



EMPLOYMENT TRIBUNALS

Claimant: Mr I Ralph

Respondent: Buckinghamshire College Group

Heard at: Watford Employment Tribunal

On: 20 to 24 June 2022 (in person) and
(in chambers by video) on 2 August 2022

Before: Employment Judge Quill; Ms I Sood; Mr D Sutton

Appearances

For the claimant: In person
For the respondent: Ms B Clayton, counsel

RESERVED JUDGMENT

- (1) The complaint of unfair dismissal is dismissed.
- (2) The complaint of indirect discrimination is dismissed.

REASONS

The Evidence

1. This hearing took place in person, save that one witness gave evidence by video.
2. We had a hearing bundle which at the start of the hearing was around 270 pages. We had written witness statements from each of:
 - 2.1 For Claimant's side: the Claimant; Bruce Hope; Nick Lindsay; Kunal Nanavati.
 - 2.2 For Respondent's side: Lisa Portland; Isobel Ellison; Alison Muggridge.
3. Mr Hope and Ms Lindsay did not give evidence, but we gave their written statements such weight as we saw fit. The remainder all swore to the accuracy of their statements, and answered questions on oath. The Claimant and Ms Portland were each re-called to give further evidence following some late

disclosure of documents. Ms Muggridge was the only person to give evidence by video, and the remainder gave their evidence from the hearing room.

4. The late disclosure of documents from the Respondent during the hearing took the bundle up to 355 pages. This was a combination of policy documents which were missing from the original bundle, and items which Ms Ellison located after having heard Ms Portland's initial oral evidence.

The Claims and the Issues

5. At a preliminary hearing on 14 May 2019, the claims and issues had been clarified and itemised by the judge. Subject to one clarification each side confirmed that list of issues was still accurate
6. The original list was:

Constructive unfair dismissal & wrongful dismissal

4.1 It is agreed that the claimant resigned with immediate effect on 3 August 2018. The claimant alleges that the respondent acted in breach of the implied term of mutual trust and confidence and/or the implied term that an employer will reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance and/or the implied term that the respondent will provide a safe system of work. The claimant relied on 24 breaches as set out in the List of Issues and which referred to the relevant paragraphs in the ET1 . It was agreed that the breaches are limited to what is set out in the ET1. The conduct/breaches on which the claimant relies breaches are as follows:

4.1.1. Ms Portland acting in a belligerent and/or unduly critical fashion towards the claimant on 21 September 2017 (10 & 11 POC) and following the claimant's return to work in or around early April 2018 (18&29(m) POC);

4.1.2. Following the Claimant's increase in pay, failing to pay the Claimant outstanding back-pay: §6 and 29(a) POC;

4.1.3. Ms. Portland failing, following the merger which resulted in the Respondent taking over the college, to put forward the Claimant's grievance in relation to his backdated pay: §13 and 29(i) POC;

4.1.4. Following the above (as set out at paras. 3(a)(i) - (iv)), Ms. Portland e-mailing HR to inform them that the Claimant's pay issue had been resolved, despite this not being the case: §17 and 29(l) POC;

4.1.5. From around early April 2018, Ms. Portland overwhelming the Claimant with work and failing to lend the Claimant any moral support: §18, and 29(b) POC;

4.1.6. On or around 7th June 2017, Ms. Portland, in the course of a meeting with the Claimant and Ms. Alison Muggridge, the Respondent's Executive Director Special Projects, Creative, Digital, and Business, falsely accusing the Claimant of being the reason why the inspection folder was not ready for external review: §7 and 29(c) POC;

4.1.7. Ms. Portland treating the Claimant differently to other members of staff and micromanaging the Claimant by behaving in the manner set out at §29 (b), (d), (h), and (q) POC;

4.1.8. Ms. Portland unfairly singling the Claimant out by arranging for a consultant to inspect the Claimant's lesson delivery when compared to similar members of staff in September 2017: §9 POC;

4.1.9. On or around 21st September 2017, Ms. Portland misinforming the Claimant that the consultant had provided poor feedback on the Claimant's lessons: §10 and 29(f) POC;

4.1.10. On or around 21st September 2017, Ms. Portland unfairly singling the Claimant out by placing him on the Respondent's capability procedure: §11 and 29(h) POC;

4.1.11. Between 29th January 2018 and 29th March 2018/ conducting the process to consider the Claimant's grievance in an unreasonable fashion by failing to interview key individuals highlighted by the Claimant: §17 and 29(n) POC;

4.1.12. Following an unfair grievance process prior to 29 th March 2018 by failing to interview the individuals included on the list provided by the Claimant on 29th January 2018: §15, 17 and 29(j) POC; - ;

4.1.13. On or around 29th March 2018, Ms. Isobel Ellison, the Respondent's Executive Director of HR, disregarding the Claimant's concerns regarding having to return to work under the management and supervision of Ms. Portland as the Claimant had raised a grievance regarding her treatment of him: §16 and 29(k) POC;

4.1.14. From approximately early April 2018, when discussing the Claimant's performance, Ms. Portland unfairly focusing solely on the negatives of the Claimant's performance: §18 and 29(o) POC;

4.1.15. Ms. Portland disregarding the Claimant's contention that his back pay grievance had not been concluded following the Claimant's e-mail of 7 th June 2018: §19 and 29(p) POC;

4.1.16. Ms. Portland placing the Claimant on a formal disciplinary procedure on 12th June 2018 during Ramadan: §22 and 29(q) POC; ;

4.1.17. Ms. Isobel Ellison disregarding the Claimant's concerns into Ms. Portland's motives in placing him on the formal disciplinary procedure: §29(r) POC;

4.1.18. On or around 12th June 2018, unfairly and unreasonably refusing the consider the Claimant's appeal against the outcome of his grievance on the basis that it was out of time: §22 and 29(s) POC;

4.1.19. On or around 13th June 2018, unreasonably refusing to postpone the Claimant's capability hearing of 19th June 2018 by one week to a time when the Claimant would not be fasting: §23 and 29(t) POC;

4.1.20. On 19th June 2018, conducting the formal capability meeting for approximately two and a half hours despite knowing that the Claimant was fasting: §24 and 29(u) POC;

4.1.21. Following the meeting of 19th June 2018, placing the Claimant on a plan of action to be monitored by Ms. Portland: §25 and 29(v) POC;

4.1.22. On or around 27th June 2018, Ms. Allison Muggridge disregarding the Claimant's concerns regarding the appropriateness of Ms. Portland monitoring the Claimant's plan of action? §25 and 29(w) POC;

4.1.23. Following 13th July 2018, the Respondent disregarding the e-mail of Nick Lindsay, the Claimant's trade union representative, regarding the unfair treatment which the Claimant had been subjected to and raising concerns that the investigation into the Claimant's grievance had been biased: §26 and 29(x) POC.

4.2 The respondent denies that there was a repudiatory breach of contract.

4.3 If the actions set out at para 1 above took place, did they, either individually or cumulatively, amount to a repudiatory breach of contract of the implied term(s) relied upon by the claimant?

4.4 Was the respondent's repudiatory breach an effective cause of the claimant's resignation?

4.5 Insofar as the Respondent's indifference to the claimant's concerns detailed at paragraph 1 (xxiv) above are relied upon by the claimant as a 'last straw', did the Claimant affirm the contract following any of the earlier matters, such that the Claimant can no longer rely on those matters as contributing to a breach of the implied term(s)?

4.6 If the claimant was constructively dismissed, what was the reason (or, if more than one, the principal reason) for his dismissal?

4.7 If the claimant was constructively dismissed, was his dismissal fair having regard to s. 98(4) (a) and (b) ERA 1996?

EQA, section 19: indirect religious discrimination

4.8 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

4.8.1 The requirement that the claimant attend the formal capability hearing during Ramadan (36(b) POC.

4.8.2 Did the respondent apply the PCP(s) to the claimant at any relevant time?

4.8.3 Did the respondent apply (or would the respondent have applied) the PCP(s) to persons with whom the claimant does not share the characteristic?

4.8.4 Did the PCP(s) put persons with whom the claimant shares the characteristic, being Muslim, at one or more particular disadvantages when compared with persons with whom the claimant does not share the characteristic?

4.8.5 Did the PCP put the claimant at that/those disadvantage(s) at any relevant time?

4.8.6 If so, has the respondent shown the PCP(s) to be a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim(s):

- i. The respondent has a responsibility to ensure that all of its teaching staff are at the required capability level and it was therefore not unreasonable to continue with the formal capability hearing during the claimant's working hours (10-12.30am)

Remedy

4.9 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

7. The clarification was that 4.8.1 refers to a hearing which took place on 19 June 2018. Although the invitation (dated 12 June 2018) was during Ramadan, the hearing itself was not. So, 4.8.1 should instead read:

4.8.1 The requirement that the claimant attend the formal capability hearing during a period of fasting which the Claimant undertook immediately after the end of Ramadan (36(b) POC)

The findings of fact

8. The Claimant started working for Amersham and Wycombe College ("Amersham") around 2006. In around October 2017, there was an exercise described by the witnesses as a merger ("the Merger") between his employer and Aylesbury College ("Aylesbury"). In legal terms, this was a relevant transfer within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 2006. It had the effect that (amongst other things), the Claimant's contract of employment transferred to the Respondent, Buckinghamshire College Group.
9. The Claimant was a lecturer. He worked in the Business and ICT department. From time to time, he had particular responsibilities as course leader for particular courses.
10. His employment ended on 3 August 2018, which he says was because he was constructively dismissed, and the Respondent says was because he resigned.

11. The Claimant's religion is Islam, and he observes that religion in several ways, including fasting during Ramadan and praying. On Fridays, he visits a mosque for prayers.
12. Over the course of time, prior to the Merger, he had had various line managers, and we accept his evidence that he had good working relationships with all of them. There was at least one occasion when he was notified of poor performance, but he improved during the next review cycle.
13. Prior to the Merger being formally completed, there was a close relationship between Aylesbury and Amersham.
14. Lisa Portland was curriculum manager for at Aylesbury from around September 2016. She was an interim, rather than a permanent member of staff. Prior to the Merger, she became the Claimant's line manager, in around March 2017. Her employment with the Respondent eventually came to an end around March 2019, which was around 7 or 8 months after the end of the Claimant's employment.
15. The Respondent had some general concerns about performance at Amersham, and part of the overall plan was to seek to improve performance at Amersham, including, where appropriate, requiring the same standards of performance that it believed existed at Aylesbury.
16. Alison Muggridge (Executive Director Special Projects & Faculty Creative, Digital, Business) was Ms Portland's line manager. Ms Muggridge informed Ms Portland that part of her brief was to improve the performance of the Business and ICT department at Amersham. The Respondent used a grading system which mirrored the OFSTED system in which Grade 1 was "Outstanding", and Grade 3 was "Requires Improvement" and, around the time of the Merger, Business and ICT was considered to be Grade 3.
17. One of the responsibilities for course leaders for particular courses is to ensure that the records of individual students are up to date within the Respondent's systems, showing attendance etc. This is important for various reasons, including so that the records meet the required standard for internal verification ("IV") as well as external verification ("EV"). The primary responsibility for creating/updating the records falls upon the tutor for a given class/lecture, but the course leader is responsible for ensuring that this has been done, that it is filed correctly, and – where necessary – chasing up colleagues.
18. Some time after Ms Portland became responsible for the Business and ICT department (so no earlier than March 2017) and before June 2017, a course leader, Babatunde Lawanson, left. There was a conversation between the Claimant and Ms Portland during which he became aware that he was taking over Mr Lawanson's course leader role. The Claimant does not believe that it was made sufficiently clear to him that he would be taking over the entire duties, including responsibility for IV for that course. Ms Portland believes that the fact that he knew he was taking over as course leader means that he knew (or should have known) that included all of the duties of the course leader for that particular course. (They both agree that the Claimant did know the duties of course leader, as he had been leader on other courses already).

19. We are satisfied that it was made clear to the Claimant that he was taking over as course leader, and he was not told that he was only taking over some of the responsibilities. This was in addition to, and not instead of, his existing duties. He was not told, for example, that someone else would ensure that IV or EV standards for Mr Lawanson's course had been met. We are not satisfied that the Claimant misunderstood the role/task that he was being given.
20. In any event, even if the Claimant did not understand from Day 1 of taking over from Mr Lawanson (and neither Ms Portland or the Claimant recall the exact date of that) that he would be responsible for compliance with IV/EV standards, he was made aware towards the end of May 2017 that there would be an external assessor attending on 1 June 2017 who would be checking that the IV records were compliant. He knew from that point, at the latest, that he was expected to ensure the records for the Business Course (of which Mr Lawanson had previously been course leader) were complete. On any view, he had less time for this task than he would have had if he had been course leader from the start of the course; on his case, he only had a few days notice, not having been aware – he says – that this task had been part of what was allocated to him following Mr Lawanson's departure.
21. On 1 June 2017, the external assessor informed Ms Portland that the relevant folder, which should have held the IV records for the Business Course, uploaded for inspection purposes, was empty. On 2 June, Ms Portland spoke to the Claimant and he told her that he had not had enough time to complete the work.
22. A meeting was arranged with Ms Muggridge, attended also by Ms Portland, to discuss this situation. One of the outcomes of this meeting (which took place 7 June 2017) was a formal warning. This was discussed on 7 June, and the notification that it would last on file for 6 months was sent 8 June 2017 (see page 102 of hearing bundle). The actual written record itself is dated 30 June 2017, page 106, and records Ms Muggridge's findings that the Claimant had been specifically informed about the need to do the IV work, and of the inspection on 1 June 2017, and had failed to tell the Respondent prior to 2 June 2017 that he had not completed it.
23. The Claimant suggested during the tribunal hearing that there may have been an IT problem of some sort, and that the work might have been completed, but the upload to the location from which the inspector was going to view the records failed. Our finding is that that is not what happened, and is not the explanation which the Claimant gave to Ms Muggridge or Ms Portland when the matter was fresher in his memory.
24. At the 7 June meeting, there was also a discussion that the Claimant was concerned about stress. In her email of 8 June, Ms Muggridge notes that she had asked Ms Portland to meet him to discuss that. That meeting took place on 12 June 2017, and the notes are at page 104. There was a discussion about Ramadan, and that Ms Portland would agree to his taking a day of TOIL at the end, and/or time off for Eid. She also stated that she had previously told him that he could work from home on Friday afternoon's (because he left around lunchtime to go to a mosque nearer to his home than to the workplace) provided that his Friday afternoon work was something (for example marking) that did not require

his on-site presence. Ms Portland's own title was "Programme Area Manager" or "PAM" and there was a discussion that the Claimant hoped to move up to that level in due course. Ms Portland said that she had made, and would continue to make, some arrangements to assist the Claimant; these included removing some of his teaching responsibilities and providing assistance with marking.

25. There is no dispute between the parties that the Respondent was aware that the Claimant fasted for Ramadan each year. In any event, the notes of 12 June 2017 show that Ms Portland and the Claimant specifically discussed, in 2017, his fasting arrangements that year.
26. There is no suggestion by either party that either the Claimant or the Respondent said, in either 2017 or 2018, that the Claimant should not, or could not, perform his normal duties during (his fasting for) Ramadan.
27. In 2017, the Claimant informed Ms Portland that his course, Business Level 3, had passed IV. She commented that she thought that he had been lucky. It was her genuine opinion that a different assessor might have taken a different view. She was not seeking to insult the Claimant personally, but to convey the opinion that she thought that a higher standard of compliance was generally required, and should be the target in future.
28. Around September 2017, the Respondent arranged for an external consultant, Kam Nandra, to come and do some lesson observations. This was because the Respondent wished to ensure that it was ready in the event of an OFSTED inspection. The consultant was not brought in specifically in order to observe the Claimant, or coach the Claimant, or find fault with the Claimant. It was Ms Muggridge's decision that Mr Nandra would come in and do the work. It was Ms Portland who suggested that the Claimant was one of the lecturers who would have a lesson observed. Mr Nandra's role included feeding back to the lecturer after the lesson, but was mainly to feedback to the Respondent as to whether there were areas for improvement (especially with one eye on the potential for OFSTED to inspect the newly merged entity).
29. The Claimant argues that there is something inconsistent or suspicious about how Mr Nandra's role, and the circumstances of his appointment, has been described to him. In our opinion, there is not. In any event, our finding is that his appointment was for the reasons described in the previous paragraph. It is true that (one of) Ms Portland's reasons for nominating the Claimant to be observed is that she had some concerns about the standards of his lessons; however, the Respondent was specifically intending to nominate, for observation, a mixture of lecturers believed to be better than average, average, and lower than average. Her reasons for selecting the Claimant included that she had to select somebody, and she was not picking him out because of any personal animosity towards him.
30. Mr Nandra observed the Claimant on or around 18 September 2017. He produced a document for the Respondent (pages 107-109) in due course, which the Claimant did not see straight away. After the lesson, he gave some feedback to the Claimant. Mr Nandra was not a witness, but our finding based on the totality of the evidence (including his email to Ms Portland on 22 September 2017, and the answers given to the grievance investigator) are that: (a) his genuine opinions

are those expressed in the formal written feedback to the Respondent; (b) he was not persuaded by Ms Portland or anyone else to write those things; (c) while he attempted to highlight some positives to the Claimant in the oral feedback immediately after the lesson, he did also convey the criticisms / areas for improvement, which appear in the written document.

31. It was Mr Nandra's opinion, conveyed to the Claimant (albeit perhaps couched in friendly language) that areas for development included
 - 31.1 the aims and objectives presentation activity did not work properly, and only few learners were able to fully participate,
 - 31.2 learners were not challenged by their peers, or the tutor, to check and extend their knowledge.
 - 31.3 learners were not asked to reflect or recap what they had learnt and were not given an opportunity to identify any gaps in their knowledge.
32. Around 15 September 2017, Ms Portland also conducted an observation of one of the Claimant's lessons and also thought there were areas for concern. She did not speak to him about that immediately after her observation.
33. On 21 September 2017, as a result of her own and Mr Nandra's observations (as well as a report the Respondent had received from Mr Nandra about the Claimant allegedly being out of the room when a lesson was supposed to be taking place), Ms Portland had a discussion with the Claimant.
34. During her discussions with the Claimant, Ms Portland stated that the lesson she had observed was a bad one. The Claimant recalls that she said "very, very bad" and we accept that his recollection is likely to be accurate. Ms Portland was expressing her genuine opinion. The reason that she was doing so was that she was seeking to inform the Claimant, on behalf of the Respondent, that (in her opinion) an improvement was required, and letting him know (part of) the basis for her opinion.
35. One of the outcomes of the discussion was that the Claimant told her that he believed that Mr Nandra had formed a good opinion of his lesson. Ms Portland, who had received the formal written feedback (which the Claimant had not seen at this stage) agreed to check. She did so, and on 22 September 2017, Mr Nandra replied, effectively standing by what was in his written report, and claiming to have conveyed these points to the Claimant already, but also pointing out that it was part of his role to act as a coach and to mention positives as well (which he said he had done).
36. Following that response, and following a discussion with Ms Muggridge, Ms Portland spoke to the Claimant to inform him that she was instigating the informal stage of the Respondent's performance review process. This was 26 September 2017. The Claimant commenced a period of sickness absence the following day. He was not sent any written notification about the informal performance review process, or issued with any written performance improvement plan. He remained on sick leave for several months. During the first few months, there was no discussion with him about his performance or the informal stage of the procedure.

37. There is a document in the bundle at page 113 which bears the date 26 September 2017 and the title "Ref: Formal Grievance pertaining to Lisa Portland" and is in the form of a letter to the Respondent from the Claimant. The Respondent has accepted, as do we, that that letter was created around 26 September 2017. However, it was not sent to the Respondent at that time. It was sent to his union representative, who did not forward it to the Respondent. In November 2017, the Claimant sought an update on his grievance, and the Respondent (Anne Franklin, HR Manager) replied on 22 November 2017 to say that none had been received. Following further communications, on 24 November 2017 the union representative (Nick Lindsay) forwarded the letter to the Respondent stating that he had assumed that the Claimant had sent it to both the Respondent and him at same time (28 September 2017).
38. The Respondent held a meeting called "Preliminary Grievance Discussion" on 13 December 2017. For the Respondent, Kathy Coshan, Senior HR Business Partner attended. The Claimant attended with his representative, Mr Lindsay. The things discussed included the pay issue which we will discuss below, and Ms Portland's alleged treatment of him. In particular, he referred to the IV issue, including the written warning and his claim that he had not had enough time to prepare for the visit. He wanted the Respondent to acknowledge that formally and to pay him overtime for the preparation work he had done. He complained that he was not properly appreciated and objected the criticism of his performance. He noted that she had had a performance issue discussion with him (which he thought was not justified). He also stated that he should be promoted.
39. On 21 December, Ms Coshan sent her notes to the Claimant and he replied with 2 points of correction/clarification. He accepted that he had been told he could appeal against the June 2017 warning and that he had decided not to (though he stated that he had said this was on the basis that he regarded Ms Portland as also having been at fault).
40. We do not think that there was an undue delay between 24 November (when the Respondent received the grievance) and the meeting on 13 December.
41. Promptly after the 13 December meeting, Isobel Ellison, Executive Director Human Resources, liaised with Ms Muggridge to appoint an appropriate person to investigate the grievance. Ms Coshan's 21 December communication informed the Claimant that Janice Incerpi, Curriculum Manager – Business and Computing, from Aylesbury had been appointed to carry the investigation into the grievance.
42. We do not think that there was an undue delay between 13 December and 21 December in appointing Ms Incerpi. The Claimant alleges to us that she was not sufficiently independent, as she was someone who knew Ms Portland. While we accept that she had had some professional dealings with Ms Portland in the past, that was not the reason that the Respondent selected her as investigator. Furthermore, and in any event, the decision-maker was to be Ms Ellison.
43. The Claimant did not object to Ms Incerpi when he was informed of her appointment. On 19 January 2018, Ms Coshan wrote to the Claimant to explain that the investigation had not yet been completed, in part because Ms Incerpi had been on leave over the holiday period, returning in second week of January. The

Claimant met Ms Incerpi on 29 January 2018 as part of her investigation. On 30 January, he forwarded her an email trail with Ms Coshan in which (amongst other things) he responded to Ms Coshan’s request for a list of potential witnesses/people to speak to, naming: David Benson; Romey McDonald (Hub); Elaine (Hub); Mario Santos (Computing); Melissa Tomblin (Achievement coach); Sue (L2 Business ALS).

- 44. Ms Incerpi spoke to Kam Nandra to follow up on the Claimant’s suggestion that Mr Nandra had regarded the lesson he observed as good, and that Ms Portland had falsely claimed that Mr Nandra had highlighted specific points for improvement.
- 45. On around 5 March 2018, Ms Ellison – the decision-maker - received the draft report. (Ms Incerpi sent the draft report to Ms Coshan on 5 March 2018 and the same day Ms Ellison chased Ms Incerpi for it). In the draft report, the comments on the list of witnesses were:

Who	Role if known	Relevance to the grievance
David Benson	Lecturer in Access	As his name did not form part of IR’s originally complaint, I did not believe there any relevance to the particular grievance
Rommy MacDonald	Information Assistant – Learning Hub	Left the business and therefore unable to speak to her
Elaine ??		No surname given and therefore not able to take up this conversation as part of the investigation
Mario Santos	Lecturer in Computing	As his name did not form part of IR’s originally complaint, I did not believe there any relevance to the particular grievance
Melissa Tomlinson	Achievement Coach	As her name did not form part of IR’s originally complaint, I did not believe there any relevance to the particular grievance
Sue ???		No surname given and therefore not able to take up this conversation as part of the investigation

- 46. Ms Ellison thought that some additional points should be investigated. She discussed that with the Claimant (who had not seen the draft) on 9 March 2018. The same day, she emailed Ms Incerpi. As a result of these discussions, Ms Incerpi had a discussion – at the Claimant’s request – with Helen Riddlington. Ms Incerpi supplied Ms Riddlington’s comments (about the Claimant’s workload and relationship with Ms Portland) to Ms Ellison on 27 March 2018. (Page 184 of bundle).
- 47. At 15:27, on 29 March 2018, Ms Ellison wrote to the Claimant with the grievance outcome letter. All of the particular points which had been treated as allegations were rejected. These were:
 - 1. That Lisa Portland (LP) was not treating IR fairly and equally as she does with other staff members.
 - 2. That LP was deliberately picking on and bullying IR.
 - 3. IR felt that he was being micromanaged compared to other members of staff.

4. IR felt that LP was constantly pointing out mistakes on trivial issues only with IR and no other members of staff.
 5. IR felt that LP was setting him up to fail.
 6. LP placed IR on formal capability without any warning.
 7. IR was singled out when another staff member has not been placed on formal capability.
48. As made clear by points 6 and 7, the Claimant was aware the discussions with Ms Portland in September 2017 had been part of the Respondent's performance management procedure. The Claimant's perception, in fact, was that Ms Portland had been instigating the formal (rather than informal) stage of the procedure; but he was not under the impression that there had been no discussion about that procedure, or information given to him that there might be a monitoring period during which improvement was required (failing which he might move to the next stage).
49. The letter gave Ms Ellison's reasons for rejecting the grievance, and these were her honest opinions, based on the report and evidence which she had received.
50. The letter told the Claimant that he could appeal within 5 working days. The Claimant read the letter the same day, and emailed back to say that he was "saddened by the decision". He was already aware that the Respondent had arranged a mediation meeting for him, Ms Coshan and Ms Portland to attend. The same day, the Claimant also asked for – and obtained – assurances that there would be no "repercussions" because he had complained about Ms Portland. Ms Ellison replied to say:
- Hi Imran
- Lisa is an interim and will be leaving at the end of this year.
- There will be no repercussions following your grievance.
- You will however be managed, as all of our staff are, so I'm glad that you're open to mediation as a way forwards. As an organisation we want all of our staff to be successful in their roles and we will support them to do so.
- Please do keep in touch and let me know how things progress.
51. He acknowledged to thank her, and did not, at that time, make any attempt to appeal.
52. There were specific mediation meetings: 17 April 2018 and 26 April 2018. The minutes of 17 April refer to a previous meeting. Based on the late disclosure, that seems to refer to 9 April; a document records a mediation meeting at 3.30pm followed by a return to work meeting at 4pm.
53. The following return to work plan was discussed and put in place on 9 April.

Phased return and work expectations over next 7 weeks to half term:	
Week 1 – Monday – 3.30pm and 4pm Meetings as above.	9.4.18
Tuesday - Wednesday – 9.30 – 4pm – Non classroom based activities (see details below)	
Week 2 – Monday – Wednesday – 8.30 – 5pm– Non classroom based activities (See details below)	10.4.18
Week 3 & 4 – Wednesday – Friday – 8.30 – 5pm– Non classroom based activities (See details below)	16.4.18
Plus: 4 x 1.5hr Assignment workshop only, no prep or delivery	23.4.18 30.4.18
Plus: AP Meeting with Bruce Hope/Thursday.	
Plus: Meeting with LP to confirm EE evidence in place for 9.5.18	
Week 5 – As week 3 & 4	7.5.18
Plus: Review meeting IR/LP/AM	
Plus: Attend EE meeting to present sampling.	9.5.18
Week 6 – As week 3 & 4	14.5.18
Week 7 - As week 3 & 4	21.5.18
Plus: Prepare teaching materials for next half term – units to be agreed with CLs.	
Plus: Learning Walk with Bruce Hope	
Plus: 2 nd review meeting IR/LP/AM	

54. Bruce Hope, Advanced Practitioner, was to be the Claimant’s mentor during his phased return. Slots for the Claimant to meet with him were included in the phased return plan. On 17 April, the Claimant confirmed that he was happy with Mr Hope and thought he had good ideas.
55. In the mediation meetings, Ms Portland emphasized the need for the Claimant to stick to just doing the agreed areas of work during the phased return, and not to do other things too (and gave him specific examples of things he should not be doing.)
56. The summary of action points from the second meeting was:
1. BH & LP need to review IR progress and ascertain what additional support he needed, especially as IR was struggling professionally prior to going on sick leave (i.e. IR had already had an initial Capability conversation)
 2. To increase IR’s working days from 3 to 4, with the expectation what he would be back working full time (5x5 by July 2018) sooner if possible
 3. LP & IR review IR’s job description to ensure that IR fully understood his role now that A&W was fully merged into the Buckinghamshire College Group

4. LP & IR to undertake PDR and set clear and defined targets for the rest of the year
 5. Given the positive results of the last 2 mediation meetings, IR/LP didn't feel any additional mediation meetings were needed, but felt that regular meetings between LP, BH and IR should continue . These meetings are to ensure IR understands what is expected of him, along with any support LP and BH are able to provide
57. The Claimant did not challenge or dispute these at the time.
 58. During his absence, the Claimant had been referred to Occupational Health in October 2017 by Ms Portland. We did not have either the referral form or the advice, just the letter sent to the Claimant on 7 November 2017 referring to the fact he had had the appointment and the Respondent wanted to meet to discuss the report (which had been supplied to the Claimant) and his absence.
 59. On 26 January 2018, Ms Coshan had made a referral and the reply is dated 12 February 2018 (pages 152-155 of bundle). It suggested that the Claimant could be fit to return to work on expiry of his fit note, but wanted the grievance sorted out first. It said the claimant was unlikely to meet the definition of disability in the Equality Act. It said he had a further appointment with OH on 14 March 2018.
 60. We have not seen the report (if any) from 14 March 2018, but we infer from the contents of the 12 February 2018 document, the return to work notes, and the 24 May 2018 report, that OH was content with the phased return to work plan suggested on 9 April. On 24 May, OH wrote to Ms Ellison stating:

I understand that Imran returned to work in April 2018 and is working 3 days only, which he states is helping him to rehabilitate back into work and to manage the work stressors which according to him have not changed.

If possible can Imran continue on 3 days until the end of this term? Please review and if manageable he will aim to resume to normal hours at the beginning of next term
 61. The report also stated he was discharged from further routine reviews with OH. It recommended that a stress assessment be done.
 62. Apart from the mediation meetings, Ms Portland met the Claimant to discuss his performance and general work issues on 19 April, 26 April and 10 May 2018. We accept these meetings took place and that the discussions were as per the minutes which were part of the late disclosure. There is no evidence that the Claimant received the minutes by email or was asked to approve them.
 63. As far as Ms Portland was concerned, these meetings were the continuation of the informal performance review process which she had told him was being started in September 2017. Both sides agree it was appropriate for no further action to have been taken between 27 September 2017 and 9 April 2018 (the Claimant's continuous sickness absence). In these proceedings, the Claimant alleges that the Respondent should not have move to this stage so quickly, and/or he was not aware that he was going through this stage, and/or that this stage should have been cancelled completely following his sickness absence and only started – if at

all – once he (a) had resumed full-time hours and (b) had been back long enough on full-time hours for a decision to be made as to whether to go through the informal performance process.

64. Our finding is that he did know that the Respondent had instigated the informal review process (his grievance had been on the basis that a formal review process was not justified, the outcome informed him it was informal). He also knew in April that the Respondent was progressing the matter, both from being told that in the mediation meeting, and from the meetings with Ms Portland. He was told in those meetings that Ms Portland did not believe he was making satisfactory progress.
65. In May 2018, Paula Kavanagh, Curriculum Director conducted a “learning walk”. As a result she spoke to Ms Portland about one of the Claimant’s lessons, and asked Ms Portland to speak to the Learning Support Assistant (“LSA”). She did so, and the note on 270 is an accurate reflection of that discussion.
66. On 12 June 2018, Ms Portland held a meeting with the Claimant as part of the informal capability process. She informed him that, in her opinion, there had not been sufficient improvement in his teaching and performance and the intention was to move forward with a formal capability process. At this time, the Claimant was still on the phased return to work, and the adjusted timetable. He was fasting for Ramadan, but had neither requested nor been given any adjustments to his workload for that reason.
67. This came discussion was partly prompted by the Learning Walk and the discussions with the LSA which took place afterwards. That therefore featured in the documents sent to the Claimant. It was not the main reason for the capability meeting.
68. The emails back and forth between the Claimant and Ms Portland and Ms Ellison and Ms Muggridge on 12 and 13 April 2018 are at pages 211 to 216 of the bundle.
 - 68.1 At 16:35, on 12 June, the formal invitation to the capability meeting for Tuesday 19 June was sent.
 - 68.2 At 16:49, the Claimant replied to Ms Muggridge to say he was unhappy about the situation.
 - 68.3 At 17:05, the Claimant wrote to Ms Ellison to say he did not agree with the decision (conveyed to him orally at around 4.30pm, he believed) and said he would like to meet Ms Ellison with his union representative. He referred to the exchange in which he had asked about repercussions following his grievance.
 - 68.4 At 17:32, Ms Ellison replied to say that, at the meeting on 19th, he would have the chance to comment fully on anything that Ms Portland said and to present evidence that his performance was such that there were insufficient grounds for following the formal capability procedure. She declined to meet to discuss.
 - 68.5 At 09:12, on 13 June, Ms Muggridge wrote to the Claimant (replying to his of 16:49) to say that she had seen Ms Ellison’s response and hoped that explained everything.

- 68.6 At 09:16, the Claimant emailed Ms Muggridge to say he would like to appeal against the grievance outcome.
- 68.7 At 09:18, Ms Muggridge replied to say that he should liaise with Ms Ellison (who was copied in) about that, and it was separate to the capability.
- 68.8 At 17:05, Ms Ellison replied to say he was out of time to appeal the grievance.
- 68.9 At 17:20, the Claimant wrote to say that Ms Coshan had not told him there was a time limit to appeal. (Whether that is true or not, the appeal outcome letter told him the deadline).
- 68.10 In the same 17:20 email, he said "I will be continuing my optional fasting next week up until Thursday. I would prefer it if the meeting can be rearranged for the following week." This was the first time he had raised this as a reason for postponement.
- 68.11 At 17:26, Ms Ellison replied to say:

Dear Imran

The grievance outcome letter clearly stated the parameters around the appeal process and timelines, so unfortunately you are not able to appeal.

We do need to progress this meeting next week. I understand that you are fasting and should you need a break during the meeting that can easily be accommodated.

I am on leave from 25 June and will not be able to postpone. I explained this to Nick when I saw him earlier. Tuesday will be a fair process and you will have every opportunity to put your side forwards.

69. The Claimant wrote to Ms Ellison on 14 June 2018, giving reasons that he thought the grievance should have been upheld, complaining that Ms Incerpi was biased, and had not interviewed everyone that he had requested. He also suggested that he could not have a good working relationship with Ms Portland and she was targeting him unfairly.
70. The capability meeting took place on 19 June. The outcome letter is dated 25 June 2018, and it gives Ms Muggridge's decision and opinions on each of the 4 bullet points as per the invitation letter dated 12 June. We are satisfied that the notes of the meeting (221-227) are reasonably accurate and are intended to give a fair summary of what was said, without being verbatim. The Claimant did not ask for, and was not refused, breaks. He was accompanied by Mr Lindsay. As well as there being a discussion about each of the bullet points in the invitation letter, the Claimant was able to put forward his own arguments for saying that Ms Portland's assessment of him was not fair and reasonable.
71. The outcome letter stated Ms Muggridge's genuine opinions, and the reasons for the course of action she chose. That course of action was:

Having completed this process, my decision is, although a warning at this stage is unwarranted, a formal monitoring and review period is needed to assess your performance and so we will need to meet to complete a Performance Action Plan.

You are therefore invited to attend a meeting with Lisa Portland and Bruce Hope to complete and agree a Personal Action Plan as detailed below:

Date: Thursday 28th June

Time: 10am

Venue: Amersham Campus

I confirm that there will be a monitoring period up to 4 months during which it is expected that you will make a significant and sustained improvement to meet the required standards.

Review meetings to monitor your progress will take place on a fortnightly basis. The first review meeting will take place at 10am on Thursday 12 July 2018 at the Amersham Campus.

72. The review process as discussed in the letter commenced. The late disclosure included a document which contained: (a) Ms Portland's notes of the 28 June meeting (the white rows); (b) Ms Portland's comments on what had happened for each of those items between 28 June and 12 July (the blue rows); (c) what was discussed for each of those items at the meeting on 13 July 2018 (the grey rows).
73. Mr Hope had not been available on 28 June, but did attend on 13 July. The notes accurately reflect what was discussed. They show that the Claimant returned to full-time hours in week commencing 2 July 2018. There were specific discussions about what pieces of work needed to be done by which dates, and what assistance Mr Hope would provide.
74. In around October 2017, following the TUPE transfer, the Respondent had sought to obtain right to work documents, and copies of qualifications, etc, from the employees who had come into this organisation. The Claimant was on sickness absence at the time. We have not seen evidence that any request was made to him in October 2017 for these items, but we do accept that the Respondent had been seeking these items from everybody. Seemingly, nobody had picked up on this at the time of the Claimant's return to work in April 2018 that this was outstanding. During this period, around June 2018, HR did chase him for the documents. He supplied them and they were all in order and above board. The Respondent raised queries with him asking him to explain the difference between the name on some of the documents, and the name he used at work. The only reason for asking was that this was an educational establishment, and the Respondent believed that it was appropriate to seek clarification. It was not because of the concerns over his performance, or because he had brought a grievance.
75. The Claimant had started a new employment contract with effect from 25 June 2010. The Claimant's interpretation was that he was automatically entitled to 3 annual increments until he reached the top of the salary band.
76. Clause 5.2 of his contract stated:

From time to time the Corporation will assess levels of pay across the College against any external factors that may be appropriate. The result of any review will be communicated to all staff.

77. The Respondent apparently did not agree with the Claimant's interpretation, and, while it gave him increments for 10-11 and 11-12, then left him on the same point. The Claimant complained about this, including by his letter dated 6 June 2017, which asserted that (a) he was now on the top salary point in the band but (b) he should have been, and was not, on it for 13-14, 14-15 and 16-17. The 6 June letter was to Adrian Cottrell Vice Principal - Finance and Resources, was not the first time the Claimant had raised it. He had written to Mr Cottrell on 7 October 2016, thanking him for backdating a pay rise to August 2016, but saying the backdating should be for a longer period.
78. The 6 June 2017 letter threatened legal action if the matter was not resolved. The Claimant raised the matter orally with Ms Portland some time in August 2017, and she wrote to Mr Cottrell to say that she did not think the Claimant should get a performance increment. Mr Cottrell replied (24 August 2017) to say that he had regarded the matter as closed, but the Claimant was still seeking a further change in what Mr Cottrell regarded as the final appeal outcome.
79. In the 17 April 2018 mediation meeting, the Claimant raised this pay issue and was told unequivocally by Ms Coshan that (a) the current employer regarded the matter as closed and (b) they regarded it as having been closed prior to the TUPE transfer. She also gave him copies of the email exchange just mentioned, from which the Claimant learned that Ms Portland had written to Mr Cottrell on the topic.
80. In the meeting, the Claimant replied to say that he understood. He said he was disappointed that Mr Cottrell had not spoken to him about the matter.
81. On 13 July, Mr Lindsay wrote to Ms Muggridge and Ms Ellison stating that he thought the capability meeting was "utterly ridiculous". He also said the grievance had been well-founded and the outcome biased. He continued:

Throughout the meeting, it became increasingly clear that there was no basis for the capability procedure and that the complaints were, at best, on a personal, not professional level. I would go as far as to say they were malicious in their intent and a visibly desperate attempt to force Imran out of his position. I have had further conversations with Imran who has stated that the campaign of bullying appears to be ongoing - perfectly acceptable work that has been graded or IV'd by Imran has been rejected as unsuitable, completely undermining his abilities as an experienced member of staff. The monitoring sessions seem to be another attempt to micro-manage Imran, causing further unnecessary stress.

I would like there to be a further examination into the behaviour of Lisa towards Imran or I am afraid you will lose an experienced member of staff. Whether this takes the shape of further mediation between the two, a further investigation into Lisa's behaviour or a regular informal and private conversation between Imran and HR, action needs to be put in place to ensure that this bullying does not continue.

I hope you treat this matter with the confidentiality, urgency and respect it deserve.

82. In response, Ms Ellison asked if the Claimant would like a transfer to another site. Mr Lindsay replied on 17 July:

Isobel,

I have just had a chat with Imran regarding our conversation yesterday. Your suggestion of Imran moving to Aylesbury was not considered feasible.

Imran is willing to discuss a package based on the proposal of a without prejudice exit from his position.

Could you please outline what you would propose as suitable compensation, bearing in mind:

- the stress that Imran has had to bear as a result of the treatment by his line manager
- the ongoing issue of back pay which should have been resolved by the previous management
- The length of service (appx 14 years)

We look forward to your response.

83. The parties have not waived privilege, save to the extent that the documents in the bundle make clear that there were some discussions after this, but no agreement reached.
84. At 12:31 on Friday 3 August 2018, the Claimant sent his resignation letter, attached to an email. It simply said:

Due to circumstances beyond my control, I feel I am unable to continue my role at this college therefore I ask you to accept my resignation with immediate effect. I believe that my resignation constitutes constructive dismissal.

85. During the hearing, the Claimant was asked (both during evidence and during submissions) what was the specific thing that caused him to decide to resign. He gave no answer other than pointing to paragraphs 4.3 and 4.5 of the list of issues and stating that he relied on all the matters at 4.1.1 to 4.1.23 both individually and cumulatively, and also on the last straw argument.
86. It was put to the Claimant that he resigned because he had already been offered a more lucrative post working abroad. We accept his evidence on oath that the offer came later, and that at the time he resigned he had no job to go to, no job offer, and was unemployed for a period without knowing what he could do next.
87. Ms Ellison asked her assistant to contact the Claimant straight away to say she would be in touch when back in the office. On Wednesday 8 August 2018, Ms Ellison wrote to the Claimant offering him the chance to retract his resignation. She also said that if he did resign, he was required to give 3 months' notice.

88. On 10 August 2018, the Claimant replied to say that his decision remained the same. He referred to the back pay issue, and acknowledged that he had been told by Ms Coshan in April that it was closed but asked for it to be re-opened. He did not expressly refer to any other specific incident, but did say that “the events that I have been put through have had a profound impact on my health and well being”.

The Law

Unfair Dismissal

89. For the unfair dismissal claim, the claimant relies on section 95(1)(c) of the Employment Rights Act 1996 (“ERA”) to establish that he was dismissed. It reads:

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

90. Section 95(1)(c) is colloquially referred to as constructive dismissal. In order to prove constructive dismissal the employee must prove

- 90.1 that the employer has committed a serious breach of contract and
- 90.2 that the employee resigned because of that breach (or at least partly because of that breach; it does not necessarily have to be the only reason) and
- 90.3 that the employee must also prove they has not waived the breach by affirming the contract.

91. In London Borough of Waltham Forest v Folu Omilaju [2004] EWCA Civ 1493, the court, at paragraph 14, stated that:

The following basic propositions of law can be derived from the authorities:

1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761
2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 , 34H–35D (Lord Nicholls) and 45C–46E (Lord Steyn). I shall refer to this as “the implied term of trust and confidence”.
3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666 , 672A. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship (emphasis added).
4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must “impinge on the relationship in the sense that, looked at objectively , it is likely to destroy or seriously damage the degree of

trust and confidence the employee is reasonably entitled to have in his employer” (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at paragraph [480] of Harvey on Industrial Relations and Employment Law:

“[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the ‘last straw’ which causes the employee to terminate a deteriorating relationship.”
92. The last straw might be relatively insignificant, but it must not be utterly trivial. An entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful.
93. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, the Court of Appeal clarified the analysis in Omilaju and added to it. It reiterated that the last straw doctrine is only relevant to cases where the repudiation relied on by the employee takes the form of a cumulative breach and that the last straw doctrine does not have any application to a case where the alleged repudiation consists of a one-off serious breach of contract.
94. In Kaur, the Court of Appeal made clear that in a last straw case the fact that the employee might have affirmed a contract after some of the earlier conduct does not mean that it is not possible for the claimant to rely on that earlier conduct as part of a cumulative breach argument and in paragraph 55 of its decision it summarised the correct approach.
 - (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) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation ...)
 - (5) Did the employee resign in response (or partly in response) to that breach?
95. Where the answer at point (4) is “no” (for example the act that triggered the resignation was entirely innocuous), it is necessary to go back and see whether there was any earlier breach of contract that has not been affirmed, and which was a cause of the resignation. See Williams v Governing Body of Alderman Davies Church in Wales Primary School EAT 0108/19
96. In considering whether a contract has been affirmed after a breach, it is necessary

to have regard to the entirety of the circumstances. A gap in time between the act relied on and the resignation is a significant factor but it is by no means the only factor; in other words, a delay is not necessarily fatal to the employee's argument for constructive dismissal. The reasons for the delay would be relevant as would consideration of what had happened in the intervening period, such as was the employee working and receiving pay amongst other things.

97. Where an employee alleges constructive dismissal and succeeds in the argument then the dismissal reason for the purposes of the Employment Rights Act is the employer's reason for the conduct which caused the employee to treat themselves as dismissed.
98. It is open to an employer to argue that the dismissal was for a potentially fair reason and was, in all the circumstances, a fair dismissal
99. Where a dismissal is found to have occurred, the "reason" for the dismissal is the reason for the Respondent's conduct which has led to the finding that there was a constructive dismissal.
100. It is for the Respondent to demonstrate what the reason for that conduct was, and that it was a potentially fair reason (that is falling either within one of the categories in section 98(2) ERA or else being "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."
101. If it does so, we consider the general fairness or otherwise of the dismissal in accordance with section 98(4):

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Indirect Discrimination

102. Section 19 EQA states, in part:

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

103. One of the protected characteristics listed in section 19(3) is “religion or belief”, which is a characteristic defined in section 10.
104. The phrase “provision, criterion or practice” is commonly abbreviated to “PCP”. It is not separately defined in the Equality Act 2010. Tribunals must interpret it in accordance with guidance in the EHRC Code and in appellate court decisions.
105. In Nottingham City Transport Ltd v Harvey UKEAT/0032/12, the EAT held that the word practice has something of the element of repetition about it, and if related to a procedure, should be applicable to others as well as the complainant.
106. In Onu v Akwiwu; Taiwo v Olaigbe [2016] UKSC 31, the Supreme Court pointed out that a PCP must apply to all employees and that a practice of mistreating workers specifically because of a protected characteristic, or something closely connected to the protective characteristic, would not fall within the definition of PCP because it would necessarily not be applied to individuals who were not so vulnerable. Further, in James v Eastleigh BC [1990] HL/PO/JU/18/250, the policy was, at first sight, neutral between the sexes, but, on proper analysis the qualification criteria was so closely linked to sex that it amounted to direct, rather than indirect, discrimination.
107. The PCP does not have to be a complete barrier preventing the claimant from performing their job for section 19 to be triggered. Furthermore, a PCP might be “applied” even if the employee is not necessarily disciplined or dismissed if they fail to meet the requirement. In Carreras v United First Partners Research, the EAT concluded that an expectation or assumption that an employee would work late into the evening could constitute a PCP, even if the employee was not “forced” to do so.
108. There are two aspects to the “particular disadvantage” limb of the test for indirect discrimination.
- 108.1 that the PCP puts (or would put) persons who share the claimant’s protected characteristic at a particular disadvantage when compared with persons who do not share it. So a female claimant needs to show that the PCP puts women at a particular disadvantage when compared with men. This is sometimes referred to as “group disadvantage”.
- 108.2 that the claimant must personally be placed at that disadvantage.
109. The word “disadvantage” is not specifically defined in the Equality Act 2010. The Code of Practice suggests that disadvantage can include denial of an opportunity or choice, deterrence, rejection or exclusion. A person might be able to show a particular disadvantage even if they have reluctantly complied with the PCP in order, for example, to avoid losing their job. The EAT in XC Trains Ltd v D UKEAT/0331/15/LA held that it was sufficient that the PCP (the employer’s rostering arrangements, in that case) caused the claimant “great difficulty” in meeting her obligations.
110. An aim can be a legitimate one, even if there were alternative courses of action available. However, if the aim is indeed legitimate, then consideration of whether the particular PCP adopted to pursue that aim was proportionate may involve

consideration of what alternatives were available. If the aim is a legitimate one, the means of achieving must be proportionate for the employer to succeed in the section 19(2)(d) defence.

111. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. There must be a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts.

Analysis and conclusions

Indirect Discrimination

112. We are not satisfied that the Respondent had the alleged PCP. It made a one off decision in relation to the Claimant that the capability meeting should take place on 19 June 2018.
113. It is true that this was during a period of fasting which the Claimant was undertaking after Ramadan. It is true that the Claimant was doing this fasting for religious reasons. It is true that the Claimant asked for the date to be moved, and said it was because he was fasting.
114. We accept that having to attend a meeting at a time the employee believes is unsuitable could be considered a disadvantage. This was not an unjustified sense of grievance (although there was a lot of emails back and forth about the meeting before the Claimant raised this particular point), but a genuine opinion by the Claimant that he would perform better at the meeting if it was held on a day after his post-Ramadan fasting had finished.
115. However, even if – contrary to our finding – the Respondent did apply a PCP (as alleged in paragraph 4.8.1, as amended) then we are satisfied that the Respondent's defence succeeds.
- 115.1 It did have the aims of seeking to ensure that its staff were at the required capability levels
- 115.2 It did hold this meeting pursuant to that aim
- 115.3 Its reasons for refusing to postpone were as stated in the email at the time (Ms Ellison was going to be on leave the following week) and in evidence (that it was a small HR department with no-one else available). Not holding the meeting on 19 June 2018 would have meant delaying until September.
- 115.4 The needs to have the meeting and to set formal targets if appropriate (the actual outcome was no formal targets) was sufficiently important to outweigh the comparatively minor discriminatory effects, taking account that:
- 115.4.1 The Respondent made clear there could be breaks
- 115.4.2 The Claimant was accompanied

- 115.4.3 This would have been a normal working day for the Claimant (albeit he was on a phased return). In other words, his fasting was not something he had said, or the Respondent believed, interfered with his work performance.
116. The allegation of breach of the Equality Act 2010 therefore fails.
- Unfair Dismissal
117. For the following reasons, our decision is that the Claimant was not dismissed. His employment terminated on 3 August 2018 because he resigned.
118. In what follows, the paragraph numbers refer to the subparagraphs of 4.1 in the list of issues.
119. Re paragraph 1, we are not satisfied that Ms Portland spoke to the Claimant in a belligerent and/or unduly critical fashion on those dates. She criticised his performance and told him what the basis of the criticism was. She told him accurately what Kam Nandra had said, and she doublechecked with Mr Nandra as requested by the Claimant. She did tell him that her opinion was that the lesson which she observed was a bad one. These were her genuine opinions, and she was required to give him reasons for her decision to commence the informal performance review.
120. Re paragraph 2, we are not persuaded there was a breach of contract. We have noted the letters from October 2016 and June 2017. Even if this had been a breach, the Claimant had waived any right to rely on it as grounds for claiming constructive dismissal. He had not pursued legal action after threatening it. When told in April 2018 that the matter was closed, he said he understood. He continued to work for the Respondent for several years after the original date that the increment was supposedly due, and not granted, and for over a year after his final appeal had been exhausted (which was prior to the June 2017 letter). We are not persuaded that any back pay was due to him.
121. Re paragraph 3, there was nothing that Ms Portland was supposed to do, that she failed to do. She communicated to Mr Cottrell that she thought no discretionary pay rise should be given. He replied to say that the matter he had been dealing with had reached its conclusion. The fact of the Merger did not re-open the matter.
122. Re paragraph 4, it is factually accurate that Ms Portland wrote to HR to say that she had told the Claimant that the matter was closed. This was 1056 on 12 April 2018, at page 200. She did not state or imply that the Claimant was satisfied with the outcome, and nor did Ms Ellison or Ms Coshan believe that the Claimant was satisfied with the outcome. They did, however, believe it was closed, and were not relying on Ms Portland's opinion to reach that conclusion.
123. For paragraph 5, the Claimant came back on a phased return. The mediation meetings and performance meetings which Ms Portland held with him are as discussed in the findings of fact. She did adjust his workload and his timetable, and give him specific instructions as to which tasks he should not undertake, and offer assistance with those that he did need to undertake. She also provided the

services of Mr Hope. As of 2 July 2018, the Claimant said he was coping OK with the return to full-time working.

124. For paragraph 6, we do not find that there was a false accusation. The Claimant has given us his version of events. As Ms Portland and Ms Muggridge make clear, he was given a written warning. This was because Ms Portland alleged, and Ms Muggridge agreed, the Claimant had had sufficient warning of the external inspector's visit, and had not ensured the records for the course were correct and complete. The Claimant did not challenge the warning at the time.
125. For paragraph 7, Ms Portland did not inappropriately seek to micro-manage the Claimant. She was his line manager and was entitled to know what work he was doing, and when, and to what standards. During the performance review periods, she was entitled to set him targets. During the phased return to work, it was appropriate to tell him what work to prioritise.
126. For paragraph 8, as per the findings of fact, we accept Ms Muggridge's evidence (paragraphs 6 and 7 of her statement) about the reasons Mr Nandra was in the college. The Claimant's poor performance (in Ms Portland's opinion) was part of the reason that he was selected for observation, but not part of the reason that Mr Nandra was brought in. Mr Nandra was not asked to produce a deliberately poor or unfair negative review of the Claimant's lesson. In principle, Mr Nandra could have given a very good lesson observation (if that had been merited) and, if so, that would have assisted the Claimant in any argument that Ms Portland was being biased or unfair. The reason that the outcome was that areas for improvement were identified is that that was Mr Nandra's genuine opinion.
127. For paragraph 9, this is factually incorrect. Ms Portland conveyed accurate information to the Claimant about Mr Nandra's report.
128. For paragraph 10, there is no evidence that other people were performing to a similar standard as the Claimant and not being subjected to capability procedures.
129. For paragraphs 11 and 12, Ms Incerpi met the Claimant and took notes and prepared a report. She interviewed Ms Portland and Mr Nandra. Her recommendation was that the grievance be rejected and she said why. This was appropriate in her role as investigator. We do not think she gave good clear reasons in every case for failing to interview each of the people that the Claimant had mentioned. (For example, the mere fact alone that a potential witness is not mentioned in the grievance document should not matter if they are mentioned later on, especially given Ms Coshan expressly asked him for names, and he supplied them.) Ms Ellison challenged her, however, and ultimately, as the decision-maker, decided that it was not necessary to interview those specific people to decided on the specific complaints which the Claimant had brought. Ms Ellison decided that Ms Ridlington should be interviewed (after consulting the Claimant) and that was done. Ms Ellison's outcome letter expressed the genuine opinion that an adequate investigation had – by that stage (29 March 2018) - been completed. There was no attempt by the Respondent to conceal who had, and who had not, been interviewed. The Claimant had all that information by 29 March 2018, and chose not to appeal. (That is, he did not appeal within 5 working days, albeit he attempted to appeal in mid-June 2018). There was also no attempt by the Respondent to

deliberately ignore relevant witnesses. Rather, the Respondent (Ms Ellison) ensured that those witnesses who were thought to have relevant information were interviewed.

130. For paragraph 13, it was not unreasonable for the Respondent have the Claimant return to work under the management and supervision of Ms. Portland. The Claimant had raised a grievance, but that had been rejected. There was mediation and a return to work plan. In his email exchange with Ms Ellison on 29 March 2018, he did not ask for a new line manager. He asked for, and received, assurances that there would be no repercussions. Later, he was offered a move to a different site, and rejected that.
131. For paragraph 14, it has not been demonstrated to us that Ms Portland focused only on the negatives. It is common ground that she did criticise him, and placed him under performance review. She brought things to his attention which – according to her – required improvement. The Claimant disagreed, and did not think he needed to improve those areas. However, Ms Portland was doing her job as a manager, and one tasked with improving Amersham, when she expressed her genuine opinion that higher standards were required than those which the Claimant was – in her opinion – demonstrating.
132. For paragraph 15, the Claimant had been told in April by Ms Coshan that the back pay issue was closed. At the time, he accepted that. Ms Portland was not obliged to his 7 June email in any event, for that reason. However, the Respondent did reply. Ms Ellison (who had been copied in by the Claimant) did so on 8 June 2018 stating again that the matter was closed. It is not reasonable for the Claimant to complain that he did not get a specific reply from Ms Portland in those circumstances.
133. For paragraph 16, it was not unreasonable to tell the Claimant on 12 June 2018 about a meeting that was due to take place on 19 June 2018. 12 June was during Ramadan and 19 June was not. The meeting had to take place – at the latest – by the week containing 19 June 2018 (for the reasons mentioned when discussing indirect discrimination). It was therefore appropriate to tell the Claimant about the meeting on 12 June 2018 and the fact that it was Ramadan was not a reason for them to refrain from doing so. By telling him on 12 June, the Claimant had a greater opportunity to prepare for the meeting and arrange a companion than if the Respondent had waited until Ramadan was over.
134. For paragraph 17, in the findings of fact, we have discussed the exchange of emails between Ms Ellison and the Claimant and Ms Muggridge about the proposed capability meeting. The Claimant's concerns were not ignored or brushed off. He got a specific and clear response about what would happen at the meeting, and that it would be Ms Muggridge not Ms Portland who would make the decisions. The Claimant was told that rather than seek to pre-empt what might happen at the meeting, any points he wanted to raise with Ms Ellison could instead be raised at the meeting with Ms Muggridge.
135. For paragraph 18, it was not unreasonable to correctly point out to the Claimant that he had been told about the appeal time limits and had not appealed. He had been back at work for over 2 months (since 9 April 2018). Thus this was not a

request for a small extension, or on medical grounds. The attempt to appeal was very plainly, given the chronology, a reaction to being told about the capability meeting. The Claimant was told that if he had criticisms of Ms Portland's decision, he could raise them with Ms Muggridge. He was not being silenced by the decision that his appeal was out of time. This was a decision open to a reasonable employer.

136. For paragraph 19, this was not an unreasonable decision by the Respondent for the reasons given above. Ms Ellison was going to be on holiday, and not holding the meeting on 19 June would have meant a delay until September. The decision that that delay was too long was a decision open to a reasonable employer.
137. For paragraph 20, the Claimant had the opportunity to take breaks. The minutes suggest that Ms Portland's presentation time took no more than a reasonable period of time. The duration of the meeting was, in part, dictated by the amount of time that the Claimant and his rep wished to have to put across their points. It was reasonable to continue the meeting to a conclusion, rather than adjourn, for the same reasons that refusing postponement was reasonable.
138. For paragraph 21, Ms Muggridge's outcome decision was her genuine opinion. She did not place the Claimant on a formal warning. She believed that there should be monitoring. She, Ms Muggridge, believed that Ms Portland was the appropriate person to do the monitoring. It would not have been Ms Portland who was the decision maker if matters moved (potentially) to the formal stage. Rather again (as on 19 June 2018), it would have been Ms Portland who presented a case (alleging poor performance on this hypothesis) and the Claimant who responded, and someone else (Ms Muggridge, perhaps) who made a decision. In any event, that eventuality was not an inevitable outcome of Ms Muggridge's June 2018 decision, because another possibility was that the Respondent might decide no further action was needed after a successful monitoring period.
139. For paragraph 22, the Claimant and Ms Muggridge had an exchange after the outcome letter was received. The Claimant's 27 June email objected to Ms Portland and Ms Muggridge's 28 June responded, declining to change her mind, and pointing out that the grievance had been rejected and that Bruce Hope would also participate. The Claimant was not ignored. The response was not the one he wanted, but it was one open to a reasonable employer. As Ms Muggridge said in her email, she had heard the Claimant's points already at the meeting.
140. For paragraph 23, Mr Lindsay's email of 13 July is discussed in the findings of fact. He was the Claimant's representative, expressing disagreement with the outcomes of the grievance (29 March, with 5 working days to appeal) and capability meeting (letter of 25 June, to which the Claimant had responded on 27 June). The Respondent had already answered the Claimant directly, and the fact that his representative later made similar points does not start a new clock running for appeal purposes. However, it is factually incorrect that there was no response. Ms Ellison replied by email and there were also oral discussions. The Claimant chose (as was his right) not to pursue the move to another campus, but the Respondent did not ignore him. As mentioned in the findings of fact, in rejecting the offer of a move, Mr Lindsay sought details of a termination package. The parties did have without prejudice discussions after that.

141. We do not find that any of the 23 allegations were a breach of contract in their own right.
142. We do not find that any of the 23 allegations, or any combination of some or all of them, were conduct by the Respondent such that the employer had, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
143. The Claimant was not dismissed and therefore his unfair dismissal claim fails.

Outcome and next steps

144. The hearing that had been scheduled for 28 October 2022 is cancelled and will not take place.

Employment Judge Quill

Date: 22 September 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

28 September 2022

FOR EMPLOYMENT TRIBUNALS