EMPLOYMENT TRIBUNALS

claimant: Mr Andrew Davies

respondent: Blackburn with Darwen Borough Council

Heard at: Manchester **On:** 14-17 November 2023
8-12 January 2024

Before: Employment Judge Cookson
Mrs A Booth
Ms V Worthington

REPRESENTATION:

claimant: Mr D Flood (Counsel)
respondent: Mr A Barron (Solicitor)

JUDGMENT

The judgment of the majority of the Tribunal, Employment Judge Cookson dissenting, is as follows:

1. For the purposes of section 95(1)(c) of the Employment Rights Act 1996 ("ERA"), the claimant terminated the contract under which he was employed in circumstances in which he was entitled to terminate it without notice by reason of the employer's conduct.

2. The claimant's complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

The unanimous judgment of the Employment Tribunal is that:

3. The claimant was not dismissed by the respondent in accordance with section 95(1)(a) of the ERA.

4. The complaint of unfavourable treatment because of something arising in consequence of disability is well-founded and succeeds.

5. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.

6. The complaints of direct and indirect age discrimination are dismissed on withdrawal.

7. The Tribunal has been unable to determine the question of wrongful dismissal and further submissions are required from the parties for the reasons explained below.

REASONS

Introduction

1. These Reasons explain why the Tribunal determined its judgment in this case.

2. The claimant in this case, Mr Davies, is 59 years of age. He is referred to as "the claimant" throughout these Reasons. He was employed by the respondent, a local authority, from 31 August 1993 until 20 April 2022. On 15 June 2022 he commenced early conciliation, and an ACAS early conciliation certificate was issued on 26 July 2022. A claim was lodged with the Employment Tribunal on 26 August 2022 against the respondent bringing complaints of (as clarified at this hearing):

(a) Unfair dismissal, pleaded in the alternative that the claimant was dismissed by the respondent in accordance with section 95(1)(a) or that he was entitled to terminate his employment without notice by reason of the employer's conduct in accordance with section 95(1)(c) of the Employment Rights Act 1996;

(b) That the claimant was subject to unfavourable treatment because of something arising in consequence of his disability;

(c) Failure to make reasonable adjustments pursuant to section 20 of the Equality Act 2010;

(d) Direct age discrimination;

(e) Indirect age discrimination;

(f) Wrongful dismissal.

3. The respondent denies all of the claims. It asserted that the claimant voluntarily resigned from his employment. It denied that he was disabled.

4. As explained in the discussions and conclusions section of this Judgment, the claimant withdrew his age discrimination complaints at the start of submissions, and those claims have accordingly been dismissed on withdrawal.

Evidence and Witnesses

5. In reaching this judgment the Tribunal considered:

a. A joint bundle prepared by the respondent which runs to some 645 pages;

b. Evidence in witness statements and given orally for the respondent by:

   i. Mr Watson, Head of Environment;

   ii. Mr Addison, formerly employed by the respondent as Service Lead for Construction and Facilities;

   iii. Mr Kinder, formerly employed as Head of Estates and Property.

c. Evidence in witness statements and given orally for the claimant by:

   i. The claimant;

   ii. Mr Wolstenholme, formerly employed by the respondent as Building Liaison and Responsive Management Manager

   iii. Mr Crew who appeared before us as the claimant's trade union representative.

d. Oral submissions provided by Mr Flood on behalf of the claimant and written submissions from Mr Barron.

6. There was a preliminary hearing in this case on 22 February 2023 before Employment Judge Shotter which records that further and better particulars of the constructive dismissal complaint had been provided, but which required further clarification from the claimant about his complaint. The parties were subsequently able to agree a List of Issues which was discussed at the outset of this hearing. At the outset of the hearing an issue arose about whether the claimant may have suggested that he had in fact been dismissed by the respondent. That is what is commonly referred to as a "Hogg v Dover College" dismissal which is discussed in further in the law and discussion sections below. Mr Flood confirmed that was the case and Mr Barron raised no objections to the tribunal considering actual and constructive dismissal in the alternative.

7. Mr Flood subsequently provided a documents referred to as "particulars of amendment" clarifying the terms on which it was alleged that the respondent had imposed a unilateral change of terms on the claimant that were so different from his original terms of employment as to amount to a termination.

8. It was not possible to conclude the evidence in this case during the original trial window. That was mainly due to the volume of documentary and witness evidence but, in addition, during the cross-examination on day 4, Mr Flood raised concerns about the claimant's ability to answer questions and it transpired that he had had very little sleep and was unable to focus and follow the tribunal proceedings. In the circumstances we adjourned for the day and started a little the following day. We took that into account in assessing Mr Davies' evidence.

The Relevant Law

Unfair dismissal

9. Under s94 of the Employment Rights Act 1996 (ERA), employees with qualifying service have the right not to be unfairly dismissed. In order to claim that right an employee must be dismissed by the employer in accordance with s95 of the ERA.

10. S95 provides as follows

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.

(2)An employee shall be taken to be dismissed by his employer for the purposes of this Part if—

(a)the employer gives notice to the employee to terminate his contract of employment, and

(b)at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire; and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

Termination by the employer

11. It is usually obvious if an employee has been dismissed by their employer in accordance with section 95(a) but that is not always the case, and it can be that by though the respondent's conduct there is a termination of the claimant's contract of employment. These are often called *Hogg v Dover College*[1] dismissals after the leading case.

12. The case law is this area was reviewed relatively recently by Judge Barry Clarke in he EAT in the case of *Miss Clare Jackson v The University Hospitals of North Midlands NHS Trust* (Case No: EA-2022-000134-LA). This helpful reminds us it is not a case looking for a more serious than usual repudiatory breach by an employer. What we are looking to see if whether the contract under which the employee is employed has been terminated by the employer – if it has the dismissal falls within s 95(1)(a). The complicating factor is that such cases arise when the employer has not explicitly

[1] [1990] ICR 39 EAT

terminated the contract but rather purported to vary it in some way. As Judge Clarke records in his judgment *"The EAT in both Hogg and Alcan Extrusions [v. Yates [1996] IRLR 327 adopted various expressions that act as helpful guides to whether variation constitutes termination, such as "radically different terms", "wholly different terms" and "totally new terms", but they are not a proxy for the simple question, as articulated in Hogg and based on the statutory wording, that a tribunal must answer"*. The question is has the employer terminated the original contract and imposed a new one? To answer that the Tribunal must do a comparison of the contracts to ascertain whether the new terms were of sufficient difference to amount to the withdrawal of one contract and its replacement by another

Termination by the employee in response to the employer's conduct – "Constructive dismissal"

13. In contrast to a *Hogg v Dover College* dismissal above a constructive dismissal is a dismissal falling within termination under Section 95(1)(c) above ie "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."

14. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in *Western Excavating (ECC) Limited v Sharp* [1978] IRLR 27. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

15. In this case the claimant relies in part on the implied term of trust and confidence. In *Malik and Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20 the House of Lords considered the scope of that implied term and Lord Nicholls expressed it as being that the employer would not: "…without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

16. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."

17. In *Bournemouth University Higher Education Corporation v Buckland* [2010] ICR 908 the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in *Malik*.

18. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in *Malik* recognises that the conduct must be likely to destroy or seriously damage the

relationship of confidence and trust. In *Frenkel Topping Limited v King* UKEAT/0106/15/LA 21 July 2015 the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

> *"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:*
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> *"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."*
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> *13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.*
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> *14.The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.*
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> *15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."*

19. In some cases the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35 confirms that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal reaffirmed these principles in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978. Even if the last straw turns out to be innocuous or trivial, there might still have been a constructive dismissal if previous conduct amounted to a

fundamental breach which has not been affirmed: *Williams v Alderman Davies Church in Wales Primary School* UKEAT/0108/19/LA

20. The law relating to the reason for a resignation after a repudiatory breach was reviewed by the EAT (Langstaff P presiding) in *Wright v North Ayrshire Council* [2014] IRLR 4. If an employee has mixed reasons for resigning it is enough if the repudiatory breach played a part in that decision. It need not be the sole, predominant or effective cause. That is particularly clear from the decision of the Court of Appeal in *Nottingham County Council v Meikle* [2005] ICR 1. At paragraph 20 of Wright Langstaff P summarised it by saying *"Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause*."

21. The position as to affirmation once a fundamental breach has occurred was recently considered by the EAT (Langstaff P presiding) in *Chindove v William Morrisons Supermarket PLC* UKEAT/0201/13/BA (26 March 2014). In considering whether the passage of time alone could indicate affirmation, the EAT said this in paragraphs 25-27

> *"25….We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.*
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> *26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.*
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> *27. An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go.*

Where an employee is sick and not working, that observation has nothing like the same force…."

Disability Claims under the Equality Act

Meaning of Disability

22. Section 4 EqA identifies "disability" as a protected characteristic. Section 6(1) defines disability:

A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

23. The claimant in this case has had cancer which is defined as a disability by the Equality Act. Despite the fact he appears before us to link his stress and anxiety in part at least to his cancer, the claimant does not rely on his cancer as the disability but instead says he was disabled by reason of his anxiety and depression. Those conditions are not accepted as amounting to a disability by the respondent.

The burden of proof in discrimination cases

24. s136 Equality Act states that

"(1) This section applies to any proceedings relating to a contravention of this Act.

(2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred

(3)But subsection (2) does not apply if A shows that A did not contravene the provision."

25. This section reflects what is often called the shifting burden of proof. The law recognises that direct evidence of discrimination is rare and employment tribunals frequently have to infer discrimination from their findings of material facts. The law requires the claimant to show facts which could suggest that there was discriminatory reason for the treatment, but the claimant does not have to prove discrimination.

26. It is only if the claimant shows facts which would, if unexplained justify a conclusion that discrimination had occurred, that the burden shifts to the employer to explain why it acted as it did. The explanation must satisfy the Tribunal that the reason had nothing to do with the protected characteristic.

Discrimination because of something arising in consequence of disability – s 15 Equality Act

27. Section 15 EqA defines discrimination arising from a disability

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had a disability."

28. Section 15 EqA is particular to people with disabilities. It recognises that the reason for discriminatory treatment might not be the disability itself (that would be direct discrimination) but because of the way the disability impacts on the disabled person, for example because they had to take a lot of time off due to sickness absence caused or related to their disability.

29. The treatment is unlawful if it is "unfavourable" rather than "less favourable" which means that no comparator is required for this form of alleged discrimination.

30. s15 EqA requires unfavourable treatment to be because of something arising in consequence of the disabled person's disability. If the something is an effective cause – an influence or cause that operated on the mind of the alleged discriminator to a sufficient extent (whether consciously or unconsciously), the causal test will be satisfied. The employer's motivation is irrelevant. It is sufficient for a claimant to show facts from which the tribunal could reasonably conclude that there is some causal link, and that the unfavourable treatment has been caused by an outcome or consequence of the disability. If the claimant does that the burden shifts to the respondent to show that there was a non-discriminatory reason for the treatment.

31. Even if a claimant succeeds in establishing unfavourable treatment arising from disability, the employer can defend such a claim by showing either that the treatment was objectively justified, or that it did not know or could not reasonably have known that the employee was disabled.

32. There is guidance for tribunals about how to approach s15 claims in the case of *Pnaiser v NHS England and anor* 2016 IRLR 170, EAT. Mrs Justice Simler summarised the proper approach to establishing causation under S.15 is as follows:

    a. First, we must identify whether the claimant was treated unfavourably and by whom.

    b. Next we must then determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant.

    c. We must then establish whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective

question and does not depend on the thought processes of the alleged discriminator.

Failure to make reasonable adjustments

33. The Equality Act (EqA) imposes a duty on employers to make reasonable adjustments for disabled people. The duty comprises three requirements. In this case we were concerned with the first requirement. This is set out in sub-section 20(3) and references to A are to an employer.

"(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

34. Paragraph 20(1)(b) of Part 3 of Schedule 8 of the Equality Act says that the duty to make reasonable adjustments does not arise if the employer: *"does not know and could not reasonably be expected to know – "(b) …that an interested person has a disability and is likely to be placed at the disadvantage referred to…"*

35. S21 of the Equality Act provides

"Failure to comply with duty

(1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

36. It is for the claimant to show what "provision, criterion or practice" it is alleged they have been subject to. The term is not defined in the EqA. However, the EHRC's Employment Code, explains how we should approach this as follows the term 'should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A [PCP] may also include decisions to do something in the future — such as a policy or criterion that has not yet been applied — as well as a "one-off" or discretionary decision' (para 4.5).

37. Where a disabled person claims that a practice (as opposed to a provision or criterion) puts him or her at a substantial disadvantage, the alleged practice must have an element of repetition about it and be applicable to both the disabled person and his or her non-disabled comparators.

38. In terms of how we should assess whether an adjustment is reasonable or not the Code of Practice says this,

"What is meant by 'reasonable steps'?

6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

6.24 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable."

39. Where a disabled person claims that a practice (as opposed to a provision or criterion) puts him or her at a substantial disadvantage, the alleged practice must have an element of repetition about it and be applicable to both the disabled person and his or her non-disabled comparators. It is common for complaints to be raised about decisions where it might not be clear whether this part of a "practice".

40. *Ishola v Transport for London* 2020 EWCA Civ 112, CA, is a case about a claimant who argued that requiring him to return to work without a proper and fair investigation into his grievances was a PCP which put him at a substantial disadvantage in comparison with persons who are not disabled. An employment tribunal found that this was a one-off act in the course of dealings with one individual and not a PCP. After that was upheld by the EAT, the Court of Appeal looked at the extent to which all "one-offs" could be said to be "practices".

41. Lady Justice Simler accepted that the words 'provision, criterion or practice' were not to be narrowly construed or unjustifiably limited in their application, but she identified that it was significant that Parliament had chosen these words instead of 'act' or 'decision'. Her explanation is helpful. *"As a matter of ordinary language, it was difficult to see what the word 'practice' added if all one-off decisions and acts necessarily qualified as PCPs. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The act of discrimination that must be justified is not the disadvantage, but the PCP. To test whether the PCP is discriminatory or not it must be capable of being applied to others. However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. The words 'provision, criterion or practice' all carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. Although a one-off decision or act can be a practice, it is not necessarily one*."

Our Findings in this Case

Findings of Fact

42. The Tribunal has made our findings of fact in this case based on the material before us, taking into account contemporaneous documents where they exist. Conflicts of evidence which arose were resolved on the balance of probabilities and

the Tribunal took into account our assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts. We did not make findings of fact about every contested matter of evidence before us, but only those which we considered to be relevant and necessary for us to determine the complaints contained in the claim.

43. In terms of credibility of witnesses much in this case turned on the credibility of the evidence of the evidence of the claimant and Mr Addison. Mr Addison repeatedly told the Tribunal that he could not recall what happened when he was asked questions about why particular things had been done or said where he might reasonably have been expected to provide an explanation for his actions, although he was very definitive in his answers about other things. The tribunal unanimously found him to be evasive and selective in his evidence. This affected how much weight we could attach to his evidence.

44. As the judgment above records, the Tribunal Panel were not able to reach a unanimous judgment in relation to the alleged constructive dismissal. The differences in factual conclusions and how that was reflected in the overall conclusions drawn about the case are explained in the discussion and conclusions section of this Judgment.

45. This is a somewhat unusual case. We were given extensive evidence of the history of the last few years of the claimant's employment, but in terms of the legal issues we had to determine, the events are very limited in time and are centred on a request for clarification about his role sent by email via the claimant's trade union on 15 March 2022. It is however necessary to summarise briefly what led to that email in our findings of fact.

46. As noted above, the claimant was employed by the respondent as a Principal Building Surveyor (PBS) at the time his employment ended. He started his employment as a surveyor. In 2001 his employment was transferred to Capita and in 2008 he was promoted to the role of PBS. On 1 July 2016 his employment was transferred back to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations. In 2016 Mr Addison had joined department working as a Building Estate Surveyor, initially junior to the claimant.

47. In late 2016 the claimant's then line manager, Mr Baker, became unwell and the claimant undertook some of his duties on an interim basis, for around nine months. Mr Baker ultimately resigned his employment and Mr Addison was promoted to the role of Building Consultancy Manager (BCM). The claimant had not applied for this role. The claimant now reported into Mr Addison who in turn reported to Mr Lee Kinder, the Head of Estates and Property.

48. The respondent's witnesses in this case agreed that the claimant was regarded as a very experienced and technically very able building surveyor with outstanding knowledge of his subject area. In his witness statement Mr Addison however was critical of the claimant's leadership and line management skills, but the Tribunal were not satisfied by his evidence explaining those criticisms which we found to be vague and unsatisfactory.

49. Further, given the criticism made by Mr Addison of the claimant's performance we were troubled by the lack of contemporaneous evidence. It seems that the claimant

never had any formal appraisals despite this being a breach of Council policies and there is no specific record of any concerns about his performance. We found that inexplicable and it went to the credibility of significant elements of Mr Addison and Mr Kinder's evidence.

50. At the time he transferred back to the respondent from Capita, the claimant had day-to-day management for three building surveyors. It is not disputed that Mr Addison took on the responsibility of supervising the building surveyors shortly after he commenced in the role of BCM. The claimant described that as Mr Addison taking away his responsibilities for supervision and gradually taking away most of his management responsibilities so that he ended up mainly dealing with building projects. In essence the building surveyors within the team only came to the claimant for technical advice. Mr Addison described that as him assuming the responsibilities for the management of the building surveyors so that the claimant could take on more technical projects given his grade and level of expertise.

51. In early 2019 Mr Addison approached the claimant to suggest that he was concerned about him and that he wished him to undergo an Occupational Health assessment. Mr Addison suggested that this was because concerns had been raised about the claimant's behaviour (although there is no evidence in the bundle recording those concerns). The OH referral form does not refer to concerns in specific terms, with the reason given for the referral is changes to the claimant's attitude towards work and the claimant seeming nervous.

52. The claimant disputed that there had been any grounds for criticism, but he attended an Occupational Health appointment, and a report was provided to the respondent. The report was provided on 5 February 2019 by a Dr Andrews. Dr Andrews recorded that the claimant had been surprised that he was being asked to attend an Occupational Health consultation and that he had not been aware of any issues regarding his performance.

53. The report does go on to record that the claimant had been subject to increasing stress at work, in part due to a difficult contractor, and that there were increasing demands within his role and that he was not always well supported. The assessment recorded that the claimant was tense but did not appear overtly depressed and using the PHQ-9 scale for depression, he scored 5 out of 27; and using the GAD-7 scoring for anxiety he scored 6 out of 21. The summary of the report was that the claimant was experiencing some degree of work-related stress, but was coping satisfactorily within his role. No formal intervention or management was recommended but the doctor expressed the view that there was some reluctance on the part of the claimant to admit the degree of stress he was experiencing, and a recommendation was made that he should regularly meet his line manager to assess his progress.

54. A welfare meeting was held on 5 March 2019. At that meeting the claimant explained to Mr Addison that his father had been diagnosed with the early stages of dementia and there was some discussion about the pressures he felt he was under. It is relevant to the facts in this case to record that the claimant has caring responsibilities for his elderly parents.

55. In the course of a later subject access request submitted by the claimant, a copy of Dr Andrews' letter of advice was disclosed which includes various annotations

made by Mr Addison which are critical and somewhat hostile although it seems the claimant did not see them at the time.

56. Following the meeting Mr Addison wrote to the claimant to provide an outcome from the welfare meeting. That letter refers to things which had been discussed in the course of the meeting. It says that the meeting was to discuss welfare and not performance, but it also says:

"There was a discussion around performance, strengths, weaknesses, behaviours and expectations but it was agreed that this was not a performance related meeting, although it was discussed that as the needs and direction of the council continued to change there are likely to be pressures placed on a principal surveyor along with a certain level of behaviours and expectations."

57. The claimant alleged that at the meeting it was stated that if he was struggling with the role he should consider stepping down to a junior role, that of building surveyor rather than principal surveyor. That is not reflected in the notes, but Mr Addison does not dispute that this was something raised with the claimant, he says in a supportive way as an alternative role for the claimant to consider. The claimant also says that Mr Addison questioned what line management responsibilities the claimant was carrying out in a critical way, and that the claimant had pointed out to him it was Mr Addison who had taken those away from him.

58. Following that meeting the claimant complained to Mr Kinder about the meeting and raised concerns with his trade union, although it does not appear that any formal complaint was lodged. Although the claimant had clearly expressed dissatisfaction with how the meeting had been handled, no grievance was raised.

59. On 12 March 2019 the claimant was informed by his trade union representative that his job was being reviewed. The claimant understood this to mean that his job might be at risk and he was clearly deeply suspicious about Mr Addison's possible role in that, but it appears that subsequent enquiries revealed that it a different role being reviewed, that of principal surveyor in the Growth and Development Department. The claimant had perceived this as being a sign of underhand tactics of his manager, but he accepted in cross examination that this appears to have been a mistake by his trade union representative.

60. Early in April 2019 (the precise date is unclear) the claimant was sent a letter inviting him to an informal performance management meeting to be held on 9 April 2019. The letter said that this meeting did not form part of the formal stages of the council's performance management policy and that there was no possibility of a notice of improvement being issued at the meeting, but the claimant would be entitled to be accompanied at the meeting and that its purpose was to discuss the claimant's performance and to look at ways Mr Addison could provide support. In the end the meeting discussed welfare issues and no performance issues were taken forward. Although there is reference in the letter to performance concerns, there are no contemporaneous evidence about the concerns in question.

61. In March 2020 with the advent of the Covid lockdown the claimant (along with the rest of his team) began working from home. The claimant's caring responsibilities increased. Over that summer into the autumn the claimant's mother began to experience serious health issues, including experiencing blackouts. The claimant was

also caring for his father who was suffering from dementia. It would later transpire that his mother's blackouts were caused by an issue with her pacemaker, but that was not diagnosed and resolved until March/April 2021 and understandably the claimant had a long period of very serious concern about her health.

62. In late August 2020 Mr Addison began to seek to encourage the team to return to the office on a rota basis. Mr Addison contacted the claimant at home and told him that he needed to return to the office in order to undertake the role of PBS and that if he did not do so his role would be downgraded to that of building surveyor. The claimant contacted his trade union, who told the claimant that the council's policy on working from home if possible had not changed. The background to this was that at the time the UK was generally coming out of lockdown, but levels of covid in the North of England, and in the Blackburn area in particular, were very high. The claimant wanted to work from home but attend site visits as required. He had concerns about returning to the office which he felt was contrary to the guidance of the respondent's Chief Executive and would cause a risk to his mother's health in particular because she had been classed as vulnerable. This caused conflict between Mr Addison and the claimant and undoubtedly contributed to the deterioration of their relationship, although there are no specific legal claims linked to this issue.

63. Over the course of 2020 senior roles within the respondent were restructured. Mr Kinder resigned and his role was removed from the structure. Mr Addison was promoted to a new post of Service Lead for Construction and Facilities ("Service Lead"), initially on a temporary, acting up basis. It appears the claimant understood that this was simply a new job title for Mr Kinder's previous role, but Mr Addison and Mr Kinder explained to us that the restructuring had in fact resulted in significant changes to the area of responsibility as a whole and their evidence about that is consistent with the team structure documents in the bundle. In particular, changes had been made to the scope of management responsibility for the Service Lead. Mr Kinder's role as Head of Estates and Property had been a higher grade reflecting the fact it was role with greater responsibility both in terms of executive responsibility and in terms of the numbers of teams and staff it covered. It was a role with a wider scope and more responsibility. The Service Lead role was a higher-grade role than that of BCM but lower than Head of Estates and Property reflecting those differences in executive and senior managerial responsibility.

64. When he took up the new role, Mr Addison asked if any of the team would help fulfil some of his existing duties managing the business of the team. The claimant agreed to resume management duties that had previously been taken from him which were part of the role of PBS.

65. The claimant's own witness evidence suggests that during October 2020 his relationship with Mr Addison may have improved slightly. The claimant took up his suggestion for holding team meetings, and Mr Addison asked the claimant to discuss with his team whether they would be able to offer assistance to the reactive team. That reflected changing workloads at the time caused by the impact of the Covid pandemic on work requirements because many planned works had been put on hold. The claimant told us this was sensible.

66. Unfortunately, in the course of November 2020 the claimant's mother became very unwell, both with covid and with the continuing effects of her health conditions. The personal pressure on the claimant at this time was undoubtedly significant.

67. Following the reinstatement of lockdown measures in early 2021, on 8 February 2021 the claimant informed Mr Addison that his mother was classed as vulnerable. Mr Addison asked the claimant if he was only prepared to work from home and in response the claimant said that he would be willing to do site visits, but he wanted to limit his exposure as much as possible to safeguard his mother's health. He told us he felt pressurised by Mr Addison to return to the office.

68. Later the same day the claimant contacted Mr Addison to say that he could not cope with the stress of working and that he was having a nervous breakdown because of work pressures and the difficulties he was facing caring for his elderly parents. The claimant was subsequently signed off work by his GP. The claimant reports that the pressure to return to the office had added to his stress and anxiety.

69. The claimant was invited to a formal welfare meeting which he attended with his trade union represented on 8 April 2021. An outcome letter was sent on 9 April 2021. The claimant's ability to return to work was discussed at the meeting and it was agreed he should be referred to Occupational Health.

70. The Occupational Health assessment was undertaken on 22 April 2021. The referral records that the claimant was the main carer for his elderly parents and had been signed off work for stress-related reasons, and in the manager's comment section it records that his position of principal building surveyor is a "*pressure [sic] role with management, financial and operational responsibilities*".

71. The assessment was undertaken by telephone and an Occupational Health report issued on 1 June 2021. The Occupational Health report is dated 20 May 2021 and was prepared by Ms Grant, an Occupational Health adviser. That records that in her opinion the claimant was fit to return to work with immediate effect with the suggestion that it may be supportive if he was allowed to work from home in light of his caring responsibilities and that he should return to work on week one to 50% of his hours, to be increased by mutual agreement. Ms Grant recorded that in the short-term the claimant was fit to work but *"with elderly parents to support the future is unknown".* Ms Grant advised that the claimant was unlikely to be regarded as disabled for the purposes of UK legislation because *"he has not been diagnosed with a health condition*" but refers to the possibility of the claimant being *"disabled by association"*, but that was not currently the case for the claimant. Although the report noted that the claimant does not suffer from a health condition, it did record that his caring responsibilities can cause symptoms of stress such as disturbed sleep, worry, tiredness and irritability which could impact on work.

72. At around the same time the claimant had a telephone assessment with a charity, "Minds Matter", that recorded a depression measure of 8 and an anxiety measure of 6.

73. In June 2021 the claimant saw his GP which resulted in him being sent for further tests, in due course he was diagnosed with cancer in September 2021.

74. At around the same time, the claimant was invited to a Stage One Absence Meeting which he attended on 16 June 2021 with his trade union representative. The claimant acknowledged that some of his stress was caused by issues at home, but he thought that some of it was also work-related, and he told the respondent that he wanted to take a period of annual leave and return to work on 1 July 2021. In his

witness statement the claimant confirmed that he felt Mr Addison was supportive at that time and had recognised the stress and anxiety he was under.

75. The claimant returned to work in July 2021, but the suspected cancer diagnosis and continued ill health of his parents was continuing to cause him stress and anxiety. At around this time there had been further team changes. Mr Addison had been permanently appointed as Service Lead and the building maintenance team manager, Mr Wolstenholme, had tendered his resignation. On his return to work the claimant was told that he would be taking on the management of both the building consultancy (BC) and the building maintenance team. In terms of whether this was a significant increase in workload, the claimant acknowledged in the course of cross examination that on his return to work his previous projects had been correctly reassigned to other members of his team and that it would not have been appropriate to transfer them back, and that as a result he had spare capacity. However the claimant also felt it was inappropriate because he was suffering from anxiety and stress at the time.

76. The claimant understood that he was being asked to act as a liaison between building maintenance and Mr Addison and referred to himself as such in an email he sent to Mr Addison on 15 July 2021. Mr Addison replied in somewhat hostile terms that this was not correct, the claimant was expected to manage both teams.

77. Over the course of August tensions grew between Mr Addison and the claimant about the claimant's return to working in the office. An email that he sent to his trade union representative on 16 August 2021 records that the claimant had taken over Mr Wolstenholme's responsibilities, that the situation at home was getting worse and that Mr Addison was insisting that the claimant return to the office more and "set an example".

78. Two days later, on 18 August 2021, the claimant sent an email to Mr Addison pointing out that the respondent was required to undertake an assessment for employees returning to the workplace who have vulnerable dependants who are shielding. Mr Addison replied and stated that he would carry out a risk assessment, but his view was that unless the claimant was vulnerable he could be expected to work in a covid safe environment and the letter makes clear that Mr Addison considered that the claimant needed to make himself more visible in the office and that the claimant could consider something that was more suitable if he could not do that. The claimant regarded that as further pressure to accept a demotion.

79. The following day the claimant went to see his GP as a result of which he was signed off work for two weeks. The claimant says that was caused by the stress and anxiety caused by managing two teams (his original team and Mr Wolstenholme's team) over and above his role of principal building surveyor, moving to a different site, undergoing an assessment for cancer together with his parents' ill health. The claimant told us he knew that if he stayed in work any longer he would have had a complete breakdown.

80. On 25 August 2021 the claimant was invited to a further Stage One Attendance Meeting. The claimant explained at that meeting that he was feeling anxious and had not been sleeping well, and he was referred for a further Occupational Health assessment.

81. On 7 September 2021 the claimant informed Mr Addison that he had cancer and that it was possible that surgical procedures would be required.

82. An Occupational Health assessment was undertaken on 17 September 2021. The report was prepared by Ms Canlin. The report she prepared recorded the sources of stress the claimant was subject to from the situation with his parents and the fact that he had been diagnosed with cancer. The claimant told Ms Canlin he had been given the work of two managers and that he could not cope, and had been told that he could either be demoted or leave, he was having ongoing issues with his manager and that he felt he was being set up.

83. Ms Canlin recorded symptoms of moderately severe depression and severe anxiety. She found that the claimant was unfit for work due to his symptom levels and thought that his prognosis was unclear. She informed the respondent that the claimant was unlikely to be considered disabled because his stress had not lasted for longer than 12 months. The following day the claimant went to see his GP again and was issued with a sick note until the end of October 2021. In fact he was never to return to work.

84. A welfare meeting was held with Mr Addison on 12 October 2021. At around that time the claimant submitted a data subject access request, and amongst the documents sent to him was a letter providing pension information and in particular a so called “strain payment calculation”, that is what payments the respondent would have to make to the Local Government Pension Scheme (LGPS) because under the LGPS scheme if he was made redundant over the age of 55, the claimant would be entitled to immediate access to his pension on an actuarially unreduced basis. The claimant's evidence about this is mainly relevant to his withdrawn age discrimination claim but it is clear that seeing this added to his suspicion that Mr Addison wanted to end his employment. However we were told that calculations had been requested at a senior level for a range of roles at the time because wider restructuring was being considered and there is no suggestion that this calculation had been done at Mr Addison’s request or that it was ever suggested that the claimant’s role would be redundant.

85. At the meeting on 12 October 2021, which was also attended by HR and Mr Crewe as the claimant’s trade union representative, the claimant told Mr Addison that he felt bullied and that he was being forced out. It is clear the meeting was difficult, and it was closed on the basis it was agreed that it would be best if matters were looked at by a third party.

86. Subsequently the claimant was told that meetings about his welfare would be undertaken by Mr Watson, a senior manager of the respondent, who gave evidence to us. Mr Watson was Head of Environment. Over the following months there were a series of meetings between the claimant and Mr Watson.

87. The tribunal panel found Mr Watson to be straightforward and credible witness but the evidence about the precise timing of meetings and what was discussed when was rather vague from all concerned. What is clear is that on 21 October 2021 there was welfare meeting between Mr Watson and the claimant at which the claimant's health issues were discussed as well as his concerns about Mr Addison. The claimant explained the background that he had been asked to undertake a different role when he returned to work in July 2021, taking over the management of both teams and that

he was no longer just carrying out the role of PBS and the claimant said that he required certainty in terms of his duties.

88. Mr Watson told us his focus in the welfare meetings that followed was on trying to find a way for the claimant to return to work. Discussions centred on three options The first was a hybrid role which would involve the claimant managing his team and the responsive repair team ("BLRM team"), that is a version of the job he had initially undertaken on his return to work, the second was the claimant staying in the role of PBS but reporting to Mr Addison as the Service Lead rather than as BCM. This would involve the claimant being required to deputise for the Service Lead role as required. The third option would be the claimant accepting a demotion to the role of surveyor, although with full pay protection of 12 months and 50% protection for the next 12 months after that. This was not of interest to the claimant.

89. It appears the respondent had taken the view that the hybrid management role might be a suitable alternative role for the claimant, but it is not clear to the tribunal why this was thought to be helpful. The claimant always appears to have been resistant to it.

90. The claimant was sent "key requirements documents" for the proposed hybrid roles and his PBS role. This reflected a change in terminology by the respondent, which was undergoing a process of updating job descriptions for all employees, not least as part of the general job evaluation process which has been underway across much of the local authority sector. This meant on due course the claimant's role would be evaluated for pay purposes. We accepted Mr Watson's evidence that was a general process, but it is not clear that this was ever clearly explained to the claimant who clearly perceived references of revaluation as some threat to his pay. Although there was a difference in name the key requirement document was in essence an update job description.

91. Mr Watson explained his understanding of the background. It appeared to him that the claimant thought that the requirement to manage both roles would be an ongoing requirement of the PBS role, but Mr Watson told us that he was clear that that there were two roles – the hybrid role (which would involve managing both teams) and the PBS role (which would essentially be the role that the claimant had previously undertaken). There would be a difference for the claimant in terms of the PBS role if he returned to that because the role of BCM (Building Consultancy Manager) had been removed from the structure. This meant PBS could now be required to deputise the Service Lead whereas previously he had deputised for the BCM. However Mr Watson told us there was no question that this meant the claimant would be expected to deputise for aspects of the Service Lead role that he had no experience for, he would only be required to deputise within his areas of responsibility and expertise and other senior managers would be asked to deputise in relation to other areas if required. In other words the claimant would not be the only person who might be asked to deputise for Mr Addison – he would only be asked do so if the need for a deputy arose in relation to the claimant's area of responsibility.

92. On 2 November 2021 the claimant emailed his trade union explaining his concerns, which continued to focus to some extent on the return to the office and how often that would be required. In the meantime, the claimant had continued to be issued with further sick notes and remained off work. However in December he received

positive news about the treatment for his cancer and this increased hope he would be able to return to work in the new year.

93. Following further meetings in January 2022 to discuss options and address the claimant's concerns, Mr Watson seems to have hopeful that he could formally offer two options for the claimant to consider supported by new key requirement documents.

94. Mr Watson told us that he had instructed Mr Addison to produce a new key requirements document for the PBS role which made clear the position in relation to deputising for the Service Lead role. However Mr Addison did not do what Mr Watson had expected or required.

95. The respondent's new key requirements documents were intended to be rather different to the previous job descriptions with more detail and "granularity" about the requirements of the job. Instead of producing a brand-new document adopting this new approach however, Mr Addison simply took the old job description, dropped it into a new format and replaced all references to "Building Consultancy Manager" to "Service Lead". This suggested the claimant could be required to deputise for any aspect of the Service Lead role.

96. Mr Watson had identified that the new key requirements document seemed to extend potential responsibility too widely just before a meeting arranged to discuss the options on 8 February 2022. Mr Watson referred to this in his covering mail sent on the day of the meeting the claimant and Mr Crewe, acknowledging that further changes to the documents would be needed in terms of the potential apparent council-wide scope (because of the drafting issue explained above) and inviting the claimant and his trade union representative to highlight any other changes they thought necessary. The email expresses the hope that by a meeting set up for the following week *"a way forward could be identified for [the claimant] to continue in the original principal surveyor's role with management of staff or move to the hybrid role Rob emailed about last week and explained*."

97. It appears from the chronology provided to us that there were two final meetings between Mr Watson and the claimant. The first was on 8 February 2022 was attended by Mr Addison, Mr Watson, Mr Crew and the claimant. The claimant produced his own notes of that meeting but respondent did not. The second appears to have been on 16 February but where the claimant appears to refer to this in his statement he refers to his notes of 8 February and Mr Watson's evidence failed to differentiate between the meetings in any meaningful way. The absence of any meeting notes and the passage of time appears to have affected the recollections of all those connected. It may be that some of the things we are told happened on 8 February in fact happened on 16 February, but nothing seems to turn on that.

98. The claimant's notes of 8 February 2022 record he had raised concerns about the key requirements document sent to him (which he refers to as "my contract"). The claimant's own notes record that Mr Addison and Mr Watson explained to him that Mr Addison would still act as the manager for both teams, BC and the BLRM (responsive maintenance) team, and that the claimant would not be filling a management role for both but could be asked to advice and guidance for the two teams.

99. The claimant expressed the view that the removal of the job family/section, the omission of any reference to the BCM post and the addition of Service Lead were

significant contractual changes and that he made representations about how contracts can be amended.

100. The claimant also referred to other matters as significant changes to his contracts in terms of management responsibility for building surveyors, health and safety legislation and financial responsibilities, but as Mr Watson pointed out, in fact the wording in the key requirements was exactly the same as the claimant's previous job description and there is no suggestion that these provisions had ever caused the claimant difficulty or the contractual provisions applied in an unreasonable way before his sickness absence.

101. In terms of the removal of refences to the role of BCM, we accepted Mr Watson's explanation that the role had been removed from the structure and this meant that that role could no longer be referred to in any job description of the claimant. That meant that even if the new key requirements format had not been used for the claimant, his old job description would have to have been updated to make clear the change to reporting lines.

102. The claimant's notes of the meeting record that Mr Watson had said at the end of the meeting that it was obvious that the claimant was not interested in accepting the new role (the hybrid role) and in that case he would go back to his previous role of managing the BC teams, managing a full team of surveyors. Mr Watson regarded that as the end of any need for his involvement although the claimant had continued to insist that his contract of employment had been changed because the BCM role had disappeared and the claimant had continued to say to Mr Watson that he did not trust Mr Addison and felt that his position was untenable.

103. Mr Watson's email sent just before the meeting on 8 February had invited the claimant to identify any other changes to the key requirement role that he felt was necessary. Emails between the claimant and his trade union representative after the meeting show the claimant was unwilling to do that because he felt *"it may affect me as I'm agreeing to a new contract*". Mr Crewe told the claimant not to review the document because that something for Mr Addison and HR to do. This reluctance does not seem to have ever been expressed directly to Mr Watson.

104. In the meantime, on 8 March 2022, the claimant was invited to a Stage Two Monitoring Period Meeting. The invite letter stated that the purpose of the meeting was to discuss the claimant's health and wellbeing, but also warned the claimant that the meeting was being held in accordance with the council's improving attendance policy and there were a number of possible outcomes, which include an agreed action plan. That meeting went ahead on 14 March 2022. It was a short meeting only lasting around half an hour. Mr Addison told us that he thought the meeting had been positive. That was not how the claimant felt about it, although the record of the claimant's responses and the fact that it was online is perhaps an explanation for this. The claimant told Mr Addison that the situation with his parents seemed to be improving. The trade union representative raised that he had some questions which the claimant explained were relating to the decisions as to the way forward but they were not discussed. Mr Addison had said that he would look at that and get back to them, but the current meeting was dealing with welfare. There was then a discussion about the claimant taking holiday leave.

105. In the background there were various emails continued to go backwards and forwards between Mr Addison, Mr Crewe and HR about the key requirements document. On 14 March 2022 Mr Addison emailed Mr Crew (copying in Mr Watson) stating that the claimant would be reporting to him and the expectations of him and his role are clear within the job description. What Mr Addison said about that contradicted what we had been told by Mr Watson, who was explicit that he had told Mr Addison to produce an updated version of the key requirements document reflecting the discussions on 8 March. If an updated version reflecting Mr Watson's instructions had ever been produced and sent to the claimant and Mr Crewe we were not taken to it.

106. On 15 March 2022 the email which is at the centre of this case was sent. In light of the significance of the email and Mr Addison's response, both are set out in full below. The claimant did not want to email Mr Addison directly so it was sent via Mr Crewe.

107. The text of the email sent by the claimant says this

"Hi Paul

in order to take make a decision and help me return to work can you send the following email to Rob please

Hi Rob

I understand the position relating to my manager will be as follows:

As per the meeting dated the 8 February 2022, if I returned to my existing role of principal surveyor within the building consultancy team, Robert will fulfil the role of Building Consultancy Manager as well as Service Lead to whom I will directly report. I will act as his deputy. I understand this is a permanent change.

If I were to accept the hybrid position I will be assigned to both teams, as per the meeting dated 8 February 2022, I will be responsible for the day-to-day running of both teams but I would not be filling a management role, which will be undertaken by Rob as Service Lead.

The positions of Building Consultancy and Responsive team managers will not be filled in the future in either scenario.

I just need to get a good idea regarding the above so that I can make a decision in relation to the various options which have been put forward.

I will be most grateful if you can confirm clarify my position matters. I will then better idea as it will alleviate a lot of my current health issues and ultimately allow me to make a decision. If I don't back from you by Friday, 18 March 2022 I will assume my understanding *above is accurate.*

Regards

Andrew"

108. That email was forwarded on in its entirety from Mr Crewe to Mr Addison at 14.28 on 15 March 2022. Mr Addison replied the following day on 16 March at 17.36 directly to Mr Davies as follows

"Andrew,
further to your email correspondence I would like to provide you a final response regarding the arrangements for your return to work which compliments the response you have also received from HR.

The organisation and I have tried to work with you by suggesting alternatives (that could perhaps have suited) which included a hybrid role, you have had ample time to consider these and have been as previously to indicate your preference regarding this, however you have not confirmed any decision regarding this option.

Due to your lack of response, I was required to put alternative temporary arrangements in place in order to maintain the delivery of service. Therefore I can now confirm that the offer of hybrid working arrangement is off the table.

When you were ready to return, you will return to your existing role as principal building surveyor, of which the expectations and reporting lines have been clearly set out for you.

I will reiterate (extracted from my email of 1/2/2022).

So that expectations are clear from the onset:

Vision – my vision and that the organisation is one of the high-performance and collaborative culture, sharing and developing knowledge, skills, resources, clients, stakeholders and direction by creating synergies and the expectations that is embraced.

Behaviours - the expected behaviours are within the attached behaviours framework; these will be discussed in regular reviews.

Presence - key to this role is the need for interaction with colleagues, peers, myself and seniors, it is envisaged to carry out the role effectively there will be a need to attend an office environment more than not (restrictions dependent of course) although flexible, this is envisaged to be at least three times per week. As discussed this can be flexible and can be managed but office attendance will be expected.

Location – again flexible, but will consist of Davyfield Road, OCS, Old town hall and working from home.

As indicated, at your recent welfare meeting, your current fitness expires next week, I shall therefore make arrangements to have a follow-up meeting to discuss the return to work/the next stage of the improving attendance policy.

Thanks,

Rob Addison"

109. An outcome letter from the stage 2 Absence Monitoring Meeting on 14 March 2022 was sent on 16 March 2022. That letter confirmed the discussions and that Mr Addison had received the questions from the trade union representative and that a response had been sent. The claimant was informed that monitoring of his absence would continue.

110. On 5 April 2022 Mr Addison sent a letter to the claimant stating that the claimant's return to work had been expected on 1 April but instead a further sick note had been received and it was understood that the claimant was due to see his consultant again. The claimant was invited to a Stage 3 Case Review Meeting and was expressly warned that if he was too ill to return to work, one potential outcome of this meeting could be a referral for a formal capability meeting where a Chief Officer might consider whether the claimant should be dismissed.

111. The following day the claimant resigned. He spoke first to a member of the HR team and then wrote to Mr Addison to confirm his resignation, with employment terminating on 30 April 2022. The resignation letter does not suggest that the claimant regards himself as constructively dismissed or refer to any of the alleged breaches of contract.

Submissions

112. We received written submissions from Mr Barron and oral submissions from Mr Flood. Rather than seek to summarise those here, the relevant issues are discussed below to explain how the panel reached its conclusions.

Discussion and Conclusions

Issue one: Unfair Dismissal: Was the claimant dismissed by the respondent and if so was that unfair?

Did the respondent terminate the claimant's contract of employment?

113. Did the respondent attempt to unilaterally vary the claimant's contract in a way so fundamental as to constitute a termination of the claimant's employment? (The alleged *"Hogg v Dover College* dismissal")

114. The question for the tribunal was whether Mr Addison terminated the claimant's contract of employment as Principal Building Surveyor ("PBS") and sought to impose or replace that contact with a new contract when he wrote to the claimant on 16 March 2022 in response to the claimant's email of 15 March 2022?

115. On 16 March 2022 Mr Addison had told the claimant that the offer of a hybrid role was now off the table and on his return to work the claimant would be returning to his PBS role "*of which the expectations and reporting lines have been clearly set out for you*" and requiring the claimant to work across three sites, with some home working.

116. The claimant's contract of employment, which is reflected in the statement of employment particulars acknowledged by the claimant on 28 June 2016, refers to the claimant's job title as "principal building surveyor". The job description which forms part of that contract of employment contained the following flexibility clause *"it reflects the position and the present time only and may be changed at management's discretion. As a general term of employment the Council reserves the right, with in this contract of employment, to effect any changes in job content or may require you to undertake other duties provided that such changes are appropriate to your remuneration, status and competencies*". In the section on job location there is also a flexibility clause which allows the respondent to vary the claimant's place of work either on a temporary or permanent basis subject to the claimant been given 4 weeks' notice of any change.

117. During the claimant's final sickness absence, there had been discussions between the claimant and his trade union representative on one hand, and Mr Watson and Mr Addison on the other. As noted in the findings section above, in the course of those discussions, it had been agreed that the claimant needed a new key requirements document for the PBS which was essentially a new job description to reflect the respondent's new practice of requiring greater detail in job descriptions and to reflect the fact there was no longer anyone in the post of Building Consultancy Manager (BCM). This meant that rather than the PBS reporting into the BCM who then reported to the Head of Estates and Property, the PBS would report directly into the new role of Service Lead.

118. Our findings about Mr Addison failings in relation to the preparation of the new key requirements document for the PBS role are significant. Not only did the claimant have concerns about that, Mr Watson himself told us that Mr Addison had not done what was required to prepare the key requirements document correctly properly because rather than prepare a new more detailed and specific document, he had simply cut and paste the old job description into the new format, changing "Building Consultancy Manager" to "Service Lead" throughout.

119. Mr Flood argued that the removal of the BCM role and the breadth of the Service Lead role meant that it is was inevitable that much more work and responsibility would be placed in the shoulders of the PBS. Mr Flood also argued that the fact that the equivalent to the PBS role in the BLRM team (ie Mr Wolstenholme's previous role) had not been replaced would also mean that the more management responsibilities would fall on the claimant as PBS.

120. In addition Mr Flood pointed to the scope of the deputising responsibilities placed in the PBS role. The new key requirements document says this *"to deputise as required for the Service lead, representing them and the wider Council at a range of meetings and evets. Completing senior level actions with minimal supervision at the instruction of the Service lead or Chief Officers".* Mr Flood argued that deputising for the Service Lead is wholly different from deputising for the BCM. This inevitably widened the scope of the claimant's role so that it was effectively a new job.

121. Mr Watson had accepted in his cross-examination that if the wording above drafted reflected the reality of what was required of the claimant, this would amount to a "major" change (in his words) to that term in the claimant's contract because of the apparent scope of the potential deputising responsibilities. However, Mr Watson told us that this did not reflect what had happened in reality or what had been discussed

with the claimant. It was not intended that the PBS would ever be asked to deputise for the Service Lead outside the PBS' areas of knowledge and expertise. Mr Watson had agreed with the claimant's concerns that this should be clarified and instructed Mr Addison to prepare a new key requirements document for the PBS role as a result. Unfortunately that was never done.

122. Mr Addison gave undisputed evidence that by March 2022 the management responsibilities within the BLRM team were covered from within the BLRM team itself. We accept that when the key requirement role was being discussed and the possibility of the claimant returning to work in March 2022 was being looked at, it was not intended that the PBS role would cover these. That was why when there had been discussions about the claimant managing both the BLRM and the BC teams that had been identified as a new role, the so called hybrid role. We accept there was a distinction between the scope of the hybrid role and the PBS role.

123. In deciding if a new role was imposed on the claimant in such a way as to amount to a dismissal, the Tribunal was assisted by the guidance provided by Judge Clarke in *Jackson v The University Hospitals of North Midlands NHS Trust* [2023] EAT 102 and referred to in the section on the law above. In that he emphasises that the tribunal must do a proper before-and-after comparison of the old contract and the alleged new contract to ascertain whether the new terms were of sufficient difference to amount to a withdrawal of one contract and its replacement by another.

124. In terms of the comparison between the old PBS contract and the new one said to have been imposed by Mr Addison, the position is as follows. There was no change to pay, remuneration and status. Although it appears the name of the team was changed to Building Design Team it was referred to throughout as the "BC" Team and that is how we have described it. We see no significance in that. There was no change to hours of work. The role of the PBS within the BC Team in terms of responsibility to the team members would not change. What would be different was that there would be a change to the work location and there was the change to the post the PBS would report into (Service Lead rather than BCM) and the associated widening of the scope of deputising responsibilities.

125. The tribunal was persuaded by the evidence of Mr Watson that the new key requirements document did not mean that a new contract whose terms were sufficiently different from the old had been imposed on the claimant so as to amount to the withdrawal of one contract and its replacement by another. The tribunal unanimously found that, although Mr Addison had failed to properly reflect or describe how the claimant's role would be affected by the removal of the BCM role, that did not mean that the new key requirements document effectively amounted to a new contract.

126. The tribunal also accepted that the restructuring of the team above the PBS had resulted in some changes to the PBS role, but not such to make a significant change to amount to the imposition of a new contract. The tribunal accepted Mr Barron's submissions that the changes made to the key requirements document fell within the scope of the flexibility clause of the contract of employment. Such changes as were imposed by the removal of the BCM post were appropriate to the claimant's remuneration, status and competencies.

127. The tribunal unanimously concluded that the claimant had not been dismissed by the respondent pursuant to s95(1) (a) of the ERA.

Did the respondent's conduct entitle the claimant to terminate his contract and treat himself as dismissed? (ie the constructive unfair dismissal complaint)

128. The tribunal then considered whether the claimant was entitled to terminate the contract under which he was employed (with or without notice) in circumstances in which he was entitled to terminated without notice by reason of the respondent's conduct (S 95(1)(c)ERA)? This is of course commonly referred to as being "constructively dismissed" although that terminology does not appear in the legislation.

129. The tribunal panel did not reach unanimous findings in relation to this issue.

130. The claimant relied on a number of alleged breaches either individually or cumulatively.

131. *The first alleged breach of the implied term of trust and confidence was that between 12 October 2021 and 16 March 2022 the respondent had failed to formally consult with the claimant in accordance with the respondent's own organisational change policy in respect of his role change.*

132. It was conceded by Mr Flood in his submissions that although the process with Mr Watson had not been identified as consultation as such under the organisational change policy, it had been a consultation process and we were told that this was no longer relied as a breach. No finding was required on that.

133. *The second breach, said to be a breach of the implied term of trust and confidence, was a failure to advertise with an intention to fill, at any time, the business consultancy manager (BCM) role, to reassure the claimant he would not be expected to at any future date to manage either or both the BC team or Business Liaison and Responsive Maintenance(BLRM) team in addition to his substantive post or supervise the BLRM team.*

134. The tribunal unanimously accepted Mr Barron's submissions that there was no breach in this regard. We did not accept that within the scope of the implied term of trust and confidence is an implied right for an employee to insist that a particular managerial structure which they report into is maintained. If the claimant was right that it was a breach of his contract for the respondent not advertise to fill the BCM role, he would effectively have a right to veto changes to the senior management structure above him, giving him rights in relation to the terms of employment of other employees. We do not accept that is part of the implied term of trust and confidence.

135. *The third breach was a failure to reassure the claimant that he would not be expected to manage either or both the BC team or the BLRM team or supervise the BLRM team in addition to his substantive post when he asked for clarification on 16 March 2022.*

136. In the request sent to Mr Addison via Mr Crewe on 15 March 2022 the claimant had stated his understanding that:

a. If he returned to the role of PBS within the BC team, Mr Addison would be undertaking the BCM role as well as that as Service Lead. The claimant would be required to report directly to Mr Addison as Service Lead on a permanent basis.

b. If the claimant accepted the new hybrid role he would be assigned to both teams (BC and BLRM) and would be responsible for the day-to-day running of both teams but he would not fill a management role which would be undertaken by Mr Addison as Service Lead.

c. The positions of BCM and Responsive Team Manager would not be filled.

137. The claimant had said that he required confirmation or clarification of his understanding of this to have a better idea as *"it will alleviate a lot of my current health issues and ultimately allow me to make a decision. If I don't hear back from you by Friday 18 March 2022 I will assume my understanding above is accurate".*

138. In his reply sent the next day, Mr Addison had not sought to provide the confirmation or clarification requested by the claimant. Instead he had asserted that the claimant had had "*ample time*" to consider alternatives including the hybrid role and he suggested that because of the claimant's lack of response to the offer of the hybrid role, Mr Addison had been required to put alternative temporary arrangements in place in order to maintain the delivery of service. Without warning Mr Addison went on to withdraw the possibility of an alternative hybrid working arrangement and informed the claimant that he would return to his existing role as PBS, setting out a number of expectations including a requirement for the claimant to attend an office environment at least three times per week and to work across three office locations as well as working from home.

139. The tribunal panel were agreed that there had been no attempt by Mr Addison to reply to the points raised by the claimant. His assertion that the claimant's failure to make a decision had meant that arrangements that had to be put in place to maintain the delivery of service was plainly untrue. The claimant had been off sick and Mr Addison would have had to make arrangements to cover that sickness absence in any event. There had been no suggestion during the consultation about the hybrid role and the new key requirements document for the PBS role that a decision by the claimant in relation to the hybrid role was preventing the respondent from filling vacancies or in any way impacting on service delivery. The claimant had not been told that the offer of hybrid working would only be held open for him for a particular period of time, so to remove it without warning was unfair. In addition the claimant and his trade union representative had been waiting for Mr Addison to do what Mr Watson had required which was to produce an updated and accurate key requirements document. Mr Addison had failed to do that.

140. The tribunal panel were unanimous in their view Mr Addison's reply was inappropriate and ill-tempered. It shows an irritation on Mr Addison's part which was unfair. In light of Mr Addison's failure to do what Mr Watson had told him to do and update the key requirements description, the claimant's request for confirmation or clarification was perfectly reasonable. In light of Mr Addison's failure to provide that document it was also wholly untrue for him to say in the email "*the expectations and reporting lines have been clearly set out for you*".

141. There were however differences in further factual conclusions reached by the Tribunal which as explained below which were significant in terms of the overall conclusions reached by the panel on the application of the law on the question of whether there had been a fundamental breach of the implied term of trust and confidence, applying the test in *Malik and Mahmud v Bank of Credit and Commerce International SA*, what is required is that the employer, without reasonable and proper cause, has conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

The Majority Decision

142. This section records the reasoning of Mrs Booth and Ms Worthington in the majority (the Majority). The Majority found that Mr Addison acted deliberately in sending his email of 15 March 2022 to increase the stress on the claimant. Mr Addison knew the claimant was suffering from work related stress and anxiety. In addition to GP sicknotes he was in receipt of an Occupational Health Report written by Ms Susan Canlin Occupational Health Advisor dated 17 September 2021 which said *"Mr Davies required a period of sickness absence earlier this year due to stress linked to home and work issues. He is currently off work sick again with stress he attributed this to a combination of home and work issues, including caring responsibilities towards both parents*."

143. In addition, the Majority concluded Mr Addison was aware of interpersonal difficulties in his relationship with the claimant. Ms Canlin's report said *"Mr Davies states that he has issues with his line manager. He tells me that when he returned to work following sickness absence earlier this year, he was given the work of two managers. He states that he was told that if he couldn't cope, he could be demoted or leave. He reports ongoing issues with his manager stating he is being "set up", and that the manager has a restructure to do and he doesn't fit into it*". Mr Addison was the claimant's line manager and the Service Lead. Despite Mr Addison's knowledge and the specific instruction from his superior, Mr T Watson, the tribunal unanimously found Mr Addison as Service Lead chose not to clarify in an updated Key Requirements document what was expected of the Principal Building Surveyor when "representing them and the wider council". "Them" referring to himself as Service Lead.

144. On 15 March 2022 at 14.23pm the claimant requested, clarification by email of the options available to him. The claimant said

"I just need to get a good idea regarding the above so I can make a decision in relation to the various options which I have put forward.

I would be most grateful if you can confirm or clarify my position on these matters. I will then have a better idea as it will alleviate a lot of my current health issues and ultimately allow me to make a decision"

145. The Majority concluded the above was a reasonable request. Mr Watson agreed clarification was necessary in the meeting of 16 February 2022 with the claimant and Mr Addison present. Mr Addison failed to provide this clarification during the next 4 weeks.

146. Mr Addison responded to the claimants email on 16 March 2022 at 17.36pm as follows:- *"Due to your lack of response, I was required to put alternative temporary arrangements in place in order to maintain the delivery of service.*

Therefore, I can now confirm that the offer of a hybrid working arrangement is off the table. When you are ready to return, you will return to your existing role as P.B.S of which the expectations and reporting lines have been clearly set out for you."

147. The Majority concluded that Mr Addison was deliberately seeking to blame the claimant for "not responding" when he clearly had. Mr Watson confirmed in his oral evidence the claimant was fully engaged in the process. The Majority also found by saying *"I was required to put alternative temporary arrangements in place*" Mr Addison was implying that this was the claimant's fault. The majority found Mr Addison acted in anger in withdrawing the hybrid role and he was vindictive. The Majority found that Mr Addison's email of 16 March 2022 was deliberately designed to un-nerve the claimant following his request for clarification. He must have known he would exacerbate the claimant's stress.

148. The Majority found the claimant credible and honest when giving his oral evidence. They found there was a lack of reliability in Mr Addison's oral testimony and he was evasive in many instances.

149. The Majority concluded that Mr Addison had acted vindictively, and he deliberately failed to provide the clarification or reassurance sought by the claimant and had deliberately replied to him in a way intended to increase the pressure on the claimant.

150. The Majority accepted the claimant's evidence he was concerned about managing the BLRM team. This team was responsible for day-to-day reactive maintenance and statutory compliance. The claimant had done some of this work in the 1990s and he was happy managing the one surveyor in this team. However, he had never managed the electrical / mechanical engineers in that team and had no experience of statutory compliance, such as gas safety and legionella checks, nor service contracts, for example, boiler maintenance.

151. The claimant when re- examined by his Counsel when asked about the options available said "No" to the option of managing both teams. He said the hybrid role would be too much work consistent with what he said earlier in his oral evidence about his lack of experience in managing the work of the engineers in the BLRM team. No key requirements document for the hybrid role was ever produced by the respondent for the claimant to consider.

152. The Majority found the claimant feared that even if he came back as the PBS he would be required to undertake responsibilities in relation to the BLRM team when deputising for Mr Addison as Service Lead. Mr Addison, having responsibility for both the BC and BLRM teams as Service Lead. The claimant said in his oral evidence, he would effectively be in the same position whether he accepted the hybrid role or came back as the Principal building surveyor.

153. The Majority found the claimant was concerned about the additional work and responsibilities that would land on him in the absence of appointment of a Building

Consultancy Manager and, a manager for the BLCM team, the previous BLCM manager Mr Wolstenholme having left. The claimant told the Tribunal he didn't believe Mr Addison would be able to fulfil the roles of BCM and Service Lead without considerable assistance from himself. Mr Addison did not tell the claimant that the role of Service Lead was not as wide as the previous Head of Estates and Property.

154. The claimant was concerned that the additional work would exacerbate his anxiety and stress and lead to further breakdown. The claimant told the tribunal everything was starting up again post-covid. Major planned work and work involving disability facilities grants had all been on hold during Covid. Major planned work was coming on stream at the time, disability facilities grants were now in place and required the management of work. In addition, as PBS he was responsible for planning and setting in motion the following year's major work.

155. The claimant was clearly proud he had been appointed to the role of principal building surveyor he said he had worked hard to achieve this role. The Majority found he clearly wanted to return to this position, however, he was fearful of the extra work that would land at his door in view of Mr Addison's promotion and without the appointment of a new BCM.

156. At the end of his re-examination, the claimant told the tribunal Mr Addison had moved up to managing a large team of over 100 people. He would have to take on a lot of his responsibility. It would be a demanding role and because of his home problems he couldn't spend extra time like he could in 2016 when he fulfilled that role, referring to when he acted as BCM on a temporary basis in 2016.

The Minority Decision

157. In the minority, Employment Judge Cookson concluded that Mr Addison had shown a lack of concern or empathy for the claimant, and he had acted unfairly and unreasonably, but she did not consider that the evidence supported a finding that he had been vindicative or had deliberately sought to increase the pressure on the claimant. Rather she concluded the emails suggested that Mr Addison has lost patience and had decided that the claimant should no longer have the option of another role. However at the conclusion of his evidence, during re-examination, the claimant's evidence had been that he was not interested in the hybrid role in any event and she concluded this meant reassurances not being given about that role could not be said to seriously destroy the employment relationship because it was a role that was in fact of any concern to the claimant.

158. Further Employment Judge Cookson did not consider that Mr Addison's conduct had been so unreasonable as being sufficient to be capable of so damaging or being likely to seriously damage the relationship of trust and confidence that it amounted to a fundamental breach. In reaching that conclusion she took into account the guidance of Justice Langstaff in *Frenkel Topping* that the formulation of the test in *Malik* is a demanding one and that a manager simply acting in an unreasonable manner is not sufficient to create such a breach. She concluded that Mr Addison had acted unreasonably, but not in a way which could be said to seriously damage the employment relationship to the extent required to destroy the employment relationship. Mr Addison's impatience was not conduct sufficient to suggest that the respondent was abandoning and altogether refusing

to perform the contract (the test applied in *Tullet Prebon plc v BCG Brokers LP and others*) or that by not providing the requested clarification and reassurance that this was conduct which the claimant could not be expected to put up with (the test in *Woods v W M Car Services (Peterborough) Ltd*).

159. *The fourth breach was a failure to give any indication on or after 16 March 2022 that should the claimant have to manage either both BC team or BLRM or supervise the BLRM team in addition to his substantive post whether temporarily or not, then he would be paid at a higher level for so doing when he was acting up.*

160. The tribunal unanimously again accepted Mr Barron's submissions in this regard. The claimant has a contractual right to be paid in accordance with the terms of his contract of employment. There is no implied right for an employee to receive a higher rate of pay if they undertake additional duties. Further the claimant had not sought any reassurance from Mr Addison about pay and he had been told by Mr Watson that the new key requirements description of his role would be considered for job evaluation purposes. Whether "acting up" beyond the scope of the claimant's existing role may justify a temporary increase in pay would depend on the circumstances and would be a matter for agreement between the parties. The panel found that the implied term of trust and confidence imposed no requirement on the employer to promise to pay higher rates of pay in particular circumstances.

161. *The fifth (and final) alleged breach of the claimant's contract of employment was an alleged breach of the duty to provide a safe working environment. It is expressed in the list of issues as follows "that on or after 16 March 2022, the respondent, having actual knowledge that the claimant had previously been ill when the claimant went off work on 18 August 2021 with work related stress due to managing/supervising two teams, failed to provide clarification and/or reassurance to the claimant went asked that he would not be expected to at any future date, manage either or both the BC team or BLRM team or supervise the BLRM team in addition to his substantive post."*

162. The factual conclusions reached by the Tribunal members set out in relation to the third breach above are also relevant to their conclusions here.

The Majority Decision

163. The Majority concluded that Mr Addison had acted vindictively, and he deliberately failed to provide the clarification or reassurance sought by the claimant and had deliberately replied to him in a way intended to increase the pressure on the claimant.

164. The Majority accepted the claimant's evidence he was concerned about managing the BLRM team. This team was responsible for day-to-day reactive maintenance and statutory compliance. The claimant had done some of this work in the 1990s and he was happy managing the one surveyor in this team. However, he had never managed the electrical / mechanical engineers in that team and had no experience of statutory compliance, such as gas safety and legionella checks, nor service contracts, for example, boiler maintenance.

165. The claimant when re- examined by his counsel when asked about the options available said "No" to the option of managing both teams. He said the hybrid role would be too much work consistent with what he said earlier in his oral evidence about his lack of experience in managing the work of the engineers in the BLRM team. No key requirements document for the hybrid role was ever produced by the respondent for the claimant to consider.

166. The Majority found the claimant feared that even if he came back as the PBS he would be required to undertake responsibilities in relation to the BLRM team when deputising for Mr Addison as Service Lead. Mr Addison, having responsibility for both the BC and BLRM teams as Service Lead. The claimant said in his oral evidence, he would effectively be in the same position whether he accepted the hybrid role or came back as the principal building surveyor.

167. The Majority found the claimant was concerned about the additional work and responsibilities that would land on him in the absence of appointment of a Building Consultancy Manager and, a manager for the BLCM team, the previous BLCM manager Mr Wolstenholme having left. The claimant told the Tribunal he did not believe Mr Addison would be able to fulfil the roles of BCM and Service Lead without considerable assistance from himself. Mr Addison did not tell the claimant that the role of Service Lead was not as wide as the previous Head of Estates and Property.

168. The claimant was concerned that the additional work would exacerbate his anxiety and stress and lead to further breakdown. The claimant told the tribunal everything was starting up again post covid. Major planned work and work involving disability facilities grants had all been on hold during Covid. Major planned work was coming on stream at the time, disability facilities grants were now in place and required the management of work. In addition, as PBS he was responsible for planning and setting in motion the following year's major work.

169. The claimant was clearly proud he had been appointed to the role of PBS he said he had worked hard to achieve this role. The Majority found he clearly wanted to return to this position, however, he was fearful of the extra work that would land at his door in view of Mr Addison's promotion and without the appointment of a new BCM.

170. At the end of his re-examination, the claimant told the tribunal Mr Addison had moved up to managing a large team of over 100 people. He would have to take on a lot of his responsibility. It would be a demanding role and because of his home problems he couldn't spend extra time like he could in 2016 when he fulfilled that role, referring to when he acted as BCM on a temporary basis in 2016.

171. The Majority found Mr Addison's continuing equivocation and lack of clarity on matters the claimant sought to have detailed in writing did not provide a safe environment. Mr Addison and the respondent at all times were aware of the claimant's health situation and the seriousness and fragility of his state of mind.

172. Mr Addison and the respondent knew the claimant was vulnerable to stress so this would create the risk of an unsafe working environment. The Majority concluded that by Mr Addison's actions the respondent had failed in its duty to provide him with a safe working environment. That was a fundamental breach

going to the heart of the employment relationship and it was conduct which the claimant could not be expected to put up with. The claimant was entitled to conclude that the respondent had abandoned its responsibilities towards him and was refusing to provide him with a safe place of work. That was a fundamental breach of his contract of employment.

The Minority Judgment

173. Employment Judge Cookson in the minority, accepted that Mr Addison had knowledge of the claimant's stress and that the claimant had concerns that he might be required to manage and supervise both the BLRM and the BC team, but she also found this was only relevant to the hybrid role which the claimant had no intention of accepting in any event, as was clear from his re-examination. Mr Addison had been unreasonable and unfair in his email. It had been unfair to take the hybrid role "off the table" without warning, but by doing that Mr Addison had also removed the issue of managing both teams. Significantly the claimant's email had not expressed any understanding that he would be required to manage both teams if he returned to the role of PBS and he had not sought any clarification about that. The employment judge concluded that the alleged breach of the failing to provide a safe system of working had to be looked at within this context.

174. The employment judge also considered that the alleged breach of contract had to be considered as pleaded by the claimant, who had had been professionally represented throughout these proceedings. The breach of a duty to provide a safe working environment was said by the claimant to be a failure to provide a reassurance or clarification not explicitly sought in his email. It was not said to be the contents of the reply from Mr Addison, nor the removal of the offer of the hybrid role, nor was it suggested that the respondent was generally failing to provide a safe working environment for the claimant or had done so in the past. Whilst it was clear that the claimant could be required to deputise on occasion for the Service Lead in the future, she accepted Mr Barron's submission that this did not mean the claimant could reasonably understand from the discussions with Mr Watson that he would be required to manage both teams moving forwards in his role as PBS.

175. The employment judge accepted Mr Barron's submission that even taking the claimant's case at its highest, it seemed the claimant was anticipating that at some point in future if and when he was asked to deputise for the Service Lead that this might involve managing both teams or wider BC management responsibilities and at that point the respondent might breach its duty to provide a safe working environment. The employment judge concluded that such a concern about a future *possibility* was insufficient to amount to a breach of the duty to provide a safe working environment.

176. The alleged breaches of the claimant's contract of employment were pleaded as individual or cumulative breaches of contract. The majority of the tribunal found that the claimant's contract of employment had been fundamentally breached in two regards by the failure to provide the reassurance sought, although of course it is the same act which is said to breach implied terms in two different ways. The question of cumulative breach was not something they needed to decide.

177. The employment judge did go on to consider, from the facts as found, whether there had been a cumulative breach of the claimant's contract of employment as

suggested in the list of issues. However, she had found that second and fourth alleged breaches were not matters falling within the scope of the implied term of trust and confidence and the third and fifth breaches were allegations about the same email, essentially pleaded in the alternative. She concluded that this was not a situation where a cumulative breach of contract needed to be considered.

Had the claimant waived the breach or affirmed the contract? What was the reason for him leaving the respondent's employment?

178. The email exchange between the claimant and Mr Addison happened on 15 and 16 March 2022. On 16 March 2022 Mr Addison recommenced the sickness absence procedure and there was a meeting on 24 March followed by the letter from Mr Addison to the claimant on 6 April 2022, warning him that he may be dismissed due to sickness absence under the case review stage of the sickness absence procedure and inviting him to a further meeting. The claimant was also told that he would lose his entitlement to sick pay on 8 April 2022.

179. The claimant initially replied to say he could not attend the meeting then this was followed later the same day by his resignation letter dated 6 April 2022, sent after discussions with an HR manager.

180. Mr Barron argued that the timing of the resignation suggested that the reason for the claimant resigning it was the fact the next stage of the sickness absence procedure was being initiated and the claimant's sick pay entitlement had ended. The claimant conceded in cross examination that this did have some bearing on his decision to resign.

181. Even taking that concession into account, the tribunal panel unanimously found that the email exchange with Mr Addison had had a material influence on the claimant's decision to resign and also found no conduct on the part of the claimant between the email exchange and resignation which could be said to amount to an affirmation of contract. For the avoidance of doubt if the employment judge is wrong about the question of fundamental breach, she would also have found that the claimant was materially influenced by the email exchange so that it formed part of his reason for resigning.

182. The panel unanimously concluded that it could not be said that the claimant had affirmed his contract between receiving Mr Addison's email and contacting HR. He had a long career with the respondent and he had financial responsibilities. He was off sick at the time and had spent little more than a couple of weeks deciding what to do. There was no conduct on his part which could be described as affirmation as suggested by the respondent.

183. The respondent had not sought to offer a fair reason for dismissal and accordingly by majority the tribunal found that the claimant had been dismissed by the respondent in accordance with s95(1)(c) of the ERA and his dismissal was unfair.

Wrongful dismissal

184. As above the tribunal accepted that the claimant was dismissed by the respondent. That meant in accordance with s86 ERA he was entitled to 12 weeks'

"following discussions with the HR manager… my employment to be terminated on 30 April 2022" notice of dismissal. However, the claimant did not resign without notice. His resignation letter is somewhat ambiguously worded. He says that rather than saying in terms I am giving 3 weeks' notice, but it is not suggested by either side that this was consensual termination.

185. The panel heard minimal submissions from the parties about wrongful dismissal. Mr Flood suggested that if the panel concluded there was a dismissal it would be both unfair and wrongful and Mr Barron did not address this at all in his written submissions.

186. What follows is an issue which was not raised with the parties at the time by the employment judge, but on reflection she draws the parties attention to the decisions of the Court of Appeal in *Norwest Holst Group Administration Ltd v Harrison* 1985 ICR 668, CA and as applied subsequently in *Cockram v Air Products plc* 2014 ICR 1065 where Mrs Justice Simler said this: *'An employee wishing to resign and successfully claim constructive dismissal would have to resign without notice. To do otherwise would be to affirm that part of the contract covered by the period of notice.*' The tribunal notes the High Court's decision in *Quilter Private Client Advisers Ltd v Falconer and anor* 2022 IRLR 227, QBD, where Mr Justice Calver found that provided the employee makes unambiguously clear his or her objection to what has been done by the employer, he or she is not necessarily to be taken to have affirmed the contract by giving a short period of notice. However, it is not clear whether the claimant's situation can be distinguished from the *Norwest Holst* authority on that basis because there is no reference to what the employer has done in his resignation letter. Of course the parties may have other submissions they wish to make and authorities they wish to rely on in relation to this.

187. Further submissions from the parties are invited on this issue before the wrongful dismissal claim is determined.

Disability Discrimination Claims

Was the claimant disabled at the relevant time?

188. The claimant has had cancer. That means of course that he is disabled by virtue of paragraph 6 of Schedule 1 to the Equality Act 2010. However, the claimant does not rely on that disability in these claims. Rather he says he was disabled by his anxiety and depression as a mental impairment. Mr Flood submitted that at the relevant time for the discrimination claims is between 16 March 2022 and the termination of the claimant's employment on 30 April 2022. The respondent contends that the claimant was not disabled by that mental impairment at the relevant time.

189. Mr Barron argued that the evidence showed that the claimant had experienced a reaction to work and home life and invited the tribunal to make a finding that the claimant's medical condition amounted to a medicalisation of a work problem or adverse life events and pointed to the fact that the claimant had not seen his GP after 22 April 2022 and that his condition seems to have resolved after he left the respondent's employment.

190. However the tribunal preferred Mr Flood's submissions about disability. The panel unanimously accepted that in March 2022 the claimant was not suffering from stress which was simply a reaction to work pressures or the difficulties in his relationship with Mr Addison, in other words it was not simply a state of affairs which would simply resolve if workplace stress was reduced. His stress was caused by a combination of work pressures and the pressure of caring for supporting elderly vulnerable parents with complex health needs. It was this combination of sources of stress which had caused the claimant's mental health to be increasingly adversely affected and this sustained pressure had caused the claimant to develop anxiety and depression.

191. In September 2021 the respondent's occupational adviser, Ms Canlin, recorded that the claimant had symptoms consistent with moderately severe depression and severe anxiety and that he remained unfit for work. She had pointed out that stress is not itself a medical diagnosis and she had recorded that the claimant was experiencing moderate severe depression and severe anxiety as a result of the stress, leading him to be unfit for work in any capacity. Although Ms Canlin recorded that that the claimant's condition was unlikely to be a disability the only reason given for that opinion is that the condition had not, at September 2021, lasted for more than 12 months.

192. In May 2021, the NHS "Minds Matter" service had recorded the claimant's depression score (PHQ9) to be 8 and his anxiety measure (GAD7) to be 6. Those scores had been consistent with him being able to return to work after a previous period of heighted stress and anxiety, but his ability to return to work had been short-lived. He had been forced off work again by his mental health in mid- August 2021. By November 2021 the significant deterioration in the claimant's mental health, as noted by Ms Canlin, was reflected by the scores recorded by Minds Matter of a PHQ score of 17 and GAD7 of score 18. Although there was not a further occupational health referral, the tribunal accepted the claimant's evidence that his severe anxiety had continued into the following year. By mid-March 2022 we accepted that what may have been anticipated to be more transitory in nature 6 months earlier, was now sustained and was likely to continue for more than 12 months. This was especially so when the previous occasion when the claimant had been so severely impacted by stress, he had been forced to take some 4 months off work between February and June 2021. The panel accepted that evidence suggested that the claimant ability to undertake day to day activities was so substantially and adversely impact by a mental impairment that it had affected his claimant's ability to work for around 11 months in the approximately 14 months prior to the termination of his employment

193. The tribunal accepted that by March 2022 the claimant's anxiety had had a substantial impact on his ability to carry out day-to-day activities which had lasted for 12 months or by that point in time it was likely to last for more than 12 months. The panel also accepted that in circumstances where the health of the claimant's parents was unlikely to improve significantly, it was very probable that the claimant's difficulties with anxiety and depression would continue to re-occur in the future. Accordingly, the tribunal unanimously found that the claimant was disabled at the relevant time.

Discrimination because of something arising in consequence of disability – s 15 Equality Act

194. The first issue identified in the list of issues in relation to this head of claim is whether the respondent knew or could reasonably have been expected to know that the claimant had the disability and from what date.

195. On the question of knowledge, the employment tribunal unanimously found that Mr Addison and the HR department the respondent were aware from occupational health report in September 2021 that the claimant was impacted by stress and anxiety. All three occupational health reports offer an opinion that the claimant is not disabled, but the tribunal accepted Mr Flood's submissions that it is clear that the occupational health advisers had failed to consider the full legal test under the Equality Act, in particular when advice was given in September 2021.

196. The failure of occupational health to apply the correct test must or ought to have been apparent to the respondent. The occupational health adviser in September 2021 had only considered the question of disability on the basis that to be disabled the claimant had to have had an impairment which had lasted 12 months. They did not consider whether the impairment had lasted *or was likely to last for* at least 12 months nor was there any consideration of whether this condition may re-occur in the future.

197. By March 2022 the claimant was still signed off from work by his GP, an on-going absence of around 7 months. The tribunal panel accepted Mr Flood's submission that the respondent must have anticipated that the opinion of their occupational health advisor was likely to have changed on the question of disability given it was now over a year since the claimant had first been made so unwell by the impact of stress that he had gone off sick and he had only briefly been able to return to work in the intervening period. The respondent had failed to obtain further medical advice, but the tribunal is satisfied that if that advice had been sought it is probable that disability would have been confirmed and that would have been apparent to the respondent if it had turned its mind to that question. In conclusion the respondent knew or ought to have known in March 2022 that the claimant was disabled by reason of his anxiety.

Was the claimant subject to unfavourable treatment because of something arising in consequence of disability?

198. The unfavourable treatment complaint is expressed in the following terms in the list of issues "*not responding to the claimant's request for clarification on 16 March 2022 that he would not be required to manage/supervise either both the BC or BLR team in addition to his substantive post*".

199. In the list of issues the "something arising" is identified as the claimant's inability to manage an additional team and/or take on the other additional duties the respondent was requesting him to do.

200. Mr Flood conceded in his submissions that how this complaint is expressed is, to use his words, somewhat circular, but he argued that there is sufficient linkage between the failure to provide a response to the claimant's email on 16 March and the claimant's mental impairment for this claim to succeed.

201. Mr Barron highlighted to us that the test in making a determination in respect of section 15 is as set out in *Basildon and Thurrock NHS foundation Trust v W Mr S G Arjuna Weerasinghe*: UKEAT/0397/14/RN. The questions this tribunal must ask itself are

    a. did the claimant's disability cause, have the consequence of, or result in "something" and

    b. did the employer treat the claimant unfavourably because of that something.

202. We have also taken into account the guidance in *Pnaiser v NHS England and anor* referred to above and Mrs Justice Simler provided further guidance in *Sheikholeslami v University of Edinburgh* 2018 IRLR 1090, EAT, on how we should approach this *'On causation, the approach to S.15… is now well established... In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence*.'

203. The first question is whether "not responding to the claimant's request for clarification on 16 March 2022 that he would not be required to manage/supervise either both the BC or BLR team in addition to his substantive post" amounts to unfavourable treatment.

204. The majority of the employment tribunal straightforwardly accepted that the claimant was subjected to less favourable treatment in this regard. As set out above the non-legal members found in the majority that Mr Addison had acted vindictively in his reply in order to cause the claimant stress and increase the pressure on him because he knew the claimant was suffering from stress and anxiety. That was, in their conclusion, clearly unfavourable treatment.

205. The employment judge was concerned that the description of the claimant's request for clarification is somewhat misrepresented in the list of issues. The claimant had not asked for confirmation that he would not have to manage/supervise both the BC or BLR teams on addition to his substantive post. As explained in the section about constructive dismissal, the claimant had set out his understanding of the position in relation to his substantive post in his email in a way which was rather different from the pleaded case. However, the employment judge accepted that the claimant had asked for clarification of the responsibilities of the two posts (his substantive post and the new hybrid role) in circumstances where written clarification of the job requirements was outstanding.

206. Although the claimant had said "*if I don't hear back from you by 18 March 2022 I will assume my understanding above is correct*", it was clear from his statement that "*it will alleviate a lot of my current health issues and ultimately allow me to make a decision*", that the claimant had been seeking a response from his line manager and could have a reasonable expectation of a reply. The employment

judge accepted that the claimant was subject to a detriment through Mr Addison not replying to the specific points raised by the claimant and found, in light of the unfair nature of the reply, it was reasonable for the claimant to believe he had been treated unfavourably in that regard.

Was the "something arising" caused by the claimant's disability?

207. The "something" is identified as the claimant's inability to manage an additional team and/or take on the other additional duties the respondent was requesting him to do.

208. The panel unanimously accepted that the claimant's stress and anxiety made it impossible for him to manage both the BC and the BLRM Teams. It had been trying to manage that which had caused him to go off sick in August 2021. It was less clear to the panel that the claimant was not able to undertake the deputising responsibilities the respondent was requesting, but we accept that he had genuine concerns about the potential scope of the management responsibilities of the PBS role.

What was the reason for the unfavourable treatment?

209. This involved an examination of the thought processes, conscious or unconscious of Mr Addison.

210. The majority of the panel concluded from the evidence that Mr Addison had acted deliberately to increase the pressure on the claimant knowing that he was impacted by stress. The last paragraph of Mr Addison's reply, stating *"when you are ready to return you will return to your existing role as principal building surveyor of which the expectations and reporting lines have been clearly set out to you"* was false. The majority of the panel accepted Mr Flood's submission that the reason for the response and not providing the clarification was Mr Addison's hostility towards to the claimant, which was connected to the claimant's disability. The majority found on the facts that this was a clear-cut case where it is was not necessary to consider the burden of proof.

211. As already explained Employment Judge Cookson had not reached the same conclusion as the panel from the evidence. She was also concerned that the something arising in consequence of disability – the claimant's belief that that he was unable to manage two teams and take on additional responsibilities, was clearly the claimant's reason for requesting the clarification but found it was less clear that was Mr Addison's reason or could be described as the causative reason for not providing the clarification sought.

212. The employment judge applied the burden of proof. In terms of relevant facts Mr Addision knew the claimant was seeking a reply to a question which in the claimant's words, *"will alleviate a lot of my current health issues and ultimately allow me to make a decision*". Mr Addison knew the claimant was stressed and ought to have known that that the claimant was disabled. He had sent a hostile reply which did not provide the clarification sought and there was no apparent reason for doing that. The employment judge found that there could be a sufficient causal link between the unfavourable treatment and Mr Addison's reasons for not replying in the terms sought, recognising that there may be more than one reason or cause

for the impugned treatment and that the 'something' need not be the main or sole reason for the unfavourable treatment as long as it could have be a significant influence to amount to an effective reason for or cause of it.

213. In the circumstances the employment judge found that the burden of proof had shifted from the claimant to the respondent to show that Mr Addison had a non-discriminatory reason for the unfavourable treatment. Mr Addison had not explained why he had replied as he had. In the circumstances she concluded that the respondent had not shown that Mr Addison had a non-discriminatory reason for not replying to the email to provide the clarification shown. In those circumstances the employment judge found the s15 complaint of unfavourable treatment for something arising in consequence of disability was well founded, although for different reasons to the majority of the panel.

Reasonable Adjustments (Equality Act sections 20 &21)

214. The alleged PCP was the requirement to manage/supervise either or both the BC team or the BLR team in addition to the claimant's substantive post.

215. Mr Flood submitted to the tribunal that the respondent had applied the alleged PCP to the claimant until the date of his resignation and thus the PCP had been applied to the claimant at the relevant time – that is March to April 2022.

216. As explained above the tribunal found that the claimant was disabled by reason of his anxiety and depression at the relevant time and that the respondent had known, or could reasonably be expected to have known of the disability.

217. The question for the tribunal was whether the respondent had applied requirement to manage/supervise either or both the BC team or the BLRM team in addition to the claimant's substantive post at the relevant time. If we did we would have to go to consider if that caused the claimant a substantial disadvantage because of this disability and if the respondent know or could reasonably be expected to know of that disadvantage.

218. The employment tribunal panel found unanimously that the respondent had not applied this PCP to the claimant at the relevant time. The requirement to supervise or manage the BC team and the BLRM team was a requirement of the hybrid role which the claimant was not interested in and was not undertaking at the relevant time. Managing both teams was not a requirement for the PBS role.

219. The claimant argued that if he returned to work as PBS he would be required to undertake the management of the BLRM team, even though this is not referred to in the key requirements document. This seems to have been based on the fact he had covered some of the BLRM management on his return the previous summer. However, we accept that this had been a short-term arrangement put in place because Mr Wolstenholme was stepping back and then retiring. If it was part of the PBS role, it would not have required the claimant's agreement to cover it. The fact that the management of the two teams was identified as a possible hybrid role for the claimant when it was hoped to secure his return from sick leave was evidence that it was a set of responsibilities distinct from the PBS role. During the claimant's sickness absence the management of the BLRM returned to being

managed within that team and the claimant would only have been expected to undertake that if he accepted the hybrid role.

220. In terms of management responsibilities for the BC team we found the pleaded case somewhat confusing. The substantive PBS role already contained some management responsibilities for the BC team, but the claimant did not suggest that the existing management responsibilities he had previously undertaken had caused him any substantial disadvantage. The complaints that an adjustment was needed only applied to additional responsibilities.

221. The claimant's arguments in this regard hinged on his belief that in light of Mr Addison taking on the Service Lead role and the disappearance of the BCM role within the structure, he would be required to take on the management responsibilities of the BCM for the BC team alongside his PBS role.

222. The tribunal were persuaded by the evidence of Mr Watson that this was not correct. It appears that the claimant thought that Mr Addison was undertaking the role of Head of Estates and Property Management which Mr Kinder had previously undertaken but with a different job title, and he would be doing that job *and* the BCM role. The tribunal accepted the respondent's argument that this was not the case. The Service Lead role had less responsibility than that of Head of Estates and Property Management. It was also not simply that Mr Addison was doing a job which was all of the Service Lead job plus all of the BCM role. We accepted that been significant overlap between the roles of BCM and Service Lead and that the reorganisation of the whole structure and bringing the roles together had resulted in a consolidation of responsibilities. We had no evidence that Mr Addison had not been able to cover the role of Service Lead effectively. We accept that the claimant's perception that Mr Addison's job role was in essence impossible unless the claimant's management responsibilities were substantially increased beyond those he had previously undertaken was not correct.

223. The claimant had undertaken a wider role in terms of responsibility than his previous PBS role when he returned to work the previous summer in 2021. However, it had been expressly agreed with him that when he came back for a period of time he would undertake different role. He agreed that was sensible at the time because it had not been appropriate for some projects to be reassigned to him on his return from sick leave for continuity reasons, so he had had extra capacity. That was evidence that it was not simply a new version of the PBS role. The claimant had agreed to that as a change to his usual role which had only lasted a matter of weeks until he went off sick again.

224. As the panel concluded the PCP had not been applied the questions of disadvantage, knowledge of the disadvantage and making adjustments did not arise.

225. Accordingly the claim in relation to the making of reasonable adjustments was not well founded and is dismissed.

Age discrimination

226. The claimant's complaints of age discrimination were withdrawn at the outset of submissions and are dismissed.

Employment Judge Cookson

Date: 8 April 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

9 April 2024

FOR THE TRIBUNAL OFFICE

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