



EMPLOYMENT TRIBUNALS

Claimant: Mr N Garside

Respondent: Strategic Agenda UK Limited

Heard at: by CVP

On: 19 September 2023

Before: Employment Judge N Walker

Representation

Claimant: in person

Respondent: Ms Ikeogu - Lay Representative

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's claim for notice pay fails and is dismissed.

REASONS

The Claim

- 1 The Claimant brought a claim for breach of contract. The Claimant claimed that he had been dismissed and not paid notice pay. The Respondent contended that the Claimant was dismissed for gross misconduct and that no notice was payable.

The Evidence

- 2 The Tribunal heard evidence from Mr G Clark, the Respondent's Operations Manager, and from Mr F Yahaya, the Respondent's Managing Director. The Claimant gave evidence on his own behalf and the Tribunal had a bundle of documents as well as individual documents supplied by the Claimant. Having checked the emails carefully the Respondent has copies which show a time some 5 hours behind those received by the Claimant, indicating they were forwarded when Mr Yahaya's computer was in a different time zone. I concluded the Claimant has emails showing the UK time zone and the Respondent has copies showing USA time which has

caused some confusion on the part of the Respondent. Mr Yahaya was in the UK at the time of the incident in question.

Reasonable Accommodations

- 3 The Tribunal noted that the documents indicated that the Claimant has ADHD. The Claimant informed me that he had some legal education, but he had not qualified or practised as a lawyer. I considered that notwithstanding his legal education, reasonable accommodations should be made for him as a litigant in person and in the light of his neurodivergence. The Claimant said his condition was mild and he did not need any accommodations, but I gave him breaks wherever possible and allowed him to make a lengthy statement in addition to the matters raised in his witness statement. I am satisfied that the Claimant was able to participate fully.

The Issues

- 4 The parties agree that the Claimant was dismissed and that ordinarily he would be entitled to two months' notice. The Respondent contends that the Claimant committed an act of gross misconduct. The issues I have to determine are:

- (1) whether the Claimant had in fact committed an act of gross misconduct; that is an act of misconduct which was sufficiently serious so that the Respondent was entitled to accept that as a fundamental breach and terminate his contract without notice or notice pay;

- (2) whether the Respondent waived the breach.

Facts

- 5 The Claimant commenced work with the Respondent on 9 February 2023. He was employed as fulltime Full Stack Developer according to his employment contract, which listed his duties as including the following: developing new features, supporting the product, and fixing bugs, building related software and testing the software.
- 6 The Respondent is a small company. It operates two projects that I was told about. One was called "Robert" which was software development of a product that the Claimant and one other employee based in Greece worked on. The other product that most other web designers worked on was called TP. At one point the Respondent instructed the Claimant to work on TP and it is clear from the notes of the disciplinary hearing that the Claimant disliked that product and preferred to work on Robert alone.
- 7 The Claimant had signed an employment contract which set out his normal hours of work as being between 9:00 a.m. and 5:30 p.m. Mondays to Fridays with one hour for lunch. The normal place of work was 116 to 118 Network Hub in London. Under the heading "Sickness Absence and remote working" the contract stated:

"11.7 The Company has a hybrid remote working system, we require you to be in the office at least 3 days a week".

- 8 Mr. Clark agreed that staff often worked from home but said that he expected they would spend three days a week in the office.
- 9 The Claimant did not often go to the office. He told the Tribunal that he tended to go once a week, but he also said there was no good reason for him to go to the office. He could get more hours work in at home. It was also clear that due to certain effects of his neurodivergence, the Claimant found social interaction with some other people difficult. When working on Robert the only other employee working directly on it was based in Greece, so their interaction was carried out online and not in the office.
- 10 At one point the Claimant was asked to work on the TP product and this caused the Claimant some problems. In response he reacted and at a “stand up meeting” on 10 March 2023, the Claimant’s communications were unusual, and later writing on Slack (a computer system used for communication in firms such as the Respondent) he also made some comments to a colleague. The Claimant later explained that his communications became increasingly unpleasant in the hope that the Respondent might take him off the TP project.
- 11 Initially the Managing Director, Mr Yahaya decided to schedule a meeting with the Claimant to address those communications informally. On 14 March at 15.25 p.m., Mr Yahaya sent the Claimant an invitation to a meeting using Google calendar. The meeting was due to take place on 15 March at 10.00 a.m. The invitation referred to it being to discuss his role and teamwork. The Claimant admits that the invitation arrived, but he did not notice it. Very early the following morning at 6.20 am, Mr Yahaya sent the Claimant a follow up reminding him about the meeting due to take place at 10.00 a.m. which said:

*“Hi Noel,
Please ensure you come into the office today for the meeting.
Rgds”*

- 12 There is a copy of this email in the bundle showing it was sent at 2.20 am but this was due to the computer changing time zone when the Respondent checked it. In fact, the email provided by the Claimant shows that the copy received by the Claimant was sent at 6.20 am.
- 13 The Claimant saw that follow up at 9:00 a.m. on 15 March 2023 when he logged on to his computer to start work. The Claimant says that it would have taken him an hour to an hour and a half to get into work and he would have missed the meeting by that time. Instead of responding immediately to say that he had only just seen the message, the Claimant ignored it. A little while later (probably at 11.40 am) the Claimant realised that there had been an initial invite. At 11.45 am, he sent a message to Mr Yahaya saying:

“Sorry I missed the invite”.

- 14 In response to that Mr Yahaya emailed the Claimant again on 15 March at 12.23. His email said:

*“Hi Noel
Please make sure you come in tomorrow.*

Rgds”.

There is another copy of this email provided by the Respondent showing it was sent at 8.23 am but again, that is the effect of it being forwarded by Mr Yahaya when he was in another time zone. The email was sent at 12.23.

- 15 The Claimant did not go on to work the next day (16 March 2023).
- 16 Mr Yahaya, then decided to start a formal investigation. On 16 March 2023 at 4.25 pm Mr Yahaya emailed the Claimant to notify him there was to be an investigation under the disciplinary policy.

Dear Noel

I'm disappointed you haven't come into the office despite my invite and messages.

Following feedback from the team we will carry out a full investigation into the comments made on slack over the past few days and during the Stand-Up on Friday 10th March.

This investigation will be carried out under our Disciplinary Policy (attached).

I have asked Olivia Melluish, our Resource Manager, to carry out the Investigation and report back to me as soon as possible, and hopefully by the end of next week. Olivia has no prior knowledge of this and was not involved in the Stand-Up call as I was.

The aim of the investigation is to collect as much evidence as possible about any comments made and she will speak to all those who were involved, including yourself.

After I have received her report we will decide on the most appropriate next steps. This may be no further action, or may be a Disciplinary Hearing.

It is important that you don't discuss this with any other colleagues and I would ask that while I expect you to continue doing your job in the meantime, you refrain from contacting Dan, the TP development team, or anyone else who may prejudice the outcome of the case.

It is my wish that we can settle this smoothly and quickly and I hope you will let me know if you have any questions during the process.

Yours sincerely.

- 17 Subsequently, Mr Yahaya asked that a third allegation be added to the matters under investigation. This was:

“your lack of response to direct communication from Fola Yahaya to meet with him in the office on 15th March 2023”

- 18 Ms Melluish carried out an investigation. She obtained witness statements from various staff members and there was a statement from the Claimant. These witness statements were summarised in her report dated 27 March 2023 which says the investigation began on 20 March 2023. The Claimant's evidence included the following comments:

*“Noel did not answer when asked if he had offered to reschedule but stated that he never wanted to return to the office, as he is only able to work 6 hours per day in the office and gets distracted by people, whereas when he is working from home, he can work 10 hours per day. He also stated that he finds going into the office stressful due to his being neurodivergent and having ADHD. Additionally, he felt that people in the office “weirdo shamed” him, citing comments that certain employees had allegedly made about his food choices and the fact he had been tutted at. When asked repeatedly who had done so, Noel stated that he was unable to name names due to having face blindness. Noel stated that R** “weirdo shamed” him when suggesting that he stop drinking so much Coca-Cola. Finally, Noel stated “It's just abuse, it's really horrible. I haven't worked in an office in six years, I find the women at the office stressful and bothersome.It's an abusive environment and I don't want to come back into the office.”*

- 19 In the outcome report, Ms Melluish reported the outcome of her investigation into this allegation and mitigating factors saying:

“Noel's lack of response to direct communication from Fola Yahaya to meet with him in the office
- Fola sent a Google Calendar invitation to Noel 14th March 2023 at 15:25 to discuss his role and teamwork.
- Noel did not accept the invitation.
- Fola sent Noel an email on 15th March 2023 at 02:20 AM asking him to ensure he would attend the meeting.
- Fola sent an email to Noel on 15th March 2023 at 08:23 AM asking him to ensure he would go into the office the following day.
- Noel emailed Fola on 15th March 2023 at 11:45 AM apologising for missing the invitation.
- Noel did not offer to reschedule the meeting.
- Noel has stated that he will not return to the office despite company policy.”

“Mitigating factors: *Noel stated that part of the reason why he did not want to return to the office was that he found it stressful due to having ADHD. Noel did not mention this during his first month check-in on 9th February 2023. He had previously agreed to work on a hybrid basis.”*

- 20 As noted above, I have seen copies of the same emails from the Respondent and the Claimant, and it is clear that the email times that Ms Melluish cites are incorrect as they are 5 hours behind the actual time that they were sent. The second email from Mr Yahaya was a reply to the Claimant's email saying he had missed the original invite.

- 21 The investigatory report was passed to Mr. Clark who, as Operations Manager, was responsible for disciplinary hearings under the company

disciplinary policy. Mr Clark then carried out a disciplinary hearing which was recorded and for which there is a transcript.

- 22 The Claimant explained to the Tribunal that he has ADHD. He had not initially told the Respondent about his ADHD but clearly did so at the investigatory hearing as noted by Ms Melliush. At the disciplinary hearing, he referred at some length to his neurodiversity issues and said he knew he was not normal.
- 23 The Claimant did not work at the office after the 15 March (although he may have attended for the disciplinary hearing and investigation). I do not have an explanation from the Claimant about his not going to the office on 16 March 2023. The Claimant says that he took the instruction in the email about the investigation sent on the afternoon of 16 March 2023 not to contact certain colleagues to mean he couldn't go into the office to work since it would have been difficult to avoid contact with those colleagues. He did not check that was the meaning of that email.
- 24 The disciplinary hearing transcript does not contain a section about the failure to attend the meeting. Initially when Mr Clark listed that as a matter to be discussed the Claimant started to reply to it, but Mr Clark stopped that by suggesting they went through the items in turn, in the order they were down in, and he then started to discuss the first matter. Ms Melliush's investigatory report conclusion said that the Claimant said that he wouldn't return to the office despite company policy, but the summary of the Claimant's evidence that she recounted does not say that. The Claimant clearly disliked coming to the office and there was a discussion about the difficulties he faced at the office, but the chain of events was not revisited. The Claimant did say he never "wanted" to return to the office, but not wanting to return is somewhat different to an express refusal to return. I cannot locate any evidence that the Claimant expressly refused to attend the office.
- 25 The disciplinary hearing transcript indicates Mr Clark suggested they talk privately and turn off the recording devices. There was a private discussion in which there was an exploration of whether there was a way for the Claimant to work for the Respondent for a while on the "Robert" project, which he cared about. After that discussion the Claimant went home, and Mr Clark reflected on the position. Mr Yahaya confirms that he was not involved in the disciplinary hearing, but he had a conversation with Mr Clark afterwards. Later that afternoon, Mr Clark decided to dismiss the Claimant on the basis that the third matter was gross misconduct. The dismissal letter was sent under cover of an email which was sent at the end of the working day on 5 April and said:

"Dear Noel

Please find attached a letter from me with the outcome of the disciplinary hearing you attended earlier today.

Whilst we informally discussed various scenarios in which you might be able to continue working with Robert for a limited time, we decided after you left today that it was best to complete this process today.

As you know I am off on leave tomorrow, but Olivia and Fola will be able to deal with any questions of process you have from this point.

*Regards,
Gerald”*

26 The Claimant was shocked to receive the dismissal letter. He said that he had previously had an email from Mr Yahaya which said the most serious outcome might be a formal warning, but subsequently he could not locate that email. I have not seen an email of that nature. The email from Mr Yahaya about the investigation sent on 16 March does point out a range of potential outcomes, but it does not say that a final warning is the likely outcome.

27 In the dismissal letter Mr Clark set out the matters that had been determined in relation to the investigation of the allegation:

“Your lack of response to direct communication from Fola Yahaya to meet with him in the office on 15 March 2023”.

The letter said that in investigating this allegation we determined the following.

“ A. That you claim that you didn’t get Fola’s invitation because you only woke up at 9.00.

Firstly, you had not been suspended and so were contractually obligated to work from 9.00 so waking up at 9.00 am potentially puts you in breach of contract. Further this was a follow up email to an earlier calendar invite which was made the day before. You replied to Fola “Sorry I missed the invite” at 11.45 am that day for a meeting that had been scheduled for 10am) and then the email that appeared to come from Fola shortly after 8am said “Please come in tomorrow”. You did not and therefore I conclude that you deliberately ignored Fola’s instruction.

Further this instruction from Fola came subsequently to his request for you to not have any contact with the team. So although you claim that you hadn’t come into the office because R works from the office (which in any case I don’t consider to be an instruction not to come into the office) you had in fact been specifically told subsequent to that instruction to come into the office.”*

B. That you have openly said in your statement that you are “never coming back to the office”. You are contractually obligated to work three days a week in the office so this is in deliberate breach of contract. It is not possible for you to continue the job you were hired for without contact with the team or with us.”

28 The letter recorded the Claimant’s suggestion that he was “weirdo-shamed” as the Claimant put it. He also noted that the Claimant alleged that he’d been a victim of microaggressions from several members of staff. However, he discounted this because the Claimant hadn’t approached the management to discuss this despite various check-ins when he’d been

asked if there was anything they needed to know or any reasonable adjustments to make. He said there was evidence that the Claimant viewed women in the office differently to male colleagues which was at odds with their equal opportunities and diversity policy. He accepted that policy had only been published on 20 March but nevertheless Mr Clark's opinion was that as an adult with significant work experience, the Claimant should have been familiar with these principles, which society would regard as norms. In conclusion Mr Clark said that this was gross misconduct. He also went on to explain that the Claimant had referenced a website with advice for employers on summary dismissal and he copied out a section from that website in the letter in which it said:

“Where an employee is guilty of an act of gross misconduct, this can be treated by the employer as a fundamental breach of the implied duty of mutual trust and confidence such that this will warrant bringing the contract to an end without meeting any minimum statutory or contractual notice requirements.”

29 The dismissal letter went on to say that not only did Mr Clark think the Claimant was guilty of gross misconduct according to the disciplinary policy, but he thought that the website's description of gross misconduct also applied in this case, and he thought the working relationship between the Claimant and the Respondent was irreparably damaged and that the Claimant's misconduct was responsible for that.

30 The cover e-mail dated 5th April for the disciplinary letter sent by Mr. Clark referred to the discussion at the end of the meeting stating:

“Whilst we informally discussed various scenarios in which you might be able to continue working with Robert for a limited time, we decided after you left today that it was best to complete this process today.”

31 In his witness statement Mr Clark said it was clear from the notes of the investigation and the disciplinary meeting that the Claimant had decided he was never coming into the office again. He had been asked to and not done so. He referred to a previous situation when the Claimant lost his laptop and Mr Clark had offered to set up a new computer with Claimant in the office immediately, but the Claimant chose to stay away. He referred to the fact that the Respondent didn't know or at least understand what the Claimant was working on and didn't know how to direct him. Mr Clark stated the Claimant's answers to his questions about why he didn't want to come into the office showed a prejudice that was at odds with their equalities policy. He stated that fundamentally the Respondent established that the Claimant knew his contract obliged him to come into the office at least three days per week like everyone else and he had chosen deliberately to ignore this. Additionally, Mr Clark recorded the Claimant clearly didn't understand the grounds on which he could be summarily dismissed and made what Mr Clark consider threatening remarks in the Disciplinary Hearing about how he would take the Respondent to court and had already done so for previous employers. Mr Clark stated it was clear to him that the relationship between the Claimant and the Respondent as his employer had completely broken down.

- 32 When asked which of the examples of gross misconduct in the disciplinary policy might apply in his view, Mr Clark noted that the examples were non exhaustive but referred to two matters being a serious breach of the Respondent's rules and a deliberate refusal to follow reasonable instructions.
- 33 Mr Clark was asked whether other staff members had failed to attend at the office as much as the Respondent expected. He agreed that they had. He explained that he tended to give everyone "a few words". He told the Tribunal that doing formal things in small office was difficult. A couple of other staff members have not been coming in. He mentioned it to them, and they took note.
- 34 Unlike other staff, at no time was the Claimant ever told informally or formally that he was required to come into the office at least three days a week that if he did not, he might he would be regarded by the Respondent as being in breach of contract.

Submissions

Claimant's submissions

- 35 The Claimant said that Mr Clark had referred to the gross misconduct examples in the policy one of which was a deliberate refusal to follow reasonable instructions. He thought that there was nothing deliberate about his conduct and he had not picked up the e-mail request for the meeting. He did go to the office at times, but it was an unusual situation in that going to the office actively resulted in him doing less work than he could at home. There was a computer system which the Respondents could check which would show that he was doing stuff and working long hours out of normal hours at home.
- 36 The beginning of the Claimant's witness statement read like a written submission. In that statement, the Claimant argued that the Respondent had seriously discussed him staying on at the private meeting after his disciplinary and they had then swung to gross misconduct afterwards. He had at that stage expected to be going back to work the next day. He argued that he had never had any previous warnings. He also argued the process was unfair.
- 37 The Claimant referred to the case of Wilson and Racher 1974

Respondent's Submissions

- 38 The Respondent submitted that the Claimant had been dismissed for an outright refusal to attend the office. The Respondent was entitled to dismiss the Claimant without notice as he that was a repudiatory breach by the Claimant and amounted to gross misconduct.
- 39 Although the Respondent had accepted the two of the allegations were acts of misconduct rather than gross misconduct, they could not ignore a deliberate refusal to follow instructions to return the office as the Claimant was contractually obliged to do.

- 40 The Respondent's view was this was wilful disobedience and demonstrated in writing by the Claimant that he would not go to the office. The Respondent referred to the case of Pepper and Webb. The Claimant refused to follow the Respondent's managing director's instructions in accordance with this contract. There was no cogent reason as to why this was.
- 41 As the Claimant failed attend for work and meetings as requested by the managing director and had subsequently confirmed he was never going to return to the office, there was no alternative but to regard his actions as gross misconduct. The Claimant had been making threats about taking the Respondent to Tribunal while he was still employed. The Claimant not only made the threats but said he had done that before.
- 42 The Respondent was of the view the actions of the Claimant were so serious as to fundamentally undermine the relationship of mutual trust and confidence. The relationship had completely broken down and the Respondent could not continue to employ the Claimant who displayed and verbalised complaints and refused to follow instructions and made threats and gave an ultimatum to his employer and continued in such defiance at the most serious stage of the disciplinary hearing.

The Law

- 43 There is an implied term of mutual trust and confidence which must exist in a contract as between employer and employee. In Briscoe v Lubrizol Limited [2002] IRLR 607 CA, the test set out in the case of Neary and another v Dean of Westminster [1999] IRLR 288 was approved. Lord Jauncey stated that the conduct:

"must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment.

In this case the Court of Appeal stressed that the employee's conduct should be viewed objectively. The employee can repudiate the contract without an intention to do so.

- 44 There have been different approaches in cases which might on the face of it, appear similar. The two cases cited by the Claimant and Respondent demonstrate that. Pepper v Webb [1969] 1 WLR 1514 CA is a case where the employee was held to have committed a repudiatory breach whereas Wilson v Racher [1974] ICR 428 CA was one where that was not the case. Both involved head gardeners who acted inappropriately towards their employer but in Pepper, the Court of Appeal held that the behaviour was repudiatory whereas in the Wilson case, the Court of Appeal held that the employee was a diligent and efficient employee and that the employer had behaved in a provocative manner. On that basis, the cases were distinguished and the conduct in Wilson was not regarded as a fundamental breach of contract.
- 45 There must be an actual repudiation of the contract by the employee. It is for the Tribunal to decide whether there has in fact been gross misconduct rather than the employer having a belief that there was.

- 46 While an employee who disobeys his employer's lawful instructions may well be in breach of his duty to obey lawful and reasonable orders, not all such acts of disobedience are repudiatory breaches. In the case of Laws v London Chronicle (Indicator Newspapers) Limited [1959] 1WLR 698, the Court of Appeal said that to be repudiatory, the disobedience must at least have the quality that it is "wilful".
- 47 An employer who has affirmed the behaviour cannot rely on the matter as they have waived the breach. Bartholomew v LK Group Ltd is an unreported case referred to in the IDS Handbook which was decided on 26 February 2003 in which an employee was held not have been wrongfully dismissed for misconduct. He lived a long way from the office. He worked in a variety of places and did not attend the office much. However, the employee's working style had not changed over a long period and the employer had not criticised it, so that it did not amount to gross misconduct but if it did the employer had condoned it and thereby affirmed the contract and waived the right to rely on the breach to summarily dismiss.
- 48 In civil claims, the burden of proof falls on the party making a factual allegation and the standard of proof is the balance of probabilities.

Conclusions

- 49 The first question I have considered is whether the Claimant had committed a fundamental breach of contract. To amount to a breach of the implied term the conduct must so undermine the trust and confidence which is inherent in the particular contract of employment that the Respondent should no longer be required to retain the Claimant in his employment.
- 50 The Respondent said today that breach relied upon is a breach of the implied term of mutual trust and confidence. That is generally regarded as a fundamental breach. The Respondent's representative submitted that the act alleged to have caused this breach of the Claimant's failure to attend the office when instructed to do so by the Managing Director. This is not the allegation put to the Claimant at the investigation or at the disciplinary hearing.
- 51 The Respondent had said that the Claimant refused to return to the office, but I have no evidence that he actually said this. I can see that the Claimant said he never **wanted** to return to the office, (my emphasis) and it is clear that he found the office difficult to cope with. He struggled with social interaction and thought he was less productive at the office.
- 52 A refusal to obey instructions can be a serious matter, but it must be wilful. In this case there was an instruction to attend a meeting on 15 March, but the Claimant said he had missed the first invitation to a meeting, and he got the reminder when he started work the next day, by which time it was already late for him to make the meeting. He apologised when he realised that he had been sent an invitation. I do not consider there was any wilful refusal to obey an instruction at this stage.
- 53 The Claimant was instructed to come to work the next day, 16 March. He did not come to work that day despite the email instruction sent to him after his apology. In response the Managing Director asked for a disciplinary

process to be started into two allegations but only later added the third allegation of failing to attend the meeting.

- 54 Attendance at work was not mandatory but the contract did refer to a hybrid working pattern involving three days per week in the office. Other staff worked from home, and those who spent more time at home than the Respondent wanted, were asked quietly to attend more, but no formal process was undertaken. A failure to attend regularly might have been a minor breach of contract but it was not, of itself, a gross breach of contract in this company.
- 56 In a breach of contract claim the process is not critical so the question is whether the Claimant was guilty of gross misconduct in actual fact, regardless of whether that charge was put to the Claimant.
- 57 Having apologised for missing the first meeting, the Claimant then failed to attend the office the next day (16 March) as instructed. On the afternoon of 16 March, Mr Yahaya asked for an investigation to be started into the Claimant's behaviour but did not initially put the allegation of a failure to respond to the instruction on the list of matters to be considered, which could suggest that he did not immediately regard the failure as significant.
- 58 The Claimant has no explanation for ignoring the instruction to come to work on 16 March. Later that day that he was told to avoid contact with his colleagues. The Claimant has explained why he took that as meaning he had to stay way from the office from then on. In the light of this explanation, the subsequent non-attendance is not necessarily a wilful refusal to attend.
- 59 Although the Claimant's failure to attend on 16 March was the only date when there was no explanation, the allegation put to the Claimant related to the previous day and was "*Your lack of response to direct communication from Fola Yahaya to meet with him in the office on 15 March 2023*". It seems the Respondent's staff were confused over the dates and times of the various emails and instructions.
- 60 I considered whether the Respondent in having a quiet word with other employees about their failure to attend the office did not treat a failure to attend as a serious matter. However, I distinguish the two situations. The issue with the Claimant's conduct was not that he didn't attend the office as much as he was expected to under his contract. The issue was that when specifically instructed to attend on a particular occasion, he then failed to attend as instructed.
- 61 Mr Clark referred in his witness statement to it being clear that the Claimant had decided he was never coming into the office again. He said this meant that the Respondent did not know what he had been working on or how it could direct him. As I have said, I was not taken to that statement, and I cannot locate it in the bundle. It appears in the investigation report but appears to be a reference to the Claimant saying he never wanted to return to the office which is not the same situation as an outright refusal to attend in future.
- 62 Also Mr Clark referred in both his witness statement and the dismissal letter to the Claimant's conduct around women but there is insufficient for me to

reach any view about that being misconduct or causing a breakdown in their relationship. In fact, what the Claimant appeared to be saying was that as a neurodivergent person he could not understand the communication from women. Moreover, in submissions the Respondent did not rely on that.

- 63 The misconduct which I can clearly identify is the Claimant's failure to attend work on 16 March. There is no dispute that he was instructed to attend and did not do so. I have considered whether the Claimant was guilty of wilfully ignoring an instruction to attend the office on 16 March and whether that in itself was sufficient to amount to a breach of the implied duty of trust and confidence. I have concluded that there was a wilful refusal to obey a proper instruction and it did fall within the category of a fundamental breach of a type which led to breach of the implied duty of mutual trust and confidence. It was a blatant failure which occurred immediately after the Claimant had failed to attend the day before. On the previous day, the Claimant had an excuse and apologised for missing the invite, but on this occasion, he simply ignored the instruction.
- 64 I have considered whether the Respondent waived the breach. It is my conclusion that they did not. The management acted promptly and pursued the problem of the Claimant not attending a meeting with the Managing Director as instructed with sufficient alacrity to make it clear that they did not accept the Claimant's conduct. I do not consider the failure to put it on the list of matters for the investigation immediately as indicating it was not taken seriously or was not an important matter.
- 65 I realise the Respondent was in error in referencing the matter as taking place on 15 March, rather than 16 March. I do not consider that means the actual breach was not significant. The Claimant, on 16 March, failed to act on a reasonable instruction. There was no explanation for this, and the Claimant had already missed one meeting.
- 66 I considered the Claimant's submissions. First, I accepted the events on 15 March were not wilful but an accident for which the Claimant apologised.
- 67 I considered the Claimant's comments about the discussion at the end of the disciplinary. I take this as a submission that the fact that the Respondent explored with the Claimant the possibility of his working from home for a while on Robert at the end of the disciplinary hearing indicated that they had did not regard the breach as so serious or that they waived the breach at that stage. That meeting was not a without prejudice meeting as the covering email with the letter of dismissal referred to this as an informal discussion. The Respondent did explore options involving the Claimant leaving their employment in a short time period but later that day decided he should leave immediately. The covering letter made it clear that the Respondent considered ways for the Claimant to work from home for a period of time and only later decided that it was best to complete the process that day. The wording does suggest the Respondent was willing to contemplate the Claimant staying an employee for a short period longer and the later decision suggests it related more to the convenience of ending the relationship quickly than to the seriousness of the Claimant's conduct. Nevertheless, I do not consider the fact of the Respondent exploring alternative solutions to amount to a waiver.

- 68 I considered the Claimant's submission about the lack of any warnings. There is no requirement for a warning in relation to a fundamental breach of contract. This is not a claim for unfair dismissal. The process is not in issue in the same way as in a claim for unfair dismissal.
- 69 I considered the Respondent's submissions. I do not consider the Claimant can be in breach for having told his employer he thought he had the right to take them to an employment tribunal. That is his legal right, and it would undermine the entire foundation of employment law if an employee could not refer to that right without being in breach of contract.
- 70 The Respondent argues that the Claimant made a statement which was an outright refusal to return to the office, but as I have explained, I was not taken to the statement which the Respondent relies on. I do accept that the Claimant clearly expressed his preference not to attend again and as a neurodivergent person he also explained the difficulties he faced at the office. However, that is not the same as an outright refusal to attend at the office.
- 71 Finally, this is not a claim for disability discrimination. The Claimant has not sought to argue that the Respondent should have made reasonable adjustments for his neurodivergence. The Claimant has a condition which potentially could amount to a disability that falls within the Equality Act. While as a Tribunal, we have enormous concern for people with various conditions which make their working lives more difficult, this was not in issue, and I had no evidence about the extent of the Claimant's condition or its impact on his ability to carry out normal day-to-day activities. Had this been a case of that nature, entirely different considerations would have arisen.
- 72 In summary, I concluded that the Claimant had committed gross misconduct in failing to comply with the instruction to attend the office on 16 March and that this was a blatant failure since it occurred immediately after the Claimant had failed to attend the day before, albeit on that occasion he explained the failure was inadvertent.

Employment Judge N Walker

3 October 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

03/10/2023

FOR EMPLOYMENT TRIBUNALS