# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr Yew Sun Soo**
**Respondents:** **Pricewaterhousecoopers LLP (1) and Pricewaterhousecoopers Services Limited (2)**

**Heard at:** **Southampton Employment Tribunal via Video hearing**
**On:** **20, 21, 22 and 23 November 2023**

**Before:** **Employment Judge Youngs**

**Representation**
Claimant: In person
Respondent: Mr Anderson, Counsel

**JUDGMENT** having been sent to the parties, following oral reasons being given at the conclusion of the hearing of this matter, and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

1. The Claimant brings a claim of constructive unfair dismissal against two Respondents, namely Pricewaterhousecoopers LLP (the First Respondent) and Pricewaterhousecoopers Services Limited (the Second Respondent and the Claimant's employer. For the purposes of this Judgment, the Second Respondent is referred to as the Respondent and when both the First and Second Respondent are referred to together, they are referred to as the Respondents.

2. The Hearing of this matter commenced on Monday 20 November 2023 by video hearing. The Claimant represented himself. He gave evidence himself and his father also gave evidence for the Claimant. The Respondents were represented by Mr Anderson of Counsel. Three witnesses gave evidence on behalf of the Respondents, namely Lily Anguelova, Employee Relations Service Delivery Team Manager, Colby Pope who at the relevant time was a Senior Human Capital/Business Partner, and Trevor Smith, Director within the Audit Risk and Quality team. I had before me the witness statements, an agreed Bundle of documents, a supplemental Bundle provided by the Claimant, a chronology prepared by the Respondents and a further version of the same chronology annotated by the Claimant. Both parties made written and oral submissions, which I have taken into account.

3. At the start of the hearing I confirmed with the parties that the issues were as set out on page 74 of the agreed Bundle. Both parties agreed this was the case, and it was further agreed that issues as to liability be considered and determined prior to hearing any evidence on remedy. This meant that the issues to be determined were limited to those set out in paragraphs 1.1, 1.2, 1.3 and 1.4 of the list of issues on page 74 of the Bundle, which are as follows:

*1.1 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breaches alleged are as follows;*

*1.1.1 The Respondent delayed in dealing with the Claimant's request for the PWE/ TWE days to be signed off as set out in the claim form.*

*1.1.2 the Respondent did not grant the Claimant retrospective leave when he asked for it,*

*1.1.3 the Respondent invited the Claimant to a disciplinary meeting due to unauthorised absence.*

*(The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).*

*1.2 The Tribunal will need to decide:*

*1.2.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and*

*1.2.2 Whether it had reasonable and proper cause for doing so.*

*1.3 Did the Claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end. The Respondent says the Claimant resigned because he did not wish to face disciplinary meetings.*

*1.4 Did the Claimant tarry before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.*

4. To support the Claimant, there were a number of breaks during the proceedings, and the Tribunal also supported the Claimant to ensure that that he had covered the key issues in his questioning of the Respondent's witnesses.

**Findings of fact**

5. The Claimant was recruited in September 2010 as part of a cohort of 15-20 graduate trainees. Ordinarily, a graduate training contract would last three years. By the end of the Claimant's employment in February 2022, over 11 years after his employment commenced, the Claimant had not completed his training.

6. The Claimant's employment was subject to a set of supplementary terms and conditions for trainees in the Autumn 2010 intake seeking admission to the Institute of Chartered Accountants for England and Wales ("**ICAEW**") and to sections 1 and 2 of the Respondent's Employment Manual. Accordingly, the terms of his employment included the following:

6.1. In relation to holiday:

6.1.1. "Your combined holiday entitlement consists of 25 standard days";

6.1.2. "You may not take more than the maximum of 40 days per year standard holidays…including any holiday carried forward from the previous year…";

6.1.3. "You must request advanced approval for holiday in accordance with the authorisation arrangements for your team. We may not be always be able to grant holiday at short notice… As soon as you have approval you must record your holiday on your timesheet."

6.2. In relation to sickness absence, the Claimant was contractually obliged to:

6.2.1. "Telephone [the Respondent] by 09.30am on the first day of absence and explain why you are unable to attend work."

6.2.2. "Keep in contact with your manager…on a regular basis if you are sick for more than one day".

6.2.3. "…if you are sick for more than seven consecutive days…you must provide the appropriate fit note from your GP or hospital doctor".

6.3. The terms made clear that:

6.3.1. "If you take absence or time off that you are not entitled to, or that you don't gain proper authorisation for (i.e. in line with our procedures) you will not be entitled to pay and may be subject to disciplinary action…"

7. The Respondent's disciplinary policy gives as an example of gross misconduct "Failure to follow our documented procedures and rules and requirements or refusal to comply with our policies" and "Persisting or repeated unauthorised absence".

8. It is not in dispute that in order to qualify as an accountant, the ICAEW requires that, in addition to passing specified exams, trainee accountants have to achieve 450 days of practical work experience ("**PWE**"). This has previously been referred to as "Technical Work Experience" or "TWE", but the parties agree that these two terms (PWE and TWE) relate to the same thing. In this Judgment, I use the term PWE.

9. It is intended that the 450 PWE days be concluded over the course of a three year training period, although the period of training may be extended. To evidence the amount of PWE done, trainees, including the Claimant, are required to record their evidence of PWE, which is then reviewed on a 6 month basis. The Respondent has to sign off PWE days, to ensure that an appropriate standard and level of experience is obtained, in order that a trainee achieves an appropriate standard to qualify.

10. As an appropriate standard and level of experience is required, the Respondent does not ordinarily agree to include any PWE days undertaken when its trainees are subject to performance improvement plans. As explained by Mr Smith in his evidence, this is the standard approach taken by the Respondent in respect of trainee accountants.

11. The Claimant worked from September 2010 to April 2012 at, presumably, the required level. However, between April 2012 and October 2013, the Claimant was on a Performance Improvement Plan (or "**PIP**") and so some of that time will not have counted towards PWE according to the Respondent's general practice in that regard. Due to being rated as underperforming, the Claimant did not progress through the Respondent's role levels from Associate 1 (to Associate 2 and then Senior Associate 1). He received a warning for his performance in November 2012.

12. Due to being on a performance improvement plan from April 2012 to October 2013, and then a lengthy period of absence from October 2013 to May 2016, the Claimant did not achieve 450 PWE days prior to 2013/2016. The Respondent only signed off 90 days of PWE for the Claimant in respect of the period prior to this absence.

13. The Claimant returned to work in May 2016 but was then absent again between 3 June 2016 and 18 November 2016. A further period of approximately 3.5 years' continuous absence commenced in December 2016, with the Claimant returning to work to continue his training in June 2020.

14. In April 2019, whilst the Claimant was still off sick, the Respondent's Anna Blackman (Audit Partner and People Partner for the South East) was appointed to review the Claimant's case.

15. The Claimant emailed Ms. Blackman on 22 April 2019, stating that he was writing to "voice [his] discontent with the firm" at "pre-grievance stage". The Claimant raised issue with having been given low performance grade and expressed that he felt that he had been discriminated against. He raised the issue of PWE sign off, expressing that he felt that he had achieved 450 days before going off sick in 2013. He also raised health issues, and indicated that he was aware of the potential for employees to be constructively dismissed. It was clear that the Claimant was very unhappy about his position with the Respondent and he was minded to raise a formal grievance if amicable resolution could not be reached. Mr Smith, Director within the Audit Risk and Quality team, was copied in to this email.

16. The Respondent considered the detailed submissions made by the Claimant in 2019 in respect of PWE. It acknowledged that it holds its employees to very high standards. In order to reach a compromise with the Claimant and help him to progress, it agreed to amend the standard otherwise applied by the Respondent for PWE approval so that additional PWE days could be signed off for the Claimant.

17. Mr Smith met with the Claimant on 29 April 2019. During this meeting, Mr Smith offered to increase the number of approved PWE days (in respect of the period

2010 to 2013) to 150 days. Mr Smith updated Ms Blackman about this by email on 15 May 2019. PWE was then referred to during a subsequent meeting between Ms Blackman, Mr Pope, Senior Human Capital/Business Partner, and the Claimant on 20 May 2019.

18. In cross examination, the Claimant agreed that at the meeting on 20 May 2019, Ms Blackman did not agree to sign off a specific number of days of PWE. This was not the focus of the meeting. Following the meeting and on the same day, the Claimant emailed Ms Blackman, copying in Mr Pope, asking to raise two additional points: The first was that the Claimant wanted to be promoted to a Senior Associate grade, and the second was that the Claimant wanted to see Mr Smith's workings that sat behind the offer of approval of 150 PWE days. The Claimant suggested in his email that 250 to 300 days would be more reasonable.

19. The points raised by the Claimant were considered by the Respondent. Mr Pope responded to the Claimant by email on 6 June 2019. The Claimant was still off sick at this time. Mr Pope suggested that a return as an Associate 2 might be better than the Claimant returning to work as a Senior Associate He emphasised that he felt that progression to Associate 2 would be a more supportive approach than that promoting the Claimant to a level that he was not ready for. Mr Pope referred to the PWE days stating:

*'With regards to your TWE, we would be happy to go through the workings so as to arrive at an agreed figure with you. Perhaps this could be one of the first tasks when you return to work'.*

20. The email was supportive in tone and the Claimant appeared to take it that way. The Claimant refers to the position expressed by Ms Blackman, and by association Mr Pope, as being "fresh consideration" and it was sufficient for the Claimant to decide not to raise a formal grievance. No specific number of PWE days was agreed to be signed off as at June 2019, therefore, and both parties knew that this was something that would need to be revisited upon the Claimant's return to work. The Claimant did not complain about the approach proposed by the Respondent at this time or chase for or request any further resolution of the matter between 6 June 2019 and the Claimant's subsequent return to work in June 2020.

21. The Claimant returned to work between June and November 2020. He had some training, then a month off in September 2020 as annual leave, and then commenced client work in around October 2020.

22. In late October 2020, an agreement was reached between the Claimant and Mr Smith that the Claimant's approved PWE days would be increased to 200 days signed off. The Claimant was happy with this amount. Mr Smith signed a form on 10 November 2020 approving the increase in PWE days to be logged and this was submitted to the ICAEW on 11 November 2020. The Claimant was not copied-in to the submission email, as the Respondent did not copy in trainees when submitting such forms. However, the Claimant accepted in evidence that he was told by the Respondent that the PWE days had been submitted to the ICAEW at around this time.

23. There was an error on the form submitted by the Respondent to the ICAEW, but that was resolved in January 2021.

24. It took over a year from the date of original submission of the PWE information for the PWE days to finally be noted on the Claimant's formal ICAEW training record in December 2021. We do not know the reason for this, but all of the evidence before me indicates that the delay rested with the ICAEW and not with the Respondent. The Respondent did chase the ICEAW on a number of occasions in January 2021 and then from November 2021, as evidence by the email correspondence in the Bundle, and I find that the timing of the ICAEW logging the days on the Claimant's training record, and the lengthy delay in this being resolved, was outside of the control of the Respondent and for reasons unknown, delay by the ICAEW. However, the delay caused the Claimant to be suspicious. He said in evidence that he didn't know if he could believe what he was being told by the Respondent.

25. The Claimant was absent from work from 18 November 2020 until around September 2021. During this period, the Claimant was subject to two disciplinary procedures for failing to follow the Respondent's absence reporting policy, the first of which led to a first written warning on 19 February 2021, and the second led to a final written warning on 5 May 2021. Both warnings related to the Claimant not staying in touch with the Respondent during periods of absence and not providing fit notes when off sick.

26. On 1 October 2021, the Claimant began another phased return to work. The requirements for absence reporting were made clear during a meeting on 30 September 2021 between the Claimant and his then Career Coach, Christopher Thomas, prior to the Claimant's return to work. Mr Thomas sent a follow-up email to the Claimant the same day. The Claimant had agreed with Mr Thomas that on his return to work he would work 4-hour days for a couple of weeks while he was completing compliance and audit training. He also agreed to contact Mr Smith by 11am to note if he was working or off sick.

27. Unfortunately, the position regarding the PWE days appears to have been misunderstood by Mr Thomas, as his 30 September 2021 email refers to Mr Smith saying that he *will* sign off between 200 and 250 PWE days, when in fact Mr Smith had already signed off 200 days and submitted that sign off to the ICAEW a year previously. As at this date, the ICAEW still had not approved the Claimant's PWE days and the Claimant could not see anything in relation to these PWE days on his record.

28. The Claimant emailed Mr Thomas and Mr Smith on 8 October 2021 asking that his PWE days be signed off prior to him (the Claimant) returning to full time working. Mr Smith started chasing an update from the Respondent's Professional Qualifications team on 27 October 2021, to try to find out what happened as regards the approval / logging by the ICAEW of the Claimant's PWE days.

29. The Claimant was off work for a total of 12 working days out of a possible 21 working days in October 2021. His Career Coach reported to HR that the Claimant had failed to comply with reporting or communication obligations for seven of those 12 days.

30. The Claimant was then off work by agreement from 5 November 2021 to 24 November 2021 [as referred to in the investigation report], and then refused to return to work. He emailed Ms Anguelova on 25 November 2021 saying that he would not return to work "until my training records have been signed off to the agreed time". He went on to say that "this piece has been neglected since 2013, and it is the consistent cause of his depression caused by bullying and harassment by the Firm". The Claimant confirmed in his evidence that his initial refusal to return to work was because he was protesting against his PWE days not having been logged.

31. Ms. Anguelova replied the same day to tell the Claimant that he had a contractual obligation to attend work, unless he was unwell, and that any issues with his PWE should be dealt with locally. The Claimant responded again the same day, saying that he would like to attend work but he could not because his PWE had not been signed off. He said that every time he attended work it triggered his depression, and it had been ongoing since 2013.

32. Ms Angelova again responded to say that "Trevor has signed off the agreed days, which has gone to ICAEW and we are awaiting confirmation from their end. This is the standard process" and that the Claimant "was expected to be in work and not wait until the [days] are signed off". There was no acknowledgement of the Claimant's reference to depression at this time. The Claimant does not appear to respond further and the Claimant remained off work.

33. On 6 December 2021 Ms. Anguelova wrote to the Claimant about his ongoing absence. She highlighted that the Respondent had not heard from the Claimant since 25 November 2021, that he was not complying with the Respondent's absence reporting procedure, and (if he was off sick) he had not provided fit notes. The Claimant was asked to contact his career coach by 5pm on 8 December 2021, and he was told that if he (or someone on his behalf) did not do so, his absence would be treated as unauthorised and a disciplinary procedure would be considered. The Claimant responded the same day (6 December 2021) saying that he had already told Ms Anguelova why he was not attending work, and also informing her that he would only communicate via his personal email address or by post.

34. Ms Angelova replied on 9 December 2021 repeating a previous request for a call with the Claimant, reminding him that he was obliged to attend work, and that if he was sick he must comply with the Respondent absence procedures and provide a fit note. Ms Angelova told the Claimant that his leave since 25 November 2021 was being treated as unauthorised.

35. The Claimant responded the same day, saying that he was unable to return to work as the cause of his sickness was the missing documentation of his training since 2013. The Claimant referred in his correspondence to seeking counsel from solicitors and having been in contact with a journalist, neither of which were true (he had not taken legal advice or had contact with a journalist). The Claimant confirmed in evidence that he was trying to intimidate the Respondent into expediting the resolution of his PWE being logged. The Claimant stated that he wanted to raise a grievance.

36. Ms Angelova responded on 10 December 2021. This included an acknowledgement that the Claimant was stating that his health was impacted by the PWE issue, but that nonetheless he was required to provide a fit note if he was not fit to work. Ms Angelova also provided the Claimant with a form on which to raise a grievance and directed him to the grievance Respondent's policy. In the event, the Claimant did not raise a formal grievance with the Respondent.

37. The Respondent did seek to expedite the logging of the Claimant's PWE days and by 10 December 2021 the Claimant's ICAEW record had been updated with his PWE days. The Claimant was updated by the Respondent on 13 December 2021, although he confirmed in evidence that he had received notification from the ICAEW, so he knew that his days had been logged. By 13 December 2021 at the latest, therefore, as far as the Respondent was concerned the PWE issue, which was the stated cause of the Claimant's absence (whether due to protest or ill health), had been resolved.

38. The Claimant remained off work.

39. On 17 December 2021, Ms. Anguelova again contacted the Claimant about returning to work noting again that he should be able to see the time logged on the ICAEW system. She again reminded the Claimant of his absence reporting obligations, asked him whether he was on sick leave and, if so, asked him to provide a fit note.

40. The Claimant responded on 21 December 2021. He did not seek to clarify the reason for his absence. He expressed disbelief that the Respondent had first sent details of the PWE days to the ICAEW in 2020 and the tone and content of his email suggests a lack of trust in the Respondent. The Claimant indicated that he would be "launching a formal grievance (as advised by my legal team), expect something soon - though I do not want to disrupt the festive spirit".

41. Ms Anguelova responded to the Claimant on 22 December 2022 noting that his absence from 24 November 2021 continued to be unauthorised and said that "any relevant next steps will be picked up in the New Year" in relation to the absence. That prompted a response from the Claimant on 7 January 2022 as follows:

    *Thanks for "reminding" me.*

    *As far as I am aware I have accumulated annual leave. I would like to apply for paid leave, exhaust my balance until this grievance case is closed.*

    *Please make a retrospective application, as our discussion was the last straw that broke the camel's back.*

42. The Claimant did not say he was unwell. He did not seek to provide a back-dated fit note, or a fit note going forward. Instead, his email was a request for annual leave, and asked for a retrospective application to be made on his behalf, to cover the period "until his grievance case is closed". Ms Angelova responded to say that a grievance hadn't been received by the Respondent and to remind the Claimant of the grievance process, but she did not at this time address the

Claimant's request that a retrospective application for leave be made. It is not disputed that Mr Smith and Mr Thomas were copied into the Claimant's email refencing a retrospective application for leave. The Respondent in any event saw this as an attempt to defeat the Respondent's allegation that the Claimant had been absent without leave, which was not an unreasonable conclusion in the circumstances.

43. On 1 February 2022, the Claimant was invited to a disciplinary meeting with Alex Hookaway (another partner of the Respondents) on 4 February 2022. The allegation against the Claimant was that he was refusing to attend work and was acting improperly in placing conditions on agreeing to attend. The Claimant was sent an invitation letter, which enclosed the Respondent's disciplinary policy and an investigation report.

44. The investigation report does not make any reference to the Claimant's statements about his health, other than to say that on 9 December 2021 the Claimant had "categorically confirmed" by email that the reason for his absence (from 25 November 2021) was "not sickness related", and the report notes that the Claimant had "not presented any mitigating factors as to why he is not attending work since 25 November 2021". This is not entirely accurate, as there are two emails from the Claimant on 9 December 2021, one of which refers to the Claimant's health twice in that the Claimant says that the PWE issue is the cause of his sickness. That said, the various emails (including the two 9 December emails) were included within the investigation pack. The investigation report concluded that the Claimant "has failed to fulfil his contractual obligations" and "has failed...to act with integrity". The letter and report indicate that negative findings had been made against the Claimant.

45. The Claimant initially said he would not attend the disciplinary meeting because he was raising a grievance. The Respondent rearranged the disciplinary meeting for 14 February 2022. On 4 February 2022, the Claimant emailed Ms Angelova to say that he would not be attending the disciplinary meeting "as advised by my lawyers". He said that any disciplinary process should wait "for my grievance", although at that stage he had not raised a grievance.

46. The Claimant wrote a number of emails on 4 February and 5 February 2022 raising a number of points potentially relevant to the disciplinary process, including (i) the delay in signing off PWE days, and (ii) his application for retrospective leave, asking whether note had been taken of this. The chronology in the investigation report makes no reference to this request. At this stage the Claimant did not intend to attend the disciplinary meeting and said "if you decide to carry on the disciplinary "without" me – these are my points".

47. On 7 February 2022, Ms Anguelova again sent the Claimant a copy of the grievance procedure and responded to his emails about the possibility of retrospective leave, pointing out that she was not the person to whom annual leave requests ought to be made and advising him of the process to follow. The Claimant had thought that an email request was sufficient to apply for annual leave, and suggested that that was how he had had leave approved previously. The Respondent's policy indicates that applications for leave should be made in advance of the leave being taken.

48. On 11 February 2022, the Claimant emailed Ms Anguelova to say he "might attend" the disciplinary meeting, since he did not "feel I am fairly represented by yourself". He referred again to his "retrospective application of leave" and also referred to illness, saying both that "the "root" of my illnesses is because PwC did not sign any time off since 2013" and that "I'm not ill - you are the ill ones".

49. The disciplinary meeting was due to take place on 14 February 2022. The Claimant resigned with immediate effect that day, in advance of the disciplinary meeting.

50. In his resignation email, the Claimant said that he had meant to spend the previous day preparing for the disciplinary meeting but had slept the whole of the day. The Claimant stated that he considered himself to be constructively dismissed and referred to the Respondent pursuing disciplinary action for unauthorised absence when it had not responded to his request for annual leave, and that it took eight years to sign off 200 PWE days.

51. The Claimant contacted ACAS for pre-claim conciliation on 11 March 2022. The ACAS pre-claim conciliation period ended on 21 April 2022 and the Claimant filed his claim on 20 May 2022.

**Relevant Law**

Preliminary point: s. 111A Employment Rights Act 1996

52. There is reference in various documentation, including the February 2022 investigation report, to discussions which the Respondent says fall within s.111A of the Employment Rights Act 1996. For the avoidance of doubt, these are not referred to in this Judgment other than to confirm that neither the fact nor any detail of such matters played any part in determining the Claimant's claim.

Constructive dismissal

53. The right to bring a claim for constructive unfair dismissal is set out in sections 94 and 95 of the Employment Rights Act 1996:

*94. The right*

*An employee has the right not to be unfairly dismissed by his employer.*

*95. Circumstances in which an employee is dismissed*

*(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) and section 96, only if)—*

*…*

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

54. There is a considerable amount of case law in respect of constructive dismissal. Whilst it is not all repeated here, I note the following key principles:

55. In the leading case on constructive dismissal, *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221, CA, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it: 'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed'.

56. In order to successfully claim constructive dismissal, the employee must establish that:
    56.1. there was a fundamental breach of contract on the part of the employer,
    56.2. the employer's breach caused the employee to resign,
    56.3. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

57. The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in *Malik v BCCI; Mahmud v BCCI* 1997 1 IRLR 462 where Lord Steyn said that an employer shall not: "…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

58. The burden of proving the absence of reasonable and proper cause lies on the party seeking to rely on such absence, as confirmed by *RDF Media Group plc and anor v Clements 2008* IRLR 207, QBD. As in that case, this will usually be the employee.

59. In *Hilton v Shiner Ltd* 2001 IRLR 727, for example, Mr Recorder Langstaff QC, as he then was, stated in connection with a submission by counsel as to the proper legal test for establishing a breach of the implied term in the context of a case where the employer was alleging that the employee's misconduct had destroyed trust and confidence: "When Mr Prichard identified the formulation of the trust and confidence term upon which he relied, he described it as being an obligation to avoid conduct which was likely seriously to damage or destroy a mutual trust and confidence between employer and employee. So to formulate it, however, omits the vital words with which Lord Steyn in his speech in *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)* (above) qualified the test. The employer must not act without reasonable and proper cause… To take an example, any employer who proposes to suspend or discipline an employee for lack of capability or misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence between employer and employee, whatever the result of the disciplinary process. Yet it could never be argued that an employer was in breach of the term of trust and confidence if he had reasonable and proper cause for the suspension, or for taking the disciplinary action."

60. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal

following a 'last straw' incident even though the last straw by itself does not amount to a breach of contract – *Lewis v Motorworld Garages Ltd* 1986 ICR 157, CA. However, an employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably. This was confirmed in *Bournemouth University Higher Education Corporation v Buckland* 2010 ICR 908, CA, where the Court of Appeal upheld the decision of the EAT that the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal.

61. There is no need for there to be 'proximity in time or in nature' between the last straw and the previous act of the employer – *Logan v Customs and Excise Commissioners* 2004 ICR 1, CA.

62. In *Omilaju v Waltham Forest London Borough Council* 2005 ICR 481, CA, the Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, nor need it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective. And while it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the last straw test. In that context, in *Chadwick v Sainsbury's Supermarkets Ltd* EAT 0052/18 the EAT rejected a tribunal's finding that a threat of disciplinary action was 'an entirely innocuous act' that could not constitute a last straw.

63. Where the act that tips the employee into resigning is entirely innocuous it will be necessary to consider whether any earlier breach has been affirmed. In *Williams v Governing Body of Alderman Davies Church in Wales Primary School* EAT 0108/19 a teacher, W, was suspended for an alleged child protection matter. He was also subject to disciplinary proceedings for alleged breach of the school's data protection policy. He was dissatisfied with the process and resigned after several months, stating that the last straw was learning that a colleague, under investigation for a connected data protection breach, had been instructed not to contact him. The tribunal found that this instruction was reasonable in the circumstances and entirely innocuous. It held that, following *Omilaju*, this act could not contribute to a breach of the implied duty of trust and confidence and was not a last straw entitling W to treat his employment contract as terminated. On appeal, the EAT held that, where there is conduct by an employer that amounts to a fundamental breach of contract, a constructive dismissal claim can succeed even if there has been more recent conduct by the employer which does not in itself contribute to a breach of the implied term of trust and confidence, but which is what tips the employee into resigning. Crucially, however, the employee must not have affirmed the earlier fundamental breach and must have resigned at least partly in response to it.

64. In terms of causation, that is the reason for the resignation, a tribunal must determine whether the employer's repudiatory breach was 'an' effective cause of

the resignation. However, the breach need not be 'the' effective cause – *Wright v North Ayrshire Council* 2014 ICR 77, EAT. As Mr Justice Elias, then President of the EAT, stated in *Abbycars (West Horndon) Ltd v Ford* EAT 0472/07, "the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon".

65. Where an employee has mixed reasons for resigning their resignation will constitute a constructive dismissal provided that the repudiatory breach relied on was at least a substantial part of those reasons – *Meikle v Nottinghamshire County Council* [2004] EWCA Civ 859.

66. Thus, where an employee leaves a job as a result of a number of actions by the employer, not all of which amounted to a breach of contract, they can nevertheless claim constructive dismissal provided the resignation is partly in response to a fundamental breach.

67. If the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract resulting in the loss of the right to claim constructive dismissal. In the words of Lord Denning MR in *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221, CA, the employee "must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged". This was emphasised again by the Court of Appeal in *Bournemouth University Higher Education Corporation v Buckland* 2010 ICR 908, CA, although Lord Justice Jacob did point out that, given the pressure on the employee in these circumstances, the law looks very carefully at the facts before deciding whether there really has been an affirmation. An employee's absence from work during the time he or she was alleged to have affirmed the contract may be a pointer against a genuine affirmation. I further note that the EAT in *Gordon v J & D Pierce (Contracts) Ltd* UKEAT/2021 indicated that The EAT held that participation in a grievance or appeal process was not an unequivocal affirmation of the contract. I.e. lodging a grievance should not be regarded as waiving the breach. Rather, the EAT considered that grievance or appeal provisions may be regarded as severable from the remainder of the contract and capable of surviving independently, even though the remainder of the contract is brought to an end as a result of the breach.

68. The Court of Appeal in *Kaur v Leeds Teaching Hospitals NHS Trust* 2019 ICR 1, CA, held that, in last straw cases, if the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign.

69. If one party commits a repudiatory breach of the contract, the other party can elect to either affirm the contract and insist on its further performance or accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses. If they affirm the contract, even once, they will have waived their right to accept the repudiation.

70. The Court of Appeal in *Kaur* (above) offered guidance to tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:
    70.1. what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
    70.2. has he or she affirmed the contract since that act?
    70.3. if not, was that act (or omission) by itself a repudiatory breach of contract?
    70.4. if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?
    70.5. did the employee resign in response (or partly in response) to that breach?

**Conclusions**

71. I was invited by the Respondent to consider the last straw first, applying *Kaur*.

72. The last straw in this case is stated as being "the Respondent invited the Claimant to a disciplinary meeting due to unauthorised absence". It is alleged to be both a straw and a fundamental breach of itself. The Claimant says that the invitation to disciplinary meeting was the trigger for his resignation.

Did the Claimant affirm the contract after being invited to the disciplinary meeting?

73. The Respondent submits that in the period between receiving the disciplinary invitation and resigning, the Claimant affirmed the contract and waived the breach. The Respondent relies on the Claimant having stated that he wished to pursue a grievance (which suggests that he thought matters could be resolved), on the Claimant indicating that he intended to participate in the disciplinary meeting, and on the Claimant pressing his application for annual leave.

74. The Respondent submits that the Claimant accepted in cross examination that he saw a future with the Respondent even after the disciplinary invitation. What the Claimant said in cross examination was that he was not sure whether he saw a future with the Respondent at the time, and he said he was unsure of everything and had not been well. I do not find that the Claimant accepted or agreed that he had a future with the Respondent after he received the invitation to a disciplinary meeting.

75. I find that in the period from 1 to 14 February 2023, the Claimant was undecided as to how to approach the disciplinary meeting, as indicated by the changing position set out in his emails to the Respondent about his attendance. He had indicated at various time that he was going to raise a grievance, but did not take any steps to progress this, again indicating that he was undecided as to what steps to take. The EAT has helpfully indicated that in any event, raising a grievance or appeal does not of itself affirm all breaches of the employment contract. In this case, given the Claimant's persistent and stated unhappiness with the Respondent, I conclude that he did not intend to, and did not, waive any alleged breach of contract by his actions in indicating participation in a disciplinary and/or potential grievance process.

76. The Claimant ultimately decided not to attend the disciplinary meeting and instead to resign. The Claimant made his decision to resign two weeks after receipt of the invitation to the disciplinary meeting and in the circumstances, taking into account his varied position in communications, I do not find that this amounts to delay capable of affirming the contract.

77. Accordingly, I do not find that the Claimant waived the alleged breach or affirmed the contract of employment.

Was inviting the Claimant to a disciplinary meeting of itself a repudiatory breach of contract?

78. The Respondent avers that the disciplinary invitation was wholly innocuous. In other words, it caused no harm or offence. Having considered this carefully, I do not find that the invitation was wholly innocuous in the circumstances of this case. The invitation included an investigation report, which did not refer to the Claimant having asked that an application be made for him for leave until the grievance had concluded, perhaps because the decision to pursue disciplinary action was made prior to that request being sent, but it was relevant information and was known to the Respondent at the time of sending the invitation to the Claimant. This is the case whether or not the Claimant's request for annual leave (including retrospective annual leave) would in fact have been helpful to the Claimant and however unmeritorious that request may have been. The report also did not refer to statements that the Claimant made about his health and suggested that the Claimant had no mitigation. As I have said, relevant correspondence was included in the pack of evidence.

79. These omissions may not have been intentional, and I note that the Claimant's correspondence was not entirely consistent as regards his health and not entirely clear, but nonetheless, the invitation is not wholly innocuous.

80. That said, I do not find that on 1 February 2022, inviting the Claimant to a disciplinary meeting to consider unauthorised absence comes near to amounting to a repudiatory breach of contract in and of itself. The Respondent had reasonable and proper cause to invite the Claimant to a hearing. The Claimant was off work and was either:

    80.1. Protesting, in which case the Respondent had reasonable grounds for pursing a case that the absence was unauthorised, and the Claimant remained off work even when the cause of the protest was resolved as of 13 December 2021; or
    80.2. Sick, in which case the Respondent had reasonable grounds for pursing a case that the Claimant was not communicating that effectively to the Respondent as to the reason for the absence and, as he had done previously, was failing to comply with reporting obligations.

81. The reporting requirements were not of themselves unreasonable, and by this point the Respondent had given the Claimant a number of opportunities to submit a fit note or return to work. The Respondent had reasonable and proper cause to require a full and cogent explanation of the Claimant's conduct in not attending work, and to require that that discussion take place in the context of a disciplinary meeting. The Respondent was seeking to ensure that the contract of

employment was complied with, and was not indicating that it did not intend to be bound by it.

As the alleged last straw was not a repudiatory breach, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

82. In this regard, I have considered whether the other alleged breaches are fundamental breaches of themselves, and then also considered whether taken together the acts complained of amount to a fundamental breach of contract. As set out in the list of issues, the Claimant relies on a breach or breaches of the implied term of trust and confidence. Looking at each act in turn:

    Did the Respondent delay in dealing with the Claimant's request for the PWE days to be signed off as set out in the claim form, and if so was this a fundamental breach of contract?

83. Based on the submission to the ICAEW made by the Respondent in 2020, which shows the dates on which PWE days were approved, the Respondent had approved 94 days of PWE for the Claimant in 2010. For whatever reason, this does not appear to have made it to the Claimant's training record at the time in a format that the Claimant could see. Throughout the later discussions between the Claimant and the Respondent regarding disputed PWE days, the Respondent's communications indicate that the Respondent thought that around 90 days had been approved, and the Claimant thought that no days had been approved.

84. There is no firm evidence before this Tribunal as to whether PWE days that were approved in 2010 were notified to the ICAEW at that time, but the Respondent thought some PWE had been submitted to the ICAEW in respect of the Claimant and this is evidenced by the 2020 PWE form indicating that some PWE days were approved in 2010. The Respondent refused to sign off other PWE days when requested to do so in 2013 and 2016 because it did not consider that the Claimant had reached the necessary standard for further PWE days to be recorded. This was not delay that was calculated or likely to destroy trust and confidence. The Claimant, for example, was subject to a performance improvement plan in 2013, and then off sick. However, the Respondent subsequently responded positively to the submissions made by the Claimant in 2019 and applied a different standard to the Claimant than it would normally have applied, so that additional PWE days could be signed off for the Claimant.

85. As of June 2019, the Claimant was happy that the number of days to be signed off would be discussed on his return to work. He returned to work on 1 October 2020, and by the second week of November 2020 the PWE days had been agreed, signed off and submitted to the ICAEW. The Claimant was content with the number of PWE days that was agreed to be signed off at this time and at that time the Claimant considered the matter to be resolved. There is no significant or unreasonable delay by the Respondent in dealing with the Claimant's concerns around PWE days following the Claimant's return to work in late 2019, and no delay that would amount to a breach of trust and confidence.

86. However, it then took more than a year for the ICAEW to log the PWE days against the Claimant's formal training record. The full reasons for the delay are not known, but there is no evidence that the Respondent caused any delay past January 2021 (when it corrected an unintentional error in the form submitted). The extensive delay after that is unfortunate, and no doubt was frustrating for the Claimant, but I conclude that the Respondent did not do or fail to do anything in respect of the PWE days that was calculated or likely to breach trust and confidence following the meeting in 2019.

87. What is clear is that the Claimant had and has a genuine feeling of grievance in respect of the delays with this training. This was not helped by the delay in the PWE days being formally logged by the ICAEW, and of course the Claimant had very lengthy absences due to ill health, which impacted on his ability to complete his training.

88. However, I do not find the Respondent to have been in fundamental breach of trust and confidence in respect of how it dealt with the Claimant's PWE days.

Did the Respondent fail to grant the Claimant retrospective leave when he asked for it, and if so was this a fundamental breach of contract?

89. Whilst the Claimant's application for leave had a future facing element, the Claimant's case has been agreed, following discussion at two previous preliminary hearings, to be put on the basis of a retrospective application for leave being refused, which must, therefore, refer to a period of leave prior to the application being made. The Claimant's email asking for leave does refer to the application being retrospective.

90. The discussions at preliminary hearing aimed to understand the Claimant's claim and I note that the Claim Form does not set out a factually accurate account of the request for leave in any event (it says: the Claimant "requested time-off in November 2021 as I wanted to raise grievance - ignored". This is not accurate because a request was not made in November 2021 and a grievance was not submitted). The Claimant said at this hearing that his complaint is that the request for annual leave was not granted when he asked for it.

91. In the event, it makes little difference. It is not disputed that the Claimant's request was not granted. There is a dispute as to whether the Claimant's email was sufficient to make a request for annual leave, but this is not material to my conclusions in relation to this matter.

92. The Claimant's 7 January 2022 request for retrospective or ongoing annual leave was not dealt with or acknowledged by the Respondent at all prior to 7 February 2022, by which time the Claimant had already been served with an invitation to disciplinary meeting. The request appears not to have been recognised by the Respondent as a request for annual leave as such. The Respondent saw it as an attempt by the Claimant to retrospectively authorise unauthorised leave, and had reasonable grounds for that belief, given that the request was made in response to an email to the Claimant stating that his leave was unauthorised.

93. On the balance of probabilities, prior to the Claimant making his request, the Respondent had already decided to pursue the Claimant's absence as a

disciplinary matter. I find that that decision was made by 22 December 2021, when Ms Anguelova emailed the Claimant referring to "next steps" being "picked up" in the New Year in relation to the Claimant's absence, and that email is what prompted the Claimant to make request for leave. There is no contractual right for the Claimant to apply for leave retrospectively. The Claimant's contract required him to apply for leave in advance of taking it. The request for annual leave could not of itself undo what had gone on before in terms of the Claimant's non-attendance at work without following due process. Any failure by the Respondent to approve a retrospective request for leave was not, in my finding, calculated or likely to destroy or damage trust and confidence in this context.

94. Further, and in any event, even if the refusal did destroy or damage trust and confidence, the Respondent had reasonable and proper cause for such refusal. As at 7 January 2022 when the request was made, the Claimant was not attending work, was refusing to attend until his PWE days were logged, was not complying with absence reporting procedures and was not submitting fit notes (if he was unwell). In these circumstances, the Respondent was under no obligation to grant or consider the request for retrospective leave given that the Claimant's absence was unauthorised from 25 November 2021, and the Respondent was entitled to require the Claimant to perform the contract (and/or explain the reasons for his absence).

95. I therefore find that insofar as the request was refused, that was not a fundamental breach of trust and confidence, without reasonable and proper cause.

96. For completeness, I have taken into account that the Respondent did not deal with the request at all upon receipt, not even to say "no". That said, it did not ignore the Claimant's correspondence, and responded to other aspects of the Claimant's correspondence, and did eventually advise the Claimant how to make a request for leave, which he then did not do. Looking at the Respondent's conduct in the round, and the vast amount of correspondence between the parties, missing this point in this email was not of itself likely to destroy or seriously damage trust and confidence. Whilst it is unfortunate that this point in correspondence was not responded to quicker, of itself there was no fundamental breach of trust and confidence.

97. The leave was always unapproved, and it remained unapproved. The Respondent was not acting without reasonable and proper cause in requiring any reason for that absence to be considered at the disciplinary hearing arranged by the Respondent.

<u>Was the last straw part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?</u>

98. The last straw was the invitation to a disciplinary hearing. I have weighted up and considered the Respondent's conduct overall, as regards the alleged straws:

98.1. The Respondent had taken a lenient and compromising approach as regards the Claimant's PWE. The Respondent approved additional PWE for the Claimant that it would not normally have approved, submitted this

to the ICAEW, was aware that the ICAEW had raised a query in relation to the PWE days in January 2021, dealt with that query swiftly and as far as the Respondent was concerned, that issue was therefore concluded. Unfortunately the Claimant's initial happiness with 200 days being signed off by the Respondent dissipated due to delay that was outside of the Respondent's control. The Claimant's dissatisfaction from this point onwards was triggered as a result of delay by the ICAEW process, not any fault of the Respondent.

98.2. In the period from 2021 to 2022, the Respondent made further allowances and compromises for the Claimant in terms of his failure to comply with absence reporting requirements. Even when the initial indications from the Claimant were that his absence from the 25 November 2021 onwards was for no reason other than to protest the PWE situation, the Respondent did not move immediately or quickly to disciplinary proceedings. The Respondent repeatedly tried to encourage the Claimant to submit a fit note if he was actually sick and not just discontent, thus giving him a way to legitimise his absence. The Claimant did not do so, despite obtaining a fit note for the period prior to the 25 November 2021 and clearly knowing how to obtain fit notes.

98.3. The Respondent was therefore in the position of having an employee who was refusing to engage constructively or provide proper information in respect of his absence and invited the Claimant to a disciplinary meeting to consider allegations of unauthorised absence and failure to comply with reporting requirements.

99. Taking the Claimant's claim at its highest, the Claimant says that from 25 November 2021 he was absent due to the PWE delay, asked for leave to be approved, and was then disciplined in respect of the period for which leave was sought, the one "straw" leading to or impacting on the other and therefore being cumulatively a fundamental breach of the implied term of trust and confidence.

100. However, the Claimant has incorrectly assessed the Respondent's part in the PWE issue, and then was essentially seeking forgiveness for being absent without following the Respondent's absence processes, to avoid a disciplinary hearing. Disciplinary proceedings had already been intimated prior to the Claimant's 7 January 2022 request for leave, with the Respondent telling the Claimant in December 2021 that next steps in relation to his unauthorised absence would be "picked up" in the new year.

101. Looking at the Respondent's actions in the round, therefore, in respect of the leave and 2022 disciplinary process, the Respondent had given the Claimant numerous opportunities to explain his absence and/or assign his absence as sick leave, the Claimant was indicating that he did not intend to return to work as required by the Respondent, the Claimant was not communicating effectively with the Respondent, the Respondent was not getting cogent answers to its questions, and communications were further breaking down, the Respondent had reasonable and proper cause to refuse to grant leave, or to refuse to retrospectively remedy the Claimant's unauthorised leave prior to a disciplinary hearing, and had reasonable and proper cause to invite the Claimant to a disciplinary hearing, at which the Claimant would have had the opportunity to

raise any points in his defence (and indeed did so in writing prior to the date of the hearing).

102. Unfortunately, the Claimant's genuine and intense dissatisfaction in relation to the progress he was making in his training and employment by the Respondent in and around 2021 and 2022 was fundamentally caused by matters outside of the Respondent's control. His concerns about the PWE training days not being signed off in 2020 were misplaced and his subsequent absence and then the disciplinary procedures stemmed from that misunderstanding.

103. I have concluded that it was not a fundamental breach of contract to require a formal explanation of the Claimant in the circumstances, whether or not the Claimant had sought to remedy the position with a request for leave and taking into account the PWE situation and how the Claimant felt about that, which led to that point.

104. Unfortunately, the Claimant's assessment of how the Respondent had acted was based on his mistaken belief that the Respondent had failed to sign off PWE days when it had promised to do so in 2020. Therefore, whilst I have sympathy with the Claimant and do not doubt the impact that he feels, the Respondent itself is not responsible in respect of the breaches alleged.

105. For all of the above reasons, I conclude that there was no fundamental breach of contract by the Respondent, whether the alleged breaches are taken together or separately.

106. The Claimant's claim therefore fails and is dismissed.

Employment Judge Youngs
9 February 2024

Judgment sent to the Parties on 20 February 2024

For the Tribunal Office