



EMPLOYMENT TRIBUNAL

Claimant: Mr Lewis Clements
Respondent: Roehampton University
Sitting At: London South
Before: Employment Judge Morton
On: 25-27 September 2023
Appearances:
For The Claimant: Mr K Zaman, Counsel
For The Respondent: Mr P Wilson, Counsel

RESERVED JUDGMENT

It is the judgment of the Tribunal that the Claimant's claim of constructive unfair dismissal is not well founded and is accordingly dismissed.

REASONS

Introduction

1. The Respondent is a University based in Roehampton, England, and provides higher education to students over the age of 18.
2. The Claimant was employed by the Respondent from 13 February 2017 as an Estates Maintenance Manager. On 1 September 2017, the Claimant's title was changed to Head of Maintenance and he continued in this role until he resigned with immediate effect on 24 September 2021.
3. By a claim form presented on 3 November 2022 the Claimant presented a claim of constructive unfair dismissal against the Respondent relying on various incidents that had occurred during the course of his employment.

The hearing

4. The full hearing of the claim took place by CVP over three days at the end of which I reserved my judgment. There were some connection difficulties on the first day

and the hearing started slightly late. However, once the hearing started, I was satisfied everyone was able to see and hear clearly and participate effectively. CVP hearings can be challenging, but this hearing was conducted with patience and courtesy on all sides.

5. The Claimant gave evidence on his own behalf. The Respondent's evidence was given by four witnesses, his manager Michael Hall, Director of Campus Operations, and Chief Information Officer for the Respondent, Davina Fernyhough, the Deputy Director of Human Resources and Head of HR Operation, Simon Dorman, the Head of Froebel College at the Respondent who conducted the investigation into the Keith Wickes incident and Christopher Stephens, Head of Southlands College, which conducted Keith Wickes disciplinary hearing (and whose evidence was unchallenged by the Claimant). All of the witnesses had provided written statements and there was a hearing bundle of 407 pages. References to page numbers in these reasons are references to page numbers in the bundle.

The issues

6. The issues that arise in this case are as follows:
 - a. The Claimant relies on a series of acts and omissions on the part of the Respondent as set out in the findings of fact that follow.
 - b. Did the Respondent act as alleged?
 - c. If so, did its actions individually or cumulatively amount to a breach of the implied term of trust and confidence or a repudiatory breach of any of the other terms of the Claimant's contract?
 - d. If so, did the Claimant resign promptly in response to the breach or breaches or did he delay too long?
 - e. If the Respondent did breach the Claimant's contract, what was its reason for doing so and was this a potentially fair reason under s98 ERA?
 - f. Did the Respondent act reasonably in all the circumstances, including its size and administrative resources (s98(4) ERA)?

Findings of fact

7. I make the following findings of fact on the basis of the evidence presented to me in witness statements, oral evidence and documents. Where there was a dispute of fact, I have made my findings on a balance of probabilities.
8. The Claimant, who is by training an electrical and electronic engineer, was initially appointed by the Respondent on a temporary contract and after five months was offered a permanent role as Estates Maintenance Manager, a job title that changed to Head of Maintenance six months later. His responsibilities included overseeing inspection, maintenance, repair and improvement throughout all four campuses of the Respondent, and managing a team of engineers and contractors to carry out the work. His line manager was initially David Scott and Mr Hall took over in September 2020.
9. The Claimant took over the management of a fragmented team that was lacking in skills, direction and cohesiveness and where some poor practices had developed. He was tasked early on with restructuring and upskilling the team. He began with

six engineers and two senior technicians and ended with four maintenance engineers, four senior technicians and one supervisor. He did not consider that this was a large enough team for all the work that was needed and described the maintenance department as understaffed. Mr Hall supported this view and also gave evidence that there were missing layers in the management hierarchy, which led to a high-pressure workload for the Claimant and others (Mr Hall included). This was not unique to the maintenance department – there were pressures across the university. The Claimant also had apprentices, agency staff and independent contractors to manage. He described himself as loving his job and he committed long hours to it, but the management aspects were stressful. The work became particularly demanding outside of university term time when the students were not present but the Respondent's buildings were used to provide accommodation for the Wimbledon tennis tournament and other events. There were extra agency staff to manage during those periods. The Claimant's line managers, Mr Scott and then Mr Hall, were also very busy and at times the Claimant felt under-supported in his role.

10. He also looked to HR for help and support in managing the people in his team and his claim to the tribunal derives from six incidents in which he alleges that this support was not forthcoming, or provided in a way that was insufficient to the extent that he was justified in resigning because the Respondent's approach amounted to a repudiatory breach of his contract.

Colin Mayer incident

11. The first incident occurred in 2017, before the Claimant implemented the restructuring. It involved an employee of the Respondent called Colin Mayer and a member of the HR team called Carmel Keaney, both of whom have since left the Respondent's employment. The Respondent had not been able to find any records about this incident because the relevant emails have not been retained. I have therefore relied on the Claimant's evidence on the matter which I had no reason to think was exaggerated or inaccurate. The Claimant was clear in his oral evidence when he did not remember something and I found him to be a credible witness. I therefore find as a fact that the incident occurred as described in paragraph 8 of the Claimant's witness statement. In summary, when the Claimant challenged the way in which Mr Mayer had conducted himself during a team meeting Mr Mayer came very close to the Claimant, called him a 'cunt' and invited him outside for a fight.
12. The Claimant was shocked and upset by this conduct, but when he asked Ms Keaney for support she told him that all the university could offer was an anger management course for Mr Mayer. The Claimant felt let down by this and considered that HR should have supported him in taking disciplinary action against Mr Mayer in order to reinforce his authority within the team. From his oral evidence I conclude however that he did not specifically ask for disciplinary action to be taken – he had not at the time been promoted into the Head of Maintenance role and was seeking guidance from HR about the appropriate course of action. He accepted and trusted what Ms Keaney told him although he found it a strange state of affairs. At the time he was new to the policies and procedures applied by the university in disciplinary situations and needed HR's advice. He therefore accepted what he

was told and did not challenge it at the time.

The 'fraud' incident

13. The second incident occurred in 2018. Again, there was no documentary evidence related to this incident and I base my findings of fact on the Claimant's account, which was largely unchallenged. It came to the Claimant's attention that two of his team had seemingly made exaggerated claims for overtime payments – they had claimed for 16 hours overtime for work over a weekend, but when he had reviewed the CCTV footage from the site it appeared that they had only worked a limited number of hours on the Saturday. He raised the matter with Carmel Keaney who told him that he would need to send proof. He responded that he had viewed the CCTV footage which confirmed his suspicions. Ms Keaney told him to wait to see if the individuals concerned actually booked the overtime and if they did, this would be considered a disciplinary matter. When the engineers did make the overtime claim Ms Keaney informed the Claimant that she had ascertained that CCTV footage could not be used as evidence and that there was nothing that could be done. The Claimant raised this with Mr Scott, who was still his line manager at the time and he told the Claimant they would have to defer to HR on the matter. The Claimant said that this made him feel inadequately supported in taking action against misconduct in his team. He became further aggrieved about the matter in 2021, when CCTV footage was relied upon by the Respondent in dealing with the incident involving Keith Wickes, which I return to later in these reasons. The advice Ms Keaney gave to the Claimant was clearly incorrect.

Tony Brown incident

14. The third incident also occurred in 2018, during the period of the restructuring and involved an employee called Tony Brown. Mr Brown had not been performing well in the tests and assessments that were being used in the restructuring for deciding to whom to allocate new roles. A conversation had been taking place with him and his union representative about taking a redundancy package. Initially he had refused this option. On 30 May 2018 Mr Brown came to the office where the Claimant was working and when the Claimant asked him how he was, Mr Brown became very angry and made various threatening remarks, including a threat that he would 'fist' the Claimant. The Claimant was very alarmed by Mr Brown's threats and demeanour to the extent of feeling the need to check the brakes on his motorcycle before he went home that evening. He raised the matter with HR the next day who advised that Mr Brown would be suspended immediately and an independent investigator would be appointed. On 1 June Mrs Fernyhough appointed Jennifer Rawsthorne to conduct the investigation and Ms Rawsthorne's report (pages 133-140) was produced on 26 June 2018. During the course of her investigation Ms Rawsthorne explored the possibility in her questions that the exchange could have consisted of 'banter' or a joke as this was the explanation that Mr Brown was putting forward. The Claimant found this line of questioning upsetting. Ms Rawsthorne evidently concluded that the incident had not merely been intended in jest as she recommended that disciplinary action be taken against Mr Brown for bullying and sexual harassment and that there should be training for the entire team on harassment at work as well as a better system of one-to-one discussions between staff and managers.

15. A disciplinary hearing was scheduled for 16 August, but before it could take place Mr Brown changed his mind about the redundancy package and said he would accept it. Mrs Fernyhough and her team decided that in all the circumstances, including the fact that separately from this incident Mr Brown had made an allegation of race discrimination against another person in the organisation, Mr Brown should be allowed to leave under a settlement agreement. The fact that his departure from the organisation was not a certain outcome of a disciplinary process also influenced the decision.
16. The Claimant's complaint is that this decision had the effect of undermining his authority with his other team members and gave the impression that the only consequence of misconduct towards him would be a pay-off from the university. Comments along those lines were made by other team members after the event. He was therefore very unhappy with the outcome of the incident. He was unaware of the full conclusions of the investigation until disclosure of documents took place in these proceedings. However, he did know, because he was informed of the fact by Mr Scott, that disciplinary proceedings had been started but set aside once voluntary redundancy was accepted.
17. Because the Claimant was so upset that the incident had not resulted in Mr Brown's dismissal Mrs Fernyhough subsequently met with the Claimant and Mr Scott to explain and discuss the decision to let Mr Brown leave under a settlement agreement. It was put to her by Mr Zaman that the decision had been taken without due regard to the impact on the Claimant. Mrs Fernyhough said in response to that that the Claimant was an experienced manager with specific experience of managing teams. He also reported to a very experienced manager, David Scott and it was her expectation that between them they ought to have been able to deal with and counter the allegation that the Mr Brown had been paid off as the only consequence of threatening the Claimant. She had no recollection of the Claimant coming to her at the time to say that he was having problems managing his team.

Wayne Morgan incident

18. The Wayne Morgan incident in fact involved two incidents in which Mr Morgan, who was one of the Claimant's team members, behaved in a way that upset the Claimant. The first was a telephone call during which Mr Morgan spoke abusively to him. An account, which is not disputed by the Respondent, was given by the Claimant to Mrs Fernyhough in an email sent on 26 January 2021 (page 186) which stated as follows:

'I just received a call from one of my engineers Wayne Morgan, He attended to a job and discussed with the student about them being tested, he found out that the student has not been tested. Wayne, then decided to scream and shout at me down the phone, I asked Wayne, to calm down but he was so irate he would not listen, he continued to scream and shout at me for approx 2min then decided to hang up on me.

I know I am a manger and I am expected to act professional at all times, but i see no reason why i should have to tolerate being shouted at when I have gone above and beyond with trying to keep the whole team safe.

I am personally dealing with allot and have had 2 members of my family recently die from COVID, and my pregnant wife had to go into hospital due to COVID, this is completely

unacceptable for me to be spoken to in this way or with the tone he used.

As I write this email I am trying to calm my self down, but I am struggling to do so as I am so upset by the way I have just been spoken to. I would like to discipline Wayne, regarding his behaviour and I am looking to you both for some advise and assistance with this.'

19. The Claimant's argument about this incident was that he did not receive support in dealing with it either from his manager Mr Hall or from HR. The Respondent's position is that the onus was on the Claimant to follow up if he considered that he was not getting the response or support he needed. The account given in the Claimant's particulars of claim is largely undisputed by the Respondent. Following receipt of the Claimant's email Mrs Fernyhough replied 'in the first instance you may find it helpful to talk through the issue you have written about with your line manager or Owen [Severn] or me and then we can consider if the next step is to commission a formal investigation'. The Claimant confirmed that he would raise the incident with Mr Hall whom he emailed on 26 January 2021 stating that he wanted formal support in taking disciplinary action against Mr Morgan. Mr Hall agreed that the behaviour was unacceptable and asked for information about previous incidents which the Claimant provided. Mr Hall said that he would speak to HR about the matter and see how it could be taken forward. The Claimant sought an update on 4 February 2021. Mr Hall replied saying that he had met with HR and that he would be in contact with the Claimant to discuss further, but the Claimant heard nothing further.
20. It was clear from the Claimant's responses in cross examination that he considered that he had been told to deal with his concerns via his line manager Mr Hall. I find that he had either misunderstood or not properly read Mrs Fernyhough's email of 26 January 2021 which I find to have been a thoughtful email, sent within an hour of receiving the Claimant's complaint about Mr Morgan and expressing concern for the Claimant's welfare. Her response clearly signposted the Claimant to either Mr Hall or herself or one of her colleagues in HR as a prelude to deciding whether formal disciplinary action was needed. It was not therefore the case that she told the Claimant to raise the issue with Mr Hall first. The Claimant responded that he would raise the issue with Mr Hall (page 156) and Mrs Fernyhough replied 'I think a discussion with Mike would be very helpful in relation to this. I have not copied him in on any correspondence but again, if you would like any further support from me please do not hesitate to ask'. The Claimant did then raise the issue with Mr Hall and that did not lead to any immediate outcome as regards the management of Mr Morgan. In cross examination Mrs Fernyhough said that she had thought that it might be helpful for the Claimant to speak to Mr Hall because as head of the relevant service he ought to be aware that disciplinary action was being considered. There was no evidence of any further follow-up by the Claimant at the time.
21. The second incident with Wayne Morgan occurred about three weeks later and again the Claimant raised this with both Mr Hall and Mrs Fernyhough (page 155). The incident involved Mr Morgan screaming, shouting, and swearing at another engineer and the maintenance supervisor. The Claimant said:

'I have been on the receiving end of Wayne's, tirade of abuse, and I can confirm that it is very hard to remain calm during the, what feels like abuse. I would like to take this further, as by his actions it seems that Wayne, believes he can continue shout abuse at his work

colleges, and I am fearful that it will be only a matter of time before someone responds to his actions. Could you please inform me what I can do to address this behaviour from Wayne? As I strongly believe, if I try to approach Wayne, about his behaviour, I myself, will just receive more abuse.'

22. Mr Hall replied (page 154) saying that he had wanted to catch up with the Claimant about Mr Morgan the previous week, but the Claimant had been unavailable. He suggested a meeting on Friday of that week. In cross examination Mr Hall was not able to confirm that any meeting had taken place. Mrs Fernyhough had also replied to the Claimant on the same day saying, 'what would be very helpful is a factual timeline of these episodes and confirmation of standard setting'. The Claimant was aggrieved because he considered that he had already provided a detailed summary of the incidents in his emails of 26 January and 24 February 2021 as well as having given details of historic incidents with Mr Morgan.
23. There was no further documentation regarding this incident, and no documentary evidence that the Claimant himself had taken further steps to follow it up. Mr Hall was unable to recollect clearly what further steps he had taken to respond to the Claimant's concerns, other than confirming that he had been in correspondence with HR about it. He did not however agree with the Claimant's suggestion that a culture was developing at the Respondent in which individuals could act with impunity. He said that this was not a fair assessment by the Claimant and that staff were expected to act reasonably. It was not, he said, a 'free for all'. Mrs Fernyhough did not recall getting any response to her request for a timeline, but reiterated in cross examination that there had been nothing to stop the Claimant contacting her at any time to speak about the situation. There was no evidence that he had done that.

Keith Wickes incident

24. Keith Wickes was a member of the Claimant's team with whom the Claimant had a poor working relationship. Mr Wickes did not respect the Claimant's authority and was consistently insubordinate. The incident in question occurred on 14 June 2021 when Mr Wickes was seen driving a buggy, a vehicle used by the team to move around the Respondent's site, at speed through an area that was pedestrianised and in which students congregated. The member of staff who observed Mr Wickes reported the matter to the Claimant who decided that action was required in the form of suspending buggy use by the team for a period of two weeks. He had issued previous warnings about the speed at which buggies were being driven and felt that these had not been heeded.
25. The Claimant describes the incident in his witness statement as follows:

'When I got back to my office, I started to type up an email informing the whole team that I would be removing the use of the buggies for a period of two weeks. Whilst I was writing this email, Keith Wicks came into my office to collect some keys. I explained to him that I was removing the use of buggies and Keith asked why and I explained to him that a member of staff had told me that an engineer had driven through Digby Square at high speed, smoking a cigarette. I explained that when the engineer had been confronted, he had responded that 'at least I was not on my phone' and had simply driven off. Keith admitted it was him and I informed him that I was aware of that but that all staff were speeding in buggies and therefore, I felt it was imperative for health and safety reasons for

the use of buggies to be removed for two weeks. Keith became very angry and aggressive arguing that he never speeds, despite the fact that he had admitted previously that it was him that had been stopped in Digby Square by another member of staff. He began being extremely loud, argumentative and aggressive. I informed Keith that I was going to stick to this two-week ban on buggies for all staff, not just him and I asked him for the keys. He told me that he did not have the keys, to which I asked him if he could go and get them for me. He walked out of the office and downstairs to get the keys. I continued to write the email to all members of staff whilst he was gone. I was shocked that during typing my email, I felt a pain on my chest and realised that Keith had thrown the keys at me, and they had hit me in the chest. I was incredibly shaken and shocked by this. I called Keith as he walked out the office and he ignored me and then shouted as he left, 'You have the keys so fuck off.' I was shocked and in disbelief at what had just happened, and I felt the need to speak to him about the fact that he had thrown quite a large, heavy bunch of keys at quite a considerable force on to my chest. In my view, it was an act of serious violence, and I felt the need to speak to him about this. I went down the stairs after him and as I got to the bottom of the stairs, I opened the door and tripped on the step going out. As I tripped, I fell towards him. I did not push him, but I fell on to him. He turned round and began shouting in response to me asking why he had thrown the keys at me. I did become upset, as I had just been assaulted and I did shout at him that I was not happy. I was shaken and in shock. I noticed he was wearing a toolbelt filled with tools and I became instantaneously concerned that if he was able to throw a large bunch of keys at force at me, he could throw one of those tools at me or stab me with a screwdriver. I was in fear of my wellbeing. It is at this point that I went back to my office. I took a photograph of my injury, which is at Page 160 of the bundle of documents and sent it both Mike Hall and Davina Fernyhough. At Page 159 of the bundle of documents is my grievance and complaint regarding the incident.'

26. The grievance he refers to, at page 159, stated as follows:

'I asked him to go get the keys, he came back upstairs with the keys and stood in my door about 10ft away and threw the bunch keys at me which hit me in the chest, he then walked away, I asked him to come back and his response was 'you have the keys so fuck off' I called out again telling him to come back to which he said no and walked away, I followed him down as I was hurt by the keys hitting me and wanted to know an explanation, to why he had done this, down stairs we got into loud argument. And admit I allowed myself to raise my voice'.

27. The Claimant also called Mr Hall, who was still his line manager at the time and following their conversation sent a further email on 15 June (page 164-167) setting out the history of his difficulties with managing Mr Wickes and asking for the assault to be made 'official'. He also sent photographs of the marks left by the keys and Mr Hall suggested by text message that he keep them as 'evidence'. The Claimant said in his messages to Mr Hall said that he was unable to stop thinking about what Mr Wickes would do next, that he had become fearful of coming into work and that the incident was affecting his mental well-being. He concluded:

'It has got to the point where it is nearly impossible to manage Keith effectively as I fear approaching him will result in me being verbally abused, any instructions by myself given to Keith ends up in a verbal altercation. I hope that you can please assist me with this situation as I don't know what else to do.'

28. On 17 June the Claimant emailed Mr Hall to ask for an update, expressing concern that he was still Mr Wickes' line manager. He wrote:

'I am hoping that you have an update for me. I am concerned that I was physically assaulted by a member of staff on the 15th of June and to date I have not heard anything in

relation to this. This is effecting my mental well-being, as every time someone is coming up the stairs to my office I am worried this could be Keith. As I am Keith's line manger it is only a matter of time till our paths cross and this concerns me. I feel disheartened that in the past I have received a lack of support from HR with previous concerns I have raised including being threatened. I am hoping you can please let me know what the process is and what I can expect to happen.'

Mr Hall replied by return, saying that he had raised the issue with Mrs Fernyhough and they were working out how to respond. In fact, Mr Hall and Mrs Fernyhough had come to a preliminary view that it would not be appropriate to suspend Mr Wickes, which was what the Claimant had hoped would happen. This was because Mrs Fernyhough had also received a complaint from Mr Wickes via his union representative that the Claimant had pushed him. She had viewed some CCTV footage of the incident, which suggested that the Claimant might have been at fault by pushing Mr Wickes. They took a decision to change Mr Wickes' line manager for the time being to avoid direct dealings between the Claimant and Mr Wickes. They did not however think there was a real risk that Mr Wickes would assault the Claimant. Mrs Fernyhough said in cross examination that she had not been aware of any threats of serious violence against the Claimant and had understood that he and Mr Wickes could be separated by removing Mr Wickes from the Claimant's line management.

29. A meeting took place between the Claimant and Mr Hall on 21 June. There was a transcript of that meeting at pages 170A-H. Mr Hall informed the Claimant at that meeting that Mr Wickes had also been to see HR and had made an allegation that the Claimant had pushed him. The decision had been made not to suspend Mr Wickes whilst the whole of the incident was investigated. I find however that Mr Hall did not explain clearly at that meeting the thinking set out in Mrs Fernyhough's witness statement at paragraph 31, which referred to the difficulties arising from the two men having made allegations against each other. She said:

'It is correct that Keith was not suspended pending investigation. Whilst there is authority within our procedures to suspend staff pending investigation (page 273), in practice, we only exercise this right where there is no other reasonable alternative. On this occasion, both men had reported physical contact by the other; Lewis had reported that Keith had thrown buggy keys at him, whereas Keith had reported that Lewis had pushed him on the stairs. There was CCTV footage of the argument between Lewis and Keith which took place in the courtyard, and it did seem to show Keith stumble into the courtyard, which seemed to me to suggest, on the face of it, that Keith may have been pushed on the staircase by Lewis as he alleged. Fundamentally this is why I did not feel it was appropriate to suspend Keith, because if I did, I saw no other option but to also suspend Lewis given the allegation of physical contact on both sides. I felt that suspending Lewis would have caused him significantly more stress so, on balance, I felt it was more appropriate in the circumstances to instead arrange for someone else to temporarily line manage Keith to minimise the contact between the two men until the investigation had been completed.'

30. In particular Mr Hall was less than clear and categorical about the fact that Mr Wickes had made a counter-allegation against the Claimant and he did not explain that the Respondent had come to the view that if Mr Wickes had been suspended it would have been necessary to suspend the Claimant as well. Mrs Fernyhough, reasonably in my view, considered that that would have been an even more stressful outcome for the Claimant, but that was unfortunately not explained to him clearly. Her preference was to put in place alternative line management for Mr

Wickes. This too appeared to me to be a sensible and reasonable approach in the circumstances.

31. There was also a discussion between Mr Hall and the Claimant about the limited support that was available from HR for dealing with disciplinary issues and of the fact that there were fewer managers in the team than there ought to have been. Mr Hall said:

'The problem I have with HR, which I had to explain to Davina, cuz even she didn't realise I said you do realise that there is supposed to be me, a Director of Estates, a deputy director of ... another layer and then Lewis and the team, so she said oh do you think Lewis and I said no Lewis isn't getting the support he needs he's not getting it from me. I haven't got time to manage you. You manage yourself but I mean yeah I haven't got the time to sit there and do the all the daily one to ones and being there.'

The Claimant said:

'...it's the obviously the university making so many cutbacks and everybody struggling and having too much on their plate so I haven't raised absolutely every single issue that I've had because otherwise I would be contacting HR on a daily basis and then when they want a statement about this and a statement about that I need to do this I need to do that I don't have the time I don't have the time to do that so most of the time, I think you know it's not worth the time and effort I have to put in to report this, just mark it down and move on, but when it comes to physical violence'.

That exchange seemed to me to describe an environment in which resources were under pressure – a state of affairs that it appears everyone in the organisation needed to contend with and was certainly not unique to the Claimant.

32. On 22 June Simon Dorman was appointed to conduct an investigation into the incident between the Claimant and Mr Wickes. This fact was reported to the Claimant by Alan Westover, an interim HR partner on 28 June (page 172). There was a short delay in the Claimant receiving the message because he was on certified sick leave with stress and anxiety from 23 June and not checking his work phone (in fact he remained on sick leave until his resignation, with a period of annual leave between 16 and 31 August). However, he acknowledged the contact on 30 June (page 172). Earlier the same day he had contacted Mrs Fernyhough asking for an update and asking two specific questions – why Mr Wickes had not been suspended and why he had been expected to have continued to manage Mr Wickes for the rest of the week after the incident. He said 'I find this all to be extremely upsetting that to date, I have received zero support nor any update of any kind from yourself or HR. If you could please give me an update on the above issues raised as this all has been playing on my mind and causing me allot of worry and concern'.
33. It was clear from this message that the Claimant was very upset about the incident, but I find as a fact that it was not the case that he had had zero support – Mr Westover had been in contact with him and prior to that he had had the meeting with Mr Hall, at which he had been updated about the investigation albeit in terms that were not as clear and explicit as would have been ideal. Mrs Fernyhough wrote

to him pointing this out, (page 174), but in his reply to Mrs Fernyhough (page 174) the Claimant was dismissive of Mr Westover's approach, describing it as having been made in an 'unofficial capacity'. The remainder of his email was angry in tone, and recounted in some detail how inadequate he felt the support he had received following the incident had been. He was also dismissive of the contact he had had from Mr Hall and expressed the view that it was HR's responsibility to follow up, enquire after his wellbeing, and keep him updated.

34. The Claimant heard from Karen Chapman, HR partner on 19 July (page 182) notifying him of the date of the investigation meeting with Mr Dorman. Ms Chapman had taken over conduct of the issue from Mr Westover. She attached a formal invitation letter to an email in which she noted that the Claimant was on sick leave, enquired after his welfare and reminded him of the existence of the Respondent's EAP. She also said that the Claimant could contact her for further support (page 183).
35. The meeting with Mr Dorman took place on 26 July, during the Claimant's period of sick leave (to which the Claimant did not object). It was clear from the meeting notes that the Claimant had a genuine concern that Mr Wickes was going to attack him again (in the Claimant's own words). As noted, the Respondent (Mrs Fernyhough and Mr Hall) had already reached a view that this was unlikely and that had informed their decision not to suspend Mr Wickes. Their assessment of the risks of the situation was therefore very different from that of the Claimant himself.
36. During the meeting Mr Dorman I find that he explored the incident with the Claimant in detail. The Claimant was aggrieved that Mr Dorman did not have the photos of the bruising he said he had incurred when Mr Wickes threw the keys and in cross examination, when it was put to him that he himself could have sent these to Mr Dorman he objected, saying that this was the responsibility of HR or Mr Hall. Also in cross examination he said that it was not for him to put forward suggestions as to potential alternative working arrangements such as working from home or from another site – it was, he said, HR's responsibility to provide a safe working environment.
37. On 5 August Ms Chapman wrote an empathetic email to the Claimant attaching the notes from his meeting with Mr Dorman and again signposting him to various sources of support (page 236). She expressed concern for the Claimant's welfare and updated him on what would be likely to happen next with the investigation.
38. On 20 August the Claimant wrote to Ms Chapman again (page 236-7). He said:
**'I am hoping that I can be given an update regarding the investigation, as my leave runs out on 1st September. The thought of returning to work and having to face the person who physically assaulted me, has been weighing on my mind allot, as we come nearer to the date, this is impacting my mental well-being and causing me allot of anxiety and stress. I am hoping that HR can offer some support or suggestion on how I am expected to deal with returning to work?
Am I to be expected to continue to manage the person who physically assaulted me?
Can you please explain to me how the university is going to guarantee that the person who physically assaulted me does not assault me again when I return to work?'**

If you could also please tell me why the person who physically assaulted me was not suspended pending the investigation?
If I could also ask, as the physical assault occurred on the 15th of June and it is now the 20th August, what has caused such a long delay?’

39. Ms Chapman replied on 24 August as follows:

‘Dear Lewis,
Thank you for your e-mail and for letting me know how you are feeling at the moment, which I am very sorry to hear. This is understandably a difficult and stressful time whilst the investigation is taking place and we wish to support you during this period.
In my previous e-mail of 5 August I provided information on sources of support and assistance which may be helpful at this time, have you been able to access any of the EAP support or found any of the links or apps I sent you helpful for aiding sleep?
In addition it might be appropriate to refer you to our Occupational Health provider, Cordell Health, who can provide advice and guidance. Would you agree for me to draft a referral for you? You may also find it helpful to speak with your GP again.
I do appreciate it has been a period of time since the incident, but following the appointment of an investigation officer we have moved along with the investigation as quickly as possible and sometimes it can take longer than expected and especially due to annual leave at this time of year. With regards to the investigation, I am awaiting an update from Simon Dorman who I understand is on leave at the moment. I was back from leave for one day yesterday and did follow-up with Simon regarding the investigation report but may not have an up-date from him until he returns from annual leave next week but will up-date you as soon as I am able to. Whilst the investigation is on-going, and any outcomes from the report, you would continue not to manage Keith and Chris Barnett, Maintenance Supervisor would continue to do so.
I am on leave again for the rest of this week however my colleagues Owen Severn, HR Partner or Samantha Harper, Assistant HR Partner are available this week and can be contacted on 020 8392 3393 or 020 8392 4479. However, I think it would be useful to arrange to speak on Tuesday 31st August the day I am back from annual leave if convenient for you?’

40. The Claimant’s particulars of claim stated as follows:

‘The last straw was the Respondent’s failure to respond to the Claimant’s email dated 20th August 2021 whereby the Claimant enquired as to why KW was not suspended pending investigations, requested for a timeline as to when the investigation would be completed and asked for assurances that he will not be assaulted again by the same person when he returned to work. It is contended that this amounts to a breach of the implied term of trust and confidence, a breach of the duty to afford the Claimant the opportunity of prompt redress of his grievance, a breach of the duty to provide a safe workplace and a suitable working environment.’

I find as a fact that it was not the case that the Respondent did not respond to his email. Ms Chapman addressed each of his questions, albeit not giving him the assurances he was seeking. It was the Respondent’s case that it would simply not have been able to give a guarantee of the kind the Claimant was asking for as regards the future conduct of his colleagues.

41. Despite describing this email as the ‘last straw’ the Claimant did not in fact resign until 24 September, describing the decision as very difficult, particularly as his wife had lost her job and they had a new baby. It is recognised in the cases on constructive dismissal that employees will often need some time to weigh things up before actually leaving a job, which is a major, potentially life changing decision, particularly when the employee does not have another job to go to. The delay in

this instance was understandable and has not contributed to my decision not to uphold the Claimant's claim. The Claimant was further signed off from work from 25 August to 30 September, for reasons of stress and therefore, as noted above, never actually returned to the workplace before his resignation took effect.

42. His resignation email was at page 246. It was extremely brief and merely said: 'In view of the way I have been treated by Roehampton University I hereby resign with immediate effect.' I find that a number of matters contributed to this decision – as well as his dissatisfaction with the answer he received to his email of 20 August he was concerned about the length of time it had taken to investigate the incident – described in his particulars of claim as a failure to provide a prompt redress of his grievance. He was also concerned about the 'closure' of a record of the incident as a health and safety incident on a separate log of such incidents maintained by the Respondent.
43. As to the length of time it took to conduct the investigation, the investigation timeline was at page 235. I accepted the Respondent's evidence that the summer months were a particularly difficult time to carry out an investigation as many members of staff, including Mr Dorman himself were taking annual leave during that period. The investigation interviews were conducted between 26 July and 3 August, beginning with the Claimant himself and the investigation report was completed on 16 September, three months after the incident in question. The delay in starting the investigation appeared in part to derive from the fact that Mr Westover left the Respondent on 30 June and Karen Chapman, who took over management of the investigation, was on leave until 11 July. Mr Dorman himself was away for much of August and was not therefore able to complete his investigation report until 16 September 2021, sometime after his return from leave.
44. As regards the report itself (page 240-245), I find from the body of the report and the interview notes taken during the course of the investigation, that Mr Dorman took the same careful approach to all the other interviews he carried out as he had taken when interviewing the Claimant. His report was reasonable and thorough. Having concluded that Mr Wickes had thrown the keys, injuring the Claimant in the process and that he had been insubordinate, Mr Dorman made a series of recommendations including:
- a. A hearing to deal with the Claimant's grievance;
 - b. Contemplation of a disciplinary warning to Mr Wickes;
 - c. Supervised mediation between the two men to improve and professionalise their working relationship;
 - d. Improvement of communication and behaviour more generally within the team;
 - e. More support to the Claimant from Mr Hall and HR to assist him in managing his team effectively and avoid the impression that disciplinary issues were in fact personal matters between the Claimant and team members;
 - f. More emphasis on disciplinary action when matters involved health and safety issues or insubordination.

It was therefore the case that Mr Dorman accepted the validity of a number of the Claimant's concerns. The Claimant resigned however before his grievance could

be progressed further, although he was notified in November 2021, when a warning was issued to Mr Wickes.

45. A third matter that I find contributed to the Claimant's decision to resign arose from the fact that he had opened a record of a health and safety incident on 1 July (page 177) in the wake of the confrontation with Mr Wickes. The Respondent had a process for recording health and safety incidents that was parallel to, but separate from, Mr Dorman's investigation and involved the Claimant entering details of the incident onto an online system. Once Mr Dorman had conducted the investigation, he became responsible for keeping the record of the incident up to date on that system. When he completed his investigation report in September, he closed the incident on the system. The Claimant seems to have construed this as the closure of Mr Dorman's investigation, which was a misunderstanding on his part, but operated on his mind when he concluded that the Respondent was not taking his grievance seriously and had simply closed it down without giving him an outcome. He appeared to have reached that conclusion without making any enquiries of Mr Dorman or clarifying the matter with anyone else.

The law

46. Section 95 (1) (c) ERA provides for an employee to treat themselves as 'constructively dismissed' in certain circumstances. The section states:

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) F1. . . , only if)—

.....

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

47. Lord Denning in *Western Excavating (ECC) Ltd v Sharp [1978] Q.B. 761* set out the principle as follows:

'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 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.'

48. The case of *Malik v BCCI [1997] ICR 606* sets out the test - an employee is constructively dismissed if the employer without reasonable and proper cause conducts itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The distinction between a breach of trust and confidence and unreasonable conduct on the part of an employer may be a narrow one.
49. The following elements are therefore needed to establish constructive dismissal:
- a. Repudiatory breach on the part of the employer. This can arise from a series of acts rather than a single one, but must be sufficiently serious to justify the employee resigning.

- b. An election by the employee to accept the breach and treat the contract as at an end. The employee must resign in response to the breach.
 - c. The employee must not delay too long in accepting the breach, as it is always open to the employee to waive the breach and treat the contract as continuing and too long a delay may be regarded as a waiver. The Court of Appeal's decision in *Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121* provides guidance on when an employee should be taken to have affirmed a contract of employment.
50. Sometimes, as in this case, an employee relies on more than one act as having brought about the decision to resign. A number of authorities deal with that situation. In *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978* the Court of Appeal listed five questions that a tribunal to ask to determine whether an employee was constructively dismissed in such a case:
- 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 (applying the approach explained in *Waltham Forest v Omilaju [2004] EWCA Civ 1493*) 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? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)
 - e. Did the employee resign in response (or partly in response) to that breach?

Submissions

51. I was grateful for the clear helpful oral and written submissions provided by counsel. In summary, Mr Wilson submitted that the Claimant could only succeed in his claims if he were able to establish that the Respondent's handling of the Keith Wickes incident had itself been a repudiatory breach of contract, or a last straw in a series of acts or omissions by the Respondent that taken together amounted to a breach of the implied term. Mr Zaman submitted that the focus should not be so much on the Keith Wickes incident alone as on the cumulative effect of the various incidents on the Claimant over time.

Conclusions

52. In light of my findings of fact I do not consider that the Claimant was constructively dismissed by the Respondent. I will deal with each incident in turn and then consider the cumulative effect.
53. The Colin Mayer incident occurred early on in the Claimant's employment. There were no contemporaneous documents available to me and I was therefore reliant

on the account the Claimant gave. I do not doubt that he was extremely shocked by the conduct of one of his reports and somewhat incredulous when he was told by the HR manager in post at the time that there were no options available other than an anger management course. That seems to me to be incorrect or poor advice but I do not think that by itself it involved a breach of the implied term of trust and confidence or any other term of the contract of employment. In my judgement something more than poor or ill-considered advice to a line manager is required before the employer's conduct becomes repudiatory of the employment relationship, such as a dismissive, derisory, hostile or offensive response, or one that impugns the employee's integrity. There was no evidence from the Claimant's account that he encountered any reaction of that kind.

54. The issue involving allegedly fraudulent claims for overtime is in a similar category. Again, it was plainly incorrect to suggest that CCTV footage could not be used in the circumstances and I have no doubt that the Claimant would have felt let down by what would have seemed to have been a lack of support for addressing a potentially serious behavioural and cultural issue. The advice was seemingly poor and ill informed, but I was again hampered by a lack of contemporaneous documentation and reliant on what the Claimant told me. On the basis of that I do not consider that what he complained of, although clearly exasperating for him, met the threshold, by itself, for repudiatory conduct. It would have been different if, for example, the Claimant had deliberately had support withheld, or had been treated rudely or dismissively by HR, but that was not the case that the Claimant put forward.
55. The Tony Brown incident was clearly serious and was treated as such by the Respondent. Mr Brown was suspended on the day that the Claimant reported the matter. An independent investigator was appointed, she produced a detailed report after a thorough investigation and a disciplinary hearing was arranged. The Claimant did not complain about any of these steps – his complaint concerned the fact that at the last minute, Mr Brown was permitted to take voluntary redundancy instead of submitting to disciplinary action. The effect of this, he said, was to expose him to ridicule amongst the remaining members of his team and create an environment in which it was perceived that abusing him as a manager would lead to financial reward.
56. I considered this incident carefully as it was clear that the Claimant did feel undermined. However, the test of whether the contract is repudiated is an objective test – did the Respondent in this instance act without reasonable and proper cause or indicate that it did not intend to be bound by the terms of the employment contract? Given my findings of fact, I conclude that this was not the case. This was a thought-through decision by HR, which weighed up a number of factors and decided that allowing Mr Brown to take voluntary redundancy was a pragmatic solution in the circumstances. Whether or not the Claimant was fully cognisant of all of these factors at the time is not the point – objectively speaking the Respondent acted with proper cause. I have found furthermore that the reasons for the decision were explained to the Claimant at the time (in which respect I accepted Mrs Fernyhough's evidence) and there was an expectation on the part of HR – also reasonable in my view – that the Claimant, as an experienced manager himself, ought to be able to manage any consequences in the form of inappropriate

responses in his team.

57. The Wayne Morgan incidents occurred approximately three weeks apart. It was not disputed that the Claimant was dealing with a subordinate who was behaving inappropriately. The Claimant raised this with his manager and HR and I find that there was nothing to criticise in the way that Mrs Fernyhough and Mr Hall responded. Mrs Fernyhough gave the Claimant various options and he chose to seek support from Mr Hall. Mr Hall was very busy and did not actively progress the Claimant's concerns and desire to take disciplinary action against Wayne Morgan, but there is no evidence that the Claimant pressed him to do so or continued to push the matter forward himself by contacting either Mr Hall or Mrs Fernyhough or her team. It was arguably incumbent on him to do so, as the Respondent submitted, at the very least by pointing out to Mrs Fernyhough that he had already sent a timeline of events to Mr Hall, or simply forwarding the relevant email to her. There is therefore nothing in that sequence of events that amounts to a breach of the Claimant's contract, still less a repudiatory breach. At its highest, the Claimant's case is that his manager and HR failed to follow up with him when he had sought support in managing a difficult subordinate. In the absence of evidence that he had been deliberately ignored, undermined or treated with disrespect or hostility or there was some other conduct of that ilk, there was no breach of the express or implied terms of his contract in the way that the Respondent dealt with this matter.
58. Turning to the Keith Wickes incident, in my judgment the Claimant was evidently very upset by what had happened and his response to it was readily understandable. From his perspective he had experienced an assault by a subordinate. He became unwell and had to take a period of ill health absence and developed a fear of returning to work without certain assurances as regards Mr Wickes. However, the question of whether the contract was repudiated by the Respondent's handling of this incident is not answered by considering the impact on the Claimant, but by assessing the Respondent's conduct. The Claimant felt that HR had offered him 'zero support' and that it had not responded to his correspondence, given him the assurances he sought or dealt with his grievance within a reasonable period of time. I do not find that those perceptions were justified on the facts. It is true that the Respondent declined to give assurances that it was not in its power to give but I do not think that refusing to give an absolute guarantee in respect of something that is outside the employer's control is logically capable of amounting to a repudiatory breach of an employee's contract. In this particular case I have found that:
- a. The Claimant raised the grievance on the day of the incident, 14 June 2021.
 - b. Mr Hall spoke to him about it the same day and suggested he preserve the photographs he had taken;
 - c. Mr Hall gave him an update two days later when the Claimant approached him – by that stage Mr Hall and HR had discussed how the matter would be handled;
 - d. A decision was taken not to suspend Mr Wickes as in the circumstances that would have entailed suspending the Claimant as well, which was judged to be a worse outcome for the Claimant. Whilst opinions may differ as to the right approach in such a case, it cannot be said that this decision was taken without reasonable and proper cause;

- e. Mr Hall met with the Claimant a week after the incident – 21 June - and there was a discussion of the way forward, albeit not as clear and unequivocal as would have been ideal. This however was at most a failure of communication on the Respondent's part and as such in my judgment it fell well short of the threshold for a repudiatory breach of contract;
- f. The following day, 22 June, a senior member of staff, Mr Dorman, was appointed to investigate the incident;
- g. He did so thoroughly and professionally and within a timescale that was reasonable in the particular circumstances of this case;
- h. The Claimant was promptly informed of Mr Dorman's appointment albeit that there was a delay in him receiving the message because he was on sick leave and the message was initially sent to his work email;
- i. There was then a hiatus, attributable to Mr Westover, the interim HR manager leaving and being replaced by Ms Chapman;
- j. Ms Chapman wrote to the Claimant on 19 July sending him details of the investigation meeting with Mr Dorman, reminding him of the EAP, enquiring after his welfare and making herself available for further support if he needed it;
- k. The meeting on 26 July involved a thorough and fair exploration of the issues by Mr Dorman;
- l. The Claimant was sent the notes within a reasonable time after the meeting (5 August) under cover of an empathetic and supportive email;
- m. The Claimant's email of 20 August was responded to within a reasonable time by Ms Chapman (on 24 August – there was also a weekend between the two dates) and she answered the majority of his questions, albeit not to his satisfaction;
- n. The investigation report was completed by 16 September. Although the Claimant was not updated at this point he could have sought an update at any time and given the patters of responses he had received hitherto, it is likely he would have received a reasonably prompt response.
- o. Mr Wickes was subject to disciplinary action and the Claimant was eventually informed of the outcome, albeit after he had left his employment.

In light of those findings, I conclude that there was no breach of any of the express or implied terms of the Claimant's contract in the Respondent's handling of the Keith Wickes incident, and certainly no repudiatory breach that would have entitled him to resign and claim that he had been constructively dismissed. The fact that he felt deeply upset and distressed at the thought of returning to work, as he quite clearly did, is not determinative of whether his contract had been breached.

59. The Claimant was clear in his oral evidence that he loved his job. The incidents he relied on in this claim were spread out over a four-year period. Nevertheless, there was evidence that his team was consistently a challenge to manage and that he had got off to a difficult start by being tasked with implementing a restructuring, a process that formed the backdrop to the Tony Brown incident. It appears to me that his feelings of being insufficiently supported by HR in managing some of the individuals who reported to him were genuine, and that by the time he resigned his mental health had unfortunately been adversely affected by his experiences at work. Mr Dorman's investigation report identified problems within the team and in recommending that steps needed to be taken to address them, he validated some

of the difficulties the Claimant had experienced.

60. The test that has to be applied in a claim of constructive dismissal however is not a test based on how an employee perceives matters or feels about them. It is an objective test, based on an assessment of how the employer has conducted itself and whether it has done anything without reasonable and proper cause that could be construed as repudiating the contract, or indicating to the employee that it does not intend to be bound by the terms of the contract, including implied term of trust and confidence. On the facts of this case that would mean more than giving unwise or mistaken advice, or failing to follow up diligently a request for support, or failing to provide comprehensive reassurances that cannot realistically be given, or omitting to confirm with the employee that an investigation has been completed. An employer can make errors or respond imperfectly without indicating that it does not intend to be bound by the terms of the contract. The fact that Mr Dorman concluded that the Claimant needed more support in providing effective management (as set out in paragraph 44 above) indicates that far from repudiating the contract in this case, the Respondent was committed to performing it better.
61. I have also stepped back and considered whether viewed collectively or cumulatively the events relied on and the failings by the Respondent I have referred to in the previous paragraph, amount to a repudiatory breach even though taken singly none of them does by itself. I reach the same conclusion – this is not a case in which the Respondent's acts or omissions have undermined the employment contract or involved a breach of the implied term, taken singly or as a whole. I also find that the Claimant had unrealistic expectations at times and at other times he either failed to drive matters forward (an example being the Wayne Morgan incident) or he was somewhat passive (an example being his suggestion that it was for the Respondent to devise solutions to the Keith Wickes problem and not for him to suggest them) when it would have been appropriate for him to take more responsibility for solving the problem at hand.
62. In all the circumstances of this case I find that the Claimant was not constructively dismissed by the Respondent and his claims are therefore dismissed.

Employment Judge Morton
Date: 24 October 2023

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.