EMPLOYMENT TRIBUNALS

Claimant: Mr J Hockey

Respondent: RCKA Limited T/A RCKA Architects

Heard at: **London Central (remotely by CVP)**
On: 29 September and 1 October 2021

Before: Employment Judge Heath

Representation
Claimant:In person
Respondent: Ms S Wood (Litigation consultant)

RESERVED JUDGMENT

1. **The claimant's claim of constructive unfair dismissal is not well-founded and is dismissed.**

2. **The claimant's claim for wrongful dismissal is not well-founded and is dismissed.**

REASONS

Introduction

1. By a claim form presented on 19 November 2020, the claimant claims constructive unfair dismissal and breach of contract (related to non-payment of notice pay). The ET1 made reference to a claim for holiday pay, but the claimant told me at the beginning of the hearing that he was no longer pursuing this claim.

Issues

2. At the start of the hearing it was agreed that the issues I have to determine are as follows:-

   Constructive dismissal

   a. The claimant relied on a breach of the implied term of trust and confidence. Did the respondent without reasonable or proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant?

      i. In this regard the claimant relies cumulatively on a sequence of events relating to disciplinary action regarding to capability from 11 September 2022 to his resignation on 10 October 2020.

      ii. The claimant relies on an email from Mr Riley on 6 October 2020 as the final straw.

   b. Did the claimant resign in response to the breach?

   c. Did the claimant affirm the contract before resigning?

   d. If the claimant was dismissed, what was the principal reason for dismissal, and was it a potentially fair reason? The respondent denies that it dismissed the claimant, but in the alternative relies on capability as a reason for dismissal.

   e. If the claimant was dismissed, was the dismissal fair in accordance with section 98(4) Employment Rights Act 1996 ("ERA")?

   f. If the claimant was unfairly dismissed and such dismissal was procedurally unfair, should the claimant's compensation be reduced to reflect the chances that he would have been dismissed in any event, and if so to what extent?

   g. Did the claimant cause or contribute to dismissal, and if so to what extent should this be reflected in his compensatory award and his basic award?

   h. What compensation is due to the claimant? The respondent contends the claimant failed to mitigate his loss.

   Wrongful dismissal

   i. Was the claimant dismissed without notice? If so, what compensation is he entitled to?

Procedure

3. On reviewing the file before the hearing I noted that the parties had encountered difficulties in case preparation, to the extent that over 100 pages of inter parties correspondence was in the bundle at the claimant's

request. I reminded the parties at the beginning of the hearing of the overriding objective and the parties' duty to assist the Tribunal to further the overriding objective and to cooperate with each other and with the tribunal. I am pleased to say that the hearing proceeded smoothly and both the claimant and Ms Wood were courteous and helpful.

4. An issue arose before the hearing concerning late exchange of a witness statement from one of the respondent's witnesses, Mr Curtis. The claimant submitted that his statement should be excluded on the basis that it had been exchanged late and did not give the claimant the opportunity to deal with issues raised in it. The claimant clarified the issues where he was disadvantaged all related to remedy. On the basis that it appeared to me that it was almost certain that I would not be in a position to deal with remedy if I found in the claimant's favour, I allowed Mr Curtis' witness statement to be adduced.

5. I was provided with a 377-page bundle, a witness statement and supplementary witness statement from the claimant, and for the respondent, witness statements from Mr Kleiner, Mr Riley, Mr Curtis and Ms Charlton. All of these individuals gave live evidence.

6. As indicated above, it was clear from an early stage that there was insufficient time for this hearing to deal with remedy. With the party's agreement, evidence was heard relating to liability alone.

7. Miss Wood and the claimant gave oral closing submissions at the end of the evidence and I reserved my decision.

Facts

8. The respondent is a firm of architects which was incorporated in 2006. Mr Kleiner, Mr Riley and Mr Curtis are its directors, and Ms Charlton is the Operations Director. The company employs around 20 people. The respondent did not have a dedicated Human Resources ("HR") function, but Mr Kleiner was the director with overall responsibility for HR.

9. The claimant was employed by the respondent on 15 March 2012 as an Architectural Assistant (commonly known as "a Part II" within the industry). He had gained one year's experience as a Part I Architectural Assistant with another firm prior to joining the respondent. He continued his education and training within the respondent company and became registered as an Architect on 18 April 2018.

10. The claimant did not have a line manager, as such, while he was working for the respondent, as there was no formal line management structure. Much of the work of an architect is project based, and a director or Associate Architect would lead the project and manage the claimant's work on each particular project.

11. The respondent did not have any difficulty with members of staff working on their own private work as long as this did not impinge on their work for the respondent. The claimant did do some private work while working for the respondent.

12. The respondent conducted half yearly performance and pay reviews. The claimant received regular pay rises during the course of his employment. I accept the respondent's evidence that there is not necessarily a direct correlation between the performance of the worker and pay rises. Mr Kleiner gave evidence, which I accept, that the respondent felt the need to keep salaries in line with the market to retain staff.

13. During the course of the claimant's employment the respondent's directors found that there were a number of things that the claimant did very well. However, there were concerns about his performance in a number of respects.

14. In 2017 claimant was working on a project known as Knaphill, a large project of terraced homes, that requiried collaborative working. On 13 November 2017 Mr Riley emailed Mr Curtis and Mr Kleiner to say that the claimant, effectively, had done some work and told a junior colleague to "watch and learn" rather than including the junior colleague in the work. Mr Riley observed that this "*only reinforces the perception of him being too precious and indulgent – Another reason why James should not lead projects*".

15. Around this time the claimant was also working on a large residential design competition submission called the Frampton Estate. The claimant was tasked with developing plans for the scheme. Mr Riley considered that the claimant did not communicate effectively and was unwilling to explore design improvements to the plans that Mr Riley had asked to be tested by him. Mr Riley considered the outputs were poor and he had to undertake the claimant's work from scratch which caused problems. Mr Riley emailed Mr Curtis and Mr Kleiner on 29 November 2017 saying "*I'm struggling to get James to work with me on the Frampton plans as he is very defensive and unwilling to explore alternative layouts. They're not good enough as they stand and I can see myself doing them to make progress*".

16. In January 2018 the claimant and a colleague were emailing each other sharing their feelings of boredom and frustration working with the respondent. On 30 January 2018 the claimant emailed his colleague to say he was going to concentrate on looking for something new and had absolutely no interest in the respondent any more.

17. On 16 May 2018 the claimant had a performance and pay review. The first part of the record of this review was a summary of the previous review. This summary had raised issues of the claimant needing to smarten up his appearance, having a tendency to sound authoritative when he does not have the answer, giving incorrect answers to questions from junior staff, going into too much detail on work on the Knaphill project, issues with time planning, issues with working inefficiently, using the mobile phone excessively during working hours, needing to be more methodical and sticking to procedures.

18. In a section of the review relating to actions and outcomes since the last review it was observed that the claimant had "*performed well commercially on Knaphill*" and another project. Also that he was not a natural team leader, not a good writer of DAS and was less engaged at times.

19. In a section of the review headed "Performance Review" it was observed that the claimant works well when supporting others but struggles to lead and that he needs to get better at asking questions and does not admit often enough when he does not know the answer. It is right to say that it was also observed that he was reliable and efficient and worked well when operating with constraints (though less so when there are none).

20. The claimant has dyslexia, and as a measure of support had been encouraged by the respondent in the past to avoid writing lengthy comprehensive reports, but to focus on preparing bullet points.

21. The claimant worked on a project known as Broadfields, which involved designing a number of new dwelling houses on a council estate in the London Borough of Barnet. The claimant worked on a team of a number of members of staff as project leader, overseen by Ms Charlton. Ms Charlton, while overseeing the claimant's work saw that he was producing lengthy error strewn reports which she had to restructure and rewrite.

22. Ms Charlton was unable to attend a Broadfields design team meeting on one occasion and told the claimant not to present at this meeting one particular document, which had not been checked. The claimant, however, did present the document at the meeting and it contained a number of errors, including spelling mistakes. This appeared unprofessional and caused embarrassment in front of the client.

23. The claimant also worked as part of a team on a project called HNCC, a new community centre and 41 new home for the London Borough of Camden. The claimant was tasked with producing a set of detailed drawings for a stand-alone building which was to be converted into two homes. On the day before the deadline the claimant informed the associate architect in charge of the project that he had not progressed much work on the drawing. It later appeared that what work had been done needed to be completely redrawn by another member of staff.

24. Mr Kleiner emailed Mr Riley and Mr Curtis on 15 January 2020 to say "*Understand the basis for [the associate architect in charge of HNCC project]'s pre-Chrimbo meltdown has risen its head again. Basically James has done f-all on HNCC when he was meant to have taken responsibility for Block C. Allen looked at it today but it's a total fudge and needs 2 weeks work……. He refuses to follow Revit protocol which he simply cannot do / and he didn't tell Alan until the day before tender issued that he hasn't done any work on HNCC as he didn't have time, which is stackable/unacceptable. Need to talk with him*". Later that month a colleague, Mr Haynes, also working on HNCC, emailed the project leader

cc Mr Kleiner raising a number of other problems with the claimant's work on this project. Mr Kleiner forwarded this email to Mr Riley and Mr Curtis.

25. Around this time, early 2020, the claimant's wife emailed him links to a website containing advertisements to other architect jobs.

26. On 3 February 2020 Mr Kleiner and Mr Riley met with the claimant to discuss his performance on the HNCC project. A document headed "Informal Warning Note" dated 9 March 2020 sets out what was discussed at this meeting. It was set out that the claimant had prioritised his own work to the detriment of HNCC, that the team was left having to complete or redo his work unacceptably close to the tender deadline due to the claimant's lack of care and poor communication. This put his colleagues under undue pressure. The document includes the sentence "*hence we have had no choice but to write to you with a formal warning*". It was also observed that the claimant was spending far too much time on his mobile phone to the detriment of his focus. On this latter point, the claimant's mother was seriously ill in early 2020 and the claimant was having to spend a lot of time talking to family members and others about this.

27. The claimant denied at the hearing that he had ever received this document. I find he did. I resolve this conflict in the respondent's favour because first the document itself is expressed to have been "*delivered by hand*". Second, the claimant's position in his witness statement was, essentially, that there were no concerns with his performance. The contemporaneous documentation suggests that this is simply not the case. Third, he later wrote in an email on 15 September 2020 "*yes you did issue me with an informal warning note in March, which I raised objection to*". I find that it is more likely that the claimant received this document (as he subsequently admitted in correspondence) but "screened it out" because it did not fit with how he saw his performance, than for the respondent simply to have either made up this document or to have produced it but not given it the claimant.

28. I also find that this was a formal warning rather than an informal one. I find this first because the text of the document refers to a "formal warning" in contradiction to the heading, but also there was clearly an air of formality about this process. However, this warning was issued without having allowed the claimant the right to be accompanied at the meeting. This is against the practice set out in ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

29. In May 2020 Ms Charlton conversed with the claimant on Microsoft Teams about the Broadfields project. On 4 May 2020 Ms Charlton refers to a document the claimant had been working on which contained 261 errors.

30. On 15 June 2020 the claimant had a staff review with Mr Curtis. The structure of the review record is that most of it is filled out by the claimant. At the end is a section headed "summary/reflections" for the manager's observations. Mr Curtis made observations about team working and the need for the claimant to delegate and share progress, about time

management, about strategic design, about a disagreement with Mr Haynes, and about the need to be more structured and to do the least desirable tasks first.

31. During 2020 the respondent's directors were considering moving to a team-based office structure. On 2 September 2020 the directors had a meeting to discuss this. It was felt that team working was something the claimant did not do well and that he would not fit into this structure. The respondent's directors considered how to take the matter forward and they reached a conclusion that, to quote Mr Kleiner's witness statement, the claimant's "*skills were not compatible with the team base structure*". Mr Kleiner also mentioned the view amongst directors that the claimant wanted to pursue his own practice.

32. At around the same time the respondent's directors considered the positions of three other junior members of staff.

33. On 11 September 2020 Mr Kleiner and Mr Riley held a meeting with the claimant over Microsoft Teams. The respondent has produced a meeting note, which was in the bundle, and which the claimant was not sent. The claimant has produced a document signed by his wife dated 10 August 2021 setting out her recollection of overhearing this meeting whilst she was working from home. The claimant's wife suggests that Mr Kleiner and Mr Riley praised the claimant skill set but said that it was one which they no longer needed for the practice. She expressed the view that her impression of what was being discussed was redundancy and that the respondent had not followed the correct procedure. The respondent's note suggests that the claimant's skills were recognized, but that he had not worked successfully in teams, had not communicated well with others and had received the only written warning ever issued by the practice. It went on to state that the claimant's lack of breadth of capabilities meant that the respondent would likely dismiss him from the practice. The note went on to say that the respondent was not making the role redundant, and the reason for dismissal is lack of capability.

34. The differences between recollections are probably not of major significance. Given the overall evidence, which is that the respondents did have significant concerns about the claimant's performance, and given the claimant's inability or refusal to recognise this, I find that the respondent's recollection of the meeting as the likely. I find that there was more of an emphasis on poor performance, and certainly no mention of the claimant being made redundant.

35. On 15 September 2020 at 11:50 AM Mr Kleiner emailed the claimant attaching a notice of dismissal. This notice, dated 15 September 2020, confirmed that for the reasons discussed in the meeting of 11 September 2020 the claimant was being dismissed for "*Insufficient capability to work at the level and breadth required of the practice*". It gave a notice period of four weeks. The email raised a few things to consider ahead of the respondent and the claimant's next meeting to discuss the decision to dismiss. The email observed that Mr Kleiner was aware this may have come as a surprise, but said that the claimant should "*feel free to revisit*

any of our previous discussion to unsure you understand our decision". He said that he thought it would be helpful if the claimant could see the notice of dismissal letter before the meeting in case the claimant had any questions. Mr Kleiner said that the practice had enjoyed working with the claimant and would like to explore how they could support in the future. Kleiner said that he recognised the sensitivity of the issue and would consider the claimant's thoughts on how to inform the wider office and perhaps arrange an exit interview. He invited the claimant to raise anything else that he wished to.

36. The claimant replied to Mr Kleiner at 12:32 PM that day. He disagreed with the reason for dismissal saying that this was the first time he had been presented with this reason. He said that this implies the correct procedure has not been followed to dismiss him on those grounds. He said "*the conversation we had on Friday <u>implied</u> that RCKa no longer had enough secured work to be able to retain my position and therefore I was to be made redundant*" [my emphasis]. He also took issue with the notice period, and said that he was disappointed after his previous "*good review only a few months ago where I was told that I was a valuable team member whom has continued to perform at the highest level*", and that this was inconsistent with his position being at risk due to "*an inability to perform at the level required*".

37. Mr Kleiner replied at 2:20 PM that day to say that he was unsure how there had been a misunderstanding as he thought they were clear. He said that the respondent did not dwell on the claimant's performance as it would have been unconstructive and insensitive. He said the claimant would have been aware of the difficulties in resourcing his limited skill set to a team and referred to the informal warning note issued in March 2020 and "*serious concerns were raised in our last round of staff reviews*".

38. The claimant responded at 3:22 PM to say that Mr Kleiner had not been clear, and he felt the respondent needed to restructure the office. He accepted that he had been issued an informal warning note in March (as set out above) and referred to praise he had received for his performance on Broadfield's. He said "*the reality of the situation isn't about my performance or lack of it. The reality is RCKa have restructured and I don't fit in with your plans which I accept, and have no hard feelings about that, in fact I wish you all the best. But the way this has been handled is disappointing, my position and skill set for the practice is no longer required or to put it another way redundant therefore I should be treated in this way and not the disappointing way it is being currently handled*".

39. Mr Kleiner replied at 3:46 PM to say that he would be happy to expand upon the detail and said that the claimant was a "*lovely chap who we enjoy working with, and you're great at some things, but we struggled to find you which will become almost impossible as we move to teams*". He said the role had not become redundant but that the practice's ability to accommodate the claimant's lack of breadth of skills has.

40. Also on 15 September 2020 three of the claimant's colleagues who had under two years of service were dismissed.

41. On 16 September 2020 the claimant, accompanied by his wife, Mr Curtis, Mr Kleiner and Mr Riley had a meeting over Microsoft Teams. Again, the respondent has provided a note of this meeting as has the claimant's wife, neither of which had been shared with the other prior to litigation.

42. By this stage the respondent had taken advice from its trade body, RIBA, and an HR company. The respondent accepted that notice was incorrect and that it was open to consider any suggestion to help the claimant. The claimant said that a dismissal on his record for incapability was not acceptable, and that he wanted the respondent to consider how to reach a mutually agreeable separation. The respondent said that it would agree to consider this. The respondent's directors mentioned the written warning in March 2020 and the claimant's lack of ability to work collaboratively. The claimant rebutted criticism and spoke of his success on some projects, and said that he was fully capable of performing his role. The respondent's directors agreed to consider this assertion and agreed to consider revoking the claimant's dismissal. A mutually agreeable way forward sought, and the claimant agreed to send over what he felt would be a fair agreement to part ways and which would remove any suggestion of a dismissal.

43. On 19 September 2020 the claimant wrote to the respondent's directors. He referred to the meeting on 16 September 2020. He said that he would prefer to resolve the matter amicably and had written separately about this issue. He suggested that reasons for dismissal given by the respondent had changed during the previous week in that he was told firstly on 11 September that he would be made redundant along with three colleagues. He had then been written to on 15 September to be told that he would be dismissed for reasons relating to capability. He said that dismissal reasons have been constructed to allow the respondent to justify his dismissal and that he had demonstrated that he was more than capable of working to any level required. He made reference to criticisms made by a "disgruntled" junior team member who was obstructive when he did not get his way and refused to understand his role. He made procedural points about the issuing of final written warnings. He said that he had been unfairly treated in breach of his contract and would "*have just cause to present this case to an employment tribunal should we continue on this path of dismissal*". He asked for a response by 23 September 2020 so he could determine his next steps.

44. On 23 September 2020 a meeting invitation for 24 September 2020 with Mr Kleiner Mr Riley and the claimant was sent to the claimant. The claimant emailed Mr Kleiner to ask whether he was still proceeding with dismissal to allow him to discuss his options with his legal representative. Mr Kleiner thought it odd that the claimant was potentially refusing to attend the meeting as the claimant was still employed. He indicated that he had reflected and decided that a more appropriate action would be to retract the dismissal letter, issue the claimant with a final written warning and agree a performance improvement plan.

45. On 23 September 2020 Mr Riley wrote to the claimant requesting the claimant's site report and email correspondence relating to a project known as Park House. This was a project where there had been difficulties, and the client was not proceeding. The claimant had conducted a site visit but had not put any records on the system and the client was chasing the respondent for some information.

46. On 24 September 2020 the claimant had a meeting over Microsoft Teams with Mr Curtis, Mr Kleiner and Mr Riley accompanied by his wife. It was explained to the claimant that the respondent had listened to the claimant's feedback and would change its course. The respondent acknowledged the claimant's assertion that he was capable of performing the full role and that the respondent would provide a positive environment to support him to demonstrate this. The respondent would prepare a clear performance improvement plan which identifies key areas of focus. The claimant's dismissal would be retracted and a "*constructive and informative final warning*" would be substituted.

47. The claimant's response focused on the fact that he felt that he had a strong legal claim against the respondent. He did not appear to accept the company's change of position. He did not appear to want to remain respondent.

48. Also, on 24 September 2020 the claimant emailed Ms Charlton a fit note citing stress and anxiety and saying that he would not be fit for work before 22 October 2020. In his email he said he will still make himself available for further meetings but that he would not be checking his emails as often he would normally. The fit note was not signed by the GP, so on 29 September 2020 Ms Charlton asked the claimant if he could ask his GP to sign it. That day the claimant responded to say that he had called his GP and was told that this was an electronic fit note which did not need a signature because of Covid related issues. Ms Charlton responded that she understood that things were not happening as normal, but said that she was unable to accept a fit note that had not been signed by the doctor and asked if he could contact his GP to have the note signed. The claimant supplied a signed copy later that day

49. On 30 September 2020 the claimant and Mr Kleiner exchanged WhatsApp messages about severance.

50. On 2 October 2020 Mr Kleiner emailed a letter to the claimant. He set out the history of the meetings on 16 September and 24 September 2020. He further said that the respondent's position was that it would be fair to give the claimant an opportunity for further development and to demonstrate his abilities. He confirmed the respondent had retracted the dismissal notice letter and would now prepare a performance improvement plan and a constructive final warning to discuss.

51. Later on 2 October 2020 the claimant responded to Mr Kleiner by email. He referred to ACAS guidance on reaching settlements. He asserted that he believed his dismissal had been predetermined and reasons fabricated to justify his dismissal. He asserted that he viewed the

respondent's change of position, in revoking his dismissal, as undermining their original reasons for dismisal and said it was seeking to minimise its exposure. He said that to propose a final written warning without any discussions identifying where his performance was lacking suggests the respondent had no intention of honouring a performance plan and were looking for a legal way to dismiss him. He concluded:-

> *"as a result of RCKa's unlawful actions, and my belief, continued unlawful attempts to dismiss me, you have made my position at the practice untenable. If I have not heard from RCKa by the 09.10.2020 that you are willing to discuss a reasonable settlement agreement to terminating my contract, given we are now in an untenable situation. I will be forced to resign my position at RCKa on the grounds of constructive dismissal due to RCKa's unlawful attempts to dismiss me and a result of clear breaches in my contract with you, and proceed to employment tribunal on the grounds of unfair dismissal*".

52. On 6 October 2020 Mr Riley emailed the claimant to ask him if he could share correspondence in relation to Park House at the earliest opportunity as the client was chasing. The claimant considered this was the last straw in that he viewed Mr Riley's chasing in respect of Park House as indicating he was setting him up for performance -related issues that would lead to his dismissal.

53. On 10 October the claimant emailed his letter of resignation to the respondent's directors. It was a lengthy letter in which he recited various concerns. He concluded by saying that the respondent had never raised any performance concerns with him and that he had never been shown evidence of his lack of capability. He accused the respondent of trying to bully him into accepting their position. He resigned with immediate effect.

The law

54. Under section 95(1) Employment Rights Act 1996, an employee is considered to have been dismissed in circumstances where "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct". This is commonly known as constructive dismissal.

55. In order for there to have been a constructive dismissal there must have been:-

    a. a repudiatory or fundamental breach of the contract of employment by the employer;

    b. a termination of the contract by the employee because of that breach; and

    c. the employee must not of affirmed the contract after the breach, for example by delaying their resignation.

56. In ***Western Excavating (ECC) Ltd v Sharp*** **[1978] ICR 221, CA**, it was said "*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, 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 the employer's conduct. He is constructively dismissed*".

57. An employee can rely on breach of an express or implied term of the contract of employment. In cases of alleged breach of the implied term of trust and confidence the test is set out in the case of ***Malik v Bank of Credit and Commerce International Ltd*** **[1998] AC 20**; namely, has the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The test of whether there has been such a breach is an objective one (see ***Leeds Dental Team Ltd v Rose*** **[2014] IRLR 8**).

58. The EAT in ***Frenkel Topping v King*** **UKEAT/0106/15/LA** set out that simply acting in an unreasonable way is not sufficient to satisfy the test. The employer "*must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term*".

59. It is open to an employee to rely on a series of events which individually do not amount to a repudiation of contract, but when taken cumulatively are considered repudiatory. In these sorts of cases the "last straw" in this sequence of events must add something, however minor, to the sequence (***London Borough of Waltham Forest v Omilaju*** **[2005] ICR 481**).

60. On the question of waiving the breach, the ***Western Excavating*** case makes clear that the employee "*must make up his mind soon after the conduct of which he complains; if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will regarded as having elected to affirm the contract*".

Conclusions

61. The claimant's position set out in his witness statement is that "*it is my belief RCKa couldn't have had reason to consider me underperforming*". This is not sustainable on the documentary evidence:-

    a. Contemporaneous evidence of emails in 2017 show that there were concerns about his performance.

    b. In his performance review of 16 May 2018 a number of issues about his performance were raised.

    c. Mr Kleiner and Mr Haynes sent emails in January 2020 expressing significant concerns about the claimant's performance on the HNCC project.

d. The claimant was issued with a formal written warning (albeit headed informal) on 9 March 2020.

e. Microsoft Teams discussions between the claimant and Ms Charlton on 4 May 2020 show that she was concerned at the high number of mistakes he had made in a document.

f. The claimants staff review of 4 June 2020 did not say that the claimant "*continued to perform at the highest level*" (as he had suggested in an email of 15 September 2020), but rather raised a number of performance concerns, albeit couched in moderate language.

62. The claimant's position on his own capability is not reliable. I prefer the evidence of the four witnesses for the respondent all of whom set out in detail that the claimant, although he had some strong points, substantially underperformed. I accept their evidence that they believed the claimant had significant difficulties working in teams.

63. While I accept that the respondent had concerns about the claimant's capability, the way it went about things left much to be desired.

64. I have mentioned earlier that a formal warning in relation to performance was issued without having given the claimant the opportunity to be accompanied.

65. The claimant did not follow any proper process when it purported to dismiss the claimant on 15 September 2020. Again, the claimant should have been given the opportunity to be accompanied to the meeting of 11 September 2020. Before he had even got to that point, he should have been subjected to more transparent performance management which let him know where he was falling short and given a time bound opportunity to improve. He should have been given the opportunity to appeal against dismissal.

66. However, these substantial substantive and procedural points of unfairness did not lead to the respondent dismissing the claimant for lack of capability. Had such a dismissal taken effect it would have been unquestionably unfair. The respondent took the step of seeking professional HR advice and sought to rectify its errors.

67. What it proposed to the claimant was that it would rescind the dismissal and substitute it with a final written warning and a performance improvement plan. The claimant's case is that this was unacceptable to him as "*my performance clearly wasn't a concern to RCKa*", that they "*have no grounds for any capability issues against me*" and that the respondents were "*only looking for other ways to dismiss me*". He therefore would not accept the respondent's proposal.

68. My findings are that the respondent had reasonable grounds to conclude that the claimant's performance had fallen short. It had imposed a formal written warning for poor performance although it had done so in a procedurally unsatisfactory way in not giving the claimant the opportunity

to be accompanied. It is certainly arguable that rescinding the dismissal and imposing a final written warning following a procedurally inappropriate formal written warning may have been unfair.

69. I look now at what is expressed to be the final straw, the email from Mr Riley on 6 October 2020. Mr Riley sent this to the claimant when he was certified sick with stress and anxiety. However, the claimant had indicated that he was available for meetings and would be checking his emails albeit with less frequency. I accept Mr Riley's evidence that there was some urgency about the situation with a client chasing the respondent for records which the claimant should have put on the system and which were unable to be located. There is nothing on the face of the email to suggest a sinister intent, but the claimant's case is that he felt he was being set up to fail somehow after the proposal that he be subject to a final written warning and a performance improvement plan. I find that Mr Riley's intention in sending the email was genuinely to seek information and that he was not seeking to harass the claimant in any way. However, the claimant was off sick with stress and anxiety and his perception, in the light of the proposal for a final written warning, and perhaps of his recognition that he may not have filed the information as he should have, means that his perception that he was being set up to fail is not entirely unreasonable. On balance I find that this is something potentially of substance which is capable in law of amounting to a final straw.

70. Looking at the respondent's course of conduct as a whole, however, I do not find that it was conduct that was either calculated or likely to destroy or seriously damage the relationship of trust and confidence between the claimant and respondent. Much of the claimant's argument that the respondent was in fundamental breach rests on his assertion that taking any kind of action against him for poor performance was unacceptable because his performance was not poor. I do not accept this premise.

71. The respondent undoubtedly mishandled its capability process and conducted it in a way that fell short of ACAS Code of Practice standards. I also have some sympathy for the claimant's perception that this was in fact a redundancy situation. I cannot say further than that as I have not heard sufficient evidence to say categorically that it was a redundancy situation. In fact, this perception, I conclude, is what is at the heart of the claimant's dispute with the respondent. I repeat the email from the claimant to Mr Kleiner of 15 September 2020 "*The reality is RCKa have restructured and I don't fit in with your plans which I accept, and have no hard feelings about that, in fact I wish you all the best. But the way this has been handled is disappointing, my position and skill set for the practice is no longer required or to put it another way redundant therefore I should be treated in this way and not the disappointing way it is being currently handled*".

72. The claimant was disappointed not to be made redundant. At this stage his trust and confidence was not destroyed or seriously damaged, as the substance and language of this email makes clear. Adding to this, the subsequent rescinding of the dismissal to be substituted for a final written

warning (even though it may have been procedurally suspect) was insufficient, cumulatively, to destroy or seriously damaged trust and confidence. While adding some substance to the matter, Mr Riley's email of 6 October 2020 was not sufficient, cumulatively with what went before, to destroy or seriously damaged trust and confidence. Taken as a whole, this conduct was insufficient to pass the high bar set by case law as to what constitutes a fundamental or repudiatory breach of contract.

73. I therefore conclude that the respondent was not in fundamental breach of the claimant's contract of employment. I do not need to consider the further issues in this case. I find that the claimant resigned and was not constructively dismissed. He was not dismissed without notice. His complaint of constructive unfair dismissal is not well founded and dismissed as is his claim for wrongful dismissal.

Employment Judge **Heath**

Date: 28th Oct 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

28/10/2021.

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FOR EMPLOYMENT TRIBUNALS