



EMPLOYMENT TRIBUNALS

Claimant

Mr V Kandris

Respondents

v

(1) Costain Engineering &
Construction Limited; and
(2) Costain Group Plc

Heard at: Bury St Edmunds (by video) **On:** 20—22 November 2023

Before: Employment Judge T Brown

Appearances

For the claimant: In person
For the respondent: Mr R Fitzpatrick, counsel

REASONS

Background

1. The Claimant worked for a company in the Costain Group – I will have to return to the identity of his employer later in my decision – as a Senior Internal Auditor from 1 December 2020 until 9 December 2021, when, there is no dispute, his employment ended. There is a dispute about whether termination was by the employer and therefore a dismissal, or by mutual consent and therefore not a dismissal. This too is an issue to which I will have to return.

The proceedings

2. Following ACAS Early Conciliation against two Costain entities, Costain Engineering and Construction Limited which is the First Respondent, and Costain Group Plc, which is the Second Respondent, between different start dates in January 2022 and 22 and 26 January 2022, on 14 February 2022 the Claimant presented this claim to the Employment Tribunals complaining that he had been unfairly dismissed.
3. The Claimant had not been employed by either company for two years and therefore did not qualify for the general right not to be unfairly dismissed under s.98 of the Employment Rights Act 1996 (henceforth “the 1996 Act”). But he contended in his claim that he had been dismissed for the

automatically unfair reason that he had taken time off for family reasons within the meaning of s.99 of the 1996 Act, in particular, time off under s.57A.

4. Section 99 of the 1996 Act provides for the prescription in secondary legislation of prohibited reasons for dismissal and regulation 20 of the Maternity and Parental Leave Regulations 1999 provides that an employee who is dismissed is entitled under s.99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if the reason, or principal reason, for dismissal is connected with the fact that an employee took or sought to take time off under s.57A of the 1996 Act.
5. The Respondents defended the claim contending that the correct Respondent was the First Respondent, Costain Engineering and Construction Limited, that the Claimant's employment had ended by mutual consent, but also that his dismissal was because of the complete and irretrievable breakdown in the relationship between the Claimant and his Manager and poor levels of performance outlined to the Claimant in an Informal Performance Improvement Plan. Perhaps oddly, the Respondents' grounds of resistance set out alternatively-expressed reasons for dismissal later at paragraph 19, in responding to a complaint of ordinary unfair dismissal, namely the breakdown in relationship, alternatively, capability. Whilst those reasons were set out twice, they appeared to be in essence the same.

Legal framework and issues

6. There is no dispute as Mr Fitzpatrick made clear in a helpful opening note, that the Claimant took time off which satisfied the requirements of s.57A of the 1996 Act, in particular, satisfying the first three questions in Qua v John Ford Morrison Solicitors [2003] ICR 482.
7. A reason for dismissal is a set of facts known to the employer or it may be of beliefs held by the employer which caused the employer to dismiss the employee: see the Court of Appeal's decision in Abernethy v Mott, Hay and Anderson [1974] ICR 323. In identifying the reason for dismissal the question is not whether it is a reasonable reason, only whether it is the genuine reason.
8. The issues for me were, therefore:
 - 8.1. Who had employed the Claimant?
 - 8.2. Had the Claimant been dismissed or did his employment end by mutual agreement?
 - 8.3. And if dismissed, what was the reason or principal reason for his dismissal?
9. In other words, what did the relevant Respondent genuinely believe or know in deciding to dismiss the Claimant?

10. Since the Claimant did not have two years' continuous service at the date of his dismissal, there is also no dispute that he must establish the reason for dismissal on the balance of probabilities. The underlying civil burden of proof in relation to particular facts rests on the party asserting the fact; in other words he who asserts must prove. It is not suggested here that a decision maker was misled or manipulated into adopting a false reason for dismissal, so I did not need to consider this paradigm.
11. There has been an unfortunate procedural history to this claim, largely described by Employment Judge Anstis following the Hearing on 23 October 2023, which was to be the first day of the Final Hearing of this claim. In a written opening note dated Thursday 16 November 2023, the Respondents through Mr Fitzpatrick, explained that its witness Miss Michelle Snashall would not be giving oral evidence because she had ceased to communicate with the Respondents and their representatives. The Respondents sought to rely instead on oral evidence from Ms Satinder Williams for whom a witness statement dated 15 November 2023 was served.
12. At the start of the Hearing before me, the Claimant applied to exclude the evidence of Ms Snashall on the basis that she would not be giving oral evidence and although, in form, the matter came before me as an application by the Claimant also to exclude the Statement of Ms Williams, in substance this was an application by the Respondents to rely on witness evidence served late and in breach of the Tribunal's Case Management Orders. The Claimant submitted that if I were to exclude all of this evidence I should strike out the Respondents' Response.
13. For oral reasons which I gave on the first day of the hearing, I decided to admit the Respondents' evidence conditionally, that is admitting it in what would in former times have been called *de bene esse*, to use the Latin (or 'for what it's worth'). I decided that I would receive all the evidence the parties wished to put before me and then decide in light of it what was fair to take into account. The Claimant indicated after I had given my oral reasons that he was content for the admission of the evidence since he would have a chance to cross examine and make submissions on it.
14. As a result of my decision on the admissibility of the evidence, the strike out application, which was contingent on my refusing to admit it, did not call for determination. But even if I had struck out the Respondents' response, the Claimant would still have had to prove his claim since the burden of proof was on him. As will be apparent from my findings of fact below, I have given essentially no weight to Ms Williams' evidence and I am in some respects critical of it. I have given weight to Ms Snashall's evidence but only where her evidence concerns matters that the Claimant cannot have known about and where it is adequately supported by contemporaneous documentation.
15. I reached the following findings of fact on the balance of probabilities.

Findings of Fact

16. The Respondents are part of a group of companies. Costain Engineering and Construction Limited is, as its name suggests, an engineering and construction business working in the energy, auto, transportation and defence markets. Costain Group Plc, as is apparent from its name, is a publicly listed company and the Group parent of the First Respondent Costain Engineering and Construction Limited. In what follows, although there are two respondents, I will refer to “the Respondent”, to mean the Claimant’s employer, though I will resolve this issue later in my decision.
17. The Claimant is an Internal Audit Professional. Before joining Costain he was an Assistant Manager at Deloitte UK in the Audit and Assurance Department. He was contacted by a recruiter to work for Costain in 2020, not for the first time, and after interviews in August and September 2020 was offered by a letter dated 22 September 2020, and accepted on 25 September 2020, employment with Costain Engineering and Construction Limited (I will hereafter refer to them as Costain Engineering), as a Senior Internal Auditor.
18. The terms of the written offer of employment are in the agreed Hearing Bundle which I used, at pages 100 – 108, and I will not repeat them in full here, although they should be treated as incorporated by reference into this decision, except to note that the contract identified the employer as Costain Engineering. The Claimant’s payslips however refer to the organisation name as Costain Plc. It will be apparent that the Claimant’s employment began during the Covid-19 pandemic and he worked almost entirely remotely. His Line Manager was Ms Michelle Snashall, Audit Manager, who reported in turn to Elizabeth Tarr, Head of Internal Audit.
19. The responsibilities of the Costain Group’s Internal Audit function included delivering an Internal Audit Plan, that is delivering internal audits against a plan of such audits.
20. The Claimant was subject to a three-month probationary period which he passed without extension, termination or any apparent expression of concern. His salary increased in April 2021. In an undated Teams chat relating to what I infer to be that salary increase, the Claimant said that he had just seen that he had got a raise in his salary and thanked Michelle Snashall, to whom he wrote. Ms Snashall, in her reply, said amongst other things,

“I know things have been a little tough for you but we’re glad to have you as part of the Team.”
21. The Claimant responded thanking Ms Snashall and saying that he was happy to be here and to be part of the team.
22. Also in April 2021 there was a discussion by email about the Claimant taking a substantial period of annual leave between 19 July 2021 and

13 August 2021. This was approved by Ms Tarr, albeit not without some misgiving expressed by her.

23. During the same period, the Claimant passed an exam of the Institute of Internal Auditors in Essentials of Internal Auditing, as well as an Executive Leadership program at the Saïd Business School, which is part of Oxford University. It is evident that the Claimant was ambitious, and focused on his effective personal development.
24. In July 2021, therefore some time after the Claimant's completion of probation, concerns were raised by Ms Tarr about the Claimant's work in response to the sending of a draft of a Work Winning Report. Ms Tarr provided feedback on 1 July 2021. This said:

"Can you please go back through the report and think about the following
- Our findings should not reference anything we haven't explained in the section above
- The initial section in each scope area should explain what our process says should be done, where and what testing we performed to check the function of the process, what we found in our testing.
- We have already made the point about Dynamics in our control risk management audit. I am happy to make the point again, once. But in this report we should be explaining what we found in the the [sic] manual procedures behind that to check that the tests are happening and writing findings on that basis. Costain is well known to have rubbish documentation, but that doesn't mean the controls aren't being performed.
- I'm not sure the report has been able to get across the systematic control failings that must be evident to issue an Unsatisfactory report
- We should have an assessment of the effectiveness of the new controls they are going to implement and whether they will address the gaps we have found."

25. Ms Tarr, in the same email chain, there having been a reply from the Claimant at 16:56 which said,

"Thank you, I will go through the Report again and make the necessary changes"

wrote privately to Ms Snashall at 17:10 on 1 July 2021 saying,

"I think we are going to need to start checking up on his work more often [referring to the Claimant] until he gets into the right habits that he may find is awful and I am really disappointed with him. It is unprofessional and doesn't match the Report, has gaps all over it and having just checked there is no documentation in our file structure."

26. Ms Snashall replied to Ms Tarr the same day at 19:42, saying that she had specifically talked through with the Claimant how to structure the file in TeamMate, but that the Claimant had felt that what Ms Snashall was suggesting was overkill and unnecessary and that there had been several calls on Work Winning when Ms Snashall had told the Claimant what he needed to do and the information he needed to obtain. But, she said she

should have been keeping a closer eye on the Claimant's work which she would do going forward. She went on to say,

"...Bill does get very defensive with me but I am putting it down to the fact that he is quite young and doesn't have much experience and trying to gauge him on how to accept direction in his role and also the fact that sometimes he just has to do things a certain way even if he doesn't agree. I can speak to him first thing based on your last email to him re Team Mate and the file structure, but don't mind if you want to have a conversation with him directly."

27. Ms Tarr replied on 2 July 2021 at 09:12 saying that she had just spoken to the Claimant and that the Claimant would likely give Ms Snashall a call too, as Ms Tarr had told the Claimant that Ms Snashall also had comments. She went on,

"...I said he needs to listen to you when you give him pointers as you have done this lots of times and know what is expected. I didn't mention what you said below, or allude to it in any way. My main message to him was the unprofessional standard of his work in Team Mate and in our files that there is no record of the work he has performed, so what am I to take away from that, that he has presented a Report that is unsatisfactory, largely based on documentation but he hasn't done that himself. That Team Mate is not optional, basically not acceptable, do better and I don't want to have to have the conversation again. Please don't take this as a reflection on you, both of us need to work out how to manage him better to get what we need."

28. Ms Snashall replied acknowledging that email.

29. The Claimant takes issue with the reasonableness of this feedback about his performance and from his evidence I accept that there are very good grounds for him to have found the assessment of his work unfair and unreasonable. In my judgement there appears to have been a genuine difference of view between the Claimant on the one hand who had prior professional audit experience, including experience at a well regarded organisation, Deloitte, and who considered Costain's processes to be in substantial respects absent or lacking, and Ms Tarr who was the leader of the Costain Internal Audit function. Although I did not hear oral evidence from either Ms Snashall or Ms Tarr, I considered that the concerns expressed by them in the email exchange to which I have just referred, were genuine concerns, even if they were not reasonably held. They may well have arisen as a result of a difference in view or opinion as to what was appropriate or required. Indeed, Ms Snashall herself had noted in her exchange with the Claimant that sometimes the Claimant needed to do things even if he disagreed that they were required. Also notably, these expressions of negative feedback cannot have been caused by the Claimant's later request for time off to care for his father or for taking that time off because he had not yet taken time off.

30. Also on 1 July 2021, at page 220 in the Hearing Bundle, Ms Tarr wrote to the Claimant saying:

“Bill, please can you also finish your documentation in Team Mate, we have discussed previously Team Mate is not optional and I should be able to review the complete record of your work alongside the Report. “Ten random opportunities, no docs and not possible to ensure process has been followed”, this is not an acceptable finding to record in our records, I am disappointed.”

31. She then went on in the email and asked the Claimant to set up an HS2 file before Monday and that she would be checking how that work was progressing in TeamMate throughout the next week.

32. The Claimant responded three minutes later at 1706 saying,

“No problem, I will complete all of the Team Mate steps tomorrow.”

33. The Claimant then did not take issue with the reasonableness of this instruction and again I am satisfied that Ms Tarr genuinely considered that the quality of the Claimant’s documentation in TeamMate was not acceptable, however reasonable or unreasonable that genuine consideration may have been. Again, it cannot have been influenced by the Claimant taking time off because he had not yet done so.

34. At the Claimant’s mid-year review in August 2021, his self-assessment was of superior performance; that is Grade 4 on the Respondent’s Performance Rating Matrix. Ms Snashall’s assessment was of partially successful performance, that is Grade 2 or rating 2 on the same matrix. Again, the key issue is less the reasonableness of the views either of the Claimant on the one hand, or Ms Snashall on the other and more whether the view of Ms Snashall was a genuine view held by her. Again, in particular it was not a view that could have been caused by a request for time off work which had yet to be made, and it was consistent with earlier assessments of the Claimant’s performance.

35. Ms Snashall said in her narrative in support of the rating which she had given,

“Bill’s performance has been partially successful, he has settled into the role and demonstrated willingness to get involved and carry out various assignments. However, the output of his work does not always meet the standard required in the Internal Audit Team. Focus for balance of year needs to be not only on delivery but on the quality of the work delivered. We have agreed an Informal Performance Improvement Plan focused on the Work Winning Audit which will help Bill reach the required standard in carrying out field work and writing the Report. I have also asked Bill to think about how he works in order to recognise a balance between challenging back which demonstrates knowledge and engagement, but also realises the point at which he needs to follow instructions from both the Head of Internal Audit and Risk and I.”

36. That reference to the Head of Internal Audit and Risk I am satisfied was a reference to Ms Tarr.
37. As referred to in that mid-year review narrative, an Informal Performance Improvement Plan was put in place. The Claimant was sent documents by Ms Snashall on 19 August 2021. In her covering email Ms Snashall said,
- “The Performance Improvement Plan is for us to keep on file and as I mentioned, this is an informal process. If the Plan is not delivered then we may need to have a discussion about putting a more detailed Formal Plan in place.”*
38. The Performance Improvement Plan itself set out four areas for improvement, namely: Audit, Folder Structure, Field Work Reporting and Team Mate, the target dates for which were 6 September 2021, with envisaged weekly catch-ups until those due dates.
39. The Claimant provided a Work Winning Audit Testing Plan to Michelle Snashall, by email on 23 August 2021 and chased her for a meeting on 25 August 2021.
40. Ms Williams gave opinion evidence, or commentary, about these email exchanges. I do not consider that commentary helpful and I prefer the Claimant’s evidence that the exchanges showed him chasing Ms Snashall for a response. More generally, I did not consider Ms Williams’ commentary on documents especially helpful in reaching my decision. She was no better placed merely to comment on documents which were new to her than anyone would be and several of her comments from the position of ignorance of the facts were in my judgement unreliable. For example, she made reference to a particular document as evidence of the Claimant being on jury service, where the dates which the document bore and indeed the description of the document in the index to the bundle did not support the evidence that the document was proof of the Claimant’s attendance on jury service. It was also apparent to me that she had adopted parts of Michelle Snashall’s evidence without checking for herself that it was reliable and when a review would have shown that it was unlikely to be reliable. In that regard, Ms Williams made reference to the Claimant taking seven days of leave where the leave record showed that the Claimant had only taken six days of leave. It appeared from her oral evidence that Ms Williams had simply adopted unquestioningly the evidence of Ms Snashall, even though it was plainly wrong.
41. The Claimant provided a Work Winning Draft Report on 2 September 2021, which he noted was four days before the deadline for doing so in the Informal Performance Improvement Plan. He said in the covering email to that Draft Report,

“Please feel free to change anything that can be phrased differently, adjust any of the ratings to what you think is suitable and / or delete any

parts of the Report which you think are not needed. Regarding Work Winnings progress, I have added an extra paragraph under the conclusion to reflect Roger's comments, he will be sending through a paragraph later on today so we can replace this with Roger's summary if you like."

42. The Respondent suggests this is evidence of poor performance by the Claimant. In my opinion it shows some lack of confidence, but also the Claimant had been criticised for being over challenging and in my judgement this is evidence of him responding to feedback and demonstrating a willingness for give and take.
43. Michelle Snashall's witness statement, which I remind myself was not tested in cross examination and was not evidence given on oath, however, was critical of the Claimant's approach as set out in this paragraph. I consider that her evidence, while not evidence of what was objectively reasonable is nonetheless likely to be reliable in identifying ongoing subjective concerns, and genuine subjective concerns at that, about the quality of the Claimant's work, although I accept the Claimant's evidence that he had a difference in perspective as to what was appropriate. There is also, I note, no evidence of Michelle Snashall feeding back to the Claimant so that he understood that difference between his perspective and that of Michelle Snashall.
44. Elizabeth Tarr commented on the draft Work Winning Report. Her comments are shown in the copy of that Report in the bundle in blue comment boxes. In my judgement, many of those comments are critical of aspects of the Report and somewhat terse in expression. They do not, in my judgement, suggest a positive assessment of the draft report. Again, the Claimant says that Ms Tarr's position as expressed in those comments was not a reasonable one and that he acted on feedback that he was given. I accept that he may very well be right about that. Again, in my judgement, this is evidence of Ms Tarr's lack of appreciation for the Claimant's work and the quality of it *before* he had made a request for time off to take of his Father.
45. In an undated message in the bundle from Mr Roger Foot to the Claimant, Mr Foot said at page 245, the message sent at 1601,

"I thought I'd let you know that even if some people don't appreciate your work, there are those much higher up in the company who are looking to changing exactly what you described as wrong. Keep the faith buddy."
46. Some eight minutes later Mr Foot wrote in response to an expression of appreciation by the Claimant,

"You're welcome, hate to see a good man being penalised for doing his job properly."
47. This exchange too, in my judgement, suggests that others, here Mr Foot, perceived a subjective lack of appreciation for the Claimant's work by

others and a difference of opinion or perception between the Claimant and others about his role and the output of the Internal Audit function.

48. I infer from the surrounding circumstances that the reference to being penalised and to a lack of appreciation relate in particular to Ms Tarr. Nobody else has been suggested as being unappreciative of the Claimant's work.
49. The Claimant's suggestion that the position of Ms Tarr was not reasonable may very well be right; it receives some support in this exchange from Mr Foot. I remain satisfied that it was a genuine lack of appreciation in response to the Claimant's work and in particular that it was a lack of appreciation which was not motivated and could not logically have been motivated at this stage by the Claimant' seeking or taking time off work. That is because of this cogent evidence being concerns raised and of a lack of appreciation *before* a request for time off.
50. The Informal Performance Plan ended on 6 September 2021. The Claimant rightly observes that he was not moved straight away to a Formal Performance Improvement Plan, he was assigned an Internal Audit into Robotics Process Automation which involved working with all four of the most senior Stakeholders in the company. He suggests that this is not consistent with his managers having genuine beliefs in his ongoing poor performance, but in light of other contemporaneous documentation and since the Internal Audit function was so small that it does not appear that work could readily have been assigned elsewhere, I do not consider that the assignment to the Claimant of the Robotics Process Automation Audit is strong evidence countering the presence at around this time of genuine performance concerns.
51. In a private exchange in the Bundle dated 8 October 2021 between Ms Snashall and Ms Tarr, Ms Snashall in sending the first message on 8 October 2021 at 1031 said,

"Bill has just heard his Dad has cancer."

Ms Tarr replied at 1032 saying,

"Okay, thanks for letting me know."

Ms Snashall replied to that message at 1032 saying,

"So probably not a good time to discuss what we were planning."

Ms Tarr replied at 1033 saying,

"Maybe but we do still need to, I am going to see how it goes."

52. Ms Snashall's witness evidence at paragraph 23 was that these exchanges were evidence of a decision that had been made to move the Claimant to a Formal Performance Improvement Plan.
53. The Claimant suggested that these could be evidence of other decisions or types of decisions by Ms Snashall and Ms Tarr. While I accept that they could be evidence of a different decision, Michelle Snashall's evidence, even though not tested in cross examination, is in my judgement relevant. She was to be a witness and signed her Witness Statement attesting to its truth. Assessed on the balance of probabilities, there is no cogent evidence to counter Michelle Snashall's evidence that a decision had been reached to start a Formal Performance Improvement Plan. The fact that Michelle Snashall and Elizabeth Tarr were discussing withholding discussing that is consistent with Michelle Snashall's evidence. Whatever was going to be communicated to the Claimant was evidently not pleasant or neutral because otherwise there would be no need to refrain from communicating it. Nor do I consider that the delay between 6 September 2021 when the Informal Performance Improvement Plan ended and 8 October 2021 when I am satisfied the conversation referred to implementing a Formal Performance Improvement Plan is a delay which undermines Ms Snashall's evidence that a decision had been made to start a Formal Performance Improvement Plan.
54. In my judgement that is consistent with the apparent ongoing subjective perceptions of both Ms Snashall and Ms Tarr. Once again the question for me is not whether these were reasonable viewpoints for them to hold, but whether they were genuine. Again, importantly in the context of the issues for my decision, the 8 October 2021 exchange pre-dates the Claimant's request for time off to care for his father.
55. The Claimant's evidence was that on 12 October 2021, having learned some days previously that there was a high probability that his father had colon cancer, his father's doctor urgently advised hospitalisation for the removal of a large intestine tumour. The Claimant promptly informed Michelle Snashall, explaining his need for time off to take care for his father. Recognising the potential disruption for that absence, he suggested working remotely from Greece and Michelle Snashall assured him that she would discuss this with Elizabeth Tarr and respond.
56. A meeting then took place on 13 October 2021 at the Respondent's Maidenhead Head Office. This was the first occasion during the Claimant's employment at Costain when the team was gathered at Head Office instead of working remotely from their various homes. The Claimant says that, despite being emotionally devastated and exhausted from a sleepless night following the distressing news that he had received, he managed to compose himself and went to the office as planned.
57. I accept the Claimant's evidence at paragraphs 11 and 12 of his Witness Statement, which should be treated as incorporated into these Reasons. I accept among other things, his evidence that Ms Tarr was unempathetic

and cold and that Ms Snashall was unsupportive of the Claimant in light of Ms Tarr's position. This is evidence that has not been countered and it is direct evidence from the Claimant. The Claimant took umbrage at this lack of support or empathy shown by Ms Tarr.

58. While this related to the Claimant's father's serious ill health, the behaviour as described was in relation to the fundamental issue of a lack of empathy being demonstrated by Ms Tarr for the Claimant and his situation. The Claimant says that Paul Brady and Tidi Munuraze, colleagues of his, were shocked by Ms Tarr's reaction. This does not appear from the Claimant's narrative to be a reaction caused directly by a request for time off, but rather in the context of the broader issue of the Claimant's father's ill health and the emotional impact of that on the Claimant. Understandably it seriously upset the Claimant and I am satisfied that Ms Tarr's cold and unempathetic response caused immediate damage to the relationship between the Claimant and Ms Tarr.
59. At 1600 the same day, the Claimant, Ms Tarr and Ms Snashall met. The Claimant explained in person his need for time off. Again, the Claimant has given an account of this in his Witness Statement at paragraph 15 and 16 which I accept in the absence of evidence to the contrary, is an accurate account of the meeting which took place. While this showed, I am satisfied, a hostility to the Claimant's request for time off, this was a hostility shown, in light of my earlier findings of fact, in the context of genuine subjective views about the Claimant's performance on the part of Ms Tarr and Ms Snashall and in the context of a frustration as a result of these circumstances of their intended plan to move to a Formal Performance Improvement process.
60. On the Claimant's side I am satisfied that the context to this 1600 meeting included the Claimant's upset at Ms Tarr's earlier unsympathetic response to the very worrying news the Claimant had received.
61. Under the terms of the Respondent's Compassionate Leave Policy, the Claimant's request for leave met the terms of the policy.
62. That is because the terms of the Compassionate Leave Policy provide that compassionate leave may be extended at the discretion of the company to care for a seriously ill family member, the very circumstances which the claimant was experiencing. Ms Williams suggested in her witness statement, or appeared to suggest, that the basis of the Claimant's request for leave did not meet the terms of the Compassionate Leave Policy because she considered the policy to provide for leave in the case of bereavement. In my judgement, that was incorrect and it was surprising evidence from a senior human resources professional, given the express terms of the Compassionate Leave Policy.
63. However, Ms Williams' evidence appears to suggest an overly restrictive approach to compassionate leave by somebody other than Ms Tarr at Costain.

64. The Claimant was then absent from the following day, 14 October 2021 until 1 November 2021. I note that under the terms of the Compassionate Leave Policy ordinarily only up to five days' paid leave will be provided and therefore the fact that the Claimant was offered a substantially longer period would not ordinarily have justified payment under the Compassionate Leave Policy for the duration of that absence. He was initially on paid leave, using his holiday, and from 25 October 2021 he went onto unpaid leave. His colleagues, including Ms Snashall, as can be seen from WhatsApp messages being sent between them and the Claimant at this time, were supportive. But Ms Tarr did not interact with the Claimant; she appears from the evidence to have remained a cold and distant managerial figure.
65. I am satisfied that the Claimant took no more time off than was necessary and returned in accordance with a timetable that he had mapped out before his leave began, namely that he would return when his father was home from hospital and chemotherapy had been arranged.
66. This period of leave by the Claimant to take care of his father was no longer than a period of a conventional holiday and it was a considerably shorter period than the time the Claimant had taken off between July and August 2021 for a holiday. There is no evidence that his absence caused particular problems.
67. The fact that the Claimant was allowed to take time off, of course is not itself good evidence that the Respondent more generally was acting lawfully because the Claimant had a statutory right to take time off. The Respondent could not have stopped him from taking it. The fact that there is no evidence that the Claimant's time off caused difficulties, certainly no contemporaneous evidence of complaining or griping by email, is in my judgement material. So too is the fact that there was no suggestion that the Claimant would require further time off in the future to care for his father.
68. A further email was sent by Ms Tarr to Ms Snashall on 18 November 2021, in which Ms Tarr said,
- “Can you check with Bill where he is with the Audit [referring to the Robotics Audit] there is nothing in the Reporting folder to suggest he is drafting a Report, TeamMate isn't complete and checking some of the field work folders shows that they are empty.”*
69. This email is not different in tone or content to the earlier emails from July 2021, that is it demonstrates essentially a continuum of similar types of concern being expressed by Ms Tarr rather than any kind of new concern. It suggests a subjective belief in poor performance by the Claimant. Again, the Claimant takes issue with the reasonableness of the criticisms being conveyed by this email, but that in and of itself does not undermine the genuineness of the view that Ms Tarr was expressing to Ms Snashall.

70. The Claimant sent a draft Report in relation to the Robotics Audit on 19 October 2021. This was not reviewed until 24 October 2021 by Ms Snashall.
71. The Claimant does not appear to have been alone in having a difficult working relationship with Ms Tarr. In a Teams conversation on 22 November 2021, between the Claimant and his colleague Tidi Munuraze, the Claimant at 11:19 messaged saying,

“Are these calls getting more and more awkward or is it just me?”

Ms Munuraze replied,

“Not just you, to me too. I dread before logging in to them. Think they can just be once a week maybe, twice is too much lol.”

72. This too, in my judgement, tends to suggest that Ms Tarr’s management style was generally poor, rather than there being a particular targeting of the Claimant. The Claimant’s evidence is that upon his return to work he sensed a hostile atmosphere. Michelle Snashall had distanced herself from him and he was subjected to constant micromanagement by Elizabeth Tarr via Michelle Snashall. Additionally, he found himself unfairly blamed for tasks that had not been completed by Michelle Snashall.
73. I accept this evidence, but in my judgement, on the balance of probabilities the likely reason or principal reason for it remained the genuine subjective perceptions of the Claimant’s performance which had informed Elizabeth Tarr’s conduct towards the Claimant before 13 October 2021.
74. The Claimant refers to a specific instance of behaviour on 26 November 2021, over three weeks after his return to work from time off to care for his father. He says that during a Microsoft Teams meeting that day involving Ms Tarr, Ms Snashall and himself, Ms Tarr had placed blame on him for not finalising the Audit Report on time. He says that throughout the meeting Ms Tarr had displayed passive aggressive behaviour in an attempt to humiliate the Claimant and undermine his work, rather than fostering a constructive meeting.
75. I accept that Ms Tarr’s behaviour at that meeting was as the Claimant describes it. Again, there has been no evidence on oath or affirmation or subject to cross examination to counter it. However, the Claimant has not satisfied me that it is more likely than not that the reason for this behaviour was the fact that he had asked for or taken leave to care for his father rather than Ms Tarr’s enduring, subjective, concerns, of questionable reasonableness and fairness, about the Claimant’s performance. Ms Tarr appears to have been picking on the Claimant, but I am not satisfied that it is more likely that she was doing so because of the Claimant’s request for and taking of time off, rather than because of her genuine views about his performance. The fact that Ms Tarr’s criticism was objectively unfair is not

such good evidence that it was not genuine, that it outweighs the evidence of genuine subjective performance concerns which are seen in the contemporaneous documentation over a long period.

76. By this time the Claimant believed, I am satisfied, that his treatment was solely or predominantly because he had taken time off. The Claimant's account in his evidence is that he proceeded during the meeting to give a detailed walk through of the work that he had done, but that Elizabeth Tarr was actively seeking to find fault in his work and that having become frustrated at Elizabeth Tarr's persistence in directing the Claimant to follow her instructions and her expressions of disappointment, he said that he would no longer tolerate her mistreatment and bullying due to his earlier leave of absence for his father's care. His evidence again, which cannot sensibly be countered is that Ms Tarr asked if he was resigning and the Claimant said that he had no intention of resigning, but would not endure further mistreatment and indicated his intention to escalate the matter to Human Resources.
77. Ms Tarr then requested an example of when she had bullied the Claimant and the Claimant reminded her of the meeting on 13 October 2021 at which Ms Tarr had said, "*deadlines are deadlines*" after being informed of the Claimant's father's condition. The Claimant says that Ms Tarr acknowledged that she had said this and that her tone subsequently shifted, suggesting a separate discussion to address that, but the Claimant insisted on escalating the matter to Human Resources.
78. On 26 October 2021, in other words the same day, likely after this meeting, Ms Tarr wrote to Michelle Snashall in relation to an Outlook invitation that she had received. She asked Ms Snashall,
- "Did you add the Human Resources names into Bill's invite, or did Bill include them? I was just going to respond to him and say HR recommended just us three, we can sort on Monday morning."*
79. This appears on its face to be an attempt by Ms Tarr to exclude Human Resources from a grievance process, although in fact, a member of the Respondent's Human Resources function, Georgia Amblet, was later involved in a meeting which took place on 29 August 2021.
80. The Claimant refers in his witness statement to paragraph 3.1 of the Respondent's grievance process which concerns the handling of informal grievances. He notes that paragraph 3.1 provides that if a grievance concerns the employee's line manager they should instead raise the grievance with a senior manager and if it is not possible to raise it with a more senior manager, the employee should discuss their concerns with the HR department. He also refers to paragraph 3.4 of the Respondent's grievance process, which concerns formal grievances.

81. There appears, therefore, to be some conflation of separate parts of the grievance process, paragraph 3.1 which deals with Informal Grievances and paragraph 3.4 which deals with Formal Grievances.
82. Ordinarily a grievance against a person should be considered by someone else, rather than the person complained about. This is a principle true of both Informal and Formal stages of the Respondent's Grievance process, as well as a principle of more general application in relation to employee relations.
83. The exclusion, or attempted exclusion, of HR from the process, the apparent conflation by the Claimant of the Respondent's informal and formal processes, the absence of a written grievance, and the involvement of Elizabeth Tarr in a grievance which was about her, in my judgement likely complicated and obscured a process that would have made better sense if a grievance had been sent in writing to Human Resources or otherwise raised with Human Resources, given the nature of the person complained about. Human resources, once aware of the grievance, did not grapple with it effectively; Georgia Amblet does not seem to have been a senior HR professional.
84. The Claimant's complaint was not put in writing. Ms Tarr could not sensibly resolve a grievance which was being brought against herself and since the meeting on 29 November 2021, self evidently did not succeed in resolving the Claimant's concerns, it was, in my judgement, open to the Claimant to raise thereafter a Formal Grievance in writing to be considered by somebody within the Respondent's organisation senior to Elizabeth Tarr. But the Claimant did not do so. His approach to the grievance, and this is in no way a criticism of him, was somewhat unorthodox. The Claimant's grievance was factually distinct from his request for time off and for the taking of time off. In my judgement nobody within the Respondent appears to have grappled with the appropriate approach to the concerns that the Claimant had raised at the meeting on 29 November 2021.
85. The Claimant then took some time off work on the grounds of his health. He wrote to Michelle Snashall on 30 November 2021 at 0810 saying,

"I would like to inform you that I feel stressed and need some time off. I have been trying all these months to stay strong and work through the issues that I mentioned over our call with HR yesterday, but now it has gotten to a point where it is unbearable and it is taking a toll on my mental health."
86. The circumstances viewed as at 30 November 2021 did appear to suggest an essentially fundamental breakdown in the working relationship between the Claimant and Ms Tarr about him, the Claimant, having raised a complaint. I am satisfied that Ms Tarr continued to have genuine concerns about the quality of the Claimant's performance. Meanwhile the Claimant genuinely believed that he was being victimised for taking time off and it is likely that Ms Tarr in turn saw the Claimant's subjective belief that he was

being picked on as a blocker to moving forward in a way which met her expectations. This was, so assessed, a working relationship that very much appeared to have broken down. In my judgement the roots of that breakdown preceded the Claimant's request for time off and his taking of that time off.

87. I am satisfied that it may well be that Ms Tarr's concerns about the quality of the Robotics Audit and the timing of the work on it, reflected in the tone of the 26 November 2021 meeting, included concern about delay in the production of that Report and that this delay was in part the product of the Claimant's time off work in late October and early November 2021. However, I have not been satisfied that this was the sole or principal reason for Ms Tarr's behaviour, or for her belief about the Claimant's performance.
88. Ms Tarr's response to the Claimant indication that he was taking time off was to remove his access to the Dynamic System on 1 December 2021, see the email at page 302 in the Hearing Bundle. That was an aggressive step to take.
89. On 3 December 2021, Georgia Amblet sent to Ms Williams draft guidance for a meeting with the Claimant, showing in my judgement that by then a decision had been made that the Claimant would be dismissed. The immediate catalyst for the Claimant's dismissal was, I find as a fact, his 30 November 2021 email indicating that he needed time off and amounting to further indication that the relationship between him and Ms Tarr had essentially broken down.
90. The evidence from the Respondents as to who took the decision to dismiss the Claimant by 3 December 2021 is in my judgement of poor quality. Despite their evident involvement, neither Ms Snashall gave evidence about it, nor did Ms Williams, nor is there cogent evidence of the timing of that decision, except that it had been taken by 3 December 2021.
91. Despite the Respondent's reliance on the Claimant's performance as a reason for dismissal, the draft script that was produced, whilst saying that performance issues should be highlighted, also said "don't spend too much time on the performance problems as Bill may argue this". The Claimant suggests that this is evidence of a realisation that the Respondent could not support or justify the performance concerns relied on. This is a cogent interpretation of what that means, but there are others, including the intractable nature of trying to reconcile differing perspective about performance where, as I have described above, there appeared to be competing subjective perceptions about where the issue lay.

Termination of the claimant's employment

92. The meeting at which the Claimant was dismissed and the events leading up to it are central to my decision. As I have said, a decision to dismiss the

Claimant had clearly been taken by 3 December 2021 and therefore long before the meeting on 9 December 2021 in relative terms, following which the Claimant's employment terminated. The only participant from the meeting on 9 December 2021 from whom I heard, was the Claimant.

93. The Claimant disputed in evidence that there was a mutual termination of his employment at the meeting. He contends that he was dismissed. The Respondents say that the Claimant's communications to others in the aftermath of the termination of his employment suggest that he agreed to the termination of his employment. In my judgement the two messages on which the Respondents rely at pages 291 and 306 do not suggest that the Claimant had agreed to leave. At page 306 the Claimant says in terms that it had not been his decision to leave and at page 291, the Claimant disputes to a colleague that he had resigned and suggests that if somebody suggests that he had resigned that they were not being truthful.
94. The Claimant's evidence about the 9 December 2021 meeting is crisp. He says that he was dismissed. Michelle Snashall's evidence does not really suggest a consensual termination of employment as opposed to a dismissal and certainly does not unpack how what had been intended to be a dismissal meeting prior to the start of it, turned into a meeting at which termination was instead agreed. I would have expected rather more detail in such a witness statement from the witness whose evidence was that an intended dismissal had become a mutual termination.
95. The Respondents' Grounds of Resistance to the claims say that the agreement for termination of employment followed a discussion about the available options, but those available options are not referred to at all in Michelle Snashall's Statement.
96. This is a weak basis for the contention that there was a consensual termination. The letter of 9 December 2021 from Georgia Amblet the Claimant, at page 323 of the Bundle, does not suggest a consensual termination. I note in passing that this letter is written on writing paper which bears the name of the Second Respondent, Costain Group Plc, a matter which I will still need to turn to in due course.
97. I therefore prefer the Claimant's evidence that he was dismissed rather than being party to a mutual termination of employment. In my judgement it would be wrong for me to prefer the untested and weak evidence of a witness who has not given evidence to that of a witness who has given sworn evidence on an issue where both had direct knowledge and memory.

The reason for the claimant's dismissal

98. The relevant attendees and decision makers on the Respondents' side were in the Respondents' employment when the claim was started and I assume that they left the Respondents on notice rather than without notice, so that witness statements could have been obtained from them

and they could have been the subject of witness orders. I do not understand any such witness orders to have been made. I also take into account that where the issue is the reason for dismissal, cross examination of decision makers is likely to be a key source of relevant evidence. However, I also take into account that the burden of proof where an employee does not enjoy the general right to be unfairly dismissed is on the employee and that Parliament has decided not to introduce burden of proof provisions for such unfair dismissal complaints which mirror the burden of proof provisions which apply to complaints under the Equality Act 2010.

99. It is therefore the Claimant who faces the burden of satisfying me that the reason or the principal reason for his dismissal was that he sought to take time off, or took time off, to care for a dependent and the burden does not shift even where there are facts from which I could reasonably reach such a conclusion. While I have been satisfied that it may well be the case that the time which the Claimant took off played some role in Ms Tarr's enduring and increasing hostility towards the Claimant, I am not satisfied that it is more likely than not that the Claimant's time off played some role in the decision, nor that this was the sole or principal reason for the decision, to dismiss the Claimant.
100. The Claimant, in my judgement, has not rebutted the Respondent's explanation in light of the contemporaneous documentation that I have referred to above, which shows enduring concerns, over a long period of time, about the Claimant's performance and which in my judgement show latterly a breakdown in the relationship between the Claimant and Ms Tarr.
101. That breakdown in that relationship, in my judgement, is not so closely connected to the Claimant's request for and time off work as to be a proxy for it for the purposes of the applicable statutory provisions.
102. I have therefore concluded that the burden of proof has not been discharged by the Claimant to satisfy me that it is more likely than not that dismissal was for a relevant prohibited reason.
103. I have not found this a straightforward decision to reach, with the particular and unusual evidential deficiencies in this case. Nor have I found it straightforward giving that there are some matters from which inferences in support of the Claimant's case could be drawn. Those matters are:
 - Ms Tarr's proven hostility to the Claimant taking time off on 13 October 2021, including in particular a failure to treat any of the Claimant's leave thereafter as paid compassionate leave and Ms Tarr's lack of empathy towards the Claimant while he was away;
 - Ms Tarr's hostility towards the Claimant on 26 November 2021, which on the Claimant's evidence was unreasonable hostility;
 - Ms Tarr's attempts to side line Human Resources from the Grievance which the Claimant raised on 26 November 2021;

- the failure by the Respondent, including Georgia Amblet, in particular to treat the Claimant's Grievance properly;
- the absence of meeting notes for key meetings, in particular those on 29 November and 3 December 2021;
- the absence of cogent evidence from the Respondent explaining how the decision to dismiss the Claimant was taken, when and by whom;
- the downplaying of performance concerns in providing guidance for the 9 December 2021 meeting; and
- my preference for the Claimant's evidence over Ms Snashall's evidence on the question whether the Claimant was dismissed or left by mutual consent.

104. But I have ultimately concluded that the direct evidence including importantly contemporaneous evidence tending to suggest a pre-existing belief by the Respondents in performance concerns and ultimately in the breakdown of the working relationship following the 26 November 2021 meeting, is stronger than the circumstantial evidence above from which inferences might be drawn, and that the primary facts from which inferences might be drawn, which I have identified above, do not justify the drawing by me of the inference that the sole or principal reason for the decision to dismiss the Claimant was connected to the fact that the Claimant had sought to take or had taken time off to care for a dependent.
105. I have found this a difficult decision and the time that I have taken to reach it reflects the anxious scrutiny that I have given to the evidence, and its unusually one-sided nature.
106. It follows that I find that the Claimant was dismissed, but not for an automatically unfair reason.
107. While therefore the correct identity of the Claimant's employer is no longer decisive of the claim, I conclude by finding that the Claimant remained employed by Costain Engineering. I accept that other documentation which I have referred to above (payslips and the dismissal letter) bears the corporate mark of Costain Group Plc, but in my judgement this identification of Costain Group Plc on non-contractual documentation is not enough to displace Costain Engineering status as employer as reflected by the most important document, namely the written contract. The fact that other documents refer to the Second Respondent does not explain away the identification of the First Respondent as the employer.
108. The claim against Costain Group Plc is therefore dismissed on the ground that it did not employ the Claimant and therefore could not have dismissed him.
109. The claim against Costain Engineering is dismissed on the basis that the Claimant has not shown that the reason for his dismissal was an automatically unfair reason.

Employment Judge T Brown

Date: 13 December 2023

Sent to the parties on: 10/1/2024

N Gotecha
For the Tribunal Office.