EMPLOYMENT TRIBUNALS

Claimant: **Mr James Mannering**

Respondent: **DHL Services Limited**

Heard at: **London South**

On: **6, 7, 8, 9 & 10 November 2023**

Before: **Employment Judge Carney, Mr R Singh, Mr C Mardner**

Representation

Claimant: Ms Fadipe (counsel)

Respondent: Mr Dunn (counsel)

JUDGMENT having been given to the parties during the hearing and sent on 22 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

Claims and Issues

1. The claimant, Mr James Mannering, brought claims of (i) failure to make reasonable adjustments, (ii) discriminatory constructive dismissal, (iii) constructive unfair dismissal, and (iv) victimisation.

2. A list of issues was agreed between the parties and was included in the agreed bundle of documents at page 64. That list of issues is attached to these reasons.

3. At the start of the hearing, counsel for the claimant clarified that the alleged breaches in paragraphs 9.2, 9.3 and 9.4 of the list of issues were alleged to be collective breaches of the implied term. It was additionally agreed between the parties that the tribunal also had to consider the following issues:

    3.1. When the respondent should reasonably have made any adjustments to mitigate any substantial disadvantages suffered by the claimant.

3.2. Whether the claims of discrimination had been brought within the primary limitation period set out in section 123 Equality Act 2010 (plus early conciliation extension, if appropriate) and, if not, whether there was conduct extending over a period and/or whether they were brought within such further period as was just and equitable.

3.3. In respect of the claim for constructive discriminatory dismissal, whether or not the alleged PCPs or the acts of alleged victimization were fundamental breaches of contract entitling the claimant to resign without notice and treat himself as dismissed.

3.4. In respect of the claims for breach of the implied duty of trust and confidence, the test was whether the respondent had, without reasonable and proper cause, behaved in a way that was calculated or likely to destroy or seriously damage trust and confidence between the claimant and the respondent.

3.5. Whether the claimant had affirmed the contract after any breach but before resigning.

Procedure, documents and evidence

4. The tribunal asked whether the claimant needed any reasonable adjustments. It was requested on behalf of the claimant at the start of the hearing that he needed regular breaks due to his anxiety condition. It was agreed that he should have a break once an hour and that counsel for the claimant would request a break on behalf of the claimant, if necessary.

5. The claimant gave evidence on his own behalf and had two additional witnesses: Mr Armand Musaku and Mr Steve Rich, both ex-employees of the respondent. The tribunal heard evidence on behalf of the respondent from Mr John Williams (Lead HR Business Partner at the respondent) and Mr Gary Jackson (Shift Operations Manager at the DHL Allington site).

6. We discussed the timetable and order of evidence at the start of the hearing. Mr Jackson had recently learnt of two urgent hospital appointments that he needs to attend on Wednesday. He was therefore not available to give evidence on Wednesday. It was requested on behalf of the claimant that the respondent gave its evidence first, then Mr Jackson could start and his evidence would be finished before Wednesday. This would also mean that the claimant could give all his evidence in one day and would not have to be left overnight without being able to discuss his case with his legal team, which was likely to exacerbate his anxiety. The tribunal gave careful consideration to this request. It clearly had the advantages set out here. But the tribunal decided that it would be very difficult for them to follow the case that was being brought unless the claimant went first. He has a long witness statement and is making several claims based upon a complicated chronology of facts, including multiple grievances and investigations and a lengthy bundle of over 600 pages. The tribunal decided it needed to hear from the claimant first in order to make sense of the other evidence.

7. We therefore heard evidence from the claimant first and then Mr Jackson on behalf of the respondent. During the course of the second day, the tribunal was

informed that Mr Rich was not available until Thursday. So we heard from Mr Musaku and then Mr Williams on Wednesday and Mr Rich on Thursday morning before we heard the parties closing submissions.

8. We did not hear evidence from Mr Wallbank, who was the manager considering the claimant's second grievance. We understand he was on holiday. Nor did we hear from Mr Parkes, the claimant's line manager who has left the respondent's employment.

9. The respondent requested that one additional document (an email) be adduced in evidence. It had come to light over the weekend (following counsel's conference with the respondent last week) and counsel first saw it on Monday morning, when it was disclosed to the claimant. The respondent accepted it was disclosed very late and that this caused some prejudice to the claimant but submitted that this prejudice was limited because the document was so short and that it should be included because it was highly relevant. Claimant's counsel confirmed they had seen the document and they did not object. The tribunal agreed, given its relevance to the issues in dispute. It was included in the bundle of documents as page 677.

10. The tribunal informed the parties that unless we were directed to a page in the bundle, we would not read it.

11. Counsel provided written closing submissions, which they supplemented with oral submissions.

12. The tribunal reached a unanimous decision.

Fact Findings

13. DHL Services Limited, the respondent, is part of the DHL group of companies, an international group of logistics companies.

14. The claimant was employed by the respondent twice. His first employment was from 1996 to 2017 on the respondent's Dartford site. His claims relate to his second employment which started on 7 May 2018 as a warehouse first line manager at the respondent's Allington site. This employment ended on 9 June 2021 when he resigned with immediate effect.

15. During his first employment, the claimant filled in a 'medication advice form' dated 29 January 2016 which is at page 101-102 of the bundle. (From this point, numbers in brackets after a reference to a document seen by the tribunal refer to page numbers in the bundle.) The claimant stated on this form that he is taking Sertraline, that he started taking it on 29 January 2016 and that he is taking it for depression.

16. On 22 May 2018 the claimant filled in and signed a new starter form, which is in the bundle (pp. 103–106). Amongst other questions, the form asked if he considered he had a disability. The claimant answers no and further that he did not consider he had ever had a disability. The claimant answered in this way because there is a subsequent question on the form about a disability registration number and the claimant thought that the form was only asking about disabilities with a registration number and not conditions which would amount to a disability under the Equality Act 2010 (EqA).

17. The claimant had eight days' sickness absence in 2019, starting on 28 November 2019. He had a return-to-work interview and there exists a completed return to work interview form (pp. 112–113) and accompanying medication advice form (pp. 109–111) both dated 9 December 2019 and signed by the claimant. The return-to-work form says that this was the first sickness absence in 12 months, that the medical issue was testicular pain, investigations are ongoing and the claimant has been prescribed painkillers and anti-depressants. The medication form says the claimant is taking Lyrica and Sertraline medication, which it says he started on 28 November 2019. It says Lyrica is a painkiller and Sertraline is an antidepressant. It says he's taking 'the medicine' because of testicular pain. We do not accept the claimant's evidence that he discussed his mental health generally in this interview. Details of such discussions are wholly absent from the form, which he signed as accurate. Furthermore, Mr Musaku was the relevant manager according to the Medication Advice form but Mr Musaku gave no evidence to the tribunal that the claimant had discussed his mental health with him at this time (p. 109).

18. On 23 April 2020 the claimant submitted a grievance (the first grievance) (p. 114). According to his letter he had been shocked to be told in a recent appraisal that he hadn't met performance targets and upset that this had never been raised in his one-to-ones before this. He is upset about the fact that he consequently didn't get a merit-based pay rise, whereas those who hadn't yet had an appraisal had got a pay rise. In his oral evidence to the tribunal the claimant made it clear he had been very concerned about the lack of pay rise but that he thought there hadn't been any problems with his performance. The claimant did not raise any issues about the size of his team or his mental health as part of this grievance. The claimant's grievance was upheld. (The outcome letter starts at p. 120.) The claimant was told he would get a pay rise and that in future he should have regular one-to-ones with his new line manager to discuss his performance and development.

19. Around June 2020 Richard Parkes became the claimant's manager.

20. During the Covid pandemic, some of the respondent's Allington site managers (including the claimant and Richard Parkes) started using a WhatsApp chat group to discuss work and help facilitate shift handovers.

21. On 3 February 2021, the claimant first raised the fact that he was concerned about the size of the team he had to manage. He does this in the WhatsApp chat (p. 142). He had 17 team members, and we accept the evidence of the claimant and other witnesses that this was a high number to manage and other managers had more like 12.

22. We were shown various WhatsApp messages from the group chat (pp 122–148). The claimant alleged his performance was publicly criticized in this chat. We deal with this allegation in detail in our conclusions below.

23. On or around 4 February 2021 the claimant learnt that a new accuracy management system was being introduced. The system was designed to monitor the performance of the employees reporting to first line managers. The claimant and other first line managers were sent various emails with

attachments about the new system and how it should work (pp. 151–172). The new system was rolled out from 15 February 2021.

24. The new system was important to the respondent because mistakes in the warehouse meant that clients got the wrong items or the wrong number of items. This was detrimental to client relationships, and it cost the respondent money because the clients were compensated for the mistakes. The respondent was trying to minimize the number of mistakes by monitoring which employees made mistakes and then taking a series of escalating actions starting with a verbal conversation, followed by formal counselling and then disciplinary sanctions.

25. From 21 February 2021 the claimant was on two rest days followed by holiday. He returned to work on 26 February 2021. He had two further rest days on 28 February and 1 March 2021.

26. The claimant returned to work on 2 March 2021 and was informed by his then line manager Ian Garnham that he was being suspended pending a disciplinary investigation into the allegation that he had falsified company documents. (Notes of the meeting start at p. 185.) A letter of 3 March 2021 confirming his suspension was sent to the claimant, which said that suspension was not disciplinary action and that suspension did not equate to guilt. It told him not to come in to work or to contact anyone at DHL other than people services (HR), Mr Garnham or his own representative. It said he could contact Mr Garnham with any questions. However, when the claimant tried to contact Mr Garnham the next day, he found that Mr Garnham had left the business with immediate effect. The claimant thought this was suspicious and indicated a conspiracy against him.

27. Gary Jackson, from whom we heard evidence, took over the investigation. There was an initial disciplinary investigation meeting on 4 March 2021 and the claimant was accompanied by a colleague (Mark Bailey). During this meeting it was put to the claimant that he had filled in a spreadsheet, called the ‘error log’, incorrectly on 26 February 2021. (The error log is at p. 160.) The error log shows the names of warehouse employees who have made an error and the date of the error. It shows their manager’s name. Then there are two columns headed ‘date’ and ‘action taken’ respectively. The claimant, as a first line manager, was expected to check the log to see which of his reportees (if any) were identified as making an error. The ‘action taken’ column has a drop down menu from which the manager has to select an option from some four or five options.

28. On 26 February 2021, the claimant had filled in six lines of the spreadsheet in respect of 5 employees that reported to him (one employee appeared twice) and had selected the option ‘verbal conversation’ from the drop down menu in the ‘action taken’ column for each employee.

29. Gary Jackson put it to the claimant that two of the employees were not at work on 26 February 2021, so the claimant could not have spoken to them. And that two of the others denied that the claimant had spoken to them. This was the reason that the claimant had been suspended but a further allegation (which had been raised by Adam Buchan, the General Manager of the site) was put to him in this meeting that the claimant had made up some OMS feedback.

30. The disciplinary investigation meeting was adjourned for further investigation by Mr Jackson. The claimant asked Mr Jackson if he would view the warehouse CCTV as part of that investigation because it would show he did talk to the employees that denied he had raised their errors with him.

31. During the course of this further investigation, Mr Jackson decided that the second allegation about the OMS feedback was not substantiated and it was dropped.

32. The claimant said (and we accept his evidence) that he thought the system was intended to be that he completed the spreadsheet with the date of when he'd noted that one of his reports had made an error and to indicate that he intended to take action in respect of it as soon as possible in the future.

33. The day after the first disciplinary investigation meeting the claimant visited his GP and was signed off sick until 18 March 2021. His fit note says 'depression' and in the comments box it says 'work stress' (p. 258).

34. On 6 March 2021 the claimant wrote to Mr Jackson (p. 259) and again asked him to check the CCTV. In this letter he mentions his 2020 grievance and that he had not been having the regular one-to-ones he had been promised in the outcome to that grievance. He said he felt his 'card was marked' and the disciplinary outcome predetermined. And he mentions concerns about the size of the team reporting to him. He says 'I suffer from anxiety', the meeting had caused him a lot of distress and enclosed his fit note.

35. As a result the claimant's suspension was lifted and he was put on sick leave

36. On 18 March the claimant's GP signed him off for a further period until 31 March 2021. This sick note says his condition is 'stress at work' and in the comments box it says 'low mood'.

37. On 12 March 2021 Mr Jackson attempted to call the claimant but there was no reply. Mr Jackson had a welfare call with the claimant on 15 March. Although the claimant said that this and other calls were not real welfare calls because Mr Jackson did not say what the claimant himself would have said, we do not accept this. Different managers will have slightly different styles. We accept Mr Jackson's evidence that this and subsequent calls detailed below were to check on the claimant's welfare as well as to convey necessary information to him.

38. Mr Jackson then arranged for the claimant to have an occupational health (OH) interview. This occurred on 22 March 2021 (p. 265). The resulting report makes it clear the claimant has suffered from anxiety and depression since teenager. And that he is on long-term anti-depressant medication. It says following his suspension, which came out of the blue, he relapsed. The report says he might have a disability for the purposes of equality legislation, and that he is still unfit to work but is fit to engage in a management process. It further says that although attendance at a disciplinary investigation meeting would cause the claimant more distress, this had to be set against prolonged uncertainty caused by delays. The report made various suggestions, including:

38.1. not holding the meeting in the next 2 weeks to give him time to consider what they had discussed. But to try to avoid a delay of more than 4 weeks.

38.2. It may be helpful to consider holding the meeting virtually.

38.3. Give short breaks.

38.4. Have a companion.

38.5. Have someone else to drive (if the meeting was not virtual).

38.6. Have family and friends to support him before and after.

39. Mr Jackson tried to call the claimant on 31 March 2021. The claimant did not respond and messaged Mr Jackson to advise he had been signed off for two more weeks and that Mr Jackson could call him on the 1 April. Mr Jackson did not see this message immediately and Mr Jackson messaged him on the 3 April to say he would call him after the Easter weekend.

40. There is a further fit note dated 1 April signing the claimant off sick for the period to 30 April 2021 (p. 268).

41. On 6 April 2021, Mr Jackson made a welfare call to the claimant.

42. The claimant is told in a letter dated 11 April 2021 that his sick pay will go down from 13 April 2021.

43. On 12 April Mr Jackson told the claimant that he has been unable to arrange his shifts to enable him to continue the investigation meeting but he would be in touch about it.

44. On 15 April 2021 the claimant submits a second grievance (starting at p. 271). He sends it to Stella Mackway Jones in business services. His covering email makes it clear he has sent it solely to her as he believes it falls under the whistle-blowing policy. It contains a number of concerns. The keys ones being:

44.1. He is not getting the one-to-ones he was promised after his previous grievance;

44.2. There is a culture of bullying at the Allington site and poor morale;

44.3. There is a high staff turnover and that those with vulnerabilities (older, sick, etc) are targeted for dismissal;

44.4. He thinks his disciplinary investigation is a witchhunt;

44.5. He understands his position has been filled ‘on secondment’ by someone from the Dartford site and that he assumes this secondee will be his replacement.

45. The claimant gets an out of office message from Ms Mackway Jones. He sends an email asking who he should send his grievance to and he is told John Williams. He sends it to Mr Williams on 20 April 2021.

46. Mr Williams replies on 21 April to say he has asked Mr Buchan, General Manager of the Allington site to hear it. On the same day Mr Buchan writes to the claimant to invite him to a grievance hearing on 26 April 2021. The claimant immediately sends an email to Mr Williams asking how Mr Buchan can be impartial as the claimant is raising issues about the culture at the depot. The claimant sends another email saying the same thing on 22 April and on that day, Mr Williams replies to say that in light of the claimant's concerns he will find an impartial manager to hear the grievance.

47. The manager appointed to hear the grievance is Mr Wallbank, a site operations manager at the nearby Barming site.

48. On 28 April 2021 the grievance hearing is rescheduled at the claimant's request.

49. On 1 May 2021 the claimant returns from sick leave and his suspension is reimposed.

50. On 4 May 2021 the claimant attends a grievance investigation meeting.

51. On 6 May 2021 he is invited to a reconvened disciplinary investigation meeting.

52. Mr Wallbank went on holiday from 10 May 2021.

53. The disciplinary investigation meeting is reconvened on 13 May 2021 (notes at pp. 228–249). Mr Jackson had done further investigation by speaking to two employees identified by the claimant but he had decided not to view the CCTV footage because, although it might show the claimant having conversations with individuals, as there was no sound, it would not confirm what was being discussed. The CCTV could not therefore provide useful evidence as to whether or not the claimant had had accuracy management conversations with the employees who were denying the conversations had taken place.

54. During this meeting the claimant gave Mr Jackson a pre-prepared statement (p. 233) admitting he had made a mistake but saying it was unintentional and that he had been 'set up to fail' and that he had not been treated fairly. The claimant subsequently refused to answer more questions, citing his welfare. There was a short adjournment and then Mr Jackson told the claimant he would not be asking him more questions but would adjourn again to prepare a summary and then call him back to deliver it. There was another half an hour adjournment and then Mr Jackson gave the claimant a written summary (p. 247) saying that Mr Jackson had decided there was a disciplinary case to answer into the allegation of falsifying company documentation which constituted a breakdown in trust. The claimant was informed there would be a disciplinary meeting in due course.

55. The claimant admitted that he understood the process, apologized for his mistake, and admitted his completion of the error log may have misled the respondent (pp. 208, 209, 232, 233).

56. Mr Wallback returned from holiday on 25 May 2021 and recommenced the grievance investigation.

57. On 7 June 2021 the claimant was sent a letter by email inviting him to a disciplinary meeting to be held on 10 June (p. 326).

58. On 9 June 2021 the claimant received a letter by e-mail from Mr Wallbank with the outcome of his grievance (pp. 322–325). The claimant's grievance was not upheld. The letter is dated 4 June 2021 and there was some initial confusion amongst the parties about when it was sent and received. However, we find that it was sent on 9 June, as at the end of the letter, when setting out how long the claimant has to appeal, it says that as the letter was sent on 9 June, any appeal must be within five working days and must be received by Wednesday 16 June (p. 324).

59. On the same day as receiving the grievance outcome letter, the claimant resigned. His resignation letter is at p. 328 of the bundle. The claimant gives various reasons, including the conduct of the disciplinary process and also that he has that day received the letter dismissing his grievance. Mr Williams wrote to the claimant urging him to reconsider and to come and discuss his concerns with him but the claimant does not do so (p. 330).

60. We were shown evidence that as part of Mr Wallbank's investigation into the claimant's grievance, he had interviewed various employees. (Transcripts of the interviews are at pp. 670–676.) None of the witnesses at the tribunal had seen these transcripts until they were disclosed for these proceedings and Mr Wallbank was not here to talk about the decisions he had made. The transcripts show:

    60.1. In the grievance outcome letter Mr Wallbank says that he was not able to interview Jack Sadowski but there is a transcript of an interview between Mr Wallbank and Mr Sadowski (p. 673);

    60.2. The notes of the conversations with Mick Philips and Nathan Cox are identical apart from the names and dates at the top and bottom of the transcripts (pp. 671 & 672).

    60.3. Mr Wallbank asked Richard Parkes about the conduct of the disciplinary investigation, rather than Gary Jackson who was conducting it.

61. Unless Mr Philips and Mr Cox gave word for word identical answers to the questions put to them (which no one here has suggested and is highly unlikely), there are two possibilities. Either that Mr Wallbank fabricated one or more of these statements or there was a mistake, for example, one document was accidentally saved over another. Mr Williams said in his evidence that he did not believe Mr Wallbank would fabricate documents. But it is also hard for us to understand how there could have been a technical error (such as saving one document as another) which meant that the names on the documents and the time and date at both the top and the bottom of the documents are different but the questions and answers are the same.

62. We are not going to find that Mr Wallbank deliberately falsified documents without further evidence and when he did not have an opportunity to explain what may have happened. But we do find there were flaws with the grievance process which we discuss in the conclusions section below.

63. The claimant alleged that in the disciplinary meeting adjournments Mr Jackson had sought instructions from Mr Parkes. We do not accept this allegation. The claimant admitted it was based on suspicions rather than any other evidence and Mr Jackson denied it in clear and robust terms in his evidence. Furthermore, this allegation was connected to the claimant's wider allegation of a 'conspiracy' against him which we do not accept. The claimant's evidence was that this conspiracy was being conducted by a large group of people spanning multiple sites including the HR team (people services), Mr Buchan, Mr Jackson, Mr Parkes, and Mr Wallbank. The claimant sees events which on the face of it are totally unconnected to him, such as Mr Garnham and Mr Parkes leaving employment unexpectedly, as indications of this conspiracy but he does not provide any evidence, other than his suspicions, that those departures are connected to him in any way.

64. Mr Musaku's evidence purported to support the claimant's allegations that the disciplinary investigation was a sham. Mr Musaku's witness statement initially said that he had had a conversation with Ian Garnham (the claimant's first manager) who had told him that that Gary Doyle (a manager from the Dartford site) had come to their site to support Mr Jackson to 'get rid' of the claimant in the disciplinary investigation. In his oral evidence, Mr Musaku said his statement contained a mistake and he had actually meant to say this conversation was with another employee called Ian Berwick. He admitted that Mr Berwick was not a manager, would have had no particular knowledge of what was going on and was speculating. Mr Musaku further said that Mr Parkes could get '40 people' to support him in targeting the claimant. But he gave no evidence to support the claim that this had happened, he just said that this was how Mr Parkes worked and he could have done it.

65. Mr Musaku's evidence was that on the day the claimant resigned Mr Parkes approached him and said 'see silly bollocks the one I did not want in here I got rid of'. If this statement was made, it is very unclear what it may have meant. But, in any event, we do not accept that this statement was made for a number of reasons. The very odd phrasing makes it seem unlikely. We also find Mr Musaku's evidence less convincing because of his failure to notice he had named the wrong manager in his statement until day three of these proceedings (even though he says he had read his statement through before signing it). The exaggerated nature of the allegations he makes with no supporting evidence, such as that '40 people' are conspiring, also makes his evidence unconvincing.

66. We find there was no conspiracy against the claimant. We find the allegations wild and implausible. If people services were involved in this conspiracy, Mr Williams would not have written to the claimant suggesting he reconsider his decision to resign. If Mr Jackson was involved in a conspiracy he would not have dropped one of the charges against the claimant (about fabricating OMS feedback) during the investigation.

67. We accept Mr Jackson's evidence that he found there was a disciplinary case to answer on the charge that the claimant had falsified documents but that he did not make any disciplinary finding and the matter would have been considered subsequently by a (different) disciplinary manager.

68. Mr Rich gave evidence that he had worked with the claimant in his first employment with the respondent. This was not in a management capacity. Mr Rich knew at some point during this employment that the claimant was suffering from anxiety and depression. He himself also suffers from the same condition and he recognized it in someone else and asked the claimant about it. Mr Rich did not tell the tribunal he informed anyone else at the respondent about the claimant's mental health. Nor did he mention anyone specifically at the respondent who also knew (although he did say other people at the respondent 'would also have been aware').

69. Mr Williams denied knowing about the claimant's disability until it came out in the grievance process. Mr Jackson says he did not know or suspect that the claimant suffered from anxiety or depression and he thought the claimant's absence was reactionary to his work situation. We accept their evidence. There is a question to be determined about whether the respondent had constructive knowledge of the claimant's disability, which is dealt with below.

70. The claimant alleged that his job was filled permanently by someone else before he resigned. We heard no evidence to substantiate this, other than the claimant's suspicions. We find that his job was performed on a temporary basis by someone else whilst he was absent and then filled permanently after he had resigned.

71. The claimant alleged that details about his disciplinary suspension was shared by managers in breach of his confidentiality. We found no evidence to support this contention. When an employee is not at work for any reason, their absence is noted and commented upon by their colleagues. The claimant did not provide any evidence that showed or implied that particular managers had shared information about him. Nor did he show that any of his colleagues knew any more about his situation than they might have gleaned from observing and speculating about his absence.

Law

72. The law that the tribunal had to consider for these claims is as follows.

73. Duty to make reasonable adjustments

Section 6 of the Equality Act 2010 (EqA)
(1) A person (P) has a disability if –
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Schedule 1 EqA
2(1) The effect of an impairment is long-term if–
(a) it has lasted for at least 12 months, or
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected

Section 20 EqA

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply;

and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) […]

Section 21 (EqA) Failure to comply with duty

(1) A failure to comply with the first […] requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) […]

Section 39 (EqA) Employees and applicants

[…]

(5) A duty to make reasonable adjustments applies to an employer.

Para 20 Schedule 8 EqA

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –

(a) […]

(b) […] that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

74. Constructive discriminatory dismissal

Section 39 EqA

(2) An employer (A) must not discriminate against an employee of A's (B) –

[…]

(c) by dismissing B

(7) In subsections (2)(c) […] the reference to dismissing B includes a reference to the termination of B's employment –

(a) […]

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

75. Constructive unfair dismissal

The law relating to the right not to be constructively unfairly dismissed, is set out in sections 94, 95 and 98 Employment Rights Act 1996 (ERA):

Section 94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

Section 95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if […]

(c) the employee terminates the contract under which he is employed (with or

without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Section 98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason of a kind falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

[(ba) …]

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

[(2A) …]

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

[(3A) …]

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

76. Victimisation

Section 27 EqA

(1) A person (A) victimizes another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes B has done, or may do, a protected act.

(2) Each of the following is a protected act –

[…]
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

77. We also considered the following authorities:

77.1. *Gallop v Newport City Council* [2014] IRLR 211, CA

77.2. *Griffiths v SSWP* [2017] ICR 160, CA

77.3. *Project Management Institute v Latif* [2007] IRLR 579 EAT.

77.4. Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, CA

77.5. *Malik v BCCI [1997]* 3 WLR 95

77.6. *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481, CA

77.7. *Meikle v Nottinghamshire County Council* [2005] ICR 1

And we gave appropriate regard to the EHRC Equality Act 2010 Statutory Code of Practice. That code says that 'the phrase "provision, criterion or practice" is not defined by the act but should be construed widely, so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications, including one-off decisions or actions' (6.10).

Conclusions

Failure to make reasonable adjustments

Knowledge of disability

78. The respondent had conceded before the start of the hearing that the claimant had a disability. But there is a dispute about whether the respondent had knowledge of the disability at the material time. We were invited by the claimant to find that the respondent had constructive knowledge of the claimant's disability throughout his employment. Constructive knowledge is constructive knowledge of the facts constituting the disability, as identified in section 6 EqA. The respondent does not have to know as a matter of law that those facts meet the test for disability (*Gallop v Newport City Council (2014) IRLR 211, CA*).

79. We were referred by the claimant to the medication advice forms of 2016 and 2019. When the first medication advice form was completed (which states he was taking Sertraline), it was in respect of a different employment on a different site. The respondent did not name one person from his previous employment, other than Mr Rich, who knew that he had depression and anxiety. Mr Rich was not aware in a management capacity, he was not in HR nor was he an OH adviser. He was a friend and colleague of the claimant. We heard no evidence that Mr Rich told anyone else at the respondent or as to why knowledge he had should be imputed to the employer. Neither did we hear any evidence from Mr Rich that he (or anyone else) was aware at the time that the claimant's condition had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

80. Furthermore, when the claimant started his second employment with the respondent he said on the new starter form that he did not have a disability. His explanation for this is immaterial, the respondent had knowledge of what he put on the form not what was in his head.

81. The return to work interview and medication advice forms from December 2019 state that the claimant had started Sertraline on 28 November 2019. 28 November 2019 was the first day of his period of absence. The impression given by these forms is that the claimant has a serious condition (testicular pain) which is being investigated and that this is causing depression and he had therefore just started anti-depressants. There is no indication it is a long-term condition, for example, that it started before his testicular pain or that it was likely to continue for any length of time. There is also no evidence of substantial adverse effect on day-to-day activities. We heard no convincing evidence that the claimant told the respondent during this meeting that he had a disability (or facts that would reveal that his mental health met the test for disability).

82. We note that the 2020 grievance makes no mention of disability or health issues.

83. In his letter of 6 March 2021, the claimant told Mr Jackson that he suffered from anxiety and his sicknote from this point says depression and work stress. But, as set out above, we accept Mr Jackson's evidence that he thought the claimant was suffering because of the current work situation and that he had no knowledge of any facts that would suggest a long-term disability. Similarly, the next fit note says 'stress at work' and 'low mood'. Again there is nothing to indicate the claimant's mental impairment was having a long-term effect.

84. It is not until the OH report that the respondent had sufficient information to know or suspect it was a longstanding condition that was disguised by medication. We find that the respondent had actual or constructive knowledge of the claimant's disability when it received the occupational health report on 22 March 2021.

PCPs

85. A PCP and the precise nature of the disadvantage it creates by comparison with its effect on the non-disabled must be identified. Until the disadvantage is properly identified, it is not possible to determine what steps might eliminate it. (*Griffiths v SSWP* (2017) ICR 160, CA).

The respondent's performance standards and performance management regime for first line managers, including the requirement to manage a particular size of team (Statement of Issues 3.1)

86. It is not clear what the claimant means by this PCP, other than his complaint about the size of his team. In his evidence, the claimant said by the performance management regime he meant the accuracy management system, but that system was a performance standard that applied to the warehouse employees not the first line managers like him. If he means performance standards more generally, the claimant did not present any evidence about the respondent's other performance standards or performance management process or systems.

87. PCPs must apply or be capable of applying to others (disabled or not). We find that the requirement to manage 17 people was a PCP that could be applied to others and was in fact applied to the claimant. But it is not clear what substantial disadvantage the claimant is alleging. The list of issues says the claimant was less able to cope with managing a team of that size. But being less able to cope is something that flows from the fact that the claimant is disabled. It is not in itself a disadvantage caused by the PCP. The claimant failed to plead what disadvantage he says the PCP created.

88. If the claimant means he would not have made the mistake on the error log if it were not for the fact that he managed 17 people, we did not hear any evidence about that. The claimant's own evidence was that he just made a mistake about the process, that he thought he was supposed to fill in the log to indicate he intended to speak to his colleagues about their errors but that he was in fact supposed to complete it after he had spoken to them. We heard no evidence from him that his mistake was connected to the size of the team he had to manage or to his disability.

89. If the claimant means he suffered other disadvantages because of the PCP to manage such a large team, we have found that the respondent did not have actual or constructive knowledge about the claimant's disability until 22 March 2021 and the claimant never came back to work in the warehouse to manage his team after this point. So the respondent did not fail to make reasonable adjustments to the size of his team from the point it was on notice that he was suffering a disadvantage.

Using WhatsApp group messages to publicly criticise performance (3.2)

90. The claimant did not plead whether he alleged this was a provision, a criterion or a practice. We assume that he meant it was a 'practice' of the respondent. Considering this allegation in light of the EHRC guidance, we find this was not a formal or informal policy, rule, practice, or arrangement operated by the respondent. We heard no convincing evidence that the respondent had a practice or policy of using WhatsApp messages to criticize people's performance generally or the claimant's performance in particular.

91. The WhatsApp group was a group of managers using this method to communicate during Covid-19 when face to face conversations were difficult. The messages were a mixture of chat about how the shifts had gone, what had gone well and what could be improved and necessary information being passed between day and night shifts. There is also banter and jokes and chat about people's health. When there is discussion of issues that have arisen during a shift, no one is singled out by name.

92. The claimant alleged he was singled out for criticism in the WhatsApp messages but could not point to any critical messages that named him. He did point to a WhatsApp message from Richard Parkes that does not name him and which is addressed to the group generally. It says 'this pains me to say this but until you get control of the shift again flex is to be put in each day regardless of what the plan states' and which goes on with some comments about the day's shift (p. 141). This is not a criticism of the claimant's performance in particular but a criticism of everyone on the shift.

93. There was another message from Mr Parkes which complained about not having been informed that an employee, Sonya, was not working (pp. 128–9). The claimant said that he had put it in his handover notes and Mr Parkes insisted he had not been told. In this exchange, Mr Parkes is insisting that, despite claims to the contrary, he had not been told something. This is not a criticism of the claimant's performance.

94. On 19 January 2021 Mr Parkes admits to the WhatsApp group that he himself has made a mistake (p. 138).

95. There were no other messages critical of the claimant, either by name or implication. There were other messages in the WhatsApp chat that were positive and encouraging to and about the claimant. For example, in response to the claimant messaging on 27 November 2020 to say he wasn't sure if it was a good shift, Richard Parkes said 'the shift was ok the number at 14:00 was over, but we must stop losing cases in the last 2 hrs, it's ok to drop a little but not hundreds. We are again running without a full team which is a challenge but are still doing it so all keep your chin up' (p. 123). On 29 November 2020, Mr Parkes messaged to say 'Jim [the claimant], Ian, well-done over the last 3 days' (p. 124). On 5 December 2020 Mr Parkes messaged and said 'Jumbo [the claimant] well-done over the last 2 days very good shift today'.

96. We find that that respondent did not have a PCP of using WhatsApp group messages to publicly criticise performance.

97. Further, there is no evidence that the use of the WhatsApp group put the claimant at a substantial disadvantage compared to someone who was not disabled. The claimant alleged he was more sensitive and less resilient than others who did not share his disability but he does not go on to say what that means in terms of a disadvantage. For example, he does not plead that he therefore relapsed. Presumably he would say he was more sensitive and less resilient than persons not sharing his disability before any alleged PCP was imposed, his sensitivity and lack of resilience does not flow from the alleged PCP but from his disability.

98. In any event, our finding about the timing of the respondent's knowledge of the claimant's disability means this claim has to fail. The WhatsApp group messages all date from before the respondent had actual or constructive knowledge of the disability.

The respondent's disciplinary procedure, including suspension pending disciplinary investigation (3.3)

99. We find that the respondent's disciplinary procedure is a PCP applied by the respondent to all employees. To succeed in this aspect of his claim, the claimant also has to show that this PCP put him at a substantial disadvantage compared to persons not sharing his disability.

100. In the list of issues the claimant says that this PCP caused him substantial disadvantage in that the timeframes over which disciplinary processes were undertaken and/or his suspension pending the outcome impacted him more significantly than someone not disabled because he was

more sensitive/less resilient because of those disabilities. However, we heard no evidence as to how the timeframes or his suspension impacted the claimant more significantly than someone not sharing his disability. As for the previous alleged PCP, we were told that the claimant was more sensitive and less resilient than others, but as discussed earlier, even if it is true he was more sensitive and less resilient, that condition preceded and is not a result of the application of the disciplinary process.

101. The claimant failed to mention his disability in the statement he delivered to Gary Jackson in the reconvened disciplinary investigation meeting. Instead that statement essentially takes issue with the fairness of the disciplinary investigation process and the lack of support in implementing the new accuracy management system (p. 233). In his grievance letter the claimant mentions the toll the disciplinary investigation as a whole is taking on his mental health but he makes no mention of his suspension or of the timeframes of the process (p. 272–274).

102. So, we are not clear what substantial disadvantage is being alleged. For this reason, we find that the claimant has not proved he was put at a substantial disadvantage. The burden of proof lies on the claimant to show the PCP put him at a substantial disadvantage.

103. For the sake of completeness, the claimant has also failed to present any evidence that his proposed adjustments would have avoided any disadvantage or were reasonable.

104. The proposed adjustments are set out at 6.3 of the list of issues. They are: (i) abridging the time for the disciplinary process, (ii) not suspending him, and/or (iii) following OH recommendations.

105. Given the claimant's sickness absence and concurrent grievance, we find the disciplinary process was carried out expeditiously and could not reasonably have been abridged without compromising fairness. The alleged misconduct was committed on 26 February 2021. He was suspended within a few days (on 2 March 2021) and the first investigation meeting was held a few days after that (on 4 March 2021). The next day the claimant was signed off sick and did not return to work until the beginning of May 2021.

106. The claimant put in a grievance which mentioned the disciplinary process (amongst other things) on 15 April whilst still off sick. It was fair and reasonable for the respondent to wait until the claimant could attend a grievance hearing to set out the details of his grievance before it completed the disciplinary investigation, given the claimant had made allegations about the disciplinary process in his grievance.

107. The respondent could not have followed the OH recommendations to hold the next disciplinary investigation meeting between two and four weeks after the date of the OH report of 22 March 2021, as the claimant was off sick in this period and his own evidence was that he was not fit to attend meetings. The meeting was held within 2 weeks of his return to work following his sickness absence.

108. The claimant attended a grievance hearing on 4 May (within a few days of being back at work). The respondent held the reconvened disciplinary investigation meeting on 13 May, which was not an unreasonable delay after that. At that meeting the claimant was told that Mr Jackson thought there was a case to answer. Mr Jackson then prepared the lengthy investigation report (pp. 315–321) which was completed by 25 May 2021. And the respondent had to make arrangements for a disciplinary hearing. The claimant was invited to a disciplinary hearing by letter (sent by email) on 7 June 2021. The hearing was to take place on 10 June but the claimant had resigned before then.

109. Holding the disciplinary investigation virtually was a suggestion to be considered, not a recommendation by OH. The claimant did not present any evidence to the tribunal that he had requested the meeting be held virtually. Nor that holding the disciplinary investigation meeting virtually would have avoided any disadvantage.

110. The claimant had already started his suspension before the respondent had actual or constructive knowledge of his disability. The claimant did not present any cogent evidence to the tribunal that ending his suspension at this point would have avoided any disadvantage. He would still have been subject to disciplinary allegations, which in itself would have been stressful.

Not carrying out welfare calls during sickness absence (3.4)

111. We find that this was not a PCP. We heard no evidence that the respondent had a policy or practice of not carrying out welfare calls. Mr Jackson did carry out welfare calls to the claimant as set out above. The fact that the welfare calls were not done in the way the claimant says he wanted or would have done them himself, does not mean they did not happen.

112. It is also unclear that there was any substantial disadvantage connected with an alleged lack of welfare calls. How exactly did a failure to have more or better welfare calls cause the claimant a substantial disadvantage? What was the effect on the claimant of not having more or better welfare calls? We heard no evidence on this.

Filling on a permanent or indefinite basis a position left vacant pending disciplinary investigation or sickness (3.5)

113. We find that this was not a PCP. We heard no evidence that the respondent had or would have had a policy or practice of filling such vacancies permanently or indefinitely. We also found that it did not do so in the claimant's case. The claimant himself said in his grievance letter that he understood someone had been seconded into his role; in other words, he believed it was a temporary deployment (p. 273).

Burden of proof

114. If the claimant establishes that the duty to make reasonable adjustments has arisen and also that there are facts from which it could be reasonably inferred (absent an explanation by the employer) that the duty has been breached, the burden of proof shifts to the respondent to show it had not failed to make reasonable adjustments. (*Project Management Institute v Latif* [2007]

IRLR 579 EAT). The claimant has not established that he was placed under a substantial disadvantage by any of the alleged PCPs, so the burden of proof does not shift to the respondent.

115. For the reasons set out above, the claims for reasonable adjustments all fail.

Victimisation

116. We are going to deal with the allegation of victimisation next, as our findings on this will feed into our findings on the claim of constructive discriminatory dismissal.

Protected act

117. The claimant says that his grievance of 15 April 2021 was a protected act in that it alleged a failure by the respondent to make reasonable adjustments. In particular, he says that the grievance alleged that the respondent's disciplinary process and performance standards/performance management regime were putting him at a substantial disadvantage because of his poor health and that the respondent was failing to follow OH recommendations and/or relax performance standards to mitigate the disadvantage.

118. We find nothing in the grievance letter that amounts to a protected act. The claimant does not make an allegation in this letter of a contravention of the EqA (whether express or implied). He refers to his poor health but does not refer to the disciplinary process or performance management process putting him at a disadvantage because of his health. Nor does he say expressly or imply that the respondent was failing to mitigate a disadvantage by not following OH recommendations or relaxing performance standards.

Detriment

119. We find no evidence that the respondent's alleged detriments (of proceeding with the disciplinary process and/or dismissing the grievance) were linked in any way to the alleged protected acts. On this the claimant's evidence contradicted his claim. His evidence was that there was a conspiracy from the beginning organized by Richard Parkes. (Since the claimant linked Ian Garnham's departure to this alleged conspiracy, on his account the conspiracy dated back to his initial suspension, long before he wrote his grievance letter.) On the claimant's own account, the respondent's acts of proceeding with the disciplinary and/or dismissing the grievance were not because he had made allegations in his grievance letter but were part of this long-standing conspiracy.

120. The claimant does talk about being 'victimised at work' (p. 271) but this is not a reference to victimisation in the legal sense.

Constructive discriminatory dismissal

121. Because the claimant's claims of discrimination all fail, his claim of constructive discriminatory dismissal fails too.

Constructive unfair dismissal

List of Issues 9.1

122. The claimant alleges that the alleged PCPs and/or victimization breached the implied term of trust and confidence.

123. The tribunal will need to decide whether the respondent was in fundamental repudiatory breach of the contract of employment in that it, without reasonable and proper cause, conducted itself in a manner calculated or likely to seriously destroy the relationship of trust and confidence between the claimant and the respondent (*Malik v BCCI (1997) 3 WLR 95).* And, if so, did the claimant resign in response to the breach?

PCP number 1 (performance standards and performance management regime for FLM, including the requirement to manage a particular size of team)

124. As set out above, the claimant did not adduce any evidence about the performance standards and performance management regime for first line managers. So, he has not proved that the imposition of those standards or regime would damage the relationship of trust and confidence.

125. The respondent did require the claimant to manage a team of 17 people. The claimant did not adduce any evidence that having to manage a team of that size was a breach of trust and confidence in itself. He said it was a large number to manage. The tribunal finds that this was not in itself a breach of trust and confidence, even if it was a large number to manage. In any event, the claimant clearly did not resign in response to that requirement, as he had been managing that number for some time and he makes no mention of the size of his team in his resignation letter.

PCP number 2 (using WhatsApp messages to criticize performance)

126. The tribunal has found that the respondent did not have such a PCP. There was no breach of the implied term of trust and confidence. And again, the claimant did not resign in response to this alleged breach.

PCP number 3 (the Respondent's disciplinary procedure, including suspension pending disciplinary investigation)

127. The claimant did not present any evidence that the disciplinary procedure in itself was a breach of the implied term of trust and confidence. The claimant's suspension was not a breach of the implied term of trust and confidence. It was reasonable for the respondent to suspend the claimant whilst investigating alleged dishonesty, falsification of documents and breach of trust. There was no breach of the implied term of trust and confidence in relation to this allegation.

PCP number 4 (not carrying out welfare calls during sickness absence)

128. The tribunal has found that the respondent did carry out welfare calls during the claimant's sickness absence. There was no breach of the implied term of trust and confidence in relation to this allegation.

PCP number 5 (filling on a permanent or indefinite basis a position left vacant during a suspension pending disciplinary investigation and/or sickness absence)

129. The tribunal has found that the respondent did not fill the claimant's position during his absence and that there is no evidence that the respondent had a policy or practice of doing such a thing. There was no breach of the implied term of trust and confidence in relation to this allegation.

Victimisation

130. The tribunal has found that there were no acts of victimisation and therefore this allegation is not substantiated.

List of Issues 9.2 –9.4

131. The way the issues in 9.2 to 9.4 have been pleaded has been unhelpful. Issue 9.2 deals with breaches in relation to the implied duty of trust and confidence and/or implied duties of confidentiality in respect of both the disciplinary process and the grievance process. Issue 9.3 refers to further alleged breaches of the grievance process. And issue 9.4 alleges more breaches of the disciplinary process.

132. Although it could have been pleaded with more clarity, the claimant makes five broad complaints about the grievance process and contends that collectively they amount to a breach of trust and confidence and/or a breach of an implied duty of confidence and to provide a fair procedure for dealing with grievances. These are that:

132.1. The claimant's grievance was not kept confidential, despite the claimant making it clear he perceived it as confidential and in particular, it was shared inappropriately with managers from the depot about whom the claimant had made allegations;

132.2. The grievance was not dealt with in a timely manner;

132.3. The grievance investigator did not contact and interview everyone he should have done to investigate the grievance;

132.4. The grievance investigator did not uphold elements of the grievance following a finding that a bullying tone had been used;

132.5. There should have been a grievance outcome meeting.

133. The claimant also makes eight complaints about the disciplinary process and contends that collectively they amount to a breach of trust and confidence and/or a breach of an implied duty of confidence and to provide a fair procedure for dealing with disciplinary matters. These are that:

133.1. The respondent shared information about the claimant's suspension more widely than necessary;

133.2. The disciplinary process was not dealt with in a timely manner;

133.3. The disciplinary investigation process was not conducted in good faith;

133.4. The disciplinary investigator did not undertake and record all necessary interviews;

133.5. The investigator did not view all relevant evidence, especially CCTV footage;

133.6. There was a failure to produce accurate minutes of meetings;

133.7. The investigation failed to take into account the claimant's absence in finding a case to answer;

133.8. The disciplinary investigation failed to follow OH recommendations.

134. We find there were not a fundamental breach of the implied term of trust and confidence or any other implied term in relation to the disciplinary process.

135. As set out above, we find that the respondent did not share information about the claimant's suspension more widely than was necessary to carry out the investigation.

136. As explained above, we find that the disciplinary investigation process was conducted within a reasonable period, in the context of the claimant's sickness absence and his concurrent grievance.

137. The claimant's allegations of bad faith rest upon his claim that there was a conspiracy, involving multiple people from multiple different sites, all being manipulated by Richard Parkes. As set out above, we do not believe that there was such a conspiracy. We accept Mr Jackson's evidence that he conducted the investigation in good faith and that his conclusion was that there was a case to answer. He did not make a finding as to whether or not misconduct had occurred, which would be for the disciplinary manager to determine.

138. We also find that Mr Jackson's investigation was reasonable and certainly not conducted in such a poor manner as to amount to a fundamental breach of contract. He interviewed relevant witnesses. The claimant has not said who else Mr Jackson should have interviewed. The claimant admitted to Mr Jackson that he had filled in the error log in a way that indicated he had spoken to individuals he had not actually spoken to. No further investigation was necessary.

139. It was reasonable for Mr Jackson to decide not to view the CCTV footage, as he would not have been able to ascertain from it what the claimant was discussing with other employees. In his evidence, the claimant made the comment that the individual may have been holding a sign whilst he was talking to them to say what he was talking about. We assume this was a facetious comment and not intended to be taken seriously. There would be no reason for someone to be holding such a sign and he has certainly never before raised that they were and that this could be seen on CCTV footage.

140. Mr Jackson was not cross examined about the accuracy of the minutes. The claimant has not explained what the inaccuracies were and why they were so significant that they amounted to a fundamental breach of contract.

141. Mr Jackson was entitled to reach the conclusion that there was a case to answer despite the claimant's absence. The claimant was not absent when the accuracy management process was introduced. Mr Jackson was principally concerned about the claimant's apparent dishonesty when filling in the spreadsheet. The claimant told Mr Jackson in the investigation that he understood the process and apologized if he had mislead anyone. It was therefore reasonable for Mr Jackson not to take his absence into account. The claimant had completed the error log on other occasions before this incident.

There would have been a disciplinary meeting, at which the claimant could have asked the disciplinary manager to take into account the fact that he was absent around the start of the implementation of the new procedure.

142. The respondent could not have convened the disciplinary meeting in the period recommended by OH because the claimant was off sick. It was held within a reasonable period of his return to work. OH had said 'it may also be helpful to consider holding the meeting virtually to avoid anxiety attending the workplace'. This was a reasonably tentative suggestion, not a recommendation. It was not put to us that the claimant requested the meeting be done by video link.

143. We find there was a breach of the implied term of trust and confidence in relation to the grievance process. That there was a course of conduct comprising several acts and omissions which collectively amount to a repudiatory breach of the implied term of trust and confidence and that the claimant resigned in response to the 'last straw' (see *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481, CA).

144. We find that the respondent did share the claimant's concerns about the management at Allington with managers (including General Manager, Mr Buchan) despite the fact that the grievance was addressed to Ms Macway Jones and that to ask Mr Buchan to handle it was inappropriate. The claimant makes it clear in his grievance letter that he has sent it solely to Ms Macway Jones because he believes it falls under the whistle-blowing procedure. This should have raised a red flag with people services that it should not be disseminated without careful consideration. The respondent's grievance procedure makes it clear that grievances are normally raised with the manager (or manager's manager). The claimant chose to bypass this process and made it clear on the face of his grievance he was doing so because he believed he was blowing the whistle on the culture of the Allington depot. Despite this, people services sent the grievance to Mr Buchan, the general manager of the depot.

145. Mr Buchan incidentally does not seem to have thought it inappropriate for him to hear the grievance, even though he was currently asking Mr Jackson to investigate a disciplinary issue with the claimant. But the claimant then objected to Mr Buchan hearing the grievance and it was allocated to Mr Wallbank instead.

146. There followed other problems in connection with the grievance investigation.

147. We do find that the grievance response was slow. In itself, it was not sufficiently slow as to amount to a fundamental breach but it is one of the ways in which the grievance procedure fell short of a reasonable standard which cumulatively amount to a fundamental breach. We accept that the grievance hearing could not reasonably have been held before 4 May 2021, given the claimant's illness and the rescheduling of the hearing to suit the claimant's companion. But he was not sent an outcome until 9 June 2021. We accept Mr Wallbank was on holiday for about 14 days in the interim but five weeks for the investigation done is still excessive.

148. We find that there were multiple issues with the interviews carried out by Mr Wallbank and that therefore Mr Wallbank did not contact and interview everyone he should have done. We are not going to make a finding that Mr Wallbank deliberately falsified documents when he was not here and did not have an opportunity to explain what may have happened. But there is something troubling and unexplained about how the transcripts of interviews with Mick Philips and Nathan Cox are identical in questions and answers but still have different details (names, dates and times) at both the top and bottom of each transcript. That indicates that it is not a simple case of one document being saved over another. Furthermore, we find it difficult to understand why Mr Wallbank's grievance outcome letter says he did not speak to Mr Sadowski, when there is a transcript which purports to show a record of a call with him. Mr Williams provided a possible explanation for this but was just speculating.

149. We find that Mr Wallbank either did not interview one of Mr Philips and Mr Cox, or he interviewed them both but failed to record his interview with one of them and therefore did not effectively take into account their evidence. Furthermore, all the call logs show very sketchy and brief conversations took place.

150. And Mr Wallbank's notes indicate he failed to interview Mr Jackson about the claimant's complaints about the disciplinary investigation, even though Mr Jackson was conducting it, and instead interviewed Mr Parkes about it. Mr Wallbank clearly should have interviewed Mr Jackson about this allegation.

151. The grievance outcome did not find that a bullying tone was used, so there was no issue in respect of a failure to uphold the grievance despite that finding. We also do not find that there was any issue with a failure to hold a grievance outcome meeting. The respondent had a discretion as to whether or not to hold an outcome meeting and it was not unreasonable to choose not to do so.

152. The grievance outcome should have upheld the claimant's complaint about the lack of one-to-ones (following the outcome of the first grievance) rather than dismissing his grievance in its entirety, as the respondent conceded these had not taken place.

153. There is clear evidence that something went very wrong with the grievance investigation and it was a flawed and unreliable process. We find that the matters set out above were cumulatively a breach of the implied term that the respondent would not without reasonable and proper cause conduct itself in a manner calculated or likely to seriously destroy the relationship of trust and confidence. Collectively they amounted to a wholesale failure to investigate properly and respond adequately to the claimant's grievance.

154. We find that the claimant resigned without delay in response to this breach on receiving the grievance outcome letter dismissing his grievance, which was the 'final straw'. He had been informed several days before his resignation that the disciplinary matter was proceeding to a disciplinary hearing but he did not resign in response to that news. He resigned on the same day he received the grievance outcome letter, citing the grievance outcome amongst other matters in his resignation letter. Although the grievance

outcome was not the only contributory factor to the claimant's resignation it does not have to be provided it was a substantial part of his reasons, which we find it was (*Meikle v Nottinghamshire County Council (2005) ICR 1*).

155. A hearing will be listed to determine remedy in respect of the claimant's successful claim of constructive unfair dismissal.

Employment Judge **Carney**

7 December 2023