



EMPLOYMENT TRIBUNALS

Claimant: Ms De-Wilde Clark

Respondent: National Crime Agency

RECORD OF A FINAL HEARING

Heard at: London South (in person)

On: 4, 5, 6 September 2024
27 November 2024,

Before: Employment Judge Hart

Representation:

For the Claimant: Ms Ferber (KC)

For the Respondent: Mr Lyons (of Counsel)

JUDGMENT having been sent to the parties on 14 October 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. These are the reasons in support of the Judgment that the Claimant's claim for constructive unfair dismissal was well-founded and succeeded.
2. The Claimant was a senior manager who resigned in response to treatment by her line manager, Mr Anthony, which amounted to a fundamental breach of the implied term of trust and confidence by the Respondent. The last straw was being informed that she was 'underperforming' at a meeting on 24 November 2022 with no prior support, warning or line manager engagement.

THE HEARING

3. The hearing was conducted in person. The Claimant was represented by Ms Ferber (KC), the Respondent by Mr Lyons (of counsel). No reasonable adjustments were required for the hearing.
4. It was agreed at the outset that I would deal with liability first, and then address remedy after the announcement of the Judgment on liability.
5. During the Liability Hearing I was provided with the following documents:
 - 5.1 An agreed hearing bundle of 923 pages (referred to as the 'disclosure bundle' by the parties). References to page numbers in this judgment are to the pages in the hearing bundle.
 - 5.2 An agreed supplementary bundle of 250 pages (including those added during the hearing) containing Mr Anthony's witness statement. References to page numbers in this judgment with the pre-fix 'SB' are to the pages in the supplementary bundle.
 - 5.3 A paginated witness statement for the Claimant.
 - 5.4 An agreed chronology and reading list.
 - 5.5 An agreed list of issues (based on those provided by Employment Judge Hart).
 - 5.6 An agreed summary of the law on constructive dismissal and the Claimant's list of page references for closing submissions.

The parties were informed that I would only read those documents identified on the reading list, referred to in witness statements or referred to in evidence.

6. The Claimant gave evidence on her own behalf. Mr Anthony gave evidence on behalf of the Respondent. On completion of the evidence the parties provided an agreed summary of the law on constructive dismissal (which I adopt the one area of dispute having been resolved during the hearing) and provided oral submissions on the facts.
7. For the Remedy Hearing, I was provided with an updated schedule of loss and a supplementary witness statement from the Claimant. The Respondent objected to the supplementary statement since this had not been ordered and been disclosed very late. It was submitted that it was prejudicial because it contained medical information that the respondent was not in a position to contest. The respondent did not object to those parts that were non-medical in nature. I decided to accept those parts of the supplementary statement that did not address medical matters, I took the view that it helped the parties and the Tribunal to have the Claimant's evidence in written form in advance of oral evidence being given. Having read the supplementary statement I was also of the view that the medical evidence did not explain any failure by the Claimant to mitigate her losses since on her own case she started applying for jobs shortly after she was dismissed. In other words she was not stating that she was too ill to look for work and was only relying on the medical information as background information.
8. The Claimant gave evidence on her own behalf and was cross-examined. Both parties then provided oral submissions on the law and the facts.

CLAIMS AND ISSUES

9. The claim for constructive dismissal was based on the breach of implied term of trust and confidence only. The Claimant confirmed she was not bringing any claim for discrimination.
10. The liability issues were agreed (with a minor amendment to issue 1.1.22). These are set out in the appendix below.
11. The Claimant confirmed that she was not pursuing her application for disclosure but would be inviting the Tribunal to draw inferences from any non-disclosure. I have only done so where I have considered the disclosure could not otherwise be explained.
12. In relation to remedy, the parties agreed that the only issues for me to determine were:
 - 12.1 Whether the Claimant had mitigated her losses?
 - 12.2 The amount of any award for loss of statutory rights?

The parties had agreed the earnings figures to be used and the Respondent confirmed that it was not seeking any other deduction.

FINDINGS OF FACTS ON LIABILITY

13. I have only made findings of fact in relation to those matters relevant to the issues to be determined. Where there were facts in dispute I have made findings on the balance of probabilities. I confirm that I have taken into account all the documentation and evidence before me and if something is not specifically mentioned that does not mean that I have not considered it as part of my deliberations.
14. Since the Claimant has not made a claim for discrimination, I do not make any findings in relation to the reason for the treatment. Nor do I consider whether the Claimant has been treated differently from others since I do not have sufficient evidence to make that finding. Nor do I make any findings in relation to Mr Anthony's conduct following the Claimant's resignation, since this is not relevant to whether the Claimant was constructively dismissed.

About the Claimant

15. The Claimant is a Senior Manager in Digital, Data and Technology (DDaT), employed on G2 grade, working 37 hrs pw (compressed over 4 days). She commenced employment with the Respondent on 31 March 2003 and was employed by them for 20 years. Over the period she was promoted four times and commenced her current role in May 2017.

About the Respondent

16. The Respondent is a non-ministerial government department. DDaT is one of the directorates headed by Mr Coleman (Director). The Claimant's team was Supply and Management. At the material time she reported to Mr Anthony (Head of Service who in turn reported to Mr Al-Shabab Head of Enterprise Services Team.

The Respondent's Performance Review Process

17. The Respondent had a mandatory annual performance review process (PDP). Its employees were required to document their own objectives and assess their performance against those objectives. They would upload the objectives and assessment onto a PDP form on ResourceLink, the human resources (HR) digital system to which the employee had access. This was then discussed with their line manager at a mid-year review in October and at an end-of-year review the following March/April. The line manager would provide a rating: 'Must improve with evidence'; 'Must improve'; 'Achieved'; 'Exceeded' (which carried additional pay). The manager would add this rating and any comments to the PDP form on ResourceLink. If a manager failed to complete the performance review they could be reprimanded.
18. Following the end-of-year review meeting the rating and any comments by the manager were provided to a Moderation Board. If the rating was 'must improve' or 'exceeded', then the line manager was required to provide a statement in support or an explanation. No additional comment was required for an 'achieved' rating. The moderation process was a 2-stage process. The rating was first reviewed by a departmental board which received oral feedback on each reportee from the line manager. The rating was then reviewed by a moderation board at directorate level chaired by Mr Coleman. The line manager did not attend these meetings. HR attend both meetings and took notes, with detailed notes to be taken if an employee was to receive a lower performance rating than that recommended by the line manager.
19. In addition to the annual PDP process there was an annual staff succession moderation process to identify career aspirations, training needs and make recommendations for promotion. This was referred to as the '9-box grid'. Line managers were to discuss this with their reportees and provide a score which was to be discussed by the moderation board. The line manager's score and comments and the moderation board decision were recorded on the 9-box grid form.
20. The Respondent also scheduled weekly 1:1 meetings between line managers and their reportees. Prior to each meeting the reportee was required to complete a 1:1 review template setting out 'What you did' and 'What you will be doing': eg **pgs 132-138**. There was no formal process for recording the outcome of these meetings.

Chronological Events

21. The Claimant had been given the rating of 'achieved' in the 2017/18, 2018/19 and 2019/20 PDP reviews: **pgs 774 and 779**. The comment box for the 2017/18 mid-year review was empty and for the end-of-year merely stated '*well-done for a good start*': **pg 774**. The comment box for the 2018/19 mid-year review contained positive comments about the Claimant's development and for the end-of-year review was empty merely stating '*submitted on the last day*': **pg 779**. This supported the Respondent's case that comments were not required and could be very short.
22. In March 2020 Mr Anthony became the Claimant's line manager: **pg 820**. The same month Ms Montgomery (the Claimant's previous line manager) conducted the 2019/20 end-of-year review and scored the Claimant as 'achieved' and provided detailed positive comments: **pg 784**. Mr Anthony added a comment at the end that he had only just become the Claimant's line manager so was unable to comment on her performance but went on to state that his previous work with the Claimant gave him '*confidence that she is a very capable member of the team, and I look forward to working closely with her in 2021*': **pgs 785-786**. Her 2020 9-box grid rating was 'effective': **pg 768**.
23. In October 2020 the Claimant had her 2020/21 mid-year review meeting with Mr Anthony: **pg 799**. On the PDP form Mr Anthony recorded that '*Roz has worked hard....*'. I accept from this that it was not his management style to provide lengthy comments. During this meeting the Claimant said that she said to Mr Anthony that she had not had an opportunity to develop their working relationship, to which he responded, '*we don't have a relationship*' (**issue 1.1.2**). The Claimant also said that Mr Anthony told her that she needed coaching and that he would provide this to her, but then failed to do so. Mr Anthony denied that he made these comments. I prefer the evidence of Mr Anthony. There is no documentary evidence supporting the Claimant's allegation regarding this comment and there is no reference to coaching in the PDP commentary. It was a meeting that took place four years ago and I consider it likely that she has misremembered or misconstrued it. In reaching this conclusion I take into account my findings that some of her evidence was not wholly reliable for the reasons set out below.
24. At the 2020/21 end-of-year review the Claimant was marked 'achieved' with no additional commentary: **pg 799**. Her 2021 9-box grid rating was 'strong': **pg 768**.
25. In October 2021 the Claimant attended her 2021/22 mid-year review with Mr Anthony: **pg 805**. On the PDP form he commented that '*Roz has performed well this year*' and referred to changes in her role. He scored her as 'achieved'. The Claimant claimed that she was told that she was on track for an 'exceeded' score at the end-of-year review. I accept the Claimant's evidence since this is consistent with her record of the discussion at the 2021/22 end-of-year review (see below).

26. On 25 February 2022 the Claimant attended an off-site meeting with Mr Anthony. She informed him that she wished to move to a 3-day week as part-retirement and that she wanted to lose her line management responsibility. The meeting was positive and she emailed Mr Anthony the next day stating: *'Thank you for travelling to meet face to face, and an added treat of brekkie, it was appreciated'*: **pg 42**. Mr Anthony actioned this request; discussed it with Mr Al-Shebab and HR and drafted a job description for the Claimant's new role as Senior Business Change Manager: **pg 839**. This was a mutually beneficial arrangement, since the financial saving from reducing the Claimant's hours could be combined with an already vacant post to allow Mr Anthony to appoint another G2 post.
27. On 21 April 2022 the Claimant completed her 2021/22 end-of-year review paperwork stating that she was grateful to Mr Anthony for his encouragement and support with her personal development: **pgs 62, 64-75**. In the covering email she stated that *'I trust I find you well'* and referred to her break with her family.
28. On 9 May 2022, the Claimant attended the 2021/22 end-of-year meeting with Mr Anthony: **pg 805**. The Claimant said that at this meeting Mr Anthony failed to inform her, or discuss with her, feedback that he had received by email from Mr Longmate and Ms Rentell (members of her team): **pgs 44 and 60** respectively (**issue 1.1.3**). Mr Anthony accepted that he did not forward these emails to the Claimant but stated that this was because he was aware that she had received copies directly and that he read them out during the meeting. I accept his evidence, since Mr Longmate and Ms Rentell had forwarded their feedback to the Claimant in advance of the meeting. The Claimant also says that Mr Anthony failed to raise any performance concerns with her (**issue 1.1.4**). Mr Anthony disputed this but gave no evidence as to what was said and provided no notes of this discussion. Following the meeting the Claimant had added to her PDP form the heading *'On reflection after the EOY [end-of-year] discuss see my response below'*: **pg 56**. In the text that followed the Claimant referred to a busy 12 months and stated *'I agree that there are areas for development and I also wanted to address comments from our discussion'*. She then referred to the coaching sessions to be provided by Mr Anthony not taking place as planned (this is a reference to IT coaching that the Claimant had requested). She also agreed that not everything had been delivered as quickly as possible but that she did not agree that she had been distracted when individuals had come to her for support. This all suggests that the Claimant's performance was discussed at this meeting, and I find that it was. However the context was a discussion as to why the Claimant had been rated 'achieved' rather than 'exceeded' as she had expected following the mid-year review. I reach this finding because this discussion was referred to in the Claimant's subsequent draft grievance of 11 November 2022 (see below). Further, had there been a discussion that the Claimant was under performing, I would have expected this to have been documented and an action plan to be put in place to enable her performance to improve.
29. In cross-examination it was put to Mr Anthony that between May 2022 and November 2022 there had been only 12 of the scheduled weekly 1:1 meetings

with the Claimant (based on there being 10 templates and 2 emails in the bundle). Mr Anthony disputed this but was not able to provide any evidence of other 1:1 meetings. I therefore find that there were only 12 meetings over this period.

30. On 16 May 2022 Mr Anthony emailed the Claimant asking if the 1:1 meeting could be put back to tomorrow, the Claimant agreed: **pg 98**.
31. On 17 May 2022 Mr Anthony announced the Claimant's new role: **pg 102 (issues 1.1.1)**. The Claimant responded thanking him and saying it was very much appreciated. In the same email she reported on discussions with a colleague and asked some questions. Mr Anthony could not recall if he replied to this email.
32. On 19 May 2022 the Claimant updated her PDP for the 2021/22 for the departmental moderation board, attaching the feedback from her team: **pg 106, 108**. Mr Anthony did not reply to this email (**issue 1.1.1**). Mr Anthony stated that he then completed the Claimant's PDP review for the moderation board which confirmed her 'achieved' rating, however there is no evidence of this since the 2021/22 end-of-year entries are blank: **pg 805 (issue 1.1.5)**.
33. On 27 May 2022 the Claimant provided Mr Anthony with documentation for their weekly 1:1 meeting: **pgs 131, 132**.
34. On 31 May 2022 the Claimant emailed Mr Anthony and another in relation to the DDaT Integration Workshop the next day asking if this was a meeting that she should be attending: **pg 148 (issue 1.1.1)**. The Claimant says that Mr Anthony did not reply to this email and Mr Anthony could not recall if he did. He said that sometimes he replied by phone or text or verbally at the next 1:1 meeting. I accept that the lack of an email response does not automatically mean that Mr Anthony did not provide a response.
35. On 1 June 2022 the Claimant emailed Mr Anthony to ask him whether a communication would be sent to the DTP teams informing them of her new role and function: **pg 151**. The Claimant says that Mr Anthony did not reply to this email and Mr Anthony could not recall if he did but says he did inform the DTP team (**issue 1.1.1**).
36. On 5 June 2022 the Claimant provided Mr Anthony with the documentation for their weekly 1:1 meeting: **pgs 153-154**. Mr Anthony did not reply to this email (**issue 1.1.1**).
37. On 16 June 2022 the Claimant and Mr Anthony signed the part-retirement application form to reduce her hours from 5 days to 3 days per week, and draw some of her pension on attainment of age 60: **pgs 230-235**.
38. On 21 June 2022 the Claimant emailed Mr Anthony to update him in relation to a meeting that day with Mr Pracy-Nyman: **pg 200**. She opened the email stating *'hope you are well and enjoying the great weather. Looking forward to hearing how the DIY is going....'*. Mr Anthony did not reply to this email (**issue 1.1.1**).

39. On 29 June 2022 line managers were reminded to holding 9-box grid meetings with their reportees: **pg 202**. The deadline for providing the scores was 9 July 2022. The Claimant said that she asked Mr Anthony for a meeting but he would not agree a date, although he had meetings with the rest of the team. I accept that Mr Anthony did not conduct a meeting with the Claimant because she continued to request that he does so (see below).
40. On 4 July 2022 the Claimant emailed Mr Anthony asking him to complete her 2021/22 end-of-year review on Resourcelink: **pg 205** Mr Anthony did not respond to this email nor did he complete the end-of-year review: **(issues 1.1.1 and 1.1.6)**.
41. The same day the Claimant emailed Mr Anthony congratulating him on a piece of work that he had done with another member of staff: **pg 207**. Mr Anthony did not reply to this email **(issue 1.1.1)**.
42. On 5 July 2022 the directorate level moderation board met, following which managers were required to close the 2021/22 PDPs.
43. On 6 July 2022 the Claimant emailed Mr Anthony informing him that all actions in her role as line manager had been discharged and that she was handing over line management responsibilities to Mr Anthony: **pg 214**. Mr Anthony did not reply to this email **(issue 1.1.1)**.
44. On 7 July 2022 the Claimant emailed Mr Anthony with her documents for the weekly 1:1 meeting and again requested that Mr Anthony complete her 2021/22 PDP: **pgs 218, 219, 225 (issue 1.1.7)**. In the document she thanked Mr Anthony for allowing her to take 3 weeks' leave to enable her to step away from work and have a gap before taking on her new role. She wrote '*Honestly, sometimes I think you know me better than I know myself*': **pg 222**. In the covering email she wished him a good weekend. Mr Anthony did not respond to this email.
45. On 11 July 2022 the Claimant emailed Mr Anthony attaching the early retirement application and thanking him for his time and support: **pg 229**
46. On 13 July 2022 the Claimant forwarded to Mr Anthony an email from HR that they were unable to progress her application for early retirement because they had not yet received approval for a re-shaped role: **pg 246**. Mr Anthony says that at this point he realised that he needed to formalise the new job role with HR, he emailed the next day stating that he would find out what he needed to do to formalise it: **pg 248**.
47. The same day Mr Anthony emailed the Claimant declining the 1:1 meeting set up by the Claimant because he was meeting one of the partners in that slot: **pg 252**.
48. On 15 July 2022 the Claimant emailed Mr Anthony with her documentation for the weekly 1:1 meeting and again requested that Mr Anthony complete her

2021/22 PDP: **pgs 253, 254, 262 (issue 1.1.8)**. Mr Anthony did not respond to this email.

49. On 20 July 2022, Mr Al-Shebab asked the Claimant to complete a number of tasks to prepare for a presentation at the Away Day the next day. The Claimant objected to being asked to do this because it was lower grade work. The Claimant emailed Mr Anthony asking him whether it was his understanding that she was to do this work: **pg 285**. Mr Anthony did not respond to this email; however he says that he noticed a missed call from the Claimant and that he tried to call her back twice later that afternoon.
50. On 21 July 2022 the Claimant emailed Mr Anthony with documentation for their weekly 1:1 meeting: **pg 288**. At the meeting later that morning, Mr Anthony informed the Claimant that he did not expect her to undertake the work requested by Mr Al-Shebab and that he would raise this with him.
51. On 25 July 2022 the Claimant emailed Mr Anthony providing her thoughts following the Awayday event, proposing actions points: **pg 290**. Mr Anthony did not respond to this email (**issue 1.1.1**).
52. On 26 July 2022, Mr Anthony emailed the Claimant to change the date of the next 1:1 meeting due to annual leave, to which the Claimant responded '*that's fine*': **pg 292**.
53. On 28 July 2022 the Claimant emailed Mr Anthony with the report of the 'DCOM Weekly All Hands Meeting' the previous day, identifying questions for him to consider in blue: **pg 294**. Mr Anthony did not reply to this email (**issue 1.1.1**).
54. On 1 August 2022 the Claimant emailed Mr Anthony asking him to look at the briefing paper on 'Triggersbroom' and asking him for some guidance: **pg 301**. Mr Anthony did not reply to this email (**issue 1.1.1**).
55. The same day the Claimant emailed Mr Anthony with her documentation for the weekly 1:1 review meeting. She again requested that Mr Anthony complete her 2021/22 PDP and that he discuss with her performance objectives for the 2022/23 PDP: **pgs 308, 309, 314 (issues 1.1.9 and 1.1.10)**. Mr Anthony did not reply to this email.
56. The 1 August 2022 was the cut off day for line managers to enter their PDP ratings and comments. Mr Anthony relies on this to claim that he did complete the Claimant's PDP, but there is no evidence of this. He had a general memory of closing off all PDPs for those under his line management, but no specific memory of doing so for the Claimant. He stated that he must have done otherwise he would have been chased. I find that he did not complete the 2021/22 PDP, since there is no record of his ranking or comments being entered onto the PDP form on the ResourceLink system, the relevant boxes are blank: **pg 816-819**. Further the Claimant continues to request that this be done.
57. On 4 August 2022 the Claimant raised that Mr Anthony had failed to approve her expenses request: **pg 329**. He responded the same day apologising and

asking her to resend, to which the Claimant responded '*Thanks, no problem...*' I accept Mr Anthony's explanation that claims for expenses were rejected if they were not approved within a certain timeframe and that problems had arisen because the automated system filtered requests as junk mail.

58. On 9 August 2022 the Claimant emailed Mr Anthony proposing a half an hour meeting to discuss changes following the restructure, stating that she would send him an invite on teams: **pg 377**. Mr Anthony did not reply to this email (**issue 1.1.1**).
59. On 10 August 2022, Mr Anthony emailed to change the start time of the meeting on 'Improvement Target': **pg 381**. The Claimant responded '*yes of course*'.
60. On 11 August 2022 the Claimant emailed Mr Anthony to report on her 1:1 with a member of the team who Mr Anthony was due to meet later that week: **pg 383**. At the end of the email the Claimant suggested a 10 minute meeting to discuss. The Claimant separately emailed Mr Anthony to provide a report on the 'DCOM Weekly All Hands meeting' identifying questions for his consideration in blue: **pg 396**. Mr Anthony did not reply to either of these emails (**issue 1.1.1**).
61. The same day the Claimant provided Mr Anthony with her documentation for her weekly 1:1 meeting and requested that Mr Anthony meet with her to discuss her performance objectives: **pgs 399, 400, 403 (issue 1.1.11)**. Mr Anthony did not reply to this email.
62. On 17 August 2022 the Claimant emailed Mr Anthony to inform him that she had an infection and would not be in for the rest of the week and identifying work related actions: **pg 424**. She provided him with a list of outstanding work and asked him to confirm that he had sent off her pension documentation. Mr Anthony did not reply to this email (**issue 1.1.1**).
63. On 1 September 2022 the Claimant emailed Mr Anthony in relation to 'IWG – Review and updates for discussion', asking some questions as how it impacted on his team: **pg 432**. Mr Anthony did not reply to this email. The same day at 08:43 the Claimant provided Mr Anthony with documentation for the weekly 1:1 meeting. Under 'Team issues and concerns' she again requested a discussion about objectives, the 9-box Grid and PDP: **pgs 455-457 (issue 1.1.12)**. She noted that there was a clash and suggested a shorter meeting at 12:30 or that the meeting be rescheduled. At 12:18 Mr Anthony emailed the Claimant changing the date of the 1:1 meeting stating '*appreciate that we need to catch up...*': **pg 433**. The Claimant responded '*yes of course*'. Therefore it was not correct that Mr Anthony did not reply to this email at all. However there is no evidence that he responded to her request to discuss objectives, the 9-box grid or the PCP.
64. On 5 September 2022 the Claimant emailed Mr Anthony providing him with a report of the action she had taken following their 1:1 meeting: **pg 436**. She asked him if he was happy to let another member of staff know about this work going forwards. Mr Anthony did not reply to this email (**issue 1.1.1**).

65. On 9 September 2022 the Claimant was informed by letter that her partial retirement application had been approved from 1 November 2022: **pgs 465-467**.
66. In early September Mr Anthony informed the Claimant that he had given her the rating of 'early potential' in the 9-box grid: **pg 769 (issue 1.1.12)**. The Claimant accepted that was reasonable since it reflected her new role. The 9-box grid recorded that Mr Anthony had entered not just the pre-moderation ranking of 'early potential' but also that the Claimant's key developments for the year ahead was *'to take the leading role in managing changes to service and service delivery in Enterprise Services'* and referred to the Claimant's partial retirement from this year. It then recorded that the moderation board had given her a ranking of 'inconsistent' and made the following comment:
- 'MARKING - INCONSISTENT. Unable to pick from drop down list.*
- Can be variable in delivery of work, and often struggles to understand scale and scope of role. Has had role shape changed both in order to facilitate partial retirement and also give more simple and structured objectives to measure performance.'*
- The Claimant accepted in submissions that Mr Anthony was not responsible for the inconsistent ranking and comment. The Respondent has provided no explanation for the change in the ranking, how this decision was reached or when this entry was added to the 9-box grid. The Claimant was only became aware of this entry following disclosure in the course of these proceedings.
67. On 18 October 2022 the Claimant returned to work following a 3-week absence for surgery. The Claimant says she phoned Mr Anthony and his response was *'Yep... I don't have long'*. The next day the Claimant emailed Mr Anthony thanking him for his time and setting out what had been discussed: **pg 472**.
68. On 19 October 2022 the Claimant emailed Mr Anthony raising a number of issues including that the 2021/22 PDP had 'still not been completed' and submitting her objectives for 2022/23 mid-year review and asking Mr Anthony to confirm or amend: **pg 472 (issue 1.1.13)**. The email ended with the Claimant stating 'on a personal note' he should take time to reflect on accomplishing the transition of the new services ending *'YOU DID THAT!!'*. Mr Anthony did not reply to this email (**issue 1.1.1**).
69. On 26 October 2022 Mr Anthony emailed the Claimant to reduce the time of the Change Delivery meeting *'due to Adel [Mr Al-Shahab] being unavailable, and the length of the agenda'*: **pgs 470 + 513**. The Claimant responded *'that's fine'*.
70. The same day the Claimant provided Mr Anthony with her documentation in advance of their weekly 1:1 meeting. Under 'Team issues and concerns' she included a request that Mr Anthony conduct her mid-year 2022/23 review: **pg 474**. Mr Anthony did not reply to this email, however I note that a mid-year review did take place on 24 November 2022, and therefore there must have

been some form of response (**issue 1.1.14**). After the 1:1 meeting she emailed Mr Anthony providing changes to a slide pack that had been discussed at that meeting: **pg 478**. Mr Anthony did not reply to this email (**issue 1.1.1**).

71. On 28 October 2022 the Claimant emailed the DDaT team announcing her partial retirement and that she would be stepping away from line management responsibilities to focus on her new role: **pg 501**. She stated that Mr Anthony was '*extremely supportive of my decision*'.
72. The same day the Claimant emailed Mr Anthony providing comments by a colleague on 'ES SLT Change Delivery Meeting - 26 October 2022': **pg 498**. She stated '*I haven't seen anything in my inbox from you. Please can you amend and return it back to me or if you want it out asap send it directly to Matt and copy me in, so I am aware. Matt is expecting it.*' Mr Anthony did not reply to this email (**issue 1.1.1**).
73. On 1 November 2022 the Claimant moved to part-time hours (partial retirement).
74. On 3 November 2022 the Claimant emailed Mr Anthony stating that she had not completed the 1:1 template as she had no updates. She reported on ongoing work. She also identified as items for the 1:1 call to include: (1) completion of her 2021/22 PDP; (2) Agreement of her performance objectives; (3) conduct of her mid-year 2022/23 review: **pg 505**. (**issue 1.1.15**). Mr Anthony did not reply to this email (**issue 1.1.1**).
75. On 4 November 2022 the Claimant emailed Mr Anthony identifying items that required his input since they had not had the 1:1 meeting the previous day: **pg 506**. This included his input on 2 objectives for her 2022/23 mid-year review (**issue 1.1.16**). Mr Anthony did not reply to this email (**issue 1.1.1**).
76. On 10 November 2022 the Claimant again emailed Mr Anthony regarding the 'ES SLT Change Delivery Meeting - 26 October 2022' stating 'Please can you amend and send back': **pg 511**. Mr Anthony did not reply to this email (**issue 1.1.1**).
77. The same day Mr Anthony had a 1:1 Review meeting with the Claimant. There is a dispute about what was discussed (**issue 1.1.17**). The Claimant says there was a general discussion about the lack of progress of the Digital Transformation Programme; the discussion was not about her personal performance but rather the lack of engagement by others. Mr Anthony says that he raised performance concerns with the Claimant at the meeting including that she had failed to deliver against key tasks. There are no notes or any other documentation from Mr Anthony recording what was said. However there are two contemporaneous documents provided by the Claimant:
 - 77.1 The first document is an email dated 11 November 2022 that the Claimant sent to Mr Anthony setting out her concerns about 'maturing the role' in the light of lack of engagement due to the demands and priorities being placed on the programme and project managers: **pg 516**.

She referred to a number of factors including 'limited communication' and that whilst there has been progress the role was continually being reset. Mr Anthony accepted in cross-examination that his interpretation of the email at the time was that the Claimant was complaining about some elements of his line management. At the end of the email the Claimant stated: *'thank you for the opportunity to discuss my concerns and reassurance that the challenges I am facing are expected during transformational change'*. This suggests that the Claimant was provided with reassurance at the meeting not warned that she was underperforming.

- 77.2 The second document is a draft grievance (not sent) expanding on the lack of support being provided to enable her to do her job: **pg 618**. I accept that this was drafted at the same time as the email since it refers to *'our meeting yesterday'* and some of the wording is the same as the email that was sent. This document refers to it being clear from the discussion that the role was more complex, but again does not suggest that the Claimant was being informed that she was under performing.

On the basis of these two documents I find that although there was a discussion about the role, the Claimant was not informed that she was underperforming. This interpretation is supported by the fact that the Claimant thanked Mr Anthony for his 'reassurance'.

78. In the email of the 11 November 2022 sent to Mr Anthony the Claimant had also stated: *'...I am starting to feel I have no meaningful employment and even considering whether I am being encouraged to retire'*: **pg 516**. Mr Anthony did not reply to this email (**issues 1.1.1 and 1.1.18**). He agreed that this email required a response and that to not have done so would have been *'a horrible way to treat someone'*. He claimed that he did respond in that he scheduled an additional one hour 1:1 meeting shortly after receipt of this email which took place between 11 and 17 November 2021. This was disputed by the Claimant. I do not accept Mr Anthony's evidence, there is no documentation referring to an additional 1:1 meeting and he had not referred to this meeting in his statement. The first time he mentioned it was in cross-examination when being asked about his failure to respond. This was a glaring omission in relation to a central issue. If it had taken place I would have expected it to be referred to in his statement and therefore conclude that Mr Anthony is mistaken in his recollection.
79. On 11 November 2022 the Claimant again asked Mr Anthony to complete of her 2021/22 PDP: **pg 516**. Mr Anthony did not reply to this request (**issue 1.1.19**).
80. On 17 November 2022 the Claimant emailed Mr Anthony the documentation in advance of their weekly 1:1 meeting. Under 'Team issues and concerns' she stated *'mid-year review – next week's 121?'*: **pg 527 (issue 1.1.20)**

81. On 18 November 2022 the Claimant emailed Mr Anthony requesting his support for her to attend some training: **pg 537**. Mr Anthony did not reply to this email (**issue 1.1.1**).
82. On 23 November 2022 the Respondent was due to attend an Enterprise Services Operational Meeting: **pgs 541-543 (issue 1.1.21)**. The Claimant says that she called Mr Anthony 13 times, and emailed 3 times, to confirm his attendance at the meeting, but he did not respond. Mr Anthony says he has no record of receiving these calls; however, he did receive two emails from the Claimant stating that she was having IT connectivity difficulties and was unable to join the meeting. I prefer the evidence of Mr Anthony since the emails in the bundle referred to the Claimant having connectivity problems and made no mention of Mr Anthony not attending the meeting **pg 541**. The emails also confirmed that the Claimant tried to phone Mr Anthony, however if his phone was switched off then he would not have received them. The Claimant alleged that when she spoke to Mr Anthony the next day about his failure to respond to her phone calls he had responded '*I MUST have been doing something more important*'. Mr Anthony disputed he had said this. I find that on balance probabilities that he did, it is a plausible response to someone who was querying why he had not responded to 13 phone calls.
83. On 24 November 2022 at 10am Mr Anthony conducted the mid-year 2022/23 review with the Claimant and informed her that she was 'under-performing' (**issue 1.1.22**). There are no notes of this meeting and no record of what was said. The Claimant expected the meeting to be a discussion about an action plan for the next year and the objectives to be met. She was not expecting her performance to be criticised and the criticism came out of the blue. Mr Anthony confirmed her reaction: that she was upset and started to cry. It was not disputed that at the meeting Mr Anthony informed the Claimant that she was at risk of a 'must improve' rating because she had not completed one of her assigned tasks (the creation of a tracker document). However the claimant did dispute that this had been raised with her repeatedly in 1:1 meetings since July 2022. Further the Claimant disputed that the meeting concluded with an agreement to reconvene in a couple of weeks to reassess and avoid a 'must improve' rating'. Mr Anthony said that this was the reason why he did not make an entry onto the PDP spreadsheet or make any official report of the Claimant's underperformance eg to his line manager and / or HR since this may not have been the outcome.
84. I find that Mr Anthony's criticisms of the Claimant's performance did come out of the blue. I do not accept that Mr Anthony had raised this issue in previous 1:1 meetings since there is no evidence whatsoever of this. Further I note that the Claimant would report on the development of the tracker in her 1:1 documentation, but there is no suggestion that Mr Anthony was raising any criticism. Nor are there any emails from Mr Anthony chasing the Claimant to complete this task. Further, in relation to the conclusion of the meeting, I note that between 26 November 2022 and 6 December 2022 the Claimant was on leave. There is no documentary evidence of a reconvened PDP meeting being scheduled to take place on the Claimant's return from leave: no meeting invite

or email from Mr Anthony. Therefore I find that no further meeting was arranged.

85. On 6 December 2022, the Claimant contacted HR to discuss her resignation. The Claimant says that she informed HR about Mr Anthony's line management, however she did not refer to it in her resignation letter nor did she refer to this conversation in her witness statement. I noted that there was a meeting with HR after she tendered her resignation and consider that she has conflated this discussion with the later discussion with Ms Andrews (HR Business Partner) which she does set out in her statement.
86. On 7 December 2022 at 8am the Claimant emailed her resignation letter to Mr Anthony and others (I note the letter was dated 24 November 2022 but the Respondent did not challenge that it was sent on 7 December 2024): **pg 544**. She resigned with 3 months' notice stating that the reason was retirement and stated that she was 'extremely grateful' to the Respondent. The Claimant stated in evidence that if Mr Anthony had not raised performance concerns on 24 November 2022 she would not have resigned but would have discussed with him an action plan for the next year and the objectives for the programme.
87. On 16 December 2022 the Claimant had a meeting with Ms Andrews and informed her about her reasons for resigning: **pg 574**.
88. On 20 December 2022 Ms Andrews informed Mr Coleman that the Claimant had raised concerns about Mr Anthony's line management of her and commented that there appeared to be some room for improvement: **pg 570**. Mr Coleman responded thanking her for the helpful context and stating '*we have had performance issues*' with the Claimant: **pg 570**.
89. On 6 January 2023 the Claimant emailed Ms Andrews, attaching the unsent grievance of 11 November 2022: **pgs 616, 618**.
90. On 9 January 2023 Mr Anthony announced that he would be shortly moving to a different role: **pg 627**
91. On 12 January 2023 the Claimant commenced accrued annual leave during her notice period, she did not return to work: **pg 630**.
92. On 19 January 2023 the Claimant sent an email to Mr Anthony congratulating him on his change of role: **pg 650**.
93. On 1 March 2023 the Claimant's employment terminated: **pg 630**.
94. On 3 April 2023 the Claimant attended a meeting with Mr Coleman in relation to outstanding pay issues. During this meeting she informed him of the reasons that she resigned. Mr Coleman took a note: **pg 746**. The Claimant stated that he expressed concern and apologised to her. Following this meeting Mr Coleman wrote an email on 5 April 2023 for the Deputy General providing background information: **pg 759**. It recorded the following:

- 94.1 That the Claimant *'was subject to performance management action by her line manager based upon evidence from multiple business areas across DDaT and our key suppliers'*.
- 94.2 That *'significant support'* was provided to the Claimant *'to shape and understand the objectives'* for her new role and *'the actions she needed to take to make the role a success'*.
- 94.3 That the Claimant and the line manager had a different view about the responsibilities of the old and new role. Mr Coleman was *'working with the line manager to ascertain how this was communicated and whether this could have been done differently'*.
- 94.4 That from Mr Coleman's own discussion with the Claimant, she appeared to be attributing many actions by her line manager to reinforce the unprofessional nature of her treatment. In discussions with Mr Anthony he did not believe this to be the case and he was reviewing how it could have been handled differently in future. This to include *'whether there were behavioural indicators that would have warranted an OH [occupational health] referral'*.

Mr Anthony confirmed that he had met Mr Coleman following the Claimant's resignation in December 2022. He did not provide any evidence of this in his witness statement. In cross-examination he stated that the reference to *'evidence from multiple business sources'* did not come from him but from Mr Coleman's own dealing with the Claimant and discussions between Mr Coleman and Mr Al-Shahab. He also denied that he was responsible for the reference to the need for an OH referral, saying those were Mr Coleman's words.

95. On 25 April 2023 the Claimant had a meeting with the Director General to receive a 'Letter of Thanks' for her long service. During this meeting the Claimant informed him of why she had resigned. He took a note and informed her that he would follow up with HR: **pgs 770-773**. The Claimant was not informed of the outcome of these discussions.
96. On 3 May 2023, ACAS EC commenced and on 14 June 2023 the ACAS EC certificate was issued: **pg 5**. On 14 July 2023 the Claimant submitted her claim form: **pg 7**.

FINDINGS OF FACT ON REMEDY

97. The Claimant said that she found it a shock to be out of work: she had lost a job that she had loved and had worked for the civil service for 20 years. Following the termination of her employment she applied for the following roles:
- 97.1 On 24 April 2023, Commercial Administrator, for Thames Hospice at a salary of £35,000. The Claimant was informed that they would not be

proceeding with her application because they felt she was overqualified for the role but the feedback was extremely positive.

- 97.2 On 10 June 2023, Liaison Co-Ordinator, for Ben Organisation (Lynwood independent living village), a charity at a salary of £30,000. The Claimant was invited for an interview which went well; however they did not appoint because the person who had left the post wanted to return. The Claimant was informed that they had the role of Receptionist that they wanted her to consider and invited her to attend an interview which she did and was offered to role.
- 97.3 In September 2023, HR Learning and Development Officer, for Eton College. Following submission of her application, the college informed the Claimant that the deadline was being extended. They were unable to provide any indication as to when any interview would take place. The Claimant made the decision do not pursue this application and take the role of Receptionist for Ben Organisation.
- 97.4 On 23 October 2023 the Claimant was approached by Thames Hospice to apply for the role of HR Administrator, but she did not pursue this opportunity it because it was only a six-month fixed-term contract.
- 97.5 On 27 November 2023 the Claimant commenced work as a Receptionist for Ben Organisation (Lynwood village).
- 97.6 On 18 June 2024 the Claimant had a meeting with the Director of HR at Thames Hospice and she said that she would keep the Claimant informed if anything arose in the coming weeks. On 23 July 2024 the Claimant applied for a Fundraising Co-Ordinator role at a salary of £35,000, she was offered an interview however was unsuccessful.

THE LAW ON LIABILITY

98. Section 95(1)(c) of the ERA 1996 provides that:

- (1) *an employee is dismissed by his employer if (and only if)—*
...
(c) *the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

99. The employer's conduct which gives rise to a constructive dismissal must involve a *repudiatory breach of contract*, the employee must resign in response to that breach and not otherwise waive or affirm the contract: **Excavating (ECC) Limited v Sharp** [1978] IRLR 27. The legal test requires looking at the circumstances *objectively* — i.e. from the perspective of a reasonable person in the employee's position, whether the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract: **Tullett**

Prebon plc v BGC Brokers LP [2011] IRLR 420 (CA). An employee is not justified in leaving employment just because an employer has acted unreasonably: **Bournemouth University Higher Education Corporation v Buckland** [2010] ICR 908 (CA).

100. The Claimant relies on a breach of the implied term of trust and confidence. This is that an employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the trust and confidence between the employee and employer: **Malik v Bank of Credit and Commerce International SA** [1997] IRLR 462 (HL). A breach of the implied term of trust and confidence is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract.
101. Individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of breaching the implied term of trust and confidence: **Lewis v Motorworld Garages Ltd** [1986] ICR 157 (CA). In a final straw case the last act need not itself be a breach of contract, it need not be unreasonable or blameworthy, nor does it need to be of the same character as the earlier acts. However it did need to add something to the breach even if what it added was relatively insignificant. An entirely innocuous act on the part of the employer cannot be a final straw: **Omilaju v Waltham Forest London Borough Council** [2005] ICR 489.
102. The employer's motive for the conduct causing the employee to resign is irrelevant: **Bliss v South East Thames Regional Health Authority** [1987] ICR 700 (CA).
103. The tribunal must focus on the employer's conduct not that of the employee: **Tolson v Governing Body of Mixenden Community School** [2003] IRLR 842 (EAT). Thus, when determining whether there had been a repudiatory breach by the employer it would be an error of law to attach any weight to the failure to exhaust an employer's grievance process: **Nelson v Renfrewshire Council** [2024] EAT 132. I confirmed with the parties that whether or not the claimant had submitted a grievance was only relevant to the consideration of credibility.
104. Affirmation may be expressed or implied by conduct through inaction or delay. However the issue is essentially one of conduct and not of time, it all depends on context and not upon any strict time test: **Chindove v Morrisons** (2014) UKEAT/0201/13/BA.

THE LAW ON REMEDY

105. An employee is under a duty to mitigate her loss. This duty does not arise unless and until the employee has actually been dismissed: **McAndrew v Prestwick Circuits Ltd** [1988] IRLR 514.

106. The EAT in **Gardener-Hill v Roland Berger Technics Ltd** [1982] IRLR 498 stated that when considering mitigation the tribunal should ask itself:
- 106.1 What steps were reasonable for the employee to take in order to mitigate her loss?
- 106.2 Whether she did take those reasonable steps?
- 106.3 To what extent, if any, would those steps have actually mitigated her loss?
107. The EAT in **Cooper Contracting Ltd v Lindsey (2016)** (UKEAT/0184/15/JOJ), provided a summary of the principles to be applied:
- 107.1 The burden of proof regarding failure to mitigate is on the wrongdoer (i.e. the employer); the employee does not have to prove that she had mitigated her loss.
- 107.2 If evidence as to mitigation is not put before the tribunal by the wrongdoer then the tribunal is under no obligation to look for that evidence or draw inferences.
- 107.3 The employer must prove that the employee has acted unreasonably, the employee does not have to show that she acted reasonably. In so doing the tribunal should take into account the employee's wishes as one of the circumstances, though it is the tribunal's assessment of reasonableness not the employee's that counts.
- 107.4 The tribunal should not apply a standard that is too demanding.
- 107.5 The test may be summarised by saying it is for the wrongdoer to show that the employee acted unreasonably in failing to mitigate.
- 107.6 The mere fact that it would have been perfectly reasonable for the employee to have taken on a better paid job does not necessarily satisfy the test but will be important evidence as to whether the employee has acted unreasonably.
108. In relation to loss of statutory rights there is limited caselaw and the amount to award is a matter for the tribunal. The sum of £500-£750 is often used. In **Countrywide Estate Agents & Ors v Turner** (2014) UKEAT/0208/13/LA, the EAT upheld a decision by a tribunal to award 2 weeks' gross pay as permissible and within the discretion of the tribunal.

DISCUSSION AND CONCLUSION

109. In my view the evidence from both witnesses was not totally reliable. The Claimant had a tendency to misconstrue events. For example she described the relationship with Mr Anthony as 'bullying from the outset', yet it is clear from

the email exchanges that the relationship was at times warm and friendly, inquiring about each others health and outside interests. I accept that someone who has a difficult relationship with their manager may try to maintain a friendly rapport in order to prevent deterioration. However the nature of the exchange does not suggest that she was being bullied from the outset. The Claimant herself accepted that she did work closely with Mr Anthony on some projects and that the relationship was collaborative. Further there is evidence that Mr Anthony was prepared to go out of his way to support the Claimant, meeting with her in person to discuss her part-retirement plans and providing the paperwork to make this happen. Finally the draft grievance written on 11 November 2022 only referred to concerns over the last 6 months, and did not suggest that the Claimant felt she was being bullied over a period of 2½ years.

110. There are also other inconsistencies in the Claimant's evidence including:
- 110.1 She complained that Mr Anthony never wrote up her PDP in the 2-3 years that he was her line manager, however that is not supported by the PDP spreadsheet which included his comments on the 2019/20 and 2020/21 PDPs, albeit they were not as effusive as his predecessors.
 - 110.2 I have accepted her evidence that Mr Anthony had informed her that she was on target for an 'exceeded' rating at the 2021/22 mid-year review. This is inconsistent with her claim that Mr Anthony was bullying and undermining her from the outset.
 - 110.3 She complained that Mr Anthony had removed her line management responsibilities however she accepted under cross-examination that this was something she had requested.
 - 110.4 She complained that Mr Anthony ignored her by not agreeing to, cancelling or not turning up to 1:1 meetings. However she accepted under cross-examination that Mr Anthony had attended at least twenty 1:1s over the year and in the bundle there was evidence of 12 meetings between May and November 2022 (a period of 7 months). Whilst the meetings were not weekly, sufficient number of meetings had taken place over the relevant period and undermined her evidence that she was ignored.
 - 110.5 She also complained that Mr Anthony ignored her by not responding to her emails. This is dealt with below.
 - 110.6 Her timeline of events was at times confused. I accept that giving evidence should not be a memory test and that recollection of dates is frequently difficult. However there were some significant matters that the Claimant was vague about, for example whether she complained to HR prior to her resignation. I have found that she did not.
111. However the mere fact that the Claimant did not raise a grievance or otherwise complain about Mr Anthony during her employment does not mean that the whole of her evidence is not credible. Not everyone complains and submitting

a grievance can often increase tensions at work. She was a senior manager near the end of her career, and it is understandable that she would wish to continue to try to work with Mr Anthony and may be reluctant to raise any concerns formally. What is clear is that she did consider raising concerns more formally in what I have referred to as the draft grievance of 11 November 2022. She decided instead to send the more carefully worded email, which was still critical of Mr Anthony's management.

Mr Anthony evidence

112. I accept that Mr Anthony came across as a more straight-forward witness. However his evidence simply did not fit with the documentary evidence. In particular:

112.1 There is no evidence that the 2021/22 PDP was completed.

112.2 There is no evidence of a 1:1 meeting being arranged following receipt of the Claimant's email of 11 November 2022.

112.3 There is no evidence of the 2022/23 mid-year review meeting being rearranged for December on the Claimant's return from leave.

112.4 The email of 11 November 2022 and draft grievance undermine his evidence that he had discussed the Claimant's performance at the 10 November 2022 meeting.

113. Further there were some significant gaps in Mr Anthony's evidence.

113.1 The lack of any explanation as to the apparent failure to complete the 2021/22 PDP.

113.2 The failure to provide any evidence in his witness statement of raising performance concerns with the Claimant prior to the 24 November 2022 meeting.

113.3 The failure to provide any evidence of his meeting with Mr Coleman in December 2022.

113.4 The failure to provide any emails or other evidence alluding to any concerns about the Claimant's performance over the relevant period. I accept that different managers have different communication styles and that Mr Anthony may have preferred to communicate verbally rather than in writing. However the complete lack of any email or other communication from him to the Claimant on this issue, undermines his evidence that there were serious concerns about her performance.

114. I am also concerned about the failure to provide any notes of any meetings with the Claimant. The Claimant's solicitors had repeatedly sought disclosure in advance of this hearing. The Respondent had not provided any explanation for their non-disclosure. In supplementary questions at the start of his evidence Mr Anthony stated that notes had been made during the meetings but not

disclosed because they had been destroyed. He provided two explanations for their destruction:

- 114.1 For security reasons his electronic device was wiped in May 2022. However this does not assist him with the lack of notes or documentation after this date (the period relevant to this claim).
- 114.2 That he routinely disposed of handwritten notes after they are no longer relevant. He informed us that following the Claimant's resignation he considered that his notes of meetings with her were no longer relevant, although he was not able to state when the notes were destroyed. His decision to destroy the notes is particularly concerning because the Claimant's resignation had been tendered shortly after he had threatened her with a 'must improve' rating (at the 24 November 2022 meeting). He knew that she was shocked and upset and therefore he must have suspected that she may complain. Indeed she had already criticised his lack of communication in her 11 November 2022 email. Further, he had a meeting with Mr Coleman in December 2022 during which there appears to have been a discussion about how Mr Anthony could have 'handle this differently in future' (pg 759). From this date, at the very latest, he would have been on notice that the Claimant may submit a complaint and been aware of the importance to retain all notes of his dealings with her. Further I take into account that the Respondent is a large employer with clear processes for assessing performance and would know the importance of record keeping and maintaining records. In particular, given the nature of their business, a government department responsible for data collection and analysis, I consider that they would be acutely aware of the importance of the integrity of record-keeping and not destroying notes of meetings.

In the absence of a plausible explanation, I draw a negative inference from the failure to disclose these notes and / or their destruction.

CONSTRUCTIVE UNFAIR DISMISSAL

115. The Claimant alleges that *'the central issue is whether the Claimant's treatment by line manager, Mr Anthony, amounted to a fundamental breach of contract by the Respondent, culminating in the 'last straw' of Mr Anthony informing the Claimant that she was 'underperforming' at a meeting on 24 November 2022 with no prior support, warning or line manager engagement'*.
116. The Respondent's position is that even if the alleged acts occurred, they were not sufficiently serious to amount to a breach of implied term of trust and confidence.

Was the Claimant dismissed?

Did the alleged acts / omissions occur and if so did they singularly or cumulatively breach the implied term of trust and confidence? (issues 1.1 and 1.2)

Did Mr Anthony fail to respond to the Claimant's emails (at the pages identified by the Claimant)? (issue 1.1.1)

117. In order to avoid duplication, I only address the failure to respond to emails not otherwise covered by a specific issue (see below).
118. The Claimant says that between August and November 2022 she had sent Mr Anthony 97 emails and that Mr Anthony had only sent her 8 emails and that these were to cancel or shorten meetings. This was not disputed. However the mere fact that an email was sent does not mean that a reply was required, albeit it would have been courteous to have sent an acknowledgment. Of the 28 emails that the Claimant has relied on during this hearing (identified in the findings of fact), a number were reports of meetings or thoughts that did not require a response. Others were providing documentation in advance of the 1:1 meetings, again not requiring a response. I also accept Mr Anthony's evidence that he preferred to contact the Claimant by telephone rather than respond to emails and the Claimant accepted that he would on occasion phone her. There were also likely to be times when he was too busy to respond. I also note Mr Anthony's evidence in chief that compared to others at her grade the Claimant needed a lot of time and attention. That other G2s would raise issues at the 1:1s but otherwise would not contact him unless a matter was urgent. He expressed the view that the Claimant should have been making her own judgments. I find that Mr Anthony did not respond to some of the Claimant's emails asking him questions or seeking approval, because he saw them as unnecessary and because he thought she should be making her own decision rather than asking him.
119. I do not consider that any of these failures singularly or cumulatively (with other conduct) amounted to a breach of the implied term of trust and confidence. Even if it was the case that he ignored some of the Claimant's emails, this was not evidence that he ignored her more generally. There were regular 1:1 meetings, albeit fewer than scheduled, and there is evidence that when something required an urgent response he did respond; such as supporting the Claimant's application for part-retirement or her reminding him to approve her of expenses. Therefore this issue is dismissed.

At the mid-year Performance Development review meeting on Oct 2020 did Mr Anthony say to the Claimant 'we don't have a relationship' and inform her that she needed coaching and that he would provide that to her. If so did he fail to provide this coaching? (issue 1.1.2)

120. I have not found as a fact that this was said and therefore this issue is dismissed.

At the PDP 2021/22 end-of-year Review Meeting on 9 May 2022 did Mr Anthony fail to inform the Claimant of and / or discuss the positive feedback from colleagues? (issue 1.1.3)

121. I have not found as a fact that Mr Anthony failed to inform the Claimant of and / or discuss the positive feedback from colleagues, therefore this issue is dismissed.

At the PDP 2021/22 end-of-year Review Meeting on 9 May 2022 did Mr Anthony fail to indicate any performance concerns (issue 1.1.4)

122. I have made a positive finding that Mr Anthony did indicate performance concerns at the end-of-year review meeting. This was not a discussion about under-performance but rather one about why the Claimant was to be scored 'achieved' rather than 'exceeded'. Since there is sufficient evidence that performance concerns had been raised at this meeting, albeit not at a level that required an action plan or a 'must improved' rating, it cannot be said that Mr Anthony failed to indicate any performance concerns. This issue is dismissed.

Did Mr Anthony fail to complete the Claimant's end-of-year PDP 2021/22 review (sent to Mr Anthony on 21 April and updated by The Claimant on 19 May)? (issue 1.1.5)

123. I have found that Mr Anthony did not complete the 2021/22 end-of-year review. There is no evidence of an entry for 2021/22 being made and Mr Anthony was unable to explain why.
124. Both parties agreed that this was a mandatory process. Therefore this was a significant failure on his part. Whilst this does not singularly amount to a breach of the implied term of trust and confidence, this failure can be considered cumulatively with the events on 24 November 2022 (see below).

Did Mr Anthony fail to respond to the Claimant's emails of 4 July 2022, 7 July 2022 15 July 2022, 1 August 2022, 1 September 2022, 19 October 2022, 3 November 2022, 11 November 2022 requesting that he complete her 2021/22 PDP? (issues 1.1.6, 1.1.7, 1.1.8, 1.1.9, 1.1.12, 1.1.13, 1.1.15, 1.1.19)

125. It was not disputed that Mr Anthony had not responded to these emails requesting that he complete the Claimant's 2021/22 PDP review.
126. Mr Anthony's evidence was that he had completed it but it had not been uploaded by ResourceLink since it was still going through the formal moderation process which can take a couple of months. I have found that in fact he had not completed the 2021/22 PDP form at all. Mr Anthony's explanation would only be plausible in response to the Claimant's July emails (since the moderation process may have still been ongoing). However it does not explain his failure to respond to the Claimant's emails between August and November 2022. If he was indeed telling her that he had completed her 2021/22 PDP, then why was she continuing to request that it be done and why did he not put something in writing along the lines of 'I have repeatedly told you it has been done'. Instead there is complete silence from Mr Anthony,

which combined with the fact that no 2021/22 PDP was completed, leads to the inevitable conclusion that Mr Anthony was ignoring the Claimant's requests that this be done.

127. Whilst this does not singularly amount to a breach of the implied term of trust and confidence, this failure can be considered cumulatively with the events on 24 November 2022 (see below).

Did Mr Anthony fail to respond to the Claimant's email of 1 August 2022, 11 August 2022, 1 September 2022, 19 October 2022, 4 November 2022 in relation to setting her performance objectives for the 2022/23 mid-year review? (issues 1.1.10, 1.1.11, 1.1.12, 1.1.13, 1.1.16)

128. It was not disputed that Mr Anthony had failed to respond to these emails. This was something that required a response since the Claimant was in a new role and therefore needed to know what were going to be the performance objectives for that new role against which she was going to be assessed.
129. Whilst this would not have been a breach of the implied term of trust and confidence on its own, it forms an important background to the 'must improve' rating that she was subsequently given at the mid-year PDP review on the 24 November 2022. Therefore it can be considered cumulatively with the events on 24 November 2022 (see below).

Did Mr Anthony fail to respond to the Claimant's email of 1 September 2022 to discuss ... 9 Box Grid....? (issues 1.1.12)

130. I have found that Mr Anthony did discuss the 9-box grid score with the Claimant, since she was informed that it was 'early potential'. Therefore this issue is dismissed.

Did Mr Anthony fail to respond or address the Claimant's emails of 26 October 2022 and 17 November 2022 requesting that he conduct her mid-year review? (issues 1.1.14 and 1.1.20)

131. In relation to the 26 October 2022 email I have found that there must have been some form of response since the mid-year review did in fact take place on 24 November 2022.
132. In relation to the 17 November 2022 email, this was not a request for Mr Anthony to conduct a mid-year review but merely provided him with the completed template for a meeting already scheduled. Therefore there was no requirement on Mr Anthony's part to respond or address the email, albeit it would have courteous to have acknowledged it.
133. Therefore this issue is dismissed.

Did Mr Anthony fail to raise his performance concerns with the Claimant at the 1:1 review meeting on 10 November 2022? (issues 1.1.17)

134. I have found as a fact that Mr Anthony did not raise any performance concerns with the Claimant at the 1:1 meeting on 10 November 2022. Whilst this does not singularly amount to a breach of the implied term of trust and confidence, this failure can be considered cumulatively with the events on 24 November 2022 (see below).

Did Mr Anthony fail to respond or address the Claimant's email of 11 November 2022, raising concerns about the handling of her new role? (issues 1.1.18)

135. I have found as a fact that Mr Anthony did not respond to the Claimant's email of 11 November 2022 raising concerns about the handling of her new role. The Claimant was expressing the view that she had 'no meaningful employment', that she was being 'encouraged to retire' and that it was impacting on her well-being. In cross-examination Mr Anthony accepted that as her manager he should have responded and not ignored it, and that it would have been 'horrible' not to have responded. I agree, it was a clear cry for help and required a response.
136. Mr Anthony's actions may not have been deliberate and designed to encourage her to resign, however this was a significant failure particularly when considered cumulatively with what occurred at the meeting of the 24 November 2022.

On 23 November 2022 did Mr Anthony fail to respond to the Claimant's phone calls and emails to confirm his attendance at the Enterprise Services Operational Meeting? (issue 1.1.21)

137. I have found as a fact that whilst Mr Anthony did not respond to the Claimant emails and phone calls, these were not in relation to his attendance but rather her connectivity problems. Therefore this issue is dismissed on the facts as presented.

On 24 November 2022 did Mr Anthony inform the Claimant that she was underperforming at the mid-year review and / or on course for a 'must improve' rating? (issue 1.1.22)

138. It was not disputed that at the mid-year review Mr Anthony informed the Claimant that she was underperforming and / or on course for a 'must improve' rating. What is disputed is whether this was done without any prior warning and / or justification.
139. I have found that for the Claimant it came out of the blue and that there had been no prior warning. Whilst I have made factual findings that there was a discussion about the Claimant's performance at her end-of-year review on 9 May 2022, this was a discussion as to why she had not received an 'exceeded' rating as expected. In other words it did not provide her with any indication that her ranking may drop to 'must improve'. Further I have found that the only other conversation, that on the 10 November 2022, had not been about the

Claimant's under-performance but a more general conversation about 'maturing the role' which had resulted in the Claimant being 'reassured'. In other words there were teething problems, and nothing that would give an indication that she was about to receive a 'must improve' rating in the mid-year review.

140. The Respondent submits that it cannot be correct that an employee can resign and claim constructive dismissal when faced with a warning to improve, I agree. However when giving such a warning an employer must ensure that it is not done in such a way that was likely to breach the implied term of trust and confidence. It should not come out of the blue, without any prior warning. Particularly in circumstances where there were regular 1:1 meetings where it would be expected that any performance concerns would be raised and addressed as part of an ongoing discussion. If Mr Anthony did have genuine concerns about the Claimant's performance, then he should have engaged in informal discussions in the 1:1s before escalating those concerns to the more formal PDP process.
141. I also do not find that his concerns were justified. Other than his oral evidence the Respondent has adduce no evidence of poor performance. Mr Coleman's email of 5 April 2023 referred to the Claimant being subjected to performance management action by her line manager '*based on evidence from multiple business areas across DDaT and our key suppliers*'. None of this evidence has been adduced at this hearing. Further, there is no evidence that the Claimant was subjected to performance management action. Indeed Mr Anthony's evidence was that he had not completed the mid-year review but adjourned it to enable an action plan to be developed in order to avoid a 'must improve' rating. Mr Coleman's email also stated that there had been '*significant support ... provided to the Claimant to shape and understand the objectives of her new role*'. There is also no evidence of this, indeed I have found the contrary. The Claimant had repeatedly emailed Mr Anthony to ask for support in setting her performance objectives for the role and he had not responded. In the absence of such support it was unfair to measure her against objectives which had not been discussed or agreed.
142. Even if Mr Anthony did have some genuine performance concerns and he had not intended that raising these would destroy or seriously damage the relationship of trust and confidence with the Claimant it was likely to have that effect, when all the circumstances are taken into account. In particular when taking into account:
- 142.1 His failure to respond to the Claimant's email of 11 November 2022 expressing her fears about having no meaningful employment, being encouraged to retire and the impact on her health.
- 142.2 His failure to finalise the 2021/22 PDP and repeatedly failure respond to the Claimant's request that this be done.
- 142.3 His failure to engage with the Claimant and agree the objectives for her new role.

142.4 The Claimant was a senior manager, with a long standing career with the Respondent. Telling her that she was to receive a 'must improve' rating without prior warning was bound cause her considerable upset and distress.

143. I therefore find on the facts of this case that Mr Anthony's conduct cumulatively was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent. Nor was the alleged underperformance at a level of magnitude to make it reasonable or proper to justify moving to a 'must-improve' rating without prior support, warning or line manager engagement.

144. Therefore there was a breach of the implied term of trust and confidence which by definition is a fundamental breach going to the heart of the contract.

Did the Claimant resign in response to the breach? (issue 1.4)

145. Yes, prior to 24 November 2022 the Claimant had not planned to resign, indeed she had succeeded in obtaining a part-retirement package and a new role.

Did the Claimant affirm the contract before resigning? (issue 1.5)

146. The Claimant handed in her resignation on her return from annual leave, 3 weeks after the 'final straw' act. This was a relatively short period for her to make the decision to resign, given her length of service. Indeed the date on her resignation letter suggests that it was in fact drafted the same day as the mid-year review meeting.

147. Further, I do not consider that subsequent three months' notice of itself affirmed the contract. A long notice does not automatically mean that the contract is affirmed. What is important is that during this period the Claimant did not do anything that was inconsistent with her decision to resign. Indeed there is evidence that following the handing in her resignation she informed the Respondent on a number of occasions of her reasons for resigning.

If the Claimant was dismissed, what was the reason or principal reason for dismissal, i.e. what was the reason for the breach of contract and was it a potentially fair reason? (issues 2 and 3)

148. I consider that the potentially fair reason for the Claimant's dismissal was conduct. However I did not consider that the Respondent had acted reasonably in all the circumstances in treating this as a sufficient reason to dismiss the Claimant. This was because there was no evidence of the Claimant's under-performance, and even if there was, there is no evidence to suggest that the Claimant should have been dismissed for that reason without prior support, warning or line-management engagement.

REMEDY

149. The Claimant sought loss of earnings up to her intended retirement at age 67, on 31 July 2029. It was not disputed that her loss of earnings would be limited to the statutory cap of one year's loss of earnings calculated as £46,991.88.

The period between December 2022 to April 2023

150. The Respondent submitted that the Claimant had failed to mitigate her losses, in that on learning that Mr Anthony was moving to a different role on 9 January 2023 she should have asked for her resignation to be rescinded and her job back. However the Claimant was not under any duty to mitigate her loss during this period since this pre-dated the date of her dismissal.
151. In any event, this was not a case where the Respondent had asked the Claimant to rescind her resignation and agreed to address her concerns. The Respondent submitted that this was because when she resigned she had stated that it was in order to retire. However, shortly after tendering her resignation she had met with Ms Andrews on 16 December 2022 and informed her of her reasons for resigning. Further on 6 January 2022 she had forwarded her draft grievance. Therefore the Respondent were fully aware that the reason that the Claimant had resigned was because of Mr Anthony and yet at no point during her notice period did they ask her if she would like to rescind her resignation on the basis that he would no longer be her line manager. Further, the Respondent either took no steps to address the Claimant's concerns or if it did it did not inform the Claimant of any steps taken. In such circumstances it was not reasonable to expect the Claimant to request to rescind her resignation. Moreover even if she had it was unlikely that the Respondent would have permitted her to return, given the negative assessment of her on the 9-box grid and Mr Coleman's email of the 5 April 2023. Therefore such a request, if made, was unlikely to have mitigated her losses.

The period between April 2023 to November 2023

152. I accept that the loss of a job that the Claimant loved and had been doing for 20 years would have been a shock and therefore it was not unreasonable for her to take time to recover and throw herself back into the job market. Having said that the Claimant did take active steps to find work over this period, submitting an application for Commercial Administrator for Thames Hospice (£35,000) on 24 April 2023, for Liaison Co-Ordinator for Ben Organisation (£30,000) on 10 June 2023 and HR Learning and Development Officer for Eton College. All three roles were at an equivalent salary to that she would have been earning in her part-time role for the Respondent (£36,741).
153. The Respondent submitted that the Claimant had failed to mitigate her losses and that the Claimant should have engaged a recruitment agency / consultant to assist her. However it has adduced no evidence of any role that the Claimant could have applied for and did not. In the absence of evidence of other employment opportunities I do not consider that applying for three equivalent roles over this period to be unreasonable.

154. The Respondent also submitted that the Claimant had failed to mitigate her losses by withdrawing her application for Eton College post. Again I took into account that the tribunal is not to apply too demanding a standard. The Claimant explained that at the time she made her decision, Eton College had not even set a date for interview, she had been offered the role of Receptionist for a small charity and did not want to accept it only to then leave shortly after. I do not consider it to be unreasonable for her to withdraw an application for a speculative role in favour of a guaranteed offer of employment, albeit at a significantly lower salary.
155. The Respondent further submitted that the Claimant had failed to mitigate her losses by failing to apply for the 6 month fixed term post of HR Administrator. I do not consider that this was unreasonable of her, I take into account the Claimant's view that she did not feel ready to cope with the uncertainty of a short term contract and note that I am not to apply too exacting a standard on the Claimant. I note that this post arose around the same time as the Eton College decision and the same considerations apply.

The period from November 2023 to 31 July 2029

156. Having obtained the role of Receptionist, I consider that the Claimant remained under a duty to mitigate her losses and therefore she should have continued to apply for higher paid roles. I note that the only post she had applied for was that of Fundraising Co-Ordinator role for Thames Hospice on 23 July 2024, for which she was unsuccessful. I decided that it would not be reasonable for her to be awarded loss of earnings up to her retirement at age 67 years on 31 July 2029.
157. Therefore I considered what period of time the Claimant would, if acting reasonably, have found new employment at an equivalent rate. I took into account that between 2 March 2023 and end of November 2023 (almost 8 months) the Claimant had applied for 3 roles, and that although she had been unsuccessful she was being interviewed and getting positive feedback. I also took into account that she had applied for a further role on 23 July 2024 which had also been unsuccessful. Taking this all into account I consider that it would take her a further 8 months from starting as a receptionist to obtain employment at an equivalent rate i.e. by 27 July 2024.

Compensation for loss of statutory rights

158. The Claimant sought loss of employment rights of £1,142 (representing 2 weeks' pay) the respondent submitted that this was too high. I consider that the norm is to award a sum of between £500-£750 for loss of statutory rights rather than the higher sum of two weeks' gross pay. I decided that the Claimant should receive more than £500 to reflect her long service and loss of her long notice period, and therefore award £750.

Calculation

159. Having delivered the remedy judgment the parties agreed the following figures as compensation:

159.1 a basic award of **£16,273.50** (19 weeks x 1.5 x £571).

159.2 a compensatory award for loss of earnings between 2 March 2023 and 27 July 2024 of **£46,911.88**. This has been calculated as follows:

- loss of earnings for 514 days of £42,204.54;
- loss of pension contributions for 514 days of £14,433.12;
- LESS earnings in new employment for 8 months of £7,792.12; and
- loss of employment rights of £750.
- The statutory cap of £46,991.88 (52 weeks' statutory pay) was applied.

CONCLUSIONS

160. The Claimant's claim for constructive dismissal was well-founded and succeeds.

161. The Respondent is to pay the Claimant within 21 days:

161.1 a basic award of **£16,273.50** (19 weeks x 1.5 x £571).

161.2 a compensatory award for loss of earnings between 2 March 2023 and 27 July 2024 of **£46,911.88**.

Employment Judge Hart

Date: **5 January 2025**

REASONS SENT TO THE PARTIES ON

8 January 2025

FOR THE TRIBUNAL OFFICE

P Wing

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Appendix A: Final Agreed List of Issues (amendment in italics)

The claim is for unfair (constructive) dismissal.

The issues for the Tribunal to determine are:

1. Was the Claimant dismissed?

1.1 Did the Respondent do the following things:

- 1.1.1 Did Mr Anthony fail to reply to the Claimant's emails at pages 102, 106, 148, 151, 153, 200, 205, 207, 214, 227, 285, 290, 294, 301, 377, 383, 396, 424, 432, 436, 472, 478, 498, 505, 506, 511, 516 and 537?
- 1.1.2 At the mid-year Performance Development review meeting in October 2020 did Mr Anthony say to the Claimant 'we don't have a relationship' and inform her that she needed coaching and that he would provide that to her. If so did he fail to provide this coaching?
- 1.1.3 At the PDP 2021/22 end-of-year Review Meeting on 9 May 2022 did Mr Anthony fail to inform the Claimant of and / or discuss the positive feedback from colleagues?
- 1.1.4 At the PDP 2021/22 end-of-year Review Meeting on 9 May 2022 did Mr Anthony fail to indicate any performance concerns ?
- 1.1.5 Did Mr Anthony fail to complete the Claimant's end-of-year PDP 2021/22 review (sent to Mr Anthony on 21 April and updated by The Claimant on 19 May)?
- 1.1.6 Did Mr Anthony fail to respond to the Claimant's email of 4 July 2022 requesting that he complete her 2021/22 PDP?
- 1.1.7 Did Mr Anthony fail to respond to the Claimant's email of 7 July 2022 requesting that he complete her 2021/22 PDP?
- 1.1.8 Did Mr Anthony fail to respond to the Claimant's email of 15 July 2022 requesting that he complete her 2021/22 PDP?
- 1.1.9 Did Mr Anthony fail to respond to the Claimant's email of 1 August 2022 requesting that he complete her 2021/22 PDP?
- 1.1.10 Did Mr Anthony fail to respond to the Claimant's email of 1 August 2022 to arrange a conversation with her about her performance objectives for 2022/23?

- 1.1.11 Did Mr Anthony fail to respond to the Claimant's email of 11 August 2022 to meet with her to discuss her performance objectives?
- 1.1.12 Did Mr Anthony fail to respond to the Claimant's email of 1 September 2022 to discuss objectives / 9 Box Grid / PDP?
- 1.1.13 Did Mr Anthony fail to respond or address the Claimant's email of 19 October 2022 requesting completion of her 2021/22 PDP and a response to her proposed performance objectives in 2022/23 PDP mid-year review?
- 1.1.14 Did Mr Anthony fail to respond or address the Claimant's email of 26 October 2022 requesting that he conduct her mid-year review?
- 1.1.15 Did Mr Anthony fail to respond or address the Claimant's email of 3 November 2022 to complete her 2021/22 PDP?
- 1.1.16 Did Mr Anthony fail to respond or address the Claimant's email of 4 November 2022 requesting that he respond to her proposed performance objectives, so that she can write up her 2022 mid-year review?
- 1.1.17 Did Mr Anthony fail to raise his performance concerns with the Claimant at the 1:1 review meeting on 10 November 2022?
- 1.1.18 Did Mr Anthony fail to respond or address the Claimant's email of 11 November 2022, raising concerns about the handling of her new role?
- 1.1.19 Did Mr Anthony fail to respond or address the Claimant's email of 11 November 2022 chasing for completion of her 2021/22 PDP?
- 1.1.20 Did Mr Anthony fail to respond or address the Claimant's email of 17 November 2022 that he conduct a mid-year review?
- 1.1.21 On 23 November 2022 did Mr Anthony fail to respond to the Claimant's phone calls and emails to confirm his attendance at the Enterprise Services Operational Meeting?
- 1.1.22 On 24 November 2022 did Mr Anthony inform the Claimant that she was underperforming at the mid-year review *and / or on course for a 'must improve' rating?*
- 1.2 Did any of those things breach the implied term of trust and confidence? The Tribunal will need to decide:

- 1.2.1 whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and
 - 1.2.2 whether it had reasonable and proper cause for doing so.
- 1.3 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.
- 1.4 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.
- 1.5 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.
- 2. If the Claimant was dismissed, what was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract?
- 3. Was it a potentially fair reason?
 - 3.1 Did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the Claimant?
 - 3.2 The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.