EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr L Stroud	**AND**	Avon and Wiltshire Mental Health NHS Partnership Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 30 November 1,2,3,4 December 2020

EMPLOYMENT JUDGE Ms K. Halliday

Representation

For the Claimant: Mr Canning of counsel
For the Respondent: Mr Isaacs of counsel

RESERVED JUDGMENT

The judgment of the tribunal is that:

1 The Claimant was not constructively dismissed by the Respondent and his unfair dismissal claim is hereby dismissed.

REASONS

Introduction

1. The Claimant, Mr Stroud was employed by the Respondent until he resigned from his employment on 28 February 2019.

2. The Claimant claims that he has been unfairly constructively dismissed. He claims that he resigned as a consequence of a fundamental breach on the part of the respondent of the implied term within his contract relating to trust and confidence and relies on an agreed list of 16 “mistreatments” He says these incidents amounted to treatment which constituted a fundamental breach of this term and resulted in his resignation.

3. The Respondent contends that the claimant resigned, that there was no dismissal, and in any event that its actions were fair and reasonable.

4. The claimant was represented by Mr Canning of counsel and gave sworn evidence. The respondent was represented by Mr Isaacs of counsel and I heard from Adrian Bolster, Associate Director of Operations, Christopher Stancliffe, HR Business Partner, Lee Sollis Support Services Business Manager- PFI Contracts, Simon Truelove, Finance Director (by CVP) Mathew Page, Chief Operating Officer and Jane Dudley Deputy Director HR on behalf of the respondent. I have also read the witness statement of Nigel Witchalls, Head of Estates Operations but as he did not attend to give evidence in person or by CVP, his evidence has only limited weight.

5. I have also reviewed the documents referred to in the witness statements and documents drawn to my attention during the course of the hearing contained in three bundles, the Grievance bundle (GB) (93 pages), the disciplinary bundle (DB) 287 pages and the Chronological bundle (CB) 874 pages. During the hearing an additional document headed Internal Safety Audit was disclosed and added to the chronological bundle by agreement.

Issues for the Tribunal to decide

6. At the beginning of the hearing I agreed the issues to be determined with the parties. It was agreed that the hearing would deal with liability only.

   Issues

7. Can the claimant show that his resignation should be construed as a dismissal under section 95(1)(c) Employment Rights Act 1996 in that the respondent breached the implied term of trust and confidence through the following matters, as set out on the Case Management Order sent to the parties on 30 September 2019 whether considered individually or cumulatively.

First alleged breach

7.1. From 2016, a restructuring document was circulated within the respondent which did not show the claimant on it. He was told this was a mistake.

Second Alleged Breach

7.2. At a meeting on 22 October 2018 the claimant was told by his manager Mr Bolster that he should leave the organisation because of the operation of the PFI concession. He informed the claimant that the PFI partner Imagile had sought his removal and he was putting the relationship at risk.

Third Alleged Breach

7.3. On 22 October 2018 Mr Bolster said he would not follow the organisational change policy of the respondent.

Fourth Alleged Breach

7.4. The claimant's subordinate Mr Sollis was upgraded without his knowledge on 18 October 2018. He found out about that on 24 October 2018 from Mr Sollis himself but his line manager Mr Bolster never informed him.

Fifth Alleged Breach

7.5. Since he knew Imagile were seeking his removal from September 2018, the claimant sought confirmation that his position was secure in October 2018 but did not receive that confirmation.

Sixth Alleged Breach

7.6. Disciplinary proceedings were taken against the claimant as a consequence of an incident involving the supply of water to the respondent on 1 November 2018. He was suspended on 2 November 2018, which was not warranted at that stage and was all part of the "conspiracy" to have him removed. In particular, Mr Bolster had not received evidence from the utility company by then.

Seventh Alleged Breach

7.7. In breach of trust policy, there was no Disciplinary Options Meeting held with the claimant before suspension.

Eighth Alleged Breach

7.8. The claimant lodged grievances on 12 November 2018 and 26 January 2019, which the respondent decided to address at his disciplinary hearing on 26 February 2019. However, the grievances made allegations against the panel that would deal with all those matters, who could therefore not be impartial. The person who undertook the investigation was similarly "tainted".

Ninth Alleged Breach

7.9. At the disciplinary meeting Mr Bolster accused the claimant of lying.

Tenth Alleged Breach

7.10. At that meeting Mr Bolster also mentioned the claimant's application for "redundancy" in 2013 in breach of confidence.

Eleventh Alleged Breach

7.11. The allegations against the claimant changed in the course of the disciplinary process and as finally set out by the respondent were insufficiently precise for the claimant properly to prepare his defence.

Twelfth Alleged Breach

7.12. On the basis of the evidence the respondent either had or should have had before itself at the disciplinary hearing, it could not reasonably have decided (as it did) to administer the claimant with a final written warning. Indeed, that warning was given in bad faith, the respondent being aware that it was unwarranted.

Thirteenth Alleged Breach

7.13. Third parties had been informed of the plan to terminate the claimant's employment (see email of Nigel Witchall of 19 October 2018).

Fourteenth alleged Breach

7.14. In the outcome letter produced by the respondent the claimant was actually found guilty of matters that were never notified to him before. Mr Bolster also lied to the disciplinary hearing as to the date for promotion of Mr Sollis, in order to lay further blame on the claimant.

Fifteenth alleged Breach

7.15. In addition to these matters, the claimant relies upon the matters referred to under the heading "Breaches of Trust Policies" in his original claim form, largely relating to the time scales over which certain matters were handled.

8. That the breaches were (or at least one breach was) the reason for the claimant's resignation.

9. That the claimant had not lost the right to resign by affirming the contract after the relevant breach(es), whether by delay or otherwise.

10. If the claimant was dismissed, can the respondent show that the reason or principal reason for his dismissal was a potentially fair reason, being a reason related to his conduct or for some other substantial reason (SOSR)? During the course of the hearing, Mr Isaacs confirmed that the respondents would only be seeking to rely on SOSR as a potentially fair reason.

11. If so, was the dismissal fair or unfair under section 98(4) Employment Rights Act 1996?

12. During the course of the hearing the Claimant agreed that he was not seeking to rely on the first, fifth, seventh, tenth or fourteenth alleged breaches.

Findings of fact

13. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary and after having read and listened to the factual and legal submissions made on behalf of the respective parties.

    Background

14. The Respondent is an NHS Mental Health Trust providing specialist mental health services at various sites in South West England including Blackberry Hill Hospital (BHH) in Fishponds Bristol. This includes Fromeside a medium secure unit.

15. Some of the estate at BHH is owned directly by the respondent and some is owned by a Public Finance Initiative (PFI) company, Imagile. The funder for the PFI was Sempiron and the facilities management service were provided by Rydon Maintenance Ltd (RML).

16. The claimant commenced employment with the Respondent on 3 March 2008 as Head of Estates PFI. His contract of Employment is at pages 51-63 CB. I was also referred to a job description (CB544-546).

17. The Claimant's post was rebanded in December 2012 to band 8B (not 8C as set out in his witness statement). The Claimant was not happy with the rebanding but this is not one of the mistreatments relied on (CB64-65).

18. The claimant was designated as "the responsible person" under the PFI contract on the Trust's side.

19. In 2017, a restructuring document was circulated which referred to two positions of Head of Estates (the claimant being one of the two). This was queried by Mr Witchall (66CB) and the respondent's evidence is that reference was made to these positions in error i.e. that this was a mistake. The claimant initially claimed that this was the start of a plan to remove him, "*the First Alleged Breach*". I accept the Respondent's evidence that this was a genuine error. During the course of the hearing Mr Canning confirmed that the claimant no longer sought to rely on this incident.

The PFI Contract

20. The parties agree that no relevant issues arose in relation to the PFI contract until 2018 but that by then the relationship between Imagile and the respondent had become difficult with concerns about the performance of the PFI contract on the part of the respondent. Relationships had become strained between the respondent's staff and the Imagile contract managers.

21. Following the earlier appointment of a consultancy SSG, and on the advice of solicitors, a more pro-active approach to managing the PFI contract had been adopted during 2018. This included withholding payments. The strategy aimed to resolve both historic disputes and to "reset" the management of the contract moving forward. The claimant supported this approach and was instrumental in implementing it.

22. During September and October high level discussions to resolve the ongoing contractual disputes were undertaken between Rick Little of Sempiron and Simon Truelove the Respondent's finance director. An email was sent by Mr Truelove to Mr Little on 17 September 2018 (CB131) setting out a basis for resolving the issues.

23. On the 20 September 2018 Mr Little sent an email to Mr Truelove setting out Imagile's position and stating specifically that: "there is certainly some disappointment with the approach that [the claimant] has taken in respect of a number of issues".

24. Mr Truelove forwarded this email to the PFI Estates team, including to the claimant, stating both parties wished to resolve the issues: Imagile wanted the payments to be made so that matters did not need to be escalated internally; and the respondent needed the contract to work as they were tied to the contract for total period of 30 years.

25. A meeting was held on 1 October 2018 between Mr Truelove and Mr Little to seek to reach a resolution. Settlement terms were agreed in principle which resolved the historic issues and agreed a way forward. A brief handwritten note of the conversation made by Mr Truelove (CB 150) sets out: "[claimant] to step back".

26. Mr Truelove sent an email to Mr Bolster, the claimant and Lee Sollis on 1 October 2018 summarising the commercial agreement reached in principle and stated: "Further changes will be forthcoming in order to support the management of the contract however they are confidential at this point in time".

27. An email exchange between Mr Truelove and Mr Little on 2 October 2018 set out the key terms of the resolution and noted that Sempiron had agreed: "to

switch out the general Manager and… bring in a Commercial Director to oversee the reestablishment of a proper working relationship". It also set out the respondent's agreement to "instruct Laurie, Adrian and the rest of the Estates team to be less "assertive" in their day to day liaisons…" (CB152).

28. I accept the Respondent's evidence that the references to staff changes are to an agreement that the personnel who managed the contract for Imagile would be removed and that it was confidential because they had not yet been informed.

29. I find that this was an express agreement, notwithstanding that it was not recorded in the written terms set out in the draft settlement Agreement (CB179 – 187), and further that that this was the only express agreement reached in relation to changes of personnel.

30. The claimant alleges that as a consequence of these discussions there was a secret agreement or plot to remove him from managing the contract and this goes t the heart of his claim. In his claim form he alleges a "deliberate intent to remove me from substantive position culminating in suspension which can be proved to be without any grounds".

31. The Respondent acknowledges that Imagile did ask for the claimant to be removed from the contract (par 13 AB WS) but that this was not agreed. I accept Mr Bolster and Mr Truelove's evidence on this point and conclude that there was no such agreement.

32. The claimant further maintains that there was a conspiracy or vendetta against him and submits that there was commercial pressure on the trust to remove him and that this contributed or caused the subsequent events. Whilst there was clearly some commercial pressure, I accept Mr Bolster and Mr Truelove's evidence that as the client, the respondent had the right to remove the Imagile contract manager but that there was no reciprocal right. As Mr Truelove states: "there was no appetite for granting favours or setting a precedent that the contractors could get us to move staff" (par 13 WS). I find that there was no vendetta or conspiracy and that this therefore did not cause or contribute to the subsequent events.

33. I do however find that although there was no fixed plan or conspiracy, Mr Bolster was at least considering options or alternatives in relation to the claimant, given his perception that there were some performance and conduct issues to be addressed as evidenced by the statement of Emily Saad (GB81) and Mr Bolster's statement (GB84). This is also consistent with Chris Stancliffe's notes (CB355).

34. I also heard evidence about the ongoing issue of furniture specification. The replacement of fixed furniture was one of the issues in dispute between Imagile

and the respondent. The respondent had already replaced some furniture at its own cost to an updated specification. The claimant was of the view that a third higher furniture specification should be used, "the Broadmoor" specification which was more expensive but safer particularly in relation to fire risk. The situation had not been resolved by 2 November 2018 when the clamant was suspended.

Up-banding of Lee Sollis' role

35. In order to strengthen the management of the PFI contract it was agreed in or around March 2018 by the senior management team (including the claimant), that two new positions would be required, one of which was a band 7 role - PFI Contracts Manager. The respondent's own evidence on whether this was a new role or a rebanding of the band 6 position then occupied by Lee Sollis was contradictory, but I find that there was clear intention that Mr Sollis would be "slotted into" the Band 7 role to reflect duties he was already substantially undertaking.

36. There is no dispute between the parties that the claimant was tasked with preparing the job description nor that by mid-September, the job description had not been finalised. The job description was finalised by 1 October 2018 (CB 134) and submitted to the banding panel on 11 October 2018 (CB 157) but was not approved.

37. The reason for rejection of the role by the panel is disputed: the claimant maintains it was because Mr Sollis did not have the necessary formal qualifications; the respondent's evidence was not clear. The dispute appears to turn on whether the "equivalent" experience proviso at page 50 CB applies to both levels of required qualification, degree and masters or not. It is disappointing that in a matter which has been the subject of litigation the Respondent were unable to clarify their own requirements.

38. However, I find that the claimant genuinely believed that the reason that the up-banding was rejected was due to the lack of Mr Sollis's professional qualification as advised by Ms Saad and this is what he told Mr Sollis. I do not therefore find that he deliberately lied to Mr Sollis. I also find that Mr Bolster genuinely believed that the claimant had been deliberately obstructive in progressing the up-banding based on some residual resentment about the claimant's previous down-banding (initially an act relied on in this claim – *the first alleged breach*); and his lack of engagement with the task. I make no finding on the motivation of the claimant for the lack of progress, but I do find that the claimant did not progress the application as promptly as could be expected given the importance of the new role to both retaining Mr Sollis and to the known efforts being made to manage the PFI contract more pro-actively. I also find that Mr Bolster genuinely believed the reason the role was rejected

was because the role description was too long although I make no finding that this was in fact a correct assumption.

39. Mr Sollis having been told by the Claimant that the re-banding had been refused, contacted Mr Bolster by email (CB 160) stating that: the claimant had told him that the up-banding was refused due to his lack of qualification; expressing his frustration that the up-banding which he understood to be effectively a “done deal” has not taken place; indicating that he was applying for an external role; and indicating his concern for the PFI contract generally. He also stated that if he was not going to be rewarded for it, he would revert to his original job description.

40. Mr Witchalls, the claimant’s equivalent in charge of the non PFI estate, then intervened on 15 October 2018 with Mr Bolster’s consent. By using an existing (banded) role description, Mr Sollis was offered a band 7 role, backdated to 1 April 2018, verbally on 18 October 2018 and confirmed by email on 19 October 2018 (CB172), with an express request: “Due to sensitivities around other processes going on, can I ask that this is kept confidential by the three of us from non-affected members of the SMT team, and also from Estates Officers so that it can be disseminated in an agreed way, probably though an existing Estates meeting”. A formal offer dated 24 October 2018 was sent to Mr Sollis on 26 October 2018 (CH174).

41. The claimant states that he was not made aware of the up-banding until he was told by Mr Sollis by email on 24 October 2018 and that this was “kept secret” from him. Mr Bolster maintains he arranged a meeting for the 19 October 2018 (rescheduled at the claimant’s request to 22 October 2018) to discuss the up-banding. As Mr Sollis’s line manager, it is unfortunate that the claimant was not informed of the up-banding until Mr Sollis himself told him, but I do not find that there was any intention to keep the up-banding a secret from the claimant. In reaching this finding I note that in principle this had already been agreed by the SMT (including the claimant) in March. I do not find that the small delay in notifying the claimant was part of a wider plot; nor that the reference in the email of 19 October 2018 to other processes refers to the claimant. I accept the respondent’s evidence that this phrase related to potential issues with other estates officers and was not a reference to the claimant. I do not find as alleged by the claimant that “[the respondent] wanted Lee Sollis on a higher banding before removing [the claimant]” (claimant’s WS par 48).

42. I also accept the fact that in the regraded role, it was intended that Mr Sollis would continue to report to the claimant.

43. The claimant also raised a concern that the use of an alternative existing and already banded job description demonstrates a lack of transparency and failure to follow the correct processes. I accept the respondent’s evidence that this was a legitimate alternative approach. I also find that the lack of support by the

claimant for the successful re-grade of Mr Sollis' role contributed to the respondent's perception that the claimant was trying to block Mr Sollis' regrade.

Without Prejudice Meeting 22nd October

44. The parties agree that a without prejudice meeting was held on 22 October 2018 (rescheduled at the claimant's request from the 19 October 2018) between Mr Bolster and the claimant. Both parties have referred to this meeting in their evidence therefore any potential privilege is waived. It is common ground that this meeting was referred to as an "adult without prejudice meeting". The claimant states that he was not clear what "without prejudice" meant in the context of a discussion with an employee and I accept his evidence.

45. Mr Bolster states, and I accept, that the meeting was triggered by the claimant's failure to progress the up-banding of Mr Sollis' role based both on the delay and also the discrepancy in the reason for the up-banding being refused which led him to believe that the claimant was effectively blocking Mr Sollis' progression. It is clear from the claimant's evidence, the notes of the grievance hearing (677 CB) and the first grievance letter dated 12 November 2018 (GB28-31) that during this meeting there was a wider conversation about the claimant's performance and decision making and that to support a contention that he was performing badly, the issues with the replacement of furniture under the PFI contract were discussed.

46. Mr Bolster does not state in his witness statement that he informed the claimant of the alternative process that had resulted in Mr Sollis' up-banding and I accept the claimant's evidence that he was not informed of this in the meeting. However, I do find that the claimant's failure to progress the up-banding was discussed in the context of it being a perceived performance issue. I also find that Mr Bolster challenged the claimant about why he had told Mr Sollis that the rejection of the up-banding was due to lack of qualifications. I also find that in connection with the meeting Mr Bolster did speak to HR with a view to understanding potential severance options.

47. I accept that the claimant left the meeting with the fixed idea that the respondent wished him to leave his employment. I do not however accept that this was the purpose of the meeting. I accept Mr Bolster's evidence that in the context of some perceived intransigence on the part of the claimant in changing the way in which he managed the PFI contract (as exemplified by the dispute over the furniture), and his perceived reluctance to implement the up-banding for Mr Sollis, he wanted to "have an initial, honest off the record discussion" and to explore options with the claimant before potentially instigating performance management processes. I find that a severance was one of a range of options in the mind of Mr Bolster but do not find that this was "a plan". I also accept that the conversation about leaving followed confirmation by the claimant that he

had been applying for a secondment role on the 19 October 2018 when the original meeting had been scheduled.

48. The claimant specifically alleges that he was told by Mr Bolster that he should leave the organisation because of the operation of the PFI concession and specifically that the PFI partner Imagile had sought his removal and he was putting the relationship at risk. I do not find that this was said. I do find that in the discussion, reference was made to the potential role with NHS England and that Mr Bolster confirmed he thought it would be a good role for the claimant. I also accept that the possibility of secondment was raised by the claimant and that as an alternative the claimant asked if there might be a severance payment if he left the respondent.

49. I also accept that during this conversation reference was made to the fact that a full consultation process would not be required if the claimant did leave the trust as his post would still be required but not that Mr Bolster was stating he would not follow the respondent's procedures.

Ist November incident

50. On the 1 November 2018, there was a disruption to the water supply at the Blackberry Hill site.

51. Evidence was given by a number of witnesses and reference made in documents and submissions as to the nature of the inmates at Fromeside, and the likely impact that the loss of water could have on them, ranging from a suggestion that loss of water would cause virtually no disruption as toilets could be flushed using bottled water to a high risk of a riot and putting lives at risk. I find as suggested by counsel for the claimant in his written submission and as referred to in the respondent's written submission that the measured assessment of Mr Page provides the most reasonable and accurate account of the potential impact on the inmates. As a forensic psychiatric nurse and the COO of the respondent he stated: " My assessment of the situation was it was extremely serious. Maintenance of a therapeutic environment is always paramount especially in a medium secure unit where there are high levels of offending behaviour including up to homicide so it was extremely serious. A change in environment can result in extreme reaction triggered by stress. Not being able to shower is serious and flushing a toilet with bottled water is untenable".

52. The parties agree that as stated by the clamant his role was: "to manage the situation, to return the water supply to the building. Co-ordinate any activity arising from the incident" and that Mr Sollis, who reported to the claimant, was responsible for the on-ground liaison with the contractors and for understanding what was happening on site. (DB179)

53. The clamant received an email at 10:03 from Dave Read, a contact at a neighbouring site, identifying a loss of water in the locality due to a pump failure (CB279,280;493).

54. The claimant forwarded the email to relevant colleagues at 10:09. He stated that he was not sure if we “have been or will be affected” and checked on site to see if there had been any issues. No previous issues had been reported but there was no water at Lansdown (the catering unit). The claimant also tried to contact RML and spoke to Bristol water. At 10:27 the claimant spoke again to Mr Read who identified that they had intermittent supply.

55. Due the nature of the site Bristol Water is under a statutory obligation to use best endeavours to provide an uninterrupted/alternative water supply.

56. At this time, the claimant believed there was at least 12 hours of water in the tank and he was not aware that Lansdown did not have its own tanks (CB493).

57. Between 10:30 and 11:00 the claimant was told by Bristol Water that they were re-zoning the water supply and expected the situation to be resolved within 3 hours (CB 493/DB182). The claimant left a ring-back for RML and shortly afterwards missed a call from Mr Sollis.

58. Around 11:05 Ed Portingale, Services Manager – facilities (West) and Nigel Witchalls discussed matters and Mr Portingale then ordered drinking water. Mr Witchalls subsequently advised the claimant that he should consider ordering a water bowser as a contingency. The claimant decided to wait until 13:00 and then review the situation.

59. The claimant subsequently left a message to contact Stefan Jacabuwski Services Manager, Secure Services LDU, Fromeside and left a message for him to call.

60. At this point the Claimant, and other senior managers, assumed that Mr Sollis was on site, although he was not.

61. At 11:29 Mr Sollis emailed service users to say: “At the current time there is no incoming water supply to the Blackberry Hill site due to a burst water main in Fishponds. As a direct result no water is reaching the units on site to refill water tanks which are currently lower in their capacity”, He requested that water use was limited, stated that there was no timescale for supply to be reinstated and identified that: “there is capacity within the tanks to operate effectively at minimum requirements for a few hours” (CB213/DB206).

62. At 11:45 Mr Bolster responded to Mr Sollis’ email asking, “Are we talking to them about alternative supplies yet?” (CB257/DB205). This email was not copied to the claimant nor was the response from Mr Sollis to Mr Bolster at

11:50 which states: Rydon [RML] are in contact im waiting on an update. From that we will plan accordingly."

63. At around 11:50 the claimant and Mr Sollis spoke by telephone and the claimant sought to clarify if the estimate of a couple of hours was accurate. I accept that Mr Sollis did say "nah more than that" but do not find that any assurance was given as to how much more than "a couple of hours" water remained.

64. At 12:24 the claimant sent his first formal update on the situation (sitrep1) advising that Ian Lovell from RML had spoken to Bristol Water; that Bristol Water were trying to balance the pressure and "establish where the problem is". He stated that Bristol Water were to contact Ian Lovell of RML at 13:00 and that no water bowser would be ordered before then (DB208).

65. Shortly after 13:00 the claimant made contact with Kim Trowbridge of water2business (the water retailer) (D173) and also spoke to Mr Jacabuwski. At 13:50 Bristol Water spoke to RML (202DB). Mr Jacabuwski chased for an update at 13.53pm (DB212). At 14:09 Mr Sollis texted the claimant to say that RML had had a call from Bristol Water and would be calling him in 10/15 minutes. No decision was taken to order bowsers.

66. At 14:09 the claimant sent sitrep2 confirming he had spoken to Bristol Water; that there was no timeframe for the repair, but it would be at least another two hours; and that he had asked for a bowser (DB211). I find that Bristol Water had not agreed to provide a bowser at this time (CB498 par134).

67. Various conversations were held between Mr Sollis, the claimant and RML the consensus being that an alternative water supply was required.

68. Mr Bolster responded at 14:27 to say that two hours would be at the point support staff go home and if it could not be fixed then the BCP (Business Critical Plan) would need to be activated. (CB 224).

69. At 15:03 Mathew Page emailed Service managers to confirm he had been briefed by Mr Bolster, stating "I know you will already be looking at your local business continuity plans" and that a decision would be made at 16:00 as to whether a trustwide critical incident should be called.

70. Sitrep 3 was sent at 15:12 confirming that Ian Lovell of RML was checking the tanks and liaising with an inspector in the locality; that Mr Sollis would shortly be on site and that the claimant was waiting for a call back from Bristol Water. I find that there was no agreement to provide a bowser at this time (DB211).

71. The claimant had a heated conversation with Nigel Witchalls in relation to the delay in ordering a bowser and Mr Witchalls threatened to order one himself if

it was not ordered by 15:30. M Witchalls sent an email to Mr Bolster at 15:15 expressing his frustration with the situation (CB224).

72. Sitrep 4 was sent by the claimant at 15:37 confirming that "there was still no time-frame for the water being back on" but it was" "likely" to be 3-4 hours to get full pressure back on site". The claimant confirmed that bottled water would be provided by Bristol Water and that RML had ordered a bowser and that a third party (referred to as *Business 2 Busines* but actually water2business), had confirmed they would supply a bowser. I find that RML did not in fact order a bowser and that although water2business had agreed in principle to source a bowser this did not happen immediately.

73. Mr Bolster then raised some questions in response to sitrep4 at 16:08 and the claimant responded at 16:10 (sitrep 5 - DB2017).

74. At 16:45 pm there was still no supply to the tanks at Fromeside but some areas of the site had limited supply at lower pressure (DB203, DB153).

75. Following various discussions about how the bowser was to be paid for and by whom, the claimant confirmed the order of a bowser at 17.06 at a cost of £1235 + VAT by email to Kim Trowbridge at water2business (CB293). I find that this was the first time that a bowser was in fact ordered.

76. By 18:30 the tanks were filling very slowly (D204) and by 21:30 of the three Fromeside tanks, one was full, the second half full and the third not filling.

77. The tanker/bowser arrived at 22:00 (D204) and full water pressure was restored at 04.30 (Friday 2nd November) (D153).

Disciplinary and Grievance proceedings

78. The Respondent has a Disciplinary Policy (DB99-105), a Grievance Policy (GB66-72), Expected Standards of Conduct & Values (CB815- 818) and an Incident Management Policy (DB 106 -152).

79. Following a conversation with Emily Saad late on 1 November, Chris Stancliffe met with Mr Bolster at 09:00 on 2 November as he had concerns about the advice provided by Ms Saad in relation to the without prejudice meeting (CS WS par 7-10) and specifically that a severance payment would not be viable.

80. At this point no investigation had been undertaken into the water outage incident. I accept however that Mr Bolster did already genuinely have grave concerns about the way that the claimant dealt with the water outage (AB WS par 65).

81. As confirmed by Mr Stancliffe under cross-examination, in that meeting he asked Mr Bolster, “what was going on” and I find that the subsequent discussion covered both Mt Stancliffe’s concerns about the without prejudice meeting, and “the story” of the claimant’s position and role, encompassing Mr Bolster’s view of the wider performance issues including the claimant’s approach to Mr Sollis’ up-banding and Mr Bolster’s concerns about the claimant’s handling of the water outage on the previous day.

82. I do not, however accept Mr Canning’s submission that this proves that Mr Bolster did not think the situation was urgent given the initial conversation was held at 9.00 am. I find that further information (including key emails) was then collated and reviewed and that Mr Bolster decided to suspend the claimant due to his concern about the way that the claimant handled the water outage and specifically the claimant’s poor decision making. I find that Mr Stancliffe acted as an HR advisor and not a decision maker. On Mr Stancliffe’s advice a meeting was held with the claimant before a final decision was taken to suspend. It is common ground that a disciplinary options meeting was not held and Mr Canning confirmed during the course of the hearing that this alleged breach was no longer relied on by the claimant.

83. I accept Mr Bolster and Mr Stancliffe’s evidence that alternatives to suspension were considered and discussed by Mr Bolster and Mr Stancliffe but that Mr Bolster concluded that neither restricted nor alternative duties were viable due to the specialist nature of the claimant’s role and his seniority.

84. The Claimant was issued with a letter confirming his suspension dated 2 November 2018 (CB 304-305) and a suspension fact sheet. The letter was prepared by Mr Stancliffe and sent by Mr Bolster and was incomplete as it did not specify the individual to whom the claimant should report during his suspension. The claimant was advised that suspension was not a disciplinary sanction and that an investigating officer would be in touch shortly to arrange a meeting. The allegations were that the claimant had: *(i) Failed to immediately, and continuously thereafter, engage personally – as the responsible officer – in providing a response to the potentially catastrophic water failure at Blackberry Hill Hospital including our Medium Secure in patient facility; (ii) failed to ensure alternative drinking water provisions could be continuously provided to the site in a timely way.*

85. At the end of the meeting, it was agreed that Mr Bolster would call the claimant on 6 November 2018 to arrange for him to access his email account and to advise him of who was the investigating officer. Mr Bolster called the claimant on 9 November 2018. Mr Bolster appointed James Wright, Operations Manager, Secure Services LDU, Fromeside as the independent investigator although the date of that appointment is not clear.

86. In line with the Incident Management Policy (107-121 DB) a root cause analysis meeting was held to establish on a "no fault" basis what went wrong on 9 November 2018 (DB 153-161) and a number of changes were recommended including to infrastructure and contingency arrangements.

87. On the 12 November 2018 the claimant raised a grievance against Mr Bolster. His grievance was that he had been bullied and harassed by Mr Bolster specifically in relation to: (i) the 22 October 2018 without prejudice meeting, (ii) Mr Bolster targeting the claimant with a view to removing him from the Trust and offering his substantive post to other staff, (iii) his suspension on 2 November 2018 (iv) *sic* [not] selecting an independent investigator, (v) failing to undertake a formal Appraisal, and (vi) a plot to remove him from the Trust at the instigation of Imagile in the absence of an alternative position and in order to save on restructuring costs (GB 34-38)

88. The claimant attended the respondent's premises to access his emails on 13 November 2018. Mr Bolster was not aware of the claimant's grievance on this date.

89. The claimant's grievance was acknowledged by Hayley Richards the then CEO, on 14 November 2018 (CB298) and he was advised it was being passed on to Mathew Page, Chief Operating Officer, as Mr Bolster's line manager. An email was also sent to the claimant by Julian Feasby, Human Resources Director) on 19 November 2018 (CB313) in response to an email sent by the claimant to Mr Feasby on 16 November 2018 (CB313). The claimant refers to the appointment of James Wright as independent investigator in this email so was manifestly aware of this appointment by this date. The suspension letter and enclosures were sent to the claimant again by Ms Saad on 16 November (CB306).

90. Mr Bolster had no further involvement in the disciplinary process after that date other than being interviewed by Mr Stancliffe during the investigation as a witness.

91. Mr Wright interviewed and obtained statements from Mr Sollis, Mr Jacabuwski, and Mr Witchalls on 27 November 2018 as part of the disciplinary investigation.

92. On 28 November 2018 the claimant was invited to an investigatory interview with Mr Wright scheduled for 10 December 2018. The letter states: "I will be accompanied in the meeting by Chris Stancliffe (HR business Partner) who is conducting this investigation with me". (CB317)

93. There was conflicting evidence on whether in his grievance the claimant was complaining about the appointment of Mr Wright as investigator specifically, or that he had not been provided with assurances generally that the investigator appointed by Mr Bolster would be genuinely independent. I find that the

respondent believed the complaint was about Mr Wright's appointment as Mr Bolster had informed the claimant of this appointment on 9 November 2018.

94. On 30 November 2018 Mr Page wrote to the claimant to confirm that his complaints would be dealt with under the Trust's Grievance Policy and that in accordance with that policy, the investigation would run in parallel with the disciplinary allegation (GB53). The claimant was asked to complete a formal grievance complaint form which he did on 6 December 2018 (32-33GB).

95. On 6 December 2018 the claimant emailed Mr Stancliffe, Ms Saad and Mr Wright asking who the HR lead was and re-iterating his contact details (CB325)

96. On 7 December 2018 Mr Stancliffe emailed the claimant and informed him that the grievance had been received; that the treatment of the grievance was being determined; and that Mr Page was taking advice (CB325) and emailed again on 14 December 2018 noting the claimant's comments about the independence of the investigator.

97. I find that Mr Wright had started the disciplinary investigation with Mr Stancliffe but that based on the respondent's understanding that the claimant objected to Mr Wright as investigator, and following email exchanges in early December, the meeting with the claimant scheduled for 10 December 2018 was cancelled and Mr Wright was "stood down" from the investigation on or around 11 December 2018 (323CB). The claimant confirmed in the grievance hearing that his issue was with James Wright stating: "My statement was not about James's personal professional attitude which I highly regard, but is he too close as an investigator for this type of incident?" (CB689). I therefore find that the respondent had not misunderstood the issue raised by the claimant in his first grievance and that the claimant was specifically challenging the independence of Mr Wright.

98. On 21 December 2018 Mr Stancliffe emailed the claimant and his representative asking for availability in the "very early part" of the New Year (CB331) and on the 22 December 2018 notified the claimant that he would be completing the investigation (CB329, 333).

99. Following further email exchanges about the availability of the claimant and his potential representatives, Mr Stancliffe wrote to the claimant on 2 January 2019 confirming that he would be completing the investigation and inviting him to an investigatory meeting in accordance with the Trust's Disciplinary Policy to be held on 16 January 2019 (CB334). The claimant was also advised in this letter that Mr Page was replacing Mr Bolster as Commissioning Manager. Mr Page was not however notified of this fact at this time. In an email on the same date the claimant was advised by Mr Stancliffe that items 3 and 4 of his grievance would also be addressed (suspension and independence of investigator) as these related to the disciplinary process.

100. On 10 January 2019, the first suspension review meeting was held by Mr Page to consider the claimant's ongoing suspension (CB352). It was decided that the suspension should remined in place. I find that no formal suspension review meetings had been held previously in connection with the claimant's suspension.

101. On 16 January 2019 the claimant attended his disciplinary investigation meeting (CB486).

102. On 17 January 2019 Mr Stancliffe emailed the claimant to confirm that contrary to what he had told him the previous day, he would be investigating the claimant's grievance. I find that until this point, other than acknowledging the grievance, the respondent had taken no action to deal with the claimant's grievance other than stating that points 3 and 4 would be addressed in the disciplinary investigation meeting (CB393).

103. The notes of the investigation interview were sent to the claimant on 18 January 2019 (CB392).

104. The claimant emailed Mr Stancliffe on 20 and 22 January 2019 asking for the Grievance meeting to be scheduled urgently (CB511 and 513), and on the 21 January 2019 with his comments on the minutes (CB485).

105. On 25 January 2019, the claimant sent a further email to Mr Stancliffe copying in Julian Feasby and Mathew Page, thanking Mr Stancliffe "for being the only person communicating with me" and setting out a number of requests for additional and/or confirmation of information. The clamant also notified the respondent that his legal advisor was Luke Menzies "who have requested who the Trusts legal representative will be for an Employment Tribunal" (CB516).

106. On 26 January 2019 the claimant submitted a second grievance against Mr Bolster and Mr Page, referring to the matters set out in his first grievance which had not been addressed; to the lack of contact from the respondent and from Mr Page in particular; querying Mr Stancliffe's independence; and raising a number of detailed breaches of timescales and instances where information had not been provided to him or to the investigator (GB40-46).

107. Following an exchange of emails between the claimant and Mr Truelove in which the claimant again referred to potential claims against the respondent, (CB517-526), the respondent received a letter from Menzies law dated 29 January 2019 sent on behalf of the clamant in relation to the claimant's on-gong suspension, alleging that: it was a knee jerk reaction; there had been no risk assessment and no formal review; that the claimant had not been kept informed of progress or timelines; and that the position was unsustainable. A

deadline of 12 noon on Friday 2 February 2019 was given for the suspension to be lifted.

108. A further formal suspension review meeting was held on 31 January 2019 (CB533) at which the alternative of a return to administrative duties was considered (see par 110 below). Mr Page queried with Mr Stancliffe (via his Executive assistant), who was keeping in touch with the claimant during his suspension and what the process was for letting the claimant know about his suspension reviews (CB540).

109. On 1 February 2019 Julian Feasby, Director of Human Resources responded to the claimant and apologised for the delay in dealing with matters (CB591)

110. On 5 February 2019, Mr Stancliffe sent a response to Menzies offering a return to work undertaking administrative duties and indicating a provisional hearing date of 26 February 2019 (GB51).

111. There were further email exchanges between the claimant and Mr Stancliffe on 7 February 2019 in which the claimant sought to clarify and Mr Stancliffe to manage requests for more detail (CB552-557) and Mr Stancliffe sent a letter to Mr Bolster asking for responses to various questions in relation to the first grievance (CB558-560)

112. A number of emails were then sent internally at the respondent in relation to whether Mr Page should remain on the panel and how to deal with the multiple requests for information from the claimant and not delay matters further whilst Mr Stancliffe sought to finalise the minutes with Mr Sollis and his investigation report. Both Mr Page and Jane Dudley were a party to some of these emails. (CB561-600). The poor communication between the claimant and the respondent and internally within the respondent was partially caused by the fact that due to the grievance, Mr Bolster ceased to be the commissioning manager and the identified point of contact for the claimant and no alternative point of contact was identified. Practically Mr Stancliffe was the main point of contact for the claimant from the point he took over the investigation.

113. In emails of 9 and 11 February 2019 the claimant referred to an Employment Tribunal submission (CB577, CB595).

114. On 12 February 2019 Mr Feasby sent an email to the claimant addressing some of the points raised by him and confirming the respondent's decision that the second grievance would be addressed at the grievance hearing together with the first grievance. (CB589-590).

115. On 17 February 2019 Mr Bolster was interviewed by Mr Stancliffe in connection with the grievance process. Whilst explaining the context of the discussion about the claimant potentially leaving the Trust, Mr Bolster referred to the claimant's previous request of a MARS settlement.

116. On 17 February 2019, Mr Stancliffe produced the disciplinary report and sent it to Mr Page (DB1-49). The recommendation was for the matter to be referred to disciplinary action in relation to the management of the water outage incident but not in relation to the second allegation of failure to ensure alternative drinking water provisions could be continuously provided to the site. Mr Page was on leave and did not review the recommendations.

117. By letter dated 18 February 2019, the claimant was invited to a disciplinary hearing to commence at 09.30 to be heard by Mathew Page, Chief Operating Officer, Jane Dudley Deputy Director of HR, and Dr Pete Wood, Interim Medical Director CB 612). The disciplinary allegations were restated: as "(a) You did not in any significant sense manage the 1 November water outage which may have had significant consequences for the Trust's Fromeside service users, its Fromeside staff and the Trust itself. (b) You did not adequately manage the 1 November water outage which may have had significant consequences for the Trust's Fromeside service users, its Fromeside staff and the Trust itself. (c) Your management of the 1 November water outage, which may have had significant consequences for the Trust's Fromeside service users, its Fromeside staff and the Trust itself, was grossly incompetent. These allegations were differently framed but consistent with the original suspension letter (DB51) which stated that [the claimant] had failed to immediately, and continuously thereafter engage personally - as the responsible officer – in providing a response to the potentially catastrophic wate failure at Blackberry Hill including [our] medium secure in-patient facility. The letter was signed on behalf of Mr Page, but he did not approve it.

118. A Grievance report setting out the outcome of the investigation undertaken by Chris Stancliffe was completed on 24 February 2019.

119. On 26 February 2019 the grievance hearing was held at 09.30 and the disciplinary hearing at 13:00. The same panel heard both the grievance and disciplinary matters. The claimant was accompanied at both hearings by his trade union representative, Andy Cork. The notes of the Grievance hearing are at 671-698 CB and the disciplinary hearing at 633-670 CB. I find that in both hearings the claimant, and Mr Cork, were given every opportunity to state the claimant's case and make representations.

120. At the beginning of the grievance hearing, Mr Page specifically raised the question as to whether the claimant had a specific grievance about Mr Page as chair of the grievance panel. In the following discussion, the delay in the process was acknowledged and Mr Page noted that his signature was on the invitation letter although he had not approved it. Mr Page then specifically

checked “that, with the caveats around timeliness that [the claimant] is happy to proceed” (673 CB). The claimant also queried the prior involvement of Jane Dudley who confirmed that she had some involvement but not ”a close involvement”. The minutes then note that after a ten minute adjournment the formal grievance hearing commenced. I find that the claimant and his representative therefore did not object to Mr Page and Ms Dudley forming part of the panel.

121. During the grievance meeting, in seeking to explain the purpose of the adult without prejudice meeting on 22 October 2018, Mr Bolster stated: “my statement is absolutely clear that the primary need for the meeting was about the 2 job descriptions and the fact that one of my staff had been lied to about the outcome of that.” (678 CB). The statement taken during the grievance investigation (82-86 GB) also refers to the fact that Mr Bolster had raised the same issue in the adult without prejudice meeting held on 22 October 2018. I accept that this statement was made by Mr Bolster referring to the claimant during the grievance meeting. I also find that in Mr Bolster’s statement dated 17 February taken for the grievance hearing, he does refer to the MARS settlement (GB84) and that this was referred to in the hearing. Mr Canning confirmed during the course of the hearing that that the claimant no longer relies on this alleged breach.

122. The outcome of the grievance was provided verbally at the end of the day and split into four areas. Firstly, the claimant’s grievance in relation to the holding of the adult without prejudice meeting on 22 October 2018 was upheld and the finding was that it was not handled satisfactorily. The second allegation that there was a wider conspiracy was not upheld. It was acknowledged that there had been delays and Mr Page apologised again but there was no finding that the delay had undermined the grievance or disciplinary process. Finally, the grievance in relation to the claimant’s suspension was not upheld. At the claimant’s request the panel adjourned again to consider specifically if the allegation of bullying and harassment should be upheld, but it was not.

123. In relation to the disciplinary outcome the outcome was also delivered verbally at the end of the day and the claimant received a final written warning which in accordance with the Respondent’s policy was for the minimum recommended period of 24 months. The finding was that the panel concluded that the claimant was guilty of misconduct in that [he] failed to adequately respond to the situation at Blackberry Hill Hospital by not assessing the likelihood of an adverse outcome on the day and not properly assessing the seriousness of the incident and not giving direction to staff, not ensuring vital information was given and shared with colleagues and that roles and responsibilities were understood during the incident. The panel found that this was a failure to carry out core responsibilities of the claimant’s role but did not dismiss having taken into account the mitigation put forward by the claimant.

124. The claimant asked for the outcome to be confirmed in writing the next day. His representative pointed out that the timescales in the policy was 7 days and Ms Dudley confirmed that the best that could be done would be two days.

125. The claimant resigned by email on 28 February 2019 referring to “a breakdown in trust and confidence in the Trust as my employer reflecting on the management of his grievance and suspension and the failure to provide the written warning as promised” (CB700). He also referred to the fact that his suspension was known by peers and colleagues, he had not previously been subjected to capability issues, that Mr Sollis had been employed in his new role prior to 1 November 2018 and that this had been kept from him and that “false allegations of “lying” will be included in future legal action”.

Post resignation

126. The outcome letter dated 28 February 2019 was emailed to the claimant by Joan Baptiste executive assistant to Mr Page at 12.30 on 1 March 2019. The letter confirmed the verbal outcome provided to the claimant on 26 February 2019. The claimant subsequently appealed against both the grievance and disciplinary outcomes but these matters do not form part of these proceedings.

127. The claimant made contact with ACAS on 6 April 2019, the certificate was issued on 6 May 2019 and the claimant issued proceedings on 26 May 2019 claiming constructive unfair dismissal. The Tribunal has no jurisdiction in relation to a separate claim for bullying and harassment or damage to professional reputation.

The Law

128. Having established the above facts, I now apply the law.

129. Under section 95(1)(c) of the Employment Rights Act 1996 (“the Act”), an employee is dismissed if he 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.

130. If the claimant’s resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides “…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case”.

131. I have considered the cases of *Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT; Leeds Dental Team v Rose [2014] IRLR 8 EAT; Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT; WA Gold (Pearmark) Ltd v McConnell (1995 IRLR 516); Sawar v SKF (UK) Ltd (2010) 1 WLK 407; Working Mens' Club, Institute Union Ltd v Balls (20110 UKEAT/0119/11LA); Crawford v Suffolk Mental Health Partnership NHS Trust [2012] EWCA; Blackburn v Aldi Stores Ltd [2013] ICD D37; WE Cox Toner (International) Limited v Cox (1981) ICR 823 and Upton-Hansen Architects ("UHA") v Gyftaki UKEAT/0278/18/RN.*

132. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in *Western Excavating (ECC) Limited v Sharp [1978] IRLR 27*: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

133. In *Tullett Prebon PLC and Ors v BGC Brokers LP and Ors* Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."

134. In *Courtaulds Northern Spinning Ltd v Sibson* it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is

such a breach, it is clear from *Meikle, Abbey Cars and Wright*, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. In need not be the predominant, principal, major or main cause for the resignation.

135. With regard to trust and confidence cases, Morrow v Safeway Stores holds that all breaches of the implied term of trust and confidence are repudiatory, and Dyson LJ summarised the position thus in *Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA*: "The following basic propositions of law can be derived from the authorities:
1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761*.
2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example *Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D* (Lord Nicholls) and *45C – 46E* (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".
3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, *per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A*; "the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship".
4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must: "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"."

136. This has been reaffirmed in *Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA*, in which the applicable test was explained as:
(i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test should be applied;
(ii) If, applying *Sharp* principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed;
(iii) It is open to the employer to show that such dismissal was for a potentially fair reason;
(iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see

Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."

137. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (*Claridge v Daler Rowney [2008] IRLR 672)*; and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (*Lewis v Motorworld Garages Ltd [1985] IRLR 465*). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (*Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA*).

138. The judgment of Dyson LJ in *Omilaju* has recently been endorsed by Underhill LJ in *Kaur v Leeds Teaching Hospital NHS Trust*. Having reviewed the case law on the "last straw" doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee.

139. In addition, it is clear from *Leeds Dental Team v Rose* that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed and does not turn on the subjective view of the employee. In addition, it is also clear from *Hilton v Shiner Ltd - Builders Merchants* that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.

140. Mr Isaacs has directed me to the cases of *WA Gold (Pearmark) Ltd v McConnell (1995 IRLR 516) and Sawar v SKF (UK) Ltd (2010) 1 WLK 407* in support of the contention that whilst it is an implied term that the employer will give an employee a reasonable opportunity to obtain redress in respect of a grievance this does not mean the poor handling of a grievance necessarily constitutes a repudiatory breach. He has also directed me to the case of *Working Mens' Club, Institute Union Ltd v Balls (20110 UKEAT/0119/11LA)* in support of his argument that tribunals should be slow to treat the initiation of an investigation as itself a repudiatory breach, and by analogy be slow to treat suspension as a repudiatory breach.

141. Mr Canning has directed me to the Court of Appeal decision in the case of *Crawford v Suffolk Mental Health Partnership NHS Trust* in support of his contention not that suspension was a knee jerk reaction (which he fairly accepts it was not in this case) but that it should not be a default and given the impact

on the suspended employee should only be used where absolutely necessary and then for no longer than is required.

142. He has also asked me to consider the case of *Blackburn v Aldi Stores Ltd [2013] ICD D37*, a case where the same manager heard both the grievance and the grievance appeal in support of his contention that a failure to adhere to a grievance procedure is capable of amounting to or contributing to [sic] a breach of the implied term of trust and confidence.

143. On affirmation and waiver I have considered the case of *WE Cox Toner (International) Limited v Cox (1981) ICR 823*, and specifically the premise that at some stage the employee must elect between affirming the contract or waiving the breach. Although there is no need to do this in a reasonable time and delay by itself does not constitute affirmation, if the innocent party calls on the guilty party for further performance, he will normally be taken to have affirmed the contract. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract.

142. As re-emphasised by the EAT in the decision of *Upton-Hansen Architects ("UHA") v Gyftaki*, it is for the employer to advance in pleadings, assert in evidence, and prove a potentially fair reason for the dismissal, and a failure to do so may preclude them from a defence to a claim of constructive dismissal.

Decision on liability.

143. Mr Canning confirmed during the course of the hearing that the claimant is no longer relying on the first alleged breach, the fifth alleged breach, the seventh alleged breach, the tenth alleged breach or to the extent it refers to the termination letter (which post-dates the claimant's resignation) the fourteenth alleged breach. In his closing submission Mr Canning also reframed the alleged breaches as follows: (i) As at 22 October 2018, [the claimant] was told to leave the respondent; (ii) His superiors conspired to secretly appoint his direct report Lee Sollis; (iii) He was unfairly suspended; (iv) on 26.2.2019 his line manager accused him of being a liar; (v) the grievance and disciplinary processes were fundamentally flawed and unjust. Number (v) was then split into five further submissions – (i) delay, (ii) the [lack of] independence, (iii) [the inadequacy of] the disciplinary report, (iv) changing allegations, and (v) whether taking disciplinary action and in the alternative the outcome was without reasonable and proper cause.

144. In his closing submissions Mr Canning also stated that the claimant's primary case is that this is not a "last straw" case because he resigned (at least in part) to each of [these] breaches. Mr Isaacs on behalf of the respondent sets out the guidance on the last straw principle as stated in London Borough of Waltham Forest v Omilaju and Kaur V Leeds Teaching Hospital NHS Trust.

145. I therefore consider first if taken alone any one of the breaches relied on is sufficient to breach the implied term of trust and confidence (Implied Term) and in the alternative, if taken cumulatively, they would do so.

146. *Second Alleged Breach:* I do not find that the claimant was told to leave the respondent, nor do I find that holding an adult without prejudice meeting is in itself a breach of the Implied Term. Nor do I find that anything said in that meeting (whether or not the meeting could properly be construed as without prejudice) in itself constitutes a breach of the Implied Term. It is common practice within employers for "protected" or "without prejudice" conversations to be held before performance management procedures are instigated. On this occasion, the meeting was poorly planned and executed as found by the grievance panel when they upheld the claimant's grievance but did not in itself constitute a breach of the Implied Term. I further find, that even if it had been a breach, the claimant had affirmed the contract by continuing in employment and further that it did not contribute to his decision to resign as he did not mention it in his resignation letter.

147. *Third Alleged Breach*: I do not find that Mr Bolster did state that he would not follow the organisational change policy as alleged. There is therefore no breach of the Implied Term. Further I do not find that even had he done so, that this would have constituted a breach of the Implied Term

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148. *Fourth Alleged Breach:* I have concluded that the claimant was aware of the proposed up-banding of Mr Sollis and indeed had been tasked with delivering it. I therefore do not accept that the up-banding happened without his knowledge nor do I accept that this was in any way part of a wider secret plot. I accept that the claimant was not informed in the period from 15 October to 24 October 2018 that an existing job description was being used by Mr Witchalls to facilitate the re-grade as an alternative to using a new role description and I also accept that Mr Bolster did not inform the claimant of the fact that the up-banding had been agreed with Mr Sollis verbally on the 18 October 2018 before Mr Sollis himself notified the claimant of the up-banding on 24 October 2018 but I do not find that these events constitute a breach of the Implied Term. It could be expected that the claimant would have been pleased that a solution had been found to an on-going issue. I also find that Mr Bolster did intend to tell the claimant of this fact at the meeting originally scheduled for 19 October 2018 but did not do so at the rescheduled meeting on 22 October 2018.

149. I have also considered the expanded allegation (page 5 of Mr Canning's submissions) that the claimant's superiors "conspired" to secretly appoint his direct report. I do not find that there was any such conspiracy and therefore do not find that there is any breach of the Implied Term.

150. *Sixth Alleged Breach.* Whether the instigation of disciplinary action in relation to the 1 November incident, is a fundamental breach is considered below. However, I do not find that there was a conspiracy to remove the claimant from his role. I do not therefore find that the decision to suspend him was part of a wider conspiracy to have him removed as claimed. I also note that ultimately the claimant was not dismissed following the disciplinary process which, had there been such a conspiracy, would have been the obvious outcome. Throughout the internal Trust processes and indeed the Tribunal hearing, the claimant has maintained a genuine, albeit I find, an unfounded belief, that there was a conspiracy to remove him, notwithstanding that when he could have been dismissed, he was not and in my view this has led him to an inaccurate interpretation of the motive for the respondent's actions.

151. In relation to the more general issue as to whether the suspension was in itself a breach of the Implied Term, Mr Canning identifies in his submission (par 29 (i)), as does Mr Isaacs (par 80) and I agree, that the reason for the claimant's suspension was the respondent's concerns about the claimant's judgment. Mr Canning then submits that the risk of the repetition of a similar event was miniscule (par 29 (iv)) and highlights that a significant contributing factor on 1 November 2018 was Bristol Water's failure to escalate the situation and that with new procedures in place following the root cause analysis meeting on 9 November 2018, there was "no on-going risk". I do not accept this argument. Whilst Bristol Water were undoubtedly at fault on 1 November 2018 and it may be unlikely that an identical crisis would arise, the claimant occupied a senior position where from time to time, unexpected incidents would occur for which he would or may be responsible.

152. Having listened to evidence from the claimant, Mr Bolster and Mr Sollis who were all involved on 1 November 2018, and having considered other relevant evidence both oral and written and with the benefit of helpful chronologies from both counsel, I conclude that what did in fact occur on 1 November 2018 and who knew what when, and how much risk there was to the site was complicated to establish. The respondent's disciplinary policy provides that suspension may be appropriate, "Where the alleged action is of a serious nature, potentially constituting gross misconduct" (DB102) and the Suspension Fact Sheet (CB312) states that suspension may be appropriate if: "there is a risk to the health and safety of … service users [or] other employees…. if the employee remains at work; [or] there is a risk of repetition in allowing the employee to remain at work; [or] the employee might damage the Trust's interests if remaining at work". I am satisfied that given the complexity of the situation on 1 November 2018, the nature of the site and the vulnerability of some of the site's occupants, the respondent's decision to suspend the claimant was not unreasonable and was not in breach of the respondent's own policies. Although suspension may give rise to a breach of the implied term of trust and confidence I find that the claimant's suspension on this occasion was done with reasonable and proper cause.

153. The claimant specifically alleges that Mr Bolster should have waited for evidence from the utility company before considering suspension. I do not find that this was a material omission or that a decision to suspend could not be taken before this information was obtained.

154. The claimant also relies on the fact that the suspension was not reviewed in accordance with the grievance policy. I accept that the suspension was only formally reviewed at the two review meetings held on 10 and 31 January 2019. However, I do not find that this is in itself a fundamental breach of the Implied Term. I also note that following the 31 January 2019 review the claimant was offered reinstatement to administrative duties. To the extent that the claimant seeks to rely on a series of associated breaches linking failure to keep in touch with the claimant and failure to review the suspension with the length of the suspension (par 29(vii) Mr Canning's closing submission), I find that the further breaches in relation to the claimant's suspension are not fundamental breaches and even if they were, that they have been affirmed by the claimant by his continuing engagement with the disciplinary process.

155. *Eighth Alleged Breach:* I deal with this alleged breach at pars 166 onwards below.

156. *Ninth Alleged Breach:* I have found that Mr Bolster genuinely believed that the claimant had misled Mr Sollis about the reason for the refusal of the up-banding. I have also found that the original purpose of the 22 October 2018 meeting was in part to establish why the claimant had miscommunicated the reason for the refusal to Mr Sollis and that this was in fact discussed at the meeting on 22 October 2018. On this point I accept Mr Bolster's evidence (CB677). I do not find that this question was without reasonable and proper cause likely to seriously damage the trust and confidence between the employer and employee as based on his genuine mistaken understanding, it was reasonable and proper for him initially to seek to establish from the claimant his explanation for the information he communicated to Mr Sollis. I do not accept that by referring the panel to his earlier statement of 17 February 2019 in which he stated that "the reason for the meeting was in relation to the job description development and lying to a colleague" as an explanation, Mr Bolster was repeating the allegation. I accept that there was genuine confusion about the basis for the refusal and miscommunication between Mr Bolster and the claimant. In honestly reporting the discussion he had had, in the context of the fact that the claimant was not in the disciplinary hearing being accused of lying, I do not find that Mr Bolster's comment was a breach of the Implied Term. Even if this is not correct, to the extent that there was a breach when Mr Bolster first raised this with the claimant on 22 October 2018. I find that the claimant subsequently affirmed the contract both by continuing in employment and by subsequently engaging in the disciplinary process.

157. *Eleventh Alleged Breach:* Of the two allegations contained in the suspension letter, the second in relation to failure to ensure a continuous supply of drinking water was not pursued. The first allegation that the claimant had not engaged personally – as the responsible officer – in providing a response to the water failure was re-framed as three alternative allegations in the disciplinary invitation letter of 18 February 2019: essentially that the claimant's actions were either grossly incompetent, inadequate or that he did not in any significant sense manage the incident on 1 November 2018. I accept that the re-framing of the allegations was not helpful, and this was clearly the view of the disciplinary panel as their written outcome letter was formulated against the original allegation, but I am satisfied that the claimant understood in advance of the disciplinary hearing that it was his actions on 1 November 2018 that were under scrutiny and that the allegation was that he personally had not managed the situation to the required standard. I also note that in the disciplinary hearing when the claimant set out his initial account of who was responsible for what on the day, Mr Page stated to the claimant: "your initial management case you have presented is technically an engineering account; it is a contractual account of who is responsible for what. The allegations against you are about your management of the situation (CB 645)." The claimant then continued to give a full account of how he had sought to manage the situation. I therefore do not find that the allegations were insufficiently precise for the claimant properly to prepare his defence or to provide a full explanation of his actions at the disciplinary hearing and I therefore find this did not constitute a fundamental breach of the Implied Term.

158. *Twelfth Alleged Breach:* I do not find that that the final warning was given in bad faith and other than the claimant's belief that there was a conspiracy to remove him, no evidence to support this contention was provided and I reject this allegation. I then turn to consider whether on the basis of the evidence, the respondent either had or should have had before itself at the disciplinary hearing, it could reasonably have decided (as it did) to administer the claimant with a final written warning. I am mindful as agreed with both counsel that in considering the respondent's decision to issue a final written warning, I am not to substitute my decision for that of the respondent, but to consider whether it is within the range of decisions a reasonable employer could have reached. I conclude that based on the evidence before it, which I find was adequate, and the submissions made by the claimant and his representative in the disciplinary hearing, which were detailed, that the panel's decision to issue a final written warning was within the range of reasonable responses which could have been issued and per **Buckland** conclude that this is relevant in determining, which I do, that the issue of the final written warning does not breach the Implied Term. The basis for the finding as explained to the claimant supports this finding, namely that the claimant failed to adequately respond to the situation by: (i) not properly assessing the likelihood of an adverse outcome, (ii) not properly assessing the seriousness of the incident, (iii) not giving direction to staff, (iv) not ensuring vital information was given and shared with colleagues; and (v)

[not ensuring] that roles and responsibilities were understood during the incident.

159. *Thirteenth Alleged Breach:* I have not been expressly directed to any evidence in support of this contention and there is no email from NW dated 19 October 2018, However, in an email dated 5 November 2018 (CH252) to which I was referred in the course of the hearing, reference is made to an "exit process and settlement" and to third parties being aware of "a process". I find that there had been discussion between senior managers about the options available to resolve the situation, including a settlement as an alternative to the disciplinary process, and from the evidence provided conclude that Mr Witchalls favoured an alternative to formal disciplinary proceedings. However, I do not find that the process referred to was anything other than the investigation nor that there was a "plan" to terminate the claimant's employment which was communicated to third parties as alleged. I therefore do not find that this constitutes a breach of the Implied Term.

160. *Fourteenth alleged Breach.* I deal only with the allegation that Mr Bolster lied to the disciplinary hearing as to the date of the promotion of Mr Sollis as the letter post-dates the claimant's resignation. See also comments on changing allegations below. I have found that Mr Sollis was informed on the 18 October 2018 verbally that the up-banding had been approved and that this was confirmed to him by letter dated 24 October 2018 sent to him on 26 October 2018. No "start date" for the change was set out as the pay increase was back-dated to 1 April 2018. I accept Mr Bolster's evidence under cross examination that this was a genuine mistake and I accept Mr Isaac's submission that this does not constitute a repudiatory breach.

161. *Fifteenth Alleged Breach.* Although the case management order identifies the "Breaches of Trust Policies" as set out in the claimant's original claim form as primarily as relating to the time scales over which certain matters were handled, the procedural breaches identified and relied on by Mr Canning have been expanded on and I make my findings in relation to each of the identified areas of breach as set out in his closing submission.

162. *Delay*: *disciplinary procedure.* Although a disciplinary procedure that takes four months to complete is not satisfactory, having reviewed the multiple factors that led to this time frame, including the complexity of the issues, the concurrent grievance which led to the replacement of the original investigator, the difficulties with scheduling interviews due to the availability of relevant parties, including the claimant and his representative (exacerbated by the Christmas break) I do not find that the delay is in itself a fundamental breach of the Implied Term notwithstanding that the claimant was suspended. Further the claimant affirmed the contract by continuing to engage with the disciplinary process.

163. *Delay: grievance procedure.* The first grievance was not dealt with well. There was considerable internal confusion on receipt of the first grievance and whilst I find it was in fact acknowledged relatively promptly (on more than one occasion) it was not then progressed. The respondent having taken a decision to deal with it concurrently with the disciplinary process, which was in accordance with its own procedures, (and I find a reasonable approach given the overlap in subject matter), the claimant could have expected that he would have been informed of the time frame and process. The respondent's grievance policy does not require an investigation to be carried out and it would have been possible for a grievance hearing to have been convened within a reasonable time-frame. Alternatively, if the respondent's decision was to undertake an investigation then the scope and time-frame for the investigation should have been identified. The respondent muddled the two processes (disciplinary and grievance) and I find that this did this result in delay. However, I do not find that this delay is in itself a fundamental breach of the Implied Term even though the clamant was suspended. Further I find that the claimant affirmed the contract by continuing to engage with the disciplinary and grievance processes.

164. There was no delay in dealing with the second grievance.

165. Mr Canning raises an additional point in his submissions that the failure to keep in touch with the claimant was in itself and/or in conjunction with the other breaches also a fundamental breach. I note the respondent's failure to deal with the consequences of the grievance against Mr Bolster by not appointing a new commissioning manager or point of contact and as acknowledged by Mathew Page in the grievance hearing, accept that this caused considerable distress to the claimant. However, I do not find that the lack of contact was in itself a fundamental breach of the Implied Term and to the extent that the claimant seeks to rely on a series of associated breaches linking failure to keep in touch with the delay, I find that cumulatively they are not a breach of the Implied Term and even if they were, that they have been affirmed by the claimant by his on-going engagement with the disciplinary and grievance processes.

166. *Independence (Thirteenth Alleged Breach).* There are three challenges to the impartiality of those involved in the disciplinary and grievance processes. The claimant alleges that Mathew Page who chaired the panel that heard both the disciplinary and grievance hearings had had previous involvement in the incident; that he was implicated in the first grievance and named in the second. He also asserts that Jane Dudley who sat on the disciplinary and grievance panel, had previous involvement in the process and was herself implicated in the first grievance and had already reached a view on whether Mathew Page should hear the disciplinary and/or grievance. Lastly the claimant alleges that Christ Stancliffe, who took over the investigation from James Wright had been involved as HR advisor in relation to the 22 October meeting and the suspension and therefore "had skin in the game", as well as being implicated in both the first and second grievances. The respondent has also helpfully highlighted that Mr

Stancliffe had in fact drafted the disciplinary invitation letter containing the revised disciplinary allegations, which it is accepted was not sent by Mathew Page although signed on his behalf.

167. I deal first with the disciplinary hearing. I find that both Mathew Page and Jane Dudley were impartial panel members at the disciplinary hearing and that their previous limited involvement had not led them to pre-judge the outcome. In relation to Mathew Page's involvement on the day of the incident I do not find that having in mind whether a BCP should have been put into operation meant that he had prejudged the outcome of the disciplinary hearing against the claimant. I am also mindful that the panel consisted of three members, the third member Peter Wood being entirely independent. I therefore do not find that the constitution of the panel was a breach of the Implied Term. If I am wrong on this point, then I find that the claimant affirmed the breach by continuing to participate in the disciplinary hearing.

168. In relation to the grievance hearing, I note that neither Mathew Page nor Jane Dudley were named in the first grievance and Jane Dudley was not named in the second grievance. Having reviewed the level of her involvement and heard her evidence, I find that Jane Dudley was impartial in relation to both the first and second grievance notwithstanding her previous involvement in email correspondence and discussions with Chris Stancliffe about the process.

169. I also find, having reviewed the level of his involvement and heard his evidence, that Mathew Page was impartial in relation to the first grievance. His inclusion on the panel in relation to the second grievance is however I find a breach of the Implied Term as the second grievance was raised expressly against him in relation to delay. I note that the outcome of that part of the grievance was an acknowledgement and an apology for the delay, (although the finding was that the delay had not fundamentally undermined the disciplinary and grievance processes) but whilst this suggests impartiality, the claimant was entitled to have his grievance against Mr Page considered independently. I also note the respondent's rationale for not wishing to delay matters further is relied on as providing "reasonable and proper cause" for the potential breach, but I do not find that this is an acceptable reason. It would have been entirely possible to deal with the first grievance and the disciplinary hearing whilst reserving the second grievance to be considered separately and/or on conjunction with any subsequent appeal or for Mr Page to recuse himself from the panel for the second grievance, leaving the remaining two members to consider the points on which there was a conflict. However, having found that the claimant and his representative were offered the opportunity to object to Mathew Pages' inclusion on the panel at the start of the grievance hearing, I do find that the claimant affirmed the contract by continuing with the grievance process knowing Mr Page was chairing the panel.

170. In relation to Mr Stancliffe, his role in the disciplinary process was to complete the disciplinary investigation and to prepare a report. My findings on the adequacy of the report are below (par 172), but I am satisfied that he had no pertinent knowledge about the 1 November incident. I have considered carefully whether his involvement in the decision to suspend tainted the investigation to such a degree that it was in itself a breach of the Implied Term but do not find this to be the case. The investigation report was merely a report, with relevant witness evidence appended, and the minutes of the disciplinary hearing show that both the panel members and the claimant and his representative had the opportunity to and did challenge its contents before a decision was reached by the panel.

171. In relation to the grievance, Mr Stancliffes' role evolved from investigating those elements of the first grievance which related to the disciplinary process, to investigating all aspects of the first and second grievance (to the extent necessary) and to preparing an investigation report, although neither the terms of reference nor the process for dealing with the grievance were clearly identified. I note Mr Stancliffe was not named in either grievance but that the investigation report does contain a section headed "Independence of Chris Stancliffe" (GB 20) and I therefore accept as submitted by Mr Canning, that Mr Stancliffe was in part, essentially investigating himself. Mr Isaacs submits that Mr Stancliffe was not "wholly" independent but was "sufficiently" independent. I have considered carefully whether this section of the report tainted the entire investigation to such a degree that it was in itself a breach of the Implied Term but do not find this to be the case, I accept that Mr Stancliffe was sufficiently independent when looking at the totality of all the grievance issues raised, if not in relation to his own involvement which formed a relatively minor part of the grievances raised. Further, as with the disciplinary investigation, the grievance investigation report was a report, with relevant witness evidence appended, which was considered by the panel at the hearing and the minutes of the grievance hearing show that both the panel members and the claimant and his representative had the opportunity to, and did, challenge its contents before a decision was reached by the panel on the grievance outcome.

172. *Disciplinary Report*. The claimant alleges that the disciplinary report was not a proper disciplinary report and this fact led the panel to error. The disciplinary bundle which was presented in Tribunal in addition to the chronological bundle comprises 287 pages and contains the investigation report, witness evidence and relevant documents. I accept the evidence of Mathew Page and Jane Dudley that this was reviewed by them and I note from the minutes that questions were asked by the panel of those in attendance and that proper consideration was given to the matters set out in the report and supporting documents. I therefore do not find that the report was in itself so inadequate as to render the whole process to be in breach of the Implied Term, nor that its inadequacies led the panel into error.

173. *Changing allegations (Fourteenth Alleged Breach (part)).* As with other aspects of the management of the disciplinary and grievance processes, the respondent's re-framing of the disciplinary allegations was unsatisfactory. However, I am satisfied that the claimant understood that it was his personal management of the 1 November incident that was under scrutiny and that the difference in the allegations between the suspension letter, were not a breach of the Implied Term and were further affirmed by him by his continued engagement with the disciplinary process. No reference is made in the claimant's resignation letter to any change in allegations and the reversion to the original wording of the suspension letter in the outcome letter cannot have caused to any extent his resignation as it was not received by him until the next day.

174. *Disciplinary action/outcome without reasonable and proper cause.* It is not disputed that issuing a final written warning is conduct likely to seriously damage trust and confidence. However, the claimant submits that disciplinary action should not have been taken against the claimant at all in light of the provisions of the Incident Management Policy (DB107 onwards). He also referred the Tribunal to a document entitled Internal safety Alert dated December 2012 (added to the bundle during the course of the hearing). This document states: "There is no intention to subject staff to disciplinary procedures for honest mistakes". It continues "the Root Cause Analysis investigation is not intended to … determine whether there are individual disciplinary … issues ", Alternatively Mr Canning submits that the outcome of the disciplinary hearing should or indeed could only have fairly have been a finding that the claimant was not to blame, or if there was fault that it did not amount to misconduct. I have considered the last two submissions in dealing with the Twelfth Alleged Breach above. In relation to whether it was inappropriate to take disciplinary action at all, given the provisions of the Incident Management Policy and the Alert, I find that it was an appropriate cause of action for the respondent to take. The fact that an incident review should not be used to identify fault, does not mean that if there has been fault, this should not be separately identified and addressed. If and to the extent that fault constitutes potential misconduct then the appropriate way to address it would be by using the respondent's disciplinary policy. I do not therefore find that there is a breach of the Implied Term in using the disciplinary procedure in relation to the 1 November incident.

175. Having considered whether the claimant is able to rely on any one of the alleged breaches in order to found his claim and concluded that he cannot, I now consider if taking cumulatively the breaches constitute a breach of the Implied Term. I have in mind the principles set out in *Lewis* and *Omilaju* as endorsed by Underhill LJ in *Kaur v Leeds Teaching Hospital NHS Trust* and specifically on the premise firstly that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee and secondly that if relying on a series of acts the claimant must point to the final act which must be

shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment.

176. Mr Canning has made no submissions in relation to the last act relied on and the extent to which it contributed or added to the cumulative breach of the implied term of trust and confidence by the respondent, relying on his primary case that each of the alleged breaches was in itself a fundamental breach which was not subsequently affirmed by the claimant. This may well be because he sees little merit in pursuing this line of reasoning. For completeness however, I find that the last in the series of acts in this case or the "last straw" event is the failure to confirm the warning in writing within two days as Jane Dudley had indicated in the disciplinary hearing it would be, when pressed by the claimant. The outcome letter was sent the next day, within the 7 days identified by the claimant's representative as being provided for by the policy. Whilst I have found that the respondent had failed to deal with both the disciplinary and grievance processes expeditiously (albeit not in itself constituting a fundamental breach of the implied term of trust and confidence), I do not find that this minor delay can be said to contribute or add in any way to the breach of the implied term of trust and confidence.

177. In conclusion, I find that there I has been no fundamental breach of contract, relying either on individual breaches or cumulatively. The claimant's resignation cannot therefore be construed to be a dismissal. I find the claimant resigned and was not dismissed. In the absence of a dismissal his unfair dismissal claim must fail and is hereby dismissed.

178. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraphs 1 to 12 the findings of fact made in relation to those issues are at paragraphs 13 to 127; a concise identification of the relevant law is at paragraphs 128 to 142; and how that law has been applied to those findings in order to decide the issues is at paragraphs 143 to 176.

Employment Judge K Halliday

Dated: 31 December 2020

Judgment sent to Parties on: 7 January 2021

FOR THE TRIBUNAL OFFICE