EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Bailey	**v**	British Telecommunications Plc

Heard at: Cambridge **On**: 3, 4, 5 and 6 September 2019

Before: Employment Judge Johnson (sitting alone)

Appearances

For the Claimant: In person, supported by Mr M Byrne (a McKenzie Friend)

For the Respondent: Mr J Ward, (Solicitor)

JUDGMENT

The Claimant's claim of Constructive Unfair Dismissal is not well founded and is dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent from 1 June 1998 until on or around 9 February 2018, when the Respondent accepted that the Claimant had resigned following their receipt of an email from him dated 7 February 2018. The Claimant disputed that he had actually resigned.

2. The Claimant commenced proceedings in the Employment Tribunal on 14 May 2018 following a period of Acas Early Conciliation from 27 February 2018 until 27 March 2018. He presented complaints of Disability Discrimination and Unfair Dismissal. The Respondent presented a Response on 22 June 2018.

3. The case was the subject of a number of Case Management decisions by the Employment Tribunal. However, the most significant of these was the Case Management Order of Employment Judge Bloom dated 22 November 2018. During this hearing it was accepted by the Respondent that the Claimant was a disabled person within the meaning

of Section 6(1) of the Equality Act 2010. The Claimant has osteoarthritis in his right knee following an accident at work earlier in his career.

4. While the Claimant informed me that both his knees were affected, it was identified at the earlier Case Management Hearing that the Claimant did not actually suffer any discrimination by reason of his disability. Accordingly, the Claimant had agreed to withdraw the Disability Discrimination complaint and the matter was listed for a hearing to consider the Unfair Dismissal claim on 3 to 6 September 2019.

5. Following the Preliminary Hearing on 22 November 2018, there was further correspondence between the Claimant and the Employment Tribunal. In particular, the Claimant had retained copies of covert recordings of meetings which took place with the Respondent's Managers relating to disciplinary and grievance issues. It was made clear in an Order of Employment Judge Ord, dated 1 February 2019, that the Claimant should disclose copies of all recordings that he wished to rely upon to the Respondent and a transcript should be agreed for use at the Hearing.

6. The Claimant also sought to rely upon the evidence of up to 22 witnesses whom he felt had relevant evidence to give in support of his complaint of Unfair Dismissal. Employment Judge Ord, in his letter of 11 May 2019, confirmed that the Claimant could apply for Witness Orders if he was unable to get these witnesses to confirm their attendance at hearing.

The Evidence Used in the Hearing

7. Before the evidence could be heard in this case, it was necessary to consider a number of preliminary matters.

8. The Claimant's arthritis in both knees caused him to experience mobility issues. He was also quite nervous. I confirmed that he could ask for breaks as necessary, but also, if it became clear to me that a break would be of assistance, whether to him or anyone else present at the Hearing, I would allow this.

9. Mr Ward for the Respondent explained to me that he had received copies of audio files from the Claimant of the recordings he had made at various meetings relating to disciplinary and grievance issues. Where possible, the Respondent had arranged for typed transcripts to be produced. Some of the files could not be opened by the Respondent and they had informed the Claimant that if he could source an independent company to obtain the relevant transcripts, they would reimburse him for the costs of doing so. It was understood that the Claimant had not done this. I advised that it may be necessary to hear the actual audio recordings of meetings, but I would first need to ensure that the appropriate equipment available so they could be played back in the Tribunal. As it happened, this was not required during the Hearing. The Claimant had also sought to produce some

documents which he described as 'transcripts' of the recordings that he had made. However, it became clear during the Hearing that these were abbreviated notes of what was played containing key points that he felt were relevant to the proceedings and not verbatim notes.

10. The Claimant had emailed the Watford Employment Tribunal with a list of the 22 witnesses whom he wished to be the subject of Witness Orders. My enquiries revealed that this message and attachments had reached the Tribunal's email inbox but had not been processed. Accordingly, none of these Orders had been issued and sent to the witnesses identified.

11. I informed the Claimant that in a case of Constructive Unfair Dismissal, it would be unusual for so many witnesses to be called by either party. It was more usual for the Claimant to call a few key witnesses and the Respondent to call Management witnesses involved with relevant processes that gave rise to the resignation and termination of employment. I explained that while I recognised the Claimant wished all of these witnesses to be present, some of them had been called by the Respondent and the Claimant would have an opportunity to cross examine those present. Most of the others appeared to be managers against whom the Claimant had raised grievances, rather than the individuals who were managing the processes which gave rise to a termination of the Claimant's employment.

12. I explained to the parties my duty to the overriding objective under Rule 2 of the Employment Tribunal (Constitution and Rules of Procedures) Regulations 2013. This meant that I had a duty to deal with the case fairly and justly. This would include my dealing with the case in a way which was proportionate to the complexity and importance of the issues and avoiding delay insofar as it is compatible with the proper consideration of these issues. Having heard all of the evidence, I determined in the absence of any further applications from the Claimant, it would not be necessary or proportionate to adjourn the case part heard and to arrange for the additional witnesses identified by the Claimant and not called to be ordered to attend. I was satisfied that all the relevant issues could be dealt with fairly without these additional witnesses being called.

13. I therefore advised that I would keep an open mind throughout the proceedings concerning the witnesses whom the Claimant wished to call and if it became clear that it would not be in the interests of justice to conclude the Hearing without having heard from them, I would make appropriate orders to secure their attendance. However, I explained to the Claimant that four days for a Constructive Unfair Dismissal case was quite long and should be sufficient for the issues to be considered through examination of the witnesses who had already been called. In addition, the Respondents arranged for Lynne Chatt, who is a Human Resources Manager, to be called to attend the Tribunal on Day 2 of the Hearing and the Claimant called her to give evidence.

14. For the Claimant, the Tribunal heard evidence from the Claimant, his friend Mr Byrne who was a former colleague and Union Representative and Lynne Chatt who is a HR Case Consultant with the Respondent. I also read a witness statement from Heather Holder who was another former colleague. Ms Holder did not attend the Hearing to be questioned and the Claimant confirmed that he understood that as a result less weight would be attached to her statement.

15. For the Respondent, the Tribunal heard oral evidence from Douglas Marvel (a former Manager of the Claimant), Charlotte Kime (a Manager who discussed the Claimant's sickness absence with him) and Matthew Bartlett (a Manager who considered the Claimant's Appeal against a disciplinary sanction and grievances).

16. This was a case where three lever arch files had been provided by the Respondents and which were agreed with the Claimant. However, the Claimant attended the Tribunal with numerous boxes containing box files of further evidence which he intended to rely upon during the Hearing.

17. I explained to the Claimant that he could only rely upon the evidence which had been disclosed in accordance with the Case Management Orders of Employment Judge Bloom on 22 November 2018 unless further applications were made for disclosure. I recognised that it may be necessary for a few additional documents to be allowed into the proceedings during the Hearing, subject to the relevant application being made and it being in the interests of justice to do so. However, I did not anticipate that many documents contained in the additional boxes, would be used at the Hearing.

18. Finally, and perhaps most importantly, the Claimant did not actually provide a witness statement in support of his evidence, contrary to the Order of Employment Judge Bloom of 22 November 2018. It was clear that for him to be able to participate meaningfully in this case, he would need to give evidence and taking into account his failure to provide a statement, I explained that I would rely upon the brief description of his claim given in Section 8 of his form ET1 and also the relevant issues identified by Employment Judge Bloom in the Order of 22 November 2018.

The Issues
(as identified in Case Management Order dated 22 November 2018)

<u>The First Issue</u>

19. Having been appointed to the planning job with the Respondent, the Claimant alleged that he received inadequate support for training required to undertake that role. He claimed that he was given little or no work to do

having moved into the office based role. He said that he did not get his first job to do until February 2015.

The Second Issue

20. The Claimant received a letter from his Line Manager, Mr Marvel, in October 2014 which raised concerns regarding his performance which required him to attend a disciplinary hearing. This resulted in the Claimant suffering from stress related symptoms between October 2014 and February 2015 and being absent from work.

The Third Issue

21. During June 2017, the Claimant submitted to a Senior Manager, Mr Bownass, an email setting out his concerns regarding a Level 2 Manager Miss Sarah Molloy. The Claimant believed that when he complained to Miss Molloy about the lack of training, she had told him,

"You could always find another job".

The Claimant argues that Mr Bownass rejected this complaint unreasonably.

The Fourth Issue

22. In or around July 2017, the Claimant raised a complaint that his Level 1 Manager Lorraine Young was being bullied by Ms Molloy which he felt was unfair and his concerns were not properly considered by the Respondent.

The Fifth Issue

23. Towards the end of 2017, the Claimant raised a grievance about all of these matters. His grievances were rejected unreasonably, he believes, in January 2018. He alleges that the Respondents failed to fully and properly deal with those grievances, the investigation was inadequate and the conclusion that there was no foundation in his grievances were in all circumstances unreasonable.

The Sixth Issue

24. The Claimant makes a general allegation that there were unreasonable time demands placed on his work which he was unable to comply with as a result of lack of training given to him.

The Seventh Issue

25. In August 2017 disciplinary proceedings were instituted against the Claimant after he misused the email system. These proceedings resulted in the imposition of a formal warning in November 2017. He alleges that the institution of those proceedings and the sanction of a formal warning

was inappropriate because he had sent the email whilst suffering from stress which was a medical condition that the Respondent was aware of at the time.

The Eighth Issue

26. There was an unreasonable delay, he alleges, in the Respondent dealing with his grievance raised on 9 October 2017.

The Ninth Issue

27. He was subjected to a disciplinary action under the Respondent's Attendance at Work Policy in January 2018. The absences were not caused by his physical impairment, but due to stress related symptoms. He alleges that it was unreasonable of the Respondent to institute that action whilst he had an ongoing grievance which had not been resolved. The Attendance at Work Policy was instituted by Molloy who was a subject of his grievance, which was inappropriate in all of the circumstances.

The Tenth Issue

28. He was instructed to attend a meeting on 19 October 2017 whilst he was off sick from work and should not have been instructed to do so. He was told he should return to work even though he was still signed off from work at the time.

The Eleventh Issue

29. A grievance meeting held with the Claimant on 10 January 2018 was improperly conducted, he alleges, and the process improperly conducted by the Respondent.

The Twelfth Issue

30. He should not have received a First Written Warning in respect of his poor attendance. He appealed against it and his appeal failed which he alleges was unreasonable in the circumstances. He makes a general allegation that the Respondents failed to follow its own internal grievance and disciplinary policies.

The Thirteenth Issue

31. The Claimant denies that he resigned when he sent his email of 7 February 2018 to Managers within the Respondent Company and that it was unreasonable for the Respondent to rely upon that email as a resignation notice.

Findings of Fact

Having heard the evidence during the hearing, it appeared to me that the best way to make findings of fact, was to group the individual issues identified above, into broader related themes. The relevant Issues relating to each theme are identified under each heading below:

Training in the Planning Job and Performance Management
(First, Second and Sixth Issues)

32. The Respondent had a procedure for managing performance.

33. The Claimant was appointed to the position of Planner in 'BDUK Planning' on 28 November 2013 by the Respondent following a lengthy period of what was effectively redeployment. This process was used to consider the adjustments required to accommodate the disability he had sustained following an accident at work in 2012. This had resulted in a serious injury to his knees and which had left the Claimant with osteoarthritis and mobility issues. He was no longer able to work in his engineering role and it was necessary for the Respondent to look at alternative jobs.

34. The Claimant's new line manager for the Planner role was Douglas Marvel. He required significant training as this role was considerably different to the work he had done previously for the Respondent and having heard evidence from both the Claimant and Mr Marvel, I accepted that there was a three month period where the Claimant was being trained and was not doing actual work himself. This included training on a course from 9 to 17 December 2013. The Claimant also spent a lot of time during this period sitting with experienced planners and taking detailed notes of what the job involved. His frequent emails with Jill Halson who was part of the Respondent's 'Wish Team' and who helped get the Claimant the Planner role, indicate how busy he was, how much information there was to learn and how much he was enjoying the new job.

35. It is understandable that the Claimant was not given a lot of work to do at this stage as he was training and not doing planning jobs alone.

36. On 13 February 2014, Mr Marvel held a meeting with the Claimant and his previous manager and informed him of the 'Glide Path' that would be used to support him in becoming a permanent Planner. This document provides a series of staged targets so that he could reach a stage where he would be able to work on his own planning tasks with an appropriate level of quality and speed. The Glide Path was reviewed at regular stages. It was initially intended to take four weeks to complete, but due to performance issues on the part of the Claimant, the Glide Path was extended for a further four weeks.

37. After a period of eight weeks, the Claimant was considered by Mr Marvel to be underperforming and was only reaching 25% efficiency, when he should have been working at least at 75% efficiency or above. As a consequence, the Claimant was then placed on a Coaching Plan, which

was a standard process used by the Respondent where performance needed to be improved. The plan provided for the Claimant to receive support and focused upon efficiency rather than quality, the latter being at an acceptable standard. The Claimant was warned of the potential sanctions for continued poor performance.

38. The documents used for the Coaching Plan were detailed and the Claimant was subject to reviews on a weekly basis. However, by week 6 he was warned by Mr Marvel that he was still not achieving his target and although the Claimant felt he could still improve with time, the end of this process had been reached. It appeared that there was a delay before further action took place, but on 3 October 2014, Mr Marvel wrote to the Claimant explaining that there had been a lack of progress and that he was considering imposing an Initial Formal Warning under the Respondent's 'managing under-performance procedure. He was invited to a meeting under the process and was advised he could bring his union representative on 10 October 2014.

39. The Claimant then sent a lengthy email to the Chief Executive Officer and other senior managers complaining about this process on 7 October 2014. Having seen many examples of the Claimant's emails in the hearing bundles, I did notice a certain pattern in how he reacted to being managed as a Planner. He would initially appear to be very positive and expressed an enthusiasm to work hard and did not give the impression he was finding things difficult. However, whenever any attempt was made to by management to tackle a concern relating to performance, conduct or absence, he would produce lengthy correspondence to numerous senior managers, rather than focus upon the process and seek to resolve matters with his immediate line managers.

40. The Claimant did attend the meeting on 10 October 2014 and sought to argue that the targets set were unrealistic. However, I noted that the Claimant did not challenge the targets during the Glide Path or the Coaching Path and it appeared that he had been given a reasonable amount of time to become an efficient Planner. Indeed, he had been working in this role for almost 10 months when the meeting took place and normally an employee would be expected to be working by themselves efficiently at 8 weeks after starting.

41. The Claimant was absent from work following this meeting until 13 February 2015. He did meet with Mr Marvel on 3 February 2015 for a welfare meeting and issued him with an Initial Formal Warning. While the Claimant's sickness may have been prompted by stress and anxiety which he associated with the sanction considered under the process, he had been given plenty of time in which to improve his performance before that occurred. Moreover, he had not raised any concerns regarding stress and anxiety before this process was considered by Mr Marvel and indeed, the Claimant's emails during his training were largely positive and complimentary of the process.

42. It was noted during the Claimant's cross examination of Mr Marvel, that he sought to argue that he had not been properly trained due to the lack of certificates that he had received. However, I am satisfied that as the Claimant was being trained internally by the Respondents, the existence of a certificate was immaterial as to whether the training actually took place. It was clear from the evidence that the Claimant had been trained initially over a number of days and once in the workplace, spent many weeks observing and being subject to a Glide Path and Coaching Plan before any sanctions were imposed under the Respondent's Procedure.

The Claimant's Grievances about Sarah Molloy and Others
(Third, Fourth, Fifth, Eighth and Eleventh Issues)

43. The Claimant sent an email to Mr Bownass who is a manager with the Respondent on 16 June 2017. In this email he mentioned that Sarah Molloy, '…*wants stats, pushing too hard…',* but in it he does not suggest that she had given him an ultimatum which said, *'you could always find another job'*. While during cross examination, the Claimant did concede that Ms Molloy did not make that statement, but used *'words to that effect'*, I am not convinced that a conversation of this nature took place as alleged. The email of 16 June 2017 does suggest that the Claimant was complaining about Sarah Molloy in terms of her expectations, but it primarily appeared to relate to a decision that the Claimant could not be allowed to become a mobile planner due to his disability.

44. Mr Bownass replied to the Claimant's email and explained that while he could not be a mobile planner at the moment, he would continue to have his desk job, stressed its importance as a problem-solving role and also that training would be provided on the job. His reply appeared to be reasonable and supportive towards the Claimant and dealt with the concerns raised. It was not clear at this stage that the Claimant was seeking to raise a grievance against Ms Molloy and it is understandable that Mr Bownass did not anticipate that a grievance was being raised from the email of 16 June 2017.

45. The Claimant raised a grievance concerning Ms Molloy in his email of 21 September 2017. He identified what he believed was her poor behaviour and identifies relevant HR policies concerning standards of behaviour. While the Claimant argued that this grievance was not properly considered, a letter was sent to him from Edward Bownass on or around 10 October 2017, (it was undated and received by the Claimant on 11 October 2017). He confirmed that Ms Molloy had been investigated informally and that he was satisfied that she had been behaving in accordance with company policies and procedures. While this was not a detailed response, the Claimant was informed of his right to proceed to a formal grievance process and provided with details of how the process worked.

46. The Claimant raised further multiple grievances on 9 October 2017 against managers involved with his disciplinary process and his union representative. As the Claimant was the subject of a disciplinary process at this stage, the Respondent's managers who were dealing with the Claimant, decided to delay dealing with this grievance until it had been resolved.

47. The Claimant then raised grievances on 22 December 2017 relating to Sarah Molloy and others. These were acknowledged by email by Theresa Hyde on the same day and confirmed that they would be passed to a case handler. The Claimant was provided with relevant details of the grievance process and was informed by Mr Bartlett that he had been appointed as the Investigating Manager in his letter dated 5 January 2018. He further explained that he would conduct a grievance meeting to discuss all of these issues on 15 January 2018. The purpose of the meeting was explained and the Claimant was allowed to have a union representative present. Mr Bartlett gave evidence that he was advised by HR concerning the investigation process.

48. The meeting took place over a period of almost 2 hours on 15 January 2018 and considered the six grievances that had been raised in relation to employees of the Respondent. The grievances against union representatives was understandably a matter for the CWU union if the Claimant chose to pursue them further. The note of the grievance meeting, which is a transcript of the Claimant's covert audio recording indicates that Ms Chatt attended on behalf of the Respondent's HR and the Claimant was supported by Mr Good of the CWU.

49. On 17 January 2018, the Claimant raised two further grievances concerning Ms Molloy and Ms Kime relating to the action taken against concerning his sickness absence. These were subsequently not pursued by him.

50. The outcome of the grievance was given by Mr Bartlett in a detailed letter which identified each complaint and which explained his finding. The letter gave the Claimant the opportunity to appeal the decision. It was surprising that the Claimant confirmed in evidence that he did not read the grievance outcome letter. This was particularly unfortunate as Mr Bartlett had suggested that mediation with an independent mediator might be useful in resolving any issues the Claimant had with Ms Molloy, against whom he had the most long standing grievance with. The Claimant did not seek to bring an appeal concerning the decision of Mr Bartlett.

51. Mr Bartlett confirmed that he did consider the delay in the Respondent dealing with the grievances, which even taking into account the ongoing disciplinary process, was longer than it should have been. He explained that the Claimant had initially used the wrong channels to pursue his grievances. The Claimant confirmed that he used standard Acas templates rather than the Respondent's own versions. Neil Brown of the Respondent's HR, advised the Claimant of the correct versions to use in an email to the Claimant in early November 2017. In any event, Mr

Bartlett was satisfied that this not adversely affect the Claimant's position. Indeed, the additional time appeared to give the Claimant time to add to the grievances that he had already raised in October 2017.

52. I believe that Mr Bartlett gave reliable evidence in relation to this matter and I could see that when the Claimant brought his second set of grievances on 22 December 2017 using the correct processes, these were dealt with quickly.

53. While the grievance process was lengthier than it should have been, I find that the Respondent behaved reasonably and it is the Claimant who is largely to blame for the delay in progressing the grievance. He had a tendency to have explosions of activity where he raised multiple grievances against anyone involved in a decision he did not like, this included his union representatives. Despite being advised by his union, he appeared to be unable to use the correct processes and rather than focus on the grievances that were outstanding, continued to raise further grievances concerning those managers involved in the processes relating to his sickness absence.

54. The actual grievance hearing was properly arranged with HR involvement and support from a union representative. It was long enough in duration for the relevant issues to be considered. The transcript of Claimant's own covert recording of the meeting supports this to be the case and suggests a largely amicable meeting. The Claimant was given ten days notice of the actual hearing date and had adequate time to prepare for it.

Disciplinary Action regarding the phishing emails
(Seventh Issue)

55. The Respondent has a Disciplinary Policy entitled 'Handling Misconduct Fairly'. This was updated from time to time and although the Claimant raised issues concerning the date of the version of the Policy in the bundle, I was satisfied with Ms Chatt's explanation that the document was reviewed and updated on a regular basis and that the version contained within the bundle described in its footnote as 'Version 1.1' and 'October 2017' was reflective of the disciplinary procedure in place when the Claimant was subject to this process.

56. Within the Disciplinary Policy, the Respondent provides a description of misconduct and gives a non-exhaustive list of examples of gross misconduct. This list includes reference to 'serious misuse of systems, like email…. (including breaches of acceptable use, internet, social media or phone policies)'. Further explanation provides that acts of gross misconduct may lead to summary dismissal.

57. The Claimant accepted that he used the Respondent's email system inappropriately by sending emails on 10 and 17 August 2017 in response to 'Project Surf', which was an exercise involving its employees being sent fake 'phishing' emails. This was an exercise designed to test their ability

to detect emails from those seeking to illegally obtain personal and financial data. The Claimant responded to these test emails by making flippant and abusive comments. These were considered by the Respondent to be inappropriate and not in accordance with the 'BT Standards of Behaviour' policy.

58. A disciplinary investigation was commenced with an initial fact finding meeting taking place with Mark Kavanagh and the Claimant on 21 August 2017. While the Claimant was unhappy that this meeting took place after he had finished work, it appeared from the documentary and witness evidence of Mr Bartlett that Mr Kavanagh did not appreciate that the Claimant's working day had finished and in any event believed that the meeting would be very short. The Claimant then sent an email on 23 August 2017 which he described as being an apology, but which was sent to several managers including Mr Kavanagh and which attacked him as being unprofessional.

59. Mr Herbert who is a manager informed the Claimant verbally on 21 September 2017 that he was being suspended and that the matter would be fully investigated as a misconduct matter. A letter was passed to him confirming the suspension and its conditions. This was followed by a letter from Allan Lane dated 22 September 2017, which suggested that the inappropriate emails may constitute gross misconduct. A disciplinary hearing was arranged for 9 October 2017 and the Claimant was advised that he could be accompanied by a trade union representative. A transcript of the covert recording of the meeting by the Claimant shows that he was supported by Gary Good of the CWU and it was approximately an hour in length. The Claimant was given sufficient opportunity to participate and explained that he was suffering from stress at the time he sent the messages and that he had subsequently sent an apology.

60. An outcome letter was sent to the Claimant on 6 November 2017 by the hearing officer Allan Lane. He mentioned that the Claimant had alluded to bullying in the office without giving specific details and that if he felt these were matters to be resolved, he should bring grievances concerning the instances to which they related. He also considered the Claimant's concerns regarding the fact finding meeting on 21 August 2017, but felt that it was held appropriately. His decision was that the Claimant had breached the Respondent's policies concerning standards of behaviour and also security. He felt that a final written warning of 18 months duration was appropriate and directed that the Claimant's line manager should support him with any improvements required. The Claimant was advised that he could return to work on 13 November 2017 and that he had a right of appeal.

61. The Claimant confirmed by email on 19 November 2017 that he wished to appeal the decision to impose a final written warning. This was arranged to take place before Mr Bartlett on 15 January 2018. The Claimant was supported by Mr Good of the CWU. Mr Bartlett gave his decision to uphold the original decision to impose a final written warning in his letter

dated 5 February 2018 and which explained that the process was fair and the sanction imposed was reasonable.

62. I considered the witness evidence concerning the disciplinary process and the appeal hearing and there was consensus that the Claimant accepted that he sent inappropriate emails, but that he believed the sanction of a final written warning was too severe. This appeared to relate to comments made to him by Mr Good and Ms Molloy describing the matter 'as a storm in a teacup'. Additionally, the Claimant believed that he had sent an apology by email on 23 August 2017 which should have at least reduced the sanction that was imposed. The process was fair and reasonable and afforded the Claimant the opportunity to fully participate with union support. Email security is understandably an important issue for everybody and particularly for a communications business where the risk of reputational harm for having proper procedures in place is significant. While it might have seemed like a minor matter for those discussing the matter with the Claimant informally, the Respondent's policies make clear that the Claimant's emails were inappropriate and the Claimant accepted that during the disciplinary process and when giving evidence.

63. While the Claimant may feel that he apologised for his conduct on 23 August 2017, Mr Bartlett was correct to find that this was far from an unequivocal apology and it actually made unfavourable comments about Mr Kavanagh and was shared with an audience was unnecessarily wide nor appropriate. If anything, this email served to demonstrate that the Claimant had failed to show any genuine contrition concerning the incident and that the Respondent might be concerned that he failed to understand the seriousness of the issues being considered in the disciplinary process. While the Claimant did allude to stress, there was no medical evidence produced during the disciplinary process by him which would indicate that he was suffering from a health issue which might have affected his judgment when the emails were sent.

64. I was somewhat surprised that Mr Bartlett was instructed to hear both the grievance and the disciplinary appeal and that he heard both of these matters on the same day. To some extent, it may well have been felt by the Respondent that Mr Bartlett was at the correct grade as a Tier 3 Manager, was not connected with the grievance or disciplinary matters previously and as the processes had some overlap of the factual background, it was appropriate to have both meetings taking place on 15 January 2018. I do not find that it prejudiced the hearing of these matters and Mr Bartlett behaved appropriately in how he dealt with them and sought to ensure that the issues were kept separate from each other to avoid confusion. In any event, this was not a concern raised by the Claimant in his resignation email of 5 February 2018.

The Attendance at Work Issue
(Ninth and Twelfth Issues)

65. The Respondent had a Policy relating to Attendance and Procedure in managing it. Ms Kine gave evidence, that the processes relating to the management of attendance, conduct and performance were separate from in each other. This meant that any sanction imposed within one process would not relate to, or impact upon any sanction imposed within the other. This is relevant in this case because the Claimant, who was subject to a final written warning within the disciplinary process, was then subject to a sanction in respect of his poor attendance following his meeting with Ms Kime.

66. The Claimant did have a significant amount of sickness absence from 2014 until the date when his employment terminated in 2018. Prior to the disciplinary action in the summer of 2017, he had experienced a period of sickness absence relating to 'stress/anxiety' from October 2014 until February 2015. However, the absences experienced before the disciplinary issue arose in 2017 were not described in the sickness records as being related to mental health issues. These entries would not have put the Respondent on alert that he might be under significant stress. The next period of sickness absence where the records identified 'stress/anxiety' took place during August and September 2017 and from November 2017 onwards, appeared to be connected with the Claimant being subject to a disciplinary process and having raised a number of grievances.

67. The Claimant was subjected to action under the Attendance at Work Policy in January 2018 and was interviewed at an Initial Formal Warning ('IFW') Meeting by Charlotte Kime on 10 January 2018. Ms Kime gave evidence concerning this issue. The reason for the meeting was that the Respondent's managers were concerned about the Claimant's attendance and his future ability to provide regular and effective service. An absence history was identified in the IFW checklist document and during 2017, the Claimant was recorded as having 51 days off sick with 45 of the most recent sick days being described as due to 'stress/anxiety'.

68. Ms Kime confirmed that she was asked to carry out the interview by Sarah Molloy and about whom she said during cross examination, '…*no matter what was going on, Sarah Molloy was still the senior manager'.* Ms Kime went on to explain that she was appointed as interviewer at the IFW, because of the managers in Bedford, Mark Kavanagh was the subject of a grievance brought by the Claimant and the other local manager Joseph Mwaala was acting up in this role and did not have enough experience. There were two other possible managers based in Leeds, but as Ms Kime was based in the West Midlands, she said it was felt that she was the best person to act as interviewer.

69. It was not in dispute that the Claimant was supported at the IFW by his union representative Gary Good. Mr Mwaala attended as a note taker. It

was also not in dispute that while Ms Kime asked permission of the Claimant to record the meeting using her mobile phone. The Claimant also recorded the meeting, but did so covertly and without asking the permission of Ms Kime. Understandably, she was unhappy that the Claimant had taken this action. A transcript of the Claimant's recording was made by the Respondent during the course of the proceedings and was available within the hearing bundle together with a shorter edited version provided by the Claimant.

70. The meeting appeared to have been somewhat difficult and Ms Kime felt that the Claimant displayed a demeanour at times that was '*very arrogant'* and she said he was unwilling to discuss mitigating circumstances relating to his absences and was unwilling to discuss these details with her. She had already explained to the Claimant that the IFW allowed her to consider evidence from him and decide whether an informal warning should be issued concerning absences, or whether there were mitigating circumstances that might justify the temporary absences. The information that she requested was not unreasonable under the circumstances, but from the evidence it appeared that the Claimant was more concerned about the grievances that he had raised. Indeed, the transcript of the IFW clearly shows Ms Kime offering the Claimant an Occupational Health referral and he refused.

71. I found Ms Kime to be a reliable witness and her sensitivity towards issues of mental health suggested to me that she was doing her best to support the Claimant in relation to this process.

72. Ms Kime made clear at the IFW meeting that she wanted to explore which action she was going to take and the discussion was prompted by the Claimant having 3 absences in one year. She would then reach a decision as to what action to take within the scope of the Respondent's policy on sickness absence. The Claimant had an opportunity to raise mitigating circumstances that might influence her decision, but chose not fully avail himself of that opportunity.

73. Ms Kime confirmed that she did allow 5 days before confirming her decision following the IFW meeting and this was because of issues raised by the Claimant and Mr Good concerning his ongoing grievances. Ms Kime agreed that she would check with Human Resources before doing so. In any event, she decided to issue an Initial Formal Warning and set this out together with reasons and support that could be offered, in her letter to the Claimant of 15 January 2018.

<u>The Claimant being asked to come into work whilst off sick</u>
<u>*(Tenth Issue)*</u>

74. The Claimant was recorded in the Respondent's Absence History as being absent from work due to ill health from 24 August 2017 until 18 September 2017 and then from 20 November 2017 until 8 December 2017 with stress/anxiety.

75. The Claimant was suspended from work during an investigation into the 'Phishing email' matter and to consider potential disciplinary action. This started on 21 September 2017 and on 6 November 2017, Allan Lane wrote to the Claimant asking him to return to work on 20 November 2017 as the suspension had ended.

76. At a return to work meeting on 20 November 2017 with Emmanuel Adjel, the Claimant explained that he was subject to a GP fit note and was signed off due to work related stress. Following this meeting, the Claimant returned home taking sick leave.

77. During Ms Kime's evidence, it became clear that this confusing situation arose because the Respondent's systems did not record someone as being signed off sick from work while they were suspended during a disciplinary investigation. This explains why the Claimant was asked to return to work once the suspension had concluded by Mr Lane and why he did not seek to have the Claimant's GP or their own Occupational Health physician consider whether the Claimant was fit to return to work. It was surprising that the Claimant did not contact his line manager to inform him of the doctor's fit note upon receipt of Mr Lane's letter.

78. It does seem that the Respondent should review its systems of recording absence in this regard in order that both suspensions and sickness absence are recorded concurrently, but in relation to this incident, it would appear that the Claimant was asked to return to work due to a genuine error. Once it was clear at the return to work meeting that he was unfit for work, he was immediately allowed to return home and his sickness record confirms his absence as starting from this date.

The Claimant's resignation?
(Thirteenth Issue)

79. The Claimant sent a lengthy email on 7 February 2018 which he spent one and a half hours preparing when he arrived at work that day. The Claimant is quite explicit in this email that he *"quit"* and he was critical of how he had been treated by Management. The Claimant argued that while this was the case, the Respondent was aware of his mental health issues and should have treated the email as a *"cry for help"* rather than a resignation email.

80. I heard evidence from Mr Bartlett and Ms Chatt concerning this matter. When the email was sent, the Claimant got up from his desk and left his workplace without telling anybody what he was going to do. Understandably, his Managers were concerned as to his well being and I am satisfied that steps were taken to locate the Claimant and to check he was not in any danger. Mr Bartlett confirmed that he had asked Theresa Hyde who was dealing with the resignation, to make further enquiries before acting upon the resignation. An added difficulty regarding this

search was that the Claimant had resided in a number of addresses at this time and two managers tried three different addresses before locating the Claimant.

81. By 9 February 2018, the Respondent had received confirmation that the Claimant was safe. The Respondent had not received any further correspondence from the Claimant by this point seeking to withdraw his email or asking to meet to discuss any issues that he had.

82. As a consequence, the Respondent accepted the Claimant's notice of resignation on 9 February 2018 and his employment was terminated on this date.

The Law

83. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the Employer's conduct.

84. In Western Excavating (ECC) Ltd. v Sharp [1978] ICR 221, it was held that in order to claim Constructive Dismissal an employee must establish:

(i) that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach); (note that the final act must add something to the breach even if relatively insignificant: Omilaju v Waltham Forest LBC [2005] IRLR 35 CA). Whether there is breach of contract, having regard to the impact of the employer's behaviour on the employee (rather than what the employer intended) must be viewed objectively: Nottinghamshire CC v Meikle [2005] ICR 1.

(ii) that the breach caused the employee to resign – or the last in a series of events which was the last straw; (an employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to plead Constructive Unfair Dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract; see Logan v Celyyn House UKEAT/2012/0069. Indeed, once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon; see: Wright v North Ayrshire Council EATS/0017/13/BI); and

(iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim Constructive Dismissal.

85. All contracts of employment contain an implied term that an employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores Plc [2002] IRLR 9.

86. In Aberdeen City Council v McNeill [2010] IRLR 375, the Employment Appeal Tribunal held that the implied term of trust and confidence was mutual; neither the employer nor the employee would, without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The Employment Appeal Tribunal ruled that if the employee was, at the time he resigned, in breach of that implied term, he is in repudiatory breach and not entitled to terminate the contract on the basis that the employer had itself breached that implied term. This case was determined by reference to Scottish law and the decision of the Employment Appeal Tribunal was overturned by the Inner House of the Court of Session; [2013] CSIH 102.

87. In Croft v Consignia Plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.

88. In Cantor Fitzgerald International v Callaghan [1999] IRLR 234, the Court of Appeal held that whether or not non-payment of agreed wages, or interference by an employer with a salary package, is or is not fundamental to the continued existence of the contract of employment depends upon the critical distinction to be drawn between an employer's failure to pay, or delay in paying, agreed remuneration, and his deliberate refusal to do so. An emphatic denial by the employer of his obligation to pay the agreed salary or wage, or a determined resolution not to comply with his contractual obligations in relation to pay and remuneration, will normally be regarded as repudiatory. On the other hand, where the failure to pay or delay in paying represents no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness or accident or unexpected events, it is open to the court to conclude that the breach did not go to the root of the contract. However, if the failure or delay were repeated or persistent, perhaps also unexplained, the court might be driven to conclude that the breach or breaches were repudiatory.

89. It is open for an employer to argue that, despite a Constructive Dismissal being established by the employee, that the dismissal was nevertheless fair. The employer will have to show a potentially fair reason for the dismissal and that will be the reason why the employer breached the employee's contract of employment; see Berriman v Delabole Slate Ltd. [1985] ICR 546 CA. The employer will also have to show that it acted reasonably. If an employer does not attempt to show a potentially fiar reason in a Constructive Dismissal case, a Tribunal is under no obligation to investigate the reason for the dismissal or its reasonableness; see Derby City Council v Marshall [1979] ICR 731 EAT.

90. The Respondent's representative, Mr Wade, also provided myself and the Claimant with a copy of the Court of Appeal decision in the case of Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978. This case considers the law in relation to constructive dismissal and helpfully summarises the questions that should be asked by a tribunal when a claim of constructive dismissal is being claimed.

Discussion and Analysis

The Claimant's Resignation

91. While the Claimant was very unhappy at the time he sent the email on 7 February 2018, I did not hear any evidence which persuaded me to believe that the Claimant put the Respondent on notice that he was suffering from mental health issues at this time which would make a reasonable employer believe that his resignation was unclear.

92. Had the Claimant sought to qualify or withdraw his email shortly after it had been sent, it may have made matters somewhat different. However, it is clear that the Respondent, made further enquiries as to the Claimant's whereabouts and allowed two days to elapse before accepting his resignation. In the absence of any contrary indication from the Claimant during this period, it was reasonable for the Respondent in this case to reach the conclusion that his resignation was unequivocal.

93. Accordingly, I find that the Claimant did give notice of his resignation by email on 7 February 2018 and it was reasonable for the Respondent to rely upon this. The Respondent appeared to accept the resignation on 9 February 2018 once it had made enquiries as to the Claimant's whereabouts and this was the date when the termination of employment took place.

Was there a fundamental Breach of Contract?

94. It was clear from the evidence that I heard concerning the Claimant's training and performance management in 2014 and 2015 that he was the subject of appropriate supervised training plans and was given plenty of

time to become efficient enough to work alone. He was given 10 months before any sanction was considered and was allowed to continue in his role. I find that the Respondent behaved reasonably towards the Claimant and nothing that was done concerning his training or the imposition of a sanction for poor performance amounted to a fundamental breach of contract.

95. The Claimant asserts in his resignation email of 7 February 2018, that he had raised grievances and felt that everything '*has gotten out of control'*. It is correct that he had a raised a number of grievances during late 2017 and these appeared to be against Ms Molloy and those managers involved in his disciplinary process and sickness absence process. The Respondent broadly followed a reasonable process in dealing with these grievances and which were complicated by the Claimant's decision to use non-standard methods of raising some of the grievances and also adding additional grievances as decisions were made in relation to disciplinary or sickness processes were made. The Claimant was afforded the opportunity of an appeal and those remaining grievances relating to the Respondent's employees were considered in detail by Mr Bartlett on 15 September 2017. Mr Bartlett was clearly thorough in how he dealt with the grievance and quite reasonably identified a long standing issue that the Claimant had with Ms Molloy and which required some sort of resolution. He therefore sought to arrange independent mediation to resolve this matter and this would suggest that he was being more than perfunctory in dealing with this matter. It is unfortunate that the Claimant chose not to read the Mr Bartlett's decision concerning the grievance as it may well have assisted him in restoring his working relationship with Ms Molloy.

96. It appears that the Claimant in his resignation email was most concerned about Mr Bartlett's qualifications concerning the grievance process. However, the transcript of the covert audio recording made by the Claimant suggests that he was actually content with Mr Bartlett conducting the grievance meeting and it was an amicable process. This does not support a concern being raised about Mr Bartlett's competence to hold the meeting and certainly does not amount to a fundamental breach or the last of a series of events that could be described as 'a last straw', as described above.

97. In his resignation email, the Claimant explains that he was unhappy with Mr Bartlett's qualifications in relation to his hearing the disciplinary appeal on 15 February 2018. However, the transcript of the disciplinary hearing using the Claimant's covert audio recording does not indicate that this was an issue and the meeting was reasonably amicable. The Claimant does not agree with the actual decision reached by Mr Bartlett, but taking into account the manner in which the disciplinary process was conducted and the Claimant's acceptance of his misconduct, this does not amount to a fundamental breach. It appears that he attributes the formal warning in the resignation email to decisions made by Sarah Molloy. However, as she was not a decision maker in the disciplinary process, it is not reasonable

for the Claimant to conclude that she was the 'controlling mind' behind this process.

98. While it was understandable that the Claimant might have become suspicious of any action taken by the Respondent following the number of grievances he had raised, I am satisfied that Ms Kime was properly asked to invite the Claimant to the IFW. The Claimant's level of absence justified this process being activated. Ms Kime was properly appointed and indeed account was taken of the grievance involving another manager Mr Kavanagh. Ms Molloy was no doubt involved to some extent as overall manager, but it was reasonable for the process to take place and the IFW actually served as a means for the Claimant to provide mitigation for the absences and to thereby avoid the imposition of a sanction. Whatever his reasons were for not doing so, the Claimant failed to take advantage of this opportunity. It is unfortunate that he took this decision, but insofar as this Tribunal is concerned, the Respondent behaved reasonably in relation to this particular issue.

99. The request that the Claimant return to work following suspension on 20 November 2017 while still subject to a doctor's fit note appeared to be a genuine mistake and while an unfortunate problem with the Respondent's absence recording systems, did not amount to a fundamental breach of contract or more importantly, part of a series of events culminating in a last straw shortly before his resignation.

Did a breach cause the employee to resign?

100. The Claimant's resignation email would suggest that his motivation for resigning was the long-standing issues that he had with Sarah Molloy, the grievances that he subsequently raised and his unhappiness about the disciplinary action taken against him.

101. In terms of what triggered the decision to resign, it would appear to be the outcome of the hearings which took place on 15 January 2018. In this respect, the Claimant appeared to only have read the decision relating to the disciplinary appeal as he had not read the grievance outcome letter sent by Mr Bartlett. However, the tone of the resignation email suggests that he was unhappy about the outcome or anticipated outcome of both processes and was unwilling to engage with management to seek a resolution of these long-standing issues.

102. The decision of Mr Bartlett in relation to the disciplinary appeal was dated on 5 February 2018 and it was not doubt something that played a major role in his decision. He was clearly minded to resign and on his own evidence spent one and a half hours drafting it on the morning of 7 February 2018. It was in his mind a final straw in relation to his ongoing anxieties about the other matters which have formed the issues of this case and in particular the grievance process. In this respect, he did not delay too long before resigning. However, while this might be the case, I

do not find that any of these reasons amounted to a fundamental breach or the decision in the disciplinary appeal amounted to a last straw which justified his resignation on grounds of constructive unfair dismissal.

103. Had the Claimant not resigned, there was no reason why he could not have remained in employment. The grievance process had been concluded and the opportunity was available for the long outstanding issue that he had with Ms Molloy to be resolved through mediation. While he was unhappy with the outcome of the disciplinary appeal, he was able to continue with his employment and to work out his final written warning. I did not hear any evidence which convinced me that the Respondent would not have supported the Claimant at work and allowed him to continue in his employment.

Conclusion

104. For the reasons given above the conclusion of the Tribunal is that the Claimant's claim of Constructive Unfair Dismissal is not well founded and is dismissed.

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Employment Judge Johnson

Date: 10 October 2019

Sent to the parties on: .....

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For the Tribunal Office