



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr O Swan

v

Ashford & St Peter's Hospitals NHS
Foundation Trust

Heard at: Reading Employment Tribunal

On: 20 – 23 November 2023 (in person)
24 November 2023 (by CVP)

Before: Employment Judge S George (sitting alone)

Appearances

For the Claimant: Ms E Walker, Counsel

For the Respondent: Ms E Skinner, Counsel

RESERVED JUDGMENT

1. The Claimant was not dismissed.
2. The claim of unfair dismissal is not well founded and is dismissed.
3. The remedy hearing provisionally listed for 23 February 2024 is vacated and will not now take place.

REASONS

1. The Final Hearing in the present case was scheduled to be conducted over five days, but due to availability of judicial resource was allocated to a Judge who was unable to sit on the whole of Day five. The Hearing was timetabled with the agreement of the parties at the outset of the first day so that the whole of the first day was allocated to Tribunal reading time. Initially it was expected that an oral Judgment could be delivered on the morning of Day five; I was unable to sit in the afternoon of Day five because of a personal appointment. In the event oral evidence took a little longer than expected and consequently the timetable was adjusted so that oral submissions were delivered remotely by Cloud Video Platform (CVP) in the morning of Day five and judgment was reserved.

2. In accordance with the Practice Direction on the recording of Tribunal proceedings, due to the unavailability of recording equipment in the Tribunal hearing room, no recording was made on Days one to four. However, the remote hearing on Day five (being the oral submissions of the representatives only) was recorded.
3. When considering the issues in the case I had the benefit of a joint file of relevant documents running to 1,415 pages and page numbers in these Reasons refer to that joint file. I heard from four witnesses. The Claimant gave evidence in support of his own claim and adopted in evidence a 30 page Witness Statement upon which he was cross-examined. The Respondent relied on the oral evidence of three witnesses who all adopted witness statements, Christopher Bell (Director of Estates and Facilities), Keith Hayward (Head of Service) and Ian Rowlan (Assistant Director of Estates Operational Services from September 2019 to October 2021) Mr Rowlan and Mr Hayward were no longer employees of the Respondent at the time of the hearing.
4. The final hearing had originally been scheduled to take place in March 2022, but was postponed at the joint request of the parties because the then time allocation was agreed by them to be insufficient. At that time a Witness Order had been issued for Mr Rowlan and an application for it to be renewed was sent to the Tribunal shortly before the hearing in November 2023. In the event, Mr Rowlan attended to give oral evidence and to be cross-examined on his witness statement voluntarily.
5. On the second day of the final hearing, I heard and rejected a contested application by the Respondent to adduce two late disclosed documents. Oral reasons for my decision were given at the time and are not repeated. If either party wishes those to be provided in writing they must request them within 14 days of the date on which this Reserved Judgment is sent to them.
6. The claim arises out of the Claimant's employment by the Respondent from 23 October 2013 until it ended following his resignation on notice on 2 May 2020. His job title and role at various times will be the subject of more detailed findings below. Following a period of Early Conciliation which lasted between 5 May and 5 June 2020, the Claimant presented a claim in time on 26 August 2020 which was responded to by a Grounds of Response presented on 21 October 2020. The claim was originally scheduled to be heard between 9 and 11 August 2021 by a listing made on the initial sift, but this was postponed because of the non-availability of a key Respondent witness. Further and better particulars of the allegations were requested in December 2021 and provided on 7 January 2021 (page 42). The re-scheduled hearing for March 2022 was, as I have already indicated, postponed on the joint request of the parties because the three day time estimate was regarded to be insufficient and in April 2022 a Notice of Hearing for the hearing before me was sent by the Tribunal to the parties.

The Issues

7. The parties had co-operated on agreeing an updated List of Issues which was handed to the Tribunal on the first day of the Hearing and is Appended to this Reserved Judgment for reference. In the form handed in to the Tribunal List of Issues 1.c.i.-iv., vi. and vii. and List of Issues 1.g.i. were in blue to denote that they had been provided by way of the further particulars in January 2020. The allegation at List of Issues 1.c.v. was rendered in red in the updated List of Issues to denote that although it was found in those further and better particulars the Respondent's position was that it should form part of relevant background only and not be taken into account as contributing to an alleged breach of the implied term of mutual trust and confidence because it was not referred to in the original claim form. This was agreed to by Ms Walker and therefore my conclusions in this matter, set out with reference to the Appended List of Issues, reflect the common position that List of Issues 1.c.v. was not a factual matter which it was necessary for me to decide in order to determine the issue between the parties.
8. In the interests of clarity, in order that the parties should be able to understand the reasons for my decision, I have appended the agreed, updated List of Issues in its entirety, notwithstanding the inclusion in it of a factual matter which is agreed not to be part of the necessary decision making rubric.

The Law Applicable to the Issues

9. On the morning of Day three of the final hearing I circulated a proposed self-direction on the law to the representatives, explaining that this was intended to be a starting point for their oral submissions and was subject to their observations on the relevant law. The representatives were free to comment on whether the proposed self-direction accurately set out the relevant law insofar as it went and on whether other statutory provisions or authorities were relevant to the decisions I had to make on the issues in the case.
10. This enabled the representatives in their oral submissions to limit the extent to which it was necessary to address me on the relevant law and both representatives confirmed in their oral submissions that they agreed that the self-direction was an accurate statement of the applicable principles. I have amended this self-direction to take account of their submissions.

Constructive Dismissal

11. Section 95(1)(c) of the Employment Rights Act 1996 makes it clear that dismissal includes the situation where an employee terminates the contract of employment (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct. This is commonly referred to as constructive dismissal and the leading authority is Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA. If the employer is guilty of conduct which goes to the root of the contract or

which shows that they no longer intend to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat themselves as discharged from any further performance of it. The employer's conduct must be the cause of the employee's resignation and thus the cause of the termination of the employment relationship. If there is more than one reason why the employee resigned then the tribunal must consider whether any repudiatory breach by the employer was an effective cause of the resignation. The crucial question on causation is whether the repudiatory breach played a part in the employee's resignation.

12. In the present case, the claimant argues that he was unfairly dismissed because he resigned because of a breach of the implied term of mutual trust and confidence; a term implied into every contract of employment. The question of whether there has been such a breach falls to be determined by the authoritative guidance given in the case of Malik v BCCI [1998] AC 20 HL. The term imposes an obligation 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.
13. One important question for the tribunal is, therefore, whether, viewed objectively, the facts found by me amount to conduct on the part of the respondent which is in breach of the implied term as explained in Malik v BCCI. Whether the employment tribunal considers the employer's actions to have been reasonable or unreasonable can only be a tool to be used to help to decide whether those actions amounted to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence and for which there was no reasonable and proper cause.
14. If there has been a breach of the implied term of mutual trust and confidence, that would inevitably amount to a fundamental or repudiatory breach of contract going to the heart of the employment contract.
15. If that conduct is a significant breach going to the root of the contract of employment (applying the Western Excavating v Sharp test) and the employee accepted that breach by resigning then he was constructively dismissed. The conduct may consist of a series of acts or incidents which cumulatively amount to a repudiatory breach of the implied term of mutual trust and confidence (see Lewis v Motorworld Garages Ltd [1986] ICR 157).
16. Woods v WM Care Services (Peterborough) [1981] ICR 666 EAT, is authority for the proposition that when considering whether conduct amounted to a breach of the implied term of mutual trust and confidence it was not necessary for the employee to show that the employer had intended a repudiatory breach of contract. The Tribunal should look at the conduct as a whole and determine whether the effect of it is the employee cannot be expected to put up with it any longer. Claridge v Daler-Rowney [2008] IRLR 672, sets out the general proposition that when the employee relies upon the mishandling of a Grievance the test remains for the Employment Tribunal to consider whether the handling of the Grievance

amounted to conduct which was calculated or likely to destroy or seriously damage the employment relationship.

17. Once he has notice of the breach the employee has to decide whether to accept the breach, resign and claim constructive dismissal or to affirm the contract. Any affirmation must be clear and unequivocal but can be express or implied. Langstaff P discussed affirmation in Cockram v Air Products plc [2014] ICR 1065, EAT paragraphs 11 to 25. Mere delay in resigning is unlikely to amount to affirmation by itself although delay can be taken as evidence that the employee has affirmed the contract and decided to carry on working notwithstanding the breach. Langstaff P also gave the example of a situation where an employee has called for further performance of the contract and that might lead to affirmation being implied from that conduct if it is consistent only with the continued existence of the contract.
18. The last straw doctrine is explained in the judgment of Dyson LJ in Omilaju v Waltham Forest London BC [2004] EWCA Civ 1493, [2005] IRLR 35, [2005] 1 All ER 75, [2005] ICR 481 CA. Omilaju is often referred to for the description by Dyson LJ of what the nature of the last straw act must be in order to enable the claimant to resign and consider him or herself to have been dismissed.

“The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase “an act in a series” in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.” (paragraph 19)

19. The doctrine was considered by the Court of Appeal in Kaur v Leeds Teaching Hospital [2018] IRLR 833 CA. Having discussed the development of the authorities in this area, Underhill LJ explained that

“there are two theoretically distinct legal effects to which the 'last straw' label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the *Malik* threshold: in such a case the breaking of the camel's back⁴ consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so. I have thought it right to spell out this theoretical distinction because Lewis J does so in his judgment in *Addenbrooke* which I discuss below; but I am bound to say that I do not think that it is of practical significance in the usual case. If the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the *Omilaju* test), it should not normally matter whether it had crossed the *Malik* threshold at some earlier stage: even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so.” (paragraph 45)

Before giving the following guidance,

“In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- (2) Has he or she affirmed the contract since that act?
- (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
- (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)⁶ breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para [45], above.)
- (5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.” (paragraph 45)

20. Once the tribunal has decided that there was a dismissal I must consider whether it was fair or unfair in accordance with s.98 ERA 1996.

“Section 98 Employment Rights Act 1996

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
 - (a) the reason (or, if more than one, the principal reason) for the dismissal, and
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it-
 - (a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
 - (b) Relates to the conduct of the employee,[(ba) ...]
- (c) Is that the employee was redundant, or
- (d) ...

(3) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was 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

shall be determined in accordance with equity and the substantial merits of the case."

Findings of Fact

21. Before making my findings of fact on the chronology of relevant events, I set out my findings on some particular topics.

Claimant's roles and job titles with the Respondent

22. The Claimant had a number of different roles and job titles during his employment by the Respondent. He was initially employed as a Band 7 Energy Manager between 23 October 2013 and July 2015. At the outset of his employment this was on a fixed term contract, but he was appointed to a permanent Energy Manager contract, still at Band 7, with effect from 1 June 2014. The email from Mr Bell (page 320) makes clear his then enthusiasm for the success of the Claimant in the role, providing "*excellent technical support and significant savings*" which had prompted a decision to make this a permanent post.

23. The job description for the permanent Energy Manager Band 7 role is at page 46 and shows that the post holder was responsible and accountable to the Head of Estates and Facilities. At first, Mr Hayward line managed the Claimant, but then the Claimant was promoted to the Medical Engineering and Energy Manager (a Specialist Engineering Manager role) and his line manager changed. This appointment was initially on an interim basis from July to December 2015 and then made substantive on 4 January 2016 at Band 8A. The job description is at page 418, which is an annotated version of the job description which formed part of the Claimant's submissions to the consultation (see para.71 below).

24. In October 2017, line management of the Claimant reverted to Mr Hayward who had been himself promoted to Head of Estates. He held that position until his retirement in March 2019.

25. It was also in March 2019 that the Claimant was moved into the role of Estates and Sustainability Programme Manager, which he held from 1 March 2019 until the end of his employment. In his paragraph 4, the Claimant states that the job description for that role is at page 261. One of the key matters of dispute between the parties is whether the Claimant is justified in his criticism that this role, although nominally a Band 8A, had key duties that were almost identical to the first Band 7 role into which the Claimant was initially appointed.

26. In the interim, pending the appointment of a new Director of Estates, between 1 March 2019 and September 2019 the Claimant was line managed by Mr Bell. Mr Rowlan was employed from September 2019 as Assistant Director of Estates Operation Services and he took over Line Management of the Claimant. He explains in his paragraph 2, and I accept, that in that role Mr Rowlan was managing around 30 members of staff but had two Direct Reports: the Claimant and the Estates Manager who managed the Estates Operational Team and whose position was also a Band 8A. The latter is referred to as “the Estates Manager” or “the EM” in these Reasons.
27. Also relevant is the Health and Safety Manager whose role was re-banded from Band 7 to Band 8A, when he took on responsibility for Fire and Fire Safety Advisor and became Decontamination Lead. That individual’s Band 7 role had been Health and Safety Manager and his Band 8A role was the Non-Clinical Risk Manager with the additional responsibilities that I have mentioned.

Reliability of Witness evidence

28. I also set out at this point some general observations about the reliability of evidence given by some of the Witnesses.
29. It was put to the Claimant by the Respondent that he had a tendency to misinterpret and skew his description of events to fit a theory that he had been intentionally marginalised; they also alleged that he made presumptions which were not objectively justified.
30. An example relied on is the complaint the Claimant makes about being physically isolated because of his office location from 1 March 2019 onwards in the Estates and Sustainability Programme Manager role (hereafter referred to as ‘ESPM’ role). The Claimant accepted that this was a new role, he was not being moved into a vacancy. Prior to this move he had been managing the Medical Engineering Department in the combined position of Medical Engineering and Energy Manager and had had his own office located near the team he was managing. He accepted that in the Estates Operational Team area - where Mr Bell, Mr Hayward (until his retirement when – after about six months – he was replaced by Mr Rowlan) and the EM worked. There were no vacant offices. The Claimant was in an adjacent part of the same block in an office accessed from a separate entrance and members of staff from the Estates Team accessed a meeting room in that part of the block, along with the kitchen, toilet and changing rooms. The effect was that the Claimant had his own office in a part of the block which was regularly used by other members of the Team, but which was not on the same corridor as the working place of those Team members. These basic factual matters appear to be common ground.
31. The Claimant does not allege that it was difficult for him because he was on his own, he describes himself as having been “*physically and professionally isolated from other staff*” (paragraph 96a of the Claimant’s

Statement). The Claimant's proposed solution was that he and other members of the Estates Team would share an office, but I accept the Respondent's observation that the Claimant is very hierarchical in his thinking and in a number of respects places great store on the status of his role. It seems to me to be highly unlikely that the Claimant would have regarded it as satisfactory that he should move from having his own office to sharing an office. It is likely that he would regard that as diminishing his status. He accepted that there was to be redevelopment of the physical location and yet seemed to think that he had been intentionally undermined by Mr Bell by being allocated to this office position. Objectively this was not a reasonable interpretation of what happened.

32. Another example is the Claimant's reaction to the proposed escalation structure in October 2019. The relevant documents are at page 493 – 495 and the structure itself is at page 495. The overall heading of the structure is "Estates Department Management Technical Escalation Structure" and the single box on the first row bears the title "Technical Escalation". I shall refer to this structure as the 'EDMTES'. I have considered the respective parties' evidence about this and it seems clear to me that this was a Technical Escalation Structure for the Estates Department Management. The version at page 495 contains amendments to the structure which were proposed by the Claimant (as set out in page 493). He had received the structure in an email from the Estates Manager. The email was also sent to Mr Rowlan in order to comment on a draft structure by the EM in his email as described by him as "*Managerial Escalations Structure for our core Estates disciplines*". He had himself received a first draft from Mr Rowlan who described it as "*Escalation Structure*" and in his email on page 494 asked the Estates Manager,

"If you could revise to include any capital members of the team would be more appropriately placed in certain areas of technical support".

33. The Claimant's email says as follows,

"I have taken a look at Andy's email and proposed responsibilities. I am very uncomfortable with the proposed escalation structure. I have not copied Andy or anyone else into this message.

To ensure equivalence and to reflect my role's responsibility and accountability, I have made some suggested changes (see attached), that to me reflect a fairer balance all three Band 8a – myself, Andy and Steve Hill. It also shares the workload as I can see Steve and Andy enduring high work levels. Given that both Andy and Steve are represented as accountable and responsible under Andy's original proposed structure, I fail to see equivalence for my role, where I am not leading on any aspect shown. Working at the level suggested by Andy cements my concerns regarding the subordination of my role, which is unacceptable.

So a reasonable change to this structure would offer an opportunity to share workload. My suggested changes are to substitute Andy for myself as Lead on Ventilation and BMS under my stewardship. This is at least consistent

with the changes made to my post last March, and establishes the Lead as AE on Ventilation / HVAC. Given my four years within Medical Engineering and current work I would be able to offer as co-Lead on Sterilisers / Decontamination. It would make good use of my work experience, professional interest understanding.

Andy ought to have raised this with me personally before emailing this out to everyone. I am surprised at the thoughtlessness and lack of tact."

34. I have quoted that email in its entirety because it appears to me to illustrate the sensitivity of the Claimant to perceived subordination of his role. It also appears to illustrate his ambition that he should take on leadership elements. A particular challenge to him formally taking over a lead role in ventilation is described below. However, I found Mr Rowlan's evidence about the purpose of this to be entirely plausible and accept it. It is relevant that in his initiating email, Mr Rowlan describes it as an Escalation Structure. It is apparent that it was designed as a method of communicating who should be called on for technical advice in various different areas of Estates responsibility. If the individual in the lowest level of the chart was unavailable or unable to deal with the particular technical query, the query should be escalated up the chain to those who are more able to deal with technical queries. Mr Rowlan said that the word management was there because it was a hierarchy for each of the disciplines determined by knowledge, expertise and the individual who had demonstrated their ability to have that knowledge and expertise. He stated that it was hierarchical in terms of the knowledge of the individual that they could bring to that discipline, not in terms of the Banding of the role occupied by the individual. It referred to a hierarchy of technical expertise. Mr Rowlan had sent it initially to the EM, expecting him to revert with any changes rather than to circulate it more widely. The Estates Manager managed the Technical Operatives in the Estates Team and it was therefore reasonable that Mr Rowlan should seek Mr Hanney's opinion about where the greatest breadth and depth of technical expertise lay.
35. I accept this evidence that it is only put forward as a question of which individual is most suitable to deal with a technical enquiry. I do not have, in evidence the version that was originally created by Mr Rowlan, nor yet that which was circulated by the EM. The Claimant took issue with the EDMTS because of what he perceived as its description of his role. This was to misunderstand the purpose of the document which was not about the contents of any particular role, but about the post holder's ability to respond to technical queries. I accept that this document did not suggest a subordination of his role and it was in any event a draft for consultation. The fact that the structure was sent initially to Mr Hanney does not lead to an inference that Mr Rowlan was side-lining the Claimant.
36. The email at page 514 is an illustration of Mr Rowlan making identical requests for information of both of his direct reports. The last sentence of the quotation at para.33 above causes me to infer that the Claimant's relationship with the Estates Manager was somewhat strained. The email

at page 514 is also evidence which supports the Respondent's argument that the Claimant has a tendency to misinterpret and skew events which means that his evidence should be viewed with caution. CIP stands for Cost Improvement Program and the EM responded to Mr Rowlan the same day, copied to the Claimant, with some suggestions for cost improvement.

37. The Claimant in his email at the top of page 513, stated that his fellow Band 8A was factually inaccurate in some of what he said, but also was very clearly upset that the EM had made any suggestions about energy contracts,

"I am the Lead for the Energy contract, if there is anything to discuss on this then it ought to be my position to do so. Andrew if you want to suggest something, wouldn't it be better to talk to me first? Why did you not do this, rather than send an email to our Manager?"

I want you both to know and be reminded that I see this as part of an ongoing pattern of antagonistic, unsupportive behaviours shown within the Directorate towards me. I find this degradation and insubordination of my role to that of Assistant to the Estates Manager stressful, provocative, and insulting, and humiliating."

38. The email exchange has to be seen in context of the events surrounding it which are discussed in more detail below. However, the heightened tone of the Claimant's response suggests that he is highly sensitive of the respect he perceives to be due to his role and very hierarchical in his approach. The Estates Manager's response suggested a possible saving to the Energy contract. Whether or not that had overlooked something previously said by the Claimant, to characterise it as antagonistic or "degradation and insubordination of my role to that of Assistant to the Estate Manager" involves a degree of overstatement and amplification beyond what is objectively reasonable.
39. The Claimant's oral evidence was prone to the same overstatement and amplification and that means in my view that it was often unreliable as a basis of objective findings of fact.
40. On the other hand, there were criticisms made on behalf of the Claimant of Mr Rowlan as a witness because in some respects he stated that he had better recollection during the Final Hearing of events than he had had at the time he drew up his witness statement. He stated that he had experienced symptoms of Long Covid which had meant that his memory had been affected from time to time, but no medical evidence has been provided to support that.
41. Contrary to the argument of Ms Walker, it is not unusual that a witness should claim to have better recall at the final hearing than at an earlier time. The witness may have focused more intently on the evidence in the documents during the hearing, particularly so when, at the time they prepared their witness statement, they were no longer in the employment

of the Respondent. At the time that Mr Rowlan gave his evidence he was the last witness to give oral testimony having attended and listened to the whole of the proceedings before taking the Oath. However, where his stated recollection replaces a previous inability to remember, it is probably not an original memory, but is recall based on documents which have possibly triggered recollection and may also simply be an acceptance of what probably was the case. Given the journey of recollection described by Mr Rowlan, I am wary about whether he can genuinely recall matters that are not covered by documents. The view I have taken is that he probably has a better recall of his own role and of what was intended by particular communications that are in front of him than he does of off the cuff conversations or undocumented meetings such as that recorded by the Claimant. However, I found his evidence to be confident and compelling about the purpose of the EDMTES which had obviously been a piece of work which he had been intent on putting in place for sound reasons.

42. As to the criticisms of Mr Bell as a witness, the amendments he made to his witness statement were actually relatively minor when considering his statement as a whole. For example, as originally drafted paragraph 10 is plainly inconsistent with paragraph 59 and following. For him to correct the statement in paragraph 10 that he was not aware about whether the Claimant's unhappiness with Mr Rowlan was ever formalised so that it was consistent with his statement in paragraph 61 that the Claimant asked formally to bring something to his attention, is not the sort of change that causes me to think that he has made a significant alteration to his evidence. Overall, Mr Bell did not claim to recall everything but was confident about his reasons, his own actions and those reasons were consistent with the contemporaneous documents.

Relevant Policies

43. There are a number of Policies which have been relevant to the decision I have made.

Dignity at Work Policy

44. The Dignity at Work Policy starts at page 209. In paragraph 1 at page 212, it is recorded that the Policy forms part of the Respondent's commitment to create a positive culture of respect and that it wishes to ensure all staff are treated with dignity and respect and that there is a working environment free from harassment and bullying. Without suggesting that the parts that I specifically refer to in these reasons are the only relevant sections, I note the Manager's responsibilities in paragraph 3.2 at page 213, which include to inform an HR Advisor or Business Partner if a complaint of harassment or bullying is received and that a failure on the part of a Manager to take action will be seen as a failure to carry out the full responsibilities of their role. The definition of bullying in the non-exhaustive list at page 222 includes:

- "constantly undervaluing effort";

- “ganging up on or whispering / giggling about someone”;
- “ignoring or excluding someone either socially or at meetings”;
- “removing areas of responsibility”;
- “imposing more menial asks [sic]”;
- “withholding information”; and
- “obsessive control / management”.

Grievance Policy

45. The Grievance Policy is at page 231. It defines a Grievance as, “A concern, problem or complaint that an employee raises with their employer.” Managers are required by the Policy to take all employee workplace complaints seriously, even those not raised as a Grievance. (See all of the Manager’s Expectations at paragraph 4.1 on page 233).

Relevant parts of the Disciplinary Procedures and Policy

46. These start at page 188, which includes paragraph 5 headed “Management Prior to Disciplinary Procedures”. I quote the first four paragraphs in their entirety,

“The disciplinary procedure is not intended to replace the normal management / employee relationship. Therefore, the line manager will consider offering appropriate training, mentoring, coaching or any other support as appropriate to improve standards of conduct in an effort to avoid formal action.

When an employee’s conduct is below acceptable standards, the manager should meet informally with them to discuss any perceived problems. These meetings are part of the normal management and employee relationship and do not constitute part of the formal disciplinary procedure.

The purpose of these meetings is to ensure that the employee clearly understands what is expected by the Trust, the acceptable standards of behaviour, and the potential consequences (disciplinary action up to and including dismissal) of failure to comply. It is also to help the employee rectify faults by discussing problems with the manager and thereby avoiding the use of the formal disciplinary procedure wherever possible.

The manager will write to the employee advising them of the content and outcome of the informal meetings and a copy of the letter or email will be placed on the employee’s personnel file.”

Transcript of Recorded Meeting

47. The Claimant covertly recorded a meeting between him and Mr Rowlan on 29 January 2020. Mr Rowlan did not know at the time that he was being recorded. There were two transcripts of this audio in the Hearing Bundle. One (at page 540) had been produced by the Claimant and was annotated both by highlighting particular aspects which he considered to support, or

not support, his arguments and with red commentary. The audio itself was disclosed to the Respondent who prepared their own transcript which is at page 569. Ms Skinner confirmed that her understanding was that at page 569 was, for all relevant purposes, the same as the Claimant's version at page 540 if one ignored the Claimant's comments, and witnesses were cross examined on the Claimant's version of the transcript. I was certainly not alerted to any material differences or inaccuracies in that transcript.

Factual chronology

48. I then move on to findings of fact about the factual chronology. I do not set out all of the evidence that I heard, only my findings of fact; those findings which it is necessary for me to make in order to decide the issues that need to be decided to resolve the dispute between the parties. Where I have been obliged to choose between competing witness accounts, I have taken into account all relevant evidence, the preliminary observations I made above about the weight that can be given to the evidence of particular witnesses and the different accounts given by witnesses on different occasions. I have compared that with contemporaneous documentation where it exists in order to make findings of fact on the balance of probability.
49. The Claimant has highlighted in his witness statement key issues which he relies on as reasons for his resignation in circumstances which he argues was a constructive dismissal. Those are set out in paragraph 94 and following. The first incident in time concerns the actions of Mr Hayward in May and June 2018. As previously stated, Mr Hayward retired in March 2019 and was therefore giving oral evidence about events which took place more than five years before the Final Hearing when he had been out of the business for a considerable length of time by the date of the hearing.
50. In about May 2018, the Claimant started an Informal Performance Management process with one of the direct reports on his Team. A seven page letter which goes into considerable detail about the Claimant's criticisms was prepared by the HR Advisor supporting the Claimant based on information he provided to HR (see the letter at page 342). Although Mr Hayward could not recall who brought this to his attention, he thought it was either another member of HR or the Direct Report concerned. Mr Hayward explains that he had been unaware of any problems with the individual's work and felt that the letter was unnecessarily harsh and confrontational, effectively out of proportion to the gravity of the alleged conduct that the Claimant wished to manage.
51. Mr Hayward decided to step in and suggest mediation, but external mediation was not possible as he explains in his paragraph 8. He therefore convened a meeting between the Claimant and his Direct Report. That was held on 31 May 2018.
52. Although the Claimant emphasised that the HR Representative who supported him was experienced and had approved his letter, he appeared

to accept that the Senior HR Advisor and a Manager felt that it was unnecessarily harsh and confrontational. He did not accept that it was harsh and confrontational and had evidently thought it necessary to set out with great particularity what his criticisms were. The letter was nonetheless a formal reflection of the informal stage of the Performance Management Policy and was to be placed on the Direct Report's Personnel file. A ten week period of review was instigated. She was told that if the improvement was inadequate then the review period could be extended or the formal process would be invoked.

53. It is not part of the ambit of this case for me to decide on whether the criticisms of the Claimant were justified. It is for me to consider whether there were legitimate grounds for Mr Hayward to step in. I accept that Mr Hayward genuinely was concerned that the approach taken by the Claimant was likely to be detrimental to the good relations between him and his Direct Report, which may not achieve the desired result of improved performance.
54. The Claimant's complaint is that when he went into a meeting with Mr Hayward to discuss the letter, he thought his position as Manager was going to be respected and supported.
55. It is clear from Mr Hayward's email of 4 June 2018 at page 354, that he did not regard the joint meeting as having been productive. It seems that the Claimant went into the joint meeting expecting his version of events to be accepted without question, whereas Mr Hayward intended to obtain the Direct Report's perspective as well. The Claimant complains about having his authority undermined. Although Mr Hayward recognises that was Mr Swan's perception, he explains in his paragraph 11 that he was trying to act as a neutral party.
56. I do not see evidence from which I can infer that Mr Hayward sought to mislead the Claimant about the purpose of the meeting. The one email sent before it that I have been taken to (page 351) refers to the Claimant raising discussion points and that is consistent with Mr Hayward considering that the initial stance to take would be to try to enable the Manager and the Direct Report to resolve their differences informally and to support the Claimant as he learned his role of Manager.
57. I do not accept that Mr Hayward was misleading about the purpose of the meeting when he encouraged the Claimant to participate in it. Taken as a whole, the evidence suggests that Mr Hayward and at least one member of the HR Team thought the Claimant's approach was too strict as a first step and I accept that was genuinely Mr Hayward's position. This is not the same as Mr Hayward being unsupportive of the Claimant as a Manager, or treating him as being at fault, but taking steps to assist the Claimant's growth as a Manager appropriately. It would not have been right of Mr Hayward simply to accept the Claimant's approach was beyond criticism.

58. What happened was that Mr Hayward arranged to meet with the Claimant and the Direct Report separately.
59. Mr Hayward was also alleged to have bullied the Claimant by whispering or gossiping about him behind his back, in relation to alleged conversations with members of the Medical Engineering Team. That was certainly how the allegation was put to him in cross examination, in effect suggesting that his conduct met the definition of bullying referred to in paragraph 44 above.
60. The Claimant's evidence on this is set out in his paragraph 17(e) where he states that two members of his Team told him between June and November 2018 that other Team colleagues had openly discussed having private meetings with Mr Hayward which included complaints about the Claimant's conduct. On the Claimant's account, the alleged private meetings between those Team colleagues and Mr Hayward had taken place during the Claimant's holiday. According to the Claimant, Mr Hayward had accepted the meetings had taken place. The Claimant expressed concerns about this in an email to an HR Advisor dated 1 October 2018 (page 355). In that email the Claimant recounted a conversation with Mr Hayward on 28 September 2018. Apparently in that conversation Mr Hayward accepted meeting with the Direct Report who was concerned in the May and June incident and had said there was no further action to take, but had also said that he had met others "*in passing*".
61. Mr Hayward, in his paragraph 17, denied having any discussions with other members of staff regarding any conduct issues in respect of the Claimant. That was not inconsistent with the oral evidence of Mr Hayward that he had had passing conversations with people who had made comments about the Claimant's actions and mentioned specifically being told by the Team that the Claimant locked the departmental door until the designated start time: he did not, however, regard those as serious conduct issues.
62. This seems to me to be an instance of the Claimant reading far more into what happened than it was reasonable to do. I accept that Mr Hayward would, had received something that he regarded as a serious complaint about Mr Swan, have come to the Claimant about it and intervened as he did when he had concerns about the way the Claimant was managing the Direct Report in May 2018. I do not accept that the Claimant's recollection of what Mr Hayward said to him was the latter accepting he was guilty of conduct that can validly be described as gossiping about the Claimant behind his back, or bullying him. Furthermore, if a member of a Team goes to their next but one Manager with a concern or a comment about that Manager's actions, that does not seem to me to be the type of conduct that the Policy is referring to in its definition of bullying.
63. A third particular criticism of Mr Hayward refers to a meeting which took place on 16 October 2018, which the Claimant states involved Mr Hayward "*concealing the true motive*" and "*acting dishonestly with a view to ambushing me*".

and without giving me notice or reasonable opportunity for prior discussion”, (see paragraph 98.a.ii).

64. The objective evidence which causes the Claimant to make that inference is that a meeting was called where the invitation (page 358) has the subject heading “Energy and Sustainability Strategy”. The Claimant complains that the discussion with Mr Hayward and Mr Bell on 16 October 2018 caught him by surprise because it involved a discussion about a post re-organisation affecting him (see his email on 19 October 2018 at page 360). He appears immediately to have assumed that the Respondent was effecting a re-organisation that would cause a “*de facto demotion back to Energy Manager*”.
65. I can see that the invitation refers to the Trust’s Energy and Sustainability Strategy. As Mr Bell explained in response on 19 October 2018 (see page 363) a discussion of the Energy Strategy of the Trust would be highly likely to involve a discussion of the resource needed to execute the Strategy. That resource predominantly was the Claimant who was the Energy Manager, although he had the additional responsibility for Medical Engineering at the time. Mr Bell responded appropriately to the Claimant’s concerns, agreed to postpone a follow up meeting that had been scheduled for 25 October 2018 and said the Claimant was welcome to bring a companion to any future meetings.
66. I accept Mr Bell’s evidence that the background to the meeting was a review of the Energy and Sustainability Strategy, because the redevelopment of the St Peter’s Hospital site was to be initiated (see CB paragraph 15). A redevelopment of that scale would inevitably impact on Energy Planning and Mr Bell states and I find, that the Respondent expected the work to be delivered by its existing Estates and Facilities workforce. The implication of what Mr Bell says is that, through the course of this redevelopment, it was expected that the Energy Manager role would expand both in scope and importance. The full implications may not have been something the Claimant had turned his mind to before the meeting of 16 October 2018, but he should have realised that an area of growth in the Hospital site was likely to lead to affect the resource allocated to it, including in his own specialty. At worst, this was a failure to flag up in advance that revisions to the Trust Energy Strategy might have an impact on the role of the Energy Manager, but I reject the suggestion that the Respondent concealed the motives of the meeting.
67. This is in part because of the view I take about the Claimant’s central complaint that he was in effect demoted back to the Energy Manager role. This is therefore a convenient opportunity to compare and contrast the various job descriptions. Mr Bell was cross examined extensively about them contrasting the Band 7 Energy Manager job description at page 46, with the Energy and Sustainability Manager at Band 8A being the job description the Claimant worked under from March 2019 onwards. When comparing and contrasting job descriptions, I bear in mind that they are not necessarily definitive about the tasks an individual is carrying out in

that post on a day to day basis and I accept that both of these roles were new posts for the Trust at the time the Claimant was appointed to them. The consequence of that is that there may be aspirations as to the elements of the role that the post holder would grow into and it seems to me that that is particularly true of the Energy and Sustainability Manager post, given that it was an enhanced development opportunity being put in place at the outset of an important phase in the Trust's Energy Strategy.

68. It is not particularly significant how many bullet points there are under a particular heading. What is significant, in my view, is the use of particular language to show what the Trust's expectation was in terms of the leadership, responsibility and accountability. Therefore, it seems to me to be relevant that the job summary of the ESM role at Band 8A includes "deliver the Energy and Sustainability Strategy and associated Plans". That is not a part of the job summary in the Band 7 role and an obligation to *deliver* the strategy denotes responsibility and accountability. Similarly, an additional objective in the and Band 8A job summary is to "manage, monitor and control all utilities used within the Trust". Contrast that with the key result areas of the Band 7 role involved the post holder to "manage, review and report carbon reduction and water usage against Trust targets" and similarly be involved in Energy and Water Saving Plans. The inclusion of all utilities and the use of the word 'control' implies greater responsibility. Similarly, there is an additional specification that the post holder will "provide guidance and support on all energy and sustainability issues in new builds and Capital Projects" and this is consistent with Mr Bell's evidence about the redevelopment of the site. There are intended to be key external working relationships of the Band 8A role and the key result area of "an effective contribution to reaching the Trust's vision, strategic objectives and key work programmes" leads to the inference that, in due course, measurable targets would be put in place to monitor that.
69. Mr Bell accepted in cross examination that each of the sub-paragraphs under the main duties and responsibilities of the post with a couple of exceptions only had one additional duty or responsibility added. However, it does not follow that the post is not sufficiently different as a result to justify an increase in Banding. An example is the requirement that the post holder organise and play a lead role in the Sustainability Steering Group. Although there was a loss of Line Management responsibility, there is evidence to support the Respondent's witnesses' position that the profile of the role was sufficiently greater than that of the Energy Manager role to justify the increase in Banding.
70. Furthermore, I accept that if the size of the budget increases to the degree described by Mr Bell, then management of the Energy and Sustainability function becomes much more important in a way that is not necessarily reflected in a change of wording in the job description.
71. The Specialist Engineering Manager role, which the Claimant held when he managed the Medical Engineering Department, has a job description which is analysed by the Claimant in annotated form at page 418. It is

accepted by the Respondent that a number of aspects of that job description would have been removed when he no longer had responsibility for that department. However, I reject his argument that he was in effect being demoted for reasons I have explained. There is evidence in documentary form in the Grievance Investigation Minutes at page 770, that a review of the job description was undertaken within the HR Department by a process described as “clustering” which appears to fall short of a full re-Banding or Band evaluation. Although Mr Bell appears to think that it went to HR to be Banded, a full re-evaluation does not appear to have been thought to be necessary. There is no basis to think that there was anything underhand about that judgement or that the judgement was not that of HR, or that it was done other than consistently with their approach in other cases.

72. Given my findings that this was a development opportunity when the strategy of the Trust was in a state of flux and development, if the Claimant was not on a day to day basis doing everything that the job description permitted or anticipated the role would become, that does not support an inference that the Claimant was demoted.
73. It is clear that the Claimant felt himself to be caught by surprise - as he said in his email of 17 October 2018 (page 365). Mr Bell immediately sought to reassure the Claimant in his response by saying that the meeting had been,

“an opportunity to discuss the large Energy and Sustainability Agenda and how a re-emphasis on this side of your job role would benefit the organisation.”

74. It was appropriate for Mr Bell to have started the conversation with the Claimant informally as he did. In any event, the Claimant’s reaction was to write to HR saying he felt that he needed to start a formal complaint against both Mr Bell and Mr Hayward.
75. The Claimant was then on 30 November 2018 formally invited to a Consultation Meeting (page 372). That meeting was to take place on 7 December 2018 and it included a copy of the Energy Environmental Strategy at page 374. The detail in that Strategy causes me to conclude that this was a result of a decision on Strategy taken at a much higher level than Mr Swan and the number of Capital Projects referred to in the Project Strategy support a finding that this was a genuine decision taken to benefit the Trust, rather than something done to target the Claimant and remove aspects of his role. The paper leads to a recommendation that the Medical Engineering and Energy Manager role is re-defined as was ultimately done, into the ESM role.
76. The Consultation Meeting took place as planned on 7 December 2018. The hand written jottings of the HR Representative present (page 378 and following) sets out the Claimant’s concerns and make clear that he had a preference for remaining with the Line Management responsibility for Medical Engineering with taking on particular projects. Ultimately, it

seems to me to be reasonable for the Respondent to wish to have a dedicated ESM.

77. The Claimant presented a formal Grievance on 14 December 2018 against Mr Hayward. The Grievance starts at page 384. Mr Hayward had been informed in about mid December that the Claimant had made complaints about him and was considering a formal Grievance (see KH paragraph 22). However, the formal Grievance was never discussed with Mr Hayward.
78. The Claimant met with Mr Bell on 20 December 2018 at a meeting which included a Representative of HR and is reflected in the email from Mr Bell to the Claimant at page 432. In the meantime, the Claimant had entered a detailed response to the Consultation about the proposed move to the ESM role (on 19 December 2018, see page 407 and following). It is within this response that the annotated job descriptions referred to in cross examination were provided.
79. The Claimant's complaint had been raised under the Dignity at Work Policy and it is clear that at the meeting on 20 December 2018 the Respondent explored the options available under that Policy. It appears that the Claimant was undecided how to address the matter because he particularly was aware that Mr Hayward was due to retire from the Trust in March 2019.
80. When cross examined about the Meeting on 20 December 2018, the Claimant accepted that the different options on how to progress were discussed and that the email at page 432 accurately summarised the way things had been left. However, he disagreed that he had decided after Christmas not to proceed with the Grievance and alleged that he had not been contacted by Mr Bell after Christmas, but had been waiting for him to discuss the Grievance further. However, he wrote to his Representative on 22 January 2019 (at page 436) and said, "*I am starting to change my decision and proceed with a Grievance*", which suggests that he had decided not to proceed over Christmas.
81. The Claimant's insistence that he had been waiting for Mr Bell to come back is inconsistent with the wording of Mr Bell's email of 20 December 2018 which makes clear in the fifth paragraph that it was the Claimant who was going to take time to consider his options and how he wished to pursue his complaint if he still did. Separately, Mr Bell was going to review the Claimant's comments on the proposal for his role and it appears that this had also been discussed with the Claimant having given Mr Bell the impression that he thought it was a good time to take up the revised role, albeit with some of his amendments being incorporated. One of those proposed amendments was the possibility of the appointment as Authorised Person for electricity, ventilation, water and heating plant.
82. However, it also appears that it was made clear to the Claimant that the Consultation process about his role and his complaint about Mr Hayward,

were two separate processes (see the statement at page 449 in an email of 27 February 2019 from Mr Bell).

83. The email at page 434 dated 3 January 2019 causes me to conclude that Mr Bell did consider the proposals put forward by the Claimant, but was not able to accept changes to the ESM role's responsibilities which would impact on another Manager's role and would cause the Consultation process to be extended to re-structure the job content of others. There appears to have been another meeting on 8 February 2019 between Mr Bell and the Claimant, which is referred to in the email of 22 February 2019 (page 443). In that Mr Bell explained that he could not support the inclusion of additional duties *"as this would then have an impact on other existing and occupied roles within the structure"*. Mr Bell's decision was that the responsibility for Medical Engineering would not remain in the Claimant's portfolio because *"the focus of your role will now need to be placed solely on Energy and Sustainability in line with our site redevelopment and major investment plans"*. In other words, the respondent agreed to put in place a Personal Development Plan and support training that would lead to the claimant obtaining further qualifications.
84. There had clearly been a discussion about the Claimant's concerns of the risk of marginalisation and his expectation that he would not be seen as subordinate to peers in the Band 8A role. Mr Bell agreed to develop a set of work streams with a view to enabling the Claimant to develop the role to its full potential. Mr Bell had also returned comments on the Claimant's proposed revisions. They start at page 445 and include a comment on the Claimant's observation that further training was necessary, including to achieve professional qualifications. Where Mr Bell commented, *"happy for us to support you in a Personal Development Plan that includes qualifications"*.
85. Between 25 and 27 February 2019, there was an exchange of emails between the Claimant and Mr Bell which includes discussions about a final copy of the job description. Among other things the Claimant asks to see the Banding Evaluation and the Claimant goes on to discuss his Grievance relating to the conduct of Keith Hayward saying that he thought an investigation into the marginalisation of his work would be useful. He does not accuse Mr Bell in this email, of 25 February 2019, of failing to progress the Grievance. Mr Bell's response indicates that his understanding had been that the Claimant had not been keen to progress the Grievance given Mr Hayward's imminent retirement and then after Christmas 2018, had indicated that he was happy not to pursue any further action. Mr Bell goes on to ask for clarification about whether the Claimant wished to pursue his original Dignity at Work complaint, or whether he was raising a separate Grievance under the Grievance Policy about Mr Hayward's management and asks for clarification of this as soon as possible. Mr Bell pointed out that since Mr Hayward is only going to be with the Trust for a further four weeks, if it was to be progressed that needed to be done as soon as possible.

86. He also attached a draft Work Schedule which included a section for the Claimant to complete on "Support that you may need to be successful". The Work Schedule is at page 452. The detail and engagement by Mr Bell with the Claimant's concerns about the job description and the detail in the Work Plan caused me to consider that he was engaging with the Claimant in good faith because he considered this to be a necessary post for the benefit of the Respondent.
87. Ultimately, on 7 March 2019 (page 457), the Claimant offered to end his Grievance in relation to "*concerns about unfair treatment and of demotion to the new post*" as the Claimant puts it "*to give the new post the best chance of success*". He describes the revised job description and Mr Bell's assurances regarding maintaining equivalence to others at the Band 8A level as a positive step towards addressing his concerns. This was confirmed in writing by Mr Bell on 1 April 2019 (page 458).
88. It is clear, therefore, that the Claimant discontinued the Grievance and decided not to complain about the alleged demotion. I also accept that Mr Bell genuinely believed that the Claimant was considering his position over the Christmas break in 2018 to 2019 and had communicated early in the New Year that he was not proceeding with his Grievance. I therefore conclude that the reason that Mr Bell did not on his own initiative investigate the Grievance, or notify Mr Hayward about it, was that he did not believe the Claimant was pursuing it or was deciding whether or not to pursue it.
89. The Work Plan appears to have been the subject of some further discussion and on 6 June 2019 Mr Bell wrote to the Claimant thanking him for an updated version (page 471). They had met the previous day for an Appraisal and the email of 6 June 2019 is intended to summarise that Appraisal and Personal Development Plan. This is during the period when Mr Bell was line managing the Claimant after Mr Hayward's retirement. It is clear that in the Appraisal it has been agreed that the Claimant would undertake the Authorising Engineers' role in ventilation. This fits with one of the proposals put forward by the Claimant for how his role would develop. Funding and time for training was to be arranged. It is apparent from the revised Work Plan at page 473 that the Claimant has identified support that he considers necessary.
90. In September 2019, Mr Rowlan started work and became the Claimant's Line Manager. It appears that by October 2019 the Claimant was still concerned and unhappy that the ESM post did not meet Band 8A levels of responsibility and accountability and he indicated that he was going to raise that at his upcoming Appraisal. It was at the end of this month, shortly after Mr Rowlan started work, that the EDMTES Escalation Structure was circulated (see paragraphs 32 above).
91. The Claimant and Mr Rowlan held an Appraisal meeting which is recorded in the document starting at page 505. In that Appraisal he appears to express concern about his career progression within the NHS and in the covering email (page 504) he asked Mr Rowlan to set aside time to

discuss the PDP (Personal Development Plan) and Work Plan. Among the Claimant's complaints at paragraph 96(f) are that he received no response or further support as an outcome from that Appraisal, nor agreement to a PDP to discuss future career progression.

92. Mr Rowlan was unable to recall whether a PDP was prepared and one was not pointed to in the Bundle that post dated this Appraisal. Although in Mr Bell's paragraph 7 he states that the Trust offered to put a Development Plan in place for Mr Swan, this appears to have been in connection with the Claimant expressing an interest in the Head of Estates role before Mr Hayward's promotion back in October 2017. Therefore even if the Claimant did decline the offer of a Development Plan at that time, this does not appear to be relevant to the question of why there was no progress in the PDP in November 2019 after Mr Rowlan took over.
93. I have quoted from the exchange about Mr Rowlan's request for his two Direct Reports to identify Cost Improvement Plans in paragraph 37 above. The Claimant's sensitivity to perceived slight by the Estates Manager is apparent from that exchange, for reasons which I explain in those paragraphs, I do not accept that these exchanges are inappropriate or that they are evidence of delegation or of Mr Rowlan making the EM the *de facto* Line Manager of the Claimant. The Claimant appears to have over reacted to the situation.
94. At about the same time, on 15 October 2019 (page 1310), there was an exchange between Mr Rowlan and the Claimant about an upgrade to the toilet facilities to make them accessible for people living with dementia. This is a matter that the Claimant points to as indicating that he was allocated minor works. Mr Rowlan refuted the allegation that this was something outside the scope of the Claimant's job role. Mr Rowlan clarified the evidence about this which had given in his statement at paragraph 9.3) (WB page 58). At the time he made the Statement, which must have been approved before exchange, he appears not to have recollected this particular exchange. The email stands for itself and I do not accept that Mr Rowlan in his original Statement was being evasive, he genuinely did not recollect the events.
95. Mr Rowlan's paragraph 9.5) was another section which was amended when he adopted his statement in evidence. At the time he made the statement he said that he had had no specific recollection of a particular meeting in Ashford Hospital in October 2019, but did by the time of giving oral evidence.
96. In about December 2019 the Claimant asked Mr Rowlan if he could take time off in lieu of time outside core working hours that he needed to spend at night showing Atkins Contractors around a site and undertaking a thermal building survey after dark. In paragraph 100(d) of his Witness statement, the Claimant refers to a 14 January 2020 request for overtime. In his oral evidence he clarified that rather than requesting overtime he was requesting time off in lieu. The details were accepted by the Claimant to be that he had outlined to Mr Rowlan he wished to do the work that

needed to be done in the evening and the request for him to receive time off in lieu was not immediately approved. However, the Claimant accepted that it was for a Manager to decide what tasks ought to be prioritised at that moment.

97. Mr Rowlan said that he had not intentionally failed to get back to the Claimant with a response, but needed time to think about it and then had been distracted with other duties.
98. In the meantime, the Claimant's Authorised Person designation for ventilation had not yet been signed off (see page 521). This email is relied upon by the Claimant as evidence of demotion, but although in it he is asked by the Estates Manager to co-ordinate with Theatres, by itself it does not provide sufficient to base a conclusion that Mr Swan had been subordinated to the EM. Rather, Mr Swan was invited to go direct to the contract. The Estates Manager was responding to what appears on page 552 to have been an annual request by a Contractor for dates when they might carry out particular work. At worst it indicates that the practical consequences of the increase in importance of the Claimant's role had not yet translated to him being the point of contact for external providers.
99. As I outlined in paragraph 36 above, on 14 January 2020 Mr Rowlan instructed the Claimant and the Estates Manager to contribute to the budget for the following year (page 513 – 514). According to paragraph 100(d) of the Claimant's Statement, it was on the same day that Mr Rowlan declined his request for TOIL (Time Off In Lieu). Mr Rowlan now has very little recollection of this and did not put forward a good reason why he should refuse the request, although the evidence seems to be that he would think about it and then did not refer to the Claimant. I accept the Claimant's evidence that under previous Line Managers it was something he had done normally before.
100. The Claimant's response to the Estates Manager's suggestion for cost savings was sent early in the morning on 15 January 2020 (see paragraph 37 above). Objectively the Claimant's perception of antagonistic and unsupportive behaviour and of deliberate subordination of his role to that of his peer, is unsupported by the evidence. It seems to me that Mr Rowlan was probably finding the Claimant's extreme sensitivity to be difficult to manage and the Estates Manager's email to Mr Rowlan of 17 January 2020 commenting upon the Claimant's outburst which Mr Rowlan forwarded to the HR Department on 20 January 2020, sets out that the EM was beginning to find the Claimant's,

“negativity to be reputationally damaging to the Estates Team Leadership and on occasions myself”.
101. To put it mildly the relationship between the Claimant and the EM was clearly strained.
102. I also accept the evidence of Mr Bell that the Claimant, while having many strengths, did not have technical qualifications or suitable technical

experience that would enable qualifications such as that needed for the AP role to be signed off. This is not a criticism of the Claimant's abilities, but I accept that there were some roles for which, for want of a better word, trade qualifications and experience would be needed to enable the Claimant formally to take on aspects of the role that had a regulatory function. The Claimant appears to have regarded the insistence of the Respondent on technical experience as being a criticism of his capability.

103. Evidence which supports this conclusion, in my view, concerns the challenges in getting the Claimant authorised as the Authorised Person for ventilation. This was explored by Mr Rowlan with the Claimant in the meeting that took place on 20 January 2020 and it appears in the transcript at page 548. Mr Rowland describes this as being a vicious circle where the Authorising Engineer needs to authorise the Claimant to be the Authorised Person (AP) and Mr Rowlan explains that in order to do so the Engineer has to work with the Claimant,

"in your environment testing and inspecting ventilation plant so he understands that you have got oversight or an overview of your existing plant".

104. It appears that the Claimant had refused to work with the Authorising Engineer until he had authorised the Claimant. Put simply, the Claimant does not appear to accept that he has to go through those hoops in order to achieve the designation of AP that he desired as part of growing the Leadership elements of his Band 8A role.
105. Having said that it is clear relationships were being strained and in the absence of any clear explanation from Mr Rowlan, it seems to me to be more likely than not that he did not engage sympathetically with the Claimant's request for what otherwise would be perfectly normal TOIL.
106. There is also the circumstances complained of by the Claimant in his paragraph 58. He had on occasion worked from home. There is some dispute with the Respondent about whether his assertion that he needed to do so to alleviate back and neck pain was something they were aware of prior to January 2020 and there is some contemporaneous evidence to support the Respondent's position on this. Nevertheless, even if one accepts the Respondent's position that Mr Rowlan put in place a request that individuals ask in advance if they could work from home so that he knew who was on site – a request that the Claimant accepted was a reasonable one – the documents at pages 515 and 516 suggest that the Claimant asked to work from home (giving a week's notice) and this was declined without any explanation given. He does state at the request at page 515 that the purpose of it is to allow him to manage his back and neck pain.
107. I have already referred to the meeting which took place on 29 January 2020. This was an informal meeting called by Mr Rowlan who had consulted HR, as I see from page 524. By this email dated 20 January 2020, he forwarded the completed Appraisal conversation to HR saying,

“As you can see there is a continual pattern of hierarchical need which is being disproportionate to his current role.”

108. I am satisfied on the basis of the email from HR at page 525 that Mr Rowlan was advised by them to manage this as a conduct matter on the part of the Claimant at an informal stage and a draft letter (at page 525) was prepared. This and the covering email were disclosed to the Claimant during the disclosure process. However, Mr Rowlan’s recollection was that the Claimant had been given a hard copy during the meeting.
109. Mr Rowlan invited the Claimant to the meeting on 28 January 2020 (page 539) and the meeting was headed with the subject heading, “Work Capacity and Expectations”. The Claimant asked for a summary of what Mr Rowlan would like to discuss so that he could prepare for the meeting and Mr Rowlan responded there was no need to prepare as it was an informal conversation. The transcript prepared by the Claimant starts at page 540 and the Respondent has not suggested that it is inaccurate, if one ignores the Claimant’s comments upon it.
110. Mr Rowlan opened the meeting by saying that he had consulted with HR who had given him two options of either to, *“go through a letter that we have put together informally”* and the other one is just to have, *“an informal chat and go through the letter”*. He asks the Claimant which he would prefer. It is understandable that the Claimant says that he was taken by surprise because as put by Mr Rowlan, it is difficult to understand the difference between the two options. I understand him to have meant that rather than formally give the Claimant a copy of the letter, the more informal, informal stage would be to have a chat that was informed by the contents of it.
111. The Claimant appears to choose to go through the points in the letter straight away.
112. The nub of the Claimant’s complaint about Mr Rowlan’s conduct at this meeting is that in it he is said to have raised unmerited and unfounded allegations of performance and conduct issues as bare allegations which were unsubstantiated. Alternatively, it is described (List of Issues 1.d.) as being an attempt to discipline the Claimant without following the Trust procedure. Further, it is said that the true motive for the meeting was concealed dishonestly with a view to ambushing the Claimant.
113. It is true that it is likely that the reasonable employee would not understand that the fact that the subject of the meeting was said to include “expectations” might be a reference to Mr Rowlan’s expectations of the Claimant’s behaviour; it might mean that the extent to which he fell short of those expectations was to be explored at the meeting. However, I reject the allegation that this was contrary to the Capability Policy or the Disciplinary Policy. At page 188, Section 5 of the Disciplinary Policy refers to *“Management Prior to Formal Procedures”*, including an informal meeting which is described as being part of the *“normal management and employee relationship”* and not part of a formal disciplinary process. It is said that the purpose of the meetings is to ensure that the employee clearly

understands what is expected by the Trust. The only writing that is prescribed under the Policy is for the Manager to write advising the employee of the content and outcome of the informal meeting. That is essentially what the draft at page 526 was. This was the Policy or procedure which legitimised the steps taken by Mr Swan in respect of his own Direct Report. I do not see that the Policy requires the employer to notify the employee in advance of the nature of the concerns when the purpose of the meeting is to have an informal discussion about those concerns and it is stated that the meeting is not part of the formal disciplinary process.

114. I also reject the Claimant's allegation that Mr Rowlan did not have grounds or a basis for the criticisms he raised against the Claimant. I accept that the negativity and sensitivity displayed by the Claimant would have made him difficult to manage and difficult to work alongside as part of the same Team. It seems not at all unreasonable to me that Mr Rowlan sought to meet with the Claimant in order to try to manage the consequences of these behaviours. Mr Rowlan's recollection was that the Claimant took a copy of the conduct letter away with him. He repeated in cross examination on a number of occasions that the intention of the informal meeting had been to start to have the conversation and that seems to me to be within the spirit of the disciplinary process. I do not see that it is justified to accuse Mr Rowlan of deliberately trying to ambush the Claimant about the content of the meeting. He could have given the Claimant a bit more time to think about what the two options meant and what they potentially meant to his future track record within the company. The way Mr Rowlan explains the two options is a bit confusing. However, I do not think there is evidence from which I could infer that there had been dishonest intent or a deliberate attempt to confuse Mr Swan in respect of the way that these materials were presented.
115. It is a fair comment to make, as the Claimant does, that there are not specific, detailed examples of every allegation. He is in general criticised for not supporting the Team (see page 560), but at that point no specifics are given about incidents that have led to that inference.
116. On the other hand, the Claimant accepted that Mr Rowlan went through the matters set out in the conduct letter which do provide particulars of complaints of conduct that were causing Mr Rowlan concern. He said that the Claimant had walked out of meetings abruptly on occasions mid-way through the meeting and prior to the meeting ending. He gave an example of a meeting on 20 January 2020 stating that he had to rearrange the CIP meeting so that the Claimant could participate. The Claimant is alleged to have declined to attend a meeting at the Electrical Resilience Project unless he could project manage it all. Mr Rowlan gave an example of the Claimant declining to witness some training prior to being certified as the ventilation Authorised Person. I accept that that was something that the Claimant had declined to do because of the impasse I refer to in paragraphs 103 & 104. At the top of page 527 in the Bundle, Mr Rowlan criticises the communication style used by the Claimant in the email on

15 January 2020 (see quote at paragraph 37). I accept that this was a valid criticism of the communication style chosen by the Claimant. It can be seen from the transcript that Mr Rowlan raised these matters as specifics in the meeting, see page 542 where he discusses the Electrical Resilience Project. At the top of the same page, Mr Rowlan says he is not happy with the Claimant walking out of meetings when they have not finished. At the bottom of page 543, Mr Rowlan explains the challenges proposed by the Claimant's communication style.

117. On page 545, Mr Rowlan responds to the Claimant's explanation that he has neck and back issues by saying that it is necessary to get a Risk Assessment on the Claimant's work station and invites him to carry out his own Risk Assessment when he is working from home. Not only do I consider this to have been an appropriate response to the neck and back pain revealed by the Claimant, but it indicates that Mr Rowlan was open to the Claimant working from home in general because he included the Claimant's work environment at home as something that should be covered by a risk assessment.
118. I am satisfied, based on the evidence I have heard, that these allegations were not unfounded. The Claimant accepted that he had walked out of more than one meeting over a short period of time, but said that he had valid reasons for doing so. He did not claim that Mr Rowlan was aware of all of these reasons and had an opportunity to explain his perspective on the accusation. Furthermore, this was a record of an informal meeting so it would not lead to a finding that the Claimant was guilty of misconduct in having walked out of meetings. Mr Rowlan was reasonably of the view that the Claimant's participation in meetings, whether or not he was leading them and whether or not he was participating directly in the whole of the meeting, was important for providing an opportunity to include him in discussions that would be relevant to the whole of the Team. It also seems inconsistent that the Claimant should absent himself with his complaint that the location of his office meant that he was isolated.
119. As a matter of factual finding, therefore, I am not satisfied that the informal conversation was initiated without basis or merit.
120. Furthermore, the complaint that there was a lack of documentary evidence to substantiate the allegations is not made out because some of the complaints were matters for which there would be no documentary evidence and others, such as the complaint about his communication style, are evidenced by the email that I have seen. I have not heard that documentary evidence had been provided by the Claimant in advance of the meeting. Overall, I am satisfied that Mr Rowlan had a sound basis for initiating the conversation.
121. The Claimant relies upon a particular comment made by Mr Rowlan and recorded on page 547 (see paragraph 75 of the Claimant's Statement). The conversation had apparently moved on from going through the details in the draft letter to Mr Rowlan asking what support he could give the Claimant. From page 546 onwards, the Claimant raises a number of

issues that he has with Mr Rowlan's management. It is during this that the Claimant says that he can offer explanations as to why he walks out of meetings and his communication style. He goes on to say that he also raised concerns saying that he does not feel that he has had the support from Mr Rowlan, HR or Chris Bell. He says that he does not feel as though the Leadership role for a Band 8A position is materialising and Mr Rowlan replies,

"I agree Ollie, you are not working at a Band 8A, you're working at a Band 7... and if that at all."

122. However, he goes on at the bottom of page 547 to say this,

"I can't [...] give you at the moment any more responsibility than [...] your workload that you've got at the moment. I have written down, er about AP ventilation, er, and duties and, er, this morning I printed off what Steve, Steve does... I think it might be worth you having a look at that [it]"

123. It is at this point that they go on to have the discussion about the Claimant refusing to work with the Authorising Engineer. I am therefore satisfied that in context the comment that Mr Rowlan makes is not evidence that the ESM role was a demotion and was not a Band 8A role, but is evidence that the tasks the Claimant was carrying out meant that as executed by him it was not satisfying the full Leadership potential intended by the job description and therefore he was not working at Band 8A. I also accept that there is evidence that the Respondent encouraged and sought to support the Claimant to acquire the technical skills and experience that would enable him to take on areas of responsibility that ultimately would mean that he was working at Band 8A as well as in the post that was Band 8A.

124. The Claimant had emailed complaints about Mr Rowlan to Mr Bell on 24 January 2020 in an email at page 610. He particularly raised the refusal of his working from home request and his request for time off in lieu for working on the thermographic survey. He concluded,

"With regret I need to bring this formally to your attention as I cannot see his treatment as fair, supportive or acceptable. I have already expressed your wish to leave the directorate for reasons such as this. In addition to this email, next week I shall submit a further document outlining other instances of unreasonable treatment and bias which I would like to be considered as part of a wider grievance."

125. Mr Bell's response was sent on 31 January 2020. Although not an immediate response, it does over the course of several paragraphs engage with the concerns expressed to that stage in the email of 24 January 2020. He describes the request for TOIL as having been, "fair and reasonable", but is generally supportive of a request that working from home should be booked in advance while repeating that the health issues have been referred to Occupational Health. It appears the Claimant had not attended an appointment because it was not convenient for him. I do

not see the lack of a holding response to the email of 24 January 2020 to be a matter indicating a lack of seriousness on the part of Mr Bell given what he eventually said in response.

126. The Claimant resigned on 3 February 2020 and explains his decision in paragraphs 89 and 90, where he says that,

“the cumulative effect of the treatment I had suffered from the Respondent culminating in Ian Rowlan’s treatment of me on 29 January 2020”

meant he had no choice but to resign. He raised a formal grievance at page 613. He resigned giving full notice of 12 weeks. Since he says in that paragraph that the treatment culminated in the conduct of Mr Rowlan on 29 January 2020, it seems to me that Mr Bell’s response of 31 January 2020 did not play any part in the Claimant’s decision to resign.

127. The last act in time prior to his resignation which played a part in his decision to resign was the meeting on 29 January 2020.

Conclusions on the Issues

128. I start by setting out a recapitulation of my findings categorised by the issues set out in the Agreed List of Issues appended to these Reasons.

129. Contrary to List of Issues 1.a, I reject the allegation that the Respondent carried out a prima facie demotion of the Claimant back to his first appointment as Band 7 Energy Manager. He was in form and in substance moved to a Band 8A ESM role which was genuinely and reasonably expected by the Respondent to be a development role fulfilling sufficient leadership elements to warrant that banding.

130. Contrary to List of Issues 1.b, the Claimant was not excluded from leadership roles, responsibilities and discussions, or allocated piecemeal and minor jobs. The Estates Manager was not either formally or informally appointed to be in a position of leadership over him. The Claimant was highly sensitive to perceived slights and formed a fixed view that he was being isolated and made subordinate to the Estates Manager, but that was not supported by objective evidence. The Claimant has not made out the core facts underpinning his allegation.

131. The allegations at List of Issues 1.c. are only made out to the extent that the Claimant alleges in List of Issues 1.c.vi. and vii, that Mr Rowlan declined the Claimant’s request to work from home on particular occasions and has not been able to explain a reason why he did so, given that occasional working from home appears to have been supported in the past. Furthermore, Mr Rowlan at best did not return to the Claimant on a request for TOIL in respect of night working, which was a fair and reasonable request.

132. It seems to me that by the time of these requests, which was about December 2019 to January 2020, Mr Rowlan may have been becoming

frustrated with the Claimant's communication style and negativity and that may have had an impact on his decision at that particular time to refuse working from home arrangements. He may have been seeking to reassert authority over the Claimant who had been leaving meetings part way through, as explained by Mr Rowlan during the meeting on 29 January 2020. Otherwise the allegations particularised in i. to vii. are not made out. I have not dealt above specifically with the complaint about the Claimant being allocated the upgrading of the toilet and bathroom facilities, but I have been persuaded by the Respondent that this was not a responsibility of the Claimant's subordinates in the sense that a renovation and upgrade of the toilet facilities to make them accessible for patients with dementia, was an important part of fulfilling a strategic vision of improved accessibility the Trust and the Claimant significantly seeks to underplay and undervalue the importance of the project.

133. The complaint of the Claimant (see List of Issues 1.c.i & ii) that Mr Rowlan raised unmerited and unfounded allegations in the meeting of 29 January 2020 and had no documentary evidence to support it, is specifically rejected.
134. List of Issues 1.c.iv. is based on an allegation that, when Mr Rowlan's requested Mr Swan and the EM to put forward Cost Improvement Proposals, and the Estates Manager's response included a suggestion which was within the ambit of the Claimant's job. To characterise that as the Manager telling the Claimant to seek approval in respect of any tender approaches or cost improvements from the Estates Manager, stretches the meaning of Mr Rowlan's instruction far beyond that which the words can reasonably bear and, in any event, was not his intention.
135. As referred to above, it is not the case that Mr Rowlan sought to discipline the Claimant on 29 January 2020 without cause and the meeting was held in accordance with the Trust procedure. List of Issues 1.d. is not made out.
136. I accept that the wording of the invitation to the meeting on 29 January 2020 would not have caused the Claimant to understand that it was an informal meeting under the Disciplinary Policy. However, I reject the allegation that this was done dishonestly with the view to ambushing the Claimant. The other meeting of which he complains held on 16 October 2018, was initiated quite properly (see paragraph 63 to 66 above).
137. List of Issues 1.f. alleges that from 1 March 2019 the Respondent arbitrarily changed the job role. I reject that because it was part of the Respondent's proposal to enlarge their resource committed to Energy and Sustainability. It was not arbitrary. The consultation is evidenced by the proposal on which the Claimant was consulted over a period of at least 4 months between October 2018 and February 2019, as set out in paragraph 63 to 88 above.
138. The refusal of the single working from home request does not amount to the removal of an accommodation of the Claimant's working environment.

The Respondent's immediate referral of the Claimant to Occupational Health when his neck and back pain was disclosed, shows that by offering a Risk Assessment of his home working environment the Claimant would be supported in working from home in general. The Claimant was asked to help the management of working from home by giving a week's prior notice. The respondent had not previously been aware that he sought it at short notice to help his back and neck and when alerted to those medical conditions, they referred him to occupational health.

139. In List of Issues 1.h. the Claimant alleges a number of incidents amount to marginalising him, bullying him and ostracising him. The factual basis put forward by the Claimant has not been made out.
140. The Claimant's allegations in List of Issues 1.i. that the Respondent failed to address the grievance or complaints made by him against Mr Hayward in a formal grievance of 14 December 2018 is rejected. This was dealt with appropriately by the Respondent by convening a meeting with the Claimant on 20 December 2018 at which matters were left in the Claimant's hands as to how he wished to proceed given the imminent retirement of Mr Hayward and the fact that the Claimant was also going through a Consultation process which ultimately led to him moving to a different role. Mr Bell reasonably expected the Claimant to revert to him should he wish to pursue the Grievance and the Claimant following Christmas 2018 notified the Respondent that he did not wish to do so.
141. Although the Claimant did complain about the conduct of Ian Rowlan on 24 January 2020, I reject the characterisation of Mr Bell's response, set out in the allegations in the particulars, as failing to address the Claimant's concerns or the Claimant's back pain. Mr Bell had made a referral to Occupational Health and Mr Rowlan had stated that a workplace risk assessment, both in the office and at home, would be initiated. Furthermore, this particular response by Mr Bell did not play any part in the Claimant's decision to resign.
142. When I go on to consider the questions recommended by the Court of Appeal in Kaur: the most recent act on the part of the employer which the employee said caused or triggered his resignation was the meeting on 29 January 2020. This was properly convened in accordance with policy and Mr Rowlan had a reasonable and proper cause for raising his concerns with the Claimant. No question of affirmation of the contract following that meeting arises, however, it was not by itself a repudiatory breach of contract.
143. Mr Rowlan's conduct in December 2019 and January 2020 is not beyond criticism and I have accepted that it may well be the case that irritation with the Claimant influenced decisions to reject working from home, for which no reason was given, and for rejecting the Claimant's application for TOIL, or at least not dealing with it in good time. However, in the context of the Claimant's complaints and the way that Mr Rowlan was managing the situation in general, those matters do not get anywhere near amounting to a breach of the implied term of mutual trust and confidence because they

cannot be said to amount to conduct which was intended or likely to damage or destroy the relationship of trust and confidence between employer and employee.

144. Other than those matters which could lead to some criticism of Mr Rowlan, the Claimant has not made out his allegations of continuing and persistent bullying and undermining of him over a number of years. In general his account of events has been skewed to fit his perception that that was what was happening. I am therefore not of the view that there was a course of conduct in this case which viewed cumulatively amounts to a repudiatory breach of the implied term of mutual trust and confidence.
145. Although the Claimant resigned in response to what he perceived as being behaviour worthy of criticism directed towards him, that conduct did not breach the implied term of mutual trust and confidence and therefore the Claimant has not shown that he resigned in circumstances where he was entitled to resign and consider himself dismissed by reason of the employer's conduct.
146. For these reasons I conclude that the Claimant was not dismissed and his unfair dismissal claim is therefore not well founded and is dismissed.

Employment Judge George

Date: ...24 January 2024.....

Sent to the parties on:
1 February 2024

.....
For the Tribunal Office.

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge is likely to be payable in most but not all circumstances. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

APPENDIX

IN THE READING EMPLOYMENT TRIBUNAL

CASE NO: 3311080/2020

B E T W E E N

MR O SWAN

Claimant

-and-

ASHFORD & ST PETER'S HOSPITALS NHS FOUNDATION TRUST

Defendant

UPDATED LIST OF ISSUES

Further particulars provided by the Claimant on 7 Jan 2022 appear [in blue](#). The Respondent considers that one matter in the Claimant's further particulars is not in the Particulars of Claim and this appears [in red](#). The Respondent's position is that this does not form part of the alleged breach of contract and is background only.

CONSTRUCTIVE DISMISSAL

1. Did the Respondent do the following things?

- a. From 1 March 2019 prima facie demote the Claimant back to his first appointment as Band 7 Energy Manager, despite the Claimant demonstrating changes and the ability to process to achieve a role consistent with Band 8a **[ET1 17.17(i)]**;
- b. From October 2019 onwards, [Ian Rowlan] excluded the Claimant from leadership roles, responsibilities, and discussions consistent with Band 8a within the Estates team, despite his clear ability to perform at this level. On the contrary, the Assistant Director allocated ad-hoc piecemeal and minor jobs under the leadership and accountability of the Estates Manager or works officers to the Claimant **[ET1 17.17(ii)]**;
- c. From 2019 onwards breach the Dignity at Work Policy and NHS Managers' Code of Conduct. The Claimant was subjected to subjugation, belittling, continuing passive aggressive behaviours which sought to exert unreasonable control and so undermine his confidence and capability **[ET1 17.17(iii)]**, by:

[Further particulars:](#)

- i. [The Claimant's line manager \[Ian Rowlan\] raised unmerited and unfounded allegations of performance and conduct issues ahead](#)

of an appraisal meeting on 29 January 2020. He was unable to substantiate the allegations at the meeting on 29 January 2020 [FP1].

- ii. The Claimant's line manager [Ian Rowlan] failed to provide any documentary evidence to substantiate the allegations at the meeting on 29 January 2020. Still further, the Claimant's line manager continued with the meeting despite having been provided with documentary evidence in advance of the meeting by the Claimant rebutting the suggested poor performance or conduct then thereafter, at the meeting, remained silent in respect of this rebuttal evidence [FB2].
- iii. The Claimant's line manager [Ian Rowlan] decided to allocate the Claimant work which was outside the remit of his role, including the delegation of the task of upgrading the toilet and bathroom facilities of the hospital (which the Claimant did complete without reservation) – this was a work responsibility of the Claimant's subordinates. This occurred around November-December 2019. [FP3]
- iv. The Claimant, who in his role had responsibility for the energy contracts at the hospital, was told by his line manager [Ian Rowlan] to seek approval in respect of any tender approaches or cost improvement decisions made in respect of energy contracts from a colleague on the same grade as the Claimant [Andrew Hanney] rather than his line manager. This occurred in January 2020. [FP4]
- v. The Claimant's line manager [Ian Rowlan] refused to accept valid reasons for the Claimant either not attending meetings or leaving early (and sought to cite these as examples of a failure to co-operate on the Claimant's part), more specifically: [FP5] ***[R: This allegation is not in the Particulars of Claim]***
 - 1. Ventilation system meeting at Ashford hospital – October 2019 – the Claimant left early due to a need to attend another meeting (Kick-off meeting with Atkins environmental re net zero feasibility and options report) but was criticised for having to leave;
 - 2. Group meetings of estate officers – the Claimant is alleged to not have attended despite not having previously received an invite yet was criticised for not attending nevertheless – September – October 2019 (to be confirmed);

3. Group meetings of estate officer – the Claimant did attend in November 2019 where it was confirmed beforehand that the claimant would attend, present in respect of 1 issue, then leave thereafter - despite this he was criticised for leaving early in this respect also.
- vi. The refusal to provide the Claimant with flexible work arrangements that he had enjoyed previously without reason – this occurred between October 2019-January 2020 – the Claimant’s line manager [Ian Rowlan] had introduced new rules for request ad-hoc flexible/home working which the claimant did comply with, but which were rejected - no reason for this rejection was given. **[FP”5” [Should be numbered FP6]]**
- vii. The Claimant’s line manager [Ian Rowlan] refused a reasonable overtime request in respect of night working when the Claimant sought approval to show contractors around a site and undertake a thermal building survey at night – this was rejected without any reason being given - December 2019. **[FP”6” [Should be numbered FP7]]**
- d. On 29 January 2020 [Ian Rowlan] without merit sought to discipline the Claimant without any cause or adherence to Trust Procedure **[ET1 17.17(iv)]**.
- e. Concealed the true motive for a number of meetings, acting dishonestly with a view to ambushing the Claimant **[ET1 17.17(v)]**:
- i. During a meeting on 16 October 2018 with Keith Hayward and the Claimant’s Director [Chris Bell];
- ii. During a meeting on 29 January 2020 [Ian Rowlan].
- f. From 1 March 2019 arbitrarily changed the Claimant’s job role without merit **[ET1 17.17(vi)]**.
- g. In January 2020 [Ian Rowlan] sought to remove a number of accommodations to his working environment without cause or adherence to Trust policy **[ET1 17.17(vii)]**:

Further particulars

- i. The Claimant worked up to 2 days per week at home and had done so for 6 years or more without issue. His line manager [Ian Rowlan] in late 2019/January 2020 introduced new approval policy for ad-hoc/home working requests before approval was granted.

This removal of prior accommodation of home working further breached the implied duty of trust and confidence. The Claimant was further advised that it was unlikely that home working would be approved going forward (post January 2020) without any reason given.

- h. From 2018 onwards sought to marginalise, bully and ostracise the Claimant **[ET1 17.17(viii)]**.

Further particulars:

C: "These incidents have been fully particularised in the Claimant's ET1 at para 7, 9-17.17" [The Respondent has set out below the additional allegations arising from para 7, 9-17.17 of the ET1. The Respondent considers that paras 15, 16, 17, 17.1 and 17.4 are background, and paras 17.2, 17.3, 17.7-17.17 are all covered by other allegations already in this list of issues]

- i. 5 June 2018 – Keith Hayward treated an issue C raised to him about the performance and conduct of C's team supervisor as C's fault. **[ET1 7]**
 - ii. Late Sept 2018 – Keith Hayward did not tell C about concerns staff had raised about C's conduct. **[ET1 9]**
 - iii. On 16 Oct 2018 - C was asked to attend a strategy meeting [with Keith Hayward and Chris Bell] and then told of a sudden change of post without consultation. **[ET1 10-13]**
 - iv. 30 Nov 2018 – C's appraisal with Keith Hayward was not completed and descended into an argument. **[ET1 14]**
 - v. The Claimant was continually isolated by being placed in a room with limited contact. **[ET1 17.5]**
- i. From 14 December 2018 onwards, failed to address C's grievances/complaints, undertake a reasonable investigation or provide a response to complaints made either in a timeous fashion or at all **[ET1 17.17(ix)]**. *[The Respondent understands this to relate to:*
- i. **ET1 16:** *"The Claimant escalated his concerns about the conduct of Keith Hayward to a formal grievance on 14 December 2018. This was followed up with a meeting between the Claimant, HR and his Director on 20 December 2018;"*
 - ii. **ET1 17.4:** *"He subsequently raised renewed concerns in this regard during his appraisal in May 2019";*

iii. **ET1 17.6-7:** *“On 24 January 2020, the Claimant had cause to complain that Ian Rowlan had both been inconsistent and unreasonable by his unreasonable refusal of the Claimant’s legitimate request to work from home and request for time off in lieu. / The Claimant subsequently received a reply from his Director on 31 January 2020 which entirely failed to address the Claimant’s concerns nor address the Claimant’s significant back pain which promoted the request, and in respect of which was accommodated going back to the inception of the Claimant’s employment. The Director also went on to advise the Claimant that his complaint about Ian Rowlan would be addressed not by himself, but by Ian Rowlan directly.”]*

2. If so, did the Respondent’s conduct breach of the implied term of trust and confidence? The Tribunal will need to decide:
 - a. Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and respondent; and
 - b. Whether it had reasonable and proper cause for doing so.
3. If so, did the breaches amount to fundamental breach of contract entitling the Claimant to treat the contract as repudiated?
4. If so, did the Claimant resign because of the repudiatory breach of contract?
5. Did the Claimant affirm the breach of contract thereby waiving his right to claim constructive dismissal?
6. If the Claimant was constructively dismissed, was the dismissal for a potentially fair reason pursuant to s.98(1) and (2) ERA?
7. And was the dismissal fair or unfair pursuant to s.98(4) ERA?

REMEDY

8. If the Claimant was unfairly dismissed:
 - a. To what basic award is the Claimant entitled under s.119 ERA? The Tribunal will decide:
 - i. Should the basic award be reduced by reason of the Claimant’s own culpable or blameworthy conduct pursuant to s.122(2) ERA?

- b. What compensatory award would be just and equitable in all the circumstances having regard to the loss sustained by the Claimant under s.123 ERA? The Tribunal will decide:
- i. What financial losses did the constructive dismissal cause the Claimant?
 - ii. Did the Claimant take reasonable steps to mitigate his losses?
 - iii. If not, for what period should financial losses be awarded?

Should the compensatory award be reduced by reason of the Claimant's own culpable or blameworthy conduct pursuant to s.123(6) ERA?