EMPLOYMENT TRIBUNALS

Claimant: Mr J Mbwete

Respondent: Asda Stores Limited

HEARD AT: Bedford Employment Tribunal

ON:17th-19th and 24th - 25th July 2017

BEFORE: **Employment Judge King**

MEMBERS: Mr C Davie and Ms Edwards

REPRESENTATION

For the Claimant: In person

For the Respondent: Mr N Pawghazi (Counsel)

JUDGMENT

1. The Claimant's claims for unfair dismissal and victimisation fail and are dismissed.

REASONS

1. This Judgment is the unanimous decision of the Tribunal. The Claimant represented himself. The Respondent was represented by Mr Pawghazi of Counsel. The Tribunal heard evidence from the Claimant and Mr Justin Openshaw (GMB Shop Steward) who appeared for the Claimant under a witness order. We heard evidence on behalf of the Respondent from Mr Paul Mackay who was then General Manager of the Bedford Distribution Centre, Mr Glynn Edwards General Manager of the Wakefield Distribution Centre, Mr Richard Fielding General Manager of the Didcot Depot and Mr Elliott Vyse who is now the Warehouse Operations Manager at the Didcot Depot. The parties exchanged

witness statements in advance and produced an agreed bundle which ran from pages 1 to 552. This hearing was previously adjourned following its listing for a final hearing commencing on the 5th June 2017 to allow the Claimant further time to prepare his case for the reasons set out in the Judgment of this Tribunal dated 5th June 2017.

The Issues

2. At the hearing on the 5th June 2017 the issues were defined as follows:-

Unfair Dismissal (Constructive)

(1) The Claimant being an employee with the requisite service, was an act or omission (or series of acts or omissions) by the Respondent a cause of the Claimant's resignation? The Claimant relies on the breach of implied trust and confidence and specifically:

a) The Respondent's handling of the grievance process;

b) The Respondent's handling of the grievance appeal process;

c) Being subject to the Respondent's disciplinary procedure following that grievance.

(2) Did the acts or the omissions by the Respondent amount to a fundamental breach of contract?

(3) Did the Claimant resign in response to that breach?

(4) Has the Claimant affirmed the contract following that breach?

(5) If not, was the Claimant constructively dismissed? The Respondent concedes there was no other reason for dismissal which was potentially fair.

Victimisation

(1) It being agreed that the Claimant's grievance of the 16th February 2016 is a protected act, has the Claimant shown detrimental treatment on which he relies namely:

a. Being threatened with dismissal by the Respondent during the grievance process;

b. Being subject to the Respondent's disciplinary procedure following the grievance;

c. The Respondent's handling of the grievance process;

d. The Respondent's handling of the grievance appeal process.

(2) Has the Respondent carried out that treatment because the Claimant had done a protected act?

The Law

3. Section 94 of the Employment Rights Act 1996 sets out that an employee has the right not to be unfairly dismissed by his employer.

4. The circumstances in which an employee is dismissed are covered by Section 95(1) of the Employment Rights Act 1996 *"for the purposes of this part an employee is dismissed by his employer if:-*

(and subject to sub section 2 only if;
a) …

b) …

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."

5. Section 98 of the Employment Rights Act 1996 states:

(1) In determining for the purpose 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 principle reason) for the dismissal.

(b) That is either a reason falling within sub section 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.

(4) Where the employer has failed the requirements of (1) the determination of the question whether the dismissal is fair or unfair (having regard to reasons shown by the employer):

a) Depends on whether in the circumstances (including the size and administrative resources of the employers 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.

6. Under the Equality Act 2010 (1) race includes "*colour, nationality and ethnic or national origins."*

7. Section 27 of the Equality Act 2010 – Victimisation states:

   (1) A person (A) victimises another person (B) if A subjects B to detriment because:-

      (a) B does a protected act; or

      (b) A believes that B has done or may do a protected act.

   (2) Each of the following is a protected act:-

      (a) Bringing proceedings under this Act;

      (b) Giving evidence or information in connection with proceedings under this Act;

      (c) Doing any other thing for the purposes of or in connection with this Act;

      (d) Making an allegation (whether or not expressed) that A or another person has contravened this Act.

   (3) Giving false evidence or information on making a false allegation is not a protected act if the evidence or information is given or the allegation is made in bad faith.

   (4) This section only applies when the person subjected to a detriment is an individual.

8. Both parties prepared written submissions for the Tribunal and the Respondent referred us to a number of cases upon which the Respondent relies namely:

   (1) Western Excavating (ECC) Limited v Sharp [1978] ICR 221

   (2) Woods v W M Car Services (Peterborough) Limited [1982] ICR 693

   (3) Omilaju v Walthamstow Forrest London Borough Council [2005] IRLR 35

   (4) Blackburn v Aldi Stores UKEAT/0185/12

   (5) Amnesty International v Ahmed UKEAT/447/08

   (6) Assamoi v Spirit Pub Company (Services) Ltd UKEAT/0050/11

   (7) Wright v North Ayrshire Council UKEAT/0017/13

   (8) Abbey Cars (West Hordon) Limited v Ford UKEAT/0472/070

(9) *Weathersfield Limited v Sargeant [1999] IRLR 94*

(10) *Chindove v William Morrisons Supermarket Plc UKEAT/0201/13*

(11) *Derbyshire and Others v St Helen's Metropolitan Borough Council (Equal Opportunities Commission and Others intervening) [2007] UKHL 16*

(12) *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11*

(13) *Ministry of Defence v Jeremiah [1980] ICR 13*

(14) *Essop v Home Office (UK Border Agency) [2017] UKSC 27*

(15) *Mr A J Panayitou v Chief Constable Paul Kernaghan and the Police and Crime Commissioner for Hampshire [2014] IRLR 500*

(16) *Martin v Devonshire Solicitors UKEAT/0086/10*

9. The Claimant directed us to the ACAS Code of Practice on Grievances which he had copied as extracts into the second bundle and to which we have had regard and would have done so in any event.

Findings of Fact

10. The Claimant was employed by the Respondent from the 5th November 2007 as a warehouse colleague at the Bedford Depot. The Claimant resigned with immediate effect on the 3rd August 2016.

11. The GMB has negotiated rights at a national level being a recognised trade union by the Respondent. The GMB was a trade union which negotiated terms and conditions covering the Claimant, and the Claimant was a member of that trade union.

12. Between 2007 and 2014 the Claimant had a number of variations to his contractual hours at his request. In 2007, the Claimant started work on a 40 hours a week contract. In September 2011, the Claimant requested and was granted a contractual change to 16 hours per week. Again in 2011 (on the 13th November) at the Claimant's request, his hours were increased to 24 hours. In March 2012, the Claimant again requested and was granted a reduction in his hours to 16 hours per week.

13. Again in November 2014, the Claimant requested an increase in his hours (which once again was granted) to 40 hours per week. In January 2015, the Claimant again requested to vary his hours to 16 hours per week which was granted.

14. On the 15th April 2015, the Claimant wrote again to vary his hours asking for:

> *"I would like to change my working days from 2 days to 3 days. Therefore from 22nd April 2015, I will be working 3 days from Thursday to Saturday until the 31st May 2015. Then I will work for 2 days Friday and Saturday until 13th September 2015 whereby I, expect to resume full time duty. The main reasons for all of these changes is to take full responsibility for my children and make sure they attend school, after school club and their wellbeing. Furthermore during the school holiday time I can work full time (on the week starting 24th May 2015 to 31st May 2015 is half term break I would like to work 40 hours)."*

15. This request was accommodated save that on this occasion it was not followed up by written changes to the Claimant's contract and no new contract was issued unlike on previous occasions.

16. However, in September 2015, the Claimant did not go back to full time (40 hours a week) as indicated. The Claimant wrote to Warren Carter on 12th September 2015 requesting to return to 40 hours per week with effect from the 20th September 2015. The GMB wrote this letter on behalf of the Claimant, and the Claimant accepted in evidence that this was with his express consent.

17. The Claimant wrote to the Respondent on the 18th April 2015 to request a period of extended annual leave for 9 weeks and 5 days over the summer, this letter said as follows:-

> *"Dear Sir/Madam, Shift 3 (2 to 22 Manager)*
>
> *…. I intend to take my annual leave from the 7th July 2015 to the 13th September 2015 for paid and unpaid holiday. I will travel to Africa with my family during summer break. I intend to use all my holiday hours available for this and the rest on unpaid. I will be on 2 days working schedule 16 hours a week during my leave time.*
>
> *I kindly hope my request will be granted. Thank you in advance for your support and I apologies for any convenience may caused by this matter."*

18. The Claimant handed this letter into reception. The Claimant had requested and had been granted extended leave on previous occasions. The correct procedure for an extended holiday request was to write to the line manager who either authorised it or passed it onto the departmental/operational manager. The Claimant did not follow this procedure.

19. The Claimant spoke to Warren Carter who then requested he set out in writing the reasons for the extended leave. The Claimant wrote a

second letter dated 14th May 2015 repeating the request from April but adding:

> *"I am planning to get married on the middle of August 2015, but I have to be there early due to preparation. This is lifetime event, I hope you will grant the permission for unpaid leave."*

20. The letters did not find their way onto the Claimant's personnel file but were produced by the Claimant to Glynn Edwards in the grievance meeting. We accept that the Claimant handed these into reception but that these never found their way to Warren Carter.

21. However, in July 2015 the Claimant raised his extended leave again with Warren Carter whilst Mr Carter was walking the warehouse floor. Warren Carter told the Claimant that he would have to review this as it is 3 weeks paid holiday max and the summer holidays are a higher request period and he needed to be fair to all colleagues. The Claimant became agitated and emotional so Warren Carter went upstairs to review the Claimant's holiday request and authorised it. He went downstairs and told the Claimant straightaway. The Claimant therefore went on this period of extended leave from the 7th July to the 13th September 2015.

22. The Claimant raised a grievance with Mr Paul Mackay dated 21st September 2016 raising issues about Warren Carter showing "*serious harassment and discrimination or bullying towards my issues at Asda*". He raised specific issues about the lack of response to his letters of the 15th April 2015 and 12th September 2015 (both concerning variations to contractual hours) and the letter requesting extended leave dated 14th May 2015. The requested contractual variation was due to take effect from the 20th September 2015 (the day before the grievance was raised).

23. As a result of that grievance the Claimant met Paul Mackay for an informal meeting on the 2nd October 2015 where these issues were discussed. By this time the Claimant had taken his extended leave and the focus of the meeting was about his request to return to a 40 hour week.

24. At the outset Mr Mackay raised his concerns about the Claimant's performance and attendance over the last 5 years. He highlighted the Claimant had had 18 absences in 5 years and his performance was at 70% of the national deal.

25. The national deal was an agreement with the GMB trade union from 2012. This agreement included measures for the average pick rates over a period as measured by an independent company which took into account the product mix. This average was then set at the 100% level and each pickers performance was measured against it. The Claimant was said to be performing at between 70% and 80% of this national

average over the 26 week period before this request to increase his hours.

26. Mr Mackay said in this meeting that the Claimant was a "risk" colleague referring to his performance and absence. Mr Mackay wanted the Claimant to undertake an 8 week trial of full time hours to show that he could attend every day and that he could perform at the national deal rates i.e. 100%. At the end of the meeting it was agreed that there would be a 4 week trial and if successful the Respondent said it would allow the Claimant to be on a full time contract.

27. Subsequent to that meeting (with GMB input) it was discovered that the Claimant had not had a written contractual change since his last full time written contract so the Respondent felt that this should be honoured and no trial period was required. The Claimant returned to full time duties with immediate effect.

28. The Claimant wrote a letter dated 27th October 2015 addressed to the shift manager raising what he felt were unfair practices at the workplace concerning the unequal treatment of different departments, i.e. the picking department (of which the Claimant was one colleague) compared to other departments. He suggested solutions to the issues he raised.

29. In January 2016, the Claimant began experiencing pain in his left hip. On the 15th January 2016 the Claimant consulted his GP and was signed as being fit for work with amended duties which were:

> "*Recommend avoid heavy lifting and reduce excessive walking*."

He was not told:

> *"You are not fit for work."*

30. That Friday (15th January 2016) in the afternoon, the Claimant had a meeting with Trevor Richards concerning the fit note. The Claimant was represented by his GMB representative. Adjustments were made to his normal working duties. It was proposed that he was "off picking" until at least Wednesday the next week, the day after he was to pick single items only in a maximum of 2 x 2 hour pick blocks compared to his normal 8 hour pick rota.

31. When the Claimant was due to resume his lighter picking duties (Wednesday 20th January 2016) the Claimant went off sick. The Claimant did therefore not carry out any picking during the 2 week amended duties period recommended by his GP. The Claimant was absent for 6 days from the 20th January 2016 to the 26th January 2016.

32. The Respondent wrote to the Claimant by letter dated 26th January 2016 advising:

"Notification of withholding of company sick pay (CSP)

Dear John

I hope you are making progress in your recovery and are receiving the necessary medical advice/treatment you require.

I am writing as we are concerned about your current absence ……. since the start of 2010 you have had 25 occasions of short term intermittent absence.

It is vital that we obtain clear and accurate information about the nature and extent of your illness so that we are in a better position to support you in your return to health at work. You should be aware as outlined on page 13 of the national agreement policies company sick pay can be withheld for reasonable belief of abuse of the CSP scheme which I believe there has been on this occasion.

Please note since the commencement of your absence on 20th January 2016 your company sick pay (CSP) has been suspended until I can meet with you to discuss further.

I would be grateful if you could contact us on 01138268820 to arrange a meeting with your immediate manager at your earliest convenience."

That letter was from Mr Mackay.

33. The meeting referred to in that letter took place on the 27th January 2016 when the Claimant returned to work. John Williams conducted a return to work interview with the Claimant. The Claimant was advised that due to 25 occasions of absence over 5 years the Claimant would be forwarded to an investigation for patterns of absences as serious misconduct. Notes of the return to work interview were made and signed by the Claimant. This return to work form dealt with absence triggers and three stages all of which referred to absence patterns causing concern and the potential outcomes.

34. Justin Openshaw gave evidence to this Tribunal about the agreed sickness absence policies with the GMB. The National Agreement in 2012 sought to preserve the generous Company Sick Pay (CSP) provisions which the Respondent was concerned were being abused. Their business intelligence systems colour coded absence which could highlight patterns. The GMB agreed that the Respondent could review sickness absence back to 2012/over a 5 year period where there were concerns under the disciplinary process. Mr Openshaw confirmed that the Respondent had taken this action on a number of cases (including the Claimant's). It was common place and had occurred on more than 10 occasions at Bedford. He also confirmed that Bedford had a high absence rate and Paul Mackay came in and focused on absence

management adopting a more hard-line approach to patterns/periods of absence.

35. There was also a separate Performance Absence Review (PAR) policy which reviewed absence in 26 week blocks in April and October. However, the GMB recognised that this was not sufficient to establish patterns; for example, when someone took every Christmas off as this would not be picked up unless a longer review period was adopted. Also under the absence and sickness policy the Respondent could withhold company sick pay in certain circumstances including where it held a reasonable belief of abuse of the CSP scheme. The purpose of this policy also sets out:

> *"Equally, it is important that conduct related sickness absence matters are promptly managed to encourage good attendance consistently, in particular for cases where colleagues exhibit patterns and sickness absence repetition."*

36. The Claimant wrote to Paul Mackay by letter dated 4th February 2016 about the decision to withhold company sick pay. The Claimant mentioned ethnicity, racial background and a background and culture of white privilege and direct discrimination. Paul Mackay did not reply to this letter as an investigation into absence patterns was underway. However Paul Mackay did meet with the Claimant and his GMB representative the same day to discuss company sick pay and it was in this meeting that the Claimant handed Paul Mackay the letter of 4th February 2016. Paul Mackay explained that the letter should be dealt with as part of the Claimant's mitigation for the investigation. The Claimant was advised in that meeting that absence patterns would be investigated. He was told that if it was decided that there were no patterns or abuse these two sickness days would be paid, if it was decided that there was it would remain withheld. The Claimant raised concern over the length of time the Respondent was reviewing for sickness absence patterns namely back to 2010. It is noted that Andre Marques the GMB representative for the Claimant explained to the Claimant that this was permitted under the policy on at least four occasions in that meeting. The Claimant signed these notes at the meeting as accurate.

37. Under the absence and sickness policy, the Claimant's sickness absence at the last review (October 2015) was at 10%. The Claimant's attendance did improve as in his April 2016 attendance review this was at 3.80% over the past 26 weeks, this still exceeded the 3% threshold under the policy. The 3% threshold was again agreed nationally with the GMB.

38. Also in the meeting of the 4th February 2016 the Claimant raised the issue that he had been there 8 years and only had one skill but white colleagues who had been there 3 years, had 4 skills. Mr Mackay asked the Claimant whether he had put his name forward as his name was not

down for the December training advert and asked him what training he wanted. The Claimant advised him:

> *"Nothing, I don't want any."*

39. The procedure for requesting training was that an advertisement went onto the training boards and a copy into reception. Anyone wanting to take up the training advertised would put their name down. If over subscribed the Respondent had an agreed selection criteria with the GMB of looking at each applicant's performance and attendance, and then as a tie-breaker it would look at each applicant's length of service. In more recent years the training was under subscribed as there had been a previous training drive. The Claimant did not put his name down for any training advertised in this way. The Claimant was aware certainly by February 2016 that this was the procedure of requesting training.

40. Michelle Keene was asked to investigate the decision to withhold company sick pay. The Claimant attended an investigation meeting with her and was accompanied by his GMB representative Andre Marques. Notes of the meeting were taken signed by the Claimant and his representative. Michelle Keene explained the reason for the allegation was because:

> *"The reason it is sitting at serious for the allegation is because in the period since 22nd December 2009 you have had 18 counted periods of sickness. That is discounting 2 instances for kidney stones and malaria and 4 other occasions where I have no written evidence of what they are for."*

41. The Respondent also discounted the period of absence which triggered the withholding of the company sick pay (6 days) in total when looking at this pattern. It was recognised in that meeting that the business intelligence was wrongly showing the Claimant's 6 day absence as 1 day. The Claimant raised concerns about the inaccuracy of this data but this did of course reduce the number of sick days not inaccurately inflate them. This period had in any event been discounted. The Claimant did not provide to Michelle Keene (despite being repeatedly invited to) any underlying reason to explain his high levels of short term absence over that period. The Claimant advised that he would never reveal his personal medical history to anyone at Asda.

42. On the 17th February 2016 Michelle Keene had a re-convened meeting advising the Claimant that he would be forwarded to a disciplinary hearing for conduct for absence patterns. Michelle Keene felt that as his absence had improved in recent weeks this would be investigated as misconduct (which may result in a verbal warning) as opposed to serious misconduct. On the 18th February 2016, the Claimant appealed this outcome but was advised by letter dated 22nd February 2016 that he could not appeal against the outcome of an investigatory meeting as no

formal disciplinary action had been taken against him at that time. This was also consistent with the disciplinary policy which states that investigations are not part of the formal disciplinary action.

43. By letter wrongly dated 2nd February 2016 the Claimant was invited to attend a disciplinary hearing on the 3rd March 2016 with David Adams. The Claimant attended this meeting and was again represented by his GMB representative Andre Marques. Minutes of this meeting were made and signed by the Claimant and his representative as accurate.

44. The disciplinary hearing was re-convened on the 4th March 2016 for the decision. Again, the Claimant attended with the same GMB representative. Minutes were taken but on this occasion the Claimant refused to sign them. The Claimant was given a verbal warning for 6 months which was confirmed by letter dated 10th March 2016. The reasons for this was that it was felt the Claimant had abused the company's sickness policy because:

"

- *Between December 2009 and January 2016 you have 18 separate period of absence of less than 7 days.*
- *Of those 18, 16 were self certified absences.*
- *The time frame was 10 or less weeks between 14 of those 18 absences."*

45. The letter also confirmed that his company sick pay would also be suspended for the duration of the live warning.

46. On 10th March 2016, the Claimant appealed against the decision and the whole process up to the disciplinary hearing.

47. The Claimant was invited by letter dated 20th March 2016 to attend a disciplinary appeal hearing on the 21st March 2016 with Trevor Richards. The Claimant attended the meeting with a GMB representative Justin Openshaw. Minutes were taken of this meeting, which were signed by the Claimant and his representative. The Claimant raised that he felt that he had been discriminated against but when asked what characteristic (of the 9 he quoted from the Equality Act 2010) he replied:-

"I do not know, other colleagues have been exempted."

and again when asked he said:-

"Do not know."

He did however list two examples of different treatment with Asheel Mattu and Maggie (Malgorzata Wypych Boa). Following an adjournment whereby Trevor Richards looked into the two comparative cases given by the Claimant. Trevor Richards confirmed:-

"We discussed 2 comparative cases. One was Maggie (Malgorzata Wypych Boa), which was not an investigation into short term or intermittent patterns and as such is not a comparable case. The other was that of Asheel Mattu. I have looked at this case and I believe that poor decision was made by the disciplinary manager at the disciplinary stage. We have had several other investigations into short term intermittent absence where the colleagues have had their sick pay withheld for the duration of the warning."

48. He decided to uphold the disciplinary decision made by David Adams on the 4th March 2016 as a verbal warning for abuse of the company sickness and absence policy by means of short term intermittent absence. He confirmed that this would remain live for 6 months and the decision to withhold company sick pay for the duration of that warning was upheld.

49. This outcome was confirmed in writing by letter dated 28th March 2016. This decision was final and there was no further right of appeal.

50. After the investigation referred to above had commenced (in between the investigation meeting and the re-convened meeting), the Claimant raised a formal grievance dated the 16th February 2016 against the Operations Manager Warren Carter and General Manager Paul Mackay in respect of direct and indirect discrimination because of his race. This was the protected act the Claimant relied upon and his letter ran to six pages and was copied to the Equality and Human Rights Commission, GMB Bedford, Luton South MP and Asda Leeds (Head Office). The letter contained a number of allegations in summary:

- Being treated differently with regard to his amended duties set out in his fit note dated 15th January 2016 because he was black and because of his skin colour. He referred to a comparator who was permitted to undertake office duties without picking;

- Being investigated for his pattern of short absence and the decision to withhold company sick pay;

- Being called "a risk" by Paul Mackay;

- The delay in authorising his extended leave last summer of nearly 3 months from April 2015 to July 2015;

- Decision to put him on probation when he requested to return full time after that period of leave;

- Not receiving training;

- Lack of diversity of leadership;

- Stopping sick pay for black colleagues for no reason;
- Training being allocated according to race, sex and friendship;
- Unfair work practices targeting pickers and their monitoring.

51. By letter dated 25th February 2016, the Claimant was invited to a grievance hearing on the 3rd March 2016 with Glynn Edwards. Prior to that meeting Mr Edwards asked another manager Tom Spooner to interview Trevor Richards to get some background to the grievance. Tom Spooner asked Mr Richards a set of questions Glynn Edwards had prepared prior to that meeting. That interview took place on the 29th February 2016 and notes were taken of the interview.

52. Mr Richards gave details in that interview about the Claimant's return to work and also that of his comparator Steve Field. Mr Field was signed off with a foot injury and on the advice of physio he needed to keep his weight off his foot. He was previously signed off for 2 weeks due to him being unable to work. There was an operational need for support in the office as it was peak period (Christmas) and there was more clerical work than normal. We further heard evidence before this Tribunal that Mr Field in fact returned to work earlier than anticipated specifically as he was able to carry out this role otherwise he would still have been signed off sick. Mr Richards explained in the interview notes that the Claimant's request was not in a peak period and it was very quiet so there were no extra resources required to support operations. He also confirmed he was unaware of the Claimant submitting a request to train in any other areas and that the Claimant had two skills and some colleagues were still awaiting a second skill.

53. The Claimant attended his grievance meeting on the 3rd March 2016 with his GMB representative Andre Marques. At the outset Mr Edwards highlighted that Andre Marques was referred to in the Claimant's grievance letter and suggested the Claimant get alternative representation. Mr Justin Openshaw (another GMB representative) took the place of Andre Marques after a 20 minute adjournment. Minutes of the meeting were taken and signed by the Claimant and Mr Openshaw.

54. Mr Edwards summarised that he had read the Claimant's grievance letter and there were four points and elements to which the Claimant agreed. He then set these out with, "*you may feel there is more*":

    These were listed as:

    (1) Unethical direction around fit note;

    (2) Racism/discrimination;

    (3) Absence around CSP;

(4) *Grievance around favouritism and being treated differently – reference gender, 'whitism and sexism'."*

55. At the conclusion of that part of the meeting the Claimant was asked if there was anything else and he replied no as did the GMB representative.

56. The Claimant alleged that he had been told to withdraw his grievance. Justin Openshaw confirmed that he had advised the Claimant that the grievance if unfounded could rebound on the Claimant and he could withdraw it at this point. He advised that if it was not supported it could lead to an investigation of him (the Claimant). We accept this was Mr Openshaw's personal concerns/view and not a message from management to be passed on. Glynn Edwards confirmed at the outset of the meeting that there could be a number of outcomes to the grievance. He confirmed in evidence before us that he advised the Claimant that the possible outcomes were that the grievance was upheld, partially upheld, or it may go to investigation. Mr Edwards did not threaten the Claimant with dismissal or disciplinary. We prefer Glynn Edward's evidence on this point and it was supported by Justin Openshaw the Claimant's witness. Further, Justin Openshaw told this Tribunal that he felt the Claimant had a fair hearing.

57. On the 8th March 2016 Mr Edwards interviewed Warren Carter. He then held the re-convened grievance meeting with the Claimant. There was a further adjournment for him to interview Mr Mackay. The grievance outcome was delivered later that day.

58. The written outcome of the grievance was sent by letter dated 17th March 2016 which set out Mr Edwards detailed findings over 5 pages. He did not uphold the Claimant's grievance finding:

> *"In summary, I can find no substantive evidence of your allegations of discrimination in relation to race, gender or favouritism. These are indeed serious allegations that you brought against the senior management team in Bedford and had been unsubstantiated on every count. I find this unacceptable and therefore I am recommending based on the evidence provided that you are forwarded to investigation for making false allegations that have caused unnecessary hurt to our management team resulting in a potential loss of trust and confidence. This may result in disciplinary action against you."*

59. He also found that the comment made by Mr Mackay to be an inappropriate reference. However Mr Mackay confirmed to him that he meant that his inconsistent performance and absence was a risk to the business.

60. This Tribunal explored at length with Mr Edwards his rationale for that decision. Mr Edwards gave further evidence to this Tribunal as to the

reasons for that decision to make a referral to disciplinary investigation in particularly that:

> *"I made this decision because I felt that John had made a number of very serious accusations, all of which he failed to back up with evidence of race discrimination or sex discrimination. I felt the management team at Bedford had actually been supportive of John; he had been given additional leave as requested, his duties had been adjusted when he needed them to be and he had been given an opportunity to apply for training."*

61. We heard a lot of evidence about who should have heard this grievance. Whilst not a point of the Claimant's appeal this formed part of his case. The grievance policy sets out a table as to who would be involved in hearing any grievance and appeal. Where the grievance is against the General Manager (as in this case) under the table a grievance hearing should be held by Head of Distribution and/or Regional People Manager. The appeal should then be heard by Distribution Director or equivalent Director.

62. The Claimant's witness Mr Openshaw and the Respondent's witnesses confirmed that since the policy had been put into writing there had been a re-structure and the roles of Head of Distribution and Regional People Manager no longer existed. Instead there were three Senior Directors. It had been agreed with the GMB that in cases involving a General Manager another General Manager (from another depot) could hear those grievances and then any appeals would be heard by Senior Directors. We also heard evidence that this policy along with the terms relating to pay/conditions were currently being negotiated with the GMB at national level. There is currently a working party working on this issue. Once agreed the written policies relating to grievance will be updated. Mr Openshaw and the Respondent's witnesses all agreed on this, and that the written policy did not reflect what was agreed and used in practice at the relevant time.

63. Again, the grievance policy set out timescales as to hearing the process. *"Grievance meetings will be arranged normally within 5 days of receiving a written grievance*". In this case, the grievance was dated the 16th February 2016 and the first meeting took place on the 3rd March 2016. Mr Edwards confirmed this was his first available date and that it was not his role to update the Claimant. The Claimant was not informed about any delays in writing by the people co-ordinator save for the written invitation dated the 25th February 2016 by which time the Claimant was aware as to when the meeting was.

64. Again the grievance policy sets out that the written outcome will usually be provided within 5 days of the final grievance meeting. The Claimant was given the outcome verbally on 8th March 2016, but the letter confirming that in writing was not sent until the 17th March 2016.

65. The Claimant appealed against the outcome of his grievance by letter dated 25th March 2016. The appeal letter ran to six pages. Under the grievance policy the Claimant had 7 days from the date of which the decision was sent or given to appeal. We note that the Respondent heard the appeal and took no issue with the lateness of the appeal letter (17 days after the decision was given verbally) and 9 days after the written decision was sent.

66. The Claimant did not take issue in his appeal letter with the process followed in the grievance to date save for a reference to being asked to withdraw the grievance but the substance of the appeal letter (save for now following the four heads of grievance) was not materially different from the original grievance raised.

67. The Respondent acknowledged receipt of the grievance appeal by letter dated 27th April 2016 inviting the Claimant to a grievance appeal hearing on the 4th May 2016 with Craig Taylor, Senior Director.

68. Although this was outside the normal period for arranging grievance appeal of five days, the Claimant had requested and was again permitted a period of extended leave between the 2nd April 2016 and 24th April 2016 albeit the period granted was shorter than he had requested.

69. The meeting for the 4th May 2016 was re-arranged by the Respondent due to issues with Craig Taylor's attendance. A letter dated 6th May 2016 was sent confirming the re-arranged appeal date of the 16th May 2016.

70. The Claimant and Mr Openshaw attended on 16th May 2016 but Mr Taylor did not attend as he had been called to the Warrington depot due to issues there. The meeting therefore had to be re-arranged again.

71. The People Co-ordinator Emma Knight emailed the Claimant's GMB representative Justin Openshaw on the 19th May 2016 advising that the Claimant could wait for Craig Taylor to hear his appeal or have another general manager hear this. Having spoken to the Claimant first, Mr Openshaw replied by email on the same day confirming that the Claimant was happy for another manager to hear his appeal on his return. At this point the Claimant was off work due to an operation on the 17th May 2016.

72. By letter dated the 14th June 2016 the grievance appeal meeting was re-scheduled for 16th June 2016 with Richard Fielding, General Manager. The Claimant attended the meeting on the 16th June 2016 accompanied by another GMB representative Ashok Sharma. Minutes of the meeting were made and signed by the Claimant and his representative.

73. During this meeting Richard Fielding set out that he had been involved in organising an ethics listening group following a coincidental anonymous call to the ethics hotline about favouritism about picking lines at the

Bedford Depot. The feedback about Mr Mackay was positive and people were pleased that others were doing their fair share and being challenged appropriately. Mr Fielding took an adjournment during this meeting to allow the Claimant to put his list of complaints down, the Claimant produced a list of five complaints:

"

- *Medical injustice*
- *CSP investigation*
- *Suggestive comments*
- *Leadership equals diverse team*
- *Unfair work practices"*

This list was compiled by the Claimant (who was represented) during that adjournment which he then handed to Mr Fielding after the adjournment.

74. Mr Fielding reviewed the grievance and notes of investigation, but did not interview further witnesses. The Claimant did not provide named comparators or request in the appeal letter further interviews be conducted. He did not add any additional witness names in the meeting.

75. The written outcome of the meeting was sent to the Claimant by letter dated 20th June 2016 which set out the reasons why Mr Fielding upheld the grievance decision and supported the investigation into the Claimant's conduct. The decision was final and there was no further right of appeal.

76. Mr Fielding gave further oral evidence to this Tribunal about the rationale for his decision. He felt that there was no evidence behind the allegations on the whole. He felt *"the depot had bent over backwards and given the Claimant more flexibility and more time off than I had ever seen".* He felt this was the first time the Claimant "*had been challenged in that way and that a lot of time and energy had been spent dealing with the allegations"*. He felt that the Claimant had been told *"you can have this if you sort this out"* and because of that he put in his grievance.

77. On the 13th July 2016, the Claimant replied to this letter setting out his response to the grievance appeal outcome which ran to four pages and was copied to GMB Asda Bedford, Gavin Shuker MP, EASS, Asda Store Limited Leeds (Head Office).

78. The Claimant wrote a further letter of response dated 19th July 2016 concerning victimisation copied to GMB Asda.

79. By letter dated 25th July 2016 the Claimant was invited to an investigatory meeting on the 27th July 2016 with Elliot Vyse, Shift Manager concerning the raising of his grievance. The Claimant did not attend any investigatory meeting.

80. On the 28th July 2016 Mr Vyse confirmed the Claimant would not be required to do so. He set out:

> *"I find that the allegations you made as part of the grievance process were serious and no evidence was found to support your claims. However as you refer to in your letter I believe that you made those comments in good faith as part of the grievance process, this does not remove the fact these claims were both serious and potentially harmful towards the individuals you have named and accused. As such these comments have now been proved to be unfound should not be ignored.*
>
> *To assist in bringing this whole situation to a conclusion as I have already stated I am not going to investigate this formally but this letter will form as a counselling against making any future unfounded claims. I must remind you that if you are to make similar allegations again either within the formal process and unsubstantiated or outside of the formal process they will be investigated accordingly and could result in disciplinary action against you which could potentially lead to your dismissal from the company."*

81. Counselling is set out in the Respondent's disciplinary procedure as follows:

> *"Counselling may often be a more satisfactory way of resolving problems than disciplinary action, and the right guidance at the right time can often prevent the need for formal action. It is therefore not part of the formal disciplinary procedure but an informal discussion carried out with the colleague's manager and would take place if there'd been a minor lapse in performance, behaviour or minor breach of the rules. File notes will be removed from a colleague's personnel file after 6 months unless a trend becomes apparent."*

82. On the 29th July 2016, the Claimant wrote to indicate he had completely lost trust and confidence with internal processes, and that he would be prepared to sign a compromise agreement giving him 6 months wages tax free pay. This offer remained open for 7 days.

83. The Claimant was informed by his GMB representative at some point within that time frame that the Respondent was not interested in settlement.

84. By letter dated the 3rd August 2016 the Claimant resigned with immediate effect. He set out his reasons over two pages specifically:

- Failure to follow company procedure;
- Cancelling his meeting several times;

- Biased and inconsistent decisions and enforcement of both;
- He did not have a fair trial or fair grievance hearing and investigation;
- No fair training;
- Suggestive comments and corporate bullying.

85. The Claimant set out that he had recordings of all meetings (which were not relied upon before this Tribunal) but which he indicated could be put into the mass media.

86. The Claimant commenced ACAS early conciliation on the 19th October 2016 with a certificate issued on the 4th November 2016.

87. The Claimant brought the claim as set out in his ET1 dated 17th November 2016 for constructive unfair dismissal and victimisation stating "*the last straw due to unfair treatment towards him forcing him to resign after he lost trust and confidence in senior management at Bedford."* The Respondent filed a response to that claim.

88. The Claimant provided further and better particulars of his complaint for the Preliminary Hearing on the 2nd February 2017 before Employment Judge Adamson. At the next hearing on the 5th June 2017 the issues were identified as set out above.

Conclusions

Constructive Unfair Dismissal

89. The Claimant being an employee with a requisite service, with an act or omission (or series of acts or omissions) by the Respondent a cause of the Claimant's resignation? The Claimant relies on the breach of the implied term of trust and confidence and specifically;

    a) The Respondent's handling of the grievance process;

    The Claimant relied in this regard on the delays in the grievance process, the failure to keep him informed, the personnel hearing agreements and the investigation conducted and the outcome reached.

    b) The Respondent's handling of the grievance appeal process;

    c) Being subjected to the Respondent's disciplinary procedure following that grievance.

90. We remind ourselves of the long-established principles in *Western Excavating (ECC) Ltd v Sharp [1978]* that the matter must be determined

in accordance with the law of contract and not by applying a test of unreasonableness to the employer's conduct.

91. Taking each of these points in turn and dealing first the issue set out at paragraph 89a above:

The Respondent's handling of the grievance process

92. Looking first at the delays and the failure to keep the Claimant informed of the same. We accept that there was a minor delay in hearing the grievance but this was not outside the company's own policy and procedure as this did not give a definite timescale, just when a hearing would normally take place. Given the number of allegations the Claimant raised, their seriousness and the senior levels of management against whom he made the allegations, we do not consider the delay to be unreasonable let alone a breach of contract. We do not find that these minor delays are a breach of the implied term of trust and confidence so as to entitle the Claimant to resign and claim constructive unfair dismissal.

93. We remind ourselves of the principles found in *Blackburn v Aldi Stores Ltd* that the fact that a timetable is not met will not necessarily contribute to let alone amount to a breach of the implied term of trust and confidence. It is a matter for us to assess. In *Western Excavating (ECC) Ltd v Sharp [1978]* if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment which shows that the employer no longer intends to be bound by the more central terms of the contract, then this would be a breach of the implied term of trust and confidence but this is not the case here.

94. Turning now to the issue around the personnel, we do not find that there was any breach of the policy. We accept that this was contrary to the written policy upon which the Claimant relied but the clear evidence from both the Respondent and the Claimant's own witness Justin Openshaw was that the restructure required a variation to this policy which was not unique to the Claimant, and indeed was agreed by the GMB at national level and thus the workforce was covered by the arrangement. It cannot therefore be a breach of the Respondent's policy which was operating at the relevant time. Each person who held meetings with the Claimant was independent of the issues being discussed.

95. Turning now to the investigation into the grievance, the Respondent spoke to both witnesses against whom the Claimant had raised the grievance and another witness whose evidence was material to the allegations made. The Claimant did not name further witnesses either in his grievance letter or in the meeting for Mr Edwards to speak to. Further the Claimant did not mention any such concerns or indeed further witnesses to be spoken to in respect of his grievance appeal. We find that the Respondent carried out reasonable investigation into the allegations raised by the Claimant. We therefore do not find that the

manner in which the grievance was investigated to impact on the trust and confidence of the Claimant in the Respondent nor was there was any breach of the Respondent's policy.

96. With regard to the outcome we have heard detailed evidence of why Mr Edwards came to the conclusions he did. Based on the information before him we are satisfied that those conclusions were reasonable. We do not consider that the four points of reference is an issue as it was clear to us Mr Edwards investigated the total grievance, provided detailed findings and the Claimant himself when given the opportunity on appeal to list his grievances summarised these into only five points. The headings/labels are less important as the substance was all covered.

The Respondent's handling of the Grievance Appeal Process

97. Again, here the Claimant relied on the delays, the personnel hearing the grievance appeal and the way that the grievance appeal was conducted. Again, taking each in turn and dealing first with the delays. There were delays in hearing the Claimant's grievance appeal. These were due to operational reason but were also contributed to by the Claimant's absence leave of three weeks and then his period of sickness absence. As such we do not find that these delays were unreasonable nor a breach of contract. We do not find them to be a breach of the implied term of trust and confidence as the delays were at least in part caused by the Claimant's own absence.

98. With regard to the personnel, we do not find that there was any breach of the Respondent's policy for the reasons we have set out above. The clear evidence was that there had been a variation in practice to this policy. Further, the Claimant was expressly asked whether he would agree to a general manager hearing this appeal rather than awaiting Craig Taylor's availability. The Appeal was heard by a lower level manager than that set out in the policy but with the Claimant's express or implied agreement via his GMB representative. Indeed, the final invitation letter to the grievance appeal hearing set out that Richard Fielding was a general manager and would hold the meeting. His status was clear and the Claimant did not object either in advance or during that meeting to Mr Fielding holding the grievance.

99. Turning now to the outcome, having heard the detailed evidence we are satisfied as to why Mr Fielding came to the conclusions he did and that these were reasonable. We must state at this point that the Tribunal initially had some concerns over the use of the disciplinary policy as opposed to the PAR policy and indeed the use of the longer reference period of 5 years. However, having heard evidence from both sides those concerns have been alleviated.

100. The Respondent followed an agreed procedure with the full knowledge and recognition of the GMB which was agreed at national level, and it was clear that the Claimant was not singled out for this treatment. We

heard evidence that Bedford was a failing depot and Mr Mackay was trying to resolve historic issues of poor management. We spent a considerable amount of time exploring this with all the witnesses before us before reaching this conclusion. It was a policy that the Respondent has adopted by agreement for operational reasons. We do not find this to be unreasonable nor a breach of contract by the Respondent. We do not find it to be a breach of the implied term of trust and confidence either as it was an agreed policy.

101. We should also add that we are content that the Respondent followed the ACAS Code of Practice in connection with the grievance and the appeal. In respect of the appeal where the Respondent deviated from the ACAS Code of Practice it was with regard to seniority of manager to hear the appeal and this was with the Claimant's express consent.

Being subject to the Respondent's disciplinary procedure following that grievance

102. Again at the outset, we felt that it was a concern that the Claimant had been investigated after he raised a grievance which was accepted to be a protected act. We have dealt with this in more detail below save that from the facts the Claimant was not subject to the disciplinary procedure.

103. The Claimant was investigated but he did not attend any investigation meeting as instead it was dealt with under the informal procedure of counselling. We do not therefore accept that the Claimant was subject to the disciplinary policy following his grievance. We also remind ourselves that whilst the last act relied on does not need to be a breach of contract it must contribute something to the breach.

Did the acts or omissions by the Respondent amount to a fundamental breach of contract?

104. It follows from the above conclusions that we do not accept in some cases that there was an act or omission of the Respondent but where we have found acts omissions, we do not accept that these amount singularly or collectively to a fundamental breach of contract namely a breach of the implied term of trust and confidence. We have considered each act/omission relied upon above singularly but have also considered them collectively or as a whole.

105. We remind ourselves that a breach of the implied term of trust and confidence as set out in *Malik v BCCI*

> *"An employer must not without reasonable or proper cause conduct itself in a manner calculated or likely to destroy or seriously damage a relationship of trust and confidence between the employer and the employee."*

We do not find the Respondent's actions in this case to fulfill this test on any of the above points. We do not find that the Respondent acted without reasonable or proper cause. Its actions where they were found to be acts or omissions were taken reasonably and with cause. In connection with the last act in relation to the investigation following the grievance we find for the reasons set out below the Respondent had a proper cause to be concerned by the unsubstantiated allegations raised in the circumstances described.

Did the Claimant resign in response to that breach?

106. Given our findings above we do not need to consider points 3, 4 and 5 on the list of issues under unfair dismissal (constructive) in paragraph 2 above.

Victimisation

107. Turning back to the agreed list of issues for victimisation under paragraph 2 above; it being agreed that the Claimant's grievance of the 16th February 2016 is a protected act, has the Claimant shown detrimental treatment on which relies namely:

Being threatened with dismissal by the Respondent during the grievance process.

108. We do not find that the Claimant was threatened with dismissal by the Respondent during the grievance process. He received a strong indication from Justin Openshaw that the allegations were serious and he should consider withdrawing them. We accept that this was Mr Openshaw's personal view and not a message from the Respondent.

109. In so far as the threat of dismissal by the Respondent (which the Claimant now says was given at the outset of the meeting), we find that there was no such threat. Mr Edwards' evidence on this point was quite clear, he merely (as is normal) set out all the possible outcomes to the grievance and Mr Openshaw confirmed in his evidence that there was no such threat given.

110. It is also now suggested that Mr Vyse's letter of 28th July 2016 contained a threat of dismissal. We do not find that on any objective reading of the letter of 28th July 2016 that there is a threat of dismissal. As with any internal procedure the Respondent is merely outlining what could happen should the issue arise again.

Being subject to the Respondent's disciplinary procedure following the grievance

111. We have already set out above that we do not accept that the Claimant was subject to the Respondent's disciplinary procedure following that grievance.

112. Given our finding as to the investigation not forming part of the disciplinary procedure we do not find that the Claimant was subject to a detriment of being subjected to the Respondent's disciplinary procedure following the grievance. We have nonetheless gone onto consider the Respondent's motives in this regard further below.

C The Respondent's handling of the grievance process;

113. We repeat the conclusions from above with regards to the handling of the grievance process. We do not find that the Claimant was subject to a detriment in the way the Respondent handled the grievance process.

114. As per *Derbyshire and Others v St Helens Metropolitan Borough Council [2007]* the detriment would exist if a reasonable employee would or might take the view that the employer's conduct had in all the circumstances been to his detriment. Given our findings of fact concerning the grievance we do not find the reasonable conduct of the process to be a detriment that the Claimant can rely upon.

D The Respondent's handling of the Grievance Appeal Process.

115. We repeat the conclusions from above with regards to the handling of the grievance appeal process. We do not find that the Claimant was subject to a detriment in the way the Respondent handled the grievance appeal process.

116. Having regard again to *Derbyshire and Others v St Helens Metropolitan Borough Council [2007]* and our findings of fact concerning the grievance appeal we do not find the reasonable conduct of the appeal process to be a detriment that the Claimant can rely upon.

Has the Respondent carried out the treatment because the Claimant has done a protected act?

117. We have not found that the Claimant was subject to any detriments which form the basis of his case and are set out in the agreed issues before this Tribunal.

118. This Tribunal questioned Glynn Edwards and Richard Fielding on their motivations in detail. Given that the allegations were unsubstantiated and serious against senior managers of the company it caused great upset. The legislation only protects those who make the allegations in good faith. It is not a protected act if it is a false allegation or it is made in bad faith. The Respondent did not go so far as to make this finding as Mr Vyse recognised this would be difficult to establish and he therefore accepted the Claimant's evidence that the allegation was in good faith. Mr Fielding gave a particularly frank explanation as to why he felt an investigation was necessary, as he felt the depot had bent over backwards and this was the first time the Claimant had been challenged.

We do not go behind that decision as to good faith and as the Respondent has conceded the grievance was a protected act we do not need to further examine the Claimant's motives or this issue further.

119. We have however considered the alternative position had we done so in line with the authority of *Martin v Devonshire Solicitors*. We believe that from the findings of fact that the reason the Respondent chose to investigate the Claimant for the allegation was not the protected act itself but the features of it.

120. In particular the manner in which the Claimant made the complaint so publically, its seriousness which caused upset, that it was found to be unsubstantiated on racial or gender grounds and that the Claimant had again raised matters of holiday requests and contractual changes that had been previously resolved informally together with the allegations surrounding training in circumstances where he accepted he had not made any such requests under the agreed procedure.

121. Had we found that the Claimant had been subject to any detriment in the disciplinary procedure we would have found that the Respondent did not carry out the treatment because the Claimant had done a protected act but instead for these reasons.

122. It is for the above reasons that the Claimant's claims for constructive unfair dismissal and victimisation fail and are dismissed.

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Employment Judge King, Bedford.
Date: 25 August 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS