EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8002556/2025

Held in Aberdeen on 13, 14, 15 July and in Chambers on 30 September 2026

Employment Judge J Hendry

Mr S Murray	**Claimant** **In person**
Tykes Ltd	**Respondent** **Represented by:** **Mr D James,** **Counsel** **Instructed by:** **Jackson Boyd LLP**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is:

(One) That the claim for (constructive) unfair dismissal is dismissed as not being well founded.

(Two) That the claims for age discrimination/harassment under the Equality Act 2010 are dismissed as not being well founded.

(Three) That the claimant having resigned is not entitled to notice or pay in lieu thereof.

REASONS

1. The claimant in his ET1 sought a finding that he had been unfairly (constructively) dismissed from his position as a Fieldworker with the respondent company. The respondent company is a small charitable

organisation involved in providing support to young people in the Highlands. They are based in Golspie.

2. The claimant also claimed age discrimination in relation to references having been made to retirement by his line manager which he regarded as being harassment. In addition he claimed notice pay. The claims were opposed.

3. The case proceeded to a case management hearing on the 30 January 2026 before Judge McManus. She prepared a Note following the hearing and made orders in relation to preparations for a final merits hearing.

4. A list of Issues was discussed and later agreed by parties.

Issues

5. The following issues were to be determined:

Constructive Unfair Dismissal

1. Did the respondent conduct itself as alleged by the claimant by:

- Alleged lack of supervision and support from when Denise Campbell started in 2022 until 2024.
- The claimant having six formal supervision sessions between February 2024 and November 2024, with no further formal supervision sessions prior to his resignation in June 2025.
- Delay in issuing documents to the claimant during the disciplinary process initiated against him in May 2025.
- Sending a "Private & Confidential" email to the claimant at 21:07 on 15 May 2025, copied to a Director’s personal Gmail account, referring to a disciplinary hearing via Microsoft Teams at 10:00 on 20 May 2025.
- Notifying the claimant of a disciplinary hearing by a Microsoft Teams invitation issued at 08:16 on 16 May 2025, initially arranging the hearing for 10:00 on 20 May 2025 and later moving it to 14:30.
- Failing to provide the allegations or evidence relating to the disciplinary hearing until 14:30 on 20 May 2025.
- A lack of forward planning in arranging the disciplinary procedure, including failing to take account of HR leave, resulting in the process being hurried.
- The claimant being left "hanging" for two weeks while HR was on leave and the disciplinary process did not progress.

- An email being sent to the claimant by Denise Campbell (Project Leader/Manager) on 21 May 2025, while the claimant was absent from work because of stress, asking whether he wished to "retire or resign" and stating that he only needed to give one week's notice, although "longer would be ideal".
- A lack of response from HR to the claimant's four grievances submitted on 4 June 2025.
- The claimant's grievance number 5 being rejected without investigation after informing the claimant that there would be an investigation.
- Sending an email to the claimant on 10 June 2025, while he was absent on sickness leave, asking whether he wished his grievance to be postponed (relied upon as the "final straw").

2. If so, by those actions and/or failures did the respondent conduct itself without reasonable or proper cause in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties?
3. If so, on those findings in fact, and applying the principle of the "last straw", was the claimant entitled to resign?
4. Is the claimant entitled to any financial remedy in respect of constructive unfair dismissal?

If so, what?

5. Should any decrease or increase be applied to a basic or compensatory award to reflect:
   - The likely outcome of the disciplinary procedure initiated against the claimant.
   - Any failures in the internal grievance procedure prior to his resignation.

Age Discrimination

Section 13 – Direct Discrimination

1. Was the claimant treated less favourably by:
   (i) Being sent an email by Denise Campbell (Project Leader/Manager) on 21 May 2025, while the claimant was absent from work because of stress, asking whether he wished to "retire or resign" and stating that he only needed to give one week's notice, although "longer would be ideal".

2. If so, was that less favourable treatment than the identified hypothetical comparator because the claimant was aged 62?

3. If so, was that treatment a proportionate means of achieving a legitimate aim under section 13(2) of the Equality Act 2010?

Section 26 – Harassment

4. Was the email sent to the claimant by Denise Campbell (Project Leader/Manager) on 21 May 2025, while the claimant was absent from work because of stress, asking whether he wished to "retire or resign" and stating that he only needed to give one week's notice, although "longer would be ideal", unwanted conduct related to the claimant being aged 62 which had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, in terms of section 26(1)(b)(ii) of the Equality Act 2010, taking into account section 26(4)?

Section 39 – Discrimination by an Employer

5. If so, was such conduct a detriment to which the claimant was subjected by his employer in terms of section 39(2)(d) of the Equality Act 2010?

Section 40 – Harassment by an Employer

6. Was any such conduct harassment of the claimant by the respondent in terms of section 40 of the Equality Act 2010?

Remedy

7. Has the claimant suffered any financial loss as a result of any such unlawful actions by the respondent?

8. Is the claimant entitled to any award, recommendation or declaration?

9. If so, what?

Evidence

6. The Tribunal had the benefit of evidence from the following:

- The claimant
- Ms Jo Henderson Fieldworker and a witness for the claimant.

Respondent’s witnesses

- Mrs Denise Campbell Project Manager
- Ms Jacquie Sutherland Chair of Board

- Mrs Tessa Palmer Treasurer and Director
- Ms Natalie Perks HR Adviser

Findings

7. The claimant was an experienced and capable Fieldworker/ Young Adult Carer who had worked for the respondent charity since its inception. Over the years it had grown considerably in size.

8. The respondent had various policies for staff such as a Disciplinary Policy contained in a Staff Policy and Procedure Handbook with which the claimant has access to. Mrs Campbell became Manager in 2022. Her post was busy and demanding. She had a large workload.

9. Fieldworkers were supposed to have supervision meetings with the manager to discuss cases and air concerns. The system had broken down somewhat in the past and in 2023 staff had agreed that the supervisions should restart following a meeting of staff and with a Director Jacqui Sutherland. These supervisions started again and the claimant had six up until November 2024.

10. In one supervision meeting on the 27 February it was recorded that the claimant was unhappy in his current role. He complained of lack of staffing and that he was looking for other jobs at time (JBp48)

11. Mrs Campbell was approachable and had an open policy for staff. In mid 2024 she was concerned that he was working long hours and encouraged him to take leave (JBp77).

12. In 2025 the claimant was involved in supporting a young adult who found themselves in a number of difficult situations. This was a demanding role. He felt stressed by the work he was doing at the time and he was also disenchanted with the way the organisation was being run. He was unhappy with the appointment of a less experienced worker as his line manager and generally disenchanted with the organisation.

13. At this time he also struggled with the IT system that was being used to keep records of interactions with clients and was under pressure to keep proper records of contacts. He was poor at making digital records of such interactions as he was required to do. He was six months behind in making such records. He found it embarrassing to seek help from administrative staff. Latterly he was under pressure to get his record keeping up to date.

14. Ms Megan Penny the Lead Field Officer returned from leave on the 6 May 2025. She later reported on 12 May to the respondent that staff had reported to her that they had experienced difficulties with the claimant the previous week. That

he had been unprepared for his 'drop in' clients and been rude and abrasive in his mannner.

15. She reported that on 12 May he had asked her to help with his activity planner. He had been asked on a number of occasions by Mrs Campbell to keep these records up to date. Ms Penny said she would assist him but would not do the work for him. She says that when she tried to do so he became ''defensive and intimidating''. He raised his voice. She approached Mrs Campbell and told her that his behaviour was upsetting. Mrs Campbell who decided to investigate the matter taking a statement from her (JBp206) and later from other staff.

16. The claimant was asked to explain what had happened and a statement was taken from him (JBp201-204). In it he said he had been working with a client who had been 'hard going' He complained that he felt overwhelmed and had no support. He said he was working on his activity planner/database and had asked Ms Penny for help. The statement recorded: *"I will not be spoke to in a condescending manner -I am old enough to be her grandad. She is doing an okay job but all I needed was support. It was accumulation of everything that had occurred. I have had no s&s since November and this could have been resolved at that if I had one. If someone talks to me offensively I will respond no matter who it is"* He acknowledged that Mrs Campbell had a ''*huge*'' workload. He said he had requested help with the database three times. He also said he had been on the telephone to ACAS who said he had a good claim as ''*Tykes are partly to blame for lack of supervision*''

17. The claimant was also recorded as saying that if he was reprimanded he would take it further. It was recorded that he said he would apologise at the staff meeting: ''*It was disrespectful to other staff to see me acting that way and they would have been shocked*''

18. Mrs Campbell took advice from Ms Perks and it was decided that there should be a disciplinary hearing

19. Ms Penny emailed Mrs Campbell on the 13 May (JBp209) bringing to her attention the staff's concerns about the claimant's conduct. They later gave statements.

20. Mrs Campbell took advice from Ms Perks and it was decided that there should be a disciplinary hearing.

21. A letter was drafted to the claimant dated 14 May (JBp213) inviting him to a disciplinary hearing on the 20 May. The disciplinary issue was: ''On multiple occasions behaved in manner that is unacceptable and unwarranted and has had an adverse impact on other members of the Project'' Copies of the Statements that had been obtained were attached. The letter was sent by email to the claimant. A copy of the respondent's disciplinary procedure attached.

22. The respondent also sent an email to Ms Jacquie Sutherland a Director who had been appointed to chair the disciplinary hearing. The email was sent to Ms Sutherland's personal email address as this was the email that she used for correspondence. Ms Sutherland did not have a separate charity email address at the time. The respondent had initially been able to use NHS email addresses but this facility had been withdrawn some time earlier.

23. On 16 May 2025, the respondent sent a further email to the claimant with a Teams invitation link for the remote disciplinary hearing.

24. On 20 May 2025, the claimant attended the disciplinary hearing. It became apparent very quickly that he had not received the respondent's email of 15 May 2025 attaching the invitation letter and other documents. The claimant insisted that he wanted to proceed with the disciplinary hearing. The respondent confirmed that the hearing would require to be rearranged to an alternative date so that the respondent could re-send the papers to him and ensure that he had proper notice of the allegations before responding.

25. The respondent was unaware why the claimant had not received the email of 15 May 2025. They investigated the matter and found that it seemed to have been sent to the correct address. The same email address was used to send the Teams invitation which the claimant received successfully allowing him to attend the meeting. There was no indication the email had 'bounced' or had not been delivered. They accepted that the claimant had not received the email. In any case, the respondent re-sent the correspondence to the claimant.

26. A disciplinary hearing was rearranged to take place on **4 June 2025**.

27. On 20 May 2025, the claimant had a conversation with Mrs Campbell. He appeared disenchanted with work. He had done this in the past but had not left. Mrs Campbell thought he had mentioned retiring. She explained that she would look into matters for him which she did. She checked how much notice he would have to give and what the process would be if he retired. She noted that because of his age there would be no retirement pension payable.

28. On 21 May 2025, the claimant commenced a period of sick leave. The claimant obtained a Fit Note that cited 'stress at work' as the reason for his absence. The claimant remained on sick leave until his resignation on 11 June 2025.

29. On 21 May 2025, Mrs Campbell acknowledged the claimant's Fit Note. Mrs Campbell attached a copy of the respondent's sickness policy. She also stated that ''further to discussion'' in which he had mentioned he was interested in retiring or resigning, she had made enquiries and learned that the claimant would only need to give one weeks' notice but she added '*longer would be ideal*'.

30. On 4 June 2025, the claimant raised a grievance. It was a grievance relating to alleged failures in the disciplinary process, breach of data protection obligations, longstanding lack of support and supervision and 'inappropriate'' correspondence during sick leave (P244-246). Mrs Campbell once more contacted Ms Natalie Perks an HR professional who provided advice to charity to consider how to proceed.

31. On 5 June 2025, the respondent wrote to the claimant to acknowledge his grievance (P250). Mrs Campbell indicated that due to a conflict of interest (her actions were in dispute) she would not chair the hearing.

32. There was correspondence between the parties over the claimant's SAR application.

33. The claimant had been given a copy of the disciplinary meeting minutes. On the 20 June he wrote with some comments on the notes. The clarifications were noted (P253)

34. On 10 June the respondent asked the claimant whether he preferred to attend a grievance meeting during his sick leave or wait until after his return (P255).

35. **On 11 June 2025, the claimant resigned with immediate effect**. The claimant also advised that he was not in a position to engage in any grievance or disciplinary proceedings at the time, citing his poor health as the reason for being unable to engage in the process.

36. On 11 June 2025, the respondent acknowledged the claimant's resignation. They asked the claimant if he wanted to meet to discuss his concerns. The respondent confirmed that if the claimant did not wish to do so, they would continue to investigate his grievance based on his written concerns.

37. His resignation was acknowledged (P264)

38. On 13 June 2025, the claimant confirmed he did not wish to participate in any further meetings with the respondent (P270).

39. On the 16 June the claimant wrote to the respondent submitted a further statement about correspondence when he was absent through illness (P272-273) He made reference to the email mentioning retirement. He wrote*: "To clarify, while In may have informally expressed frustration or indicated a desire to seek alternative employment during periods of heightened stress, I never formally stated any intention to resign or retire. Any such comments were made in the context of ongoing and unresolved workplace difficulties and should not be interpreted as formal declarations of intent…"*

40. On 8 July the claimant sought to lodge a further grievance (P289/290). It related to inaction on the part of senior leaders following up concerns about lack of support raised with them by Ms Jo Henderson.

41. The respondent declined to investigate the matter as the claimant had resigned and was no longer an employee (P294).

42. On 13 August 2025, the claimant was notified of the outcome of his grievance. The respondent found that the claimant's complaints were unsubstantiated. His grievance was dismissed. The claimant was provided with a copy of the respondent's grievance investigation report. The claimant was notified of his right to appeal the grievance outcome and did not do so.

Witnesses

43. The claimant gave confident and mostly clear evidence and appeared generally a reliable historian. He had become unhappy with the organisation and with certain individuals in it and this, together with the stress he was under, impacted on his perception of events and his objectivity. The consequence was that some of the evidence he gave was not particularly credible.

44. Ms Henderson was generally credible and reliable in her evidence which was short and spoke about supervisions being rushed and internal dissatisfaction with Mrs Campblell and raising these issues with a Director of the company and at her exit interview in January 2025.

45. The respondent's witnesses were honest and straightforward in their evidence which was both generally credible and reliable. There was no obvious antipathy towards the claimant who was recognised as experienced and hardworking.

Submissions

46. Parties prepared written submissions. I have summarised these as best I can. The claimant's submissions ran to some 61 pages containing a detailed discussion of the evidence and why his evidence should be preferred to that of the respondent's witnesses.

Claimant's Submissions

47. The claimant asked the Tribunal to accept his position and uphold the complaints made in the List of Issues. In relation to remedy he opposed any reduction in compensation based on the likely outcome of the disciplinary process. He relied on the recommendations of the respondent's investigating officer who recommended no disciplinary sanction whatsoever. Instead, her recommendations focused on providing management support. The claimant argues that these recommendations presupposed his continued employment

and provide no evidential basis for concluding that dismissal, or any lesser disciplinary sanction, would have resulted from the process.

48. On contributory conduct, the claimant submitted that no reduction to either the Basic Award or Compensatory Award was justified. He noted that contributory conduct was not identified within the agreed List of Issues. In any event, the disciplinary process was never completed, no findings of fact were made, and no disciplinary sanction was imposed. He therefore argued that reliance on unresolved allegations would be inappropriate.

49. The claimant further argued that the respondent chose not to call Ms Megan Penny or other witnesses who had provided statements during the disciplinary investigation. As a result, the Tribunal was unable to assess their credibility through oral evidence or cross-examination. The Tribunal was invited to exercise caution before attaching significant weight to those allegations.

50. The claimant highlighted inconsistencies within the respondent's evidence concerning the alleged incident in which he was said to have remarked "close the fucking door." Different witness accounts disagree as to who was leaving the room, what occurred, the date of the incident, and whether the words were directed at anyone. The claimant submitted that the respondent's closing submissions inaccurately present these differing accounts as a single established event and remove important qualifications contained within the original witness statements. He argues that this undermines the reliability of the respondent's allegations.

51. The claimant also emphasised that the relevant witness statements were produced weeks after the alleged incidents, were unsigned, and were never tested in evidence. He submits that the Tribunal should therefore attach limited weight to them.

52. In relation to injury to feelings, the claimant disputes the respondent's contention that the complaint concerns only a single email. He submits that the discriminatory act relied upon, namely the email of 21 May 2025 asking whether he wanted to "retire or resign", must be viewed in its wider context. He points to evidence showing that only days earlier he had stated that he wished to retain his employment and was prepared to fight for his job. He also notes that there was no operational need for the respondent to raise retirement or resignation at that stage.The effect of the email was compounded by other communications received on the same day whilst absent through work-related stress, including notification that his work emails would be monitored. His position was that these communications conveyed a message that the respondent was focusing on facilitating his departure rather than supporting his return to work.

53. The claimant further relied on correspondence received after his resignation concerning the return of equipment and the possibility of deductions from

wages or legal action. While not advanced as a separate discriminatory act, he submitted that it demonstrated the continuing impact of the respondent's hostile conduct towards him.

54. The claimant's position broadly was that the cumulative effect of these events caused significant anxiety, distress, loss of confidence, and loss of dignity. After more than 18½ years' service, he had expected to remain employed with the respondent until State Pension Age and potentially continue thereafter as a volunteer. Instead, he resigned whilst absent with work-related stress and believes his career with the respondent was prematurely brought to an end though their actions. He contends that the impact continued long after his employment ended.

55. The claimant sought interest on any award. He sought grossing-up of any award exceeding £30,000. In respect of the ACAS ‘‘uplift’’, the claimant alleges unreasonable failures by the respondent to comply with the ACAS Code. He relies on procedural failings such as the failure to provide disciplinary documentation before the hearing, proceeding with a disciplinary hearing despite the claimant not having received the allegations and supporting evidence and failure to provide a reasonable opportunity to answer the case against him before postponement and subsequent cancellation of the disciplinary process. He says there are deficiencies in the handling of his grievance. He submits that these failings justify the maximum 25% uplift, or such lesser amount as the Tribunal considers just and equitable. As to remedy, the claimant seeks compensation, interest, any appropriate ACAS uplift, and a declaration. He does not seek a recommendation under the Equality Act 2010.

56. The claimant rejected the respondent's assertion that his case rests upon a subjective misunderstanding of events. He says that a close examination of the evidence demonstrated a documented pattern of conduct against him including: a disciplinary process conducted without proper preparation or disclosure, the raising of retirement and resignation with a 62-year-old employee on the first day of sickness absence for work-related stress when there was no genuine need to do so, an unresolved grievance process and a subsequent requirement that he make decisions regarding that grievance whilst still medically unfit for work. These matters he relies on are established not merely by his own account but by the respondent's documentary records and admissions made by its witnesses during the hearing.

Respondent’s Submissions

57. Mr James invited the Tribunal to dismiss all claims. In his submission the claimant had failed to establish either constructive unfair dismissal or unlawful age discrimination/harassment.

58. In his view the respondent's witnesses were credible, reliable and made appropriate concessions where necessary. By contrast, he argued that the claimant's evidence was inconsistent and unreliable. He pointed in particular to his initial denial that he had discussed resignation with Denise Campbell, followed by his acceptance of that fact when shown contemporaneous records. Where his evidence conflicts, the Tribunal should prefer the respondent's witnesses.

59. Counsel referred to the authorities of *Western Excavating*, *Malik*, *Omilaju* and *Kaur*. His core position was as follows:

    1. Several allegations are factually unfounded.
    2. Those matters with a factual basis are minor and objectively unremarkable.
    3. None of the matters individually or cumulatively amount to a repudiatory breach of contract or a breach of the implied term of mutual trust and confidence.
    4. The alleged "last straw", namely Natalie Perks' email of 10 June 2025, was entirely innocuous and cannot sustain a cumulative breach claim.

    The claimant repeatedly failed to raise concerns contemporaneously despite having opportunities to do so. He was a senior employee. This highlights the contradictions in his case, including complaints that the disciplinary process was both too quick and too slow, and that management simultaneously contacted him too much and too little. The respondent further contended that the claimant's own evidence was that any relevant accumulation of events began around April 2025, rendering earlier matters largely irrelevant.

60. The respondent disputes the allegation that the claimant lacked support and supervision.

61. It submitted :

    1. Any alleged absence of formal supervision in 2022 and 2023 did not contribute to the resignation.
    2. During 2025, the claimant received extensive informal support because of performance concerns.
    3. Denise Campbell met with him frequently, sometimes daily.
    4. There are contemporaneous records supporting her account.
    5. The claimant did not complain at the time about a lack of supervision.
    6. There was no requirement applicable to him for monthly formal supervision.

The claimant's real complaint was about the absence of formal meetings rather than the reality of any support itself, and that he received more support than average. Objectively, this could not amount to a breach of trust and confidence.

62. The respondent relied on evidence of performance concerns regarding record-keeping and database management. Their position was that Mrs Campbell repeatedly sought to assist the claimant in addressing those concerns. It also points to the incident involving Megan Penny in May 2025, where the claimant is alleged to have raised his voice, sworn, and behaved aggressively when support was offered. The respondent contended that the subsequent disciplinary process arose from the claimant's own conduct.

63. Turning to the disciplinary process Counsel asked the Tribunal to reject complaints about the disciplinary process. The relevant documents were sent on 15 May 2025 in accordance with policy. When it became clear the claimant had not received them, the hearing was postponed. This was good practice. The postponement protected the claimant's interests and ensured fairness. A two-week delay was reasonable given the organisation's size and reliance on an external HR adviser. The respondent argued that the process was neither rushed nor unreasonably delayed.

64. The respondent's position was that allegations about Directors using personal email accounts do not assist the claimant. Most examples relied upon occurred after he resigned and therefore could not have caused the resignation. Directors used personal accounts because NHS accounts were unavailable to them. Appropriate security measures were in place. The claimant himself used personal email accounts for work-related matters, including sending information to former colleagues and forwarding service-user information to his own account. The respondent submitted that this issue was objectively minor and incapable of amounting to a repudiatory breach.

65. The grievances lodged by the claimant were in fact responded to. The fifth grievance was lodged after his resignation and therefore cannot form part of any constructive dismissal claim.

66. The Natalie Perks' email of 10 June 2025, which asked how the claimant wanted his grievance to be progressed while absent on sick leave, was entirely reasonable. The claimant remained actively engaged with the respondent whilst off sick. He submitted grievances and subject access requests during that period. The respondent's policies contemplated contact with employees who were absent due to sickness. There was nothing objectionable in asking the claimant how he wanted the grievance process to proceed. This was wholly innocuous and added nothing to any alleged breach, and therefore cannot constitute a valid "last straw".

Discrimination

67. The claims for harassment claim must fail. The conduct was not related to age. The email arose solely because the claimant had raised retirement and resignation. The claimant gave little evidence of any relevant adverse effect beyond stating that he was "shocked". Any such reaction would not objectively satisfy the statutory test for harassment.

68. In the event that the claims succeed the respondent's position is that compensation should be limited to six months' loss. The claimant obtained alternative employment quickly and had no apparent difficulty finding work. Any future loss associated with the possible ending of his Highland Council employment is unrelated to the respondent's actions. Any compensatory award would be subject to the statutory cap. Any award should be significantly reduced for contributory conduct arising from the claimant's behaviour towards colleagues, particularly Megan Penny. The claim for injury to feelings award should fall at the very bottom of the lower *Vento* band. He is not entitled to notice pay. Finally ''Aggravated damages'' are unavailable under Scots law and no uplift should be awarded because the respondent acted reasonably throughout.

Decision

Unfair constructive dismissal

69. An employee can be 'constructively' dismissed by their employer under s.94 of the Employment Rights Act 1996 ('the ERA'). It is for the claimant to prove that he has been dismissed. S.95 of the ERA provides for "constructive dismissal" where an employee resigns "in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct." This means that there has been a fundamental breach of contract by the employer justifying resignation.

70. A breach of the employment contract can be breach of an express or implied term. In **Western Excavating (ECC) Ltd v Sharp** [1978] IRLR 27 Denning M.R. said at paragraph 15: *"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 further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed*."

71. It is well-established that there is an implied term in every contract of employment of mutual trust and confidence between employer and employee. In **Malik v Bank of Credit and Commerce International SA** [1997] IRLR 462, the term was held to be, "*The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously*

damage the relationship of confidence and trust between employer and employee."

72. Whether there has been a breach of trust and confidence is a matter of fact for the Tribunal to determine (**Aberdeen City Council v McNeill** [2015] ICR 27). An employee may lose the right to rely on the fundamental breach if he delays in terminating the contract and is considered to have affirmed the contract after the breach. This will depend on the circumstances.

73. A course of conduct can cumulatively amount to a fundamental breach of contract which would entitle an employee to resign and claim constructive dismissal following a "last straw" incident. The last straw must contribute to the breach but need not be of the same character as earlier acts nor need it be unreasonable or blameworthy conduct in itself. It may also revive earlier breaches in respect of which the claimant would otherwise be deemed to have affirmed the contract. In **London Borough of Waltham Forrest v Omilaju** [2005] IRLR 35, Lord Justice Prophet stated*: "I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence*."

74. In **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] ICR 1 Underhill LJ, at paragraph 55, stated: *"….it is sufficient for a tribunal to ask itself the following questions: (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? (2) Has he or she affirmed the contract since that act? (3) If not, was that act (or omission) by itself a repudiatory breach of contract? (4) If not, was it nevertheless a part (applying the approach explained in **Omilaju** [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reasons given at the end of para 45 above). (5) Did the employee resign in response (or partly in response) to that breach? None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.*"

75. A claimant must prove that he resigned in response to the breach of contract but the repudiatory breach or breaches need not be the sole cause of the resignation provided they are an effective cause.

76. A constructive dismissal need not necessarily be unfair. It is for the respondent to establish a potentially fair reason for the conduct that constitutes the fundamental breach within the terms of s.98(2) of the ERA. 5. If the respondent establishes a potentially fair reason, the Tribunal must decide whether in the circumstances (including the size and administrative resources of the respondent) the respondent acted reasonably or unreasonably in treating that reason as sufficient reason for dismissal. That shall be determined in accordance with equity and the substantial merits of the case (s.98(4)). It is well established that there may be more than one reasonable response to the particular circumstances. One employer acting reasonably might dismiss while another might not. The Tribunal, in making the assessment under s.98(4), must consider whether the decision to dismiss falls outside that 'range of reasonable responses'. It must not substitute its own view of what it would have done in the circumstances and conclude that if it would not have dismissed, then the dismissal is unfair.

Resignation Background and Respondent's Conduct

77. The claimant says that he resigned for a number of reasons. These are set out in the List of Issues.
78. The first related to a lack of supervision meetings from a period starting when Mrs Denise Campbell became Manager in 2022 up until his resignation. He said this in his ET1*: "Support/supervision failures. Following a DSAR I received only partial, unsigned supervision notes for 2024 and no records for 2022–2023 or 2025, despite repeated requests. This left me without proper managerial support and oversight"*.
79. The claimant pointed to the history of a lack of formal supervision meetings. He emphasised the importance of formal supervision as being an opportunity to bring issues such as workload and specific difficulties in relation to clients to the manager's attention. Mr Murray did not suggest to Mrs Campbell that there were none between 2022 and 2023. As the respondent's Counsel pointed out he made reference to a lack of supervision over a period of 18 months in his grievance.
80. The claimant did not argue that he had a contractual right to regular supervisions rather he argued that failure to have them, on which he blamed Mrs Campbell, was a breach of agreed policy which caused him difficulties and that the lack of support was itself an erosion of trust and confidence.
81. The history of the organisation is important to bear in mind. It started off some years ago as a relatively small charity but in recent times has doubled in size from around 5 or 6 employees to around 11 or 12 this has meant an increased workload on the manager Mrs Campbell. It seems that tasks such as formal supervisions which are meant to take place every four weeks have somewhat fallen by the wayside.

82. This was recognised as far back as 2023 when there was a meeting of staff at which the consensus was that there should be formal monthly supervisions and the manager should be given time to carry these out. There was evidence that despite these hopes Mrs Campbell remained very busy and found it difficult to both schedule times for formal meetings and when they did occur they were often rushed.

83. The issue is whether or not this is conduct that eroded trust and confidence. The tribunal must examine the matter objectively. I accept that the claimant felt that the issue was important and that when he began experiencing work related issues in early 2025 the lack of formal supervision did not assist him. He did not however tell Mrs Campbell that he needed support. He was one of the most senior and experienced staff. It is noteworthy that he did not seek to discuss issues or seek support from his line manager.

84. It must be borne in mind that the organisation is still relatively small. Staff interacted almost daily with each other. He was very experienced at his work. There was ample evidence before the tribunal that in day-to-day practical terms the claimant was assisted and supported by Mrs Campbell and other staff in relation to IT and other administrative matters. This assistance cannot be divorced from the other difficulties the claimant had at the time and the frustrations he felt in trying to operate the IT system.

85. There were 6 supervisions carried out the final one being in November 2024 before the system seemed to break down and lapse. I would observe that I was not particularly impressed with the reasons given for the breakdown of the system. If it could not be put in place it should have been changed in some way to allow staff a clear formal route to raise professional concerns. However, looking at the whole situation I could not accept that the lack of regular formal supervisions amounted to a material breach of contract given the support which was actually given (albeit in other areas) and the actual availability of professional support on a more informal basis.

86. The claimant was free to raise issues with Mrs Campbell both informally and formally and did not choose to do so. I accepted her evidence that she had ‘‘an open door policy’’ and would have addressed concerns raised with her. While to focus is on the respondent’s behaviour his response to the situation is indicative of the importance he placed on formal supervisions as none were specifically asked for and no grievance (formal or informal) was raised about the lack of such meetings. I formed the view that the claimant was highlighting this matter as it did not cast Mrs Campbell in a positive light as a Manager.

87. If I had concluded that the failure to put in place a robust system for formal supervision was a breach of the implied duty of trust and confidence (it was not a breach of an express duty) I do not accept that the claimant resigned because

of this particular matter or indeed for the other matters we are to consider. It seems clear when looking at the events leading up to the disciplinary hearing that the claimant's dissatisfaction with the organisation and his work and his stated intention not to allow himself to be disciplined were far stronger and immediate factors in his resignation. It is appropriate to examine these matters and consider finally the situation as a whole.

88. The next issue related to the failure to issue documents to him for use in the disciplinary process initiated against him in May 2025. A considerable amount of time in the hearing was spent discussing the abortive disciplinary hearing that took place in May 2025 and the circumstances surrounding it. The matter was canvassed in considerable depth by the claimant. Given the stress of facing disciplinary proceedings I have no doubt that some matters which he would otherwise have considered inconsequential took on an importance they did not objectively merit.

89. The claimant complains that the evidence (statements from staff) that were to be used at the disciplinary hearing and the detailed allegations were not received by him by email. It is quite clear from the evidence of Ms Perks the third party HR Adviser acting for the respondent that she took appropriate steps to e-mail the material to the claimant in good time for the hearing. She used the correct e-mail address. She did not receive any notification that the e-mail had "bounced" and had no indication that the communication had not been successfully delivered. From the respondent's point of view they had told the claimant in advance of the allegations and the evidence prior to the hearing.

90. We also spent considerable time discussing the e-mail accounts that the organisation operated. The claimant had understandable concerns that when the organisation moved away from using the NHS e-mail system that the use of personal emails by Directors and others was not as secure as it could be. I heard no technical evidence about the potential dangers of using personal accounts other than the claimant expressing his own concerns that emails sent via the Cloud could now be more readily accessed by third parties.However to a certain extent this danger was recognised by the respondent's own IT policy in which it stated that personal e-mail accounts should not be used. This of course applies to employees although I see no reason in principle why the policy should not apply to Directors and others. Most examples cited by the claimant relied upon of the use of personal emails which occurred after he resigned and therefore could not have caused the resignation. There was no evidence of any actual prejudice suffered by him through their use.

91. Turning to the disciplinary process firstly there can be no objective criticism of the respondent setting up of the disciplinary hearing. Secondly even if there can be some criticism of the respondent's Directors using their personal emails this practise had gone on for some considerable time without complaint from the

claimant. Indeed the claimant himself appeared on occasions to have used his own personal e-mail account. I do not regard the use of personal matters as a significant matter that adds anything to the claimant's case.

92. The next incident that the claimant says added to the reasons for his resignation was postponing the original hearing and then moving it from 10:00 on 20 May to 14:30. The claimant's position was that he was inconvenienced as he had work to do at lunchtime and also an important call to make. He had suggested holding the hearing later that week and indicated that he would be available. The claimant did not cross examine witnesses about the postponement. The matter is for the respondent's judgment and there can be no serious criticism of their actions. They were entitled given that arrangements had been made that day to postpone to a later time. The claimant did not renew any objections to the later start.

93. The claimant complains that there was a lack of forward planning in arranging the disciplinary procedure, including failing to take account of HR leave resulting in the process being hurried. The respondent is a relatively small organisation and they outsource their HR matters. There was no deliberate delay or any evidence that the claimant was prejudiced. I do not regard there being any basis to the claimant's criticisms around the planning and arranging of the disciplinary process. As Ms Perks explained once the invitations had been sent there was no indication given to her that matters were not properly on track to suggest that there should have been some contingency arrangements made in anticipation of not finishing. It wasn't foreseeable that the claimant (who was sent an e-mail to his correct address) would not receive it. Similarly although it must have been frustrating to the claimant for the hearing not to proceed these circumstances have to be taken into consideration.

94. On the one hand it is understandable that he would want the matter resolved given that he was feeling unwell but on the other the respondent had to act properly as his employer and ensure that the disciplinary hearing was fair. It was unfortunate that Ms Perks was about to go on annual leave for two weeks but this is not a matter that the respondent had any control over and it would not be reasonable for them to instruct someone else in the interim just for the claimant's case. There is ,therefore, no basis to suggest that the respondents acted unreasonably or that the two week delay was unreasonable or prejudicial in some way.

95. The claimant raises the email sent to him by Mrs Campbell (Project Leader/Manager) on 21 May 2025, while the claimant was absent from work because of stress, asking whether he wished to "retire or resign" and stating that he only needed to give one week's notice, although "longer would be ideal". The claimant took strong objection to this e-mail. He denied that he had made this enquiry to Mrs Campbell. The phrasing of the e-mail is somewhat clumsy

and in retrospect probably unwise. However, I accepted that Mrs Campbell was responding to expressions from the claimant that he might want to leave the organisation. She may have misheard exactly what he said but it was her genuine understanding that he had mentioned retirement and what notice he needed to give. She had no other reason for making enquiries. She had in fact discussed his request with Ms Perks shortly after their discussion and she confirmed this. In considering this matter it is important to note that there was no suggestion that this was a 'wind up' as the claimant seemed to suggest. The claimant did not deny that he had periodically indicated that he was looking for another job or wanted to leave (because of the pressures he felt) but he vehemently denied he had made any reference to retirement.

96. I accepted the claimant's evidence that he probably did not recall using the word retirement and that this was something that would not have been practical for him given his age and personal/financial circumstances. There was nothing sinister, however, in Mrs Campbell's reference to retirement or resignation. She gives the information she believes was requested. I do not regard the matter as amounting to either a breach of contract or adding to an erosion of trust and confidence or a claim for discrimination/harassment.

97. Turning to the lack of response to the claimant's four grievances submitted on 4 June. I find it difficult to understand the claimant's argument .The grievances were acknowledged and an investigating officer appointed to look into they are content. The only matter that can be criticised is perhaps the failure of the investigating officer to obtain any comment or input from the claimant in relation to the evidence she had found. However, I cannot be too critical of her given that the claimant had indicated he was not prepared to attend any meetings because of his health. This did not prevent her suggesting that he could correspond with her or speak by telephone.

98. The claimant says that his fifth grievance was rejected without investigation after informing the claimant that there would be an investigation. By this point the claimant had resigned and therefore could not rely on a failure to deal with this grievance as justifying his resignation. The respondent took the view that they would not investigate the matter because the claimant had left their employment. In some circumstances this decision might be criticised given the fact that this grievance related to some of the earlier grievances but this was their right.

99. The claimant relied on the email dated 10 June (p255) as being the "final straw"). The issue of a final straw has become somewhat complex in legal matters over the years. The current law indicates that almost anything can be a final straw. However before it can be a final straw (to use the same metaphor) there has to be a bale of hay in other words a material breach or breaches. The fact is that asking whether he wanted the grievance postponed was a perfectly

understandable and reasonable reaction given that the claimant was off ill. The claimant could complain if they had proceeded when he was unwell and he could complain if they did not. There was no ‘‘Goldilocks’’ solution available to the respondents. There was in short nothing untoward or objectionable in the way in which they treated and dealt with this matter.

100. In all of these circumstances I do not accept that the claimant has demonstrated that the respondents have materially breached the employment contract between entitling him to resign even considering any possible cumulative effect. In my view the effective reason for his resignation was his embarrassment at facing a disciplinary process presided over by Mrs Campbell Accordingly the claim for unfair dismissal does not succeed and is dismissed.

101. If the claim had succeeded I would have considered contributory conduct as it was the claimant’s behaviour, for which he apologised, that had set matter in train. Although it was serious I would have assessed it at 25% chance of dismissal at most. There were some mitigating factors such as the stress he was under and the frustration he had with the IT system. He also had long service and a clean disciplinary record which suggests that some sort of warning rather than dismissal would have been the likely outcome.

Age Discrimination

102. The direct age discrimination claim focusses on the terms of the email. It is not age discrimination to provide an employee with information in relation to leaving or retiring from employment. There was no pressure put on him to do so and was written not because of his age but because of a mistaken belief that he wanted this information. The evidence does not support the suggestion that the terms of the email or any other action by the employer tool place because of the claimant’s protected characteristic namely his age.

Harassment

103. Harassment is defined in Section 26 of the Equality Act 2010.

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B

104. Where an employee resigns in response to repudiatory conduct which constitutes or includes unlawful harassment, the constructive dismissal is itself capable of constituting "unwanted conduct" for the purpose of section 26 of the Equality Act 2010. There is no express limitation of the type of "unwanted conduct" which can and cannot constitute an act of harassment. The requirement is that the conduct is related to a relevant protected characteristic and it has the purpose or effect stipulated by section 26(1)(b).

105. The context in which the claims are made are important. The motivation of the alleged harasser is not the issue in determining if harassment has occurred although the intention of the would be harasser is often clear from what was said or done. That said it is not the wholly the victim's subjective belief that they have suffered harassment that the Tribunal must look to but whether it was reasonable for them to feel offended or harassed in the circumstances. The context here must have made it clear to the claimant that there had been a misunderstanding. There were no other factors to colour the terms of the email (which was purely factual) to allow it to be seen in the light as either violating his dignity or creating a hostile environment. There was no evidence that the claimed protected characteristic (age) played any part in events.

106. Finally for completeness the claims under Section 39 and 40 of the Equality Act also fall to be dismissed for the reasons narrated above.

Date sent to parties 20 October 2026