EMPLOYMENT TRIBUNALS

Claimant: Mr S Nkazi

Respondent: South London and Maudsley NHS Foundation Trust

Heard at: **Croydon** **On:** **23, 24 and 25 July 2024**

Before: **Employment Judge Leith**
Ms Boyce
Mr Harrington-Roberts

Representation
Claimant: In person
Respondent: Ms Skinner (Counsel)

JUDGMENT

1. The complaint of failure to make reasonable adjustments fails and is dismissed.
2. The complaint of constructive unfair dismissal fails and is dismissed.

REASONS

Claims and issues

1. The claimant claims failure to make reasonable adjustments and constructive unfair dismissal.

2. The parties had agreed a list of issues (the first draft had been prepared by the Respondent, with the Claimant adding his comments in red). The parties confirmed at the start of the hearing that it captured the issues in dispute. The list of issues was as follows:

"INTRODUCTION

1. The Claimant resigned with immediate effect on 28 April 2021.

2. It is admitted that the Claimant is disabled in respect of his prostate cancer within the meaning of section 6 Equality Act 2010.

TIME LIMITS

3. Have the Claimant's claims been brought within the primary time limits? *Yes*

4. If not, do the matters relied upon by the Claimant amount to a continuing course of conduct or a continuing act of discrimination?

5. If any of the allegations are out of time, it is just and equitable for the time limit in respect of such allegations to be extended?

REASONABLE ADJUSTMENTS (Equality Act 2010 sections 20 & 21)

6. Did the Respondent have the following provision, criterion or practices (PCPs):

A requirement to change work location.

7. If so, were those PCPs applied to the Claimant? Yes, in my case, from Bethlem to Lambeth.

8. If so, did the PCPs put the Claimant at a substantial disadvantage in relation to the relevant matter compared to someone without the Claimant's disability, including because:

Yes, instead of a journey of 20 minutes by car or 30 minutes by public transport from my home to my usual workplace, the Bethlem site, I was asked to move to another location which would have taken me I hour 40 minutes to drive or go by public transport. This would have been acutely stressful and made it difficult for me in accessing a toilet.

9. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the substantial

disadvantage? Yes, because in the Occupational Health report it says that I should avoid travelling on public transport at peak times.

10. What reasonable steps could have been taken to avoid the disadvantage? The Claimant alleges that the Respondent could have:

    a. Allowing the Claimant to work from the Bethlem site. This is the adjustment which I believe should have been made.

11. Would it have been reasonable for the Respondent to have taken those steps? Yes. If so, when? When I was ready to return to work.

12. Did the Respondent fail to take those steps? Yes

CONSTRUCTIVE UNFAIR DISMISSAL

13. Did the Respondent fundamentally breach an express or implied term of the Claimant's contract? Yes.
14. The Claimant alleges that the following amount to fundamental and repudiatory breaches of his employment:

    a. On 22 April 2021, management insisted that the Claimant work from its Lambeth site. Prince Opoku, Emma Potter and two others were present. I have applied for minutes of the meeting but they have not been supplied to me.

15. Did the Claimant resign in response to this breach(es) and not for some other unconnected reason? Yes.
16. If so, did the Claimant nevertheless delay in resigning and thereby affirm his contract of employment? No. Soon after the meeting, on 23.4.2021 I made a phone call to Prince Opoku to protest at my enforced move to the Lambeth site. He insisted that it would go ahead and that if I did not report for duty I would be disciplined, and the outcome could include dismissal."

Procedure, documents and evidence heard

3. We heard evidence from the Claimant.

4. On behalf of the Respondent, we heard evidence from:
   4.1. Emma Porter, who at the relevant times was the Deputy Director for Forensic & Offender Health Services
   4.2. Prince Opoku, Ward Manger for Ward in the Community
   4.3. Fiona Brennan, General Manager for Forensic Services

5. Each of the witnesses gave their evidence by way of a pre-prepared witness statements, on which they were cross-examined. In Mr Opoku's case, he had given a supplementary statement after the exchange of main witness statements. We admitted the supplementary statement, but we bore in mind the fact that it was produced after the exchange of witness statements when considering the weight to give to the evidence contained in it.

6. We had before us a bundle of 660 pages. References in this judgment in [square brackets] are to page numbers within that bundle.

7. At the end of the evidence we heard submissions from Ms Skinner on behalf of the Respondent, and from the Claimant (supplemented in Ms Skinner's case by a written note on the relevant law).

8. The Claimant represented himself throughout the hearing. We should say that he did so with considerable ability.

Factual findings

9. We make the following findings on balance of probabilities. We have not dealt with every area canvassed before us; rather, we have focused on those necessary to reach a conclusion on the issues in the claim.

10. The Respondent is an NHS trust proving mental health services to parts of South London.

11. The Claimant was employed by the Respondent from 30 May 2000 as a Band 2 Health Care Assistant. He was based on the Chaffinch Ward at the Bethlem Royal Hospital. During the latter part of his employment, following a flexible working request, he worked 15 hours per week (across two days).

12. The Claimant's contract of employment was in evidence before the Tribunal. Regarding "place of work", it said this [599]:

> "Your initial place of work will be Denis Hill Unit, Bethlem Royal Hospital but you may be required to work at other locations within the area of the Trust."

13. Under the heading "Terms and Conditions of Employment" it said this:

"Your terms and conditions of employment will be determined in accordance with the appropriate Trust terms and conditions and will be subject to review from time to time. The Trust reserves the right to amend our terms and conditions of employment in light of changes to employment legislation and Trust policies, to reflect the changing needs of the organization. Any changes will be made with appropriate consultation and notice."

14. The Claimant's evidence, albeit given for the first time in the course of cross-examination, was that he was told during his initial orientation that if a move of location was made, it had to be with the employee's consent. We do not accept the Claimant's evidence in that regard, because:
    14.1. It was given for the first time in cross-examination. It was not in his claim or his witness statement, or indeed in any of the contemporaneous documents.
    14.2. The Claimant started working for the Respondent in 2000. It is surprising that he would remember a detail from that long ago during cross-examination, having apparently not remembered or thought to mention it at any earlier point (including in the contemporaneous correspondence).
    14.3. It is at odds with what the Claimant's contract of employment said on its face, as well as with how the Respondent conducted itself in this case.

15. The Respondent had in force a Sickness Policy [112]. It had different sections for short term and long-term absence, with long term absence being defined as continuous absence of 21 calendar days or more. The policy provided that:

    15.1. The manager would conduct regular sickness review meetings with the employee. The purpose of those meetings was to establish the reason for the absence and its likely duration, consider offering temporary changes or reasonable adjustments, and consider termination of employment if the employee was unable/unlikely to return to work in the foreseeable future or entitlement to occupational sick pay was due to expire.
    15.2. The sickness meeting should also determine with the employee whether they would wish to consider retirement on ill health grounds if they were unable/unlikely to return to work.
    15.3. Formal warnings could be given as an outcome at those meetings if appropriate. There was no provision in the policy for staged warnings, or for a "final written warning".
    15.4. If the employee was too ill to attend a sickness review meeting at work, agreement to a home visit could be sought.
    15.5. If an employee was involved in a formal process and needed to be interviewed, advice could be sought by Occupational Health as to their fitness to attend such meetings even if the employee was unable to return to work.

16. Appended to the Policy was a template "Reasonable Adjustments Agreement", for completion when a reasonable adjustment was agreed with an employee [131].

17. The Respondent also had in place a Disciplinary Policy, to which was annexed a set of Disciplinary Rules. Rule 2.2 dealt with absence as follows:

> "Staff must not absent themselves from work without prior permission. In cases of sickness, contact with infection disease, or sudden domestic emergency, it is the responsibility of the individual to inform his/her manager within the specified time limit. All episodes of unnotified absence may be deemed unauthorised and unpaid. Unauthorised absence may lead to disciplinary action up to and including dismissal."

18. An incident occurred on 18 July 2018, between the Claimant and Malikie Saffa, the Nurse in Charge on the shift. Statements regarding the incident were produced by Mr Saffa and four other colleagues that day (Nikki Lantsbury [266], Julie Barker [269], Ashleigh Martinez [265], and Jane Arnold [268]). On 13 October 2017, the Respondent decided to proceed to a formal disciplinary investigation regarding the Claimant's conduct on the day in question [278]. Terms of reference for the investigation were drawn up. The investigation was to be carried out by Beatrice Komieter. The Claimant continued to work on Chaffinch Ward, although it was arranged that he would not work on the same days as Jane Arnold, the Ward Manager for the Chaffinch Ward.

19. The Claimant submitted a grievance regarding Ms Arnold [573]. His grievance letter was undated, but the notes of the subsequent grievance meeting noted that he had submitted it on 16 October 2018 [336]. The Claimant's grievance was therefore submitted after the Respondent had decided that the allegations against the Claimant should proceed to a formal disciplinary hearing.

20. On 18 October 2018, the Claimant was suspended from working on Chaffinch Ward. He was informed that he was not permitted to enter the Ward, and that his shifts would be undertaken elsewhere. Initially the Claimant was asked to work on reception at River House, another building on the Bethlem Royal hospital site. The Claimant explained that he could not do this due to a health problem he had encountered when working on the River House reception previously.

21. As a result, the Claimant was referred to Occupational Health for advice on his suitability for working on the reception area [282]. The Claimant was seen by a Specialist OH Nurse Advisor on 8 November 2017. Occupational Health advised that a risk assessment should be carried out. A risk assessment was apparently then carried out.

22. At the Claimant's request he was re-referred to Occupational Health on around 8 February 2018, for advice regarding his ability to undertake PSTS training (which related to the restraining of patients) [309].

23. The Claimant was assessed by Dr Grime, Consultant in Occupational Medicine, on 20 February 2018. The focus of that assessment was about the Claimant's ability to undertake PSTS duties. Dr Grime noted that he had referred the Claimant to the Staff Counselling and Wellbeing Service for an assessment of his symptoms regarding his concerns about working in the reception at River House [301].

24. Meanwhile, on 15 February 2018, it was alleged that the Claimant had attended Occupational Health with a patient who he was escorting [308]. This occurred when the Claimant was working a Bank shift for the Respondent via NHS Professionals, rather than working under his substantive contract of employment. In essence, what was being alleged was that while escorting a patient, he had undertaken a personal errand. The Respondent regarded this as a safeguarding issue.

25. Following this, on 27 February 2018 the Claimant was suspended from working bank shifts for the Respondent (which he had been doing alongside his contracted role) [316].

26. The allegation regarding 15 February 2018 was added to the existing disciplinary investigation. This was notwithstanding the fact that the Claimant was not working under his contracted role when the incident occurred. The Respondent's rationale for this was that there was already an ongoing investigation. The terms of reference for the investigation were updated on 14 March 2018 [328].

27. In March 2018, the Claimant was redeployed to the Ward in the Community, a ward at Lambeth Hospital. He reported to Mr Opoku, the Ward Manager. He worked 9am to 5pm. Lambeth Hospital was around 8 miles further from the Claimant's house than Bethlem Royal, although the extra travelling time at rush hour was significant (he described it on his claim form as taking him one hour and forty minutes, where it would have taken him around 20 minutes to get to Bethlem Royal). The Respondent paid the Claimant excess mileage for the additional mileage he had to travel to Lambeth Hospital from his home (as compared to traveling to Bethlem Royal). He was also given a parking permit so that he could park for free at Lambeth hospital.

28. The Claimant's evidence in his witness statement was that he always needed to use the toilet quite often, and when he was forced to work at the Lambeth site he experienced many uncomfortable situations where he was forced to urinate openly on the roadside. In cross-examination he explained that while he was driving to Lambeth to work in Ward in the Community, there were various occasions when he had to stop to urinate by the side of the road. The Claimant accepted in cross-examination that he did not

request an Occupational Health referral regarding issues with bladder control.

29. The Claimant's evidence in his witness statement was that his managers were "fully aware of [his] difficulties". His evidence in cross-examination was that he had told Mr Opoku about the bladder control issues he was having during the journey to work in 1:1 meetings while he was working at Ward in the Community, but he was not comfortable telling female managers about it. Mr Opoku denied that the Claimant had ever told him that he had bladder control issues with the journey to work. We deal with this in our conclusions.

30. In the meantime, the Claimant's grievance was investigated by Edward Kanu, Clinical Service Lead. The Claimant's grievance was not upheld. The Claimant was informed of the decision on 28 March 2018 [344].

31. The Claimant attended a sickness review with Mr Opoku on 26 April 2018, following a spell of short-term absence. Mr Opoku wrote to the Claimant the following day to summarise what had been discussed [388]. The Claimant explained that he had suspected prostate cancer. He indicated that he considered that his absence was caused by management. Mr Opoku explained that the Claimant would be re-referred to Occupational Health, and that he would be subject to Attendance Management Plan for 6 months. He noted also that the plan was for "management processes" to be concluded sooner, to alleviate the Claimant's anxiety (we understand this to be a reference to the disciplinary process). The letter did not refer to the Claimant having referred to any difficulties with bladder control.

32. The Claimant was seen by Dr Grime again on 1 May 2018. Dr Grime advised that the Consultant Psychiatrist had found no evidence of a mental health issue on the Claimant's part. He noted that the Claimant continued to report anxiety symptoms associated with the idea of working at the River House reception. He advised that the air conditioning or ventilation units in the reception should be checked [390].

33. Dr Grime's advice did not refer to the journey to Ward in the Community causing the Claimant bladder control issues, or to the Claimant suffering from bladder control issues more generally. The Claimant was asked in cross-examination why he did not raise this with Occupational Health, if it was causing him difficulty. The Claimant's evidence was that he believed Occupational Health knew about the issues, because one of the doctors told him he should form a habit of wearing a pad because he had lost control of his pelvic muscles after being operated on. Given that the Claimant's first surgery was apparently not until later that month, we consider his evidence in that regard to have been mistaken.

34. Ms Komieter concluded her investigation into the disciplinary allegations against the Claimant on 9 May 2018 [392]. She recommended that the case proceed to a disciplinary hearing [401].

35. On 22 May 2018, the Claimant was signed off work sick for one week due to surgery [402]. The Claimant's evidence was that this was for a biopsy. Up to that point, the Claimant had continued to work at the Ward in the Community.

36. On 24 May 2018, Emma Porter, Acting Deputy Director for Forensic Offender Health, wrote to the Claimant to invite him to a disciplinary hearing on 14 June 2018. Given the fit note that the Claimant was signed off under at that time, we find that the Respondent would reasonably have expected the Claimant to have returned to work by the proposed hearing date.

37. In the event, the Claimant apparently contracted sepsis from the biopsy, and remained signed off work. The disciplinary hearing was therefore postponed. The Claimant was formally diagnosed with prostate cancer. He remained unfit to work until 31 January 2020. The disciplinary process was put on hold while the Claimant remained absent from work.

38. On 30 January 2019, Mr Opoku conducted a formal sickness review meeting at the Claimant's house [424]. He wrote to the Claimant on 12 February 2019 to confirm what they had discussed. He noted that the Claimant had indicated that he would like to work full time from Bethlem Hospital, not Lambeth. The letter did not record that the Claimant had mentioned any difficulties with bladder control while travelling to work at Lambeth. The letter recorded that ill health retirement was not an option as the Claimant was likely to recover and return to work.

39. Mr Opoku's evidence was that travelling to the Claimant's house from Lambeth Hospital for the meetings he had there took him around 45 minutes, without traffic.

40. The Claimant was seen by Dr Deinde in Occupational Health on 4 June 2019 [436]. The Claimant accepted in cross-examination that he did not raise bladder control issues in that assessment. His evidence was that that was because at that point he was off work unwell, and he was staying in his house, so there was no need for him to mention it. Dr Deinde noted that the Claimant was unlikely to meet the criteria for retirement on the grounds of ill health, but that it was up to him if he wished to apply.

41. On 2 August 2019, the Claimant attended a further sickness absence review meeting with Mr Opoku [440]. Once again, the meeting took place at the Claimant's house. There was some discussion regarding the Claimant's progress (although not of ill health retirement). The Claimant explained that he was keen to return to work as he was in financial difficulties, but that his GP had told him that his health was more important than work. He informed Mr Opoku that he had still not received the travelling expenses from the period he had been working in the Ward in the Community prior to sick leave. He accepted in evidence that he did not, in that meeting, refer to bladder control issues. His evidence was that this was because he was off work unwell at home at the time, so it was not necessary.

42. On 7 January 2020, the Claimant was seen again by Dr Grime in Occupational Health [453]. At that point, his fit note was due to expire on 31 January 2020. Dr Grime advised that the Claimant was ready to begin a phased return to work as soon as a suitable role was available. He noted that the Claimant's conditions were currently stable and well controlled, but required monitoring and follow-up. The report then said this:

> "Should there be any adjustment to Sonny's days/hours to facilitate a return to work? In view of the duration of Sonny's absence from work, I recommend a phased return to work to facilitate Sonny's work rehabilitation. This might mean starting with fewer and/or shorter shifts initially and gradually building up to full hours over a period of time. "

43. There was no reference in the report to the Claimant having bladder control issues or to these causing a problem with the journey to work at Lambeth. When this was put to the Claimant, his evidence was initially that the bladder issue was not an issue at that time because he was not going to work. When it was put to him that the Occupational Health assessment was discussing his return to work, which was expected to be in around three weeks time, his evidence was then that the discussion about going to work was about working at the Bethlem site, not about travelling to Lambeth, and that he had been clear that he would not return to the Lambeth site.

44. On 24 January 2020, the Claimant met with Fiona Brennan, Sally Dibben (from the Respondent's HR) and Mr Opoku. Ms Brennan emailed the Claimant on 28 January 2020 with a summary of that meeting [455]. She noted that the Claimant needed to return to the Ward in the Community at Lambeth until the disciplinary process was concluded. Ms Brennan's email then said this:

> "You were unhappy with that and said that the payments were not sufficient to cover your costs and that you did not want anyhow to return to Ward in the Community but to be found a temporary position based at the Bethlem.
>
> Prince confirmed that if it helped he was happy for you to do one long day at Ward in the Community and whilst this would be short of your 15 working hours that for the temporary period we would accept this.
>
> Again you expressed that you were unhappy to have to go to Lambeth and would prefer a post at the Bethlem.
>
> I explained to you that I had to find you a post within our directorate and which meant River House on the Bethlem site.
>
> I offered you work in the River House reception for the period until your disciplinary is concluded. You again said that you would not work in Reception as your health issues meant that the environment was not healthy for you. You were advised that following the

previous occupational health report that air conditioning had been installed in the RH reception. You said that would not help with your conditions.

You asked about an admin role within RH and you were advised that there was no meaningful work that you would be able to do in terms of admin.

Prince then suggested that as we could not seem to reach any compromise situation agreeable to you that instead you return to work as planned but take annual leave each week for 15 hours until the disciplinary was concluded and an outcome reached. You made it clear that this was perhaps not your preferred option but agreed to this."

45. The reference to a "long day" was to the possibility of the Claimant working a 14 hour shift (which exclusive of unpaid meal breaks would mean working 12.5 hours of paid working time). His start time would have been flexible (although the usual start time for a long day shift was 7am).

46. The Claimant's evidence was that he did not mention the issues with needing to urinate on the journey to work during that meeting as he was uncomfortable discussing it with female members of staff.

47. The Claimant was therefore recorded as fit for work but on annual leave with effect from 1 February 2020. On 18 February 2020 Anna Reeves, General Manager – Croydon Community & Complex Care Services, wrote to the Claimant to invite him to a disciplinary hearing on 13 March 2020 [459].

48. On 24 February 2020, the Claimant emailed Mr Opoku as follows [461]:

> "May I please ask you to arrange for a career break for me for up to one year with immediate effect. I have informed Mr Touseef Akbar of human resources of this and has also copied him in this email. It is extremely important that I undertake the planned project for which I ask for this career break at this specific time; so every other thing I'm doing has to be be put on suspension for the moment.
> Thanks for your anticipated co-operation."

49. It was put to the Claimant in cross-examination that this followed a telephone call in which the Claimant said he needed a career break to pursue a political appointment in Nigeria. That had been recorded by Mr Opoku in a contemporaneous email. The Claimant denied this (indeed, when it was put to him in the course of cross-examination, he laughed).

50. Mr Opoku responded to the Claimant's email asking him for more detail about his request for a career break. The Claimant then emailed Mr Opoku informing him that the career break was to be used to bid for a scholarship award and study for post graduate studies leading to an MPhil/PhD in

Organisational Psychology. He explained that he wanted to the career break to start from the first week of March 2020. He informed Mr Opoku that he was in "good health of body and mind to undertake this project".

51. Mr Opoku responded on 4 March 2020 [463]. He explained that the Claimant's request for a career break was refused. The reasons given were that he would not authorise a career break until the pending disciplinary process was concluded. He also noted that if the outcome of the disciplinary hearing was for the Claimant to return to work, the Claimant would need to return to work for a reasonable period of time to refresh his clinical practice and make himself up to date with any changes at work before requesting a career break.

52. On 12 March 2020 the Claimant called in sick to work. He was then certified as unfit for work by his GP from 23 March 2020, with the reason being given as "urological surgery".

53. On 7 May 2020, the Claimant attended a sickness review meeting with Mr Opoku (via telephone). By the time that meeting took place, the Claimant had been absent for work for 633 calendar days across two occasions since 24 May 2018. There was some discussion at the meeting regarding the Claimant's progress. The Claimant explained that he had had three surgeries and radiotherapy treatment since May 2018. Mr Opoku decided to issue the Claimant with a written warning [479]. The Claimant was informed in the written warning letter that he had the right to appeal. The Claimant did not appeal. Mr Opoku's letter did not mention ill health early retirement.

54. The Claimant was reviewed by Dr Grime on 18 May 2020 [483]. Dr Grime advised that the Claimant was waiting for a surgical procedure which was due to take place on 20 April 2020, but which had been postponed due to COVID, and he was awaiting a new date. He noted that ill health early retirement was not appropriate as the Claimant intended to return to work when he had recovered from the procedure he was waiting for.

55. On 3 August 2020, the Claimant had a sickness review meeting with Mr Opoku. The meeting took place by telephone. Mr Opoku wrote to the Claimant on 7 August 2020 confirming what had been discussed [488]. He noted that at that point, the Claimant had been absent from work for over 700 calendar days, split across two periods of absence, since 24 May 2018. The Claimant was at that stage signed off until 31 August 2020. Mr Opoku decided to issue the Claimant with what he descried as a "final written warning", which was stated to remain live for 18 months. He informed the Claimant that he had a right to appeal. The Claimant did not appeal. Once again, Mr Opoku's letter did not mention ill health early retirement.

56. On 7 September 2020 the Claimant underwent surgery on his bladder [497].

57. On 2 October 2020, the Claimant was emailed a further disciplinary hearing invitation letter, inviting him to a hearing on 13 October 2020 [502].

58. The Claimant emailed Corrine St Mart in the Respondent's HR team on 5 October 2020 [505]. He described inviting him to the disciplinary hearing as a "foolish idea", and indicated that he had no plans to attend a hearing while was absent from work. He noted that his sickness certificate would not expire until 31 December 2020. Ms St Mart responded on 12 October 2020. She informed the Claimant that the hearing would not take place, and that the disciplinary concerns would be raised on his return to work [504].

59. On 22 December 2020, the Claimant attended another Occupational Health review with Dr Grime [519]. Dr Grime advised that:

    59.1. The Claimant would be able to return to work after his sick noted expired on 31 December 2020;
    59.2. His conditions were stable and well controlled but required monitoring and follow-up.
    59.3. There were no specific duties that the Claimant would be unable to carry out when he returned to work, although he should have an individual COVID risk assessment which should be kept under review. He should only work in a COVID safe environment.
    59.4. Ill health early retirement was not appropriate as the Claimant intended to return to work.

60. The Claimant accepted in evidence that he did not raise bladder control issues with the journey to Lambeth Hospital in the review with Dr Grime. His evidence was that he did not raise it because he did not consider that it was necessary at that time.

61. On 4 January 2021, the Claimant emailed Mr Opoku to explain that he had been advised that he should not attend work because he was clinically extremely vulnerable [522]. Mr Opoku asked the Claimant to provide a letter from his GP to confirm that he should be shielding. He did not do so. Nonetheless, he was not required to attend work while shielding remained in place, until the end of March 2021.

62. On 6 April 2021, Ms Brennan and Mr Opoku carried out a COVID-19 risk assessment with the Claimant [544]. Following that, the Claimant was re-referred to Occupational Health.

63. On 7 April 2021, the Claimant was again referred to Occupational Health. He was assessed by Dr Grime again on 20 April 2021 [545]. The report of that assessment was apparently not produced until after the Claimant's employment had terminated. It noted that the Claimant had said that he was well and had "no day-to-day difficulties at the present time". It noted that his health conditions were stable and well controlled. It further noted that there were no specific duties that the Claimant would be unable to carry out when he returned to work, although he remained vulnerable in respect of COVID-19.

64. The Claimant attended a Capability Hearing on 22 April 2021 [577]. This followed on from the attendance warnings he had been given by Mr Opoku. The hearing was chaired by Emma Porter. Ms Brennan and Mr Opoku were also in attendance, as were two HR advisors, Kerry Gallagher and Corinne St Mart. The Claimant indicated at the start of the meeting that he was not happy to proceed for three reasons:

    64.1. He did not have a Union representative, as he had not been able to arrange one;
    64.2. The Occupational Health report from the consultation on 20 April 2021 had not yet been received;
    64.3. He was unhappy with Miss Porter chairing the meeting, because of what he described as "subtle aggression".

65. Miss Porter paused the hearing to take advice. When the hearing resumed, she indicated that they would reschedule the meeting for 3 weeks time, which would allow time for the Occupational Health report to be received and for the Claimant to arrange a Union representative. She also indicated that the Claimant would need to provide evidence to support why she should not continue as chair of the meeting when it resumed, which she would consider, and that in the absence of evidence she would continue as Chair.

66. Ms Brennan then asked what would happen in the meantime, as the Claimant was at that time using annual leave, and had said that he did not want to return to work in Lambeth. The Claimant explained that he was fit to work, but that he had been told he could not work until the sickness hearing was complete. Ms Brennan clarified that the Claimant had been told to return to work, but that he had said that he did not want to return to the Ward in the Community in Lambeth. The minutes then recorded the following exchange:

> "SN [Claimant]: Yes. I don't know if PO is not communicating to you properly about this. I told him it does not make sense for me to earn £10.00 and then spend £20.00 on transport. I live in Orpington, PO has come to my house before. It is less than 20 minutes to Bethlem Royal and it takes me 1 hour 15 minutes to drive to Lambeth. Does that make sense for me to do that?
>
> FB [Ms Brennan]: PO has told me all of that but at the moment your substantive role is at Lambeth Hospital at Ward in the Community and we can't make any plans to move you anywhere else until we've had this hearing. I think that might be where the confusion was that we can't agree to be moving you elsewhere until we've had this hearing, but we certainly didn't say you couldn't come to work until we've had this hearing. [SN-Okay] You chose that you didn't want to come to work in Lambeth which is why you're using annual leave.
>
> SN: Because of the reason; because of the reason I have just given you now. I am not saying I'm not coming to work, I'm saying it's not

economically reasonable for me to do that. If you understand what I mean?

FB: Yes, I hear what you're saying.

SN: Considering what I'm paid. [FB – I'm not sure if CS wants to come in…] Do you want me to get paid £10.00 and then spend £20.00 on transport? [Laughter from SN] Only a stupid person that could do that.

KG [Kerry Gallagher]: I don't understand SN; are you saying you earn £10.00?

SN: I'm just giving an example. Because initially, when this stuff started, I was asked to go there and I said what of transport, and they said they would pay me an allowance and the first month that came, Prince is aware of all this, the first month that came to me a month was £32.00 [PO – SN?] and thereafter, nothing."

67. There was some further discussion, following which the notes recorded Miss Porter asking the Claimant if he was willing to come into Ward in the Community and to return to work. The Claimant replied "If you provide me with transport, I'm coming there in one hour". Ms Porter then said this:

> "There is public transport, and you also have your own personal car and you've also been given an additional allowance to support that so I would say that you have all the mechanisms to return back to work. So, my expectation is, that when this meeting is next convened, we will hear about your return back to work within the process."

68. There was then some discussion about how the claiming of mileage would work in practice. The Claimant would receive excess mileage for the part of the journey from Bethlem to Lambeth. The mileage would be paid at the Respondent's mileage rate, which was 56p per mile. The Claimant was told that he would need to start work at Lambeth the following week, but that there would be flexibility about his working days.

69. Ms Brennan's evidence was that the only potential role available for the Claimant at the Bethlem site was working on the reception at River House. Her evidence was that she could only place the Claimant within the Forensic Directorate. Her evidence was that while she could, in principle, ask another Directorate to temporarily redeploy an employee, it would not be normal practice to do so for an employee who was going through a disciplinary process. We accept her evidence in that regard.

70. Either later that day or the following day, the Claimant had a telephone conversation with Mr Opoku. Mr Opoku, in his witness statement, denied that the conversation had taken place. He then produced a supplementary

witness statement in which he accepted that the conversation did in fact take place.

71. The Claimant's evidence was that Mr Opoku told him that if he did not return to work at Lambeth, he could face disciplinary action. Within his supplementary statement, Mr Opoku denied that. We find on balance that it did happen. Given the clear instruction that was given to the Claimant at the meeting on 22 April 2021, we consider it is more likely than not that Mr Opoku did warn the Claimant about the possible consequences of non-compliance.

72. The Claimant was due to return to work on 26 April 2021. He did not attend work on that date. Mr Opoku emailed him to ask him why he did not turn up [549]. The Claimant responded as follows:

> "I acknowledge receipt of your email. But I wasn't expecting this from you.
> It would have been more appropriate that I get the minutes of the meeting we held last Thursday about sickness capability which would contain our agreed and disagreed decisions. Then it could be accompanied by the occupational health assessment report; before I will then receive your preparedness to tell me what I'm to do and where to do it based on your informed risk assessment.
> I'm readily available and awaiting your reasonable response ASAP. We all have to be very careful and do things reasonably and formally as was expressed in the last meeting that we had."

73. Ms St Mart from HR responded to the Claimant on 27 April 2021. She noted that the expectation was that the Claimant would return to work at Ward in the Community, with additional finance to cover excess mileage. She concluded her email as follows [548]:

> You are expected to make contact with Prince with immediate effect to arrange the days you will be returning this week. Please ensure that you call Prince immediately to arrange this.

74. The Claimant emailed the Respondent on 28 April 2021 to resign. His resignation email said this:

> The Human Resources Officer/To who it may Concern
> South London and Maudsley NHS Foundation Trust
> Bethlem Royal Hospital. Monk Orchard Road Beckenham Kent
> BR3 3BX.
>
> Dear Sir/Madam.
>
> I resign with immediate effect.
>
> Regards
> Sonny Nkazi.

75. The claimant notified ACAS under the early conciliation process of a potential claim on 21 May 2021 and the ACAS Early Conciliation Certificate was issued on 9 June 2021. The claim was presented on 7 July 2021.

Law

76. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee:
    76.1. In the terms of employment;
    76.2. In the provision of opportunities for promotion, training, or other benefits;
    76.3. By dismissing the employee;
    76.4. By subjecting the employee to any other detriment.

77. In order to be subjected to a detriment, an employee must reasonably understand that they had been disadvantaged. An unjustified sense of grievance will not constitute a detriment (*Shamoon v Royal Ulster Constabulary* [2003] UKHL 11).

Protected characteristics

78. Disability is a protected characteristic (s.6). The Respondent in this case has accepted that the Claimant had a disability at all relevant times.

Failure to make reasonable adjustments

79. The duty to make reasonable adjustments is set out in section 20 of the Equality Act 2010:

> **Duty to make adjustments**
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
> (2) The duty comprises the following three requirements.
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…."

80. Paragraph 8 of Schedule 20 of the Act provides that an employer is not subject to the duty to make reasonable adjustments if he or she does not know, and could not be reasonably be expected to know that the claimant:
    a. Has a disability; and
    b. Is likely to be placed at a disadvantage by the employer's provision, criterion or practice, the physical features of the workplace or a failure to provide an auxiliary aid.

81. The Tribunal must therefore ask itself two questions:
    c. Did the employer both know that the employee was disabled and that the disability was liable to put the employee at a substantial disadvantage?
    d. If not, ought the employer to have known both of those thing?

82. If the answer to both questions is "no", the duty to make reasonable adjustments is not triggered. The EHRC Code provides that employers must "do all they can reasonably be expected to do" to find out whether an employee has a disability and is likely to be placed at a substantial disadvantage.

83. The ECHR Code of Practice provides that the phrase "provision, criterion or practice" should be construed widely.

84. When considering whether the duty to make reasonable adjustments is engaged, the Tribunal must consider the PCP identified by the claimant. The PCP must be properly identified (*Secretary of State for Justice v Prospere* [2015] 3 WLUK 676).

85. In order to find that an employer has breached the duty to make reasonable adjustments, the tribunal must identify the step or steps that it would have been reasonable for the employer to take. The adjustment must be a practical step or action as opposed to a mental process (*General Dynamics Information Technology Ltd v Carranza* [2015] ICR 169).

86. In considering whether a step would have been reasonable, one factor the Tribunal must consider is whether it would have been effective in alleviating the disadvantage to the employee. An adjustment may still be reasonable even there is no guarantee that it would have been successful (*Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160).

<u>Constructive unfair dismissal</u>

87. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.

88. The employee must show that they were dismissed by the respondent under section 95. Section 95(1)(c) provides that an employee is dismissed if 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.

89. Guidance was given by the Court of Appeal in the case of *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 211:

> "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."

90. A constructive dismissal may be founded on the breach of an express term or an implied term. There is implied into all contracts of employment a duty of mutual trust and confidence. That duty was described by the House of Lord in the case of *Malik and Mahmud v BCCI* [1997] ICR 606 as being an obligation that the employer must 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."

The test is an objective one.

91. The employer does not have to act unreasonably in order to be in repudiatory breach of contract. In the words of Sedley LJ in the case of *Buckland v Bournemouth University* [2010] EWCA Civ 121:

> "It is nevertheless arguable, I would accept, that reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal requirement. Take the simplest and commonest of fundamental breaches on an employer's part, a failure to pay wages. If the failure is due, as it not infrequently is, to a major customer defaulting on payment, not paying the staff's wages is arguably the most, indeed the only, reasonable response to the situation. But to hold that it is not a fundamental breach would drive a coach and four through the law of contract, of which this aspect of employment law is an integral part."

92. A breach may be made up of a sequence of events which meet the test cumulatively, even if none of those events would have done so individually. In such a case, the employee may rely on a "last straw" which does not in itself have to be so serious as to constitute a repudiatory breach (*Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978). However, the last straw must not be entirely innocuous or trivial.

93. In order to succeed in a claim of constructive dismissal, the employee must resign in response to the breach. However, the breach need not be the only reason for the resignation (*Wright v North Ayrshire Council* [2014] IRLR 4).

94. If after a breach of contract the employee behaves in a way that shows he or she intends the contract to continue, they will have affirmed the contract. Once the contract has been affirmed, the breach is waived and the employee can no longer rely on it to found a claim of constructive dismissal unless there is a last straw which adds something new and revives the earlier issues.

Conclusions

95. We deal first with the complaint of failure to make reasonable adjustments.

Provision, criterion or practice

96. The provision, criterion or practice (PCP) relied upon by the Respondent is described as a requirement to change work location. The Respondent conceded that that was a PCP which was applied to the Claimant.

Substantial disadvantage

97. The substantial disadvantage relied upon by the Claimant, as captured in the list of issues, was that the additional journey time was acutely stressful for him and he was unable to go to the toilet. This reflected what was set out in his amended particulars of claim [66]. The way the Claimant put it in his original ET1 was that the journey would have exacerbated his illness with accumulated stress he would have to encounter on transit. That is not how the claim was argued before us. The focus before us was on the Claimant's bladder control issues. The way the claim was presented to us was that the reference to stress in the list of issues was to stress caused because the Claimant was unable to access a toilet during the journey.

98. There was nothing in the medical evidence before us to suggest that stress would exacerbate the Claimant's prostate cancer (which is the condition relied upon in these proceedings). Still less was there any evidence that the journey to and from Lambeth would cause stress which could lead to any exacerbation. The medical evidence before us was that, at the points when a return to work was being considered, the Claimant's cancer was stable and well controlled. So we can see no basis on which to find that the any stress caused by the journey in and of itself put the Claimant at a substantial disadvantage compared to someone who did not share his disability (prostate cancer).

99. We therefore focus on the alleged bladder control issues.

100. The Claimant's pleaded case was that the journey took him one hour and 40 minutes, although what he told the Respondent was that it took him one hour and 15 minutes. Mr Opoku's evidence was that it took him around 45 minutes, although he was not travelling in rush hour traffic. We find that the figure given by the Claimant in the meeting on 22 April 2021 was a more accurate estimate of the journey time in rush hour traffic. That estimate was given closer in time to the point when the Claimant had been undertaking the journey, and there was certainly no reason why he would have understated his estimate during that meeting.

101. The evidence regarding whether the Claimant was put at a substantial disadvantage because of his bladder control issues, and if so when, did not speak with one voice. It is, however, unnecessary for us to reach a positive finding on that point. That is because we have found that the Respondent did not have either actual or constructive knowledge of the substantial disadvantage alleged.

102. In respect of actual knowledge:

102.1. The Claimant accepted that he had not mentioned bladder control issues in any of the meetings with female members of staff present. His evidence was that that was because he felt embarrassed to do so.

102.2. The Claimant additionally accepted that he had not mentioned it even in the formal meetings he had with Mr Opoku (even in the ones with no female member of staff present).

102.3. The Claimant's evidence was that he had told Mr Opoku about his bladder control issues during 1:1 meetings while he was working at the Ward in the Community. Mr Opoku denied that. We prefer Mr Opoku's evidence, because:

102.3.1. The Claimant was vague and somewhat evasive about exactly when and what he had told Mr Opoku.

102.3.2. It would have been surprising if the Claimant had mentioned it in informal 1:1 meetings (in early 2018), but never in the formal meetings over the following three years; particularly given the number of meetings, over an extended period of time, during which he took issue with returning to Lambeth. We bear in mind that there were no female members of staff present at the formal absence meetings (which were conducted by Mr Opoku along with Mr Akhbar from HR).

102.3.3. It would also have been surprising if the Claimant had mentioned it in 1:1 meetings, but not even alluded to it indirectly in the formal meetings. But there was no suggestion that he had done so.

102.4. During cross-examination, the Claimant accepted in respect of a number of specific Occupational Health reviews that he had not mentioned bladder control issues at the review in question. The Claimant's evidence was that he thought he had mentioned it to Occupational Health, but he was not clear about when, or even to which Occupational Health adviser. It was not mentioned in any of the Occupational Health reports. We find that the Claimant did not mentioned to Occupational Health. If he had done so, there is no reason to suspect that it would not have been mentioned in the relevant report.

102.5. We therefore find that the Claimant did not expressly tell the Respondent (either directly or via Occupational Health) that he had bladder control issues; much less that any bladder control issues would cause him difficulty in travelling to Lambeth Hospital.

103. In respect of constructive knowledge:

103.1. While the Respondent was well aware that the Claimant had prostate cancer, we have found that he had not told them about bladder control issues being a symptom.

103.2. He had, on the other hand, indicated many times and in reasonably strident terms that his issue with travelling to Lambeth Hospital was financial. He felt it was unreasonable of the Respondent

to expect him to work at Lambeth, and he was unhappy with the financial recompense he received for the additional mileage he had to undertake. By making that point so forcefully, he effectively diverted any attention on the part of the Respondent away from the possibility that he may have had other issues with the journey to Lambeth Hospital.

103.3. The Claimant is an articulate man who had no difficulty in explaining difficulties he had to the Respondent. There was nothing in the way that the Claimant conducted himself in respect of the travel to Lambeth that might have given the Respondent cause to think that there may be something more underlying his unwillingness to work at Lambeth.

103.4. It is also telling that the Claimant told Occupational Health, on 20 April 2021, that he had "no day-to-day difficulties at the present time". That is highly contemporaneous, in that the Occupational Health review took place two days before the abortive capability hearing. It is, we consider, indicative of what was in the Claimant's mind at the time. A bladder problem which prevented him from making a car journey of an hour and a quarter would, in our judgment, very clearly be a "day-to-day difficulty". If that was the picture that the Claimant was presenting to Occupational Health, we consider it is very unlikely that he would have said anything to the Respondent which suggested that further inquiry was required.

103.5. The Claimant did not refer to bladder control issues in his original ET1. That again is, in our judgment, evidence of what was in the Claimant's mind at the relevant times.

103.6. The Claimant's evidence was that, had the Respondent filled in the reasonable adjustments agreement pro forma the information would have come out. We are doubtful about that. The Claimant is an intelligent and articulate man, who demonstrated during his employment that he was very well able to raise matters which troubled him. If he did not mention bladder control issues to the Respondent or to Occupational Health in any of the various meetings he had, we cannot see why filling in a form would have lead him to do so. But in any event, he did not fill the form out. The Respondent was under no duty to complete the form with him. That was not the purpose of it; it was to documented agreed adjustments rather than to ascertain whether an adjustment was required. So in our judgment the form is a red herring; it is not relevant to what the Respondent knew or ought to have known.

103.7. We therefore find that the Respondent did not ought to have known that the Claimant had bladder control issues; much less that any bladder control issues would cause him difficulty in travelling to Lambeth Hospital.

104. Having concluded that the Respondent did not have knowledge of the substantial disadvantage relied upon, it follows that the complaint of failure to make reasonable adjustments fails and is dismissed.

<u>Constructive Unfair dismissal</u>

105. The list of issues sets out only one allegation as amounting to a fundamental and repudiatory breach of his employment contract – namely the Respondent's insistence on 22 April 2021 that he work from the Lambeth site.

106. We find that the move to the Lambeth site was not a breach of the Claimant's contract of employment, because the contract expressly allows it. Nor did the contract require the Respondent to consult with the Claimant about it. By relocating him (temporarily) to the Lambeth site, the Respondent was not seeking to vary the Claimant's contract. Rather, it was exercising the existing contractual mobility clause.

107. For the reasons we have already set out, we find that the figure the Claimant provided in respect of journey time at the meeting on 22 April 2021 was a broadly accurate estimate of the time the journey would take him during rush hour traffic. Even if we had reached a different conclusion on that, in assessing whether the Respondent conducted themselves without reasonable and proper cause by requiring him to work from the Lambeth site, all the Respondent could sensibly have considered was the time estimate the Claimant had given them.

108. The circumstances as at 22 April 2021 were therefore as follows

108.1. The Respondent had taken the decision to redeploy the Claimant away from patient-facing work and away from Chaffinch Ward while the disciplinary process was ongoing. Given the seriousness of the Occupational Health allegation in particular, we find that that was an entirely reasonable decision.

108.2. The Respondent had made efforts to find another role for the Claimant at Bethlem within the Forensic Directorate, but had been unable to locate one (other than at the River House reception where the Claimant felt unable to work).

108.3. The Respondent had a contractual right to insist that the Claimant work from the Lambeth site.

108.4. They had agreed to pay the Claimant for his excess mileage at the relevant rate.

108.5. The Respondent reasonably understood that the length of the journey was one hour and fifteen minutes (less than an hour more than the Claimant's normal commute).

108.6. The Claimant had been offered the possibility of undertaking one long shift instead of two normal shifts, which would have meant he only had to commute to Lambeth once per week, and that his commuting would have been undertaken outside peak rush hour. That would have meant that the Claimant would only have worked 12.5 hours per week, although he would still have been paid for his contracted 15 hours per week.

108.7. Critically, we have of course found that the Respondent was under no duty to make reasonable adjustments for the Claimant,

because they were unaware that he would be put at a substantial disadvantage compared to someone who did not share his disability.

109. In all of the circumstances, we conclude that requiring the Claimant to work at the Lambeth site for a limited period until his disciplinary hearing could not be said to have either caused or contributed to a breach of the implied duty of mutual trust and confidence.

110. The Claimant's particulars of claim referred to other allegations which it appeared may go to the alleged breach of the implied duty of mutual trust and confidence, but which were not captured in the list of issues. They were canvassed in evidence before us, both in the cross examination of the Claimant and in the Respondent's evidence. We have therefore considered them, and we are satisfied that there is no unfairness to the Respondent in our doing so.

The issuing of a final written warning and the suggestion that the Claimant consider requesting retirement on health grounds

111. The Respondent's Sickness Policy did not provide specifically for a final written warning to be given. It did allow for written warnings (referred to as formal warnings in the policy). The Claimant had already had one formal warning. We do not see how could it be unreasonable or improper to describe a subsequent formal warning as a "final" one, even where the policy did not allow for it. It was clear that in giving such a warning, what Mr Opoku was doing was warning the Claimant that he was getting close to the point where his dismissal may have to be considered. Importantly, it was also clear that he was not applying a disciplinary sanction under the disciplinary policy.

112. In respect of the suggestion that the Claimant consider requesting retirement on ill health grounds, that was what the policy required. The Claimant had been absent for a long period of time. He had, on his own evidence, been very unwell. There was no pressure on him to apply for retirement. We do not see that reminding him that he could consider applying for it, or asking Occupational Health for advice, was in any way unreasonable in the circumstances.

The telephone call with Mr Opoku on 23 April 2021, threatening dismissal

113. We have found as fact that this happened. But again, we cannot see that that would be unreasonable or inappropriate. The Claimant had been deemed fit to work. He had been told in clear terms what was expected of him. The consequence of the Respondent's disciplinary policy was that unauthorised absence may lead to disciplinary action, up to dismissal. Reminding the Claimant of what the Respondent's policy said was entirely reasonable in the circumstances.

The request to attend a disciplinary meeting while off sick

114. The Respondent's policy suggested that they may hold formal meetings under other policies in an employee's absence (subject to Occupational Health advice). There was only one occasion when the Claimant was asked to attend a disciplinary meeting which would occur when he was off sick. When the Claimant indicated that he would be unable to attend the meeting, the Respondent postponed it and assured him that no further action would be taken while he was off sick. They did not seek to press ahead with the meeting, or even ask Occupational Health if the Claimant would be well enough to attend such a meeting. They simply accepted what the Claimant said. In the circumstances, we do not consider that that was unreasonable.

Delay in the disciplinary process (this was not expressly mentioned in the ET1, but it was canvassed before us)

115. The disciplinary process took, on the face of it, an inordinate length of time. The allegations dated to July 2017. They had not yet been resolved when the Claimant resigned in April 2021. But:

115.1. The investigation was completed in May 2018 (having been extended because a further allegation was added in March 2018 2018). Less than two weeks after the investigation was completed, the Claimant was signed off sick. He was not well enough to return to work until February 2020 – over a year and a half later. Two and a half weeks after he became well enough to return to work, he was invited to a disciplinary hearing in March 2020. In the time between being sent the disciplinary hearing invitation and the date the hearing was to take place, he applied (unsuccessfully) for a career break (assuring the Respondent when he did so that he was in good health). Then the day before the scheduled hearing in March 2020, he phoned in sick. Due to a combination of sick leave and then shielding, he was unable to return to work until April 2021. For almost all of the three years between the investigation being completed in May 2018 and the Claimant's resignation in April 2021, he was absent from work.

115.2. Every time the Respondent scheduled a disciplinary hearing, something happened which would mean that the Claimant couldn't attend it. The timing of some of those things, such as the application for a career break, did give the impression that the Claimant was actively avoiding engaging with the disciplinary hearing.

115.3. The Claimant was very resistant to the meeting being held while he was on sick leave, and the Respondent respected his wishes in that regard.

115.4. It was not unreasonable for the Respondent to want to both have the Claimant start back at work and hold the sickness absence hearing before the disciplinary hearing, given the length and nature of his sickness absence. The disciplinary allegations were serious. They could have led to the Claimant's dismissal. Given how strongly the Claimant expressed himself in October 2020 when the Respondent attempted to organise a hearing during his sick leave, it

was reasonable of the Respondent to want to make sure that the Claimant was totally well and deal with any issues arising from his long period of sickness absence before inviting him to a further disciplinary hearing.

116. In the round, we can see nothing in the Respondent's treatment of the Claimant, individually or cumulatively, which was capable of breaching the implied duty of mutual trust and confidence.

117. It follows therefore that the complaint of constructive unfair dismissal fails and is dismissed.

Employment Judge Leith

8 August 2024