EMPLOYMENT TRIBUNALS

Claimant: **Mr Ian Morgan**

Respondent: **Gwynedd County Council**

Heard at: **Cardiff via CVP** **On: 12, 13 and 14 February 2024**

Before: **Employment Judge R Havard (sitting alone)**

Representation:
Claimant: In person
Respondent: Mr O James, Counsel

JUDGMENT having been sent to the parties on 15 February 2024 and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

1. By a claim form dated 10 April 2023 the Claimant claims that he was unfairly constructively dismissed by the Respondent. In his statement dated 7 February 2024 the Claimant referred to harassment and the Equality Act but, following a discussion at the outset of this hearing, he confirmed that his claim was solely that he was constructively dismissed.

Documents

2. I have been provided with two bundles of documents, the first running to 444 pages and an additional bundle running to 134 pages.

Witness Statements

3. I had also received written statements from the Claimant and four witnesses for the Respondent namely Mererid Roberts, South Gwynedd Area Leader and the Claimant's Line Manager; Gwennan Roberts, Health and Safety Team Leader; Helen Vaughn-Owen, Learning Disability Team Leader (now retired) and Eurig Williams, Human Resources Service Manager. All five had attended and given oral evidence.

Submissions

4. Finally, I have received from Mr James documents entitled "an opening note" and Respondents closing submissions and I have listened to oral closing submissions from Mr James, I then afforded some time to the Claimant to reflect on what Mr James had said and the Claimant then made brief closing submissions. He did not take issue with the legal framework provided by Mr James in his opening note and in his closing submissions both written and oral.

List of Issues

5. At the outset of the hearing it was apparent that no List of Issues had been prepared let alone agreed between the parties. It was agreed that whilst I carried out some pre-reading the Claimant and Mr James would endeavour to prepare a List of Issues, that proved successful and the agreed issues for me to determine were as follows:

1. It is agreed that the Claimant suffered an injury when he came off his bike whilst mountain biking with a service user on 28 January 2022.
2. The Claimant resigned with immediate effect by letter dated 28 November 2022.
   <u>Contractual terms relief upon</u>
3. The Claimant relies upon the implied term of mutual trust and confidence.
   <u>Breaches relied upon</u>
4. The Tribunal will have to determine whether the Respondent breached the above term by:
   a. The Respondent's insurer's response of 25 May 2022 in that it:
      i. It denied liability;
      ii. Misrepresented the Claimant's job description and/or alleged that the Claimant acted outside the scope of his role by cycling with a care user;
   b. The Claimant's line manager failing to review the Care Plans of service user(s);

c. Failing to have in place risk assessments in respect of elements of the Claimant's role;
d. Referring the Claimant to occupational health on 20 April 2022;
e. Failing to properly report the Claimant's injury (HS11 form; R1 form and RIDDOR report);
f. The Claimant's line manager contacted the Claimant after the intimated claim for personal injury and/or the Claimant's line manager exploring the Claimant's return to work with him;
g. The Claimant's line manager bullying the Claimant up until 22 June 2022;
h. The manner in which it conducted the investigation into the Claimant's Grievance;
i. The manner in which it determined the Claimant's Grievance;
j. The manner in which it conducted and determined the Claimant's Grievance Appeal;

5. Whether any of the above, alone, amounted to a repudiatory breach of contract.
6. Whether the cumulative effect of the above was that there was a repudiatory breach of contract; and whether the final straw was sufficiently serious to justify resignation.

Causation/Reliance

7. Whether the Claimant resigned in response to the above.
8. Whether the Claimant waived any of the above breaches and/or affirmed the contract (in particular) by:
    a. Remaining on sick leave until resignation on 28 November 2022;
    b. Intimating a claim for personal injuries, as opposed to resigning, in April 2022;
    c. Not resigning, having intimated so in correspondence, on 14 July 2022.

Remedy

9. What, if any, damages is the Claimant entitled to?
10. Whether the Claimant breached the ACAS code of practice?

Findings of Fact

6. The Respondent is the Local Authority for Gwynedd offering a range of services to the public. It employs in the region of 5,500 people. As part of its overall functions, the Respondent is part of a multi-agency service supporting those with mental health issues to enable them, so far as possible, to live independent and full lives within their communities.

7. Community Mental Health ("CMH") Teams function on a multi-agency basis to provide support to "service users", alternately described as

"clients". Another agency operating within the Respondent of particular relevance to these proceedings would be the Local Health Board.

8. In respect of each service user, a Care Treatment Plan would be prepared to illustrate: the nature of the client's mental health issues; any medication they may have been prescribed; their domestic circumstances; issues relating to personal care and wellbeing; the services to be provided, and what are described as social, cultural and spiritual activities in which the service user wishes to participate and which are considered appropriate.

9. The Care Treatment Plan, which I will describe as the Care Plan, is a document that is prepared by the Care Coordinator, who will be a member of the CMH Team and who would ordinarily be someone employed by the Local Health Board. The aim is to reach agreement with a client regarding the content and objectives of the Care Plan and the Care Plan is subject to review. It is understood that, depending on the nature of the activity, a risk assessment would also be prepared.

10. In relation to the overall effort to ensure that the client would be able to live as independent and productive a life as possible, they would receive support from a Mental Health Support Worker who would also be part of the CMH Team.

11. The Claimant was employed in such a role from 20 January 2002. I have had sight of a job description for a Support Worker dated 15 February 2019.

12. Under "Responsibility for Functions", examples of what is involved in the role are as follows:

    "To undertake activities via a care programme that enable the individual to recover from the illness. The professional member of the team is responsible for providing a care programme."

    "The Support Workers assist the Care Manager to treat the person through therapy in order to improve their circumstances and illness."

13. Under "Main Duties", it includes the following:

    "Take reasonable steps to ensure the health, safety and wellbeing of the service user and themselves within and outside the homes in accordance with the Care Plan."

"Take an operational role in the process of assessing, monitoring, planning and implementing activities in accordance with the needs of the service user as stated in the Care Plan."

"Attend regular supervision with the Support Services Manager to deal with work pressure management and practice as well as attending a monthly mental health workers meetings."

"Ensure compliance with health and safety rules in the workplace in accordance with the responsibilities noted in the Health and Safety At Work Act 1974 and the Council's Health and Safety Policy."

14. The Claimant had a contract of employment. For the purposes of these proceedings, the relevant document is an amended contract of employment dated 1 April 2008. At that stage, the Claimant was employed for 30 hours per week, although, by agreement, that was subsequently reduced to 20 hours per week. Whilst he would be working with clients, the contract stipulates that the post *"is based from home*". At clause 21 of the contract, it states that various policies, to include Sick Notification Policy and Health and Safety Policy, form part of the agreement with the Respondent. The Claimant stated that he was not familiar with those Policies but I find that such Policies were readily accessible. Indeed, the Claimant appears to have had little difficulty in accessing them when the need arose following an incident in January 2022 to which I shall refer in due course.

15. He was attached to Alltwen Hospital in Porthmadog. From 2013, the Claimant's Line Manager was Ms Mererid Roberts. She described herself as a Senior Practitioner and, from 2017, has been South Gwynedd Area Leader. I was not provided with any evidence to suggest that, prior to January 2022, there were any difficulties in the relationship between the Claimant and Ms Roberts. Ms Roberts was responsible for supervising the Claimant. She said that they would meet about once every two to three months, although irregularly so, and then meetings twice a year to talk through what the Claimant would be doing with the service users for whom he was responsible. Whilst the Claimant indicated that such meetings did not happen as regularly as suggested, I accept Ms Roberts's evidence and find that, whilst not at regular intervals, she and the Claimant would meet certainly more than once during each year.

16. It was stated by Ms Roberts that those discussions would not be based around the Care Plans. It was not suggested by the Claimant that they were. Indeed, Ms Roberts stated that she was not privy to the Care Plans which, as stated, would be prepared by the Care Coordinator. The Care Plan to which reference has been made in these proceedings, is that

which related to a service user who I will refer to as Client A. It is dated in December 2021, although no doubt there was a previous Care Plan, and it was to be reviewed no later than December 2022. It refers to activities undertaken by Client A such as biking and walking and that he engaged with the Claimant in these activities normally once per week. Whilst it was accepted, and I find, that there was no risk assessment in place regarding such activities, the Claimant also stated that he had been cycling with Client A for over 10 years without reference to a risk assessment and without any prior incidents. It was conceded by the Claimant, and I found, that Mererid Roberts was not aware of the fact that the Claimant would go cycling with Client A but he maintained that she should have been aware, and would have been aware had she seen the Care Plan.

17. Ms Roberts stated that, had she been so aware, then a risk assessment should have been in place. Furthermore, Ms Roberts stated that Support Workers such as the Claimant should support clients in activities such as swimming or cycling but not actually participate themselves. As for awareness of content of Care Plans, the procedure was in accordance with good practice as outlined in the Mental Health Strategy and National Framework for Wales and there is now reference to action plans of which Line Managers such as Ms Roberts are aware.

18. Whilst surprising, I find, based on the evidence of both the Claimant and Ms Roberts, that Ms Roberts was not aware of the content of the Care Plan nor of the Claimant's practice of cycling with Client A.

19. On 28 January 2022, the Claimant was involved in an accident when he fell off his bike when out with Client A. He sustained a serious injury to his left hand. I do not underestimate the seriousness of that injury. The Claimant notified Ms Roberts. I have noted Ms Roberts's email to her Line Manager. Whilst there is reference by Ms Roberts to the injury being to the Claimant's arm as opposed to his hand, I do not consider that anything turns on this point. Ms Roberts writes about the arrangements being made, and her Line Manager responds by saying "*poor thing, hope he's ok".*

20. On 31 January 2022, Ms Roberts completes and submits a form HS11. The Claimant was critical of the way in which this form was completed and how his injuries were described. Ms Roberts stated in the form that the Claimant had fallen off his bike and landed on his hand. She stated that the Claimant had "*broken bones in his hand".*

21. On 6 February 2022 the Claimant wrote to Ms Roberts informing her that he had undergone surgery. On 8 February 2022, Ms Roberts spoke to the Claimant on the phone and, in turn, relayed the outcome to Gwennan

Roberts on the same day, having been informed by Gwennan Roberts that she would have to submit a RIDDOR Report to the HSE.

22. There was further contact between the Claimant and Ms Roberts in which Ms Roberts was asking the Claimant about his injury and recovery. In the course of a telephone conversation, Ms Roberts discussed with the Claimant a referral to Occupational Health. Ms Roberts states that such a call took place on 9 April 2022, the Claimant saying it was on 19 April. I prefer the evidence of Ms Roberts as that is confirmed in a diary note dated 9 April 2022 which summarises a conversation about his injuries, his recovery, the suggestion by Ms Roberts of support from MEDRA if the Claimant was struggling with his mental health, and that he could now play a little guitar and that he was unable to drive.

23. There is reference in the note to a referral to Occupational Health to which the Claimant consented. Ms Roberts made a referral on 20 April 2022. Again, it is suggested by the Claimant that the content of the document downplayed the extent of his injuries and also that Ms Roberts had not attached an X-ray of his hand to the form. The description provided by Ms Roberts is, *"has broken wrist*". I find this adequately highlights to the Occupational Health Advisor the nature of the injury and no doubt the Claimant himself could provide as much detail of his injuries as he wished, or the OH Advisor required, when he spoke with the OH Advisor.

24. During this time, and whilst the date of instruction was not clear, the Claimant had retained solicitors, namely Thompsons, to represent him in a claim for personal injuries. On 12 April 2022 Thompsons wrote a letter before action to the Respondent, it made various allegations of negligence and/or, in effect, breach of statutory duty, for example a lack of risk assessment, and requests the Respondent to produce a number of documents, for example, the Claimant's contract, accident report and so on.

25. Whilst the Respondent's witnesses were challenged by the Claimant about their conduct regarding the response to the claim, I accept their evidence and find that they had no contact with anyone other than the Respondent's Legal Department when providing the necessary documents.

26. On 25 May 2022, the Respondent's insurers, Zurich, responded refuting the claim. Ms Roberts confirmed that she had not had any contact with anyone regarding this claim other than to provide documents at the request of the Legal Department. She therefore made no contribution to the basis on which Zurich phrased its rebuttal of the claim. It had been

suggested by the Claimant at an early stage that the Respondent had been dishonest in its response and that Ms Roberts was a liar. Whilst he has retracted those allegations, I find no basis for them in any event. The Claimant then confirmed that Thompsons, a highly experienced firm that specialises in claims of this sort, had concluded that there was insufficient evidence to proceed with the claim, although the Claimant said the claim remains open.

27. On 13 April 2022, the day after the letter before action from Thompsons, the Respondent submitted a RIDDOR form to the HSE completed by Gwennan Roberts. Again, the Claimant suggested that the description provided by Gwennan Roberts downplayed the seriousness of his injuries. I accept Ms Roberts evidence and find that, taking account of the nature of the injury and circumstances, Ms Roberts would be restricted by a choice presented on a drop-down menu to describe the injury as bone fracture.

28. Gwennan Roberts restricted her investigation to considering the relevant documents and speaking with Mererid Roberts. It was confirmed that, if this activity was to take place at any stage in the future, then a risk assessment should be prepared and she gave advice on what the risk assessment should contain, offering to assist in its preparation. The explanation for the limits of her investigation are set out clearly in her email of 19 April 2022.

29. During May and June 2022 there were email exchanges between Mererid Roberts and the Claimant both in respect of what Ms Roberts referred to as discussions of return to work and also a referral to Occupational Health. They also spoke on the telephone. It was suggested by the Claimant that he was being instructed to attend a return to work meeting whilst clearly not fit to do so. Also, that he was instructed to go into the office if necessary by bus and that there was a discussion about him working in the office. Finally, the Claimant was resistant to attending an appointment with Occupational Health.

30. Ms Roberts stated that "*return to work"* in her email of 12 May 2022 had been used loosely and that she knew the Claimant was not yet fit to return but she simply wished to find out his current position. I prefer the evidence of Ms Roberts, I have considered the notes prepared by Ms Roberts regarding the contact she had with the Claimant. The Claimant could not recall whether it was on 12 or 19 May 2022 that he had a conversation with Ms Roberts when he alleged that Ms Roberts was, and I quote, "disrespectful, demeaning, condescending and malicious". I find there is no evidence to support such claims. Having listened to her give evidence, I accept Ms Roberts account that she would not behave in such a manner. The Claimant suggested that, in the course of the

conversation, when he said he continued to have difficulty playing the guitar, Ms Roberts suggested he should learn to play the piano. This was denied by Ms Roberts. I do not accept that she made such a remark. In her note of the conversation, Ms Roberts records that they discussed the Claimant's current condition, instructions the Claimant had had from his surgeon, the appointment with Occupational Health on 26 May 2022, and Ms Roberts reminding the Claimant, as she had on 9 April 2022, of the availability of support from MEDRA if he was struggling with his mental health. Subsequently, it transpired the Claimant had cancelled the appointment with Occupational Health. He stated in his oral evidence that he maintained that it was his decision when he was fit enough to go back to work. That is consistent with what he said in his complaint lodged on 14 July 2022 to which I shall refer.

31. I do not find that Ms Roberts had put the Claimant under pressure to return to work but rather that she made contact with him to have a conversation about his current status.

32. The Claimant had sent emails to Ms Roberts stating that he would, *"be in touch".* The Claimant stated that Ms Roberts was supposed to infer from those words that she was not to contact him. In any event it became clear to Ms Roberts that, by the end of June 2022, the relationship between her and the Claimant had broken down and therefore line management responsibilities were transferred to Theresa Williams.

33. On 25 June 2022 the Claimant wrote to Nia Gruffydd of HR complaining about Ms Roberts bullying him to go to a return to work interview *"even when I have emailed her twice not to get in touch"*. This is not correct. As stated above, the Claimant had indicated in previous emails that he would, "be in touch" as opposed to telling Ms Roberts not to contact him. He goes on to say in his email of 25 June 2022, *"once the letter of claim went in it should have been the case that she not be in touch as the claim is still ongoing. I have no idea why this allowed to happen. It has clearly put me in a vulnarable position. I have had to deal with this injury also the psychological impact. I've also explained to the Line Manager how this impacted on my family".(sic)*

34. The Claimant gives no reasons why his pursuit of a personal injury claim prevents his Line Manager from contacting him. Secondly, he refers to his vulnerability, but Ms Roberts has on two occasions, once on 9 April and once in May 2022, referred him to the support that was available from MEDRA. I do not find the Claimant's account of the chronology to be credible. However, by this stage, the Claimant was clearly considering lodging a complaint. He proceeded to do so on 14 July 2022. It is a detailed letter of complaint and it concludes by saying, *"as the claim is ongoing and in relation to the above, I believe I have no choice*

but to resign from my post". The claim to which he was referring was his personal injury claim.

35. The complaint was investigated by Helen Vaughn Owen and Bethan Thomas. I heard from Ms Owen and I found her to be a credible witness. I am satisfied that it was made clear to the Claimant and his union representative that the ambit of the investigation related to the allegations of bullying by Ms Roberts and nothing else. There were delays in the course of the investigation. However, it is evident that the cause of the delays was not some deliberate attempt on the part of the Respondent to prevaricate but due to persons' availability, to include that of the Claimant and his representative, and also Ms Roberts. I am satisfied that the investigation and the recording of the interviews of those who attended is thorough and that the outcome report was properly reasoned and again thorough.

36. On 28 November 2022, the Claimant resigned. He based his decision on the allegations of bullying by Ms Roberts trying to force him back to work. It is also due to the failure to carry out risk assessments and thereby in breach of contract for failing to comply with Health and Safety legislation.

37. The grievance not having been made out, the Claimant appealed. By this time the Claimant had already resigned with immediate effect. However, whilst Eurig Williams, who conducted the appeal, made certain observations on the way in which the investigation had been conducted, he was satisfied, having heard from the Claimant and Ms Roberts, that the original decision should be upheld.

Legal Framework

38. The legal framework had been set out in the opening note of Mr James and in his written closing submissions which had not been challenged by the Claimant.

39. In summary, the legal framework is as follows.

40. In the leading case in this area, **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.

41. 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.'

42. In order to claim constructive dismissal, the employee must establish that:

    a. there was a fundamental breach of contract on the part of the employer;
    b. the employer's breach caused the employee to resign, and
    c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

43. In order to identify a fundamental breach of contract on the part of the employer, it is first necessary to establish what the terms of the contract are.

44. Individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of, for example, undermining the trust and confidence inherent in every contract of employment. 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**

45. In such cases, the decision of the Court of Appeal **in London Borough of Waltham Forest v Omilaju [2005] ICR 481** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial.

46. In **Western Excavating (ECC) Ltd v Sharp** (above) the Court of Appeal expressly rejected the argument that s.95(1)(c) introduces a concept of reasonable behaviour by employers into contracts of employment. This means that an employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably.

47. This was confirmed in **Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA**, where the Court 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.

48. The implied term of mutual trust and confidence is defined in **Malik v Bank of Credit and Commerce International [1997] IRLR 462:**

    "*The employer must not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee*".

49. A breach of that term may give rise to constructive dismissal, but both elements of the 'test' must be met for a claim to succeed:

    i. the employer must have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee; and
    ii. that there be no reasonable or proper cause for the conduct.

50. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in Malik recognises that the conduct must be likely to destroy or seriously damage the relationship of trust and confidence.

Analysis and Conclusions

51. Addressing each of the issues in turn, the Tribunal has carried out an analysis of the facts and, applying the legal framework, has reached the following conclusions.

52. However, I start by acknowledging that the Claimant sustained a very serious injury, and also that he clearly lost trust and confidence in his employer.

53. However, the Claimant must appreciate that that, of itself, is not sufficient. He must establish that this is as a consequence of conduct on the part of the Respondent which amounts to a repudiatory breach of contract.

54. By reference to the various issues at paragraph 4, I find as follows.

55. Under 4(a) and (b), I accept the submission made by Mr James that such issues are not germane to the issues that I must consider in terms of the employment relationship between the Claimant and the Respondent. If, indeed, these amount to allegations it relates to what was said by the Zurich Insurance Company. Any suggestion that Zurich based its response on information dishonestly furnished by the Respondent has quite properly been withdrawn as has the allegation that such representations were based on lies told by Ms Morgan. Finally, experienced solicitors have concluded that on the evidence presently available there is no claim for personal injury. I do not think in any event that issues of this nature relating to a personal injury claim can be transposed to a claim that the Respondent's actions are such that they amount to a repudiatory breach of the Claimant's employment contract.

56. As for 4(c), once again, this relates to allegations of negligence. It does not bear directly on the contract of employment between the Claimant and the Respondent save the overriding duty on the Respondent to ensure the safety of its workforce. However, I bear in mind that the Claimant had been, presumably happily and without complaint, cycling with the client for some 10 years before this incident occurred.

57. Under 4(d) the referral to Occupational Health was in accordance with the Sickness Absence Management Procedure and in particular paragraph 3.2 which places an obligation on employees to attend appointments with the Occupational Health Unit. I am satisfied this was a reasonable request whatever the Claimant may have thought of the benefit of such an appointment, bearing in mind what he considered to be the current stage of his recovery.

58. Under 4(e) I rely on my findings of fact and find that the Claimant's injuries were adequately described in the HS11 form, R1 form and RIDDOR form.

59. Under 4(f), I have found that I can see no basis on which the Claimant can allege that, due to the fact that he was pursuing a personal injury claim, Ms Roberts was not entitled to contact him. She clearly had a role in managing the Claimant's absence whatever was taking place in his personal injury claim. The fact that Ms Roberts had erroneously used the expression "return to work" instead of requesting a review of the Claimant's injuries and recovery does not, in my judgement, approach a level that can be described as bullying or harassment.

60. Under 4(g) I rely on my findings of fact and conclude that the Claimant has failed to establish that he was bullied by Ms Roberts in the manner alleged or at all.

61. Under 4(h) and (i), again, whilst certain shortcomings were identified by Mr Eurig Williams in the appeal, I find that the investigation undertaken by Ms Owen and Ms Thomas, and the report they prepared containing their findings, were sufficiently detailed and reasoned. Any shortcomings that may have existed were not such as to amount to a repudiatory breach.

62. Under 4(j) I rely on my findings of fact and again find that the appeal was sufficiently thorough and the Claimant and his representative were given sufficient opportunity to outline the basis of their appeal. The outcome of the appeal was sufficiently thorough and reasoned such that the Claimant could understand the outcome even though he may not have agreed with it.

63. Issue 5. In the circumstances, and based on my findings, I have not found that any of the sub-issues particularised above amounted to a repudiatory breach of contract. It must follow that the cumulative effect of sub-issues 4(a) to (j) do not amount to a repudiatory breach.

64. For these reasons I have concluded that the Claimant's claim of unfair constructive dismissal is not well founded and is dismissed.

65. As I have not found the Respondent to be in repudiatory breach, I conclude I am not required to consider whether the Claimant waived the breaches alleged or affirmed the contract. However, for the sake of completeness, and taking account of the guidance to be found in ***Leeney -v- Loughborough University*** **[2023] EAT/155,** I conclude that, had I found the Respondent to be in repudiatory breach, the Claimant had not waived such a breach, nor affirmed the contract. I refer in particular to paragraph 35 onwards where the EAT said as follows:

35. As to the general approach that the tribunal took, its self-direction as to the law did include references to authorities such as ***Western Excavating, Cox Toner, Buckland*** *and relevant principles emerging from them. However, a number of general features of the decision give cause for concern as to whether the tribunal did take the correct approach in all respects to the question of affirmation.*

36. First, we agree with the broad tenor of Mr Flood's submission that, while the tribunal in its conclusions made a number of points about things that did not happen in this case which, if they had, might have pointed away from affirmation, what the tribunal needed to focus on was the question of what conduct there had been during the relevant period that might or might not have amounted to an express or implied communication of affirmation.

37. In its self-direction as to the law the tribunal cited the dictum of Lord Denning MR in ***Western Excavating*** *at [15]:*

"Moreover, he 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. He will be regarded as having elected to affirm the contract."

However, as later authorities such as ***Bashir*** *and* ***Cox Toner*** *explain and clarify, it is not the passage of time, as such, prior to resignation that gives rise to affirmation, but conduct or other circumstances occurring in that period from which affirmation may be inferred.*

38. The tribunal at [199] cited ***Cox Toner*** *as authority for the proposition that "[m]ere delay by itself did not constitute an affirmation of the contract, but if the delay went on for too long it could be very persuasive evidence of an affirmation." The first part of that sentence is a fair summary, but the second part does not fully capture the point about the need to focus on conduct rather than the delay itself or its length."*

66. Taking that into account, and taking account of the fact that the Claimant's grievance remained extant throughout the period from July to November 2022 and that the grounds on which the grievance was based centered on the allegations as set out above in the issues, I am not satisfied that there was undue delay on the part of the Claimant, even taking account of what he said in the last paragraph of his complaint. This is particularly so in that he then resigned before he knew of the outcome of his grievance.

67. However, this finding does not bear on the outcome of this claim. Taking account of my overall findings, the Tribunal has found that the Claimant's claim of unfair constructive dismissal is not well-founded and is dismissed.

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Employment Judge R Havard
Dated: 14 April 2024

REASONS SENT TO THE PARTIES ON 15 April 2024

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche