EMPLOYMENT TRIBUNALS

Claimant: Mr M Bassett

Respondent: Mercedes-Benz Retail Group UK Ltd

Heard at: **London South Employment Tribunal** **On: 20-22 May 2019**

Before: **Employment Judge Ferguson**

Representation
Claimant: In person
Respondent: Mr P Wilson (counsel)

JUDGMENT having been sent to the parties on **25 May 2019** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. By a claim form presented on 30 January 2018, following a period of early conciliation from 15 to 16 January 2018, the Claimant brought a complaint of constructive unfair dismissal against the Respondent, having resigned on 11 January 2018. The Respondent defended the claim, disputing that the Claimant was constructively dismissed. The Claimant essentially says that the Respondent's response to an incident on 31 August 2017, in which he was assaulted by a colleague, Mr K, amounted a breach of the implied term of trust and confidence.

2. The issues to be determined were agreed as follows:

    2.1. Did the Respondent breach the implied term of trust and confidence? The Claimant relies on the following conduct:

        2.1.1. Failing to protect the Claimant and other employees from Mr K

        2.1.2. The General Manager Mr Buhagiar's immediate reaction to the assault

2.1.3. The Respondent's handling of the disciplinary and grievance procedures

2.1.4. The Respondent not making genuine efforts to find the Claimant an alternative post when he was unable to return to Epsom due to anxiety

2.1.5. The Respondent's failure to follow its procedures on long-term sickness absence

2.1.6. Mr Jolly of HR emailing the Claimant on 14 December, saying that the Claimant was expected to return to work at Epsom, where Mr K also worked. The Claimant argues that this was the "last straw" that led him to resign.

2.2. Did the Claimant resign in response to any breach of the implied term?

2.3. Did the Claimant affirm the contract by delaying?

2.4. If the Claimant was dismissed, was his dismissal for potentially fair reason?

2.5. Did the Respondent act reasonably?

2.6. Should there be any reduction to any basic and/or compensatory award on the basis of the Claimant's conduct?

3. I heard evidence from the Claimant and, on behalf of the Respondent, from Steven Palmer, the disciplinary officer, Jerry Page, who heard the appeal, Michael Sandle, who dealt with the Claimant's grievance, and Faye McKenna-Davidson, HR Business Partner. The Respondent also submitted a witness statement from Mr Buhagiar, but it was not signed and he was not called to give evidence. I decided it was not appropriate to take it into account so I did not read it.

THE FACTS

4. The Claimant commenced employment with the Respondent on 1 January 2003. By the time of the events relevant to these proceedings the Claimant was a Retail Business Manager at the Respondent's Epsom dealership. One of his colleagues at Epsom was Mr K, another Retail Business Manager. At all relevant times Mr K was in a relationship with a junior colleague, Ms S. She was also based at Epsom but, apparently because of the relationship and to avoid any conflict of interest, she was due to move to the Croydon branch on 1 September 2017. It is not in dispute that sometime in or around June 2017 there was an incident outside work between Mr K and Ms S, resulting in Mr K being arrested and not attending work the following day. Ms S did not press charges and the police took no further action.

5. On 31 August 2017 the Claimant, Mr K and another retail manager, Mr Hoare, were in the managers' office. They all received an email from a female sales executive at the Respondent's Croydon branch enquiring about the availability of a particular car. The Claimant asked Mr K whether Ms S knew the sales

executive from Croydon. Mr K took offence at this question and an argument ensued, culminating in a physical altercation between the Claimant and Mr K. The Claimant left the office. He returned shortly afterwards to collect his phone, went to his car and attempted to call his wife. He then called his line manager and reported that he had been assaulted by Mr K. In the meantime Mr K had reported the incident to Mr Buhagiar, the General Manager of the Epsom branch. Mr Buhagiar telephoned the Claimant and asked him to come and discuss the matter.

6. A meeting took place in the board room, attended by Mr Buhagiar, Mr K, Mr Hoare and the Claimant. The Claimant told Mr Buhagiar that Mr K had headbutted him. He also said he felt he had injuries to his ribs. Mr Buhagiar said he was aware an altercation had taken place between the Claimant and Mr K. He said if it was "six of one, half a dozen of the other", they could agree to move on and no further action would be taken. Mr Hoare said he felt it was six of one, half a dozen of the other. Mr K agreed with this, but the Claimant said there was no way he was equally to blame. He said it was a completely unprovoked attack. Mr K did not say anything further. Mr Buhagiar then suspended both the Claimant and Mr K pending a full investigation. He said "Thank you both, you have now just fucked September for me. I cannot run this dealership with two managers". The Claimant and Mr K were asked to leave the site immediately.

7. Mr Buhagiar conducted an investigation and invited all three managers to investigation meetings on 7 September. The accounts given in the interviews may be summarised as follows.

8. <u>The Claimant</u>

    8.1. The Claimant said he had asked Mr K whether Ms S knew the sales executive at Croydon because he knew she was due to move to Croydon the following day and thought it would be nice if she knew someone there. Mr K then swiveled his chair towards the Claimant and said "what do you mean?", and when the Claimant said he was simply enquiring Mr K kept badgering and saying "what do you mean?". He would not let it go, and the Claimant said "oh fuck off … are you serious", and Mr K replied "don't swear at me". Then the Claimant got up to leave, which involved walking around Mr K's chair and, while standing next to Mr K, who was still sitting, he said "fuck off … I'm not arguing with you". Mr K then replied "of course they fucking know each other they work for the same group", to which the Claimant replied "so it's ok for you to swear at me then?". At this point Mr K launched at the Claimant, his forehead connected with the Claimant's forehead and he pushed the Claimant into the photocopier. The Claimant hit the corner of the photocopier and had bruises on his ribs. When they were against the photocopier Mr K said "I'll fucking destroy you". Mr K then let the Claimant go and the Claimant left, saying "there's no way you're going to assault me".

    8.2. Mr Buhagiar asked the Claimant whether there had been an earlier incident involving Mr K speaking to another colleague, Bick, and the Claimant saying to Ms S, "doesn't it remind you of how it used to be with you". The Claimant said he did not recall the conversation.

9. Mr K

9.1. Mr K said there was a "back story" to the incident, in that he and the Claimant had only recently started working in close proximity to each other, and there had been some friction between them. The Claimant had made comments about Mr K, for example saying that he had "only been a manager for 5 minutes". The Claimant had also objected to Mr K referring to the Claimant as "him". As to the incident on 31 August, Mr K said that when the Claimant asked him whether Ms S knew the sales executive from Croydon he replied "what do you mean? What context are you asking this in?", to which the Claimant said "just answer the fucking question". Mr K asked the Claimant not to swear, and said of course they knew each other. Mr K said the Claimant then took off his glasses and slammed his clenched fists on the table. The Claimant then stood over Mr K, and Mr K said "you seriously need to fuck off, you need to go away now". He also said "you need to relax and calm down". Mr K tried to get up to leave as he was concerned about what the Claimant was going to do and the Claimant put his head on Mr K's head. The Claimant said do you want to fight, and blocked Mr K's way out. Mr K then grabbed the Claimant and pushed him towards the photocopier so that he could get away. They both sat back down and the Claimant then left.

9.2. Mr K mentioned two other incidents before this where he claimed the Claimant had tried to wind him up. On one occasion he made a comment about having slept with Ms S. The other was the incident with Bick. Mr K said he was sorting out a settlement for Bick, but he was on his phone ignoring Mr K. Mr K eventually said to him "get off your phone or I'm going to ram this settlement down your throat". He said it was just banter and that Bick had not taken offence, but the Claimant said to Ms S "doesn't that bring back memories", which he considered unnecessary. Mr K described another occasion when the Claimant had come up to him on the opening of the new dealership and asked if they could "put it all behind them".

10. Mr Hoare

10.1. Mr Hoare said his understanding was that there were tensions between the Claimant and Mr K following something that had happened the day before, but he had been on a day off so did not know exactly what happened. He said Mr K had told him the Claimant made an inappropriate comment about Mr K and Ms S. As to the question the Claimant had asked on 31 August, Mr Hoare said he did not know what the link was but that Mr K took offence and replied "what the fuck do you mean by that?", and the Claimant repeated the question. Mr Hoare said he did not know the back story but the way the Claimant asked the question was to rile up Mr K. He said the first person to get angry was the Claimant and that he was aggressive verbally and in his body language as he told Mr K to "fuck off", and said it was a simple question and to "stop being an arsehole". They were both sitting down at that point. The Claimant then stood up, which Mr Hoare thought was "total provocation", and went round behind Mr K, resting on the counter standing over Mr K. Mr K was calm, saying "why are you asking", and the Claimant was repeating "stop being an arsehole". Mr K

then tried to leave, but the Claimant was standing there. At this point Mr Hoare looked away and the next thing he saw was Mr K and the Claimant both holding each other leaning over the photocopier. The Claimant had his back to the photocopier and Mr K was leaning "chest to chest" with him. Mr K then turned round and sat down and the Claimant walked out of the office.

10.2. When interviewed again later on the same day Mr Hoare gave his account of the initial exchange between the Claimant and Mr K slightly differently, saying the Claimant asked if Ms S knew the sales exec from Croydon, to which Mr K replied "what do you mean by that". The Claimant's response was "fuck off … I am asking you a civil question", and Mr K said "why are you asking me" before the Claimant said "you are a fucking arsehole". The same dialogue was "heavily repeated".

11. The Claimant and Mr K were both invited to disciplinary hearings on 13 September, to be conducted by Steve Palmer, General Manager of the Respondent's Brooklands dealership.

12. The Claimant read out a statement at his hearing, which included an allegation of an earlier incident involving Mr K, six to eight months previously. The Claimant alleged that he had been told by a sales executive that a female colleague, Ms G, had been "threatened with violence" by Mr K. There had been an incident which ended with Mr K saying "If you were a bloke I would smash you in the fucking face". The Claimant then spoke to Ms G directly, and she said she did not want to report it. She implored the Claimant not to say anything. He respected her wishes. A few months later, however, the incident between Mr K and Ms S outside work happened and the Claimant felt he had no choice but to tell management of the incident with Ms G. With Ms G's consent he raised it with the sales manager, Mr Humphries. Mr Humphries later sent the Claimant a text message saying "spoke to [Ms G] and sorted that issue".

13. The Claimant's statement also included reference to the Bick incident, which happened on 30 August 2017. He said when asked about it in the investigation meeting he did not know what they were talking about, but having read Mr K's statement he understood what they were referring to. The Claimant recalled Mr K making the comment about ramming the settlement down your throat. The Claimant did not say whether he had made the comment to Ms S alleged by Mr K.

14. The Claimant also referred to another incident in early August 2017 involving Mr K that was "circulating around the dealership". Mr K had apparently taken a C63 car on a test drive and drove down a narrow road at great speed. A local resident filmed the incident, showing smoke pouring from the tyres, and posted it on Youtube with a comment asking if this is how Mercedes-Benz conduct themselves. The Claimant said it was "a shocking example of irresponsibility of the highest magnitude" displayed by Mr K.

15. The Claimant agreed that on the opening night of the new Epsom dealership he had hugged Mr K. He said he had decided this was a new start and if they were going to make the site work they would have to dig deep and put their

differences aside. He admitted he was distant with Mr K due to the incidents with Ms G and Ms S, but said he was never hostile.

16. The Claimant confirmed, broadly, his account of the incident on 31 August given in his interview. He argued Mr K's account was not plausible, and queried why no-one had asked him why he had taken offence at the Claimant's innocent question. He said he was truly sorry that the incident occurred, but he was at a loss as to how he could have prevented it.

17. When asked about their relationship the Claimant accepted that there was a history, in terms of their professional relationship. The Claimant confirmed his relationship with Mr Hoare was good. Mr Hoare also had a good relationship with Mr K and had no reason to take sides. The Claimant said "he's a good guy but his account is not accurate".

18. Mr K in his disciplinary meeting was asked why he said "in what context" in response to the Claimant's original question. Mr K said "because it came completely out of the blue – it was like he was trying to get at something as he gave no context about the email just coming in… He was just trying to dig, dig, dig and get a reaction and was trying to do so for weeks… I could have reacted better with hindsight…". Mr K confirmed the account he had given in the investigatory meeting.

19. The Claimant was informed on the same day of Mr Palmer's decision, which was to issue both the Claimant and Mr K with a final written warning. The Claimant emailed Mr Palmer that day saying he did not agree with the decision, and he had been put in a terrible predicament because he could not work alongside Mr K again. The Claimant was signed off sick with anxiety from 14 September onwards.

20. On 18 September Mr Palmer wrote to both the Claimant and Mr K confirming the outcome and his reasons. He considered it was clear from Mr Hoare's evidence that both parties had acted aggressively. It was difficult to establish without doubt who initiated the first part of the physical contact, but he was satisfied that both parties contributed, whilst ignoring the potential to take alternative action. He believed they must share the responsibility. He was also concerned that neither party appeared to show any level of concern or remorse that their behaviour was within a customer area.

21. The Claimant appealed on 20 September. He confirmed on 3 October that he was happy for the appeal process to continue during his sickness absence.

22. His appeal was heard by Jerry Page, then Finance & Insurance Director for the Respondent, on 17 October. At the appeal hearing the Claimant said that he could not work with Mr K again and said he would be willing to move to another location.

23. Mr Page dismissed the appeal by letter dated 24 October. Mr Page said it appeared the question the Claimant asked of Mr K was unnecessary, and he noted that the Claimant had alleged Mr K was predisposed to aggressive conduct. He said:

> "Taking all of this into consideration, I do not accept your explanation about why you were asking the question to [Mr K], and this is further compounded by your pursuit of the questioning when it was apparent that [Mr K] was not open to the discussion. I find it implausible in the extreme that you would not consider that unnecessarily questioning [Mr K] about this individual in any context would have been inappropriate and at least had the potential to result in a conflict and, given your views on [Mr K]'s behaviour, I am unclear as to why you partook in a conversation starter which had the possibility to become a confrontation. At the very best, I consider this an unwise choice on your part and at worse, could be viewed as a deliberate attempt to antagonise [Mr K] and start a confrontation. Irrespective of where on this scale your actions lie, I firmly believe that the entire episode was set in motion by your first question and had you not said it in the first place, the resulting situation would not have taken place."

24. As to the physical altercation, he said he was unable to ascertain who instigated it. He addressed the Claimant's arguments about the previous incidents involving Mr K and considered they were not relevant to the appeal. The decision to issue a final written warning was upheld. Mr Page acknowledged the Claimant's request to change location, but said that before the company made a decision he wanted to offer the Claimant the option of mediation with Mr K.

25. The Claimant replied the same day saying that mediation was not appropriate and requesting a decision on whether he could move sites. The following day he sent a further email making a formal request to move to the permanent position of Retail Business Manager at either the Croydon or Brooklands sites. On 1 November Faye Davidson of HR, who had by then taken over dealing with the Claimant's case, emailed the Claimant to confirm that there were currently no open vacancies in his job role at either Brooklands or Croydon, so the company could not agree to his request to move. She requested a meeting with the Claimant.

26. Shortly after this email the Claimant replied asking about the grievance procedure. A meeting was arranged for 3 November. At that meeting, which both parties agree was very brief, Ms Davidson told the Claimant she could offer him a three-month secondment to the Brooklands site. The Claimant asked what the position would be at the end of the three months and Ms Davidson said she could not make any guarantees that the role would be made permanent.

27. On 6 November the Claimant emailed Ms Davidson saying he was unable to accept the offer because there was no guarantee of a permanent position. He alleged there had been a fundamental breach of his contract.

28. The Claimant lodged a grievance on 9 November. The Claimant complained about the company's failure to deal with Mr K, who he argued was a known risk, before the incident on 31 August. He also complained about Mr Buhagiar's response when first told about the incident and his failure to make appropriate enquiries as to the Claimant's health.

29. On 21 November, the Claimant was invited to a stage 1 long-term sickness review meeting.

30. A grievance hearing took place on 28 November, conducted by Mike Sandle, then Regional Head of Business Aftersales. In the hearing the Claimant also complained of the Respondent's failure to make reasonable contact with him during his sickness absence.

31. By letter dated 7 December (sent on 12 December) Mr Sandle wrote to the Claimant with the outcome, confirming the grievance was not upheld. As to the incident involving Ms G, he said that the incident had been dealt with by Mr Humphries. The incident with Ms S had happened outside work, and no action had been taken by the authorities. The company considered the matter closed. As to the Bick incident, he accepted Mr K had used inappropriate language, but noted that Mr K considered it to be banter and he was unable to establish any evidence to the contrary. He had looked into the C63 incident, which had been investigated by Brian Hoey, a Director of the company. Mr Hoey had been satisfied with Mr K's explanation of the circumstances and decided not to take any formal action.

32. On the issue about communication during his sickness absence Mr Sandle said he was satisfied the Claimant had been communicated with appropriately.

33. The Claimant emailed Mr Sandle on 13 December saying he was dismayed by the response and pointing out that he had not addressed the complaint about Mr Buhagiar's conduct. Mr Sandle responded saying that he considered Mr Buhagiar's behaviour appeared proportionate to his personal observations and assessment of the situation.

34. Also on 13 December the Claimant wrote to Jason Jolly of HR saying it was clear that the Respondent was not taking his grievance seriously and were not making any real efforts to resolve the matter. He said his role in the company was unclear, and asked Mr Jolly to confirm that he was actively looking for a solution. Mr Jolly responded, assuring the Claimant that his grievance was being treated seriously. He confirmed that the Claimant's role was Retail Manager at Epsom, but that due to some structural changes his reporting line would be changing. He confirmed that they were looking for a solution, but said he was unsure what a satisfactory resolution "looked like" for the Claimant. He said he was happy to speak on the phone.

35. In further email exchanges that day Mr Jolly said he understood that the offer of a secondment had been rejected, and at the moment the company's position was that the Claimant's role was at Epsom. The Claimant objected again to being required to work with Mr K, and on 14 December Mr Jolly wrote saying,

> "The company's position seems clear, and I know that Faye has discussed this with you directly. Your role currently remains at Epsom and it is the Company's expectation that you will return there on your return to work."

36. The Claimant's evidence was that it was after receiving this email that he decided he had to resign.

37. On 3 January the Respondent's recruitment department emailed Mr Jolly to inform him that a vacancy had been approved for the permanent position of Retail Manager at Brooklands, to replace a Mr Reeves. Immediately on receipt of the email Mr Jolly forwarded it to the Claimant and asked for a telephone call. The Claimant emailed Mr Jolly the following day saying that the offer had come far too late to be considered a genuine attempt to resolve matters. Mr Jolly responded that at the time of the Claimant's original request to move sites the plan to implement the "functional structure" changes had not been formally announced and they were not in a position to share the fact that the role was likely to be made permanent.

38. Ms Davidson (now McKenna-Davidson) confirmed that in her evidence to the Tribunal and I accept that there was no confirmed permanent vacancy before 3 January. She said that she did not want to raise the Claimant's hopes by saying that there might be one before it was confirmed.

39. The Claimant sent an email to Mr Jolly on 11 January saying that he was resigning with immediate effect. He said his position had become untenable due to a "fundamental breach of contract" resulting from a "lack of duty of care".

THE LAW

40. Section 95(1)(c) of the Employment Rights Act 1996 provides:

> **95 Circumstances in which an employee is dismissed**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—
>
> …
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

41. Dismissals pursuant to section 95(1)(c) are known as constructive dismissals.

42. Four conditions must be met in order for an employee to establish that he or she has been constructively dismissed:

    42.1. There must be a breach of contract by the employer. This may be either an actual or anticipatory breach.

    42.2. The breach must be repudiatory, i.e. a fundamental breach of the contract which entitles the employee to treat the contract as terminated.

    42.3. The employee must leave in response to the breach.

    42.4. The employee must not delay too long before resigning, otherwise he or she may be deemed to have affirmed the contract.

    (Western Excavating (ECC) Ltd v Sharp [1978] ICR 221; WE Cox Toner (International) Ltd v Crook [1981] ICR 823)

43. An employer owes an implied duty of trust and confidence to its employees. The terms of the duty were set out by the House of Lords in Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606 and clarified in subsequent case-law as follows:

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

44. Any breach of this term is necessarily fundamental and entitles an employee to resign in response to it (Morrow v Safeway Stores Ltd [2002] IRLR 9).

45. Where an alleged breach of the implied obligation of trust and confidence consists of a series of acts on the part of the employer, the tribunal should consider whether the final act which led the employee to resign is capable of amounting to a "last straw". It might not always be unreasonable, still less blameworthy, but its essential quality is that it is an act in a series whose cumulative effect was to amount to a breach of the implied term. It must not be utterly trivial and an entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. (Omilaju v Waltham Forest LBC [2005] ICR 481).

46. Omilaju was affirmed in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978. In the latter case Underhill LJ held at paragraph 55:

> "I am concerned that the foregoing paragraphs [summarising the authorities on 'last straw'] may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation…)
>
> (5) Did the employee resign in response (or partly in response) to that breach?"

CONCLUSIONS

47. In closing submissions the Respondent did not pursue arguments as to the reason for the Claimant's resignation or delay, and I accept that the Claimant resigned in response to the Respondent's insistence that his role remained at Epsom, and that he did not affirm the contract between 14 December and his resignation on 11 January. The real dispute is whether the Respondent acted in such a way as to breach the implied term of trust and confidence. It is difficult to look at Mr Jolly's email of 14 Dec in isolation, since it was the culmination of a process that began with the disciplinary proceedings, so I will consider whether the Respondent's conduct cumulatively amounted to a breach of the implied term.

48. The burden is on the Claimant to show a breach of the implied term, and the threshold is high. He must establish that the Respondent, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between him and it. Mere unreasonableness is not sufficient.

49. As to the "failure to protect" allegation, I do not accept that the Claimant has established any conduct capable of contributing to a breach of the implied term. The full details of the three incidents he has referred to – the Ms G incident, the one involving Ms S outside work and the C63 incident – are not known. Even if it could be established that it was unreasonable of the Respondent not to take formal action in response to any or all of them, the Claimant was not involved in any of them, other than in the reporting of the Ms G incident, and it would not be possible to describe any failure as being calculated or likely to destroy or damage the relationship of confidence and trust between the Claimant and the Respondent. Based on the information before me, they were not incidents that demonstrated, as the Claimant argues, that Mr K was a danger to his colleagues.

50. As to Mr Buhagiar's immediate reaction on 31 August, I do not consider that this comes close to establishing a breach of the implied term. He used bad language in response to a situation that he evidently considered to be of enormous inconvenience to him. As to the suggestion that he should have offered medical assistance after the Claimant had alleged he was headbutted, I do not accept that there was any absolute duty to do so. The Claimant was not presenting with any concerning symptoms and even now he does not say that he was suffering from symptoms that were invisible. It would have been a matter for Mr Buhagiar to assess whether the Claimant was safe to travel home and there was nothing to suggest that it was unreasonable to conclude that he was. The decision to suspend both employees was also reasonable, given the indication from an independent witness that it was 50/50 and the Claimant's refusal to accept any blame. Overall his conduct could not be described as calculated or likely to destroy or damage the relationship of trust and confidence.

51. The Claimant makes various criticisms of the investigation, analysing in particular Mr K's account and arguing that it was implausible. The Respondent was not required to conduct an investigation to the standard of a criminal investigation, but only to do what was reasonable and proportionate in the

circumstances. It was difficult to establish from either the Claimant's or Mr K's account how the two men had ended up on the photocopier. Clearly the fact that the Claimant had his back to the photocopier and Mr K was on top suggests that Mr K was the aggressor at that moment. Indeed he accepted that he had pushed the Claimant, saying that he did so in order to get out. In fact it was the Claimant who left. But Mr Palmer's conclusions did not involve precise findings as to how the altercation took place. He was considering relative culpability and on that issue it was entirely reasonable for him to place significant weight on the evidence of Mr Hoare, whom the Claimant had accepted would have no reason to take sides. Mr Hoare's account clearly suggests that, even if Mr K had launched at the Claimant towards the end of the incident, the Claimant had been deliberately provocative and had acted in a physically aggressive way by standing up and approaching Mr K. The Respondent did not need to determine whether it was more blameworthy to provoke someone or to react in a physically aggressive way to that provocation. It was reasonable for Mr Palmer to conclude that both parties had been guilty of misconduct which justified a final written warning.

52. I accept it was not entirely clear from the investigation why Mr K had reacted so badly to the Claimant's question. Mr Page suggested in his oral evidence that Mr K had been romantically involved with both women whom the Claimant had asked about. That is not evident from any of the evidence obtained during the disciplinary process, and it was not put to the Claimant. However, I consider it was sufficiently clear from the evidence of all three parties that there was a history of tension between the Claimant and Mr K, and it was reasonable for Mr Palmer to place weight on Mr Hoare's evidence that his impression was that the Claimant made the comment to "rile" Mr K. Mr Page's outcome letter went further than was really justified from the evidence in criticising the Claimant's conduct, but I accept that it represented his genuine view and it was not conduct that was calculated or likely to destroy or damage the relationship of confidence and trust.

53. The Claimant complained about Mr Buhagiar re-interviewing Mr Hoare after having spoken to the Claimant and Mr K, and sharing with him what Mr K had said, but I do not accept there is any valid criticism here. As I have said, the Respondent is not required to meet the standards of a criminal investigation, and in any event there is nothing inherently unfair or problematic in asking a witness to comment on something another witness has said.

54. The Claimant suggested in cross-examination of Mr Palmer that he had not been impartial because he said twice during Mr K's hearing that the hope was to get him back to work, and he had not made any similar comment to the Claimant. Mr Palmer accepted that in hindsight he probably should not have made that comment. It is certainly not sufficient to establish that he was biased, and I do not accept that he was.

55. As to the grievance procedure, the Claimant did not agree with the outcome, but there is nothing about Mr Sandle's handling of it that could be said to be calculated or likely to destroy or damage the relationship of confidence and trust. When the Claimant pointed out that he had failed to deal with one aspect of the grievance he quickly rectified that.

56. The Claimant's complaints about the Respondent's efforts to find him an alternative post are not well-founded. I have accepted the Respondent's evidence that there was no permanent vacancy until 3 January. In those circumstances the Respondent did the most it could by offering the Claimant a temporary secondment, which Ms McKenna-Davidson described as being "above headcount". The failure to communicate to the Claimant that the post was likely to become permanent, whether this was because of commercial sensitivity or the desire not to raise the Claimant's hopes, cannot be said to have been calculated or likely to destroy or damage the relationship of trust and confidence. The Claimant would have been in no worse position had he accepted the three-month secondment, given his position that he was unable to work at Epsom, and indeed it would probably have enabled him to return to work. The Claimant having rejected it, and there being no other vacancy at the time, it was not unreasonable for Mr Jolly to confirm that the Claimant's position was at Epsom. Contrary to the Claimant's assertion, Mr Jolly had also said only the day before that they were still trying to find a solution.

57. Finally, the issue about communication during sickness absence. The Respondent was in regular contact with the Claimant from the moment he was off sick until his resignation. I accept that the Respondent's policy says that the Respondent should usually make contact within the first three weeks, but the Claimant's absence was directly linked to the issues he had raised in his appeal, including the request he made in the appeal meeting for a transfer to another site. It was understandable that the Respondent allowed that process to conclude before instigating the formal long-term sickness absence procedure. There was certainly nothing in the Respondent's conduct in this respect that could have contributed to a breach of the implied term.

58. For the avoidance of doubt, I have also considered the Respondent's conduct cumulatively and I conclude that there was no breach of the implied term. The Claimant was not therefore dismissed and his claim fails.

_____

Employment Judge Ferguson

Date: 14 June 2019