EMPLOYMENT TRIBUNALS

Claimant: Mr. A Mance

Respondent: EDF Energy PLC

Heard at: London South, Croydon
On: 1-5 July 2019 and the 13-14 August 2019 in chambers

Before: Employment Judge Sage sitting alone

Representation

Claimant: Mr Oulton of Counsel

Respondent: Ms. Barsan of Counsel

RESERVED JUDGMENT

1. The Claimant's claim for constructive unfair dismissal is not well founded and is dismissed.

2. The Claimant's claims for detriment and dismissal pursuant to sections 44 and 100 of the Employment Rights Act are not well founded and are dismissed.

REASONS

1. By a claim form presented on the 26 December 2017 the Claimant claimed unfair dismissal. The claim was then amended by a letter dated the 4 April 2018 to add a claim for detriment and dismissal on health and safety grounds contrary to sections 44 and 100 of the Employment Rights Act 1996.

2. The Respondent defended the claims.

The Issues

3. The issues were agreed at the start of the hearing and they were as follows:

4. Did the Respondent subject the Claimant to the following detriments (under **Section 44 Employment Rights Act 1996**):
    a. In June 2016, Mr Willis jokes about the Claimant's health and high workload in an email sent to 10 team members, managers and consultants;
    b. In June 2016 Ms. Mukhopadhyay dismissed the Claimant's concerns regarding his excessive workload and stated that an improvement in the Claimant's workload was expected;
    c. In July 2016 the Respondent failed to properly manage a return to work programme for the Claimant;
    d. From around August 2016 the Respondent reduced the Claimant's salary to half pay and from December 2016 to nil;
    e. In October 2016, the Respondent failed to make any reasonable adjustments to facilitate the Claimant's attempt to return to work and failed to properly manage the return to work;
    f. In October 2016 the Respondent failed to properly address the issues raised in the Claimant's grievance;
    g. In April 2017 the Respondent failed to make reasonable adjustments and fully consult with the Claimant in addressing his grievance appeal; and
    h. In November 2017 the Respondent commenced ill health absence procedures against the Claimant.
5. If the Respondent subjected the Claimant to any of the above detriments set out above by any act or deliberate failure to act, was this done on the ground that:
    a. The Claimant brought to his employer's attention, by reasonable means, circumstances connected to his work which he reasonably believed were harmful or potentially harmful to health and safety, where it was not reasonably practicable for him to raise the matter with the Respondent's health and safety committee [(b) and (c) were withdrawn]
6. Did the Claimant present his complaints to the Tribunal before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure to act is part of similar acts or failures, the last of them.
7. If not, was it reasonably practicable for the complaint to be presented before the end of that period and was the claim presented within such further period as the Tribunal considers reasonable?

Unfair dismissal

8. In respect of the claim for **constructive unfair dismissal** did the Respondent's conduct amount to a breach of the implied term of mutual trust and confidence and/or the Respondent's duty to take reasonable care for the Claimant's safety?
9. The Claimant relies upon the following detriments:
    a. Failed to address concerns raised of allegedly excessive workload for over 6 months leading up to the Claimant's work stress-related illness, as particularized in paragraphs I to XVII of his claim;
    b. Engaged in actions that were detrimental to the Claimant, including his attempt to return to work, as particularized in paragraphs XVII to XXVIII of his claim, namely:
        i. Reduced the Claimant's pay to half and then to nil on account of his absence from work;

ii. Failed to appropriately manage the Claimant's return to work in July 2016 through not holding a return to work discussion with him and then providing him with a difficult task to complete;
iii. Failed to appropriately manage the Claimant's return to work in October 2016 through refusing to allow him to report to another manager (despite his warning as to the risks of reporting to the same manager), and through providing him with difficult tasks with timelines attached in his first week back;
iv. Prevented the Claimant colleague, Sabastien, from seeing him in October 2016;
v. In October 2016, unreasonably requested that the Claimant recall his symptoms for the previous 3 weeks and all items of work completed;
vi. In late October 2016, giving the Claimant the outcome of his grievance hearing in which all the blame was attributed to the Claimant, and none to the Respondent, and in which the grievance manager failed to fully address the issues raised;
vii. In November 2016, refused to correspond with the Claimant's solicitor or family member instead of the Claimant;
viii. Refused to agree to the process suggested by the Claimant in relation to his grievance appeal, imposed short timeframes for the resolution of the Claimant's grievance appeal and did not contact him to clarify aspects of his grievance;
ix. In early November 2017, invited the Claimant to attend an ill health procedure meeting.

c. Unnecessarily delaying the grievance process, as particularized in paragraphs XXIX to XXX of his claim and
d. Failed to handle the grievance and/or appeal impartially and failed to acknowledge and remediate their failures as part of the grievance process, as particularized at paragraphs XXXI to XXXIV of his claim.

10. Did any such conduct as the Claimant may prove amount (whether individually or collectively) to a repudiatory breach such as to entitle the Claimant to terminate his contract of employment without notice and treat himself as dismissed by the Respondent?

11. Did the Claimant resign in response to any breach proven?

12. Did the Claimant affirm his contract of employment?

13. If the Claimant was constructively dismissed, was such dismissal unfair under section 98(4) of the ERA?

Health and safety Dismissal

14. Was the Claimant constructively dismissed?

15. If so, was the reason (or, if more than one, the principal reason for the dismissal) the fact that:
    a. The Claimant brought to the Respondent's attention by reasonable means, circumstances connected to his work which he reasonably believed were harmful or potentially harmful to health and safety

where it was not reasonably practicable for him to raise the matter with the Respondent's health and safety committee, or

b. In circumstances of danger which the Claimant reasonably believed to be serious and imminent and which he could not reasonably to have been expected to avert, as particularized in the reply to request 3 of the further particulars of the Claimant's claim, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work.

16. The parties confirmed that the hearing was limited to liability only.

Witnesses.

17. The Claimant gave evidence and he also provided statements from the following, but they were not called to give evidence:
    a. Mr Girard Analyst for the Respondent Company
    b. Mr Anketell EFS Manager for the Respondent Company.

18. The Respondent's witnesses were as follows:
    a. Ms Mukhopadhyay Smart Metering Finance
    b. Mr Smith Decision Support at the Respondent Company (with the assistance of a BSL interpreter)
    c. Ms. Hopkinson of HR
    d. Mr Hopcroft Appeals Manager and Residential Sales Director at the relevant time
    e. Mr Willis Decision Lead in Smart Metering
    f. Ms. Rosling Grievance manager and Head of Energy Market and Credit Risk.

Findings of fact

19. The Respondent is a large energy company with Headquarters in France. The Company is primarily involved in selling electricity to residential consumers and building nuclear power plants. The company was engaged in the installation of Smart Electricity and Gas meters to all customers between 2015-2020, this was referred to as the Smart Metering Project.

Policies

20. The Respondent had a Health and Safety Policy focused on the objective of causing zero harm (see page 464). All the Respondent's witnesses mentioned this policy and confirmed that a daily health and safety message was provided to all staff to reinforce the importance of this policy and its relationship to the health safety and well-being of all in the workforce. The Tribunal was informed that if a daily health and safety bulletin were missed, all staff in the team would have to watch the briefing together with the person who was absent. The tribunal noted that a health and safety bulletin was even included when the Claimant attended the grievance hearing; this was referred to in the grievance hearing notes. Ms. Mukhopadhyay confirmed in cross examination that all teams had daily and weekly discussions about health and safety issues and all had to confirm in the meeting that they had completed their safety messages. The health and safety messages also referred to the option of making self-referrals to occupational health. The

Tribunal heard that the culture of the Company embedded health and safety awareness into the everyday environment.

21. The Respondent had a Health and Safety Committee and there were Health and Safety Representatives elected to operate within the workplace. Ms. Rosling referred in her statement to the Health and Safety tab on the Respondent's homepage where the health and safety procedures, forms and standards could be found. Included in these documents was the 'Health Safety and Wellbeing Policy", this also included details of the Safety representatives (pages 471-2 of the bundle) and members of the Health and Safety Committee. Ms. Rosling also told the Tribunal that each building had a Health and Safety Notice Board which provided details of the Committee members. The Claimant told the Tribunal that he had not read the Health and Safety policy however he provided no evidence to suggest that it would not have been reasonably practicable for him to raise his concerns with the Health and Safety Committee or the elected representatives.

22. The Respondent's grievance procedure was in the bundle at pages 143-6. At Stage 2 of the procedure, it required the grievance manager to determine what, if any, investigations were required. The investigation should be undertaken with a view to establishing all the facts surrounding the grievance. Having reached a conclusion the manager "will inform the employee in writing, of the outcome of the grievance, the decision that has been taken and any actions that are intended to be taken". The grievance procedure also provided for an appeal. The grievance policy did not include a right of reply.

Background facts.

23. The Claimant joined the company on the 27 July 2015 as a Senior Decision Analyst, his line manager was Mr Willis. Mr Willis reported into Ms Mukhopadhyay from April 2016 (when she took over from Mr Cooper, a consultant). The Claimant's place of employment was first in London and latterly he was based in East Croydon. The Claimant regularly worked in other offices in East Grinstead and occasionally in Hove. The Claimant was a full-time employee and his contract was seen at pages 484-492.

24. At the time of the hearing both Mr Willis and Mr Smith had been made redundant.

25. The Claimant accepted that during the first six months of his employment he had a good relationship with Mr Willis. The Claimant was taken to the comments he made about Mr Willis in the grievance meeting in October 2016; he stated that Mr Willis had "acted as a father figure. He was always concerned about my health and well being. It was a bit of a contradiction that as soon as I get back to work, he asked me to do a high intensity project" (page 254) This appeared to corroborate that even at the date of the grievance hearing in October 2016, Mr Willis was seen by the Claimant overall to be a supportive and caring manager.

26. The Claimant told the Tribunal that when he joined, the team comprised of three Analysts, the Claimant, Mr Smith and Mr Fam. Mr Fam was a consultant for Baringa (as was Mr Cooper his previous manager). The team

worked on the Smart Metering Project, the Claimant worked on 'Field' which looked at the Strategic costs and benefits of the Smart Meter roll out, Mr Smith worked on the Customer Services side of the business. Although the two areas were discrete there were some elements of overlap and it was Mr Willis' view that both areas were equally complex. Mr Smith told the Tribunal in cross examination that the team met once a week (on a Monday morning in London) with Mr Willis. The Claimant explained that there were three annual processes called Annual Book Reviews "ABR's". When the Claimant commenced employment the ABR 2 for 2015 had just finished and ABR 3 was starting.

27. Mr Fam left the Company in November 2015 and was not replaced, the decision not to replace him was a drive to improve efficiencies. The Respondent carried out a number of efficiency programmes from 2015, reducing headcount each time.

28. The Claimant accepted that there was an option to work from home and accepted that management tended to work from home on a Friday. He also accepted that if he worked late in the evening he was able to start work later the following morning. He also accepted that on one occasion he had been given one day off in lieu after working late. Mr Willis stated that working hours were flexible and the team "worked hard and got the job done". As they were project based the role included a bit of travelling to places such as Crawley, Bexleyheath and Hove. He said that he regularly allowed the Claimant to leave early if he was flying out somewhere (as the Claimant went on a number of short breaks to Europe during his employment). Mr Willis was not what he described as a clock watcher and was flexible in his approach to work.

29. On the issue of workload, Mr Girard stated at paragraph 5 that the workload was on average was about right and there were peaks and troughs. Mr Smith's evidence in paragraph 6 also stated that he believed that the workload was reasonable and was always manageable and could not recall raising concerns about workload after Mr Fam left. He was asked in cross examination whether he agreed with the Claimant that there was too much work in April 2016 (page 51 of the bundle) he replied that he did not agree, it was about "the priorities and how to deliver these pieces of work" and he saw it was an exercise in "what we can do and what we can leave which is why we had weekly meetings, there was a lot of uncertainty about the installation of Smart Meters". Mr Willis confirmed in cross examination that after Mr Fam left in November 2015 they used the weekly meetings to prioritize and to 'cut their cloth' accordingly.

One to One Discussions in 2016.

30. The Tribunal were taken to the minutes of the one to one meetings held by Mr Willis with the Claimant. It was confirmed by both witnesses that the notes were completed by the Claimant. Only Mr Willis had sight of these forms, they were not sent to Ms. Mukhopadhyay. The first one to one notes were on page 40 dated January 2016 (but showing the wrong date of 2015) where the Claimant made reference to "**excessive workload".** The notes went on to record that the focus for the following month was to finish up "ad hoc requests" and "ABR1" and to "**build in more time into deadlines"** and "**understand EFS model properly. Get on top of admin".** Under the

heading of "Zero harm and Wellbeing" the document recorded that "**No one harmed. Working excessive hours. Working v intensively (good + bad)".** The document also recorded that the handover from Mr. Fam was successful. There were a couple of points made by Mr Willis including a reference to "fag packet conclusions", this was a reference to adopting a style of working that was appropriate to the tasks set and to the needs of the business, and not going into too much detail. After this one to one Mr Willis wrote to the Claimant on the 22 January 2016 (page 41) confirming that his rating was good, and he received a 'well done'. In this email Mr Willis reinforced the need for the Claimant to take time to think more about prioritization and he advised him of the importance of "sticking to focus on concrete delivery of task in hand". He was also advised to "get straight to the point with presentations.." (which reinforced the fag packet comment). It was also confirmed that the Claimant "will need further support with transition to Field Activities" (page 42).

31. The next one to one held by Mr Willis with the Claimant was on the 21 March 2016 at page 47 of the bundle. This form was again completed by the Claimant. He commented that there was still a heavy workload but confirmed that he heard the message about too much detail "loud and clear for ABR2". He recorded that the focus for April was on "*self prioritize (while keeping Mike close to my priorities) now that don't have deadlines imposed (until June). Greater focus on development plan and demonstrating ability to lead*". Under the heading of 'Zero harm and Well Being' the Claimant recorded that at that time there were "no [safety] issues I'm aware of" and in relation to well-being he stated that he was suffering from "stress through excessive workload, easing off over last two weeks". This corroborated that the nature of the work was cyclical where there were busy and less busy periods. The Claimant was asked about this entry in cross examination and he said that he considered well-being as a health and safety issue. The Claimant accepted that he said in this one to one that more resources would be nice but put it no higher than that. In his view "to demand resources would be excessive, to ask in polite terms would be more acceptable".

32. After the one to one the Claimant wrote to Mr Willis and Ms. Mukhopadhyay on the 23 March 2016 (page 48) saying that he was finding it difficult to action the feedback he had received on his performance and he asked for direct feedback from both of them. Ms. Mukhopadhyay was happy to do so. The Claimant explained in cross examination that this was due to Mr Cooper's comment in March that the Claimant was not achieving the same output as compared to his consultant peers and he expected his consultants to be three times more productive than the output produced by the Claimant and Mr Smith. The Claimant said that this made him feel stressed and "pressured to drastically increase my work output". It was put to the Claimant in cross examination that it was never suggested that he had to do three times more work; the Claimant gave contradictory answers to this question first saying he did not think there was an expectation and then changed his answer saying he did believe he was expected to do three times more work. He was then taken to the grievance notes at pages 251-2 where the Claimant was recorded to have said that Mr Willis was "only passing on the message", the Claimant did not indicate in the grievance meeting that Mr Willis had told him that he was expected to increase his productivity. The tribunal therefore find as a fact and on the balance of

probabilities that at no time was the Claimant instructed or informed that he was expected to increase his productivity by either Ms. Mukhopadhyay or Mr Willis.

33. It was put to the Claimant in cross examination that the meeting on the 23 March was about how to get a high rating and he denied this, he stated that it was in response to Mr Cooper's criticism because he felt that his performance was of a high standard. He denied that Ms. Mukhopadhyay gave him feedback in this meeting about time management. However, the Claimant was taken to his email dated the 8 April 2016 (page 49) where he stated that he would be "*making myself cut out certain activities and free up some more time… and obtain buy-in from you on updates that I focus on, before I sink too much time on these*". He accepted when he was taken to this email, that he had agreed to fine tune his approach in the evolving ABR process and this corroborated that there had been some discussion about prioritizing his work. The Tribunal therefore find as a fact that time management was discussed in this meeting and the Claimant was given advice and guidance on how to adapt his approach to the workload in a manner that was consistent with the available resources. The Tribunal also conclude that the Respondent took positive steps to provide the Claimant with advice and support to help him meet the deadlines.

34. The Claimant again wrote for feedback on the ABR1 process on the 8 April 2016 and again asked for face to face discussions. Ms. Mukhopadhyay replied and suggested that he share his thoughts with the team on this occasion.

35. The Tribunal also saw a record of a monthly catch up the Claimant had with Mr Willis and Ms. Mukhopadhyay on the 25 April 2016 (page 52). At this meeting, the Claimant voiced a concern that his workload was still high and needed another team member to delegate work to. This request was escalated by Mr. Willis to Ms. Mukhopadhyay on the 29 April, suggesting that another person could help the Claimant with his work. Ms. Mukhopadhyay replied on the same day voicing concern that the Claimant should have sorted the matter out with his colleague Mr. Smith as she had suggested to him on the 8 April. Ms. Mukhopadhyay also expressed a concern that she felt the work load was still manageable from his side and wondered what had changed since their last meeting. She stated that there was no spare capacity in the team at that time and was unable to provide any support for the Claimant. Mr. Willis agreed to discuss it again with the Claimant go through his plan and ask why he needed extra help with his work. The Tribunal note that each concern raised by the Claimant was taken seriously and discussed by his managers and his regular requests for meetings and feedback were dealt with constructively and positively. The Tribunal paused there to look at the issue at paragraph 9(a) where the Claimant relied upon the detriment that the Respondent failed to address his concerns regarding excessive workload, and from the facts referred to above in relation to his one to one from January 2016, the evidence reflected that the Claimant's concerns were addressed each time they were raised and they were dealt with in a positive and supportive manner. This detriment was not well founded on the facts.

36. There was a further one to one in the bundle at page 53 dated the 28 April 2016, in this meeting the Claimant had nothing to report on 'zero harm and

wellbeing'. In the behavioural assessment box under positive indicators the Claimant recorded "time management and planning", he accepted in cross examination that he did not consider mentioning stress due to workload in this one to one.

37. On the 20 May 2016 there was a one to one conversation with the Claimant and Ms. Mukhopadhyay where the Claimant again referred to his workload, stating it was excessive and unsustainable. The Claimant recorded (page 193) that when Ms. Mukhopadhyay defended the workload as reasonable, he advised that he intended to search for a role elsewhere and would ask for a reduction to his notice period to assist with his job search. Ms. Mukhopadhyay's evidence was that in this discussion the Claimant asked for more money but her response was that "more money would not solve the workload issue". Her view was that the Claimant and Mr Smith had comparable workloads and the workload was reasonable. The Tribunal noted that this was the first time the Claimant indicated that he may wish to leave the organisation.

38. The Claimant's evidence was that he had a discussion with Ms. Mukhopadhyay in early June 2016 about prioritising his work and he was offended by what she had to say. He admitted that it was possible that she had criticized him. Ms. Mukhopadhyay stated in cross examination that she discussed with Mr Healy early in June 2016 whether they should refer the Claimant to OH, after her discussion with him on the 20 May but it was felt that he may not take it in the spirit in which it was intended. She confirmed that she saw the warning signs of stress in the second part of June 2016 and noticed that the Claimant had withdrawn completely and that "he was not communicating about missing deadlines". The Tribunal paused there to consider whether Ms Mukhopadhyay had dismissed the Claimant's concerns about workload in this meeting and on balance it appeared that she had but this was after they had scheduled several meetings to discuss this as referred to above. It was her view that the workload was reasonable however the Claimant did not agree and in the meeting a month before he had indicated he intended to leave. Although there was a disagreement between the Claimant and Ms Mukhopadhyay about the workload, there was no evidence to suggest that the views expressed by her amounted a detriment because he had raised issues of health and safety. The issue above at paragraph 4(b) was not supported on the facts before the Tribunal

The events of the 30 June 2016.

39. On the 30th of June 2016 Mr. Willis took a photograph of the Claimant asleep on the train and then sent it to all the members of the team including Ms. Mukhopadhyay and external consultants. The subject heading of the email was 'health and safety alert!' This email was not initially sent to the Claimant but was subsequently forwarded on to him by Mr Willis when he realized that he had been missed off the circulation list. When the Claimant received the email, he was deeply distressed and offended. Mr. Willis told the tribunal that he had no intention of embarrassing the Claimant but accepted that he had caused him offence and upset and accepted that it was a poor attempt at humour. He told the Tribunal that he apologized to the Claimant as soon as he realized that he was distressed, describing in cross examination how he went to find the Claimant in Pret a Manger and apologized; he told the

Tribunal in cross examination that they shook hands and his apology was accepted. Mr Willis felt that they were friends at the end of the day. Mr Willis accepted that he did not apologise in writing because the Claimant had accepted his verbal apology. In cross examination the Claimant first denied that Mr Willis apologized and could not recall precisely the discussion that took place that day, but he then accepted in cross examination that Mr Willis followed him to Pret and tried to "calm him down". The Tribunal therefore find as a fact and on the balance of probabilities that Mr Willis sought the Claimant out as soon as he was aware he was upset and apologized to him.

40. Later that day the Claimant emailed Ms. Mukhopadhyay stating that he did not think that sending the email was a good idea, felt it was humiliating and reputation harming. He indicated that he wished to raise a grievance.

41. Ms. Mukhopadhyay called the Claimant to a meeting on the 1 July 2016 where it was agreed that he would not pursue a formal grievance and was happy to deal with the matter informally. Ms. Mukhopadhyay's evidence given in cross examination was that after that meeting, she felt that the matter had been dealt with and it was her understanding that the Claimant had confirmed that he did not want to go down the formal route. As there was a conflict of evidence on this point as the Claimant told the Tribunal that he wished to pursue this as a grievance, the Tribunal must resolve this dispute. It is concluded on the balance of probabilities that the Claimant had decided not to pursue a formal grievance about this matter as it was not referred to in his later grievance letter or in his timeline of events provided during the grievance process referred to below at paragraph 52 and 60. In the issue referred to above at paragraph 4(a) the Claimant claims that sending this email was a detriment because he had raised a health and safety issue, although the email was headed health and safety there was no evidence to suggest that this was a detriment because he had discussed workload issues. The evidence before the Tribunal was that Mr Willis was concerned when he found that that Claimant was upset and he found him and apologised, there was no evidence to suggest that this was a detriment because they had previously discussed workload as a health and safety concern, this issue is not supported by the facts.

42. The Tribunal were taken to an email chain on the 4-5 July 2016 (pages 62A-63) where the Claimant had indicated, at the last minute, that his work was not ready by the deadline. Ms. Mukhopadhyay and Mr. Willis agreed that this was frustrating as the Claimant had not flagged this up during their morning meeting. Mr Willis confirmed that the Claimant had told him that the "*timetable was not realistic and was too much to do*" which he commented was bizarre as the timetable had been set by the Claimant. Ms. Mukhopadhyay commented that the Claimant's attitude was "*not great at the moment – not taking responsibility*" and he did not appear to understand the "*magnitude of these delays*". In cross examination Ms. Mukhopadhyay candidly accepted that she was frustrated because the Claimant had sent his email 20 minutes before the meeting to say that the task would not be completed, her concern was that he "*wasn't flagging this up with the team, he was simply saying he couldn't meet them*". It was confirmed that in June Mr Willis took work off the Claimant and gave one project to Mr Smith retained one for himself, leaving the Claimant with only one piece of work to concentrate on.

43. Ms. Mukhopadhyay accepted that in the light of the Claimant's withdrawal and the change in his behaviour in June, he should have been referred to OH earlier.

First sickness absence

44. The Claimant first went off sick on the 8 July 2016 with stress related symptoms and he informed Mr. Willis and Ms. Mukhopadhyay of his absence. This absence continued until the 22 July 2016. The Claimant confirmed he became aware of the Employee Assistance Programme "EAP" after he went off sick.

45. Mr Willis and Ms. Mukhopadhyay communicated prior to the Claimant's return to work on how the return to work would be handled, these emails were dated the 18 July 2016 (page 76). In the email Mr Willis indicated that "something needs to change" and identified the problem as the Claimant having "a time management issue" in the light of the problems that had arisen before his sick leave.

46. Mr Willis referred the Claimant to OH on the 21 July 2016, but the appointment did not take place until the 26 July 2016 (see page 505 of the bundle), the day after he returned to work. Mr Willis accepted in cross examination that he was wrong to delay referring the Claimant until this date as he had been signed off since the 7 July.

The Return to Work Meeting on the 25 July 2016

47. On his first day back to work on the 25 July 2016, Mr Willis held a one to one with the Claimant which was documented at page 77-8. The minutes of the return to work meeting reflected that the Claimant cited "unreasonable expectations" which had an impact "physically and mentally, feels angry about the situation". There was a dispute between the parties about when this meeting took place, the Claimant said it was in the middle of the day after the work had been assigned to him, but Mr Willis indicated it was at the start of the day. The Tribunal prefer the evidence of Mr Willis to that of the Claimant on this point as he was clear and consistent as to how and when the return to work meeting was handled. He described how the return to work meeting took place first then he gave the Claimant the task to do. The Tribunal also find as a fact that Mr Willis held a formal return to work meeting which was handled appropriately, the issue identified above at paragraph 9(b)(ii) is not therefore supported on the facts. There was also no evidence to suggest that this was not 'properly managed' as alleged by the Claimant above at paragraph 4(c) or that it was a detriment because he had referred to health and safety issues.

48. The task assigned by Mr Willis was a piece of work that the Tribunal heard would be given to a new starter and he described it as the simplest task he could assign the Claimant which did not involve any stress or timescales. Ms. Mukhopadhyay was asked about this task in cross examination and she agreed that the task assigned was simple and would only take 2-3 hours and asked for the Claimant to proof read two chapters of a publication (about 10 pages). Ms. Mukhopadhyay confirmed that there were no time

limits and this task was assigned to the Claimant because she wanted him to feel reintegrated back into the team as he had not been communicating with her or Mr Willis. It was put to the Claimant in cross examination that no deadline had been set for this task, and he replied that it "felt like it would have been expected". The Tribunal find as a fact and on the balance of probabilities that there was no consistent evidence that a timescale had been set and the evidence of the Respondent is preferred

49. Mr Willis told the Tribunal that after an hour spent on this task, he saw the Claimant sitting at a desk looking like he was in a trance, so he sent him home. There was no evidence to suggest that the Claimant was expected to meet a deadline or that he was placed under any pressure when performing this task. The tribunal considered that the Claimant was only working on the task for about an hour when he was seen to be struggling and sent home after lunch. Although the Claimant stated in issue 9(b)(ii) that this task was difficult, there was no evidence to suggest that this was the case.

50. The Claimant attended a face to face consultation with OH on the 26 July 2016 stating that he had become 'socially withdrawn' (see page 185 of the bundle) however he accepted that 4 days later (on the 30 July 2016), his GP considered him to be fit enough to travel on a three week holiday to Mumbai.

51. The Claimant was then signed off sick from the 26 July 2016 until the 30 September 2016.

The Claimant's grievance

52. The Claimant raised a grievance on the **27 July 2016** (page 91) sending it to Mr Healy the Finance Director**.** The Claimant sent in a sick note of the same date and the reason for absence was stated to be stress and was signed off for a month. He referred in his grievance to what he described as "*unreasonable and unrealistic work expectations over my 12 months at EDF, and a failure to properly investigate and take suitable action on the numerous concerns raised over this period*". The Claimant made no mention of the photograph incident. The investigation of the grievance was delayed as the Claimant was on holiday in Mumbai for 3 weeks from the 30 July 2016 (which the Claimant told the Tribunal he had booked 1 month earlier). The Claimant confirmed on his return from holiday on the 23 August 2016, after speaking to Mr Healy, that he wished to proceed with the formal grievance process.

53. The Claimant was taken in cross examination to his GP notes for the consultation on the 30 August 2016 (page 436) where he was recorded as informing his GP that he "has decided to quit his job..". In a subsequent GP note made on the 13 September 2016 (page 435-6) the Claimant was recorded as saying that he "still plans to leave". It was put to the Claimant in cross examination that he had decided not to return to work with the Respondent and he replied firstly that he had not decided to quit then he stated that after he met with Mr Anketell he had "encouraged me to stay on rather than quit", this conversation was not referred to in Mr Anketell's statement. The Tribunal find as a fact that the Claimant had decided to

resign at the end of August, the subsequent GP record for September 2016 confirmed this.

Reduction to half pay.

54. The Claimant was informed by letter that he would be moved to half pay from August; he emailed HR on the 1 September 2016 asking whether this would be appropriate as he was absent with a "work related illness". He was informed by Ms. Hopkinson that this was in line with his contractual entitlement and with the Respondent's processes (pages 111-2). There was no evidence that the reduction to half pay and then to nil pay was a detriment because he had raised issues of health and safety or that it amounted to a fundamental breach of contract. The reduction to half and then nil pay was a term within the Respondent's contractual sick pay provisions and was applied by HR who had no knowledge of the Claimant's grievance or the complaints raised in his one to one meetings. Ms Hopkinson confirmed that the reduction to half and then to nil pay was carried out automatically and if the system were to be overridden it would have to include the input of a number of managers, in practice it was never done. The Tribunal find as a fact and on the balance of probabilities that the reduction in pay was in line with his contractual entitlement and was not a detriment because he had raised concerns about his workload. In this email of the 1 September the Claimant indicated that he would not be fit to attend an appointment to discuss his grievance until after his appointment with the occupational health therapist on the 28 September 2016.

55. The Claimant went on holiday for a week's cycling in Switzerland starting on the 25 September 2016.

56. The Claimant's OH report was dated the 28 September 2016 and was seen in the bundle at pages 181-3, this was as a result of a telephone consultation. The report recommended a phased return to work and it was confirmed that the Claimant was fit to attend the grievance meeting. The Tribunal was also taken to the report and the notes reflected that he was encouraged to contact the EAP for additional support. The report suggested adjustments of a phased return to work and to be accompanied by a suitable person to the grievance meeting and for regular breaks.

The Claimant's second return to work on the 3 October 2016.

57. The Claimant emailed HR on the 3 October 2016 (page 146-7) stating that he was due to return to work that day but was concerned "*as the grievance is still outstanding, and taking into account the health and safety risk I've raised about my existing managers, can you please advise on an appropriate return to work today?"* The Claimant was advised to work from home that day and Mr Anketell was appointed to discuss his phased return to work and his fitness to return; he was still required to report to Mr Willis in respect of work allocation and supervision (page 131 and 167A). Mr Anketell confirmed in his statement that the return to work meeting was carried out over the telephone. There appeared to be no complaint about how the return to work discussion was handled. The Claimant raised a further concern via email at 20.16 on the 3 October 2016 about reporting to Mr Willis and Ms. Mukhopadhyay saying "*I am still concerned of the risk if Mike Willis and Ms. Mukhopadhyay were still to manage my workload*" and

he went on to state that "..*after my first two weeks of absence due to burnout, I returned to work and was immediately given high intensity tasks by Mike Willis, before even having a return to work discussion*" (page 132).

58. The Claimant was provided with light duties which were passed on to him by HR (page 167B). Ms. Mukhopadhyay confirmed that she had these tasks 'sense checked' by an external source because she was concerned that they had failed on the first occasion when given to the Claimant in July. On receipt of the tasks, he challenged whether they were light duties and advised that Mr Willis should devise a more realistic plan (page 169A dated the 4 October 2016). In reply HR indicated that he should not worry about timescales and "do what you feel you can, at your own pace" (see 169D). It was put to the Claimant in cross examination that HR had provided reassurance to the Claimant on the 4 October, which was his first morning carrying out any duties, this he denied because in his opinion the task was "incredibly complex".

59. The Claimant's view about the complexity of the task was not shared by Ms. Mukhopadhyay, Mr Smith or Mr Willis. Mr Willis and Ms. Mukhopadhyay confirmed that the task would take 1-3 hours and it was described as a 'housekeeping job' to ensure that the words used in the document were aligned with those used in the model. It was put to the Claimant that this was a task that only required the Claimant to read a document and he replied that it "was assumed I would use knowledge" and he felt that there were many other tasks that would have been appropriate. The Tribunal prefer the evidence of Mr Willis, Smith and Ms. Mukhopadhyay to that of the Claimant on this point. It was concluded on the balance of probabilities that the task assigned was straightforward and suitable for the Claimant on his return on rehabilitative duties. The Claimant states that the Respondent failed to make any reasonable adjustment and failed to properly manage his return to work but this was not consistent with the facts, adjustments were made and the advice of OH was considered, therefore the issue above at paragraph 4(e) is not supported on the facts. Although the Claimant made specific reference to health and safety concerns in his email (above) there was no evidence to suggest that HR subjected him to a detriment because of raising this concern. Although the Claimant again suggested above at paragraph 9(b)(iii) that he was provided with a difficult task on his return, this was not supported on the facts and he was able to take as much time as he required to complete it.

60. The Claimant was invited to a grievance hearing on the 6 October 2016 (page 134) by Ms. Hopkinson, she confirmed that Ms. Rosling would hear the grievance. In reply the Claimant sent in his timeline of events (pages 193-4). It was noted from the timeline that although the Claimant referred to discussing his concerns about what he described as "excessive workload" on a regular basis with Mr Willis and Ms. Mukhopadhyay, he made no reference to health and safety risks nor did he state that he wished to pursue a formal grievance about the photograph incident on the 30 June (although it was mentioned).

The Grievance Hearing on the 6 October 2016

61. The Claimant attended a grievance investigation meeting with Ms. Rosling on the 6 October 2016 and the minutes were on page 249-256. The minutes showed at page 255 that the Claimant informed Ms. Rosling that he had "hardly left the house" because of his illness but it was put to the Claimant in cross examination that he was away in Mumbai and then Switzerland, and the Claimant qualified this and said it referred to the period before he went to Mumbai on the 30 July. The Tribunal noted that although he referred to the photograph incident in the meeting, he did not indicate he was pursuing a grievance about the incident itself. In the interview he described Mr Willis as a good manager and confirmed that Mr Willis had suggested to him that if he were busy, he could delegate his work to Mr Smith (page 253).

62. In cross examination Ms. Rosling accepted that she did not interview all the people named by the Claimant (Mr Girard, Nicola, Mr Johnson and Mr Mohindra) and she gave a number of reasons for this. Firstly, she felt that the team was self-sufficient and did not think that the views of those outside of the team would be relevant, that is why she only interviewed Ms. Mukhopadhyay, Mr Willis and Mr Smith. Secondly, she wanted to ensure that confidentiality was maintained as far as possible. She also accepted that she did not name those who were interviewed in the outcome letter. She felt that this was the right thing to do at the time. Ms. Rosling stated that if she were to conduct the grievance again, she would put more detail in the outcome letter, but the conclusion reached would be the same.

63. Ms. Rosling confirmed her view to the tribunal that she did not think that the Respondent was responsible for the decline in the Claimant's health nor did she believe that there had been a failure to support. There was no evidence that Ms. Rosling failed to properly address the issues raised in the grievance. She conducted a thorough investigation and addressed all the issues raised by the Claimant. The decision to limit the investigation to those in his team was reasonable and there was no evidence to suggest that this was a detriment because he had raised health and safety issues.

64. The Claimant emailed Ms. Mukhopadhyay on the 7 October 2016 (page 213) thanking her for the email welcoming him back and for the tasks sent to him. He stated that he would be working from home to catch up on fitness and personal tasks but would be able to begin working on light tasks that week. There was no evidence to suggest he had begun working on the task that had been assigned to him. In the same email he informed Ms. Mukhopadhyay that he was looking to spend some time in Australia in November for a "number of weeks".

The Grievance Outcome

65. The grievance outcome was dated the 14 October 2016 (page 247) and was not upheld. It was concluded that the work expectations had "some pressures, these are manageable and not excessive". It recognised that the work was cyclical in nature and there were busy and quieter periods and that it was for him to prioritize his work. It was concluded that management took appropriate action when concerns were raised about workload issues and "either offered constructive suggestions to you or took action themselves". The outcome concluded that the Claimant *"[was] unable or unwilling to adapt your working style to work more efficiently, and instead focused on the perceived lack of resource within the team"*. It was

recognized that the Claimant's health had deteriorated but it was concluded that the management team were not at fault for this deterioration. The Claimant was urged to take steps to have honest and open conversations with the management team regarding his health and wellbeing, he was also encouraged to use the EAP. The Claimant was also informed that if he wished to have a fresh start, he would be supported in seeking a new role in the Respondent company. The conclusions reached were consistent with the facts before Ms. Rosling. Although the Claimant disagreed with the outcome and described it as lacking impartiality above at issue 9(d), there was no evidence to suggest that the Respondent failed to 'properly address' the issues or that blame was unfairly or unreasonably attributed to the Claimant or that the outcome was in any way biased, there was no evidence to support the issue at paragraph 9(b)(vi). Even though the Claimant disagreed with the outcome, an offer was made to assist him make a fresh start in another role, this corroborated that although the grievance was not upheld, the Claimant faced no adverse impact from the conclusions reached.

66. The Tribunal saw in the bundle at page 435 the Claimant's GP notes for the 19 October 2016 where the Claimant stated that it was his plan to resign "next week". It was noted that the Claimant had confided in his GP from August 2016 that it was his intention to resign from his post. This view had been expressed long before the grievance outcome had been delivered.

67. Mr Willis became concerned that the Claimant had not turned up for a meeting in the office on the 21 October 2016 (which had been arranged by HR). The Claimant confirmed he was not in the office as he had been "*experiencing some intermittent symptoms during my phased return, hence unable to come in*". Mr Willis sent the Claimant a spreadsheet later that day asking the Claimant to give details of his whereabouts and work patterns over the last three weeks and periods when he had been suffering from symptoms (page 269). Although the Claimant objected to this request and failed to respond, the Tribunal did not conclude that this request was unreasonable or that it could amount to a fundamental breach. It was a request carried out after taking advice from HR to take steps to protect the Claimant from further unnecessary stress. He explained that this was to fulfil his duty of care to the Claimant. Mr Willis agreed to meet up with the Claimant on the 24 October 2016 however the Claimant failed to attend the office therefore HR wrote to the Claimant that day asking for him to make contact as they were concerned for his welfare (page 273).

Allegation that the Respondent had informed staff they were not allowed to meet with the Claimant.

68. The Claimant made contact on the 27 October 2016 saying that he had been working from home. In this email he referred to being "*informed by a colleague that they are not allowed to meet with me due to a formal process where I need to see you and Ms. Mukhopadhyay first*" (page 306). The Claimant complained that the Respondent had prevented a colleague Mr Girard from meeting with him on the 25 October 2016. Mr Girard denied that his manager informed him of the grievance, he stated that she only informed him that there was a process with his managers, which he wrongly mistook for a return to work process. There was no evidence before the Tribunal that Mr Girard was instructed by the Respondent not to meet with

the Claimant. This incident was put to Mr Willis in cross examination and he felt that the Claimant had "got the wrong end of the stick". Ms. Mukhopadhyay was also asked about this in cross examination and she accepted that she emailed the Claimant on the 27 October (page 314) denying that any direction had been given to staff not to speak to the Claimant, she also offered to "set the record straight" with any member of staff who indicated otherwise. There was no evidence to suggest that the Respondent prevented the Claimant meeting with Mr Girard, on the facts this allegation above at paragraph 9(b)(iv) is not well founded.

The grievance appeal.

69. The Claimant appealed the outcome of the grievance on the 27 October 2016 (pages 301-2), in the appeal document he also referred to additional information which raised a concern about being asked to fill in a "detailed template of my return to work for a three week period" and "*I have been advised my colleagues have been disallowed from meeting with me due to a "formal process" that I have not been made aware of*".

70. Although the Claimant denied that he had decided to resign and return to Australia, he accepted that he went back to Australia around the time he put his appeal in (but could not be specific on the date). He accepted he was out of the country "all of November". He confirmed that he was away until early December and he returned via Singapore where he did a stopover on the 8 December. It was put to the Claimant in cross examination that he had decided to relocate to Australia in January 2017 and although the Claimant disagreed, saying he had retained a storage unit in the UK; he accepted that he returned to Australia at the end of January 2017 and did not return to the UK.

71. There was no evidence before the tribunal that the Claimant informed the Respondent of his change of address or that he had relocated to Australia. The Claimant told the tribunal that he expected the Respondent to settle his claim against them, this view was corroborated by a GP note made on the 9 December 2016 which recorded that he had "*just been in Australia for 6 weeks. Currently in talks with lawyers to make a settlement. Needs to be signed off of work until resolved – will issue another cert today*". This record of the Claimant's consultation with his GP was entirely consistent with the previous views he had expressed of wishing to resign, but this entry shows that the reason he failed to do so was that he was hoping for a negotiated settlement. The sick note reflected that the Claimant was off sick with a 'stress related problem' however the consultation notes suggested that he was signed off sick to resolve his settlement.

72. Ms. Hopkinson sought OH advice before arranging a grievance appeal. She wrote to the Claimant on the 10 March 2017 (page 323) confirming that the "*Occupational health team has indicated that it would be beneficial to your recovery for me to arrange this meeting as the next practical step in attempting to resolve the work-related issues that are currently impacting your well-being*". In reply the Claimant enquired whether the Respondent could engage with his lawyers in all future correspondence.

73. Ms. Hopkinson replied on the 14 April 2017 stating that she was seeking advice as to whether they could communicate with the Claimant's solicitor

in future. She confirmed that the grievance hearing would take place on the 20 April 2017; she asked the Claimant to confirm his attendance (page 341). The Claimant replied on the 18 April 2017 saying that a face to face grievance "would impose a risk to my recovery.." and suggested that the appeal be conducted in writing, he also asked for the hearing to be postponed. The Claimant made no mention in his email that one of the reasons that he may not be able to attend the meeting was because he was now living in Australia.

74. The appeal was postponed but the request to communicate via his solicitors was refused. The Respondent agreed to the Claimant's request to present his appeal in writing and he was asked to provide this by the 11 May 2017 (page 340). The evidence before the Tribunal therefore showed that the Claimant's request for a reasonable adjustment to consider the appeal on the papers was granted. The Claimant was unable to meet this deadline, so it was extended three times at his request to the 30 May 2017, then to the 13 June 2017 and then to the 28 June 2017, there was no evidence to suggest that short time frames were imposed upon him during this process as suggested in issue 9(b)((viii). The appeal was conducted on the papers by Mr Hopcroft, who was an independent manager. He accepted in cross examination that he did not give the Claimant a right of reply because he did not feel that it was necessary as the challenges made by him were clear and he conducted a thorough investigation. He confirmed that he would have reverted back to the Claimant if something was not clear or if there were conflicting opinions.

The Grievance Appeal Outcome.

75. The appeal outcome was sent to the Claimant on the 22 August 2017. Mr Hopcroft confirmed that he was satisfied that the Claimant was hired with a good CV and was capable of performing the role. He was also satisfied that management gave him support and regular counselling and the team had tried to look after him. Mr Hopcroft also noted that after the Claimant went off sick, the team managed without him. The Tribunal noted that Mr Hopcroft's view was corroborated by Mr Smith who confirmed that the same level of work was delivered by two people after the Claimant went off sick and this was achieved by developing a strategy to deliver the more material items. Mr Smith described this approach to the Tribunal as a 'good exercise'.

76. Mr Hopcroft confirmed that he considered all the information in the round. It was his view that the Claimant did not raise a grievance about the photo incident; he raised the issue with management at the time and they had dealt with it appropriately and it was his view that the Claimant had agreed not to pursue the matter formally. He felt that the matter was closed. Mr Hopcroft categorically denied that he turned down the grievance appeal because the Claimant had raised health and safety concerns.

77. Although the appeal outcome was dated the 22 August; the Claimant did not receive it until the 15 September 2017. The Claimant confirmed in cross examination that it was his intention to resign on the 6 November 2017 after receiving his personal data produced as a result of the Subject Access Request.

78. The reason the Claimant gave in his letter of resignation dated the 6 November 2017 was "*I feel that I am left with no choice but to resign in light of my experiences relating to the grievance process recently concluded and subsequent events, as well as EDF's failure to suitably acknowledge and address the issues raised*". The letter went on to state that he "*consider(s) this to be a fundamental/unreasonable breach of contract on your part".* The Claimant said in cross examination that the letter sent to him on the 1 November 2017 (page 429) arranging a health-related absence meeting for the 10 November 2017 played a part in the decision to resign and added that "*both end the outcome of the grievance, I was concerned that data would be wiped, both led to me resigning*". The Claimant explained in his statement that he found the letter to be upsetting and that assigning Ms Mukhopadhyay to sit in the meeting showed a disregard for his health and safety. The Claimant relied upon the ill health procedure meeting as part of the conduct that cumulatively amounted to a fundamental breach that led to his decision to resign and treat himself as dismissed. He also felt that it was a detriment due to raising health and safety concerns.

79. The Tribunal noted that by the end of the grievance process the Claimant had been absent for a period of over a year with no indication of when he would be fit to return. The Respondent was entitled to convene such a meeting under its policies and procedures and was entitled to take steps to look at ways of securing the Claimant's return to work. This cannot amount to conduct that individually or cumulatively amounts to a breach as set out above at 9(b)(ix). There was also no evidence to suggest that this was a detriment because he had raised health and safety concerns as claimed above at paragraph 4(h), the Claimant had been absent since the 24 October 2016 and the Respondent was entitled to take steps to reintroduce the Claimant back into the workplace.

80. The Tribunal have also found as a fact above at paragraph 53 that the Claimant had decided that he would resign in August and September 2016. The reason he left it until November 2017 to resign was to await the outcome of the grievance and to see if a settlement could be reached and to await the disclosure of documents under the Subject Access Request. This appeared to be corroborated by the fact that he requested to communicate via his lawyers during the appeal process and at that stage he had told his GP that he was attempting to negotiate a settlement. All the consistent facts show that the reason he resigned when he did was because no settlement had been agreed and he was required to attend a meeting to discuss his lengthy ill health absence which would have required him to travel back from Australia, where he was now living. The Tribunal find as a fact that the Claimant did not resign in response to a repudiatory breach.

The Law

Employment Rights Act 1996

Section 44 Health and safety cases

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,
(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or
(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such committee,
[(ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise),]
(c) being an employee at a place where—

(i) there was no such representative or safety committee, or
(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
(d) in circumstances of danger which the employee reasonable believed to be serious and imminent and which he could no reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or
(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) An employee is not to be regarded as having been subjected to a detriment on the ground specified in subsection (1)(e) if the employer

shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have treated him as the employer did.

(4) … this section does not apply where the detriment in question amounts to dismissal (within the meaning of [Part X]).

Section 95 Circumstances in which an employee is dismissed

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

> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
> [(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]
> (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.

Section 98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
> (b) relates to the conduct of the employee,
> [(ba) …]
> (c) is that the employee was redundant, or
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

> (a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

Section 100 Health and safety cases

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,
(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or
(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,
[(ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in the election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise),]
(c) being an employee at a place where—

(i) there was no such representative or safety committee, or
(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or
(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which a reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

Cases Referred to

81. The **Claimant** referred to the cases of:

a. *Hatton v Sutherland (2002) EWCA Civ 76* and commented that there is also a legal duty to take reasonable care which is an implied health and safety term. In a personal injury claim one must look at the reasonable foreseeability of harm. It was notable that in the present case the OH referral was made too late, this is a legal consideration.

b. *United First Partners Research v Carreras [2018] EWCA Civ 323*. The Claimant took the tribunal to the Headnote where the Court of Appeal concluded that “The ET’s finding was not based on an explicit finding of primary fact about what motivated the Claimant to resign when he did, still less on an explicit rejection, on the basis of his credibility, of evidence given by him about his motivation. Instead it was based on the two reasons which it gave and which the Court found to be flawed..”. The Tribunal was taken to paragraph 40 of this case where it stated that “It was also common ground before us that where an employee has mixed reasons for resigning his resignation will constitute a constructive dismissal provided the repudiatory breach relied on was at least a substantial part of those reasons..” In the case at paragraph 56 it was confirmed that it is not necessary for the departing employee to give reasons for his resignation as long as he is in fact leaving because of the employer’s repudiatory conduct. It was confirmed that “the crucial question is whether the repudiatory breach played a part in the dismissal”.

82. The **Respondent** referred to the following case law:
    a. The Respondent stated that in a case of constructive unfair dismissal, it is for the Claimant to show that the employer has breached the implied duty of trust and confidence and the Respondent has referred the Tribunal to the following cases: *Malik v BCCI [1997] IRLR 462* and the case of *Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420*. The test is an objective one and the Tribunal were taken to the following quote "[the legal test] is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract'.

    b. Failing to comply with a grievance procedure can amount to a breach of the implied duty as found in the case of *Blackburn v Aldi [2013] IRLR 846* however in that case it was confirmed that this is a matter for the Tribunal and must be tested according to the Malik test.

    c. The Claimant must then resign in response to the breach and it is for the Tribunal to determine whether any repudiatory breach played a part in the Claimant's resignation (*Wright v North Ayrshire Council [2014] IRLR 4*). The Tribunal also considered that if the Claimant had mixed motives for resigning, provided the repudiatory breach was relied upon for at least a substantial part of the reason, it will result in a dismissal.

    d. The Claimant must not delay in resigning, if he does so he may have by conduct impliedly affirmed any breach, however it was noted in that case that the doctrine of affirmation is applied more liberally in employment contracts and this matter is highly fact sensitive. The fact that an employee continues to accept sick pay is a factor that must be considered (*Mari v Reuters Limited EAT/ 0539/13/MC*). In the case of *Kaur v Leeds Teaching Hospital NHS Trust [2018] IRLR 839* it was confirmed that an employee was able to rely on a continuing cumulative breach even though there had been a prior affirmation, as long as the latter acts form part of a series of acts whose cumulative effect amounts to a breach of the implied term. In submissions the Respondent indicated that it may be considered to be an intention of the Claimant to affirm the contract by calling on the Respondent to comply with the contractual grievance.

Submissions.

The written and oral submissions of the Respondent and the oral submissions of the Claimant were considered. Where appropriate the submissions are referred to in the decision below.

Decision

83. The findings of fact above showed that the Claimant enjoyed a positive working relationship with his colleagues and got on well with his immediate manager Mr Willis. Although the Claimant tried to suggest otherwise,

implying that this relationship had cooled in early 2016, this was contradicted by the evidence he gave to the grievance hearing in October 2016 where he described Mr Willis as a father figure who was "always concerned about my health and well-being". This description was consistent with the evidence given by Mr Willis and by others that they enjoyed a positive relationship until at least the end of June 2016. The Tribunal conclude that Mr Willis's evidence was consistent and credible and is preferred to that of the Claimant on this point.

84. The Tribunal found as a fact that the Claimant raised a number of concerns about his workload in one to one meetings with Mr Willis and with Ms. Mukhopadhyay; on each occasion they were discussed, and positive suggestions were put forward on how to manage the workload and the above paragraphs 30-38 are referred to. It was the consistent evidence of the Respondent's witnesses given by Mr Willis, Ms. Mukhopadhyay and Mr Smith that the workload was manageable and when the Claimant complained about work pressures, projects were taken off him and shared with others in the group. There was consistent evidence before the Tribunal to show that after the Claimant went off sick, they had no need to recruit because the workload could be handled by those remaining within the team. There was no consistent evidence to suggest that the Claimant was provided with an excessive workload.

85. Although the Claimant complained that Mr Cooper had made a comment which he took to be personally critical of his output as compared to the output of the external consultants, there was no evidence to suggest that the Claimant was told by Mr Willis or Ms. Mukhopadhyay that he would be required to increase his output. The Claimant has failed to show consistent evidence to support his claim identified above at issue 4(b). The consistent evidence before the Tribunal was that the Claimant was provided with appropriate support by his managers and there was no evidence to suggest that he was required to increase his output.

86. The Tribunal found the evidence of the Respondent's witnesses to be credible and consistent. Mr Willis and Ms. Mukhopadhyay appeared to be receptive to holding regular meetings with the Claimant and when he raised concerns, they were discussed, and support and guidance was given. The tribunal also found the evidence of Mr Smith to be credible and consistent as compared to that of the Claimant in relation to the reasonableness of the workload. It was noted that Mr Willis and Mr Smith had recently been made redundant by the Respondent, they had no reason to portray a positive image of the workload or of the Respondent, but both presented a consistent picture of a mutually supportive team who managed a cyclical workload by adapting their approach and level of detail that was consistent with their available resources. The Claimant's perception that the team was under resourced, was not a view held by any of the Respondent's witnesses and as their evidence was consistent they were preferred to that of the Claimant. The Claimant has failed to show evidence that he suffered a detriment as referred to above in the list of issues above at paragraph 9(a).

87. Although the photograph incident on the 30 June 2016 was unfortunate, the Tribunal accepted the evidence of Mr Willis that he apologized to the

Claimant as soon as he became aware that it upset him. The tribunal also found as a fact that the parties agreed to deal with the matter informally and the conclusions are referred to above at paragraphs 39-41. The Tribunal conclude that this was not conduct that was calculated and likely to damage or destroy the relationship of trust and confidence, although a poor attempt at humour, swift action was taken to put matters right and it was escalated to Ms. Mukhopadhyay who reported the matter to HR and took advice. There was also no evidence that it was a detriment because he had raised health and safety concerns.

88. The Respondent's witnesses candidly accepted that they should have referred the Claimant to OH earlier however a referral was made when the Claimant went off sick with stress. Thereafter OH had regular involvement in providing advice and assistance to the Respondent to ensure appropriate adjustments were put in place to assist the Claimant in his return to work meeting in October and in connection with the handling of the grievance process.

89. The Claimant then started a lengthy absence on sick leave from the 7-24 July 2016. The Claimant returned to work for 1 day then was sent home by Mr Willis after the Claimant appeared dazed. The Tribunal accepted the evidence of the Respondent that the work provided to the Claimant on his return was appropriate and his inability to cope with the task was because he had simply returned to work too early. The Claimant then went off sick again until the 3 October 2016, during this subsequent sickness absence he was able to take two holidays abroad which suggested that the social withdrawal that he complained of on the 26 July had eased (see above at paragraph 50).

90. The Claimant raised a grievance on the 27 July which was dealt with by Ms. Rosling. The tribunal found as a fact that this was dealt with appropriately and in line with the grievance procedures. There was no evidence to suggest that Ms. Rosling failed to fully address the issues raised and provided a reasonable explanation for deciding not to extend her investigations wider than the team. The Tribunal was referred to the case of Blackburn v Aldi (above) which confirmed that a failure to comply with a grievance procedure could amount to a breach of the implied term of trust and confidence. Having considered that case, it is concluded that this can be distinguished on the facts as the breach in the Blackburn case resulted in an unfair process that was also a breach of the ACAS Code of Practice. The Claimant's only complaint about the grievance procedure followed by the Respondent above at paragraphs 4(f) was that the Respondent failed to 'properly address' his grievance however the Tribunal concluded on the facts that the grievance process dealt with all the issues raised which are referred to above at paragraph 61-63 and there were good reasons for only limiting the investigations to those within his team as referred to above at paragraph 62. The Claimant also complained that the Respondent failed to find in his favour at issue 9(v) and he complained that the process was partial (above at 9(d)) but there was no evidence to suggest that this was the case. The Tribunal concluded that the outcome of the grievance was fair and consistent with the facts following a reasonable investigation followed by Ms Rosling which is referred to above at paragraph 65.

91. Although the Claimant was unhappy that the grievance was not found in his favour at the appeal stage, Mr Hopcroft complied with the Respondent's procedures and with the ACAS code of practice. The appeal outcome was consistent with the facts before him. The Respondent's procedures did not allow a right of reply, so failing to provide one could not amount to a breach of the procedures nor did it amount to a failure to provide a fair and reasonable outcome. It was noted that the Claimant was given three extensions of time during the appeal stage and the Respondent agreed to his request for the process to be conducted on the papers as a reasonable adjustment. The tribunal refer to the findings of fact made about the appeal above at paragraphs 69-76. Although the Respondent refused to deal with the Claimant's lawyers during the appeal stage that was reasonable and could not amount to a breach of the duty of trust and confidence, it was reasonable for the Respondent to require the Claimant to communicate with them over the course of his grievance appeal. As the tribunal have concluded that the Respondent complied with their own procedures and the ACAS Code of Practice when dealing with the Claimant's grievance and appeal and dealt with the matter fairly and impartially there was no evidence to suggest that this could amount to a breach of implied duty of trust and confidence. The claims above at paragraphs 9(vi), (vii), (viii) and 9(c) and (d) are not well founded and are dismissed.

92. The Claimant complained that his returns to work in July and in October were not dealt with appropriately (see above at in the issues at paragraphs 4(c)(e) and 9(b) (ii)and (iii)) however, the Tribunal heard that after the July return to work was unsuccessful, Ms. Mukhopadhyay sense checked the task to ensure that it was appropriate. Having accepted the consistent evidence of Mr Willis of how the July return to work was handled above at paragraphs 47-9, the tribunal conclude that it was unsuccessful because the Claimant had returned to work too early and it was not due to any failure on the part of the Respondent. There was also no evidence to suggest that the way in which the return to work was handled in July 2016 was a detriment because he raised health and safety concerns.

93. In October there was a return to work meeting held by Mr Anketell on the telephone and there appeared to be no criticism of the way this was handled (see above the findings of fact at paragraphs 57-59). There was no objective evidence to suggest that the process followed in October amounted to a breach of the implied duty of trust and confidence. The return to work in October was conducted sensitively and fairly, advice was taken from HR and reasonable adjustments were made to accommodate his health needs. The Tribunal accepted that the tasks set were reasonable, and no deadlines were imposed on the Claimant. Although the Claimant's request to report to a different manager was refused, this could not amount to a fundamental breach. The Respondent arranged for the return to work to be handled by a person who was acceptable to the Claimant and HR was a point of contact to deal with the Claimant's concerns about the task set as an interim measure. The Tribunal noted that the return to work took place before the grievance had been heard, it was therefore premature to make changes to the Claimant's line management before a full investigation had taken place. On the facts the issues above at paragraphs 9(b)(ii) and (iii) are not well founded and are dismissed. The issues above at paragraph 4(e) are not well founded on the facts as reasonable adjustments were made and the return to work was managed appropriately.

94. Although the Claimant claimed that reducing his pay to half and then nil pay was a detriment because of raising health and safety concerns (above at paragraph 4(d)), there was no evidence that this was the case and no evidence that those in HR or in payroll had any knowledge of complaints about breaches of health and safety, his claim is not well founded on the facts and is dismissed. His pay was reduced in line with the contractual terms relating to sick pay. There was no evidence to suggest that this was conduct which, viewed objectively, suggested that the Respondent did not intend to be bound by the essential terms of the contract and the Tribunal refer to the findings of fact made about this above at paragraph 54. The Claimant's claim above at paragraph 9(b)(i) is not well founded and is dismissed.

95. In relation to the complaint that management prevented Mr Girard from seeing the Claimant this was found to be based on a misunderstanding by Mr Girard and was not due to any act or default by the Respondent and the findings of fact are above at paragraph 68. The Claimant's concerns about this matter were dealt with in a timely, appropriate and sensitive manner by Ms. Mukhopadhyay. The Tribunal conclude therefore that the issue above at paragraph 9(b) (iv) is not well founded and is dismissed.

96. The Claimant complained that Mr Willis asked him in late October to complete a form indicating what work he had carried out and when he had experienced symptoms and the Tribunal refer above to the findings of fact made about this matter above at paragraph 67. It was noted that this was done on the advice of HR. Although the Claimant contended that this was unreasonable, it showed a concern for the Claimant's well-being and a need to be in possession of all the facts of when his 'intermittent symptoms' arose. In this case the Respondent was in a difficult position, on the one hand they were accused of not referring the Claimant to OH in June when symptoms became apparent; but when they ask for further information to establish whether further help was required, the Claimant viewed this as a hostile act. The reason for requesting this information was understandable and was a positive attempt to protect the Claimant's health and welfare in the workplace. This was not conduct that, viewed objectively, could amount to a breach of the implied term of trust and confidence. The Claimant's claim above at issue 9(b)(v) is not well founded and is dismissed.

97. When the Claimant went off sick for a second time, he returned to Australia and failed to inform the Respondent he was no longer residing in the UK. Although the Claimant stated that he intended to return, there was no evidence that this was the case. As the Claimant only retained a storage unit in the UK, there was no evidence to suggest that he continued to reside or that he intended to continue residing in the UK.

98. Looking at the facts and viewed objectively, the Tribunal have found that there was no evidence that the Respondent intended to abandon the contract of employment. The Respondent offered the Claimant support and guidance with his concerns about workload, dealt with all the points raised in his grievance, carried out a fair and reasonable appeal and adjusted the process to accommodate his needs. The Respondent also offered to assist the Claimant find another role in the organisation, should he find it difficult to return. Looking at all the circumstances of the case objectively, from the

perspective of a reasonable person, there was no evidence to suggest that the Respondent showed an intention to abandon the contract.

99. Even though it has been concluded that there was no evidence of a repudiatory breach, the Tribunal will for completeness go on to consider the reason for the termination. It was noted that the Claimant had told his GP on the 30 August 2016 that he had decided to resign and again repeated that this was his intention on the 13 September. Having already made up his mind at that time, it was difficult to see how events after August 2016 impacted on this decision. On the 19 October 2016 the Tribunal found as a fact above at paragraph 66 he again told his GP that he was going to resign "next week" but did not do so. The Claimant's evidence given in cross examination about the GP records in August and September is above at paragraph 53 of the findings of fact and reflected the inconsistent nature of his evidence about when he decided to resign. In the light of his vague evidence it was found as a fact that he had made up his mind that he was going to resign in August 2016 and this remained his view.

100. However, rather than resign in August when he had made up his mind to do so, he started a lengthy sickness absence, spending November and the early part of December in Australia. He then engaged solicitors with instructions to negotiate a settlement with the Respondent. This was confirmed by the GP record referred to above at paragraph 71 suggesting that the only matter to be resolved by the Claimant was a settlement, there was no suggestion of a possible return to work. The Claimant has provided no consistent evidence to suggest that he resigned in response to a breach by the Respondent; his actions were consistent with a desire to terminate the relationship with a settlement and in reaching this conclusion the Tribunal considered the fact of his relocation and request that during the appeal the Respondent deal with his lawyers. All these facts were consistent with the conclusion of a person who had decided to leave his employment but on the best terms possible and at a time of his choosing. There was no evidence to suggest that when the Claimant resigned on the 6 November, he did so in response to any breach by the Respondent.

101. It is concluded that the Claimant resigned and was not dismissed. His claim for constructive unfair dismissal is not well founded and is dismissed.

102. The tribunal will now deal with whether the Claimant has done a protected act under Section 44 of the Employment Rights Act. It has been found as a fact that the Respondent operated a robust health and safety policy adopting a zero-harm approach. This was put into practice by issuing daily bulletins and covering discussions of health and safety issues in meetings. The Respondent also had a Health and Safety Committee and Health and Safety Representatives had been appointed, whose details were available on the intranet and on the notice boards. Health and safety also included consideration of well-being and this subject was included in one to one discussions as referred to above at paragraphs 30-37.

103. The Claimant has provided no evidence as to why it was not reasonably practicable for him to raise concerns about health and safety matters with the Health and Safety Committee or with the Representatives. His evidence to the Tribunal was that he did not read the health and safety policy, and, in his opinion, he should have been 'guided by his managers to this policy'.

This view appeared to be inconsistent with the health and safety-first approach described by all the Respondent's witnesses. The Claimant has failed to show that it was not reasonably practicable for him to raise his concerns with a Health and Safety Representative. The tribunal also noted that when the Claimant raised a concern about the adverse impact the workload was having on his health and wellbeing in his one to one discussion and in his grievance, these concerns were taken seriously and addressed appropriately, and he was given advice and support and referred to OH and the EAP.

104. There was no evidence to suggest that the Claimant had been subjected to a detriment because he raised health and safety concerns. When this was put to the Grievance Appeals Manager, he categorically denied it. There was no evidence to suggest that any managers were motivated by a desire to subject the Claimant to a detriment because he had raised concerns about health and safety and no evidence that he suffered a detriment and the detailed findings of fact and conclusions are referred to above. This was not a concern raised by him in his grievance or his grievance appeal and it was not a concern he raised with his GP in his many consultations. The Claimant's claim under section 44 of the Employment Rights Act pursued above at paragraphs 4 and 5 are not well founded and are dismissed.

105. Having concluded that the Claimant resigned and was not dismissed his claims under section and 98 and 100 of the Employment Rights Act are not well founded and are dismissed.

Employment Judge **Sage**

_____

Date: 4 October 2019