EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102404/2017

Held in Glasgow on 16, 17, 18 January and 7 March 2018

Employment Judge: Ms M Robison

Mr T Wilson	**Claimant** **Represented by:** **Mr G Millar** **Solicitor**
Provident Personal Credit Limited	**Respondent** **Represented by:** **Mr R Bradley** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant was unfairly constructively dismissed and the respondent shall pay to the claimant the sum of TWENTY THOUSAND FOUR HUNDRED AND FIFTY THREE POUNDS AND TWENTY TWO PENCE (£20,453.22) by way of compensation.

The Employment Protection (Recoupment of Jobseekers' Allowance & Income Support) Regulations 1996 apply to this award. The prescribed element is £4,385 and relates to the period from 7 April 2017 to the date of this judgment.

REASONS

Introduction

1. The claimant lodged a claim with the Employment Tribunal on 16 August 2017, claiming unfair constructive dismissal. The respondent entered a response denying the claims.

2. The hearing took place over four days on 16, 17 and 18 January and 7 March 2018. At the hearing, the claimant was represented by Mr G Millar, solicitor. The respondent was represented by Mr R Bradley, counsel, instructed by Mr A Gray, in-house solicitor with the respondent.

3. During the hearing, the Tribunal heard evidence from the claimant. For the respondent, the Tribunal heard from Mr Neil MacFarlane, who had conducted the disciplinary hearing, and Mr Ian Calder, who had conducted the appeal. The Tribunal was referred by the parties to a number of productions from a joint bundle of productions. These are referred to by page NUMBER.

Findings in Fact

7. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

Background

8. The claimant was employed by the respondent from 20 November 1985 until he resigned on 7 April 2017. At the time of his resignation, the respondent was the UK's largest company in the home credit market, providing short-term unsecured loans, by self employed agents, to customers in their homes. The self-employed agents are supported by development managers who in turn report to an area manager. Collections are made from customers in their homes, usually on a weekly basis.

9. The respondent is regulated by the Financial Conduct Authority (FCA) and must ensure that it meets its legal and regulatory responsibilities. As the respondent's self-employed agents visit customers in their own homes, the respondent is responsible for ensuring that its customers are protected and that it is acting in the best interests of its customers. Thus as well as the development division, there is a security and risk division. Area Risk Managers (ARM) are tasked with monitoring, uncovering, documenting and investigating fraud and financial crime undertaken by the self-employed agents engaged by the company.

10. The claimant was initially employed as a development manager, but was promoted to an ARM (initially termed area security manager) in March 1998. The role of the ARM is to prevent and detect fraud; to visit customers to check that no fraud is being committed by agents; and to ensure compliance with the FCA and Consumer Credit Act (CCA), that is that the agent had followed the correct procedures. Latterly ARMs were issued with ipads to facilitate this role, allowing them to check loan and loan repayments against information held by the company.

11. In an average week, the claimant would visit between 50 and 70 customers. In around 20-30% of these cases, the claimant would not have sight of the customer's payment book, either because they could not find it, were not prepared to look for it, or it was kept by another family member. In such circumstances, the claimant would check with the customer that the information that he had from the company (on his ipad) was correct.

12. ARMs did not build up a relationship with the agents, as there was reason to remain at arm's length, although ARMs would visit agents periodically to verify the float held in their own homes, which consisted of money for loans and money collected from customers.

13. The claimant had a good track record, having had no disciplinary issues raised during his 31 years of employment, and having performed well in his role as ARM over 15 years. For example, in his personal development review for 2016, completed by his line manager, Gavin Taylor, his overall comments are: "valuable member of the team and has no problems completing any tasks that are given to him. Always willing to help out colleagues and will do what it takes to get the job done" (page 74). For 2015 he stated, "Tom as ever has continued to show commitment to his role as an ARM and all objectives have been achieved in 2015. Tom has shown that although not at first comfortable with the new technology that has been introduced last year, by asking questions and using his own initiative he has mastered it. I am sure that this will continue in the coming year ahead" (page 77).

Relevant policies and procedures

14. The respondent's disciplinary policy states at paragraph 2 (page 35), headed "purpose", "each case must be looked at individually taking into account all the facts of the particular case and then arriving at a decision which is consistent with company disciplinary sanctions, whilst applying discretion and understanding, and that "the procedure is designed to safeguard the interests of the individual and the company and satisfy all parties that fairness and reasonableness have been applied".

15. At paragraph 3(c), it states that, "It is management's responsibility to ensure that thorough investigations are conducted and that employees are given the opportunity to make representations on their own behalf before any disciplinary decision is made". Under paragraph 4, headed, "principles", at 4(b) it is stated that "At every stage in the procedure the employee will normally be advised of the nature of the complaint against them and will be given the opportunity to state their case before any decision is made".

16. At section 6, it is stated that “disciplinary matters will normally follow the four stages outlined below. However the company reserves the right to take such disciplinary actions as it considers is justified by the offence”. The four stages are verbal warning; written warning; final written warning; and dismissal with appropriate notice. Under stage 4, it is stated at that “the company in certain circumstance reserves the right to downgrade or demote the individual as an alternative to employment”.

17. The ultimate stage is gross misconduct/summary dismissal which states that “where a very serious offence has been committed which involves a fundamental breach of contract on the part of the employee, they may be summarily dismissed after compliance with the procedures outlined…..as a summary dismissal will only occur where there has been a fundamental breach of contract, the employee’s rights to notice and pay in lieu of notice will be forfeited”.

18. At section 11, under general guidelines, the policy sets out examples of the types of behaviour which will attract the different stages of sanction, stating that these guidelines do not form part of the disciplinary procedure but are attached in order that employees may appreciate in general terms the type of disciplinary action which may be taken against them…every situation will be considering according to the circumstances of the individual case”. Under final written warning, examples include, “use of abusive or obscene language; damage to or loss of company equipment, monies or goods caused through negligence; being un the influence of drink/drugs; witnessing a credit agreement with out the customer’s signature; failure to deliver credit in accordance with the agreement”. Under summary dismissal examples include falsification of customer visits, “any acts detrimental to the company’s reputation”, and “flagrant disregard of fundamental company procedures (e.g. security procedures).

19. The respondent’s financial crime policy sets out a definition of fraud at page 45 “A fraud is defined as being any deception, deliberate violation of laws or company rules or manipulation of information which is intended to result in a direct, or indirect, gain or benefit to a person, or to a third party, or a direct or indirect loss to the company. An attempt to commit fraud may be a criminal offence even if no loss of funds or assets has actually occurred”.

20. Paragraph 1 is headed “Known or Suspected Fraud”, and states that, “It is the policy of the company that: 1.1 (Applies to all): Employees suspecting any fraudulent activity or theft must immediately report the circumstances to their line manager and a member of the HC field risk team…..”

21. From time to time training is delivered to ARMs and by ARMs regarding the security policy. This training makes it clear, in the case of "undelivered security letters" that agents must not be involved in the process (page 53, 55. 59). Further with regard to managing fraud, it is stated that "once a potential fraud has been identified, inform your line manager and the ASM/RSM; do not attempt to deal with the fraud yourself…". In bold in red on the relevant slide, is stated, "NB do not alert the Agent/Deputy about your suspicions" (page 57, 60); "all fraud suspicions should be reported" (page 62,64); and "do not attempt to deal with it yourself and never discuss it with the agent" (page 66).

Incident: customer visit (Mrs KB)

22. On 2 August 2016, the claimant visited a customer who was on his list for that day. The list of customers to visit is generated by head office, based on a "risk score". KB had recently received credit, and in particular, she had received a £1,000 loan some 3-6 weeks previously, with which she had cleared a previous loan. The claimant asked her about the details in the usual way and her information matched exactly the information which he had on his ipad "to the penny". He asked the standard compliance questions and these were answered correctly, and she entered the correct 11 digit code which operated as an "electronic signature". The only issue was that the claimant was unsure of her weekly payment. She stated that she thought that it was £23 per week, but according to the information which the claimant had, the loan repayments were £30. As no payment book had been produced to check, in these circumstances the claimant double checked the figures and there was no indication that she had not received the full benefit of the loan. In these circumstances, he telephoned the agent (JN) and she advised him that the balance of £7 was being paid by her husband.

23. He accepted that as a plausible explanation and was satisfied that there was no evidence of fraud. He recorded that the visit on his ipad and marked "all compliant". There was no facility for him to add any notes unless he had recorded that he had concerns that all was not in order.

Complaint about agent JN

24. On 24 August 2016, the claimant interviewed the agent JN along with area manager Robert Ferguson at the request of senior managers following a complaint about the agent JN from the Financial Ombudsman. The allegations were found to be malpractice but not fraud, but following discussion between Robert Ferguson, Christine Robertson, regional manager, and Gavin Taylor, regional risk manager, "it was decided that the agent JN would be accompanied this weekend and a full audit would take place on her agency prior to a decision

being made in this case" (page 80). A full audit would mean that all of her customers would be visited and checks would be made.

25. In January 2017, the claimant uncovered potential fraudulent activity when interviewing a customer on the JN agency, who thought that he had cleared a previous loan having taken out a new loan. However, records indicated that both loans were running and the indications were that the agent had withheld money and not cleared the initial loan. In these circumstances, the claimant immediately contacted his line manager, George Drummond. At that point Mr Drummond realised that there had been a failure to follow through the instruction to carry out the full audit.

26. Thereafter, the claimant was requested to carry out a full audit on JN, with colleagues, as a result of which an investigation revealed fraud on a further 6-8 accounts. KB's account was not one of those identified to have fraudulent activity.

27. KB was however interviewed during the course of that investigation on 19 January 2017. During the interview she advised of the visit which she believed had taken place three months earlier when the ARM, who was believed to be Alastair Robertson, had contacted her agent (JN) by telephone during the visit (page 89-90).

28. Subsequently, Alastair Robertson was asked to attend at the Baillieston office to be interviewed regarding this visit. When the claimant saw him he asked why he was in the office that day, and a colleague advised that he was being interviewed about a discrepancy in payments whereby a customer thought she was paying £23 but was told it was £30. On hearing this, the claimant was reminded of the visit he had around 6 months ago. He immediately spoke to his line manager, Gavin Taylor, and said that it may have been him who visited that customer.

Allegations against the claimant

29. Shortly thereafter, that same day, the claimant was asked to attend a meeting to discuss this issue. He was given no more than an hour's notice. He was aware only that it was a meeting to discuss the KB visit and he was not otherwise advised of the purpose of the meeting or therefore that it was an investigation meeting which might lead to disciplinary action. The meeting was conducted by Mr Taylor and Paul O'Neil, regional risk manager. It was recorded and transcribed in a pro forma meeting note headed "record of digitally recorded interview under caution" (Pages 93-97). It was not however given under caution,

and while there is a reference to a legal representative, there is no name and no reference to the offer having been declined.

30. The claimant was thereafter advised that he was to be suspended, on full pay, effective immediately, as confirmed in a letter dated 24 January 2017, pending further investigation into an allegation of gross misconduct, that "a conversation which took place with an agent, which related to potentially fraudulent activity".

31. During the course of the investigation into that allegation, the respondent contacted customers whom the claimant had said that he had visited, including customers visited between February 2016 to August 2016, that is up to 12 months previously, as well as on 9 January 2017. One customer, MM, stated that she had not been visited by any managers recently (page 100-103).

32. On 2 February 2017, another investigatory meeting took place, chaired by Mr Taylor, to discuss this issue. The claimant was not however given any prior notification about what the investigation meeting was about. The interview was recorded and transcribed (pages 104-109). During the course of that interview, the claimant was adamant that he had visited MM because it was recorded on the computerised system (VCS) and marked all compliant (page 103). He offered to go and visit the customer and he offered to go home to get his own personal records of the visits he had done. Mr Taylor was not however prepared to allow him to do so.

33. Immediately after the meeting the claimant went home and checked his own records which confirmed that he had visited MM that day. He then telephoned Mr Taylor to ask if he could go back and see her with a colleague of their choosing, but he was told that they were just "going with" the statement from the customer. He expressed the view that it was unfair to rely on the memory of a pensioner who was nearly 70. He followed up the call with an e-mail in which he pleaded in emotive terms to be permitted to conduct a dual visit to this customer "to clear my name", and advised that having checked his list at home he was adamant that he visited the customer. Mr Taylor responded, "email received and noted" (page 109).

34. By letter dated 3 February 2017 from Barry Hunter, regional HR manager, the claimant was advised that he had to attend a disciplinary hearing regarding the following allegations of misconduct: "1. Failure to adhere to company procedures, namely the Financial Crime Policy (Point 1.1 Applies to All), which states: employees suspecting any fraudulent activity or theft must immediately report the circumstances to their line manager and a member of the HC Field Risk Team. Specifically: an alleged conversation took place between you and an agent JN, which related to potential fraudulent activity. Any anomaly with the

customer's account should have been reported to your line manager and not discussed with the agent. 2. Alleged inaccuracies relating to customer visitation on 9 January 2017. Specifically: in relation to a statement provided by customer MM, who claimed that she had received no visitation from any manager from Provident during 2017. You have claimed to have visited and "seen" this customer on 9 January 2017". The letter included various background papers and statements relating to these allegations.

35. By e-mail dated 6 February 2017, the claimant advised Mr Hunter that he had since been able to further recollect his visits to Girvan on 9 January 2017 having realised he had mixed up the customer in question with another pensioner. He provided a detailed description of the customer and her house.

Disciplinary hearing

36. The disciplinary meeting took place on 15 February 2017, and was chaired by John Roche, with Joanne Graham in attendance from HR, who took handwritten notes of the meeting (pages 133-147). The claimant was accompanied by Lorna Glen, union representative. During the course of that meeting Ms Glen accused Mr Roche of not being impartial, having decided the outcome in advance and trying to trip the claimant up, and being backed by HR. In the face of those allegations Mr Roche and Ms Graham decided that the hearing should be adjourned, and rescheduled with a new chair.

37. That rescheduled meeting took place on 21 February and was chaired by Neil McFarlane. That meeting was recorded and transcribed (pages 153 – 212). The hearing commenced at 1.25. Although the notes erroneously state that the meeting finished at five past one, the meeting notes cover 60 pages of typewritten notes (1- 40 and 53 – 60 relating to the first allegation) and the meeting lasted several hours. During the course of that meeting, Mr McFarlane repeatedly asked questions about precise details relating to the meeting with KB, which the claimant struggled to remember, repeatedly saying that the visit was six months ago and that he had visited thousands of customer since then.

38. Approximately one hour into the meeting, the claimant stated in response to a suggestion from Mr McFarlane that what the claimant was saying was that it was ok to phone the agent, the claimant responded: "At the time I was happy that there was no fraudulent activity going on in that customer's account. Had I suspected there was any fraudulent activity I would not have phoned the agent but, I keep saying this but at the time it may have been an error in judgement but to be sitting here charged with gross misconduct as if in some way I attempted to cover up something or in some way that I suspected a fraud was taking place when I didn't, that's what I can't understand about why I'm sitting

here .....It never crossed my mind for one second that the agent was paying seven pounds into that account weekly for no, for absolutely no reason. I've never come across that in fifteen years....” He said that he was absolutely clear in his mind that the customer had received all of the proceeds of the loan because the amount she said she had cleared off tied to the penny with the amount of the loan that she'd received.

39. During the course of the meeting, Ms Glen got very frustrated with Mr McFarlane. Ms Glen explained that she was a regional officer and that she sat in disciplinary hearings every day. She raised concerns about the fact that Mr McFarlane was making statements rather than asking questions, she expressed concern about his use of an aggressive tone and obtuse questions, and about the fact that he continually expressed opinions about what the claimant should have done in the situation, about the fact that he kept going back to the same point when the claimant had already answered the question many times. She expressed concerns about the way that the disciplinary hearing was conducted which she stated was “basically testifying on behalf of your employer” unlike the way disciplinary hearings are usually conducted where the manager would take on board what had been said, and not input in that way. She suggested that all this meant that he had already decided the outcome.

40. With regard to the second allegation, in response to concerns about checking up on the claimant having made visits a year previously, Mr McFarlane stated that he would have expected them to pick more recent calls.

41. The meeting was reconvened on 24 February. The transcribed notes are at pages 213 – 216. With regard to the second allegation, Mr McFarlane was prepared to accept the claimant's account because the description the claimant gave of the customer broadly matched that of the colleague on the subsequent visit. With regard to the first allegation, while recognising that he accepted it was an error of judgement, in view of his experience as an ARM and the number of times he has detected fraud over 15 years, he regarded this as gross misconduct and consequently the claimant was summarily dismissed. This decision was followed up by letter dated 28 February 2017, confirming the decision and advising the claimant of his right to appeal.

The Appeal

42. By letter dated 14 March 2017, the claimant set out his grounds of appeal (pages 230 – 233) as follows: “1. The classification as gross misconduct is wrong; 2. Even if the classification is right, the penalty is unreasonable as it did not take into account the mitigating factors; 3. The process that I went through was not even-handed, therefore was unreasonable; 4. There is a clear

inconsistency of approach within the company; and 5. The real reason for my dismissal had nothing to do with the alleged act of misconduct".

43. Prior to the conclusion of the appeal, the claimant noted that his job was advertised.

44. The claimant was invited to an appeal hearing to be held on 29 March 2017, and conducted by Mr Ian Calder, with Ms Jacqui Bryn-Jones as HR representative (page 237 – 238). Although the claimant was told that he was entitled to have a representative, the claimant declined due to the unavailability of his trade union representative, despite an offer to postpone. The appeal hearing was recorded and transcribed (pages 239 – 260), taking place between 12.10 and 13.56.

45. The outcome of the appeal was communicated to the claimant by letter dated 6 April 2017. With regard to the first ground of appeal, that the classification as gross misconduct was wrong, Mr Calder stated that "the company's disciplinary factsheet states that the following acts, if proven, constitute gross misconduct: flagrant or deliberate disregard of specific company/departmental procedures, eg waiver process, security procedures, healthy and safety; DPA breach etc; any act that causes customer detriment".

46. Mr Calder concluded, "Having considered the disciplinary investigation and subsequent disciplinary hearing to consider the allegation made against you, it is my view that the disciplinary hearing manager was justified in exploring the allegation of gross misconduct with you at the disciplinary hearing, in that you informally contacted an agent on 2 August 2016 to clarity a discrepancy on a customer's account and this could have lead to customer detriment. Your actions on 2 August 2016 are in direct conflict with the expectations of an ARM and contravene the guidance and training you have been provided with during your 15 years in the role, therefore it was right to investigate you up to the level of potential gross misconduct. Notwithstanding the above, it is my view that you did not wilfully flout the Fraud Policy…..I can therefore confirm that your appeal regarding the wrongful classification of gross misconduct has been partially upheld".

47. With regard to the second ground of appeal, that the penalty was unreasonable because it did not take into account mitigating factors, Mr Calder said that, "although the actions you took on 2 August 2016 were in direct contravention of the expectations of an experienced ARM, there was no wilful intent on your part to flout or disregard policy and procedures. In addition, I have taken into account your long service with the company and performance during this time. I can

therefore confirm that your appeal regarding the penalty imposed being unreasonable as it did not take into account the mitigating factors is upheld".

48. With regard to the third ground of appeal, that the process was not even-handed and therefore unreasonable, Mr Calder did not accept that claimant's assertion that the process was centred on proving his guilt or that investigation into other visits to establish whether any other irregularities took place was not appropriate. He concluded that "The investigation has been handled as I would have expected an investigation of this nature to have been. Where a discrepancy has been identified the investigation process dictates that other customers visited by you should be contacted to establish whether your malpractice was a singular incident or one of a catalogue of misdemeanours. I see no evidence to support your assertion that the hearing was not 'even-handed'. I can confirm that your appeal regarding the process not being even handed and therefore was unreasonable is not upheld".

49. With regard to the fourth ground of appeal, regarding the failure to investigate the failure of managers to carry out a full audit into JN, and the claimant's assertion that others who were more culpable were not disciplined, and that he was a scapegoat for their failings, Mr Calder concluded that these were not connected and that, "In line with company procedure if any failings are identified in connection with other investigations into agent, JN, then the appropriate investigatory procedures will be followed". He therefore confirmed that the claimant's complaint about inconsistency of approach within the company was not upheld.

50. With regard to the fifth ground of appeal, Mr Calder did not accept that the real reason for dismissal had nothing to do with the alleged act of misconduct, and rather related to redundancy, given that he was involved in the Accelerate Change Programme, which he said related to managers not ARMs.

51. Mr Calder also stated that "I also asked you for your thoughts on how your line manager and those involved in the disciplinary investigation process would view you if you were reinstated, ie did you feel that your credibility was intact. You stated that you did not believe it was fair for me to ask you such a question and that you felt you should be allowed to return to your role of ARM. You also stated that it was your view and that of your trade union representative that the decision to dismiss you had already been made and asked whether the line of questioning from the disciplining manager at the disciplinary hearing was the norm".

52. In conclusion, the letter stated that: "as an ARM there is an expectation that you should have suspected potential fraudulent activity when you visited the

customer on 2 August 2016. As a consequence of this you should have followed all lines of enquiry with the customer, obtained further information from the company's Focus system and obtained a witness statement from the customer documenting the discrepancy. You have fallen well below the expected standards of your role. Your credibility to identify fraud and protect the company and its customers as well as your line manager's trust and confidence in you has been severely damaged. You have failed to recognise that contacting an agent without first exhausting all other lines of enquiry was the wrong course of action and you have sought to justify this by claiming you did not suspect fraud.

The role of the ARM is to be naturally guarded and wary of discrepancies and your admission that you did not suspect fraud or any wrongdoing is disappointing as this is fundamental to the role of an ARM…..I am not upholding the original disciplinary sanction of summarily (sic) dismissal and reducing this penalty to a Final Written Warning. You will be reinstated into your role of ARM with effect from 24 February 2017 and issued with a Final Written Warning. This warning will be recorded and remain as a live sanction for disciplinary purposes for 12 months from the date of issue. Should any further misconduct allegations be made against you, or if there is any other matter of a disciplinary nature during this time, further disciplinary action may be taken.

You will undergo retraining and monitoring and supervision which will be reviewed regularly by your line manager, George Drummond, and experienced colleagues, who I will identify in due course. The monitoring and supervision will take place for an initial period of three months and you will be required to be monitored and reviewed on a weekly basis to ensure that you are fully rehabilitated and are able to restore the confidence of the Fraud and Assurance function, and demonstrate that you are capable of protecting the company and its customers.

I have not taken this decision lightly and I expect you to return to work with an exemplary attitude and willingness to learn from your line manager and your colleagues. Your monitoring and supervision will focus on not only what you do, but how you are doing it in line with the competencies and success factors that are required in the role of ARM……"

53. The claimant responded by e-mail dated 7 April 2017 in the following terms: "Following on from the result of my appeal against dismissal, whilst I have been reinstated, I remain completely dissatisfied with both the outcome and the procedure. I set out very clearly in my appeal that this should never been classified as gross misconduct, however you have not been prepared to accept that. In addition regarding the failure to uphold the other points of my appeal I feel that I have been let down very badly by Provident. It is my view that

throughout this process I have been treated as guilty and nothing I have said has been believed. The onus has been on me to prove my innocence, rather than you having to establish my guilt. Further, I am finding it impossible to trust the management within Provident, given how I have been treated. As the trust and confidence has been destroyed, then I have no option but to resign with immediate effect".

Relevant law

54. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (the 1996 Act). Section 94(1) states than an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) states that an employee is dismissed if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is commonly known as "constructive dismissal".

55. In **Western Excavating Ltd v Sharp 1978 IRLR 27**, the Court of Appeal set out the general principles in relation to constructive dismissal. Lord Denning stated that "An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".

56. The duty of mutual trust and confidence is a term which is implied into every contract of employment. This means that an employer must not, without proper and reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee (**Mahmud v Bank of Credit and Commerce International SA 1997 IRLR 462 HL, Baldwin v Brighton and Hove City Council 2007 IRLR 232 EAT**).

57. The EAT has confirmed in **Leeds Dental Team v Rose 2014 IRLR 8** that it is not necessary to show a subjective intention on the part of the employer to destroy or damage the relationship to establish a breach.

58. When considering whether there has been a breach of the implied term, "the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it" (**Wood v WM Car Services Ltd 1982 ICR 666 EAT**, per Mr Justice Browne Wilkinson).

59. There may be a series of individual actions on the part of the employer which do not in themselves amount to a fundamental breach, but which may have the cumulative effect of undermining the mutual trust and confidence term implied into every contract of employment. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal. This is commonly referred to as "the last straw" (**Lewis v Motorworld Garages Ltd 1985 IRLR 465 CA**).

60. Where there is a breach of the implied term of trust and confidence, that breach is "inevitably" fundamental (**Morrow v Safeway Stores plc 2002 IRLR 9 EAT).**

61. The fundamental breach need not be the sole cause of the employee's resignation. Where there is more than one reason why an employee left a job it is necessary to examine whether any of them was a response to the breach, and not necessarily the principal or main cause of the resignation (**Wright v North Ayrshire Council 2014 IRLR 4).**

62. The question whether the employer has committed a fundamental breach of the contract of employment is to be judged according to an objective test and not by the range of reasonable responses test (**Bournemouth Higher Education Corporation v Buckland 2010 ICR 908 CA**).

63. Thus in order to claim constructive dismissal, the employee must show that:

    (1) There was an actual or anticipatory breach of contract by the employer.

    (2) The breach was sufficiently serious to justify the claimant's resignation; or that it was the last in a series of incidents which justified the employee leaving.

    (3) the claimant resigned in response to the breach, although it need not be the sole or even the principal or main cause for the resignation.

    (4) the claimant did not delay too long in terminating the contract in response to the employer's breach.

64. A constructive dismissal is not necessarily an unfair dismissal. A tribunal in determining whether a constructive dismissal is fair or unfair must go on to apply the tests set down in section 98 of the 1996 Act.

65. Section 98(1) of the 1996 Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Capability is one of the potentially fair reasons for dismissal, as is redundancy.

66. Section 98(4) provides that 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, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case.

67. Under section 113 of the 1996 Act, if the tribunal finds that the claimant has been unfairly dismissed, it can order reinstatement or re-engagement, or where no award for reinstatement or re-engagement is made, it can award compensation under section 112(4) of the 1996 Act.

68. Section 118 of the 1996 Act states that compensation is made up of a basic award and a compensatory award. A basic award is based on age, length of service and gross weekly wage (section 119). The amount is one and a half week's pay for every year that the employee was not below the age of 41, one week's pay for each year of employment when he was not below the age of 22, and a half week's pay where the employee was not within those bands, subject to a maximum.

69. Section 122(2) of the 1996 Act states that where the tribunal can reduce the basic award where it considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to do so.

70. Section 123(1) of the 1996 Act states that the compensatory award is such amount as the tribunal considers just and equitable having regard to the loss sustained by the claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer. This generally includes loss of earnings up to the date of the hearing (after deducting any earnings from alternative employment), an assessment of future loss, if appropriate a figure representing loss of statutory rights, pension loss etc.

71. If the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, section 123(6) requires the tribunal to reduce the amount of the compensatory award by such proportion as it considers just and equitable.

Claimant's submissions

72. Mr Millar submitted that the claimant was a loyal employee with a long career during which he performed exceptionally well. He was however judged by a higher standard than others, that is a standard imposed by Neil McFarlane and Ian Calder, rather than anything set out in any policy or procedure.

73. In particular, he was not judged on the financial crime policy or on the basis of any training materials (referred to in the bundle) and it was not put to the claimant that he had received training in respect of the correct procedure whenever there was an anomaly. The policy was that issues should be escalated when there was suspicion of financial irregularity, whereas after the visit on 2 August, the claimant quite rightly had no suspicion of fraud. This was because having done all the proper checks, everything seemed in order, except that there was no payment book and that the customer believed she was paying £23, but she was not sure. From his perspective the only person who could clear that up was the agent. This was not gross misconduct but rather an error of judgment as the claimant admitted. He was right not to have suspicions because there was no fraud on this account detected during the subsequent investigation.

74. With regard to the process followed, this was the reason he felt he had no option but to resign. The claimant's view was that this was not a fair and even-handed investigation, but the sole aim was to find fault and guilt.

75. The conduct of contacting an agent was immediately taken to be potential gross misconduct. Yet the claimant had nothing to hide: when he heard that Alistair Robertson was being interviewed about a visit in August, and he realised that must have been him, he immediately told his line manager. As a result of that, he found himself in an investigation meeting which was recorded without his agreement or knowledge. While both Mr McFarlane and Mr Calder said that it was standard practice not to give advance notice of the subject matter of the investigation, the claimant was not aware that this was a meeting which could lead to disciplinary action.

76. With regard to the suspension letter, that only refers to potential gross misconduct for communicating with an agent on 2 August 2016. Yet there was a second investigation meeting, relating to customers he had visited up to 12 months previously. The purpose of contacting those customers was not to ask

about discrepancies or anomalies or whether he had contacted an agent on these occasions, but to check if he had done what he said he had done. However, that was not relevant to the issue under investigation. No account was taken of the claimant offer of a visit or to get his notes. It was clear that the purpose of the investigation was to find fault rather than find out what had happened.

77. With regard to the disciplinary hearing, Neil McFarlane didn't believe the claimant when he said that he had no suspicions of fraud. This is why he reached the decision he did, not because he had breached the financial crime policy. While Mr Millar suggested that it might be said that his interpretation of that policy may be narrow and prescriptive, nevertheless it was a reasonable interpretation. It made clear that action was to be taken at the point when suspicions of fraud were clear. Otherwise Neil McFarlane was not able to point to any procedure which set how that ARMs were to deal with anomalies in the way that he claimed. Mr Calder mentioned that he was told this at risk meetings, but no minutes were lodged of those meetings and that was never put to the claimant. Rather, Mr Calder relied on this being "fundamental" and going to the core of their expectations, "like a stick of rock". There was no evidence to back up his assertions.

78. With regard to the full audit, from the first meeting, the claimant had raised concerns about the fact that an audit was not done, and that he was being made a scapegoat for the failure not to undertake a full audit. However those allegations were dismissed out of hand by Neil McFarlane and by Ian Calder who said they were not linked. However, George Drummond and Gavin Taylor were both responsible for failing to carry out the audit and they were the ones who ordered the investigation. While it was not clear whether or not there was a link, the respondent does not know because of the failure to investigate. At no point until today was there any indication that an audit had been carried out. Ian Calder could give no explanation why he made no mention of this in the appeal outcome letter; except that he did not think that it was relevant.

79. After concerns raised at the first aborted disciplinary hearing, as confirmed in the minutes which were seen by Ian Calder, the claimant was flagged up as a troublemaker, and the respondent closed ranks.

80. While the claimant was understandably rather emotive, his evidence was clear and credible, and should be preferred over Neil McFarlane and Ian Calder in the event of a dispute.

81. With regard to the return to work, Gavin Taylor, John Roche, George Drummond, Christine Robertson and Robert Ferguson were all involved to

some degree with what happened to the claimant, yet he was expected to work with them in the same office, which includes Neil McFarlane. The claimant was to be returning to the same office with those he had implicated.

82. The claimant's job had been advertised before the appeal, and it is inevitable that the claimant would feel aggrieved about that. By the time it came to the appeal, the claimant had lost trust and confidence in the respondent. Ian Calder had the opportunity to listen fully to his appeal points and reach a fair and proper decision but he still classified the conduct as gross misconduct.

83. With regard to the legal principles, Mr Millar relied on the cases of **Western Excavating v Sharp** and **Woods**, as well as **Eminence Property Development Ltd v Heaney 2010 EWCA Civ 1168,** to argue that the focus in this case was on repudiatory breach which was evidenced by the fact that trust and confidence had been destroyed in this case. On the question whether there has been a repudiatory breach, this must be looked at objectively, by the standard of the reasonable person. The resignation in this case was clearly in response to the repudiatory breach, which the claimant accepted and did not delay too long in resigning.

84. With regard to remedies, relying on **Norton Tool**, the claimant should be compensated fully on the basis of the difference in earnings. While he will have the ability to earn commission, he has not earned any yet. He has lost a more lucrative job, as well as his company car and his fuel card. He was paying into SAYE and he will lose that benefit also.

85. With regard to the issue of mitigation, the burden is with the respondent to prove mitigation and showing the existence of vacancies which he did not apply for is not sufficient to show that the claimant failed to mitigate his losses. Rather the respondent would have to show that the claimant acted unreasonably. Here the claimant has made reasonable efforts to find work remunerated at the previous higher rate, and his evidence was that he is still registered with recruitment agencies and checks the newspapers and on-line. He said that this was not his dream job but felt that he had to take it.

86. In conclusion, the claimant was entitled to resign, and as a consequence he has suffered considerable losses in relation to self-esteem and self worth, as well as financial losses; he has also lost a job that he loved and had devoted the majority of his working life. This shows that the decision to resign was not made lightly, but because he had no option.

Respondent's submissions

87. Mr Bradley argued that the claimant had failed on the facts to satisfy the requirement to show that the way that the respondent behaved had breached the implied term of mutual trust and confidence and that he resigned immediately after because of the breach. He said that despite the way that matters had been approached in this Tribunal, and references in questions to what was fair and reasonable, it was important not to lose sight of the fact that this was a claim of constructive dismissal and not a claim of unfair dismissal.

88. The headline facts in this case are unusual to the extent that there was an allegation of gross misconduct which led to a disciplinary hearing and dismissal and reinstatement following appeal. Despite Mr Millar's concerns, Mr Calder's evidence was that it was right to investigate the circumstances as gross misconduct, but on review determined that classification was not correct, so that the appeal was upheld. It is clear from the appeal outcome letter at page 262, that this was because he accepted that the claimant did not willfully flout the policy. For that reason, he concluded that this was not gross misconduct and the claimant should not have been dismissed. It was not a question of him still remaining of the view that it was gross misconduct and concluding that the sanction was too serious.

89. Mr Bradley suggested that there are four or five ways of looking at the circumstances of this case, but whatever way it was viewed, the claimant could not satisfy the legal framework.

90. Referring to s.95 (1)(c) ERA and the **Western Excavating** case, relying in particular on the dicta of Lord Denning who concluded that the correct test is not the reasonableness test but rather the contract test (see page 227), Mr Bradley set out the four overall principles.

91. With regard to the employee's response to the breach, Mr Bradley relied on the case of **Chindove v Morrisons Supermarket plc UKEAT/0201/13/BA** to argue that the focus was not on the length of time or delay alone. Rather the focus is on whether the actions show that the claimant intends the contract to continue, and the question is whether the employee had demonstrated his choice.

92. In that case Langstaff P. referring to **Western Excavating v Sharp**, stated that "there are two parties to an employment contract. If one, in this case the employer, behaves in a way which shows that it "altogether abandons and refuses to perform the contract", using the most modern formulation of the test, in other words that it will no longer observe its side of the bargain, the employee is left with a choice. He may accept that because the employer is not going to

stick to his side of the bargain, he, the employee, does not have to do so to his side. If he chooses not to do so, then he will leave employment by resignation, exercising his right to treat himself as discharged. But he may choose instead to go on and to hold his employer to the contract notwithstanding that the employer has indicated he means to break it……"

93. Relying on **Mahmud v BCCI**, there are two parts to the implied term of mutual trust and confidence. In order to determine whether or not there has been a breach of that implied term, the conduct must be sufficiently serious and there must be no reasonable and proper cause for the conduct.

94. Relying on **Hilton v Shiner Builders Merchants Ltd 2001 IRLR 727**, in that case the claimant was transferred but not dismissed because of his long service; but it was decided that he was not suitable for a position of trust. The claimant unsuccessfully complained that this was a fundamental breach, but the decision of the tribunal was overturned on appeal.

95. Relying on **Roberts v West Coast Trains 2005 ICR 254**, Mr Bradley argued that the effect of reinstatement on appeal was to revive the contract of employment which was terminated by the earlier decision. Thus for the period when the appeal was being considered there was no contract, as confirmed by the disciplinary procedure which states that the decision will stand pending the appeal (page 40, paragraph 9). So for the intervening period, from 24 February to 7 April, the contract doesn't exist.

96. Turning to the factual background, the claimant didn't resign until after the appeal outcome. If contract had been destroyed earlier, then the appeal was a pointless exercise, but it was a genuine appeal and that there was a clear wish to overturn the decision.

97. During the appeal, Ian Calder asked the claimant how did he see that operating and the way back into the business, if the decision was overturned. Eventually the claimant gives a clear and unequivocal answer, that the ideal outcome would be for him to be returned to his role. Mr Bradley submitted that it is not possible to reconcile that with the argument that prior to that point the contract had been destroyed. Consequently, the first element of **Western Excavating** is not satisfied. The reason for the resignation is the outcome of the appeal, but that cannot be a breach of contract, because he genuinely wished to return, and therefore relations could not be destroyed.

98. If the Tribunal is not with him on that argument, looking at the claimant's "conspiracy theory", that the respondent's sole aim was to find fault or guilt, this must be conduct prior to the dismissal. He said that as early as 2 February, "the

knives were out", and that he knew then that there would be no fairness, and he refers to the subsequent investigation as a "witchhunt" (para 9, statement of claim). In the appeal letter, he says that the decision to get rid of him was made long before he was suspended (page 233 of appeal letter). The claimant knew about the respondent's conduct in January, which he now says destroyed the contract, but he chose not to resign until after he was dismissed and reinstated.

99. Any conspiracy to implement George Drummond's plan to make him a scapegoat would require to include all of the others involved in this process, including Neil MacFarlane and Ian Calder. There is however no evidence to support the conspiracy or collusion theory. In any event, the claimant's "belief" and "feeling" that it had happened is based on speculation based on misapprehension. The particular difficulty for this theory is that the appeal was allowed, whereas if Ian Calder was the one closing ranks around the claimant, then the appeal would not have been allowed.

100. The third way of looking at this case is that the conduct of the disciplinary was routine and did not damage the relationship. The claimant says that throughout there was a presumption of guilt, but there is no evidence to support that. While the claimant claims in his statement of claim (page 17) that the original investigation was extended and Neil McFarlane said that going back a year was unusual, but Ian Calder said an investigation into other discrepancies was part of the normal investigation process. Mr Bradley invited the Tribunal to prefer the evidence of Mr Calder, that it was the normal process to look at other matters especially in a regulatory environment. The investigation looked also at more recent visits, one of which a customer did dispute the visit, throwing up another discrepancy that the claimant was required to answer. There was thus two adminicles of evidence, showing that it was a legitimate investigation based on the facts.

101. With regard to the claimant's claim that it was dealt with aggressively and the suggestion of pre-prepared questions, there was no evidence to support, that given Neil MacFarlane's denial. Reading the transcripts there are clearly no questions which are designed to trip him up. Both senior and experienced managers believed there to be a serious issue, and Ian Calder's evidence was that the nub of the issue was that he should have suspected fraud. There was thus no breach of the implied term because there was reasonable and proper cause to investigate the allegation of misconduct.

102. The fourth way of looking at this case, is that even if the conduct did not have a reasonable and proper cause, the contract was affirmed by the claimant continuing in the relationship. If trust was destroyed by 2 February, he should

have resigned then, but he exercised a choice (**Chindove**) and delayed too long (**Western Excavating**).

103. Mr Bradley's fifth argument, if the Tribunal is against him on these four approaches, is that the real reason the claimant resigned after he was reinstated was because he had another job to go to, and not because of the breach. Here the timing is unusual, in that there is no gap at all. The claimant's evidence on the timing was unsatisfactory.

104. On any of five arguments, the claimant should not succeed, measured against the legal framework, and Mr Bradley invited the Tribunal to dismiss the claim on any or all analysis.

105. With regard to quantum, Mr Bradley took issue with three entries in the schedule of loss. The first related to net pay. His position was, relying on Harvey and the IDS brief, looking at the pay slips for the last full three months before dismissal, and using the net pay stated there (leaving out SAYE because he was electing to make contributions to that scheme) that in fact his net weekly pay was £350.77, not £421.62 as stated. If he was wrong about that then adding that back in would give an extra £34.62 weekly, taking it to £385.39. Secondly, looking at his new pay, he calculated average net weekly pay to be £309.69. Thirdly, he suggested that future loss should properly be limited to 26 weeks.

106. Mr Bradley then turned to contributory conduct, relying on the case of **Polentarutti v Autokraft Ltd 1991 ICR 757**, which he said was authority for two propositions: that even with constructive dismissal, there can still be a reduction for contributory fault; and there need not be exceptional circumstances. The correct approach is first to identify any conduct which gives rise to contributory fault; secondly to identify whether it is blameworthy; third whether it caused or contributed to any extent to dismissal and fourth, determine a just and equitable reduction.

107. In this case there was an admitted anomaly on the account, it was a fundamental error to telephone the agent whereas he should have reported it and to that extent the claimant was blameworthy. Mr Millar said that at worst it was an error of judgement but it did substantially contribute to dismissal. It was just and equitable to reduce both the basic and the compensatory awards by 75%, applying the usual conventions.

108. With regard to mitigation, Mr Bradley accepted what Mr Millar said regarding the legal position. However, having secured a new job, the claimant had taken his eye off the ball thereafter and had missed two vacancies, and at least one of which was broadly equivalent to his job. He accepted the need to find that it

would have been unreasonable for the claimant not to have spotted that. However, there is no documentary evidence of him looking for further jobs.

Tribunal's discussion and decision

Observations on the witnesses and the evidence

109. In this case, I found all of the witnesses to be generally credible. Although there were few key facts that were in dispute, where there were disputed facts I took that to be a matter of perception and opinion, rather than that any witness was not telling the truth.

110. I found the claimant to be a credible witness. I was aware that he was making every effort to be entirely honest in giving his evidence to the Tribunal. His account did not change from the initial investigatory meeting to this hearing, including an early acceptance that, on reflection and with hindsight, he may have made an error of judgement. That is a different matter to the question of the veracity of what Mr Bradley called the "conspiracy theory". While I did not accept the "conspiracy theory", I could appreciate from the claimant's point of view why he might come to this view, since it is difficult to see the rationale for many of the respondent's actions, discussed below, given the claimant was a longserving and highly rated employee.

113. With regard to Mr McFarlane, I found him to be an honest witness who was prepared to answer questions in a way which was not necessarily favourable to his position. However, there was one aspect of his evidence which troubled me, and that was in relation to his assertion that the way he approached the questioning at the disciplinary hearing was designed to illicit mitigating factors. Assuming he did genuinely think that, he could not have been more wrong. Given the claimant's track record with the organisation, I would have expected his account to have been believed.That was very significant to the overall outcome in this case, because it did tend to at least give the impression that the claimant did have to prove his innocence, which suggests a lack of trust in an employee. Further, although he had not uphold the allegation in relation to the customer visit, he had essentially found this to be "unproven", saying, even in evidence to the Tribunal, that he did not know whether it had or had not taken place. This indicates that he was not prepared to accept the word of the claimant.

111. Mr Calder appeared fidgety and uncomfortable while answering questions, but my impression was that this was not because he was not telling the truth, but rather because he perhaps realised the validity of some of the points being put to him by the claimant's solicitor, seen through the eyes of the claimant.

Further, it emerged only on the fourth day of evidence that Mr Calder's position was that a "full audit" into JN had been carried out. While it is not clear why he made no mention of that in the appeal letter, I was prepared to accept that was what he was told by Christine Robertson, although I preferred that claimant's evidence that in fact one had not been carried out. Although it was not evident in his oral evidence, the appeal letter suggests that he overturned the decision to dismiss reluctantly, defensively and grudgingly, which was also significant, given the outcome of this hearing.

Constructive dismissal

112. In this case, the claimant ultimately resigned, but that does not of course prevent him from pursuing a claim for unfair dismissal. According to the relevant law set out above, a resignation will be deemed to be a dismissal if certain conditions are satisfied. I accepted Mr Bradley's submission that there are four elements to the constructive dismissal question, as set out above, to which I now turn.

1. Was there an actual or anticipatory breach of the implied term of mutual trust and confidence?

113. In this case, the claimant argues that the implied term of trust and confidence was breached. The claimant came to this conclusion after he had received the appeal outcome letter.

114. Following the **Malik** formulation, the Tribunal considered first whether the respondent had conducted itself in a matter which was calculated, or if not, which was likely, to destroy or seriously damage the relationship of trust and confidence between the employer and the employee, and secondly whether there was proper and reasonable cause for the respondent's behaviour.

115. In his statement of claim, the claimant states that having received the appeal letter, he reflected on the decision. On reflection, he was of the view that there were a number of very serious concerns, which he set out in paragraph 18, namely:

a. the fact that Ian Calder then tried to change the terms of the original charge, going from the financial crime policy to various other policies – none of which were put to the claimant and none of which he was given a chance to respond,
b. the fact that this remained as a gross misconduct;
c. the fact that all the other appeal points were not upheld;
d. the way in which the claimant was treated throughout the process with:
    i. the assumption of guilt;

ii. The expanding of the original investigation to investigate whether he had made all the customer calls he said he had done (despite being utterly irrelevant to the original allegation) and

iii. The aggressive way in which he was dealt with at the investigatory and disciplinary hearing stages, with pre-prepared questions designed to trip him up, rather than being a fair and balanced examination of the facts.

e. the fact that he was being expected to return to the same management structure that he felt had let him down so badly, and

f. the fact that his job had already been advertised before the conclusion of the appeal process.

116. During the course of the hearing, it was stressed on his behalf that it was because of the process followed that he felt he had no option but to resign. He did not however resign until he heard the outcome of the appeal.

117. Mr Bradley commented that there was an impression given that this was a claim for unfair dismissal under s94 rather than constructive dismissal under s95. I suppose that was partly to do with the fact that of course the claimant was in fact dismissed in this case. However, there were certainly a number of factors which would point to the investigation and disciplinary process being unfair and unreasonable.

118. I did find it difficult to fully understand the rationale for the approach taken by the respondent to the investigation and disciplinary process. The claimant had a particular concern regarding the categorisation of the offence. He was taken aback by being accused, from the very outset, of gross misconduct. There was much emphasis from the respondent's witnesses in this case about it being completely self-evident that the claimant should not have telephoned the agent in the circumstances he found himself in; and that even if he did not suspect fraud, he should have. Mr Calder called it "the nub of it" and he talked of that principle being imprinted like a stick of rock through all right-thinking employees.

119. But I do not think that fully justifies the way that the respondent dealt with this case. In particular, I could not understand given the claimant was an exemplary employee as suggested by his appraisals, with 31 years' service, why it would be that he would believe that he could contact an agent in the circumstances that he did; why it would be that he would not link that event with the audit of JN when he was asked to do it; why it would be that he would immediately "own up" to the visit as soon as he heard someone else was being questioned about it. I got the impression that the respondent had until this event considered him to be honest and trustworthy, and that certainly was the impression given by the claimant in the Tribunal. If it was so clear that it would be classified as gross misconduct, even the most honest person might stop to reflect on the consequences of owning up, rather than immediately advising his line manager

and finding himself at an investigation meeting within the hour as he did. Further, the claimant's evidence was that when he subsequently did suspect fraud on this agency, he immediately reported it in the usual way, and that is why the issues with this agency were identified. Indeed, if he had not reported it, then this incident may never have come to light.

120. The rationale or explanation for this conduct must be that it was not as obvious as has been portrayed by the witnesses in this Tribunal, who had the benefit of hindsight. There were particular factors in this case which led the claimant to make the call, relating to the information with which he was a supplied. Indeed, everything tallied, all checks had been done, but the customer was recorded as paying more that she thought she was paying, suggesting some lack of certainty. There was only one loan in this case. The claimant had never come across a situation like this in the 15 years he had been doing the ARM role. Although in evidence Mr Calder said that "overs" were uncommon, given that fraud accounted for only 0.1% of sales, within that number they were not uncommon, because in cases of collusion between agent and customer, an agent will maintain payments so that there are no arrears, and no suspicions will arise. However, when I asked him about this particular scenario, where the claimant said she was paying £23 and the agent said £30, he said that was "not normal because there was only one loan running at the time" and that it was usually when there were two loans, with the customer paying one and the agent the other that this kind of situation might arise. I took from that that this particular combination of factors was in fact relatively unusual.

121. Further, if it was so important that reports should be made in these circumstances, to the extent that to fail to do so was assumed to be gross misconduct, then I would have expected that to be made clear, at induction, in training, in policies, in manuals. But the respondent was not able to produce any documentary evidence to support that, and apart from Mr Calder saying that this is raised at regular risk meetings, there was no other evidence to support the argument that it should have been self-evidently obvious that it should have been reported. Indeed, the evidence heard did not support any contention that ARMs never called agents. The claimant said it was something of a last resort; but none of the evidence which the respondent lodged stated anywhere that under no circumstances should an ARM contact an agent, and certainly not where there was *any* anomaly (rather than a suspicion of fraud). Clearly, there was a measure of discretion for ARMs. Here the claimant was adamant that there was no fraud, and that the factors did not point to any suspicion of it. The evidence is quite clear that it is only when fraud is suspected that the reporting procedures should be followed. Much was made by the claimant that there was not in fact any fraud detected on this account in the subsequent fraud investigation, but the circumstances of repaying the agent the overpayments I

found rather odd, and I did not consider that they ever got to the bottom of whether there was or was not fraud on this account, but I did not consider that to be material in this case in any event.

122. I noted that the respondent's witnesses were both clear that their processes do not require them to give employees any advance warning or knowledge of what they are facing at an investigatory meeting. There may well be some circumstances when that may be required, if there are concerns about destroying evidence or the like, but I did not consider that, as a matter of course, that is universal best practice. Indeed, as I read the respondent's disciplinary policy, there was an expectation that the employee would normally be advised of the nature of the complaint against them "at every stage". The reason for that is highlighted in this case, because the outcome of the investigation meeting was very significant for the claimant, in that he was immediately suspended. The lack of warning, as well as the background circumstances, means it was not surprising that it came as such a shock to the claimant, or that he was ill-prepared to answer detailed questions.

123. This disadvantage was particularly clear in relation to the second investigation meeting, when the claimant had no time to consider what he was being accused of, to gather his thoughts or indeed information about it which, as it turns out, would have shown that the claimant's own records corroborated his assertion that the visit had been carried out. The value of meetings being recorded was that I had essentially a verbatim transcript of what was said, and it is clear from the notes that Mr Taylor was very sceptical about the reasoning put forward by the claimant, that he was not prepared to take the word of a long-standing trusted employee against that of one elderly customer, that he was not even open to allowing the claimant to try to prove the point, either through a visit or even letting him go home to bring back in his own notes. It was not at all clear why the claimant, this particular employee, would not be given the benefit of the doubt in circumstances such as these. Indeed, it seemed to me, given that the claimant visits between 50-70 customers each week, that is was surprising that he could in fact remember the visit in such detail, once he was given the opportunity to reflect, giving a description of the customer and her house. Despite the word of the claimant, and the production of his records, still this formed the basis of a second allegation against him.

124. Seen from the point of view of the claimant, it is not difficult to understand why he did not consider the process to be fair or reasonable. This was particularly when he found out, again without warning, that the respondent was checking out previous visits. While it might well be appropriate, especially in a regulated environment to check whether the alleged conduct has been repeated, here it seemed that the focus was not on whether a similar kind of behaviour had

occurred, but rather the focus came to be on whether he had told the truth about other visits. While Mr Calder said that this was the standard procedure to check if there were any other instances similar to that alleged, from the point of view of the claimant, one can see why he thought that there was an attempt to gather evidence to bolster or support the original claim, especially when they were not prepared to accept his evidence, either oral or documentary, presented in the investigation. This was just one customer among hundreds if not thousands whom the claimant would have visited during the period chosen for the checks. It seems altogether disproportionate to have added this second allegation.

125. It is also interesting to note that the first disciplinary hearing was aborted, and the reasons for that. In this case, the hearing was not recorded although there are relatively fulsome written notes. Concerns were expressed by Ms Glen about the approach taken by Mr Roche. Although the claimant was keen to proceed, and indeed as a result it seems that Ms Glen was prepared to withdraw the accusations, Ms Graham decided that it was not appropriate to proceed in the face of such concerns.

126. Ms Glen was clearly also very unhappy throughout the second disciplinary hearing. I thought this was very telling. Although I did not hear evidence from Ms Glen, it is clear from the transcript that she thought that the approach to questioning by Mr McFarlane was unusual. At one point she said she was a regional official and “did this every day”. It took it therefore that she was very familiar indeed with how disciplinary hearings are undertaken, and therefore it is clear that the normal approach was not being taken. Mr McFarlane said that he had been on a training course and seemed to think that he knew the correct way to approach questioning of this nature. But clearly his approach, in the context of a disciplinary hearing for a longserving and hitherto respected employee, was not appropriate.

127. This is evident from reading the transcript. Indeed, Ms Glen’s interjections appear justified, for example expressing concern about the fact that Mr McFarlane was making statements rather than asking questions, and expressing opinions about any answers which he was given. For example, he said of the gross misconduct allegation, “I would not have expected [that] from someone of your stature”. He said that “an area risk manager doing their work would not be expected to phone an agent to get confirmation or reassurance of any kind”, to which Ms Glen said “that makes me really uncomfortable...”. Mr McFarlane said that “It makes me uncomfortable to think that an area risk manager would do that”. Ms Glen was of the view that he made a “heartless” “awful response” to the claimant’s impassioned pleas. She expressed concerns about the way that the disciplinary hearing was conducted which she stated was “basically testifying on behalf of your employer” in contrast with the way

hearings are usually conducted where the manager would take on board what had been said, and not input in that way. She suggested that all this meant that he had already decided the outcome.

128. Further, it was not at all clear to me why he felt the need to keep asking the same questions, when he was getting the same answers. He appeared not to be listening to the answers, although he seems to suggest now that was because they were not what he wanted to hear, because he was expecting some kind of mitigation. But it was difficult to understand what mitigation he might be expecting to hear that might have altered his view, and it appeared that he was not listening to or had closed his mind to the "mitigation" which he was being presented with, namely the claimant's explanation that he at no time suspected fraud, given the particular factors of the visit. There are 60 pages of typewritten notes of the meeting, and although there is an error in the timing of the end of the meeting, it is clear that it lasted several hours. It is not surprising, given the above, that the claimant felt that the outcome had already been decided.

129. Although I did not accept the so-called "conspiracy theory", I did understand why the claimant would have thought that he was being asked to prove his innocence rather than that the respondent was required to prove guilt. But the fact that Ms Glen, an experienced full-time official, should express such vocal concerns in the two disciplinary hearings tells me that the approach of the respondent was unusual. In attempting to understand, I concluded that the overall approach of the respondent to the investigation of potential misconduct of employees was influenced by the fact that the respondent's witnesses are experienced in investigating fraud, and have developed particularly stringent techniques in that regard, as is of course very understandable in a regulated environment. However, I came to the view that this approach was not appropriate in this case and that discretion should have been used when dealing with the claimant (and employees like him), who as an employee ought to have enjoyed their trust and confidence.

130. I was prepared to conclude, given these concerns, that the approach which the respondent took to dealing with the claimant was procedurally unfair - as well as substantively unfair (given the respondent themselves agreed that the sanction of dismissal was disproportionate to the deed). However, as Mr Bradley rightly pointed out, this is not a claim of unfair dismissal.

131. The question I must ask is whether the employer conducted itself in a manner which was likely (even if not calculated) to destroy or seriously damage the relationship of trust and confidence. In this case the claimant resigned on being

advised of the outcome of the appeal. It is important to focus on the terms of that letter.

132. While Mr Calder did not accept that there was any error in the classification of the offence as gross misconduct, as I understood his evidence, he concluded that a finding of gross misconduct was not appropriate, accepting that the claimant had made an error of judgement, that he genuinely believed that there was no suspicion of fraud, and believed had followed correct procedures. While Mr Calder's evidence was clear, his letter was perhaps not quite as clear as it could have been, and certainly the claimant was left with the view that he was still guilty of gross misconduct, and it was only the sanction which was revisited.

133. Accepting that the outcome was that the claimant was guilty of misconduct (but not gross misconduct), the sanction for that was to be a final written warning, which is clearly still a relatively serious sanction.

134. Mr Calder said this was because that his actions were in direct conflict with the expectations of an ARM and contravene guidance and training provided. I have discussed above the extent to which that is in fact not clearly proven in this Tribunal. In any event, he concluded that the claimant's actions fell well below the standards expected of an ARM, but, crucially, he did not consider that he had been dishonest or that he willfully breached the policy.

135. In light of that, the rest of the letter is a particular cause of concern. The letter states that "your credibility to identify fraud and protect the company and its customers as well as your line manager's trust and confidence in you has been severely damaged". Further, the claimant was to undergo retraining and monitoring and supervision. This was "to ensure that you are fully rehabilitated and are able to restore confidence of the Fraud and Assurance function, and demonstrate that you are capable of protecting the company and its customers. I have not taken this decision lightly and I expect you to return to work with an exemplary attitude and willingness to learn from your line manager and your colleagues…." In other words, the respondent did not trust him. There was a lack of trust and confidence. This was a grudging acceptance that the sanction in the circumstances had been too harsh. It was not in any way clearing his name, or accepting his explanation for his actions. This gives no indication that the respondent's trust and confidence in the claimant is restored, despite accepting that he had not been dishonest and willful, yet such trust is necessary for the contract of employment to continuing operating. He was not to be trusted to do his old job which he had done to a very high standard over 15 years. He was to be line managed by George Drummond and others whom he had implicated by accusing them of not having done their job properly. It was not

surprising then that the claimant made a decision to resign in response to this letter.

136. Mr Bradley argued that during the appeal meeting the claimant said that he wanted his old job back, and he relied on this to show that trust and confidence had not broken down. It should be noted however that the claimant is recorded as having said that he wanted his old "role" back. It may well have been that the claimant still had some faith in his employer of 31 years to do the right thing, but once he received the letter of appeal, following on from his experience through the disciplinary process, that faith had gone, and understandably so.

137. Mr Bradley argued that the claimant could not resign in response to anything which happened between the dismissal and the appeal, but I understood him to accept that the contract revived at the point of the appeal outcome letter. He argued that the claimant could not rely on the respondent's conduct between 24 February and 7 April because no contract existed during that period the terms of which could be breached. While that may well be correct in law, I took the view that I did not need to decide that point, because the claimant was not relying on anything that happened between those dates (except, to the extent that there was a delay during which time he was dismissed).

138. I was of the view that the contract of employment had revived immediately following the appeal letter, but that the respondent's actions specifically in the terms of the appeal outcome, while not calculated, were likely to destroy or seriously damage the relationship of trust and confidence.

139. The focus in this case is on the terms of the letter of appeal, but the claimant's actions should not be considered in isolation. His decision came after the treatment he had which at the very least must have dented his trust in the respondent, for the reasons set out above.

140. Of course, as Mr Bradley pointed out, there will only be a breach of the implied term if there was no reasonable and proper cause for the conduct.

141. In this case, the respondent's disciplinary procedure sets out the process to be follow, and specifically provides for a range of sanctions and gives managers discretion to deal with misconduct. The respondent's disciplinary procedure expressly gives the contractual right to issue a final written warning as a penalty for misconduct.

142. However, I questioned whether it could be said that the respondent had reasonable and proper cause for its actions given not only the penalty of a final written warning, but also the requirement for supervision and retraining with a

previous manager and colleagues whom he had implicated (even if wrongly) in a failure of duty.

143. I was aware that the EAT, in the case of **BBC v Beckett 1983 IRLR 43**, held that the imposition of a punishment which was grossly out of proportion to the offence could amount to the repudiation of the contract of employment.

144. The employer's conduct is to be assessed taking this proportionality principle into account. Here, the procedure expressly provided the disciplining officer with a range of options which he could have imposed on the claimant taking into account all the circumstances of the case, including the mitigating factors. Managers had a range of options which they could consider, namely oral, written and final warning dismissal with notice or summary dismissal. In other words, the disciplining officer was required by the terms of the procedure to give consideration to the need to ensure that the punishment fitted the crime.

145. I therefore considered whether or not the punishment was proportionate to the offence in the circumstances of this case. I considered that in this case there were a significant number of mitigating factors. The claimant had worked for the respondent for 31 years. Fifteen of these were in the role of ARM. He not only had an unblemished record throughout this time, but I accepted, given the terms of the appraisals, that he was an exemplary employee. On this one occasion, in hindsight, he made an error of judgement. I accepted, as indeed did Mr Calder, that the claimant genuinely believed that no fraud had been committed, that there was no lack of honestly, wilful breach of policies or attempt to cover up his actions. In the circumstances, the offence would more reasonably have been categorised as a minor one, and in all likelihood a lower penalty would have been appropriate. Furthermore, the extent to which he was to return to the same manager, the same team, and to be supervised, trained and monitored by the manager and his colleagues was highly questionable.

146. In this case the claimant also relied on the respondent's actions before the letter of appeal. In his statement of claim, the claimant states that having received the appeal letter, he reflected on the decision. On reflection, he was of the view that there were a number of very serious concerns. He complained about the fact that Ian Calder relied on other policies rather than the financial crime policy, and indeed he is left with the conclusion that this was to customer's detriment, when in this case it was not. The claimant was also of the view that the offence remained gross misconduct, and I accept reading the letter that it was at least not clear.

147. The claimant had wanted to "clear his name" but other complaints were not upheld. I could understand that it would be appropriate to keep any investigation

into any failure to conduct a full audit separate, as Mr Calder said in the appeal letter. However, given the claimant's concerns that he had been made a scapegoat, at the very least Mr Calder might have been expected to have reassured him, in the appeal letter, that he had followed this up with a call to Christine Robertson, and accepted that one had been carried out.

148. He has various other concerns about his treatment throughout the process; in that he thought they assumed he was guilty, expanded the investigation, and dealt with him in the hearings in an aggressive way. While I did not accept that there were pre-prepared questions, on reading the transcript I can certainly see why the claimant thought that the questions were designed to trip him up, and I have set out my concerns about the disciplinary hearing elsewhere.

149. Mr Bradley said that the correct approach, using the modern formulation, was that there was a breach where the employer "altogether abandons and refuses to perform the contract". Lord Browne-Wilkinson, when he was in the EAT, also said in the **Wood** case that the tribunal's function is to look at the employer's conduct as a whole, and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. Much more recently in **Leeds Dental**, the EAT made it clear that there is no need to show a subjective intention on the part of the employer to destroy or seriously damage the relationship, that is there is no need for the claimant to show that was the respondent's intention.

150. While I could accept here that there was no subjective intention to seriously damage his trust and confidence, the reluctant overturning of the sanctions of dismissal, the lack of vindication for the claimant, the disproportionate nature of the penalty and the requirement to return to work with his previous managers and colleagues, and which involved retraining, monitoring and supervision was conduct, in the particular circumstances of this case, for which there was no reasonable and proper cause. This thus amounted to a breach of mutual trust and confidence and a repudiation of the contract.

151. I considered that this action following on the decision to dismiss, reinstate, and substitute the sanction with a final written warning had seriously damaged the relationship of trust and confidence between the claimant and the respondent. I accepted that this, for the claimant, was the conduct which breached the implied term, coming as it did following the disciplinary process in which at no time was the claimant given the benefit of the doubt. This was conduct which showed that the respondent did not want to be bound by the contract, and therefore amounted to a breach of contract.

2. Was the breach sufficiently serious to justifying resigning?

152. An employee is entitled to terminate his contract if the employer is guilty of a breach of the contract of employment which is so serious that it indicates that the employer no longer wishes the employee to remain in his employment. The EAT has concluded (in **Morrow**) that where there is a breach of the implied term of mutual trust and confidence, then it is "inevitably" fundamental and therefore sufficiently serious to justify resignation.

153. In this case, I have concluded that there was a breach of trust and confidence, and following the principles from case law, that is inevitably fundamental, and therefore I conclude that there was a fundamental breach of contract in this case, justifying resignation. However, in order to establish constructive dismissal, the claimant also requires to show that he has resigned in response to the breach.

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

154. Mr Bradley argued that the claimant in fact resigned because he got a new job. He argued that the circumstances were unusual in that there was no break at all between the resignation, on the Friday, and starting the new job, on the Monday. He suggested that the claimant was being disingenuous in not being able to recall when the job fair was, which of three different options was said by Sandy Bryce, a director at Parks of Hamilton, whether he'd offered him a job, that he would get him a start; that he would get him to see a manager. He said that was remarkable for a man who was desperate for a job. He submitted that, on balance, he had got the job by the Friday 7 to start on Monday 10, and that was the real reason he resigned and not any conduct of the respondent.

155. In this case, the claimant had been dismissed. It was inevitable, indeed a requirement given the obligation to mitigate his losses, that he should immediately commence the search for another job. He knew that his job had been advertised.

156. While there is an alignment of timing here, to that extent as Mr Bradley submits, it could be said that the resignation was in response to him being advised that he had a new job. Although the claimant's evidence around the timing of the offer of the job was not clear, I did not accept Mr Bradley's submissions that it was not credible that given he was desperate for the job that he would not have remembered the sequence of events. I accepted that the claimant while giving evidence was trying, but failing, to remember the exact sequence of events, and the exact wording of what was said to him by the director.

157. In all the circumstances, I did not accept that the claimant had resigned because he had a new job, rather than because the respondent breached his contract of employment.

158. I was fortified in this view because of evidence which I heard regarding the claimant having passed over the opportunity for redundancy just the year before. I therefore accepted his evidence that this was a job which he still enjoyed having devoted the majority of his working life to the company. I accepted that in taking alternative employment, the claimant had lost self-esteem and self-worth, and that his job was much less lucrative than his previous job, with lesser benefits, including pension. I accepted that he would not have resigned lightly, and I accepted for the reasons set out above, that he felt unable to return to a role where he was not trusted by his managers.

159. In any event, even if the fact that he had another job was part of the reason, the EAT has said that the breach of contract need not be the sole or even the principal cause for resigning.

4. Did the claimant delay too long before he resigned?

160. Finally, I considered whether the claimant delayed too long in terminating the contract in response to the employer's breach. Mr Bradley argued that he could not be said to have resigned in response to the breach, and that the delay in doing so where he had previously had an option to accept a breach and resign, his failure meant that he had affirmed the contract. He argued that if the claimant's position was that relations had been destroy essentially from the outset, from the day of the suspension, then by waiting until 7 April, he could not be said to have resigned in response to the breach. He submitted that delay was only one aspect of the question, which involved a choice on the part of the claimant. Here the claimant had a choice to leave in response to conduct by the employer which he said destroyed the relationship, namely the disciplinary procedure, but he chose to stay on.

161. In this case I have found that the fundamental breach was the letter and the respondent's position as set out in that, coming as it did after a number of other concerns by the claimant about the way he had been treated throughout the process. Given that letter was dated 6 April and the resignation was dated 7 April, I concluded in these circumstances that the claimant did not delay too long in terminating the contract in response to the employer's breach.

162. In all the circumstances, I concluded that the claimant has been constructively dismissed.

Unfair dismissal

163. I have concluded that the claimant has terminated his contract in circumstances in which he is entitled to terminate it by reason of the employer's conduct, and therefore that he was dismissed in terms of section 95(1)(c) of the 1996 Act.

164. As discussed above, a constructive dismissal is not necessarily a fair dismissal. Consideration requires to be given to the requirements of section 98(1), which states that the employer requires to show that the reason is one which falls within section 98(2), and that it was reasonable in the circumstances. Mr Bradley did not however seek to argue that the dismissal was fair. In any event I did not find the investigation or response to the disciplinary fair and reasonable. Consequently given conduct of the respondent which was found to be in breach of contract resulting in (constructive) dismissal, I find that dismissal in these circumstances fell outwith the range of reasonable responses and was unfair.

Remedies

165. The Tribunal having determined that the claimant was constructively unfairly dismissed, then turned to the overall question of compensation.

Basic Award

166. The claimant is entitled to a basic award. He had worked for 31 full years with the respondent and he was 53 at the time of the dismissal. The claimant sought £12,220 in respect of the basic award, and Mr Bradley did not dispute the figures.

Compensatory Award

167. In this case the claimant had a new job which started on the Monday, but the claimant was paid until the Friday 7th when he resigned. He was therefore seeking the difference in pay between his previous pay and his new pay. However, the amount of the difference was subject of dispute between the parties.

Mitigation

168. In any event, Mr Bradley argued that the claimant had failed to mitigate his losses. In particular, he brought to the claimant's attention a job of Field Compliance Manager which was a similar if not identical role with a competitor, which the claimant admitted that he would have applied for had he seen it.

169. I have accepted the claimant's evidence that he is still continuing to make efforts to seek alternative more suitable employment. He said that the job at Parks is not his dream job and I got the impression that he is struggling to earn commission in contrast with other longer serving and more experienced salespersons. I could not say that the failure to spot the advert for the equivalent job was unreasonable or showed that he had failed to mitigate his losses.

Past losses

170. The claimant said that the net weekly wage in his job with the respondent was £421.62. Mr Bradley argued that the correct approach was to base the figures on the net pay as stated on the claimant's pay slips, looking over the last full three months of pay, and he said that the net wage was £350.77. This however leaves out of account the claimant's SAYE schemes, into which he paid £150 per month. Although Mr Bradley relied on Harvey and IDS to argue that the net figure was the correct figure, I did not accept his submissions that these figures should be left out of account. I considered that these were payments made to the claimant, but invested on his behalf, and which would be returned to him in the shape of shares or a lump sum at the end of the scheme. I considered therefore that they should be included in the calculation, and if not, should be taken into account as a benefit which the claimant has lost as a result of losing his job. Mr Bradley accepted that if they were to be added back in, then the extra sum per week was £34.62, and I accepted that was the correct figure. Accordingly, I concluded that the correct figure for net pay was £385.39 per week (and not the figure put forward by the claimant).

171. With regard to his new earnings, the claimant had lodged payslips for a period of 8 months, during which time the claimant had earned £10,322.89 net, which equates to £297.78 per week as the claimant proposed (and not £309.69 as Mr Bradley proposed).

172. Using these two figures, losses were therefore running at the difference between £385.39 and £297.69, that is £87.70 per week. The claimant sought loss of wages from the dismissal to the date of the hearing and the respondent accepted that losses were due to the date of the hearing, namely 47 weeks. Over a 47 week period that equates to £4121.90.

Future losses

173. The claimant also sought future losses for 12 months from the date of the hearing. The respondent argued that the claimant was not entitled to any future loss of earnings, because the claimant had failed to mitigate his losses, but if

the Tribunal were to award future loss of earnings it should be restricted to 26 weeks from the date of the hearing.

174. I have accepted the claimant's evidence that he is still looking for more lucrative employment. I accept that at 53 it may well be more difficult to get another job which pays the equivalent to his previous wage. Nevertheless, in all the circumstances, I concluded that it was just and equitable to make an award of ongoing losses of 26 weeks from the date of this Tribunal. Thus the award in respect of such losses amounts to £2,280.20.

Other losses

175. The claimant sought compensation for loss of statutory protection, and there being no challenge to the amount sought, the Tribunal awards £500 compensation under that heading.

176. There was also loss due in respect of pension, because the claimant's pension in his new job is not at the same level as in his previous job. Mr Millar sought the difference between pension contributions at £422.03 per month and pension contributions at £11.06 per month, namely £410.97 per month, a figure with which Mr Bradley did not take issue. For 16 months the total is £6575.52.

177. The claimant also sought loss of other benefits in relation to the fuel card, which he stated to be £100 per month, and which Mr Bradley did not dispute. These losses total £1,600.

Contributory fault

178. Mr Bradley did however argued that there was contributory conduct in this case, such that award made should be reduced by 75%. Although it could be said that it was unusual for a constructive dismissal to be caused or contributed to by any conduct of the claimant, Mr Bradley relied on the principles from the **Polentarutti** case, and I readily accepted that notwithstanding the breach, there could be contributory fault and there is no test of exceptionality (the principle having been confirmed more recently in the case of **Frith Accountants Ltd v Law 2014 IRLR 510**).

179. The focus in a constructive dismissal claim is of course on the respondent's conduct, which I have found to be a breach of contract. However, in this case the claimant himself accepted that, in retrospect, he had made an error of judgement. Although the claimant gave a credible and plausible explanation for this conduct, clearly if he had not made the telephone call that day he would not have found himself the subject of an investigation. Although I have concluded,

(as Mr Calder did) that there was no dishonesty or willful breach of policies, I do accept that that claimant's conduct is to some extent blameworthy.

180. Given the particular circumstances of this case, and the limited extent of contributory conduct, I have reduced compensation by 25%. I accepted Mr Bradley's submission that the usual convention should apply, and that is that the 25% reduction should be applied to both the basic and the compensatory awards

Recoupment

181. As the claimant has been in receipt of Job Seekers' Allowance, the relevant department will serve a notice on the respondent stating how much is due to be repaid to it in respect of JSA. Meantime, the respondent should only pay to the claimant the amount by which the monetary award exceeds the prescribed element, if any.

182. The prescribed amount consists of the loss of wages from the date of dismissal to the date of the judgment, less sums earned. Loss of wages is running at £87.70 per week. The dismissal took effect on 7 April 2017 and this judgment is dated 26 March 2018, that is 50 weeks. The prescribed amount is therefore £4385. The balance falls to be paid once the respondent has received the notice from the relevant department.

Conclusions

183. I have found in this case that the claimant has been unfairly constructively dismissed, and awarded compensation as set out in the table below, with reductions for contributory fault. However, I have emphasized in this case that it was the respondent's conduct which led to the breach of contract. Perhaps the respondent will reflect and make some changes to its policies, in making it absolutely clear that ARM are not to contact agents in any circumstances. Further changes which should be considered relate to the approach to warnings about investigations as well as training for interviewers in the correct techniques for interviewing employees in circumstances such as these, whereby interviewers are much more open to the possibility that an employee has a valid explanation for their conduct. If such adjustments are made, then in future the respondent may well be less likely to lose loyal, committed, honest and hardworking employees in similar circumstances to the claimant.

Compensation table

The tribunal has therefore calculated the compensation as follows:

Head of loss	Calculation	Sub-total	Totals
Basic award	26 x £470	£12,220	
Reduction for contributory fault	Less 25% x £12,220	(£3,055)	£9,145
Compensatory award			
Loss of statutory rights		£500	
Loss from termination date to date of tribunal (40 weeks)	(£385.39 – £297.69) x 47	£4121.90	
Future loss (26 weeks)	(£385.39 – £297.69) x 26	£2,280.20	
Loss of pension (10 months to hearing and 6 months future loss)	(£422.03 - £11.06) x16 months	£6,575.52	
Loss of other benefits (fuel card)	£100 x 16 months	£1,600	
Total award before adjustments		£15,077.62	
Reduction for contributory fault	25% x £15,077.62	(£3,769.40)	
Total compensatory award			£11,308.22
Total award			£20,453.22

Employment Judge: M Robison
Date of Judgment: 26 March 2018
Entered in register: 29 March 2018
and copied to parties