great, I interviewed you and your portfolio was great but I just don’t see it*”. [ET1, §8.2]

- 1.7. On 03.12.21, when C spoke to Matthew Williams in his office, Mr Williams failed to show support or sympathy and instead suggested that C leave the company. [ET1, §8.2]
- 1.8. The grievance investigation overlooked or ignored a critical piece of evidence. [ET1, §8.2]
- 1.9. The grievance report, in stating that “*It would appear that the intention of the words and actions of Vivienne [Conway] was always meant in a positive manner to help [C] progress in his career*”, was intended to cover up Ms Conway’s behaviour. [ET1, §8.2 and §15 (para. 1.1)]
- 1.10. R failed, in the grievance and grievance appeal, to call Ms Conway to directly challenge C’s witnesses’ statements. [ET1, §15 (para. 1.2)]
- 1.11. R failed to acknowledge or deny the bullying/harassment committed by Ms Conway, while making recommendations relevant to a situation in which bullying/harassment took place. [ET1, §15 (para. 1.3)]
- 1.12. R failed to apologise to C for the bullying/harassment committed by Ms Conway. [ET1, §15 (para. 1.4)]
- 1.13. On or around 05.05.22, Ed Hussey breached an agreement with C to produce an agreed written summary of the grievance appeal meeting. [ET1, §15]

The last of those breaches was said to have been the “last straw” in a series of breaches as the concept is recognised in law.

Breach of trust and confidence?

2. What was the most recent act? The most recent act on the part of R which C says caused or triggered his resignation was the alleged act stated at para. 5th may 2022..¹ Did C affirm the contract since that act?
3. If not, was that act by itself a repudiatory breach of contract? In answering this question, the following matters arise in respect of the implied term of trust and confidence:
 - 3.1. did R act in a manner calculated or likely to destroy or seriously damage the parties’ relationship of trust and confidence between C and R as alleged by C?
 - 3.2. If do, did R thereby act without reasonable or proper cause? (moved from 3.1)
4. If the act stated at para. 1.13 above was itself repudiatory, did C resign in response (or partly in response) to that breach?
5. If the act stated at para. 1.13 above was *not* itself repudiatory, 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 trust and confidence?²

¹ See *Kaur v Leeds Teaching Hospitals NHS Trust* [2019] ICR 1 [55].

² See *Omilaju v Waltham Forest LBC* [2005] ICR 481.

6. If so, did the employee resign in response (or partly in response) to that breach? The tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.
7. If the last straw act stated above was not capable of contributing something to a breach of the implied term of trust and confidence, did any earlier conduct stated at paras. 139-1.13 above breach that term and did C resign in response to the same without having affirmed such a breach?³

Wrongful dismissal

8. Was C constructively dismissed? As to this, paras. 1-7 above are repeated. [ET1, §8.1]
 - 8.1. What was the Claimant's notice period?
 - 8.2. Was the Claimant paid for that notice period?

Holiday pay

Pre-resignation holiday pay

9. How much holiday had C accrued (but not used) from the start of the leave year (01.04.22) until his employment terminated on 20.05.22? [ET1, §8.1; Schedule of Loss]
 - 9.1. What was the Claimant's leave year?
 - 9.2. How much of the leave year had passed when the Claimant's employment ended?
 - 9.3. How much leave had accrued for the year by that date?
 - 9.4. How much paid leave had the Claimant taken in the year?
 - 9.5. Were any days carried over from previous holiday years?
 - 9.6. How many days remain unpaid?
 - 9.7. What is the relevant daily rate of pay?
10. Taking into account clause 6.4 of the contract of employment, is C entitled to a payment in lieu of such accrued but unused holiday and, if so, in what amount?

Post-resignation holiday pay

11. C claims, in his Schedule of Loss, holiday which "*would have accrued @ 23 August 2022*" and which "*would have accrued @ Hearing*". Is C entitled to payment in respect of the same and, if so, in what amount? [ET1, §8.1; Schedule of Loss]

³ See *Williams v The Governing Body of Alderman Davies Church in Wales Primary School* UKEAT/0108/19/LA [33].

Arrears of pay

12. C claims, in his Schedule of Loss, the difference between (a) his pay actually received in months on which he was on sick leave (December 2021, January 2022 and May 2022) and (b) his normal net pay. [ET1, §8.1; Schedule of Loss]
13. Did R thereby make an unauthorised deduction from wages within the meaning of s. 13, ERA 1996?
14. Was the complaint of unauthorised deductions from wages presented within the period of three months beginning with the dates of the alleged deduction(s)? In this respect, did any gap of more than three months break any series of deductions?⁴
15. If a claim was not brought within 3 months and was not a series of deductions was it reasonably practicable for a complaint to have been presented before the relevant period expired? If not was it presented within such further period as the tribunal considers reasonable?

Remedy

Unfair (constructive) dismissal

16. What is the appropriate basic award?
17. How much should C be awarded by way of a compensatory award? In determining compensation, the Tribunal will take into account (*inter alia*):
 - 17.1. What financial losses has the dismissal caused to the claimant.
 - 17.2. the principle that there should be no double-recovery with any damages for wrongful dismissal;
 - 17.3. whether any (alleged) losses flow not from dismissal but from the (alleged) antecedent breaches of contract such that they are irrecoverable in an action for unfair dismissal;⁵
 - 17.4. whether C has taken reasonable steps to mitigate his losses, if not, for what period of loss should the claimant be compensated?
 - 17.5. the chance that C would (or might) have left R's employment in any event (either at the same time or later) if so should the claimant's compensation be reduced? By how much?

Wrongful dismissal

18. How much should C be awarded by way of damages?
19. Should C give credit for any state benefits or other earnings received in what would have been his notice period?

Acas uplift/reduction

20. Should any sum awarded to C be uplifted/reduced (subject, in the case of the compensatory award for unfair dismissal, to the statutory cap)? In answering this question, the following issues arise.

⁴ See *Bear Scotland Ltd v Fulton* [2015] ICR 221.

⁵ See *GAB Robins (UK) Ltd v Triggs* [2008] ICR 529.

21. Did R fail to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures in any of the following alleged ways?
 - 21.1. R failed to follow the Acas Code of Practice on fairness and transparency.
 - 21.2. C was denied the right to give input on the agreed meeting summary.
 - 21.3. A third party was given the opportunity to review the notes before C could do so.
22. Did C fail to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures in any of the following alleged ways?
 - 22.1. C failed to raise the matters stated at para. 139 – 1.5 above without unreasonable delay with a manager who is not the subject of the grievance, contrary to para. 32 of the Code.
23. If so, was any such failure unreasonable?
24. If so, would it be just and equitable to uplift and/or decrease any award by any amount (up to 25%)? C contends that the relevant uplift should be 10%. R contends that the relevant reduction should be 20%.

Recoupment

25. What is the effect, if any, of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 (SI 1996/2349)?