



EMPLOYMENT TRIBUNALS

Claimant

MR. KEVIN HOPE

v

Respondent

WKCIC (T/AS CAPITAL CITY
COLLEGE GROUP)
[A STATUTORY CORPORATION]

Heard at: Watford (face to face/hybrid)

On: 2 – 5 October 2023

Before: Employment Judge Coll

Appearances

For the Claimant: unrepresented

For the Respondent: Mr. G. Baker, counsel

RESERVED JUDGMENT

The claimant's complaint of constructive dismissal succeeds.

The claimant's complaint of s100 ERA 1996 automatically unfair dismissal does not succeed and is dismissed.

A face to face remedy hearing has been listed for 18 January 2024 (see directions dated 15 November 2023).

REASONS

THE HEARING

1. This is a reserved judgement.
2. On 10 January 2022, the claimant presented a complaint of constructive unfair dismissal and detriment based on Health and Safety under section 44 Employment Rights Act 1996 ("ERA"). EJ Allott reformulated this for him at the Case Management Review at a Preliminary Hearing as a section 100(1)(d) and (e) ERA automatically unfair dismissal claim based on a Health and Safety reason [pages 42 – 44]. For the avoidance of doubt, this was not reformulated instead or in the alternative as section 100(1)(c).
3. Early conciliation had taken place from 31 October 2021 – 11 December 2021.
4. The respondent resisted the complaint.
5. A joint bundle of documents was lodged in advance of the hearing, extending

to 223 pages. 6 further pages were added to the bundle in the week before the hearing and consented to at the hearing.

6. In addition to hearing from the claimant, I heard from the following witnesses called by the respondent:
 - 6.1 Ms. Isatu Taylor, Curriculum Leader for the Visual Arts;
 - 6.2 Mr. Neil Scott, Head of Estates and Facilities and
 - 6.3 Ms. Marie Bradley, Head of School for Arts and Performance (newly retired as of 2 October 2023).
7. The claimant adopted his witness statement as his evidence and was cross-examined. I asked some questions of the claimant at the outset before cross examination to get a fuller picture of the courses which he taught and some questions after cross examination. The respondent's witnesses adopted their witness statements as their evidence and were also cross-examined by the claimant. I asked some questions and there was re-examination of Ms. Bradley (one question).
8. I dealt with some preliminary issues, the first being the application to convert the hearing to CVP. The timetable in the case management order dated 27 July 2022 listed the case for an in person hearing for four days for liability and remedy if that arose. Due to a train strike on 4 October 2023 and its aftermath on 5 October 2023, and the need for Ms. Taylor and Mr. Scott to maximise their working day, the hearing on 3 – 5 October 2023 was conducted on CVP (whilst I remained at the venue).
9. The claimant objected to a late document entitled "Requests for Work to be done by the Maintenance Team in August and September 2021" ("Requests for Work") [pages 224 – 229] due to its density and his lack of time to digest its contents. The claimant accepted its admission, once he was offered adequate time to study this document.
10. Finally, the claimant wished to discuss the admission of two videos (showing the egress of water into a room called G27). Given that the claimant had produced stills from these videos [pages 166 – 223], he accepted that there was little extra to be gained from the tribunal, Mr. Baker and the witnesses viewing the videos.
11. Having resolved the preliminary issues by 10.55 am, the claimant was given 1½ hours' preparation time on 2 October 2023 to read Mr. Baker's 20-page submission and to study the Requests for Work document. When asked, he preferred to take an early lunch break. The claimant therefore started his oral evidence at 1.25 pm. After a break in the afternoon, he completed his oral evidence at about 4.45 pm.
12. Ms. Taylor and Mr. Scott gave their oral evidence on 3 October 2023. I discussed with the claimant the timing of his closing submission. He stated that he would prefer to have some of the afternoon and all of the evening of 4 October 2023 to prepare. Ms. Bradley was available only on 4 October 2023 and after her oral evidence, Mr. Baker delivered his closing submission. The day ended after that to enable the claimant to prepare his closing submission

for 5 October 2023. After the claimant delivered his closing submission on 5 October 2023, from 10:15 am to 1:15 pm, I adjourned in order to write my decision. Given the complexities of the case and the law, however, this was not sufficient time and at 2:30 pm, I decided to reserve my decision. The parties were duly informed.

ISSUES TO BE DETERMINED

13. In the ET1, the claimant claimed constructive unfair dismissal and a Health and Safety detriment claim under section 44 of the Employment Rights Act 1996 (“ERA”).
14. The complaints were discussed at the hearing. Parties agreed a list of issues with EJ Allott’s assistance, which appears in the CMO [42 - 44]. That identified the issues to be determined by the tribunal, using the wording below:

Constructive Unfair Dismissal Section 94 ERA 1996

15. The claimant relies on the implied term of mutual trust and confidence.
16. Was the respondent in fundamental breach of contract? The conduct the claimant relies upon as breaching the trust and confidence term is [see 4.2.1 – 4.2.12 in the CMO]:
17. In July 2017, failing to fulfil the claimant’s requests for PPE and safe storage
18. In November. 2018, upon being notified of the flooding of the CBAT Campus workshop, failing to make any or any adequate repair
19. In November 2018, following the failure of the extraction system in the workshop welding bay, failing to repair the same until May 2021.
20. In March 2019, following a request from the claimant for PPE and safe storage failing to supply the same.
21. In October 2019, failing to resupply protective eyewear for three months.
22. In September 2019, following the claimant reporting problems with flooding, failing to take effective remedial action.
23. In November 2019, following an order from the claimant, failing to provide PPE.
24. In November 2020, causing or permitting the claimant to have to use his own PPE for himself and his students.
25. Failing to deal with the claimant’s grievances in November 2020 and April 2021 adequately or at all.
26. In May/June 2021, failing to repair the workshop roof.
27. In August 2021, failing to provide the resource is ordered by the claimant and causing and permitting the workshop to flood on at least six occasions.
28. Failing to provide adequate resources following requests by the claimant for the same.

29. If so, did the claimant affirm the contract of employment before resigning?
30. If not, did the claimant resign in response to the respondent's conduct? Was it a reason for the claimant's resignation?
31. If the claimant was dismissed, what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of ERA 1996? If so, was the dismissal fair or unfair in accordance with section 98(4) ERA 1996 and in particular, did the respondent in all respects act within the so-called band of reasonable responses?

S100(1)(d) and (e) ERA 1996 Health and Safety cases

32. At any relevant time, were there circumstances of danger which the claimant reasonably believed to be serious and imminent?
33. The claimant relies on the following circumstances of danger:
- 33.1 The CBAT campus workshop suffered serious and frequent flooding.
 - 33.2 Water contaminated electrical fittings and pooled around high voltage heavy duty tools and equipment.
34. Could the claimant have reasonably been expected to avert those circumstances of danger?
35. Did the claimant (leave or) refuse to return to his place of work, namely in the CBAT Campus workshop on 11 August 2021?
36. In those circumstances of danger, did the claimant take or propose to take appropriate steps to protect himself or other persons from danger? The steps the claimant took or proposed to take are as follows:
- 36.1 In July 2017, requesting PPE and safe storage.
 - 36.2 In November 2018, making the respondent aware of the flooding.
 - 36.3 In November 2018, informing the respondent that the extraction system in the welding bay had failed.
 - 36.4 In March 2019 requesting PPE and safe storage.
 - 36.5 In October 2019, requesting replacement eyewear.
 - 36.6 In September 2019, notifying the responding to flooding.
 - 36.7 In November 2019 ordering PPE.
 - 36.8 In November 2020, having to provide PPE himself to students.
 - 36.9 In May or June 2021, speaking with contractors at the college who were inspecting the roof of the workshop.
 - 36.10 Was the reason (or if more than one, the principal reason) for the dismissal that the claimant had left or refused to return to his place of work

and/or had taken appropriate steps to protect himself or others from danger?

Remedy - Unfair Dismissal

37. If the claimant's claims are upheld, the claimant seeks compensation only. If the claimant succeeds in part or in whole, the tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

BACKGROUND

38. The respondent runs Further Education colleges, including City and Islington College on Camden Road, Islington, which provides BTEC and Foundation courses to students in Business, Arts and Technology.

39. The claimant joined the respondent as a technician on 15 October 2004 [19] and from 16 January 2006, was employed as a 3D lecturer in Art and Design, based in the CBAT building, using the workshop, G27, as often as he could and when not available, usually Room 303 [see contract of employment at 52]. He reported to Ms. Taylor who reported to Ms. Bradley. Ms. Bradley first met the claimant when he was a technician. During the breaches alleged by the claimant, RT was the technician for CBAT, which included provision to G25, G26 and G27. I do not consider it appropriate to give his full name, given that the claimant lodged a grievance about his performance and Ms. Bradley confirmed that there had been performance issues over the years.

CHRONOLOGY

40. From or about July 2017, the claimant reported various problems which are set out in the alleged breaches above [see issues section].

41. The claimant emailed RT a number of times about lack of resources and PPE over the previous years and made representations to RT's manager, Ms. Bradley, to intervene. On 1 September 2020, the claimant had a face-to-face discussion with RT about these failures [65]. On 4 September 2020, the claimant is informed that RT has raised a formal grievance against him [83].

42. On 18 September 2020, the claimant met on Teams with Kishan Narayan, Human Resources Business Partner and Donna Adams, Program Manager for English to discuss the grievance raised by RT.

43. On 5 October 2020, the claimant raised a formal grievance against RT [113 & 114 - 119.]

44. On 13 October 2020, the claimant emailed Mr. Narayan for an update about RT's grievance and his grievance. On 5 November 2020, they had a meeting on Teams. The claimant stated that he wanted his grievance dealt with as a separate matter.

45. On 13 November 2020, the claimant met again with Mr. Narayan and Ms. Adams on Teams. His union representative, Yetunde Oyuwehinmi, was present [122]. They discussed RT's grievance. The claimant reminded Mr. Narayan and Ms. Adams that they had not yet discussed his grievance and

needed to.

46. On 1 April 2021, the claimant asked Mr. Narayan for an update since he had heard nothing about either grievance. He requests a meeting [126].
47. On 29 April 2021, the claimant had a meeting with Mr. Narayan on teams in which he complained about the lack of progress with his grievance of 5 October 2020. It is the claimant's case that he lodged a second grievance [129].
48. On 28 May 2021, Mr. Narayan emailed the claimant with the grievance report produced by Ms. Adams [131 & 132 - 137].
49. On 10 June 2021, the claimant emailed Ms. Adams about an error in the grievance report in response to the invitation to appeal [134].
50. On 15 July 2021, the claimant emailed Mr. Naryan about voluntary redundancy [144].
51. On 8 or 9 August 2021, the claimant visited G27.
52. On or about 10 August 2021, the claimant telephoned Miss Taylor (whether it was 10 August 2021, as alleged by the claimant, is in dispute).
53. On 11 August 2021, the claimant resigned [145] with effect on 29 October 2021.

LAW APPLICABLE TO THE ISSUES IN DISPUTE IN THE UNFAIR DISMISSAL CLAIM

54. Employees with more than two years' continuous employment have the right not to be unfairly dismissed, by virtue of s94 ERA. 'Dismissal' is defined in s95(1) ERA to include what is generally referred to as constructive dismissal. Constructive dismissal occurs where the employee terminates the contract under which he/she is employed (with or without notice) in circumstances in which he/she is entitled to terminate it by reason of the employer's conduct (s95(1)(c) ERA).
55. The test for whether an employee is entitled to terminate his contract of employment is a contractual one. The tribunal requires to determine whether the employer has acted in a way amounting to a repudiatory breach of the contract or shown an intention not to be bound by an essential term of the contract (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221). For this purpose, the essential terms of any contract of employment include the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (***Malik v Bank of Credit and Commerce International Ltd*** [1998] AC 20) (author's underlining).
56. Conduct calculated or likely to destroy mutual trust and confidence may be a single act. Alternatively, there may be a series of acts or omissions culminating in a "last straw" (***Lewis v Motorworld Garages Ltd*** [1986] ICR 157).
57. As to what can constitute the last straw, the Court of Appeal in ***Omilaju v Waltham Forest London Borough Council*** [2005] IRLR 35 confirmed that the act or omission relied on need not be unreasonable or blameworthy (although

it will usually be so), but it must in some way contribute to the breach of the implied obligation of trust and confidence. Necessarily, for there to be a last straw, there must have been earlier acts or omissions of sufficient significance that the addition of a last straw takes the employer's overall conduct across the threshold. An entirely innocuous act on the part of the employer cannot however be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer.

58. In order for there to be a constructive dismissal, there must be a breach by the employer of an essential term, such as the implied term of trust and confidence (as is alleged in this case), and the employee must resign in response to that breach (although that need not be the sole reason - see **Nottinghamshire County Council v Meikle** [2004] IRLR 703). The right to treat the contract as repudiated must also not have been lost by the employee affirming the contract prior to resigning.
59. In **New Southern Railway Ltd. V Quinn** [2006] IRLR 267, the claimant did not affirm her contract or waive her right to treat it as discharged by reason of her demotion and reduction in salary by continuing to accept pay and holiday pay until her resignation some six months later.
60. The Court of Appeal in **Kaur v Leeds Teaching Hospital NHS Trust** [2018] IRLR 833 set out guidance on the questions it will normally be sufficient for Tribunals to ask in order to decide whether an employee has been constructively dismissed, namely:
- 60.1 What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- 60.2 Has he or she affirmed the contract since that act?
- 60.3 If not, was that act (or omission) by itself a repudiatory breach of contract? For this reference must be made back whether the employer has, without reasonable and proper cause, acted or failed to act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties.
- 60.4 If not, was it nevertheless a part (applying the approach explained in **Omilaju**) 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?
- 60.5 Did the employee resign in response (or partly in response) to that breach?
61. If an employee establishes that they have been constructively dismissed, the tribunal must determine whether the dismissal was fair or unfair, applying the provisions of s98 ERA. It is for the employer to show the reason or principal reason for the dismissal, and that the reason shown is a potentially fair one within s98 ERA. If that is shown, it is then for the tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in

accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA, the tribunal must not substitute its own view for the matter for that of the employer but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

62. The right to obtain redress against a grievance is fundamental. In ***W.A. Goold (Pearmak) Ltd. v McConnell and another*** [1995] IRLR 516, the industrial tribunal was entitled to find that in failing to provide a procedure for dealing promptly with the employee's grievances and instead allowing them to fester in an atmosphere of prevarication and indecision, the employer was in breach of an implied contractual term which was sufficiently serious to justify the employee's terminating their employment.

FINDINGS OF FACT: GENERAL

63. The standard of proof that I apply when making my findings of fact is that of the balance of probabilities. Where it was necessary to resolve conflicting factual accounts, I have done so by making a judgement about the credibility or otherwise, of the witnesses I have heard from based on their overall consistency and the consistency of accounts given on different occasions compared with contemporaneous documents where they exist.
64. Where it has not been possible to rely on the credibility of any of the witnesses on a particular point, I have relied on the contemporaneous documents, of which there are many in the bundle.
65. I took into account all of the evidence presented to me, both documentary and oral. I also took account of the closing submissions of both parties.
66. I do not record all of the evidence in these reasons, but only my principal findings of fact, those necessary to enable me to reach conclusions on the issues before me.

FINDINGS OF FACT: CREDIBILITY

Ms. Bradley

67. Ms. Bradley was straightforward in oral evidence. When she did not know something, she admitted it. For example, she said that she did not know of the procedure whereby it was up to her as Head of Curriculum to signal to Mr. Scott that the welding room was a high priority for the curriculum and must be repaired. Her answers were clear and precise. She answered without hesitation when asked about the reasons for the claimant's resignation: the "flooding" and his relationship with RT.
68. Ms. Bradley's assessment of RT, who reported directly to her, was consistent with the claimant's; RT was disorganized and erratic, failing to order resources for G27 (and others). She agreed that his performance was lacking and that she had fixed it by periodically putting gentle pressure on him to deliver by setting him a new date and monitoring him until he delivered. Ms. Bradley agreed that she had had to send him a standards letter concerning his performance failures.

The claimant

69. The claimant was forthcoming and did not seem to censor his answers. If he did not have an answer, he admitted this. For example, when asked why his resignation email had not given a reason for resignation, he said that he did not know about constructive dismissal cases and the requirements to mention a reason. He also said that he was passionate but impractical. His discussion with HR about voluntary redundancy in about April 2021 whilst waiting for the outcome of his grievance and the grievance brought against him by RT and his request for voluntary redundancy on 8 June 2021 [139] were consistent with his ultimate resignation on 11 August 2021. His reasons for resignation were consistent with those given by Ms. Bradley.

Ms. Taylor

70. Ms. Taylor was vague at times. Her oral evidence was not consistent with that of the claimant on his reasons for resignation. Nor was it consistent with Ms. Bradley's oral evidence, which agreed with the claimant's reasons. In Ms. Taylor's view, the claimant did not say anything about his reasons for resignation in the conversation on 9 August 2021, the day before his resignation. She said he had told her in previous discussions: he had lost his passion for teaching young people and had experienced personal tragedies in his private life. He therefore needed to move on. This was not consistent with Ms. Bradley's account of his reasons for resignation. To support her view of the claimant's loss of passion, Ms. Bradley stated that in her last observation, the claimant had taught to a poor standard. There was, however, no written record of this, even though Ms. Taylor said normally she would have recorded improvement actions. Ms. Taylor did not explain why. She said it was before he had resigned but she could not remember the date. I do not find it plausible that the claimant who had a good relationship with Ms. Taylor (according to both of them) would not have spoken to Ms. Taylor before he submitted his resignation email. I also find it somewhat implausible that Ms. Taylor, who came across as a highly competent manager, failed to follow procedure and record a decline in the claimant's performance.

Mr. Scott

71. Mr. Scott's oral evidence was entirely credible. He explained clearly how attempts had been made repeatedly to find the source of the leaks since it was most economical to repair the source. Given that this piecemeal approach had resulted in a series of repairs, none of them yielding a permanent solution, it had then been appropriate to advise the Senior Leadership Team to make a capital bid to renovate CBAT, including to replace the roof.

72. He was consistent in his answers. For example, he explained that the electrician who was sent to inspect the flooding was qualified to assess the health and safety aspect of the situation. He explained how requests for repairs were channeled through the help desk, who logged the repairs. He was frank that not all repairs were logged.

73. Overall, where there was a dispute on technical building issues, I preferred the oral evidence of Mr. Scott who came across as a very competent and motivated professional in his field. Where there was a dispute about events or the

claimant's actions and motivations, I preferred Ms. Bradley's evidence which was consistent with that of the claimant.

FINDINGS OF FACT: LIABILITY

The claimant's role and content of courses

74. The claimant taught year 1 and 2 of BTEC level 3 and the Foundation year course. There were 40 in each year of BTEC divided into 20 in a class and 30 in the foundation year, divided into two classes of 15. Students for the BTEC course were usually 17 or 18-year-olds. Those for the Foundation course could be 19 or older. The fact that these students were mainly teenagers was an important consideration in designing and delivering lessons and setting assignments. Students could be volatile and highly expressive of failure to meet their aspirations. Discontent was shown through comments and behaviour (e.g. disengagement, disruptive talking during classes or abrupt leaving of classes midway through).

75. All three courses required the teaching of 3D and 2D. In addition, year 2 of level 3 had a tutorial with the claimant. Examples of 3D teaching were:

- 75.1 Sculpture
- 75.2 Architectural
- 75.3 Installations
- 75.4 Portrait sculpture
- 75.5 Characters for animation
- 75.6 Set design.

76. All of the 3D work above was designed in 2D first. In addition, a student could do a drawing (2D) of a 3D work (e.g. of a sculpture). 2D encompasses all drawing on paper or digitally. For the sake of brevity and clarity, I refer to all the works produced under the claimant's teaching as works of art.

77. The claimant is a sculptor of some standing. His perception of his role was to teach the 3D component at a high level, using demanding materials and heavy equipment to create ambitious sculptures and other 3D forms. As such, he taught whenever he could in the workshop space called G27, which included a welding room (sometimes referred to as the welding bay) with different types of welding equipment. This was his base, and he was the primary user of G27. The heavy industrial type of equipment in G27 is shown in the photographs at [166 – 223] and included:

- 77.1 Upright jigsaws
- 77.2 Reciprocating saws
- 77.3 Band saws.

Alleged breaches of the implied duty of trust and confidence

78. All but one of the claimant's alleged fundamental breaches of contract related to the alleged failure to provide something. It was the claimant's case that these alleged breaches together with that relating to the grievance were a sequence of events, which culminated in the last straw of the "flooding" on 8 or 9 August 2021. In the alternative, each alleged fundamental breach was sufficient on its own.

Details - resources and rooms (welding room and G27)

79. Failure to provide Resources:

79.1 materials from which the works of art could be made or constructed such as plaster, clay, metals (copper, steel), MDF, plywood, bamboo, willow, acrylic sheet, wire polymer, foam board and steel stock

79.2 materials which the student would use to create these works of art – pens, pencils and in particular sketchbooks.

79.3 Equipment such as a laser cutter.

79.4 PPE for heavy duty equipment (safety goggles, filter masks, safety gloves, welding masks and welding gloves).

79.5 Safe (i.e. lockable and appropriate) storage for tools/smaller equipment.

79.6 Failure to make the welding room available. It was not in dispute that the claimant had not able to use the welding room from November 2018 to May 2021 because of a failure to repair the extraction equipment which provided obligatory ventilation.

79.7 Failure to make G27 available, through a failure to fix leaks and prevent "flooding".

80. As the extent of the leaks in November 2018 and September 2019 may be in dispute and the existence of leaks in August 2021 is disputed, I deal with these in some detail below.

Flooding – pre-August 2021

81. There is no dispute that there was an ingress of water into G27 on:

81.1 18 November 2018 [paragraph 4.2.2 of issues list]

81.2 24 September 2019 [paragraph 4.2.6 of issues list]

81.3 14 and 28 September 2021 and 1 October 2021. I note, however, that the ingress of water in September and October 2021 was after the claimant's resignation and so cannot be included in his list of alleged fundamental breaches of contract at paragraph 4.2 [42-43].

82. Mr. Scott accepted that there were previous leaks within the CBAT Block in which G27 was located [NS paragraph 5]. The photographs of the water ingress in September 2021 and October 2021 show that, on those occasions,

there was sufficient water to reach a noticeable depth above the floor. The claimant has referred to all water ingress as “flooding” or “G27 being flooded”. Mr. Baker, on behalf of the respondent, disputed the word “flood/flooding/flooded”.

83. Nevertheless, Mr. Scott is more of an expert on water ingress in CBAT and G27. He uses the word “flood” or a variant in describing the water ingress on 14 and 28 September 2021 and 1 October 2021. In describing the history of leaks to the CBAT Block and G27, he, himself, states that it has experienced “flooding”. I find that the use of the word “flood” and its variations indicates a certain volume of water applies to 18 November 2018 and 24 September 2019. At the very least, a “flood” is a shallow pool of water and, at its most, somewhat greater. The floods were due to various problems with CBAT Block which was an old building needing refurbishment. Mr. Scott attributed the leaks to various sources which had been discovered in sequential attempts to resolve the floods. There was a problem with the roof, the north light windows, gutter problems, a dropped window frame and Japanese Knotweed from the next-door building, which had undermined the foundations and drainage causing water to come up through the floor.
84. The respondent had attempted to resolve these leaks/flooding by tackling different likely sources but had found that this piecemeal approach would not ultimately resolve the situation. At Mr. Scott’s instigation, the Senior Leadership Team decided to, for the first time, make a Capital Bid Application for sufficient monies to renovate CBAT completely including a new roof. The budget awarded is some £2.4 million. The Capital Bid Application had been made in the last year and the renovation was intended to happen in 2023 since, currently, the project is at tender stage awaiting quotes from contractors.
85. Given the inherent problems in CBAT and Mr. Scott’s reference to repeated maintenance and repair, I find that it is more likely than not that there had been several instances of flooding every year and their severity has varied from that in the photographs of October 2021 to a lesser level as pictured in September 2021 but still enough to cover much of the floor to a lower level of water coverage.

Flooding – August 2021

86. The last flooding before the claimant’s resignation was alleged to have been on 8 or 9 August 2021. The claimant sent no emails about this nor took a video. In contrast, post resignation, there were two floods in September 2021 and one in October 2021. He took videos of one of the September 2021 floods and the one in October 2021. He also wrote emails about these seeking to get urgent repairs done in order to prevent further leaks. He had also sent emails about leaks in November 2018 and in September 2019.
87. The respondent’s position is that there was no leak in August 2021 pre-resignation.
88. In reliance on my findings about Mr. Scott’s evidence as set out in paragraph 42 above, I find that there was a flood.

89. I find that it was on a more minor scale than on other occasions:

89.1 Mr. Scott researched the amount of rainfall on 8 and 9 August 2021, which was light.

89.2 Mr. Scott's evidence, which I accept, was that floods only occurred when there was rain.

89.3 The water ingress resulting in flooding on 8 or 9 August 2021 would have been at the lower end of the spectrum, due to this limited rainfall.

Conclusions about alleged failures to provide resources

90. Other materials for works of art were used without affecting the students' results in the assessment by UAL.

91. There had periodically been a delay in the college's receiving materials (sketchbooks, pencils, pens), but this was attributable to limited resources, the failure to require students to buy their own sketchbooks (a policy in other colleges) and administrative hurdles which even an efficient technician found difficult to operate without delay.

92. The respondent provided a laser cutter but had rejected the claimant's expensive options and chosen cheaper and adequate alternatives.

93. PPE: there was some delay in providing this, but it was not critical being under 3 months over the summer holidays. In one instance, it was a much longer delay but this seemed to be the joint fault of the claimant and RT (when PPE had been mislaid by being stored and its location forgotten).

94. Safe (i.e. lockable and appropriate) storage for tools/smaller equipment. Old filing cabinets were used for this. This was clearly not state-of-the-art, but no evidence was provided to show that this was inadequate.

Conclusions about alleged failures to provide the welding room and G27

95. The welding room was not a priority for the curriculum. The students could still meet the demands of the curriculum and achieve a good result with the examining body without the welding room.

96. G27: the claimant was not able to use G27 as his teaching space several times a year due to flooding. Ms. Taylor said that G27 would have been out of action for a few hours to a day but not for days. Ms. Bradley said that staff used the Aqua Vac to remove the water if Mr. Scott's staff had not come by promptly to help. It is not clear how flooding on any level could be dealt with so quickly and simply. I can understand how it would alleviate the situation with more minor leaks. I prefer the claimant's evidence that G27 was not available to him for more than a day at a time, due to flooding. He described detailed plans to redesign the class using different materials and tools, which make it likely that G27 was out of action for longer than a day at a time.

Details of alleged failure to deal with grievance

Requirements of the Grievance Procedure

97. The respondent operates a grievance procedure [105 – 112] which is referred to in the contract of employment [56 paragraph 13].

98. This provides actions with timescales:

98.1 Nomination of appropriate manager to investigate Investigation must commence within 5 working days of receipt of written grievance by HR Director [108 para 11].

98.2 Thorough and prompt investigation entailing meeting with employee making grievance, with member of staff against whom the grievance has been made, with any other employees who are relevant to the investigation and consideration of any relevant supporting documentation [109 paragraph 12]

98.3 A record will be kept of the procedure. The employee will be given copies of all meeting records [107 paragraph 1].

98.4 If the investigation is likely to take more than ten working days, the investigating manager to notify parties and agree new time limits [109 paragraph 14].

98.5 Within two working days of the investigation being completed, meeting with employee who lodged grievance to explain outcome. The outcome to be confirmed in writing.

Background to the alleged fundamental breach relating to grievance handling

99. RT lodged a grievance about the claimant on 2 September 2020. This concerned the claimant talking to him (on the claimant's case politely) about RT's failure to order and deliver resources in a timely way or at all. These resources were required to set up the G27 for the students for the claimant's classes and for RT to run effective open access sessions. The claimant lodged a grievance on 5 October 2020 which referred directly to RT's failures with the aim of assisting RT to improve his delivery of resources etc. The grievance also referred indirectly to RT in that it was about lack of resources and PPE which were RT's responsibilities. The grievance also contained complaints about the non-availability of G27 through flooding and of the welding room through failure to repair the extractor system.

Conclusion about claimant's grievance – did the respondent fail to deal with it?

100. The respondent's stated intention in HR's emails to him was to investigate his grievance ("his concerns"). The evidence in support of the respondent's contention is unclear but generally weak. On the one hand, the claimant was invited to two interviews and is mentioned in the report of which he was given a copy. On the other hand, first, there is no record of the interviews with him to show that he was asked about his complaints. Secondly, as the person who had lodged a grievance, under the grievance procedure, he should have been given a copy of the record of the two interviews with him.

101. Thirdly, there is no record of the interview with RT (in the bundle) to see what he said about the complaints against him. Fourthly, the report does not go into any detail about the claimant's different complaints ("flooding", the welding room, resources and PPE) or even refer to them separately.
102. Fifthly, the report mostly refers to the grievance against the claimant and produces a bland recommendation of:
- 102.1 Mediation between the claimant and RT. That could be a recommendation arising solely out of RT's grievance against the claimant.
- 102.2 The claimant is advised in future to refer all problems with RT's performance in resourcing and all problems with getting resources to RT's manager, Ms. Bradley. These too could have been recommendations arising only out of RT's grievance.
103. Mr. Baker submitted that these recommendations related to the claimant's grievance as well because the investigator had not wanted to affect the relationship between the claimant and RT so made general recommendations applicable to both. I do not accept this because none of the three witnesses were directly involved in the grievance, and they gave no evidence about the meaning of the grievance investigation report.
104. Sixthly, I also note that the invitation to an investigation hearing letter to RT refers to his grievance only. If the respondent were correct, he would have been told the purpose of the hearing was to combine the two grievances and so to find out about his grievance and his responses to the claimant's grievance (in so far as it related to him). The plain meaning of the invitation letter is that the hearing was only about RT's grievance.
105. In reliance on the above, I find that the respondent failed to deal with the claimant's grievance. In sum, the investigation did not investigate the claimant's grievance with him or with RT and the report does not cover the findings about the claimant's grievance or make recommendations about his grievance
106. If the respondent had said that they chose only to deal with complaints in the grievance over which they had control (the relationship with RT and how to secure timely delivery of items in the future), I might have come to a different conclusion. This is not something however that the respondent put forward as part of its response; that stopping the leaks to G27 and repairing the ventilation in the welding room were too expensive to be within their control and so dealing with those parts of the grievance was pointless, leading as it would to no recommendations.
107. The respondent submitted also that the claimant had accepted that his grievance had been dealt with, otherwise he would have appealed. The claimant's evidence was that he had not appealed because he read the report as being about RT's grievance only. He had one criticism; that the report wrongly said that a comment had been attributed to RT not him. If this error was corrected, it would show that he had remained calm and the person who became aggressive had been RT. Ms. Adams agreed to amend the report (although she never did). I find that due to the claimant (correctly) interpreting the investigation report as only being about RT's grievance, his failure to

appeal does not indicate an agreement that his own grievance had been dealt with.

108. I note another problem with the respondent's dealing with the claimant's grievance. The investigation should have been completed within 10 working days or the claimant and RT to be informed and a different timescale agreed. The investigator was appointed on 5 October 2020 and the report was issued 28 May 2021. The investigation was therefore completed significantly outside the set timescales. The claimant confirmed that this delay was not part of his complaint.

DISCUSSION AND DECISION

109. The claimant's case is that the respondent was in breach of his contract of employment by their actions which singly or cumulatively, breached the implied duty of trust and confidence. For the cumulative breach, the flooding in August 2021 was the final straw.

110. In considering the claimant's claim of constructive dismissal based on actions which he asserts cumulatively breached the implied duty of trust and confidence, I have considered the tests set out in ***Kaur v Leeds Teaching Hospital NHS Trust***. I also consider ***Cockram v Air Products Plc*** [2014] ICR 1065, in particular paragraphs 11 – 25, on whether the claimant affirmed the contract between the grievance and the flooding in August 2021.

111. My conclusions in relation to each element of ***Kaur*** are set out below.

What was the most recent act on the part of the respondent which the employee says caused, or triggered, his resignation?

112. The most recent act relied upon by the claimant was the flooding on 8 or 9 August 2021, which was due to the respondent's failure to undertake lasting or effective repairs. The claimant said the flooding on 8 or 9 August 2021 caused or triggered his resignation.

113. I have to consider what was in the claimant's mind when he resigned on 11 August 2021. There are two competing versions: Ms. Taylor's and that of the claimant, and Ms. Bradley's.

Ms. Taylor

114. Ms. Taylor said that the claimant had resigned because he no longer wanted to work with young people. She also said that he had "fallen out of love" with being a lecturer and he was not sure where he was going with the next step in his personal life. She referred to the reason not resignation not being "solely working conditions". I do not accept Ms. Taylor's account, which I summarise as career and life dissatisfaction.

115. There is no written or oral evidence that:

115.1 the claimant no longer wanted to work with young people or to be a lecturer. In fact, the oral evidence is to the contrary. He was enthusiastic about his students and gave the impression of enjoying teaching them and designing and marking their assignments.

115.2 the claimant had concerns about his future direction personally and whether working for the respondent fitted in with this.

Ms. Bradley

116. Ms. Bradley was asked two questions by the claimant about whether she knew the reasons for the claimant's resignation:

116.1 She said "*whenever you raised your complaints, I communicated it with R(T) and tried my best to improve the situation. I was saddened you came to the stage where you had to give in your notice*".

116.2 She also said that the flooding (along with the relationship with RT) was the claimant's reason for resignation.

117. I found Ms. Bradley's evidence to be entirely credible. She demonstrated a long and harmonious relationship with the claimant and a good knowledge of his approach to work. Her account made sense, given the many emails from the claimant about RT, lack of resources and PPE and lack of availability of G27.

The claimant

118. In his written and oral evidence, the claimant described the reason for resignation as the flooding (leading to G27's unavailability).

Conclusion

119. I find that the flooding and the relationship with RT, which relates to lack of resources and PPE, and to the grievance, were in the claimant's mind at his resignation.

119.1 Ms. Bradley told the tribunal that flooding along with the relationship with RT was the claimant's reason for resignation. This therefore corroborated the claimant's evidence about his reason but gave an accurate insight into all the factors which were at play in his mind at the time.

119.2 The claimant telephoned Ms. Taylor in the evening on 10 August 2021 shortly after he discovered the flooding on 8 or 9 August 2021 to discuss his impending resignation and reason. I prefer his evidence that he told her that he would resign and linked it to the events of 8/9 August 2021 because of the timing of his call, which Ms. Taylor did not dispute. Although she said she could not remember the exact date, it was "around 10 August 2021". I accept there is no record of this telephone call, which

was out of hours, but I have found the claimant's evidence for the reasons set above to be more credible and I therefore accept his account of its content.

119.3 The timing of his resignation on 11 August 2021 is consistent with the flooding on 8 or 9 August 2021.

Did the claimant affirm the contract since that act?

120. The claimant did not affirm the contract since that act (the flooding on 8 or 9 August 2021). He resigned immediately after this on 11 August 2021.

If he did not affirm, was that act by itself a repudiatory breach of contract?

121. That act was not by itself a repudiatory breach of contract for the following reasons.

122. The respondent acted in such a way as was likely to destroy or seriously damage the mutual trust and confidence between the parties by failing to prevent a leak to G27 after many attempts to do so.

123. The respondent's act was not, however, without reasonable and proper cause. First, the respondent had made strenuous and repeated efforts to stop the leaks. Secondly, the building was so old and dilapidated that only a major renovation could eradicate the leaks on a permanent basis. Thirdly, the respondent strove to work within its limited budget as a public sector organisation and it was only after many years of failed attempts that it could justify a Capital Bid for over £2 million (the funds necessary to renovate). Fourthly, this leak was discovered by the claimant during the summer holidays when no teaching took place. The respondent was prevented from doing his own sculpture work but there was no disruption to any classes by any failure to prevent the leaks on a permanent basis.

Was the failure to deal with the claimant's grievance by itself a repudiatory breach of contract?

124. I remind myself of *W A Goold (Pearmak Ltd.)* in which failure to deal with an employee's grievance through a failure to provide a grievance procedure without reasonable and proper cause constituted a repudiatory breach. In that case, the employer simply did nothing about the grievance because there was no grievance procedure for the employees to use.

125. In this case, there was a grievance procedure and the respondent's stated intention was to deal with the grievance. The respondent claimed during the claimant's employment that it had dealt with the grievance. Indeed, it continued to assert throughout the hearing that it had dealt with the claimant's grievance. Based on an analysis of the documents in the bundle, I have found that the respondent, however, had not dealt with the claimant's grievance. Although the facts before me are different to those in *W A Goold (Pearmak Ltd.)*, the outcome was the same. Therefore, that case is applicable to the claimant's situation and failure to deal with the claimant's grievance was an act which was likely to destroy or seriously damage the mutual trust and

confidence between the parties.

126. As the respondent claimed to have dealt with the claimant's grievance, it offered no explanation for this act (which it denied). It follows that the respondent acted without reasonable and proper cause and this act was a repudiatory breach of contract.

Did the claimant affirm or not affirm the contract between that breach (failure to deal with his grievance) and the flooding in August 2021?

127. The issue before me is to look not only at lapsed time but other factors under **Cockram** and decide whether the claimant affirmed the contract. As per paragraph 15, I must look carefully at the facts before deciding whether there was an affirmation on 28 May 2021 or on 15 July 2021. I also bear in mind paragraph 16 which states: "*it is common ground that section 95(1)(c) ERA varies the common law principles discussed above for the purposes of a statutory claim of unfair dismissal by giving the employee the right to resign on notice without being treated as having affirmed that contract*".

128. Simler J's conclusions can be summarised as follows:

128.1. The variation of common law principles is limited to "*allow only for the giving of notice*"

128.2. Further to satisfy the requirement, the resignation must be per s95(1)(c) ERA "*in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct*" and

128.3. "*The employee must not affirm the contract – whether by prolonged delay before resigning, by implication, by an equivocal election or by conduct that is consistent only with the continued existence of the contract*".

129. There was not a prolonged delay. The case of **New Southern Railway Ltd. v Quinn** [2006] IRLR 267 shows that a delay of several months (in that case, six) did not affirm the contract. The claimant was emailed the grievance investigation report on 28 May 2021 and resigned two and a half months later.

130. The claimant's conduct was not consistent only with the continued existence of the contract. The claimant expressed his unhappiness with the failure to address the complaints of flooding and the lack of G27, the welding room and resources together with RT's performance (in his grievance) by initiating a request for voluntary redundancy on 15 July 2021. The appellant's resignation took place 4 weeks later.

131. For these reasons, I find that the claimant did not affirm the contract between the failure to deal with his grievance and the flooding on 8/9 August 2021.

Was the grievance failure an effective cause of his resignation?

132. The grievance was about the relationship with RT and the consequent lack of resources and PPE, and about flooding, which led to the unavailability of

G27. The grievance failure was therefore bound up with both the flooding and the relationship with RT.

133. I found above that both the flooding and the relationship with RT were each an effective cause of his resignation. It follows that the grievance failure, being so concerned with these, was an effective cause of his resignation.

Conclusion about the grievance failure

134. Having found above that the grievance failure was a repudiatory breach and an effective cause of his resignation it follows that the claimant has established that he was constructively dismissed.

Was this a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence?

135. If, however, I am wrong about the claimant not having affirmed his contract, the last straw concept requires me to consider whether flooding was the last straw, applying *Kaur*.

136. Resources - materials for works of art: these were often not available because G27 was not available for teaching purposes and so the claimant could not teach the syllabus without a significant redesign of the works of art, opting for less ambitious materials and assignments. Although the students attained good grades in their end of year assessments by UAL, the claimant was the person who had to deal with the brunt of the students' anger and disappointment on a repeated basis.

137. Resources – sketchbooks etc: there were significant or unpredictable delays in getting these to students. Although I accept that this was a result of a bureaucratic financial approval system and the fact that the respondent almost uniquely did not require students to buy these themselves, nevertheless, the claimant had to bear the brunt of the student's anger and disappointment on a repeated basis.

138. Equipment: The key example given of this was the laser cutter which cost £15,000 or £18,000 (on the claimant's recommendations). The respondent acted with reasonable and proper cause in Ms. Bradley's suggesting a much cheaper (albeit not cheap) laser cutter for £7,000. I appreciate the claimant's argument that the respondent was willing to purchase Apple computers for the Technology Department, but no details of the total expenditure or business need have been provided to make a realistic comparison between that and the laser cutter. I note that at no time did the claimant criticise Ms. Bradley for her actions or omissions. In fact, he was most complimentary to her at the start of the cross examination. I find that in the case of the laser cutter, Ms. Bradley was acting with sensible restraint to make her budget go as far as possible.

139. PPE: Looking at the emails from the claimant to Ms. Taylor and Ms. Bradley, it is apparent that most of the failures related to the failure by RT to place orders in good time. Although Ms. Bradley said she was persistent in sending reminders to RT and was aware that at times she needed to put extra pressure on him to achieve a result, this seemed to have no effect on RT. The picture presented in a roundabout way by Ms. Bradley, who was most tactful

and non-judgmental, was that RT was extremely difficult to manage. The claimant, through RT's failures, was yet again faced with strong expressions of student disapproval.

140. Safe storage: The claimant did not identify any thefts or other problems arising from the absence of lockable and appropriate storage for tools and smaller equipment. The respondent acted with reasonable and proper cause in seeming to consider that replacing old, unlockable, filing cabinets was not an appropriate use of the budget.
141. Unavailability of G27: The points in connection with flooding of G27 have already been made above in connection with the leak on 8 or 9 August 2021, namely that the respondent acted with reasonable and proper cause in seeking to fix the source of each leak as it was discovered rather than funding a very expensive renovation.
142. Unavailability of the welding room: this was not available for a lengthy period. So that even when G27 was available, it was not. There seemed to be a noticeable passing of responsibility between Mr Scott and Ms. Bradley. Mr Scott identified that Ms. Bradley should have notified him of the importance of the welding room for the curriculum, which would have triggered a repair. Ms. Bradley was unaware of this procedure and her role in it. Ms. Taylor and Ms. Bradley gave explanations why teaching the elevated form of 3D which the claimant wished to teach was not necessary for the curriculum. They overlooked the expectations of the students who expected an elevated form of 3D and their skills to be developed to a sophisticated and cutting-edge level by the claimant. Again, he had to face their anger and disappointment on a repeated basis.
143. The acts of failing to provide resources, PPE and the welding room together with a singular lack of impact on RT's performance were extremely frustrating for the claimant. These acts caused him to be confronted regularly with the anger and disappointment of the students through no fault on his own, which must have been highly stressful. The grievance failure, which was about all of these (and flooding), intensified his feelings of helplessness. Taking the objective view, which I am required to do, they may have been in part caused by financial constraints, but they arose largely from a failure to obtain an adequate performance from RT and bureaucracy, which affected the ordering process and may also have been responsible for a failure to recognised earlier that piecemeal repair was not going to work for CBAT and G27.
144. In this context, it is plausible that a further episode of flooding on 8/9 August 2021 could have confirmed to the claimant that nothing was ever going to improve, thus acting as the last straw.
145. Relying on the last straw concept, I therefore find that the claimant has established that he was constructively dismissed.

The reason or principal reason for the dismissal

146. The reason, or principal reason, for the dismissal on Mr Baker's submission was some other substantial reason. This is a potentially fair reason within s.98 ERA. Mr. Baker stated that this was for budgetary reasons.

Was the dismissal in the circumstances of this employer within the range of reasonable responses open to a reasonable employer?

147. The respondent is a sizeable employer consisting of four colleges with an established HR Department.
148. The reason for the failure to deal with the claimant's grievance is not known. It may have been a failure on the part of the investigator in terms of lack of competence or experience, but this is speculation. What is clear is that this failure can in no way be ascribed to budgetary constraints. It would not have been more expensive to extend the duration of the hearings with RT and the claimant to encompass the claimant's grievances. The report need not have taken significantly longer to write if it had dealt with findings of fact in relation to the claimant's grievance and made recommendations specifically relevant to all parts of his grievance. Accordingly, I do not find this dismissal was within the range of reasonable responses open to a reasonable employer.
149. If I am wrong and the claimant did affirm his contract after the grievance failure, I need to look at the failures in providing resources, PPE and the welding room, the failure to obtain adequate performance from RT and the grievance failure and consider whether they were in the range of reasonable responses open to a reasonable employer. As I have covered the grievance failure in the paragraph above, I focus on the other failures.
150. The failure to provide resources and PPE is mainly attributable to the failure to address RT's performance. That cannot be ascribed to budgetary constraints. No-one has taken responsibility for dealing with the welding room repairs which suggests a collective management team failure.
151. It is not a response open to a reasonable employer to avoid managing below standard performance over many years and to adopt a management process for repairs where repairs can fall through the net and disappear. I therefore do not find this dismissal within the range of reasonable responses open to a reasonable employer.

Automatically unfair dismissal – dismissal for the reason or principal reason under s100 ERA?

A reasonable belief in circumstances of danger?

152. The claimant had a belief that the flooding in G27 constituted circumstances of danger which were serious and imminent. In his view, water contaminated electrical fittings and pooled around high voltage heavy duty tools and equipment, giving rise to the risk of electrocution.
153. I find however that the claimant did not reasonably believe the above because:
- 153.1 There was a full RCD system so that if there had been a short circuit, the system would fuse itself. It was not possible to be electrocuted in G27 because of the RCD system [NS paragraph 14]. Had the claimant asked about the risk of electrocution, he would have been given this answer.

153.2 When Mr. Scott was notified by a member of his team that electric units were unsafe in G27 because they were wet, a qualified electrician would attend the site to carry out electrical checks and to confirm that G27 was safe to use [155 and NS paragraph 13].

154. This claim therefore fails on this requirement.

Reason or principal reason for dismissal – left G27 or refusal to return to G27?

155. Was the reason (or if more than one, the principal reason) for the dismissal that the claimant had left or refused to return to his place of work and/or had taken appropriate steps to protect himself or others from danger?

156. This claim also fails on this requirement. The claimant did not leave G27 against instructions. The respondent asked him to leave G27. When asked, he returned to G27. The claimant was therefore not dismissed because he had left G27 since this was on the respondent's instructions or refused to return to G27 since he agreed to return.

Reason or principal reason for dismissal – taken appropriate steps

157. This claim also fails on this requirement. He was supported in the steps he took to protect himself and others from the effects of flooding in G27 (perceived risk of electrocution). The steps he took were:

157.1 reporting the flooding on a number of occasions (November 2018, September 2019 etc.)

157.2 speaking to the contractor working on the roof of CBAT.

157.3 I note that the other steps listed in the issues do not relate to the flooding of CBAT.

158. In particular, I note:

158.1 Miss Taylor forwarded the claimant's concerns relating to flooding and safety to several employees including Mr. Scott's team [66].

158.2 The flooding in the CBAT Block was acknowledged and that acknowledgment well documented [IT Paragraph 7].

158.3 Whenever flooding occurred, the facilities team (Mr. Scott's team) were proactive in trying to resolve the problem, whilst recognising that there was a structural issue underlying it [IT paragraph 8 & MB paragraph 18].

158.4 Investigations and safety checks were carried out to ensure that the workshop was safe, including by an electrician [55 & NS paragraph 9]. Safeguards were in place to prevent electrocution [NS paragraph 14].

158.5 The claimant was always offered an alternative teaching room whenever the workshop was flooded and most of his teaching supplies were moved to a different floor [IT paragraphs 8 -10].

I confirm that this is my Reserved Judgment with reasons in Hope v WKCIC (trading as Capital City College Group) [A statutory corporation] No 3300116/2022 and that I

have approved the Judgment for promulgation.

Employment Judge Coll

Date: 15 November 2023

Judgment sent to the parties on

.16 November 2023.....

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For the Tribunal office