EMPLOYMENT TRIBUNALS

Claimant: **Mr E Saleh**

Respondent: **Singletrack Systems Limited**

Held at: **East London Hearing Centre**

On: **17, 18, 19, 20 & 24 October & 20 November 2023**

Before: **Employment Judge S Povey**

Representation

For the Claimant: In person (supported by his uncle and father)

For the Respondent: Mr Sheppard (Counsel) [17-20 & 24 October 2023]
Mrs Ursu (Solicitor) [20 November 2023]

JUDGMENT having been sent to the parties on 28 November 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. On 20 November 2023, I informed the parties in person of my judgment (dismissing the complaints of unfair and wrongful dismissal) and gave my reasons orally. The written judgment was sent to the parties on 28 November 2023.

2. On 1 December 2023, the Claimant asked for a written copy of those reasons. That request was not forwarded to me until 21 December 2023, whilst I was on leave. I was unable to action the request until my return to work on 2 January 2024. I apologies to the parties for the delay in promulgating these written reasons.

Introduction

3. The Claimant was employed by the Respondent as a solutions engineer. His employment commenced on 23 October 2017 until his resignation with immediate effect on 1 July 2021. By a claim presented to the Employment Tribunal on 15 September 2021, the Claimant makes complaints of

constructive unfair dismissal and wrongful dismissal. The claim is resisted in full by the Respondent.

4. By way of procedural background, the Claimant had also brought complaints of disability discrimination but following a Preliminary Hearing on 22 September 2022, Employment Judge Brewer found that the Claimant was not disabled at the material time as defined by section 6 of the Equality Act 2010. By way of judgments on 9 March 2023 and 25 April 2023, the disability discrimination complaints were dismissed or struck out by the Employment Tribunal.

5. The final hearing conducted over five days at the London East Hearing Centre. At the end of the hearing, I adjourned the case until 20 November 2023 to allow time for my deliberations and to thereafter hand down judgment.

6. During the hearing, I heard evidence from the Claimant and from his uncle, Sassoon Saleh. For the Respondent, I heard from the following:

   6.1. Paul Dyson (Chief Technology Officer and, at the relevant time, a director of the Respondent);

   6.2. Bramhananda Narravula (Head of Solution Engineering & the Claimant's line manager at the relevant time);

   6.3. Michael Berman (Chairman of the Board, at the relevant time, who was appointed by the Respondent to deal with the Claimant's grievance);

   6.4. Peter Segal (formerly managing partner of Ogilvie & Associates, who was appointed by Respondent to deal with the Claimant's grievance appeal);

   6.5. Stuart Berwick (the Respondent's Chief Executive Officer).

7. Each witness I heard from confirmed and adopted their respective witness statement. I was provided with a paginated and indexed bundle of over 2,000 pages ('the Bundle') plus a chronology and cast list. I received oral and written submissions from Mr Sheppard for the Respondent. The Claimant also provided written submissions and his father made oral submissions on his behalf. I have taken the relevant evidence and the submissions into account in reaching my decisions.

8. The Claimant is a litigant in person, who was assisted and supported by his uncle and his father throughout the hearing (and his uncle throughout the proceedings). Although found not to be disabled, the Claimant is diagnosed with an autistic spectrum disorder. I had regard to the Claimant's health condition and its effects in how I managed the hearing. I explained the process and procedures to the Claimant, checked his understanding, encouraged him to ask questions and gave him guidance throughout. I was satisfied that the Claimant was able to fully engage in the process and present his claim to the best of his abilities. Indeed, I was impressed by the Claimant's clarity and focus, his understanding of the importance of the List of Issues and the adept and professional manner in which he questioned the Respondent's witnesses. I was also grateful to his uncle and his father for the undoubtedly valuable support they gave him.

9. I am grateful to the Claimant, Mr Shepperd and the Respondent's solicitors for the assistance they have provided and the work they have undoubtedly undertaken both before and during the hearing. I am grateful to all the witnesses, including the Claimant, who attended and answered the questions asked of them to the best of their recollections.

10. At the outset of the hearing, I checked that the Issues as agreed earlier in the management of this case remained the issues I was required to determine (at [2191] – [2194] of the Bundle) and the parties confirmed that they were.

11. The complaints relate to a number of alleged actions, decisions and omissions by the Respondent which the Claimant says fundamentally breached (either individually or cumulatively) the term of mutual trust and confidence implied into his (and every) contract of employment. As a result, the Claimant says that he was entitled to treat his employment contract as repudiated, that is, at an end, which he did so by resigning with immediate effect on 1 July 2021. If the Claimant is correct, then his resignation was, in law, a dismissal and an unfair one at that. It would also follow that, by resigning with immediate effect, the Claimant had unlawfully foregone his notice period and was entitled to be compensated for that (the wrongful dismissal complaint).

12. I found that all the witnesses tried to assist the Employment Tribunal to best of their ability. However, there were a number of factual disputes between the Claimant and the Respondent's witnesses which I had to resolve. That is one of my roles. I have done so based upon the evidence provided and mindful that the events in issue occurred between two to three years ago.

13. I have also reminded myself of the limitations and challenges of memory. I will explain why I have preferred one account to another. It will invariably have been because of my assessment of evidence which arose much closer in time to the events in dispute. However, I do not say that those whose accounts are not accepted have lied or been deceitful. What they have done, at most, is misremembered, a trait which is far more common that many realise. I also recognise that recollections, even inaccurate ones, can become more certain and more entrenched when challenged, as is the case in a grievance process and in legal proceedings that, like here, involve factual disputes.

14. I have only made findings required to determine complaints brought by the Claimant. A number of other matters were raised by the parties in the course of their oral and written evidence. I have not engaged with those, save where they were relevant to the determination of the issues.

15. However, first I wish to make the following general observations about the applicable law, which is settled, was not materially in dispute and was helpfully summarised in Mr Sheppard's written submissions (at Paragraphs 2 – 13).

The Relevant Law

16. Whether or not the Respondent acted in a manner that fundamentally breached the Claimant's contract of employment (such that he was entitled to resign and claimed to have been dismissed) is to be judged objectively, having regard to the evidence. The fact that the Claimant believes his contract was

breached does not mean that it was, no matter how strongly that view is held. Similarly, the fact that the Respondent did not intend to breach the contract of employment is irrelevant.

17. The fact that the Claimant disagreed with some or all of what the Respondent did or did not do is not enough to establish a breach of contract, still less a fundamental breach. What is required is evidence that the Respondent has committed a repudiatory breach of contract, classically described by Lord Denning MR, Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA, 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.

18. The Claimant must resign because of the breach and must not delay too long, as he will be deemed to have affirmed or waived the breach (that is, signalled his acceptance in law that the contract is continuing) and lose the right to claim constructive dismissal.

19. Importantly and self-evidently in this regard, the Claimant can only rely upon breaches that he was aware of before resigning. Any alleged breach of contract which the Claimant became aware of after he resigned cannot, by definition, have played any part in his decision to resign.

Findings of Fact

Background

20. The focus of the case was on the period from May 2020 until the Claimant's resignation in July 2021. However, I was addressed on alleged performance issues which predated May 2020 and begin my findings with those. Whilst not directly relevant to the issues I had to determine, it was important to understand the background and context of the subsequent performance management steps implemented by the Respondent, as they form some of the alleged breaches of contract.

21. The Claimant began his employment with the Respondent on 23 October 2017. His contract of employment was in the Bundle at [711] – [721]. He was employed as a solutions engineer with a starting salary of £28,000, rising to £33,000 on successful completion of his initial six month probationary period.

Performance Concerns

22. The Claimant was lined managed by Mr Narravula. From May 2019, Mr Narravula had some concerns regarding the Claimant's performance which he raised with the Claimant. This was clearly evidenced in the Claimant's Employee Performance Record ('EPR') at [790] – [792] of the Bundle. This included contemporaneous entries for July, September and October 2019,

where issues were raised regarding various aspects of the Claimant's performance, as follows:

22.1. In July 2019, the Respondent's conclusion was that the Claimant's "*personal development progress has stalled*";

22.2. In September 2019, feedback from senior team members was that the Claimant's contribution to projects he was working on was "*relatively small compared to other…team members and comes as a significant cost in terms of the need for close management";*

22.3. Mr Narravula had an extended meeting with Claimant in October 2019 and fed back concerns regarding the Claimant's performance, which included the view that his performance had dropped off in the second part of the year.

23. The Respondent decided to hold a further performance review in six months' time (rather than the usual 12). The contemporaneous record included the following entry (at [791] of the Bundle):

> Elliot's response to the feedback was that he felt none of the criticism was down to him and it was other people who were difficult to work with. Elliot raised the point that he works "overnight" with a development team in India on another project and he had no problems working with them.
>
> This was something Elliot's Team Leader and the [Chief Technology Officer] were unaware of and the question was raised whether the time and energy he was spending working with the Indian team meant that he was tired and easily distracted whilst at Singletrack. Elliot denied this.

24. In his oral evidence, the Claimant denied that he had, in effect, been moonlighting whilst working for the Respondent. The Claimant was taken to his own CV which he had included in evidence (at [2033] – [2036] of the Bundle). This contained details of remote work undertaken by the Claimant between May 2019 and April 2020 for a US company. The Claimant tried to row back from the work he claimed to have undertaken in his CV in the course of his oral evidence. However, the evidence was, in my judgment, compelling. The Claimant's performance, in the Respondent's view, began to tail off from or around May 2019. The Claimant told the Respondent in October 2019 that he was working overnight on another project which the Respondent was unaware of and in his own CV, the Claimant confirmed that he was working for another company from May 2019 onwards.

25. As such, I found that the Respondent had legitimate concerns regarding the Claimant's performance from May 2019 and one of the reasons for the drop off in performance was that the Claimant was undertaking work for another company in his spare time.

26. The proposed further performance review in six months' time did not happen when scheduled because of the Covid pandemic. It is from this point that the Claimant says that the Respondent began breaching his contract of employment.

Furlough

27. The UK went into lockdown on 23 March 2020. On 4 May 2020, the Respondent placed the Claimant on furlough, where he remained until 27 July 2020. During that time, the Respondent also furloughed one other member of staff, made another member of staff redundant and the remaining staff took voluntary pay cuts of between 10 – 25%.

Performance Improvement Plan & Employee Performance Record

28. Upon the Claimant's return to work, the Respondent began a formal Performance Improvement Plan ('PIP') with him (following on from the concerns raised in 2019). The PIP concluded, in the Respondent's opinion successfully on 25 September 2020 (in that the Claimant's performance had improved and he had achieved the goals set for him).

29. On 28 October 2020, Mr Dyson emailed the Claimant and proposed that the Claimant's annual EPR be moved from October 2020 to January 2021 because "*given the hiatus of the furlough period and the intensive performance review process of the PIP we think it will be fairer for you if we move the annual EPR to January to give you time to cement the good work you're doing and further grow your contribution to the SE[solutions engineer] team" (at* [1092] of the Bundle).It was also confirmed internally on same day that the EPR was being delayed to reflect the fact that Claimant had only recently completed his PIP (at [1093]).

30. The Claimant was not happy with this proposal and on 29 October 2020, he informed Mr Dyson that he wanted his EPR to take place as planned and not be pushed back to January 2021 (at [1097] of the Bundle). It would have been reasonably open to the Respondent to refuse the Claimant's request – it is, of course, a matter for the employer how they assess and review their employee's performance and how they structured and operated their approach to remuneration. It is noteworthy that this was one of a number of occasions in his correspondence with the Respondent that the Claimant gave the impression that such decisions were for him to dictate. They were not.

31. The Respondent, however, did not refuse C's request – they acceded to it (at [1138] of the Bundle) and Mr Dyson held an EPR with Claimant on 3 November 2020 (at [1140] – [1142]). Within that EPR, the Claimant's salary increase was discussed and explained, as follows (per the EPR record at [1141]):

> We moved onto the matter of salary increase which was communicated as a rise of £1k to £42k. Paul [Dyson] put this into the context of 6 months poor performance, 1 month mixed performance (first half of PIP) and 2 months good performance with the 3 months furlough essentially set aside in terms of performance consideration. Paul said that he and Stuart [Berwick} had arrived at this figure because we wanted to show good will and positive commitment vs no rise or a rise based on inflation which could be justified given the issues during the year.

The Grievance

32. On 16 September 2020, the Claimant had submitted a grievance in writing (at [1040] - [1063] of the Bundle). That written grievance was extensive, running to 24 pages and raised a number of issues including the decision to furlough the Claimant, the raising of concerns regarding the Claimant's performance, the PIP process, his EPR, allegations against Mr Narravula, Mr Dyson and Mr Berwick, training and career development and pay issues. The Claimant also set out what remedies he sought including financial compensation and the payment of his professional advisors costs (the Claimant's professional advisor was, in reality, his uncle who is an accountant, not a legal adviser; I was told that the Claimant's uncle has been charging the Claimant for his services).

33. As noted, the Claimant's grievance raised allegations against Mr Narravula (the Claimant's line manager), against Mr Dyson (the Chief Technology Officer) and against Mr Berwick (the Chief Executive Officer). As such, and for good reason, the Respondent looked to its board for the person to conduct the grievance. Mr Berman, the chair of the board, was approached and appointed. I pause to observe that the decision to appoint Mr Berman was wholly consistent with the Respondent taking the Claimant's grievance seriously and wanting, at all times, to ensure it was dealt with in a fair, impartial and informed manner. It was not in dispute that Mr Berman had had no prior dealings with the Claimant.

34. As part of his enquiries into the Claimant's grievance, Mr Berman was provided with the Claimant's written grievance of 16 September 2020. He spoke with Mr Berwick and Mr Dyson and on 30 October 2020, met with the Claimant.

35. On 3 November 2020, the Claimant provided Mr Berman with further thought, views and documents, which Mr Berman had regard to as part of the decision making process.

36. Later on 3 November 2020, Mr Berman decided the Claimant's grievance (at [1162] – [1164] of the Bundle) and sent a copy of his outcome report to the Claimant on 4 November 2020 (at [1169]). The report did not uphold the Claimant's main complaints but did make a number of recommendations, the purpose of which were set out in Mr Berman's conclusion to his report as follows (at [1164]):

> While the principal grievances have not been upheld, recommendations have been made to improve performance reviews, in particular the recording and documentation of these and, recognising his disability, to take steps which will be of help to him and the company in the context of his employment.

37. The report informed Claimant that if dissatisfied with the outcome, he had a right of appeal.

The Grievance Appeal

38. On 4 November 2020, the Claimant commenced a period of sick leave on the basis of work-related stress (at [1173] of the Bundle). On 10 November 2020, the Claimant informed the Respondent that he intended to appeal the

grievance outcome (at [1181]) and submitted his reasons for appealing on 13 November 2020, which ran to 18 pages plus attachments (at [1182] – [1201]).

39. The Claimant returned to work from his sick leave on 15 November 2020. In the meantime, the Respondent decided to appoint someone from outside of the business to conduct the Claimant's grievance appeal. Again, the Respondent was under no obligation to do that. This was, after all, still an internal grievance process. However, the decision to do so was once again a compelling indication that the senior management wanted to ensure that the process was fair to the Claimant. It was decided to obtain board approval on both the decision to appoint and on who that should be. The board next met in January 2021 and approval was given to appoint Peter Segal as the grievance appeal officer (at [1248] – [1249] of the Bundle).

40. Mr Segal provided consultancy services to the tech industry (as both managing partner of Ogilvie & Associates and since January 2021 as a sole trader). He had provided such services to the Respondent in the past, which is why he was known to them. In December 2016, the Respondent paid for part of a piece of work done by Mr Segal in stock, resulting in Mr Segal holding a 0.4% shareholding in the Respondent. That is relevant because it was one of numerous concerns the Claimant had both from the outset and since regarding Mr Segal's impartiality and independence in conducting the grievance appeal.

41. The Claimant met with Mr Segal on 4 March 2021 by Zoom. The meeting was recorded and there was a transcript of the meeting prepared for Claimant in evidence (at [1337] – [1452] of the Bundle). Immediately after the meeting, the Claimant emailed Mr Berwick and the following is a flavour of the Claimant's concerns regarding the grievance appeal process in general and Mr Segal in particular (at [1453]):

> Mr Segal has just ended the zoom meeting without my grievances being considered in any fair and honest way after two hours. He appeared to me as your agent to cover up all the wrong doing that I put together in the grievance/appeal documents. He refused to look at any of my evidence nor discuss it. He refused to tell me he was biased because of undisclosed shareholdings in the company and knowledge of yourselves as an early shareholder with an obvious conflict of interest in the outcome of the appeal where you know there are financial claims.
>
> …
>
> I felt at the end of the meeting that he needs to resign on grounds of bias, lack of impartiality, independence and integrity - he refused without any answers to justify his approach. He did not say a single comment to make me confident of his good faith or put me at ease. I did raise during the meeting that he needed a lawyer to give advice to show he was being honest with me and not taking advantage of me.
>
> …

42. On 5 March 2021, Mr Segal emailed Mr Berwick and Mr Dyson to explore a number of issues raised by the Claimant in the course of the grievance appeal (at [1457] of the Bundle). On the same day, Mr Segal emailed the Claimant, wherein he sought to reassure the Claimant as to his independence and

objectivity and set out his next steps, including contacting Mr Berwick, Mr Dyson and Mr Berman to discuss the issues raised by the Claimant (at [1458] – [1459]). There followed an exchange of emails, where the Claimant reiterated his concerns about the grievance appeal process generally and Mr Segal's involvement specifically. The Claimant included a demand that Mr Segal resign from the grievance appeal because of his shareholding in the Respondent and Mr Segal sought to reassure the Claimant but declined the invitation to resign, unless told to do so by the Respondent (variously at [1468] – [1499])

43. Mr Segal sent a draft of his appeal outcome report to the Respondent on 29 March 20201 (at [1525] of the Bundle), with a final version being sent to Claimant on 19 April 2021 (at [1610]). On 20 April 2021, the Claimant asked to be "*excused from work matters today and tomorrow to review"* the appeal report (at [1615]). From 23 April 2021, the Claimant was signed off sick with "*stress at work*" (at [1627]).

44. The Claimant raised issues about the authenticity of appeal outcome report and whether Mr Segal was indeed the author. This allegation was premised on the following:

    44.1. That the report was sent to the Claimant by Mr Berwick on behalf of the Respondent and not by Mr Segal (at [1610] of the Bundle);

    44.2. That Mr Segal refused to sign or include a statement confirming he was the author of the report (in response to a demand by the Claimant on 26 April 2021 at [1631], an email which included extensive reference to the Claimant's advisors, which was in reality a reference to the Claimant's uncle);

    44.3. That a paragraph in the report was in a different font; and

    44.4. That there had been previous versions of the report (albeit this factor only came to light after Claimant had resigned).

45. The Claimant was undoubtedly upset that the outcome of the grievance appeal was not what he wanted. He disagreed with Mr Segal's findings and conclusions. The outcome no doubt reinforced his concerns at the outset of the appeal process as to Mr Segal's impartiality, which underpinned the Claimant's belief that Mr Segal was not the sole or actual author of the appeal outcome report.

46. However, I had no hesitation in finding that Mr Segal was the sole author of the report and that the conclusions he reached were both his own and, importantly, were clearly open to him on the evidence. The fact that the report was sent to the Claimant by Mr Berwick is totally understandable. It is the Respondent's grievance procedure and the Respondent appointed Mr Segal to undertake the appeal on its behalf. The Respondent was quite entitled to undertake the appeal itself and only brought Mr Segal in to maintain impartiality and independence in the process (given that there was no-one left in the Respondent's organization with sufficient seniority who the Claimant was not raising grievances against or who had not already been involved in the grievance process).

47. The suggestion that somehow the Respondent was colluding with Mr Segal or was engaged in misdirection, subterfuge or conspiracy was not only without any reasonable foundation but also wildly at odds with the reality of the situation. The Respondent was, in no uncertain terms, bending over backwards and going the extra mile at every stage of the grievance process to accommodate the Claimant. If, as the Claimant believes, the Respondent was trying to get rid of him or deliberately undermine him in some way, there were eminently easier, less time-consuming, less resource-intensive ways of so doing. Instead, the Respondent incurred the costs of appointing Mr Segal to undertake the appeal. That appeal was by way of a complete re-hearing of the Claimant's extensive, detailed and lengthy grounds of appeal (as opposed to being limited to simply reviewing whether Mr Berman's decision was sound).

48. Mr Segal was not employed by the Respondent and had no interest in the Respondent (despite the Claimant's frankly futile attempts to suggest otherwise on the basis of a 0.4% shareholding which was part-payment for work undertaken by Mr Segal). Why would he fabricate his report and then consistently lie about the fact? The Respondent even asked Mr Segal on 4 May 20201 to confirm that he was the author, in response to the Claimant's allegations, which he did by return (at [1645] – [1656] of the Bundle and which was forwarded to the Claimant by Mr Berwick on 7 May 20201 at[1652]). Regrettably, Mr Segal's confirmation only served to further fuel the Claimant's belief that the report was a forgery and resulted in another host of demands being made by the Claimant (per his email of 7 May 20201 at [1563]).

49. The real position is stark and obvious. Mr Segal wrote the report in its entirety and the decisions contain therein were his decisions alone.

<u>Occupational Health Referral</u>

50. Prior to the publication of Mr Segal's appeal outcome report, the Respondent proposed, and Claimant agreed, to make a referral to Occupational Health ('OH'). The initial purpose was set out in Mr Berwick's letter to the Claimant of 16 March 2021 as follows (at [1504] of the Bundle):

    1) To allow the Company to understand your condition (namely, Asperger's Syndrome) and the impact that it has upon you on a day to day basis, including, in relation to your role; and,

    2) To allow the Company to understand what reasonable adjustments, if any, might be required in order to assist you in your role.

51. The Respondent chose a company called Genius Within "*as a result of their knowledge and experience of assessing and supporting neuro-diverse adults and, in particular, adults with Asperger's Syndrome"* (per Mr Berwick's letter of 16 March 2021 at [1504] of the Bundle). The Respondent also provided the Claimant with details of Genius Within's website. The Respondent's solicitors made the referral to Genius Within, along with a letter of instruction from Mr Berwick and attachments on 19 April 2021 (at [1599] – [1604]).

52. On 30 April 2021, Mr Berwick emailed Genius Within to chase the referral and also to expand the remit of the assessment, to include the Claimant's current sickness absence on grounds of stress at work (the Claimant having been

certified as such by his GP on 23 April 2021), specifically the impact of such stress on the Claimant, how that would impact his work and what adjustments, if any, the Respondent should make (at [1644] of the Bundle)..

53. On 10 May 2021, the Claimant returned to work.

54. During June 2021, Mr Berwick had further discussions with Genius Within about the purpose and remit of their assessment, which Mr Berwick also discussed with the Claimant (at [1665] – [1674] of the Bundle). On 18 June 2021, Mr Berwick emailed Genius Within (at [1675]). This set out the concerns the Respondent had had with the Claimant's performance in 2020, the successful outcome of the PIP (in that the Claimant's performance improved) and the Claimant's unhappiness with the internal grievance process. The email concluded as follows;

> As per my earlier email and in light of the above, the purpose of the report is not to address any specific current concerns or issues with regard to Elliot's performance but, rather, to allow the Company to understand Elliot's condition and how it affects him on a day to day basis, in particular whilst at work, so that the Company might understand how to best support him moving forward.

55. I pause there to reflect on the following; why would the Respondent go to the expense and time of instructing OH, for a Cognitive & Workplace Needs Assessment, with the clear request to understand the Claimant's neurodiversity and what adjustments, if any, the Respondent should implement, if , as contended by the Claimant, they wanted to get rid of him or undermine him or drive him to quit? Again the real answer is obvious – they would not. Once again, the actions of the Respondent were wholly at odds with the Claimant's allegations and suspicions.

56. The Respondent endeavoured to explain to the Claimant at length and on numerous occasions, the remit of the OH referral. An example was Mr Berwick's email of 24 June 2021 which included the following (at [1969] of the Bundle):

> The Company has explained the purpose and scope of the assessment to you on several occasions. The purpose and scope of the assessment has also been explained clearly by Genius Within. The Company and Genius Within have also been clear that what you are asking Genius Within to do (revisit the PIP/EPR, your grievance and appeal and pass judgement on the previous treatment you perceive you have received) is inappropriate and falls outside of their remit.

57. Despite this, the Claimant continually refused to provide Genius Within with information it requested about what, if anything, he found difficult about his role and/or any challenges he faced, which impacted upon his ability to carry out that role, as a result of his neurodiversity. In common with much of his engagement at this time, the Claimant made numerous demands of what Genius Within and the Respondent had to do first.

58. In his email of 24 June 2021, Mr Berwick gave the Claimant until 1 July 2021 to provide the requested information to Genius Within, failing which the Respondent would ask Genius Within to undertake its assessment limited to the information already provided (at [1696] of the Bundle).

59. On 1 July 2021, the Claimant resigned with immediate effect, setting out his reasons in a letter of the same date (at [1705] – [1708] of the Bundle).

Analysis & Conclusions

60. The Claimant relied upon 14 alleged breaches of contract (per the agreed List of Issues). I considered each alleged breach in turn, determining whether the alleged act happened and, if it did, whether it breached the implied term of mutual trust and confidence.

The decision to put the Claimant on furlough in May 2020

61. It was not in dispute that the Respondent placed the Claimant on furlough from 4 May 2020 to 27 July 2020.

62. The Respondent clearly explained the reasoning and decision to furlough the Claimant. That decision and those reasons were entirely reasonable. In reality, the Respondent furloughed the Claimant to minimize the risk of redundancy, at a time when some of the Respondent's clients were understandably pausing or cancelling contracts with the Respondent, at a time of huge uncertainty at the start of the pandemic and at a time when the Respondent did make one member of staff redundant, furloughed another employee (in addition to the Claimant) and asked all staff to take pay cuts ranging from 10 – 25%.

63. In addition, when the Claimant returned from furlough in July 2020, he was not asked to take a reduction in salary because the Respondent took the view that he had already taken a hit by being furloughed, albeit a financial hit which was still less than the salary reduction he would otherwise have been subjected to if he had agreed to the proposed pay cut.

64. On no level was the Respondent's decision to furlough the Claimant a breach of contract, still less a fundamental one. On the contrary, the Respondent acted in the Claimant's and its own best interests, at a time of financial uncertainty. The Respondent's actions protected the Claimant's employment and ensured that he was able to return to work after a relatively short absence on furlough.

65. Any recourse or reference to the Respondent's financial position at that stage as evidenced by its accounts does not alter that analysis. It was a decision for the Respondent how it managed it's business and staff during the pandemic. The manner in which it managed the Claimant was, in that regard, beyond reproach.

66. It follows that the decision to furlough the Claimant did not breach the implied term of mutual trust and confidence or any other term of the Claimant's employment contract.

Not allowing the Claimant to return from furlough, and raising the possibility of redundancy

67. The first part of this allegation is factually incorrect. The Respondent clearly allowed the Claimant to return from furlough on 27 July 2020. To the extent that the Claimant alleged that the Respondent delayed his return to work from

furlough or could have brought him back sooner than July 2020, the Respondent's reasoning was reasonable, cogent and clearly open to it, namely that the future was uncertain and a judgment call had to made on when it was appropriate for the Claimant (and the other staff member on furlough) to return. That decision was open to the Respondent, was reached in a considered and legitimate manner and was in no sense a breach of the Claimant's contract of employment.

68. The possibility of redundancy was raised by Mr Dyson in his email to the Claimant on 5 May 2020 (at [757] of the Bundle), which followed a Zoom meeting on 4 May 2020 and the email from the Claimant to Mr Dyson the same day (at [752]).

69. However, what Mr Dyson actually said, in response to a query from the Claimant as to whether furlough would protect his employment and avoid redundancy or unfair dismissal was this:

> By placing you on furlough we avoid an immediate redundancy process. You will remain an employee while on furlough. It would be unfair to give you any guarantees with regard to the future as no-one knows what it holds, however I assure you that at no time will you be dismissed unfairly.

70. That was an eminently reasonably position to take and it is a mischaracterisation to suggest that the Respondent "*raised the possibility of redundancy.*" Rather, Mr Dyson was responding to an understandable concern raised by the Claimant about his employment and it was Claimant who raised the question of redundancy.

71. In addition, the reality of the situation was that the Respondent avoided an immediate redundancy situation with the Claimant by placing him on furlough, ensured that the Claimant remained an employee and succeeded in avoiding any redundancy situation.

72. There was no breach of contract in this regard, still less any fundamental breach of the implied term of mutual trust and confidence or of any other term of the Claimant's contract of employment.

<u>The hurtful and discriminatory comments from colleagues which were shared with the Claimant, and supported by the owners-management</u>

73. In his written submissions, the Claimant relied upon three instances to support this allegation.

74. First, that in his oral evidence, Mr Berman said that the Claimant had been hired because he was an oddball and was different.

75. My note of the evidence was that Mr Berman was replying to a question from me about his decision-making process regarding the Claimant's grievance (which is considered in more detail, below). Whilst maybe the choice of the phrase 'odd-ball' was unfortunate, when read in its entirety, Mr Berman's comments were in fact complimentary of the Claimant's achievements, as follows:

> …Taking into account all the grievance statements and everything that went with that – these were very strong statements. I found down every avenue that [the Respondent] behaved in a professional and caring way. The notion that [the Respondent] had wanted to get rid of [the Claimant] is so far from truth. This was something never encountered before and they were really keen to work it out. [The Claimant] was hired because he was an odd-ball, he hadn't done what others had done, not been to university but it was extraordinary that he had reached the level he got to.

76. There is, however, a far more fundamental point to make. It was not suggested that Mr Berman ever shared that view with the Claimant prior to giving oral evidence, still less prior to the Claimant's resignation. Even if it were perceived by the Claimant as a hurtful comment (and again, considered objectively and in context, it was in fact a significant compliment, albeit with unfortunate use of phraseology), it clearly could not have a played any part in his decision to resign.

77. As such, I found that Mr Berman's comment was neither objectively hurtful nor discriminatory (as already determined, the Claimant was not disabled at the relevant time). It was therefore not in any conceivable way a breach of the implied term of mutual trust and confidence (or any other term, for that matter) and, in any event, was never shared with the Claimant prior to his resignation.

78. Secondly, on 11 April 2020, Mr Dyson emailed Mr Berwick and the email contained the following (at [748] of the Bundle):

> I've told you where the fat is in my team - it's Elliot

79. It was not in dispute that this was a reference to the Claimant but Mr Berwick's written evidence (at Paragraph 10 of his witness statement) and his oral evidence was that this was not a reference to the Claimant's physique or his body. As he put it in his written evidence:

> This is crude but common business terminology where 'bone/muscle' are people and roles that are business critical and 'fat' are people and roles that, for whatever reason, at a given point in time the business can possibly survive without.

80. Mr Berwick also confirmed in his oral evidence, on the basis of that analysis and use of terminology, that he considered the Claimant and the role he was in at that time to be in the category of 'fat', that is people and roles the business could survive without because (per my notes of his evidence):

> The analysis at that time was based on [the Claimant's] level of experience, his [performance] in role at the time that we had concerns about and the demand for the work of that role at the time, and the lack of certainty of that demand given Covid.

81. I had no hesitation in accepting Mr Berwick's explanation for the use of the word 'fat' in respect of the Claimant. It was clearly not about him personally but about his employment and his role within the Respondent. On that basis and in that context, it cannot objectively be a hurtful or discriminatory comment as alleged by the Claimant.

82. As such, it was in no way a breach of the implied term of mutual trust and confidence or any other term of the Claimant's contract of employment, still less a fundamental breach

83. In addition, this was also not shared with the Claimant at the time or during his employment. He only became aware of the email after he had resigned. Therefore, even if the comment had been objectively hurtful or discriminatory, the Claimant was wholly unaware of it prior to his decision to resign and it could have played no part in that decision.

84. Thirdly, on 12 June 2020, an unnamed employee of the Respondent's sent the following Slack message to another unnamed employee (at [1914] of the Bundle, their identities having been redacted to protect their rights to privacy):

> Elliot was your Ophelia

85. The Claimant submits that this was a reference to the character of Ophelia from Hamlet. He may be right. We will never know as the author of the message and his/her intentions are unknown.

86. However, I can be assured that the author was not one of those who gave evidence in this case (since, as witnesses, they would have foregone the right to have their identity redacted). More importantly, there was no evidence that this comment was made to or shared with Claimant during the course of his employment. It was again something which came to light after he had resigned and which he seeks to rely upon in retrospect as a breach of contract which caused him to resign.

87. It is a comment by another employee. It is possibly derogatory and possibly hurtful. But we do not know who it was sent to or who it was sent by. As such, there is simply no evidence that it was shared with management or, more importantly, that it was endorsed by management. It is not uncommon for work colleagues to not get along, even to not like each other. But that alone is not a breach of contract, still less a fundamental breach, on the part of the employer.

88. Yet again, the Claimant was seeking to rely upon something that he discovered after he resigned and sought to place an interpretation on it which is, at best, speculative and at worst, unsupported by other evidence.

89. For all those reasons, there were no hurtful and discriminatory comments from colleagues that were shared with the Claimant during his employment or which were supported by the owners-management of the Respondent. It follows that these were not breaches of the implied term of mutual trust and confidence and were not breaches upon which Claimant relied in resigning.

<u>The decision to subject the Claimant to a PIP on his return from furlough, with 3 managers over 8 weeks receiving no support or acknowledgment of upsides after passing the process</u>

90. It was not in dispute that the Respondent placed the Claimant on a PIP. The Respondent's concerns as to the Claimant's performance were clearly open to it and could in no sense to construed as a breach of contract. It is entirely a matter for an employer to raise issues and concerns about performance. The

good employers then seek to manage and support the employee into improving their performance.

91. The Respondent had legitimate concerns regarding the Claimant's performance. It was entirely reasonable for the Respondent to address those concerns, both for its own and for the Claimant's benefit. What the Respondent did not do was ignore its concerns or use those concerns as a premise to discipline the Claimant or commence a formal capability process. Instead, it devoted time and recourses to setting and monitoring objectives for the Claimant to attain, in order to support him in improving his performance. Whilst the Claimant may not agree that he was underperforming, it was well within the Respondent's rights and responsibilities to form its own view as to what it expected of the Claimant in his role and to conclude that, to a degree, those expectations were not being met.

92. In addition, there was ample evidence from the PIP process that the Respondent was fully supportive and acknowledged the Claimant's progress. Indeed, the PIP was completed successfully and the Claimant's achievements in this regard were clearly acknowledged by the Respondent. By way of any example, Mr Dyson's letter to the Claimant of 25 September 2021], which included the following (at [1072] – [1073] of the Bundle):

> Myself, Bram [Narravula] and Dan [Escott, Head of Development] all agree that progress over the last four weeks of the PIP process was good and has demonstrated that you can deliver decent solo work, pair with other developers, contribute to the wider SE team and to [Client Success team], as your role requires. That progress is well noted and commended.

93. Mr Dyson went on to re-state the objectives of the PIP, before reassuring Claimant as follows (at [1073] of the Bundle):

> If there are any of these areas that you feel you need help or training with, please reach out and talk to myself, Bram or Dan about them.

94. It follows that there was no breach of the implied term of mutual trust and confidence or any other term of the Claimant's employment contract in the Respondent's decision to place the Claimant on a PIP or in the manner that the Respondent managed the Claimant's performance.

95. Before moving on, Mr Dyson's letter of 25 September 2021 also highlighted an issue which was prescient and instructive, regarding the Claimant's response to criticism, as follows (at [1073] of the Bundle):

> I would also encourage you to rethink something you have said frequently throughout the PIP process: "when the feedback is good, I'm happy, it's only when it is bad we have a problem". In software engineering we all learn through making mistakes or by having others challenge what we do, this is true of myself and every engineer I've worked with. In your CV you state "[I am a] highly motivated person who always wants to achieve to the highest standard". In order to do that you will need to be able to take and act on constructive criticism when it is provided, whether as part of the formal performance review process or in meetings and conversations with colleagues.

> Sadly, from your comments in the final PIP meeting, it seems this is something you still haven't understood. Your assertion that your attitude during the first four weeks was down to Bram and I 'finding fault' demonstrates that even simple suggestions on how to improve your work are rejected out of hand.
>
> We sincerely hope you heed this advice, start listening to feedback provided, and return to making the kind of progress that you demonstrated during the period from mid-2018 to mid-2019. We will continue to monitor performance and provide support - as we do with all employees - in the coming months.

<u>The negative performance review that the Claimant received in November 2020 with no pay increase and more disparaging comments</u>

96. Whilst the Claimant was entitled to a review in November 2020, the Respondent suggested waiting until January 2021 for the review, given that the Claimant had just come out of the PIP process and was, in the Respondent's view, on an upward trajectory regarding performance, which, if it continued, would be better reflected in a 12-month review in January 2021 than November 2020.

97. However, the Claimant refused this suggestion and insisted on the review being undertaken in November 2020. The subsequent review was not negative, as characterized by the Claimant but, as predicted by the Respondent, was not, and could not be, as potentially positive as it would have been if the Claimant had continued his upward trajectory in performance until January 2021.

98. It is not correct that the Claimant received no pay increase. He received a £1000 increase which he considered derisory. However, the Claimant only had himself to blame. The Respondent had reasonably and considerately suggested delaying the review until January 2021 for no other reason than it would be of greater benefit to Claimant (assuming his improved performance continued). The Claimant refused that proposal and left the Respondent with no option but to assess his performance over the 12-month period November 2019 to November 2020, which included a greater period of underperformance.

99. It follows that the performance review of November 2020 and the resulting pay award did not in any objective manner breach the implied term of mutual trust and confidence or any other term of the Claimant's employment contract.

<u>The fact that the Claimant was underpaid compared to his colleagues doing similar work and the Respondent refused to engage in a meaningful salary review in May 2021</u>

100. The Claimant compared himself to two other specified employees, Sam Barnes and Jack Murphy, who were on higher salaries than him.

101. The Respondent confirmed that two factors informed their salary structure – qualifications and experience. The Claimant was, to his enormous credit, the first person that the Respondent had employed who was a non-graduate. All other programmers were educated to degree level. The two comparators relied upon by the Claimant were both graduates and both had more experience than the Claimant (according to their CVs, which were both in evidence). That

justified and explained the salary differential and was an entirely reasonable decision for the Respondent to take.

102. One of the grievance appeal outcomes was to recommend a salary review for Claimant in July 2021 which the Respondent accepted (per Paragraph 40 of Mr Dyson's witness statement). Ordinarily the salary review would not have been until October 2021, as the previous review had been in November 2020. By agreeing to a further review in July 2021, the Respondent was treating the Claimant more favorably. However, contrary to this allegation, there was no recommendation for a review in May 2021 nor did the Respondent ever agree to undertake a review in May 2021.

103. The July 2021 review never took place as the Claimant resigned on 1 July 2021.

104. For all those reasons, the Respondent's decisions regarding the Claimant's salary during his employment did not breach the implied term of mutual trust and confidence nor any other term of the Claimant's contract of employment.

<u>The failure to conduct return to work meetings after the Claimant's sick leave, or consider implementing a phased return to work plan or offering additional assistance, support, counselling, mentoring or training which would have all been welcome and important following such a difficult period for the Claimant</u>

105. So far as relevant to this claim, the Claimant off sick for two periods; from 4 to 15 November 2020 and from 20 April 2021 to 10 May 2021.

106. There was no contractual obligation on the Respondent to conduct return to work meetings or implement phased returns to work.

107. I considered first the November 2020 sick leave.

108. The evidence of Mr Narravula was the he would provide support to the Claimant when required (per Paragraph 16 of his witness statement).In his oral evidence, he referred to catch up meetings with the Claimant when he return to work from sick leave (which the Claimant, in his oral evidence said he did not remember). Mr Narravula also sent emails to the Claimant hoping he was ok and feeling better (see, for example, at [1165] & [1174] of the Bundle)

109. As regards the April to May 2021 absence, Mr Berwick contacted the Claimant on a number of occasions (at [1626] [1629] [1640] & [1657] of the Bundle). Mr Berwick also chased the OH report and asked Genius Within to expand their remit to consider return-to-work support (at [1644]). However, the OH process was not completed before the Claimant resigned.

110. There was clear evidence of the Respondent offering support to the Claimant during his periods of sick leave and upon his return to work. Whilst the Claimant may contend that more should have been done for him, objectively the actions taken by the Respondent were reasonable and proportionate. The manner in which the Respondent managed the Claimant's sickness absences did not give rise to any breach of the implied term of mutual trust and confidence or any other term of the Claimant's employment contract.

The decision to reject the Claimant's grievance and grievance appeal without proper consideration of the issues he had raised with evidence in support; the processes were unfair, one-sided and pre-judged in favour of the owner-managers

111. A number of general points need to be made in respect of this ground of compliant:

111.1. Grievance processes are not legal or even quasi-legal proceedings. They are a mechanism for resolving concerns, disputes and issues in the workplace without having to resort to legal proceedings. Whilst it is best practice for them to accord with general principles of natural justice (so, for example, the Claimant should be able to explain his grievance; the Respondent should investigate the grievance and give those whom it is against an opportunity to respond; decisions should be reasoned and there should be a right of appeal; those against whom the grievances are raised should not be involved in deciding the grievances), the process and procedures are meant to be flexible, informal and free of the procedural and legal rigours associated with litigation.

111.2. Within that very wide margin of appreciation, it is for the Respondent, not the Claimant, to decide how to investigate and decide grievances raised by staff.

112. The Claimant's contract of employment set out the grievance procedure to be followed (Clause 17, at [719] of the Bundle) and it is worth recounting in full:

> If you have any grievance arising from your employment, you should first raise it informally with your line manager. If this does not resolve the matter, you should put the matter in writing, setting out the nature of the grievance and send your written complaint to your line manager, who will hold a formal meeting with you to discuss the grievance. After the meeting, your line manager will inform you of the outcome. If, in your view, this still fails to address your grievance, you may appeal the decision by setting out the grounds of your dissatisfaction in writing and sending this to a more senior line manager in your department, who will hold a meeting with you to discuss the appeal. You have the right to be accompanied at all formal meetings by a fellow employee.

113. In this case, the Respondent did far more than was required by its own contractual grievance procedure. It recognised that the Claimant's line manager and most of the senior management team were the subject of the Claimant's grievance, so the chair of the board, Mr Berman, was appointed, since he had had no previous dealings with the Claimant. In addition, and in accordance with the contractual procedure, the Claimant put his complaint in writing and met with Mr Berman. But Mr Berman then went on to undertake more detailed investigations before reaching his decision.

114. The Claimant was also given a right of appeal, which he was again permitted to express in writing. The Respondent decided to appoint someone external to the organisation in Mr Segal, who also had had no previous dealings with the Claimant.

115. The grievance and grievance appeal process followed and exceeded the Respondent's own contractual grievance procedure. The individual processes followed by Mr Berman and Mr Segal were fair, considered, proportionate and balanced. They both reached conclusions which were clearly open to them on all the evidence presented and as a result of their own enquiries and considerations.

116. The Claimant believes that the processes were unfair, one-sided and pre-judged in favour of then Respondent. They were not. Rather, the Claimant did not agree with the procedures followed or the outcomes reached. That is not the same as the process being unfair or pre-judged. As explained, it was for the Respondent to determine the grievance procedure and, having done so, it was followed. In addition, it was difficult not to conclude that the Claimant was demanding something which was simply not available to him at that time, namely a quasi-legal inquest into his numerous concerns.

117. The grievance process and the grievance appeal process undertaken by Mr Berman and Mr Segal on behalf of the Respondent were not unfair or biased or pre-judged. The Claimant's concerns and the evidence he relied upon in support of them were properly considered. Whilst his substantive concerns were not upheld, a number of recommendations were made in both reports, which was compelling evidence that both authors engaged with the Claimant's concerns in a considered and detailed way.

118. It follows that neither process breached the implied term of mutual trust and confidence nor any other term of the Claimant's employment contract.

<u>The Respondent telling the Claimant to accept the Grievance Appeal Outcome Report, which the Claimant states was to his prejudice and did not resolve the issues in dispute</u>

119. This allegation was misplaced and misconceived.

120. On 26 April 2021, after the Claimant had made a number of demands of Mr Segal specifically and directly, and of the Respondent generally following the publication of Mr Segal's appeal report, Mr Berwick emailed the Claimant and included the following (at [1633] of the Bundle):

> As previously stated, while I am happy to discuss the outcome of your grievance appeal with you during our conversation at 11:00 tomorrow, the appeal process (and therefore Mr Segal's involvement in that process) is now at an end and there is no further right of appeal.

121. The Respondent did not tell the Claimant to accept the grievance appeal outcome report. Rather, it told the Claimant, quite properly and reasonably, that the grievance process was concluded and that there was no further right of appeal. That was also consistent with the grievance procedure set out in the Claimant's contract of employment (detailed above).

122. That is not the same as telling the Claimant that he had to accept the outcome. Rather, it was confirmation that the process was finished and the outcome would not change. Whether or not the Claimant accepted the outcome was entirely a matter for him.

123. Informing the Claimant that the grievance process was at an end was not, in any sense, a breach of the implied term of mutual trust and confidence or any other term of his employment contract.

Peter Segal (responsible for the appeal) failing to author the whole or entire grievance appeal outcome report, which the Claimant says is evidenced by Mr Segal refusing to sign his name on the report that was sent to the Claimant by the Respondent on 19 April 2021

124. For the reasons already given, this allegation is not made out. I found that Mr Segal was the sole author of the grievance appeal report and the sole decision maker.

The delay in producing the Claimant's appeal outcome

125. Mr Berwick clearly explained in his evidence that time was taken from receipt of the Claimant's request to appeal the grievance decision to appoint an independent appeal officer, given that the Claimant was raising complaints against senior management and also against Mr Berman. Mr Berwick decided that he wanted board approval to both appoint an independent appeal officer and get agreement on who that should be. These steps, once again, reflected the seriousness with which the Respondent was taking the Claimant's grievance and its commitment to ensuring the process was fair, independent and impartial.

126. In addition, Mr Berwick described how he was also dealing with his day-to-day duties, the pandemic was on-going, the Christmas period intervened and there continued to be lengthy on-going correspondence from the Claimant which Mr Berwick had to deal with and respond to.

127. Once Mr Segal was appointed in January 2021, time was then taken with investigating, reviewing, interviewing and reaching and writing his decision.

128. The grievance procedure contained within the Claimant's employment contract does not include timeframes. There was no contractual obligation on the Respondent to undertake the process within any specific time period. Any alleged delay was reasonable and warranted. It was to ensure fairness and did not, in any event, prejudice the Claimant or prevent him from putting his case forward.

129. For those reasons, the time it took to produce the Claimant's grievance appeal outcome report did not breach the implied term of mutual trust and confidence nor any other term of the Claimant's employment contract.

The failure to meaningfully support the Claimant after his periods of sick leave in November 2020 and April-May 2021, including a failure to refer him to occupational health in relation to his work related stress

130. In so far as this pertains to the alleged failure to provide support following periods of sick leave, I repeat and restate the conclusions detailed earlier regarding the return-to-work meetings and support.

131. In his oral evidence, the Claimant accepted that there was no policy that the Respondent must refer any employee to OH after periods of sickness absence. There was no evidence of the Claimant asking for an OH referral during or immediately following his sickness absence in November 2020. If the Claimant had done so and it had been refused, that may have been a different matter. But he didn't.

132. In addition, and as found earlier, the Respondent agreed to refer the Claimant to OH in March 2021, prior to his April-May 2021 sickness absence and then proceeded to widen the remit of the OH referral when the Claimant went off sick with work-related stress in April 2021.

133. As such, there was no failure to provide meaningful support and the decision to not to refer the Claimant to OH following his November 2020 sickness absence or at any time before March 2021 was in no sense a breach of contract.

134. It follows that there was no breach of the implied term of mutual trust and confidence or of any other term of the Claimant's employment contract.

<u>The failure to instruct a suitable occupational health professional promptly after the Claimant's return to work after furlough in July 2020, or after the grievance process in November 2020, or after the grievance appeal outcome process in April 2021. This was compounded by failing to provide reasonable instructions to Genius Within to conduct a full occupational health report enabling them to provide recommendations in consideration of the Claimant's condition and how it could be managed in the workplace to enable him to be supported and perform in his role</u>

135. I repeat my earlier analysis. There was no policy requirement or obligation on the Respondent to refer any employee to OH after furlough, after a grievance process or after a grievance appeal process. There was also no evidence of the Claimant asking to be referred after each of these events. The failure to instruct OH after each of these events was not, therefore a breach of the implied term of mutual trust and confidence nor any other term of the Claimant's employment contract.

136. When the Claimant was referred to OH in March 2021, instructions were clear, detailed, appropriate and subsequently expanded upon by the Respondent to cover the Claimant's anticipated return-to-work following his sickness absence in April-May 2021.

137. Again, the manner in which the Respondent engaged with and instructed Genius Within was informed, professional and evidenced the continuing efforts by the Respondent to help and support the Claimant in his work and his working environment.

138. There was, as such, no breach of the implied term of mutual trust and confidence or of any other term of the Claimant's employment contract.

<u>Not ensuring the HR records for the Claimant were corrected to reflect his proper contribution to the company and its business</u>

139. The Claimant made reference to the document he created setting out the projects he was involved in and asking the Respondent to include details of

each project's value to the Respondent and any further comments (which Respondent did not do, and which is at [1218] of the Bundle).

140. There was no basis, requirement or reason for the Respondent to do that and no basis for such information to be part of the Claimant's HR record (in reality, it spoke to his capability and competence; his reward for doing his job was his salary). To the extent that the Claimant says that the Respondent failed to engage with the document at [1218] and/or failed to amend his HR records as a result, there was no conceivable breach of the implied term of mutual trust and confidence or of any other term of the Claimant's employment contract.

141. In his submissions, the Claimant claimed that his EPR document was not complete (as it did not contain details of a complaint which had been made against him to Mr Narravula by another employee in 2019). The Claimant submitted that that omission rendered the EPR document false and misleading. It did not. There was no obligation, contractual or otherwise, on the Respondent to include the complaint in the Claimant's EPR. It was entirely a matter for the Respondent how it managed the complaint about the Claimant and it chose to do so in a sensitive and considered manner.

142. Once again, there was no breach of the implied term of mutual trust and confidence or any other term of the Claimant's employment contract.

Conclusion: Unfair Dismissal

143. The Claimant maintains that many of the Respondent's decisions were characterised by dishonesty, deception and were part of an overarching plan to get rid of him. If that were the case, why did they bother furloughing him, trying to improve his performance, raising his salary, dealing with his grievance and grievance appeal, instructing OH? All those actions were utterly at odds with the Claimant's allegations.

144. The reality, however unpalatable it may be to the Claimant, is that there was no plan, there was no deceit, there was no conspiracy. Rather, there were genuine and understandable concerns about his performance and the Respondent sought to manage those in a supportive, effective, reasonable and considered way.

145. For all the reasons set out above, the Respondent did not breach the Claimant's contract of employment, whether fundamentally or at all. There was no breach of the implied term of mutual trust and confidence and no breaches of any other term of the Claimant's employment contract.

146. It follows that the Claimant was not permitted to treat his employment contract as repudiated and his resignation on 1 July 2021 was not, in law a dismissal. It was a resignation.

147. As the Claimant was not dismissed, his complaint of unfair dismissal cannot succeed and is dismissed.

Affirmation and/or waiver

148. As I have found that there were no breaches of contract, fundamental or otherwise, whether the Claimant affirmed and/or waived any breach falls away. Similarly it is immaterial to consider whether the Claimant resigned in response to any fundamental breaches of contract, as there were none (fundamental or otherwise).

Conclusion: Wrongful Dismissal

149. As there were no breaches of the Claimant's employment contract, still less fundamental breaches, the Claimant's resignation was not, at law, a dismissal and, as explained, his complaint of constructive unfair dismissal is not made out and is dismissed.

150. It follows that, as that Claimant was not dismissed (constructively or otherwise), he had no contractual or statutory right to notice and his wrongful dismissal claim is also dismissed.

Employment Judge S Povey

3 January 2024