EMPLOYMENT TRIBUNALS

Claimant: Mr R Bussey

Respondent: The Insolvency Service

HELD AT: Manchester **ON:** 4,5, 6,7 and 8 February 2019

BEFORE: Employment Judge Sharkett

REPRESENTATION:

Claimant: In person
Respondents: Miss Balmer, Counsel

RESERVED JUDGMENT

The decision of the Tribunal is that:

(1) The claimant was not dismissed in accordance with s95 of the Employment Rights Act 1996.

(2) The claimant resigned from his position with the respondent.

(3) The claimant's claim that he was constructively unfairly dismissed is not well founded and is dismissed.

REASONS

1. The claimant brings a claim of constructive unfair dismissal by a claim form presented on 3 August 2017. At the beginning of the Hearing the issues to be determined by the Tribunal were identified as:

(1) Was the claimant dismissed. In order to determine this the Tribunal must decide:

a. If the respondent was in breach of an express or implied term of the claimant's contract of employment, and if so was it a fundamental breach going to the root of the contract? The claimant relies on the following alleged breaches:

(i) His performance grading for end of year 2014/15 which is alleged to have been unwarranted;

(ii) The evidence given by Mr Simon Button to Miss Victoria Griffiths (the Grievance Investigator) which is alleged to have been fabricated;

(iii) The alleged refusal by the respondent to investigate the claimant's complaint of alleged serious misconduct by Mr Button; and

(iv) The disciplinary proceedings taken against the claimant which are alleged to have been manifestly unjust;

b. Did the claimant resign in response to the breach or did he waive the breach by delay thus affirming the contract The respondent will say that the claimant's resignation was not in response to any fundamental breach but rather his own desire to retire. He delayed in resigning and that in respect of allegations dating back as far as 2015 he affirmed any breaches alleged to have occurred at that time. It is the claimant's case that whilst he accepts he waived the alleged breaches in 2015 he can now rely on them under the last straw doctrine which has the effect of reviving the previous breaches.

c. If the Tribunal concludes that the claimant was entitled to resign in response to a breach or breaches on the part of the respondent and thus satisfy the definition of a dismissal in accordance with s95 (c) Employment Rights Act 1996 (ERA 1996), can the respondent show that the dismissal was for a potentially fair reason. Miss Balmer submitted that if the respondent continued to argue that it could have been a fair dismissal it would probably be argued on the basis that it was for some other substantial reason of a kind justifying the dismissal;

d. If the respondent establishes the fair reason then was the dismissal fair or unfair within the meaning of Section 98 of the Employment Rights Act 1996.

e. If the dismissal was unfair what loss, if any, has the claimant suffered as a result of the dismissal.

f. Was the claimant's conduct prior to termination such that it would be just and equitable to reduce any basic award by reason of the claimant's conduct prior to dismissal, such that any compensatory award should be reduced to reflect his contributory fault;

g. Should any compensation awarded be reduced to reflect the likelihood that the claimant would have resigned soon afterwards in any event.

2. The claimant appeared in person and called three witnesses to give evidence in support of his claim in addition to his own oral evidence. The witnesses were:

a. Mr Keith Felton (ex-colleague of the claimant),
b. Mr Nigel Benson (ex-colleague of the claimant) and,
c. Mr Paul Bailey (ex-colleague of the claimant).

3. Ms Baumer appeared on behalf of the respondent and called the following witnesses:

a. Mr Daniel Jones, (Law Clerk)
b. Mr Keith Owen (Director for the Investigation and Enforcement Directorate) (IES).
c. Mrs Melanie Keeley (Senior Investigation Officer and claimant's line manager),
d. Ms Bridget Leigh Palmer (Legal Director),
e. Mr Ian West (Deputy Chief Investigation Officer),
f. Mr Orwell Jones (Director of Criminal Enforcement (Prosecutions North) and Appeal Officer,
g. Mr Glen Wicks (Deputy Chief Investigation Officer (DCIO) and Disciplining Officer,
h. Simon Button (Deputy Chief Investigation Officer (DCIO) at Manchester and claimant's Interim Line Manager.

4. The Tribunal was provided with a joint bundle of documents running to some 565 pages. All references to page numbers in this Judgment are references to page numbers in the bundle unless otherwise specified.

5. Ms Balmer on behalf of the respondent submits that there are often cases where an employee may not agree with an employer and think that the employer has got it wrong. This may well lead to an employee's resignation but as a matter of law this will not usually amount to a dismissal unless looked at objectively, the conduct of the employer is so egregious or manifestly unfair or unreasonable, that it breaches the implied duty of trust and confidence. She submits that the claimant had approached his case as a criminal trial or prosecution but that the issue here is not whether Mr Button was guilty of misrepresentation or fabricating evidence but rather whether the decision of the respondent was reasonable. Ms Balmer asks the Tribunal to have regard to the manner in which the claimant has challenged the evidence by relying on exact words spoken for example whether Ms Keeley is being inconsistent when on one account she refers to the claimant's conduct as rude and aggressive and another as abrupt and confrontational. The claimant she submits perceives injustice where a reasonable person would not, he does not take criticism

well and has a habit of raising allegations against those who do not agree with him or question him. When criticised he seeks to deflect the blame onto others.

6. Ms Balmer further submits that there is no evidence that Mr Button lied or fabricated evidence the claimant merely denies that he was spoken to about his behaviour. The claimant accepts that PMDR was discussed at the meeting of 28 January 2015 and 25 February 2015 and there are contemporaneous documents to support this. She submits that even if Mr Button is wrong about the dates he said he discussed matters with the claimant it does not follow that he fabricated evidence and made up lies, he may simply be mistaken and there is no evidence of the vendetta suggested by the claimant. Ms Balmer submits that it was reasonable for the respondent to refuse to carry out a further investigation into the claimant's allegations because he had made serious allegations without producing evidence to support them. He accepts his grievance was dealt with correctly and the outcome of that was that there was a conflict in the evidence. There was no evidence to support the fact that Mr Button has done as the claimant alleged and all those present at the validation meeting confirmed that Mr Button presented a balanced view of the claimant.

7. Ms Balmer submits that the decision to take disciplinary action against the claimant was not manifestly unjust and did not amount to a fundamental breach nor she says can be relied on as a last straw. The disciplinary process was properly followed and all those involved were professional in their approach. In respect of the sanction she submits it is not whether the sanction of a final written warning was the right one but whether it was so manifestly unfair that it breached the implied duty of trust and confidence. She drew the Tribunal's attention to the number of misconduct issues under investigation and submits that the behaviour issues with Mr Button and Mr West alone warranted action. She reminded the Tribunal that the claimant had only been recently informally warned about his conduct by Mr Owen and therefore a final written warning was potentially justified given the further conduct of the claimant. She submits that if you add to that the conduct surrounding the M case a final written warning is even more probable. She submits that there was a tendency on the part of the claimant to think that he could do whatever he liked and that he demonstrated very little respect for managers or lawyers. She says that given the experience of the claimant it would have been obvious that he was operating above his pay grade and that he needed to involve his line manager. As he had never been involved with an MOU she submits he clearly should have known that he had neither the experience nor the authority to discuss whether an MOU might need to be put in place; by doing so he overstepped the mark because he thought he could do whatever he wanted. On this basis she submits that a final written warning was warranted because the claimant thought he could do as he pleased and that everyone else was wrong.

8. The claimant reminded the Tribunal of the events leading up to his discovery that he had been awarded a box 3 marking when he had been told by Mr Button that he considered him to be a solid 2. He further submitted that his decision to resign was in no way connected to the reason why he left, this he says is firmly because of the way he has been treated by management.

9. The claimant submits that the Tribunal should consider what he refers to as the 'acid test' which is that if I accept that Mr Button told the claimant at the meeting

on 24 March 2015 that he was regarded as a solid 2 then it follows that his presentation of the claimant at the validation meeting was false and that there is substantial documentary evidence to support his assertion. The claimant refers the Tribunal to paragraphs 2 and 3 of the grievance outcome letter. He submits that Mr Button's evidence to this hearing is not credible and that the documents show that he has lied on a number of occasions. The claimant submits that his service with the respondent has always been at or above an acceptable level and this is corroborated by the absence of expressions of concern from his managers and the positive comments about his work following his review meeting with Mr Button. The claimant submits that Mr Owen was instrumental in changing Mr Button's assessment of him because he viewed the claimant as a supporter of his previous line manager Mr Bailey. The claimant refers the Tribunal to the evidence of Mr Button and Mr Owen which he submits demonstrate that Mr Button had lied and that Mr Owen's evidence is untenable.

10. The claimant submits that it is inconceivable that Mr Owen took no part in the decision of the Legal Directors not to investigate the claimant's allegations against Mr Button and that their failure to do so was a breach of the respondent's disciplinary policy. He further submits that having taken the decision not to investigate it was wholly inappropriate to then tell Mr Button of his complaint because it left him exposed to the risk of retribution. The fact that he took the decision to confront Mr Button himself was a matter within his control whereas he had not been consulted about Ms Palmer's decision to tell him.

11. The claimant accepts that he questioned what he refers to as the lawyer's lack of fortitude in June 2016 but submits that these were private comments not intended for public consumption and were in any event only minor. He submits that the respondent was in breach of the ACAS code to include the two matters in the disciplinary process given the time that had passed. This he submits was unfair and done only to add weight to the seriousness of the disciplinary proceedings.

12. The claimant refers the Tribunal to his service record and his history of working on his own initiative. He submits that his entries on cyclops were sufficient and that no further action had been needed because he did not believe the arrangement he had with the police amounted to a joint investigation. The decision to take him to a disciplinary hearing was therefore unreasonable. In respect of the disciplinary process itself he submits that the appointment of Mr Jones as the investigator was inappropriate because he was line managed by Mr West and both Mr Wicks and Mr A Jones lacked objectivity as they were members of the senior management team led by Mr Owen. The claimant submits that these appointments were made so that Mr Owen could keep the matter close to him and thus created the potential for influence on the investigation. He further submits that Mr Wicks failed to discharge the duty upon him as the decision maker in the process by refusing to investigate relevant lines of enquiry that he had requested.

13. The claimant refers the Tribunal to further inconsistencies in the evidence of Mr Button in respect of this matter in particular when he became aware of the entry on cyclops and the instructions he had given to the claimant about the scope of the M investigation and that the lawyers required police agreement to a joint operation. In respect of the interview held with the suspect at the police station he submits that the police officer was present to operate the recording equipment which he was not

authorised to access. He did not ask questions in relation to the police enquiry nor did she his enquiry. He accepts in hindsight, knowing what he does now, that he would have notified his line manager before undertaking the interview.

14. The claimant submits that but for the failure of Ms Keeley to see the update on cyclops it is likely that he would still be in the employment of the respondent. He submits that management should have identified his actions in the M case as a training need and that the decision to impose a disciplinary sanction was inappropriate and driven by Mr Button as a spiteful retaliatory act in response to the grievance and complaint the claimant had raised against him.

15. In respect of his relationship with management, the claimant submits that these allegations have been 'bolted on' to add to the seriousness of the proceedings. He submits that it is because he had the temerity to defend his actions which necessitated him in alleging management failures that led to accusations that he was rude and disrespectful. He submits the conversations could and should have been managed by all parties in a better manner. He further submits that his conduct should have been addressed immediately. He submits that the disciplinary action taken against him was unwarranted and together with the earlier breach in 2015 caused him to resign.

FINDINGS OF FACT

16. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact. These findings of fact are not a rehearsal of all the evidence before the Tribunal but all relevant evidence has been considered when making findings on the issues to be determined.

17. The claimant was employed by the respondent and its predecessors from January 2005 in the capacity of an Investigation Officer. The claimant on appointment was attached to the Manchester Office on the understanding that he would work from home which was some 120 miles away. The Manchester Office was headed by a Deputy Chief Investigation Officer (DCIO) and had two small investigation teams known as A and B. Each of those teams was led by a Senior Investigation Officer (SIO). The claimant worked for the Manchester B team and reported to his SIO Mr Philip Bailey (Mr Bailey).

18. The claimant's role involved him undertaking criminal investigations into fraud and for the most part he carried out this work on his own initiative only seeking assistance from management if required. The claimant was allocated his work by the DCIO who would have received initial instructions about the nature of the investigation to be carried out from the in-house lawyer. The in-house lawyer would give instructions about the nature of the enquiries to be undertaken by the Investigating Officer. The work of the claimant involved gathering evidence from witnesses, collecting relevant documentary material and interviewing suspects in a case. Once the investigation had been carried out the file would then be passed to the in-house lawyer who would make a decision on whether a criminal prosecution would follow. In 2015 the claimant enjoyed an unblemished record and was highly regarded by both his peers and line manager Mr Bailey.

19. In both oral and written evidence, the claimant explained that he worked from home and although he was line managed by Mr Bailey, his style of management was one of light touch. The claimant explained that Mr Bailey did not require him to supply verbal updates of ongoing investigations on a regular basis, nor was he contacted for information regarding lines of enquiry to be pursued. In oral evidence Mr Button and Ms Keeley said that they expected investigators to provide sufficient information on the system to enable someone reading it to have an understanding of what was happening in an investigation but they also also expected investigators to communicate directly with their managers generally and especially where there was a potential for the investigation to go in a direction that was outside the authority of the investigator and would require the involvement of his managers. The Tribunal note that in the Performance Management and Development Review (PMDR), completed by Mr Bailey dated 6th January 2015, he records the following about the claimant (p53).

"He is in regular contact with me discussing his investigations, identifying any areas of weakness in the evidence so that they can be progressed in a timely and costs effective manner as well as identifying investigations that require further in depth investigation"

The claimant knew what Mr Bailey had written in this report and has not sought to challenge it either when Mr Bailey was still his line manager or in his own evidence before this Tribunal. The entry is also reflective of what the claimant's DCIO Mr Simon Button (Mr Button), and his SIO, Ms Melanie Keeley (Ms Keeley), have described of their expectations of communications with investigators. Having regard to the evidence of Mr Button and Ms Keeley and the documentary evidence of Mr Bailey which supports their evidence, I find on the balance of probabilities that investigators were required to do more than simply provide updates on the system as a means of communicating with their line managers and there was an expectation that they would regularly communicate with their line manager in the manner described by Mr Button and Ms Keeley and as described by Mr Bailey at p53.

20. In May 2014 Mr Button who had been the SIO of the Manchester A team had temporarily taken over the role of DCIO at Manchester. Shortly thereafter Mr Keith Owen (Mr Owen) had been appointed as the new CIO, and Mr Button's role of DCIO was made permanent. The effect of this appointment on the claimant was that Mr Button became line manager to the claimant's line manager and now had responsibility for both the teams in Manchester.

21. The claimant had had very little dealings with Mr Button prior to his appointment as DCIO in 2015 and there is no report of any previous difficulty in their relationship. Following Mr Button's appointment a meeting was arranged so that the claimant and his close colleague Mr Felton could meet with Mr Button and introduce him to the Official Receiver in Newcastle upon Tyne (p30). The meeting took place on 28 January 2015 and once the initial purpose of the visit had been concluded talk turned to other matters including the PMDR. During the meeting Mr Button explained what it was that he expected both the claimant and Mr Felton to do in preparation for the year end meeting with him which would inform his year-end marking of their performance.

22. It is clear from the evidence of both the claimant and Mr Felton that they were not happy with what Mr Button was asking them to do in preparation for the end of year PMDR assessment because Mr Felton explained in oral evidence that it was after this that he took the decision to retire. He told the Tribunal that this was because he did not like the change in management style, he no longer felt supported in his role and was not prepared to do as Mr Button had asked. The claimant was equally unhappy with Mr Button's instruction. He had previously supplied information to Mr Bailey for the PMDR but did not like the way in which Mr Button had told him what he was expected to do. The claimant referred to the PMDR policy to establish whether he was required to do as Mr Button asked and discovered that he was not.

23. The claimant denies that Mr Button told him not to be so negative about the PMDR process, but he does accept that he has heard Mr Button give what has been referred to in this Tribunal as, "the Queen's shilling speech"; he was however unable to recall the occasion on which this had taken place. Having heard the claimant give evidence I note that when the claimant is asked whether words were or were not said he will deny it unless it is the exact word used at the exact time relied on. It was only when the Tribunal became aware of this tendency as the hearing progressed and the questions were put in a different way i.e. the claimant was asked if the word or words to that effect were used, would he admit what was put to him. Given that the 'Queens shilling speech' is one where the speaker is telling the other person that if they want to take the Queen's money they are expected to do what is asked of them in their work, and, given that all other aspects of the claimant's work were of a high standard up to that point, I find on the balance of probabilities that it is more likely than not that the speech would have been given in respect of the claimant's open dislike for the PMDR process because there was no other reason for the claimant to have been referred to the Queens shilling. Although Mr Button may not have said the exact words quoted I find that the spirit of the speech would have been in respect of the negative approach of the claimant to the PMDR.

24. I also find on the balance of probabilities that the discussion surrounding PMDR was more than just a fleeting discussion held in a pub as has been suggested by the claimant because it is clear that both personal and corporate objectives of the PMDR were referred to at this meeting as is evidenced by the email from Mr Button just a day later which confirmed

"*Again I am happy to assist you with delivering on your personal and corporate objectives as this is an area I am willing to discuss as regularly as you feel necessary"* (p35).

25. At the end of January 2015 the claimant and the rest of his team were told that Mr Bailey had gone on sick leave and would be off for two months, in his absence Mr Button would be taking over responsibility for the end of year PMDR meetings. His rationale for making this decision was that even though he was no longer a SIO, it would have been unfair to draft someone else in to be responsible for the year-end review because the person appointed would have little or no knowledge of the individuals being appraised. He advised the team;

> *"It would not be fair to draft someone else in so late into the reporting year. So please contact me directly for issues in these areas"*

26. It is the events that led from Mr Button's decision to take responsibility for the claimant's year end review that ultimately led to the breakdown in the relationship between him and the claimant. To give context as to how that came to be it is perhaps helpful to have some understanding of how the PMDR process worked although it is a system that is familiar to most who work in the field of employment. The Tribunal was told the process involved firstly setting objectives for the employee at the beginning of each year against which the employee would then be measured. This was done by scoring them within 3 box markings. Whilst in his witness statement the claimant asserts that a box 3 marking was one where development was needed he accepted in oral evidence that the policy document states that it is not a poor performance marking (p477). The objectives were essentially set in two categories, the 'whats' and the 'hows' (p53), and from April 2014, 10% of an employee's time was required to be spent on corporate contribution, which I was told included such things as giving talks or looking at what an employee had done 'for the greater good of the whole department'. The three performance ratings were based on outcomes and behaviours. The role of the line manager was to set the objectives and give indicative markings twice a year, prior to presenting the proposed box marking to the validation team. There was a requirement that there would be a percentage of employees in each box marking. The validation team included not only line managers but also independent buddies to ensure consistency and fairness (p464-479). It is not disputed that at the mid-year review in June 2014 the claimant had been marked as a box 2 by his then SIO, Mr Bailey.

27. It is acknowledged by all parties that the PMDR was a system which had not been well received by everyone. In oral evidence the claimant explained that the PMDR was a hot potato in the office and that there were some, including him and Mr Bailey who had strong views about the process and their dislike of it. The claimant explained that he and others were of the opinion that the process was overly bureaucratic and was generally disliked by many. Mr Bailey did not hide his dislike of the PMDR and this led to some tensions between him and his superiors immediately before he went off sick and then retired.

28. Both Mr Button and Mr Owen explained that Mr Bailey had been unable to attend the June 2014 validation meeting and had asked Mr Button to present the proposed box markings for Manchester Team A in his stead. When Mr Bailey passed the relevant PMDR documentation to Mr Button he became concerned about the limitations of the objectives that had been set for the team by Mr Bailey. Mr Button discussed this with Mr Owen and both were of the view that the objectives were too limited and did not sufficiently challenge or stretch the employees' abilities. In particular there were concerns that the objectives made no reference to corporate contribution. It was agreed with Mr Owen that Mr Button as the newly appointed DCIO, would speak to Mr Bailey about the matter and explain that it was felt he was letting his team down by failing to set appropriate objectives. Soon after this Mr Bailey went on sick leave and subsequently left the employment of the respondent and for the reason set out above (para 14), Mr Button assumed responsibility for the year end PMDR of Manchester B team.

29. Whilst there remains some dispute about what was discussed at the meeting of the 28 January 2015, it is clear that Mr Button suggested to the claimant and Mr Felton that they would need to provide a self-assessment for their year-end review to demonstrate their corporate contribution to the organisation so that he would be able to allocate the appropriate mark to take to the validation team. In oral evidence Mr Felton confirmed that he had been asked in the meeting to provide a document to show evidence of 'corporacy'. Mr Felton explained that he did not agree that he should have to do this and expressed his disagreement to Mr Button. In oral evidence he also explained that he had no interest in the PMDR and could *"not have cared less"* what box marking he got. He explained that he was ready to leave the respondent because of the change in management style and that he no longer felt supported.

30. Mr Button arranged to visit the North East to carry out the year end meetings during Monday 23 March to Wednesday 25 March. In his email he indicated (p42) that:

> *I would want to have a few hours with each of you individually to not only cover the Yr14/15 reporting process but to have a wider conversation re your new individualised objectives for Yr 15/16, any new initiatives or ideas you may want to discuss (corporacy?) or any other matters.*
>
> *Can you please ensure that you are able to bring your PMDR evidence to the meeting.*

31. As mentioned above neither the claimant nor Mr Felton were happy about the manner in which they had been told to provide a self-assessment for the PMDR and having consulted the PMDR policy (472-482), and discovered that he was not mandated to provide one the claimant decided that he would not. In oral evidence he explained that he always previously submitted a self-assessment but had decided that he was not going to submit one this time because of what he perceived to be the overbearing attitude of Mr Button in this regard and the fact that the policy entitled him to make that decision. By email of 10 March 2015 he advised Mr Button in the following terms (p41); -

> *"The imposition of quotas I believe has led us into a rather unsavoury position. IO's are being required to compete with their peers in the appraisal process. The decision of management as to which category I fit seems to rely on the fitness of my self-assessment portfolio.*
>
> *I have therefore decided not to submit self-assessment"*

32. Mr Button accepted the claimant's decision but told him that he still wanted to meet with him to discuss 'this' and other work-related matters. The claimant explained that he was apprehensive about the meeting of 24 March 2015, due to that fact that he had not agreed to submit a self-assessment, however it is his evidence that the meeting went well with Mr Button assuring him that he would be marked as a box 2. Mr Button's recollection of the meeting is somewhat different. He disputes that he told the claimant that he was a solid 2. He explained that if the marking depended only on claimant's abilities as an investigator he would have been marked as a box 2

but that was not the case and that was why he had asked all the Manchester B team to submit self-assessments so that they would have evidence to demonstrate their abilities and achievements elsewhere.

33. The claimant arrived at the meeting with a folder of documents that he referred to during the meeting but was not prepared to share it with Mr Button. It is not disputed that the claimant answered questions asked of him but Mr Button explained, and the claimant did not deny, that in response to a question the claimant would refer to his file of documents and then close it again pending a further question and the need to refer to it again. Mr Button explained that he went to the meeting in the hope of getting as much positive information from the claimant as he could and that was why he did not challenge the claimant about the manner in which he was presenting his answers to questions. However, he explained that apart from the claimant referring to having presented one talk he offered no other examples of corporate contribution. In response to questions put by the claimant Mr Button acknowledged that the claimant was an accredited financial investigator and explained that as he did not line manage this aspect of the claimant's work he had approached the IFI who advised him that the claimant only carried out this work in relation to his own cases. He also explained that the claimant had not volunteered this as an example of corporate contribution in the PMDR meeting and nor had he given him details of any of the work he had carried out. In as far as attending continuing professional development courses for this work, Mr Button was of the view that this was a requirement of accreditation and not evidence of corporate contribution. The claimant did not challenge Mr Button's evidence that opportunities for identifying areas of contribution may have been missed because of the way in which the claimant chose to give information, which in his view resulted in the meeting taking longer than needed and it being constrained.

34. Mr Button explained, and it has not been disputed, that in March 2015 the claimant was regarded as a very good thorough and rounded investigator. The claimant does not seek to deny that he was opposed to the rationale of the PMDR which is evidenced by him voicing his opinions on the same and exercising his right not to provide a self-assessment to help demonstrate his achievements. It is correct that there were others that did not agree with the process but that is irrelevant in respect of his own particular views and the manner in which he chooses to enforce them. It is also correct that under the terms of the PMDR policy he had the right not to submit a self-assessment. However, in acknowledging that right, Mr Button also had the right to take into account the reasons the claimant gave for not doing so (as set out in para 20 above), which reinforced the claimant's views about the PMDR process and the manner in which the process was applied in awarding box markings. It is not unreasonable therefore, given the manner in which the claimant dealt with his file of papers in the meeting of 24 March, which he does not dispute, for Mr Button to have formed the view that he did. The fact that the claimant answered all the questions asked of him is not evidence of and by itself of co-operation and engagement in the PMDR process and its requirements. Looking at the evidence in the round, including the claimant's strong views about the process, the reasons he gave for not submitting a self-assessment (as opposed to simply not giving one), and the manner in which he dealt with his file of information at the meeting, his behaviour is more akin to reluctant compliance than co-operation. In the circumstances I find it would not have been unreasonable for Mr Button to have concerns about the

claimant's behaviours in relation to his engagement with PMDR in respect of matters falling outside his day to day responsibilities.

35. Following the meeting and in preparation for the end of year validation meeting in London with other senior managers from across the country Mr Button provided his indicative markings for all of his reportees. Mr Button was uncertain about the box marking for the claimant because although he felt he deserved a 2 on the basis of his abilities as an investigator, he had reservations about what was referred to as the claimant's behaviours. He discussed his concerns with Mr Owen who told him that he should let the validation team make the final decision about whether the claimant should be a box 2 or 3.

36. The Tribunal does not accept the claimant's evidence that there was no discussion about the claimant's approach to the process, or his engagement with the requirements of it, because Mr Button made reference to the claimant's dislike of the process in his pen picture that he prepared at Mr Owen's request (p45), and the subsequent end of year report in the following terms:

> *"Bob has made no secret of his dissatisfaction with the PMDR, being vocal in personal and team meetings. He prepared a document for his referral for EYR meeting with me but declined to share it with me leading to a much lengthier meeting than was required. Having said this, he is prepared to actively contribute to his personal and corporate objectives"*

Having heard from the claimant and having considered the evidence before this Tribunal I find that the claimant is a person who is clearly determined in his views and will not hesitate to pursue a matter if he considers that he has been wronged. If there had never been any discussion about the claimant's views of the PMDR the claimant would no doubt have insisted that the reference was removed, but he did not, he merely asked if it was necessary to leave it in and was told that it was.

37. The validation meeting took place and Mr Button explained to the group that he was undecided about the box marking that should be awarded to the claimant. The Tribunal was told that it was the unanimous view of those attending the validation meeting, that even though the claimant was good at his job, his attitude in relation to the PMDR process was not acceptable and that poor behaviour should not be rewarded. It was for this reason that the claimant was marked as a box 3.

38. The claimant was not immediately informed of the outcome of the validation meeting but he heard a rumour that he had been given a box 3 which was subsequently confirmed to him by Mr Button. The claimant was not happy with his box marking and on 19 June 2015 raised a formal grievance stating that he considered that Mr Button had misrepresented his performance to members of the validation team and that the presentation he had made appeared to be in stark contrast to what Mr Button had said in his end of year review comments.

39. The grievance was addressed to Mr Owen as CIO, but as he had chaired the validation meeting he did not think it was appropriate for him to deal with the grievance. He considered that although the decision to award the claimant a box 3 marking at the validation meeting had been unanimous, he felt that there should be some independent scrutiny of the process to ensure fairness to the claimant. Ms

Stella D'Italia (Ms D'Italia) was subsequently appointed as the Decision Manager and she appointed Victoria Griffiths (Ms Griffiths) to carry out the investigation. During the course of the investigation she interviewed, the claimant (p79 & 93), Mr Button (p85), Mr Owen (p81), Tony Pedrotti – the independent buddy and Head of RPC Secretariat (p88) and Laura McArthur and Martin Hallam (p90) HR representatives. The investigation was completed sometime around the end of August but the grievance meeting did not take place until 10 November due to the availability of Ms D'Italia which the claimant was aware of.

40. In response to the Investigation Report that had been prepared by Ms Griffiths and sent to the claimant, he challenged the conclusions of Ms Griffiths and raised serious allegations of misconduct against Mr Button. He advised Ms D'Italia that irrespective of the outcome of his grievance he intended to refer the matters to HR for their consideration (p105). The claimant raised this as a formal complaint by letter to Mr Owen of 11 November 2015. The basis of his complaint was that he alleged Mr Button had fabricated the notes he provided to Ms Griffiths in the investigation and had given false information about telephone calls that the claimant maintained had never taken place. The claimant stated that he considered the allegations to be so serious that any attempt to resolve the matter informally would not be appropriate (p112)

41. The claimant's grievance meeting took place as arranged with Ms D'Italia on 10 November 2015 (p108). It was she who advised him to raise his complaints about Mr Button as a new grievance for the attention of Mr Owen. Although the claimant queried this approach he agreed that he did not consider that Mr Owen had done anything wrong (P111)

42. The claimant was notified of the outcome of his grievance by letter of 17 November (p113). Ms D'Italia upheld the claimant's grievance in part and agreed that his box marking should be increased from a 3 to a 2. She also recommended that his development objectives for 2015\2016 should include training on the aims and importance of the performance management system and describe more clearly his corporate objectives with the impact of his corporate contribution being clearly articulated at year end.

43. The letter made clear the basis upon which Ms D'Italia had reached her decision. She found that the claimant had been awarded a box 3 because of the way in which he had expressed his dislike of the PMDR and that he had decided that he was not going to submit a self-assessment that year because he did not like what he described as the overbearing attitude of Mr Button. Ms D'Italia concluded that on the basis of all the evidence before her the level of the claimant's corporate contribution was not a material factor in his box marking. She found that because the claimant was a homeworker Mr Button would not always have the opportunity to see the entirety of the claimant's work and that his request for a written assessment from the claimant was not unreasonable. She noted that the claimant had previously provided written self-assessments and that the reason he had refused to comply with Mr Button's request was not because he believed the request itself to be unreasonable but because he did not like the way he was asked. She accepted that whilst BIS values encouraged staff to challenge what does not add value, and that staff will not always agree with organisational change, staff are required to work collaboratively and adapt to changing priorities. She found that the participants of the validation

meeting found that refusing to work with Mr Button in providing him with the information he had requested fell below the expected standard (p114).

44. Ms D'Italia found that notwithstanding the fact that the claimant's behaviour on this occasion may have fallen below the expected standard she was satisfied that there was no strong evidence to show that he had been told that he needed to improve his behaviours or performance. Ms D'Italia noted that there was conflicting evidence about whether this had in fact been brought to the claimant's attention at all, which he said it had not. She decided that if there had been a need for improvement to the extent that it may have impacted upon the claimant's end of year box marking it should have been in the end of year report and it was not. Ms D'Italia found that the claimant's behaviours in respect of his work were sound and that there was no evidence that any weaknesses in his objectives had been brought to his attention. She also found that beyond the self-assessment issue his views of the PMDR process had not had a negative impact on the ability of the wider team to deliver. At the same time the decision was sent to the claimant, a copy was sent to Mr Owen with a recommendation that he revisit the assessment of the claimant's year end performance and future developmental needs. Mr Owen subsequently informed the claimant that he had decided to amend the box marking from 3 to 2 and said he would ask his new line manager Ms Keeley to discuss his additional objectives moving forward (p126)

45. Although the claimant had achieved a successful outcome of his grievance he continued to pursue his complaint against Mr Button. Mr Owen had been on annual leave when the claimant submitted his formal letter of complaint so the matter was picked up by two of the Legal Directors Bridget Palmer (Ms Palmer) and Sally Langrish (Ms Langrish). The Directors job shared a post and decided that they would deal with the complaint jointly. Mr Bussey produced a copy of the evidence he relied on in claiming that Mr Button had made up the information he gave in the investigation into his grievance. It was the claimant's case that Mr Button had never spoken to him about his objectives or prospective box marking and that he had fabricated the notes to the investigation. He further claimed that the telephone calls during which Mr Button allegedly spoke to the claimant about these matters on 26 January 2015, 13 March 2015 and March 2015 never took place. It was the claimant's case that these were allegations of gross misconduct and that further investigation, including obtaining telephone records would show evidence to the relevant standard of proof that Mr Button was guilty of misconduct in a public office.

46. Both Ms Palmer and Ms Langrish reviewed the information the claimant had provided and the evidence and outcome from the claimant's grievance. They were both of the view that the matter had been dealt with during the grievance as Ms D'Italia concluded that there was no strong evidence that Mr Button had drawn the claimant's attention to the need to change his objectives or improve his behaviours. In addition they also concluded that there was insufficient evidence to enable someone to reach a conclusion about what had and had not been said in light of the fact that it was one person's word against the other. They both thought that there was little to be gained in opening a further investigation when the grievance had been decided in the claimant's favour and the claimant had confirmed that he was satisfied with the outcome of it. In addition the claimant had also confirmed that he was working well with his new line manager Ms Keeley (p134)

47. The claimant was not satisfied with their decision and wrote to Ms Palmer in the following terms (p134):

> *"……*
> *I cannot accept your decision not to instigate a formal investigation of my allegations.*
>
> *The applicable standard of proof in this matter would be on the balance of probabilities and I have submitted information to you which I believe, as part of a formal investigation would be capable of meeting this standard leading to a determination that the allegations are proven. A formal investigation would in my view produce further evidence in support of my allegations. I therefore must reject the grounds put forward by you for your decision and conclude that there are other reasons for taking what might be considered to be the easy option. I understand that such an investigation would cause turmoil in an office that has already suffered more than its fair share but this is something the Department has got to get right and resolve before the office will be able to move forward.*
>
> *To do as you suggest means that the miscreant would never be confronted with his alleged wrongdoing. That in anybody's language cannot be acceptable.*

48. The claimant urged the Directors to reconsider, suggesting that their decision not to proceed to investigate was contrary to the Department's discipline procedures and the ACAS code. The claimant was assured that all policies had been considered before a decision had been made but that the decision remained the same. The claimant then contacted Laura McArthur in HR and persuaded her to speak to Ms Palmer again when the claimant complained that the department were prepared to refuse him his employment rights and sweep the matter under the carpet for the sake of the office (p136A). Ms Palmer and Ms McArthur reviewed all the documentation again and agreed that there was no hard evidence to support the allegations and could not see that a further investigation would serve any meaningful purpose (p137) The claimant continued to be dissatisfied, claiming that an investigation would reveal further evidence in the form of itemised telephone bills showing whether or not calls were made on the days alleged by Mr Button. By email of 4 February 2016 Ms Palmer explained to the claimant that the matter had been dealt with in the grievance and Ms D'Italia had expressly not reached any conclusion on what was and what was not said as between the claimant and Mr Button. She re-iterated what Ms McArthur had told the claimant, that as this was not a criminal investigation and she did not intend to obtain itemised phone bills or records. She concluded:

" As I said before, Sally and I are concerned by what we have heard about the way in which your appraisal was handled. We will be giving [Mr Button] words of advice about following correct appraisal procedure in the future. I do not think that an investigation would lead to any other outcome. I therefore do not think that any further investigation would be helpful or productive: it would not take us any further; it would take up considerable time and it would not be conducive to good working relations"

49. In oral evidence Ms Palmer explained that although it would have been possible to obtain itemised phone records these would show nothing more than the fact that a call did or did not take place. It would not reveal the content of the conversations or whether someone was lying, mistaken or incompetent.

50. The Tribunal finds that other than the claimant's assertion that Mr Owen was involved in the decision not to carry out a further investigation, there is no evidence to support this. The fact that he was subsequently told is not unusual given that he is the CIO. Ms Palmer was clear in her evidence that the decision was her's and Ms Langrishs' only and I accept that to be the case. When questioning Mr Owen the claimant suggested that he was protecting Mr Button because he would be tainted by the actions of Mr Button because Mr Owen had appointed him. Mr Owen appeared genuinely surprised by this suggestion and there is no evidence that this was the case. I find that on the balance of probabilities Mr Owen was not consulted before the Directors took the decision not to carry out a further investigation into the claimant complaints and nor did he have any influence in their making of that decision.

51. By letter of 25 February 2016, the claimant raised a formal complaint against Ms Palmer and Ms Langrish with the Director General for Business and Skills and Legal Services Ms Rachel Sandby-Thomas (Ms Sandby-Thomas). The claimant complained of the Directors refusal to investigate his allegations against Mr Button and indicated that their refusal had brought about *"an extremely unconducive working relationship for me, I have no trust in my manager"*

52. Ms Sandby-Thomas responded to the claimant's complaint on 3 March 2016 agreeing with the decision of Ms Palmer and Ms Langrish not to hold a further investigation into the claimant's allegations against Mr Button (p147). In her response she states:

"you have not presented me or them with any concrete evidence that Simon Button lied to the investigating officer, only that your version of events differ. I cannot see that a further investigation would lead to a different result, particularly as your original grievance was upheld".

She went on to further explain that BIS grievance procedure does not require that every complaint be investigated and therefore she did not agree that the Legal Directors were in breach of departmental procedures. She confirmed that Mr Button had been spoken to by the Legal Directors (p145) and considered that the grievance had been dealt with in a proportionate and appropriate way. She understood that he would be disappointed with her decision but hoped that he would be able to put the matter behind him and look ahead to working with his new line manager Ms Keeley.

53. The claimant was not happy with the outcome and nor was he happy with what he perceived to be Mr Button getting away with what the claimant alleged he had done. In oral evidence he explained that he believed the Directors had protected Mr Button and concealed his conduct by refusing to investigate. Consequently on 27 April 2016, he decided to take upon himself to confront Mr Button in his office because, although he had been told that Mr Button had been spoken to (p145), there had been no sanction imposed on him. The claimant accepts that he wanted to tell Mr Button what he thought of him in no uncertain terms and that he was forthright in

the way he spoke to him. He was of the view that telling his senior officer that he was appalled by him and that he was not fit to be employed by the department and was pathetic was appropriate because he had maligned the claimant's character and he had suffered greatly because of him. Having heard the recording of what the claimant said to his senior manager before walking back out of his office, I find that both the words used and the tone in which he addressed Mr Button was offensive, insubordinate and would amount to a breach of the civil service code. The claimant accepted that his behaviour could amount to professional misconduct but he explained that he found the experience cathartic and was of the view that Mr Button had breached the code in a much more serious way than he had without being disciplined.

54. The following day Mr Button emailed the claimant setting out his account of what had happened and expressing his concern about his behaviour which he considered to be unacceptable and a Breach of the Civil Code (p150). The claimant's response was *"I stand by everything I said. I would welcome any action by you to escalate this matter"* (p150)

55. Mr Button reported the matter to Mr Owen who in turn took advice from HR. Mr Owen wrote to the claimant advising him that his behaviour was unacceptable and telling him that should there be any repetition of his behaviour he would not hesitate to take disciplinary action. The claimant was not happy by what he saw as Mr Owen reaching a conclusion on the matter without affording him an opportunity of hearing his account of what happened and asked for a meeting with him suggesting that a reasonable amount of time should be set aside for it (p152). Mr Owen had been given a copy of the claimant's response to Mr Button clearly showing the claimant's position (p150). Mr Owen had also been made aware that the claimant had told his line manager Ms Keeley that he was not sure he would be willing to attend an operational meeting in Manchester because of the personal issues he had with Mr Button. Mr Owen made it clear to the claimant that the purpose of the meeting would be to provide him with support to help him move forward and not to re-open his previous complaint.

56. Ultimately the claimant did attend the operational meeting on 12 May and after it met with Mr Owen. Mr Owen was keen to repair the professional relationship between the claimant and Mr Button and explained the need for respect in the workplace; he told the claimant that he may have a personal dislike for Mr Button but he would be required to have respect for the position he held. The outcome of the meeting was that whilst the claimant was not prepared to forget and shake hands with Mr Button he would behave professionally in his dealings with him. It was agreed that this would be a new start and the past year would be put behind them.

57. The claimant accepts that whilst he says he was on the verge of resigning as a result of what had taken place in relation to his PMDR and subsequent complaint he waived any alleged breach because he carried on working with the respondent.

Matters post the claimant's grievance and complaint.

<u>The lawyer incident</u>

58. Following the meeting in May 2016 the claimant continued to work from home and report to Ms Keeley. In the summer of 2016 he was involved in a case at Teeside Crown Court where he was due to give evidence on 8 June 2016. The claimant accepts that he takes pride in his work and in oral evidence explained that he becomes closely attached and devoted to his cases. As the investigating officer in this case he had had discussions with the lawyer dealing with the matter who had told him that she would not be accepting plea bargains. When the claimant arrived at court and found out the lawyer had done the very thing that she had said she would not the claimant was not pleased because he did not accept what she had done and she had not discussed it with him before taking the decision. He explained that he had had long discussions with the lawyer and he felt he should have been consulted before she accepted a plea bargain. He concedes that under the CPS code the lawyer is the one who makes the decision and he is aware that the proper course of action would have been to speak to her or her line manager about his dissatisfaction. He did in fact report the matter the following day (p264), however on the day he expressed his dissatisfaction about the decision and expressed his views about the lawyer to the junior law clerk, Daniel Jones, who subsequently reported it back to the lawyer when she questioned him about it. The lawyer, who was not based in the north east, told Ian West the DCIO for the Watford office that whilst she was not raising a formal complaint against the claimant she was very upset by his comments and the fact that he had made them in front of a subordinate. Before taking any action on what he had been told Mr West contacted the junior clerk to confirm what had happened. Having had the account given by the lawyer confirmed, Mr West decided that action needed to be taken as he considered that the claimant's conduct was not acceptable and risked damaging the good relationship the department had with in house lawyers. He realised however that he was not the claimant's line manager but when he spoke to Mr Button about it, it was agreed that Mr West would be the person best placed to speak to the claimant on the matter because the lawyer had brought it to his attention.

12 July 2016 Mr West meeting

59. Mr West met with the claimant on 12 July 2016. He had previously spoken to him on the phone to tell him why he wanted to meet. Mr Owen refused the claimant's request for the lawyer to be present at the meeting because he did not consider it necessary and had the potential to be counterproductive. Mr West's intention was to find out the claimant's version of events and fire a shot across his bow if he accepted that he had acted incorrectly. However the claimant was not prepared to accept he was in any way at fault and when Mr West suggested that damage could be done to the lawyer's reputation his response was to ask what about his own reputation. He denied that he had called the lawyer a coward and was defensive in response to questions asked of him. He did not tell Mr West what he did say but focused on the fact that he had not used the word coward. The claimant stood up and brought the meeting to an end stating that he had said all he had to say or words to that effect. Mr West considered the claimant's attitude in the meeting to be arrogant, discourteous and self-important, and demonstrated a lack of respect for colleagues and especially senior colleagues. He also believed that his behaviour at court on 8 June 2016 had been unacceptable. He decided that there were still matters that needed to be addressed with the claimant and reported the matter to Ms Keeley as his line manager. In oral evidence the claimant accepts that his comments about the lawyer were inappropriate but that he was provoked into making them. He considers

that his conduct was a minor matter but does concede that it is similar conduct to his previous unprofessional behaviour. He also accepts that he could have conducted himself better in the meeting with Mr West but adds that Mr West could have as well. He accepts that whilst he does not consider that he was rude to Mr West he may have come across as being so to Mr West. He has also conceded in oral evidence that notwithstanding the fact that he denied walking out of the meeting with Mr West he did tell Ms Keeley he had done so when he did it.

60. Ms Keeley discussed the issue with Mr Button who suggested that it be left for the moment, therefore it was not until his mid-year review on 10 October 2016 that Ms Keeley told the claimant she considered both incidents were examples of poor behaviour. She also raised other issues of concern, one where she considered the claimant was overstepping his remit by asking to have sight of counsel's opening submissions prior to a hearing so that he could check it included all relevant evidence and another that he was refusing to follow her instruction that investigators should only attend court on the first day of the hearing and then to give evidence unless there were reasons they were needed there more often The claimant did not agree with Ms Keeley's views and challenged her reference to these matters in his PMDR (p300). She also raised the issue of the M case dealt with below and he refused to accept her views on this at the same time. It was following this meeting that Ms Keeley decided to discuss the matter with Mr Owen and he advised her to take advice from independent HR at the Ministry of Justice. I deal with this in more detail below.

<u>The M Case</u>

61. From the tone of the claimant's emails and his witness evidence before this Tribunal it is clear that the claimant had a strong belief in what he perceived to be right and had difficulty accepting any criticism or being questioned about his work. The events that led to the claimant being disciplined came to light when he was working on a case which I will refer to as the M Case. The claimant had been allocated the case in May 2016 and as usual had received his instruction from the lawyer via Mr Button. He commenced his usual enquiries to gather evidence which included communicating with Northumbria Police. In accordance with policy he entered updates on the progress of his enquiry on the cyclops system. The requirement of the entries was that they should be entered at least once a month and the content should be meaningful so that others reading them would be aware of the state of play (p419)

62. Whilst it is usual practice during the course of an investigation to communicate with other agencies which may have information that could assist an investigating officer of the Insolvency Service, if it is proposed that the case is to become a joint venture between two or more agencies it is necessary to enter into a memorandum of understanding (MOU). Only officers above the rank of the claimant have the authority to discuss a joint venture and negotiate the terms of a MOU.

63. On 29 September 2016, Ms Keeley was copied into an email from one of the in-house lawyers Mr Talbot, which seemed to suggest that the investigation in the M case had progressed beyond that which she as the claimant's line manager was aware. Managers had previously raised the issue of not being copied into emails and on receipt of this email she forwarded it to Mr Button to see if he knew the extent to

which the M case had progressed (p166). Mr Button immediately emailed both the lawyer and the claimant expressing his dissatisfaction and telling them that the fact that this was the first he had heard about what seemed to be significant investigation with other agencies was unacceptable. He was also concerned that the claimant may have compromised the department's investigation by his actions. The lawyer responded immediately explaining that he had been contacted by the claimant on 19 September to see if he had been assigned as the lawyer in the case and if so whether he would attend a meeting with the police. He had only just been formally assigned to the case and wanted to know the scope of what the claimant had done and where the police fitted in. The claimant did not respond to Mr Button until 17.58 on 30 September; his response was simply *"please see entries on Cyclops"*.

64. The claimant does not accept that the response to Mr Button was rude because he was under the impression that Ms Keeley had updated him following her conversation with the claimant on the morning of 30 September 2016. He did reluctantly accept in oral evidence that he was aware that he was required to do more than he did in relation to responding to Mr Button. Ms Keeley had called to speak to him about the matter and to tell him that he was to respond to Mr Button's email as soon as possible. The claimant was not pleased with her approach, he was going to give evidence at court and expected empathy from his manager instead of being harassed. He was also not pleased that she had involved Mr Button in the matter and was of the opinion she should have spoken to him first. The claimant admits that the conversation was heated and that he was abrupt and spoke over Ms Keeley. He justified his actions by saying that she too spoke over him and that he was defending himself. He was of the view that management had not fulfilled their role by checking his entries on cyclops and challenged her on this. He considered his entries on cyclops were adequate although in oral evidence he did accept that they could have included more information. He also told her that he managed his own cases and would only contact her if he required assistance with a problem.

65. In response to the claimant's email telling him to look on cyclops, Mr Button sent an email of 3 October 2016 (p275). Mr Button expressed his concern about the handling of the M case and the claimant's totally inadequate response which he said was *"a clear example of your unwillingness to engage with managers despite a direct request for you to do so".* The claimant responded by email telling Mr Button that he would prefer to speak to him about the matter. The claimant called Mr Button the following day at 13.30 hours. Unbeknown to Mr Button the claimant recorded the conversation and it has been produced as part of the evidence to the Tribunal. I have not listened to all of it but have been given a transcript and listened to random sections so there can be no risk of cherry picking sections. The claimant accepts that the tone of the meeting is the same as the tone of the tape I listened to previously which was of the incident of 27 April 2016 when he told Mr Button what he thought of him. In this phone call the claimant is confrontational, accusatory and his tone similar to that of aggressive cross examination. There is no doubt that he was in command of the call and accused Mr Button of using the claimant as a scapegoat for his own failings. He challenged his ability to monitor cyclops and maintained that the whole issue had been blown up out of all proportion. He told Mr Button that his style of management left a lot to be desired and said that he should have telephoned the claimant instead of shooting from the hip and sending an abrasive email. The claimant spoke to Mr Button in a wholly insubordinate and disrespectful manner

whilst Mr Button remained calm and professional despite having to deal with what was a patently difficult phone call.

66. Once Ms Keeley and Mr Button became aware of the direction in which the M case had progressed they communicated with officers from Northumbria police and discovered that the claimant had first made contact with them on 17 June 2016. He then met with the police officer dealing with the case on 21 June 2016 where the police indicated that they agreed to work together and that one file of evidence would be submitted in respect of the whole matter. At the time the claimant committed his prosecution team to the venture and said he would seek their views on doing the prosecution (p292). The claimant notified the cyclops system that he had attended a meeting with the police and gave some detail about the case. He did not however make any reference to the agreement he had reached about the two agencies working together.

67. On 31st August the police indicated that they were now more or less in a position to make arrests and said "*However, as previously discussed the ideal way to do this is a joint arrest with yourselves"* (p509). The claimant did not enter this information on cyclops. His next entry was when he attended a meeting with the police on 19 September and agreed with them that any prosecutions should be joined. It was at this stage that he emailed Mr Talbot to advise him of the position. It was this email that prompted Mr Talbot to copy in Ms Keeley to his response.

68. On 27 September 2016 the claimant attended the police station and conducted a PACE interview with one of the suspects under caution. This was a suspect that the police intended to arrest but in the event he attended the police station for interview voluntarily. The claimant attended the police station at 12.21 hours to interview the suspect under caution. It is his case that this was not a joint interview and in oral evidence said that the police officer had to be present to work the equipment for the claimant. The interview was of course recorded. The transcript records firstly the names of the claimant and the police officer as the *"Interviewing Officer(s)"* and:

"This interview is being tape recorded. The date is the 27th of September 2016 and the time is 12.21. This interview is taking place at Middle Engine Lane Police Station in Newcastle. Any my name is Bob Bussey, I'm an investigating officer from the department of Business Energy and Industrial Strategy. There's another interviewer present and I invite you to state your name".

The other person present was the police officer. At the end of the claimant's questioning of the suspect he states:

"Okay. I've got no further questions for you, but my colleague does have some questions for you"

The interview then continues with the police officer asking his questions and the claimant remains in the room. The interview is paused at 12.52 for the suspect to take advice from his solicitor and resumes at 12.55. The claimant is still present when the interview resumes. At the end of questioning by the police officer he asks:

"Right Bob is there anything that you were wanting to….?

It is clear from reading this transcript that the police officer was present for more than just the purpose of working the recording equipment. The claimant refers to him as his colleague and they are both introduced as interviewers at the outset of the meeting. In oral evidence, Mr Bailey agreed that if he was interviewing a suspect with a police officer he would have spoken to his supervisor before doing so. I do not accept the claimant's evidence that there was little difference between this interview and one where he had arranged for a witness to come in to be interviewed. This was entirely different as is evident from the transcript of the interview and when the suspect agreed to attend the police station for interview with the police there is no suggestion that he did so on the understanding that he was also going to answer questions in relation to the claimant's enquiry as well. I find on the balance of probabilities that this was a joint interview and in light of the previous discussions the claimant had with the police about this being a joint matter, it would be seen to be one. The fact that the claimant may have carried out interviews like this in the past without notifying his manager does not mean that it was appropriate for him to do so. His previous line manager we have heard was very light touch in his managerial style whereas his new managers were not.

69. Once Ms Keeley became aware of what was happening with the M case she suspended all interviews pending the reaching of an arrangement with the Northumbrian Police. A MOU was ultimately entered into but there was a general concensus between the police and the respondent that it would have been preferable to have one in place earlier. It is clear from the claimant's evidence that he had discussed working together with the police and that was what brought about his email to Mr Talbot. Although he accepts in oral evidence that he did not have authority to enter into a MOU it would appear from what I have heard that he was only intending to involve his managers once he had made all the arrangements. From the evidence I have heard from the respondent's witnesses and Mr Bailey who gave evidence in support of the claimant, whilst the claimant may himself have been confident in what he was doing and did not feel the need to bring it to the attention of his superiors, he was non the less engaging in activities that had got to the stage where they should have been involved even though the claimant continues to this day to insist that they were not.

70. Mr Owen as CIO was informed about the situation with the M case and the conduct of the claimant towards Ms Keeley and Mr Button. He explained in oral evidence that he was aware of how the claimant had behaved towards Mr Button in the past when he had given him 'words of advice' and having been made aware of further issues with his behaviour he wanted to appoint someone that was independent from the Manchester office to establish whether these were just one-off instances of whether there was a pattern of behaviour developing that needed to be addressed. He suggested that independent HR advice should be sought from the Ministry of Justice and on 11 November 2016 he appointed Glenn Wicks, DCIO (Mr Wicks) to act as decision manager and look into the conduct of the claimant (p180). Mr Wicks in turn appointed Andy Jones, SIO (Mr Jones) to carry out an investigation.

71. On 14 November 2016 the claimant was notified that Mr Jones, had been appointed to investigate several cases of alleged misconduct against the claimant. These included the incident where the claimant made derogatory comments about the lawyer and the manner in which he behaved in the meeting with Mr West, the

carrying out of a joint investigation with Northumbria Police without prior authorisation from his managers and the conduct displayed to Ms Keeley and Mr Button post 9 May 2016. A full investigation was carried out and relevant witnesses were interviewed and statements obtained.

72. The claimant was interviewed as part of the investigation on 27 January 2017. He was accompanied by his trade union representative and prior to the interview he had been provided with copies of witness statements obtained by Mr Jones. He was also provided with the documentary evidence Mr Jones had had access to. In the interview the claimant was asked to give his account of the incidents that had led to the allegations. He was afforded a full opportunity to respond (p312). In response to the comments about the lawyer the claimant explained what had happened with the case and the fact that he did not agree with the decision and was very unhappy with the way events had turned out (p325). He was disappointed that she had not spoken to him directly about it even though he had tried to contact her. He could not recall exactly what he had said but agreed that he had expressed his disappointment on the way the lawyer had handled things and asked the law clerk to express his views to the lawyer when he got back to London. He admits that he commented on her lack of fortitude in failing to respond to him and thinks he may have said something along the lines of she did not have the guts to call him. He had not expected the clerk to report that back to the lawyer. He did not recall making any of the comments in front of counsel on the case but apologised if anyone had been offended by what he said. He refuted counsel's account that he had been difficult on the day and explained that most of his 'ire' had been directed towards the lawyer and said that if he was to use one word to sum up that prosecution it would be *"shambolic"*.

73. In response to the allegation about Mr West the claimant said that he had denied that he had called the lawyer a coward because that was what he being accused of and he had not said it. The nature of the allegation that had been put to him was his use of that word in a conversation that was said to have taken place inside the court. He said he had answered all Mr West's questions and had said something to the effect that the interview had come to an end and rose from his seat to leave while Mr West was still seated. The claimant commented that at no stage did Mr West make any comment about his behaviour. He accepted the meeting was not amicable but felt it had been professional as he had dealt with his questions. He questioned what Mr West meant by arrogant and discourteous and said that even though he had risen from his seat before a senior officer he had not meant to be discourteous.

74. All the allegations surrounding the M case were dealt with together. The claimant explained that his personal view was that the arrangement with the police was simply one in which they facilitated him to conduct an interview with the main suspect in the investigation. He also told the investigation that he appraised Mr Talbot about what he talked about with the police as they had come to some agreement that if both the inquiries ended up going forward to proceedings that they should endeavour to join those proceedings, in other words have a joint prosecution. It was his view that the issue was that Ms Keeley was not aware of the updates he had placed on Cyclops and neither was Mr Button. The claimant had not liked the tone of the email he had received from Mr Button on 29 September and he admitted that during the course of a telephone call he then had with Mr Button, when he

accused him of using the claimant as a scapegoat for his own failings to effectively monitor the cyclops database. The claimant then challenged the consistency of Mr Button's evidence of when he first saw the June entry on cyclops, he stated that it was widely known within the management that the claimant and Mr Button just did not get on and told him about what he termed a major issue back in 2015. The claimant told Mr Jones that he did not expect to have to work with a manager who he alleges had been dishonest about him. He told Mr Jones that Mr Button had not only told lies but also fabricated documents and that this had caused an enormous barrier between them personally. The claimant did not accept that he had deliberately set out to compromise the M case and there was no way of knowing that the opportunity to sieze computers had been lost because an MOU had not been put in place early. He was also of the view that in any event there was no way of knowing whether there would have been any information on any seized computers that would have assisted their investigation in any event.

75. In respect of his call with Ms Keeley he explained the situation and said that he had not seen a great deal of difference between any of his other jobs where he arranged for an interview with a suspect and they came to see him. He accepted the conversation with her was heated but considered that he was defending himself. He thought Ms Keeley should have contacted him first before escalating the matter to Mr Button. He accepted that although their relationship had initially been good there were issues that had arisen with Ms Keeley because she had different views to the claimant about how processes should be done; the claimant felt he was being challenged about many things that he not been challenged on previously. When it was suggested by Mr Jones that the relationship may have deteriorated because of his lack of communication with his line mangers his response was that it was a two way street and management had to examine their consciences and consider whether they were doing their bit. The claimant's view was that he made contact and responded when he considered it appropriate to do so and that he was used to an environment in which he worked very much on his own. He saw no need to pick up the phone to his managers unless he had any particular issues or difficulties as that was the way he had worked since he joined the department. He was of the firm view that he should not be the subject of an investigation.

76. Both the claimant and his union representative felt strongly that establishing when Mr Button accessed cyclops was a very important issue in light of his inconsistent accounts of when he first became aware of the claimant's contact with Northumbria Police.

77. Mr Jones submitted his investigatory report on 16 February 2017(p194) and Mr Wicks spoke to the claimant to let him know and arrange a suitable date for a disciplinary meeting. The claimant told Mr Wicks that he could expect an appeal and Mr Wicks assured the claimant that as far as he was concerned his job was not in jeopardy and he would make his decision only after he had heard from the claimant.

78. The claimant was accompanied at the disciplinary meeting on 8 March 2017 by his trade union representative (p369). In respect of the comments about the lawyer, the claimant denied the allegation and challenged the manner in which the evidence from counsel had been obtained (p371). In respect of the meeting with Mr West on 12 July 2016 the claimant said that although he did not consider he was arrogant he was not aware that arrogance was a breach of the civil service

disciplinary code. In addition he did not accept that he had been discourteous to Mr West and considered that under the disciplinary policy he had the right to leave the meeting at any point. He had answered Mr West's questions and it was apparent the meeting had concluded. In addition the claimant maintained that Mr West had raised no issue with him about his behaviour on the day.

79. In respect of the allegation of joint working without authorisation the claimant did not accept that he had done anything wrong because his arrangement with the police did not amount to a joint investigation it was simply joint working and he did not undertake any activity that required authorisation from management. He did not accept that he had not provided sufficient information on cyclops and said if a manager wanted more they should ask for it (p375). The claimant and his union representative once again asked for an interrogation of cyclops to establish when Mr Button became aware of the claimant's contact with Northumbria Police. Mr Wicks refused the request because the issue was whether the content of the entry made clear what was happening with the case.

80. When questioned about whether he had been disrespectful to Mr Button and Ms Keeley, the claimant accepted that he was part of a situation that was not good and that his relationship with Mr Button had been extremely strained since 2015 and asked if Mr Wicks knew of what had gone in the past and said *"you can't have managers doing this with no repercussions"*. He did however assure Mr Wicks that he had recently been in meetings with his managers which did not result in any conflict. The claimant did not disclose to Mr Wicks that he had recorded the call with Mr Button on 4 October 2016 nor did he offer to provide it as part of the investigation.

81. The outcome of the disciplinary meeting was that Mr Wicks found all the allegations proven and issued the claimant with a final written warning to remain on file for a period of 12 months.

82. On 17 March 2017 the claimant exercised his right of appeal against the decision of Mr Wicks. Mr Arwel Jones (Mr A Jones) had been appointed to hear the appeal. There had initially been a question about the appointment of Mr A Jones because he was within the line management chain of the lawyer against whom the claimant had made comments and against whom the claimant had submitted a report. The respondent took advice on the matter and it was agreed that Mr A Jones would not be involved in any conversations about issues involving the lawyer.

83. The claimant set out the grounds of appeal as, procedural errors, lack of investigation, and insufficient evidence as set out in the document he provided. He included his account of the circumstances of the M case including the inconsistencies in Mr Button's account of when he became aware of the entries on cyclops and the refusal of his request for cyclops to be investigated (p385). He maintained that the circumstances of his interactions with Northumbria Police did not amount to a joint investigation and he had made timely entries with regard to his meetings with officers from Northumbria Police on cyclops. He submitted that he should not be punished for the failings of his managers to monitor cyclops and alleged that Mr Button had lied to either him or the investigating officer and had made a malicious complaint against him. He submitted that Mr Wick's refusal to investigate cyclops had denied him a reasonable line of enquiry which could have a

significant impact upon the outcome and was a breach of his employment rights. He considered that there was insufficient evidence to justify Mr Wicks' decision.

84. He submitted that there had been an unreasonable delay in pursuing the matters raised by Mr West in relation to himself and the lawyer which was a breach of his rights under the ACAS code and the Civil Service Code. In respect of Mr Wicks findings he submits that he failed to give due weight to his account and the evidence he has relied on was insufficient to form the basis of his decision. In relation to the relationship with Mr Button and Ms Keeley the claimant submits that Mr Wicks had erred in his decision because he had failed to take account of the injustices suffered by the claimant. Finally the claimant submitted that the penalty was too severe given his length and record of service (p392).

85. The appeal meeting took place in Manchester on 26 April 2017 and the claimant was once again accompanied by his trade union representative. The claimant confirmed that he believed that there had been errors in the procedure, the findings themselves and the harshness of the penalty. He considered that the charges had been contrived and that Mr Wicks had come to the disciplinary hearing having already premeditated his guilt. The claimant maintained that he had not been rude to Mr Button and did not accept that there was a fine line between being rude and accusatory and stern, which he admitted. He submitted that even if all the allegations were found proven a lesser sanction would have been appropriate because a final warning left him on a knife's edge. He considered the matter to be frivolous and vexatious and said that he had given evidence that challenged every aspect of the case which he considered to be nonsense. He concluded by saying that Mr Button had an agenda against him and taken the opportunity to harm him and that Mr West had gone far beyond his remit and gone out to assassinate him.

86. Mr A Jones notified the claimant by letter of 3 May 2017 that his appeal had not been upheld. Mr A Jones determined having reflected carefully on all matters the claimant asked him to consider, that the relevant procedures had been carried out properly by both the investigatory officer and the decision maker. Mr A Jones did not consider Mr Wicks' refusal to carry out an investigation of the cyclops data a material omission because the issue did not relate to when Mr Button had accessed the entry but what steps the claimant should have taken to alert his line manager about what was going on with the police. Overall Mr A Jones considered that this had not been a criminal investigation and there had not been any procedural flaws in the way in which the disciplinary matter had been conducted. Mr A Jones further determined that, contrary to the claimant's view that any conduct on his part which had fallen short of the standards expected in his position were only trivial and did not merit any form of disciplinary action, on the basis of the evidence before him, Mr Wicks was entitled to make a finding that each of the allegations had been found proved. Mr A Jones explained that even if individually none of the allegations crossed the threshold of a finding of serious misconduct, they were capable of doing so cumulatively when it was borne in mind that the behaviour had occurred over a period of just a few months and came soon after the claimant had received an informal warning about his behaviour in only May 2016. Mr A Jones referred the claimant to the BEIS disciplinary policy which defines misconduct as *"repeated minor offences or significant breaches of the standards expected"* and which also gives as an example of serious misconduct as *"repetition of minor misconduct where the employee has already been warned about it whether formally or informally".* In the

circumstances of this case Mr A Jones considered that notwithstanding the claimant's commendable record as an IO it was reasonable for Mr Wicks to deem that a written warning was not sufficient to mark the seriousness of the claimant's behaviour and that a final written warning was the appropriate sanction.

87. By letter of 5 May 2017 the claimant notified Mr Button of his intention to resign. He stated that:

> *I feel that I am left with no alternative but to take this course of action in view of my recent experience which amounts to a fundamental breach of contract by my employer relating to the bringing of unjust disciplinary proceedings and the imposition of a disproportionate penalty on 8 March 2017.*
>
> *My employer has previously acted in breach of contract in 2015 when it failed to investigate my complaint of serious misconduct on 11 November 2015. On that occasion I waived this breach but am now no longer willing to do so. The circumstances of this matter are connected to the disciplinary matters that have just occurred.*

The claimant asserted that he had the right to resign without notice but indicated that he was prepared to give three months notice as required under his contract of employment in order to achieve a smooth handover of his investigative workload. He also indicated that at the end of his notice he wished to start drawing his accrued pension entitlement. In oral evidence the claimant said that he was unaware that he was only required to give one month's notice under his contract of employment and thought that it was three. He said that he was prepared to continue to work for this period because as a home worker he would not have to face his accusers.

The Law

88. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed, and the circumstances in which an employee is dismissed are defined by Section 95. The relevant part of Section 95 was Section 95(1)(c) which provides that an employee is dismissed by his employer 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."**

89. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only 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.

90. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the

scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

> **"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

91. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

92. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

93. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

94. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA** 21 July 2015 the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
>
> > **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett**

> **Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.**
>
> **15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."**

95. In some cases the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial.

96. In the more recent case of **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978** Underhill LJ confirms the reasoning in **Omilaju** in that 'A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. *Harvey on Industrial Relations and Employment Law*, states that many of the constructive dismissal cases which arise from the underlying breach of trust and confidence would involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action but when viewed against the background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as constructive dismissal. It may be the last straw which causes the employee to terminate a deteriorating relationship'.

97. The law relating to the reason for a resignation after a repudiatory breach was reviewed by the EAT (Langstaff P presiding) in **Wright v North Ayrshire Council [2014] IRLR 4.** If an employee has mixed reasons for resigning it is enough if the repudiatory breach played a part in that decision. It need not be the sole, predominant or effective cause. That is particularly clear from the decision of the Court of Appeal in **Nottingham County Council v Meikle [2005] ICR 1**. At paragraph 20 of **Wright** Langstaff P summarised it by saying:

> "**Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause."**

98. The position as to affirmation once a fundamental breach has occurred was recently considered by the EAT (Langstaff P presiding) in **Chindove v William Morrisons Supermarket PLC** UKEAT/0201/13/BA (26 March 2014). In considering

whether the passage of time alone could indicate affirmation, the EAT said this in paragraphs 25-27:

> **"25 ….We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.**
>
> **26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.**
>
> **27. An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force…."**

99. If it is established that the resignation meets the definition of a dismissal under section 95(1)(c), the employer has the burden of showing a potentially fair reason for dismissal before the general question of fairness arises under section 98(4).

Application of the law and secondary findings of fact

100. The claimant specifically relies on the last straw doctrine in bringing his claim of constructive unfair dismissal and relies on **Kaur** to say that the actions of the respondent in bringing unwarranted disciplinary proceedings against him entitles him to resurrect and further rely on the breaches in 2015. However, in addition to this in submissions he also says that the bringing of the disciplinary proceedings in 2017 was manifestly unreasonable which suggest that he says that this also is a fundamental breach. On that basis it is necessary to consider first of all whether the actions of the respondent were actions taken without good cause that were likely to destroy or seriously damage the relationship of confidence and trust (**Malik)**

101. In doing this it is necessary to look at how the decision to take disciplinary action came about. I do this without initially looking at the events in 2015 as these

are relevant at this stage only to the consideration of the last straw doctrine. In May 2016 the claimant had been informally warned by Mr Owen the CIO in respect of his conduct towards Mr Button an officer two grades above that of the claimant. The claimant accepts that this was unprofessional conduct that potentially breached the Civil Service Code of conduct. He was told at that time that any further repetition of behaviour of that nature would result in disciplinary action. The claimant was not prepared to shake hands and make up with Mr Button as he obviously remained aggrieved at what had occurred in 2015, however he agreed that he would conduct himself in a professional manner towards Mr Button and respect his position as DCIO. It was agreed that a line would be drawn under the matter and parties would move on.

102. Just a few weeks later Mr West a DCIO responsible for another area of the country was told of an incident concerning the claimant where he had made what he considered to be inappropriate comments about a lawyer the claimant had been working with on a case listed at Teeside Crown Court. Having decided that the matter could not be left because in addition to the inappropriateness of the claimant's conduct Mr West considered his behaviour also had the potential to damage the working relationship with the in-house lawyers, he spoke to Mr Button who was the equivalent rank to Mr West and responsible for the team in which the claimant worked. It was decided that as the matter had been raised with him Mr West would speak to the claimant about it on an informal basis. The claimant accepts that he may have come across as rude but that had not been his intention. However it is clear from the claimant's evidence before this Tribunal that he was in some way affronted by Mr West's reference to his high opinion of the lawyer in question and clearly did not co-operate with his questions because instead of explaining what it was he had said about the lawyer, he denied the allegation entirely because Mr West was accusing him of using a word he did not use in a place where he had not said anything. Having heard from Mr West and the claimant it is clear that whilst the claimant may have answered Mr West's questions it was not in the spirit of co-operation and the claimant was concerned only with how he considered he had been affected by what had happened with his case. He accepts that he rose from his seat to bring the meeting to an end using words to indicate this, and walked out of the room. It is also clear from the evidence before me that the claimant did not consider that he was under any obligation to answer to Mr West on the matter. His acceptance of the fact that he could have conducted himself in a better manner in the meeting was qualified by his insistence that Mr West could have done as well. The claimant considers that Mr West could not have any issue with his conduct at the meeting because he did not say anything and spoke to the claimant again outside the office before he left to catch his train. I note that the only conversation the claimant had after the meeting was to once again ask for a copy of the lawyer's response to the report the claimant had submitted about what he subsequently referred to as the shambolic prosecution of the case she was dealing with. In the circumstances I can understand why Mr West did not challenge the claimant at the time, he was speaking to someone who was not in his team and was in someone else's office.

103. From the account of the meeting that I have heard from both the claimant and Mr West it was not a comfortable meeting and to further challenge the claimant on his manner in the meeting would not have achieved anything. I accept that Mr West had gone to see the claimant in an attempt to draw to his attention informally hat he

could not speak about colleagues as he had and that it could be potentially damaging to working relationships. The claimant did not accept that he had done anything wrong and therefore there was little to be gained raising the claimant's conduct towards him at that time. Mr West did as he should and reported it to the claimant's line manager. Whilst Ms Keeley did not take any immediate action on Mr West's complaint she did raise it with him as a behaviour issue in his PMDR in October 2016.

104. Prior to the meeting of 10 October 2016 the concerns about the M case had arisen and this too was raised as an issue in the meeting along with other matters referred to above. The claimant challenged Ms Keeley on all matters raised, save for the lawyer and Mr West incident as he considered these to be 'subjudice' and questioned their inclusion at all. The fact that he did this is evidence that he did not think that the issue of his conduct in respect of the lawyer and Mr West had lapsed with the passage of time or gone away.

105. It is the claimant's case that he should not have been disciplined about the M case because he had notified his managers of his actions through cyclops and it was their failure to properly manage that had led to their lack of knowledge not his omission to tell them. The claimant appears to miss the point in respect of what was the issue in this matter. His focus has been entirely on when his entries were accessed by Mr Button and Ms Keeley and the inconsistency of the evidence of Mr Button of when he did this. The giving of evidence before this Tribunal, or any other for that matter is not a memory test and it is a well-established fact based on researched based evidence that people will have a slightly different recollection of events each time they are asked to recall them. Having heard the tape of the call on 4 October 2016 with Mr Button when the claimant was asking him when he accessed the entries I find Mr Button was being badgered by the claimant so it is not surprising that under such pressure he had difficulty in accurately recalling the information.

106. However as I have said that is not the issue. The issue is whether the claimant had provided sufficient information to inform his managers of his activities. It is not acceptable for the claimant to maintain that if they wanted more information they should have asked, they cannot be expected to search for missing information that they are unaware of. Mr Button has said that when he read the entry from 21 June 2016 he was of the impression that the claimant was doing nothing more than a scoping exercise with the police. I agree that this is what would have been understood from the entry on 21 June, however what the claimant had failed to put in there was the fact that during the meeting he had with the police they had agreed to work together and that one file of evidence would be submitted in respect of the whole matter. At the time the claimant committed his prosecution team to the venture and said he would seek their views on doing the prosecution (p292). The claimant notified the cyclops system that he had attended a meeting with the police and gave some detail about the case. He did not however make any reference to the agreement he had reached about the two agencies working together.

107. In addition on 31st August the police indicated that they were now more or less in a position to make arrests and said "*However, as previously discussed the ideal way to do this is a joint arrest with yourselves"* (p509). The claimant did not make any entry on enter cyclops in respect of this information. His next entry was when he attended a meeting with the police on 19 September and agreed with them that any

prosecutions should be joined. It was at this stage that he emailed Mr Talbot to advise him of the position. It was this email that prompted Mr Talbot to copy in Ms Keeley to his response. Even at this stage the claimant did not make this known to his managers or copy them into the email he sent to the lawyer. He had said he was giving the lawyer the 'heads up' on what might be happening yet did not see fit to do the same for those whose decision it would be to agree the strategy moving forward.

108. The claimant excuses his actions by saying that this is how he has always worked and that he has never regularly spoken to by his managers about his cases. I do not accept this explanation because it is contrary to what his previous line manager has said in the claimant's PMDR (p53). I find that the claimant did fail to keep his managers properly updated via the cyclops system and discussed the strategy of the case with the lawyer without informing his managers. This was outside the scope of his authority and he should have notified his managers of what was happening. I also do not accept that his interview with the suspect was of little difference to interviews he undertook with suspects at the premises of the respondent. The transcript of the interview paints I find a completely different picture. Both the claimant and the police officer were recorded as the interviewers and referred to as such by the claimant in addition to him referring to the police officer as his colleague. I also note in particular that although the claimant states he was only interested in his own investigation he stayed in for the remainder of the interview with the police. I also note that even though there was a break in the interview with the police officer where the suspect took legal advice, the claimant did not leave then either. I find that on the balance of probabilities his actions would be seen as working with the police or at very least giving the impression to others than that is what he was doing. In the circumstances it was not unreasonable for Mr Button and Ms Keeley to reach the conclusion that they did and consider that the claimant had exceeded his remit and acted without authority and the time at which the entries were accessed on cyclops would have made no difference to that finding.

109. Having been alerted to a potential problem with the M case it was not unreasonable for Ms Keeley to ask her own line manager if he knew anything about the police involvement in M. Whilst the claimant may think that she should have contacted him first I note that she was relatively new to the department, had had wide experience of MOUs in her previous role and would have been concerned that this might be a serious matter. She was not obliged to make her first point of contact with the claimant and it was not unreasonable of her not to do so. Similarly it was not unreasonable for Mr Button to send the email that he did. I note that the same email was sent to the Mr Talbot but he did not respond in the same defensive manner as the claimant. He responded in a professional manner explaining his role in the case. In oral evidence Ms Keeley explained how the claimant had challenged her on not speaking to him before contacting Mr Button she explained that the claimant said 'did you do that Mel; did you do that; did you do that. The claimant did not challenge this evidence and I accept that he said that and that on the balance of probabilities there were said in the tone explained by Ms Keeley because I have heard the tape recordings of the manner in which the claimant has spoken to Mr Button and find it reasonable to accept that he spoke in the same manner to Ms Keeley.

110. I have already found that the claimant's response to Mr Button fell short of what he knew or should have known was expected of him and the manner in which he spoke to Mr Button on the call of 4 October 2016 was unacceptable. I do not

accept that the claimant was having to defend himself. I have heard the tape and Mr Button, despite not being aware that he was being taped was calm and professional throughout despite the claimant's verbal attack on him.

111. The claimant complains that he was not told that his behaviour was unacceptable when he met with Mr Button and Ms Keeley on 21 October 2016. Both have explained that the meeting was an operational one to get the M case back on track. Ms Keeley was taking advice from HR about how to move forward with the claimant's conduct and given the manner in which he had responded to both of them previously when criticised I find that it was not unreasonable to await the commencement by managers independent of the Manchester team to address the conduct issues.

112. Having considered all the evidence in the round, I find that the respondent had good reason to commence a disciplinary investigation into the claimant's conduct. He had been only recently been given an informal warning about his behaviour and it was reasonable for Mr Owen to consider that it should be approached with a view to establishing whether these were one off instances or a pattern of behaviour. For those reasons it was reasonable to also include the lawyer and Mr West incidents; the claimant was aware that these matters were also outstanding so it should have come as no surprise to him that they formed part of the investigation into his behaviour.

113. I also find that the disciplinary process was correctly followed and that the appointment of all but Mr Andy Jones was not challenged by the claimant. The respondent took advice about the appointment of individuals in the disciplinary process, all were committed to ensuring that a full fair and thorough process was followed and having heard from them all I do not doubt their integrity. For the reasons I have given above I did not find that the claimant was denied a legitimate line of enquiry by being denied access to an investigation of cyclops as this was not relevant to the issue to be addressed. Whilst it is not for this tribunal to interfere with any sanction imposed by an employer the Tribunal can consider the fairness or otherwise of the same in a claim of unfair dismissal. Having considered all the evidence in the round and heard from the claimant, the witnesses and the tape of the call between the claimant and Mr Button I have no difficulty in finding that the imposition of a final written warning was within the band of reasonable responses open to the respondent in respect of the allegations found proven against the claimant.

114. It is clear I hope from the reasons given above that while the claimant may not have liked the decision of the respondent to discipline him, there were legitimate grounds for doing so. It follows therefore that taking disciplinary action against the claimant was not unwarranted and neither this or the process followed amounted to a fundamental breach of the duty of mutual trust of confidence or any other terms of the claimant's contract.

115. For the same reasons I find that the respondent's actions could not amount to a last straw because there was a legitimate reason for the actions taken and the sanction imposed. Whilst it may have been seen by the claimant to be evidence of a deteriorating relationship with his employer, it was of his own doing. In other words it was his actions that caused a deterioration in the relationship. Such was his belief in

his own abilities that he refused to accept that anyone else might be right if they held a different view from him. He appeared unable to accept that his managers had the right to decide on how staff were required to work if that involved any change from what he had previously been used to.

116. For the sake on completeness however, and in the hope of affording the claimant an opportunity for closure in respect of the matters that occurred in 2015, I had considered what the impact of this case would have been if the claimant had been allowed to rely on the alleged breaches from that time.

117. It is clear that prior to Mr Bailey leaving the employment of the respondent in 2015, the claimant enjoyed his work, was highly thought of all round. He was allowed to work autonomously with little interference from his line manager. This changed however when Mr Button was promoted to DCIO and decided to take a more hands on approach when Mr Bailey went off sick and then left. Although the claimant says he had a reasonable relationship with Mr Button prior to the validation meeting it is evident that there was some tension following the meeting of 28 January 2015. The claimant's evidence was that he had always provided a self-assessment to Mr Bailey for the PMDR but he decided that he would not do that year because he did not like the way he had been asked and considered Mr Button's attitude to be overbearing. This was a departure from the claimant's usual engagement with the PMDR process, albeit something that he was entitled to do under the policy. However, I find it also demonstrates the claimant's dissatisfaction with Mr Button's management style from an early stage.

118. The claimant's email advising Mr Button that he did not intend to provide a self-assessment was curt and clearly expressed his view of how he interpreted how staff were measured under the PMDR process. As I have found above the claimant's conduct in the subsequent PMDR meeting with Mr Button, demonstrates a reluctant compliance with the process. I accept that as the new DCIO Mr Button was trying to engage with the members of Mr Baileys team and allowed the claimant to behave in the manner in which he did in the meeting and perhaps he should have said something at the time. The fact that he did not however should not have given the claimant the impression that his behaviour was acceptable as he was an experienced investigator that had worked within the police force in his previous career and would have been aware of the standard of behaviour expected of him.

119. The claimant is of the view that it was because he was perceived to be a supporter of Mr Bailey that he was singled out and punished because nobody liked the PMDR. I do not find any evidence of this at all. I accept that there were many that were opposed to PMDR across the department however the difference between the claimant and others was that he made clear his views in his email to Mr Button and gave them as the reason for not providing self-assessment. This was a departure from how the claimant had previously engaged with the process and it is not unreasonable that Mr Button should note this in his pen picture of the claimant. The claimant was aware that this was information that Mr Button intended to take to the validation meeting.

120. In respect of the indicative box marking it may be that the parties have different recollections of what was said in the meeting, Mr Button in his attempt to be positive may have given the claimant the impression he was a box 2 by focusing on

the positive aspects of his ability as an investigator. The claimant, convinced of his own abilities may not have picked up on any doubts expressed however nuanced they might have been. It is quite clear from the findings of Ms D'Italia that she did not find that any alleged failure on the part of the claimant in relation to corporacy was material in awarding him a box 3 marking.

121. I do not find that Mr Button misrepresented the claimant's position overall to the validation team because again while there is some difference in what people recollect of the meeting this is not unusual for the reasons I have given above. It is clear that both Mr Owen and Mr Button had discussed the fact of the claimant's approach to his own PMDR and his behaviour in the PMDR meeting. Mr Button had expressed this as the reason why he was undecided as to what box mark to give. There is an abundance of evidence that the unanimous decision of the validation team was that the claimant's stance in respect of PMDR was considered to demonstrate poor behaviour and that despite him clearly falling within a box 2 for his operational work the department should not be seen to reward poor behaviour.

122. The claimant exercised his right to raise a grievance against his box marking and accepts that the grievance was properly investigated and handled. The outcome was that Ms D'Italia found that the validation team had found that the claimant's conduct in respect of the PMDR process had fallen short of the standards expected and that was why he was awarded a box 3. She also found that the claimant had not been told that his behaviour fell short of what was expected of him and in the circumstances recommended that his box marking should be increased to a 2. I find, as did Ms D'Italia that Mr Button should have made it clear to the claimant that his behaviour in respect of his own PMDR fell below the standards required and would be viewed as bad behaviour. Mr Button had good reason for presenting the claimant's performance to the validation team and the claimant was aware that his view of PMDR formed part of the pen picture to be provided to it. Mr Button's failure was to tell the claimant clearly that he considered his actions amounted to poor behaviour, but I find his failure was not such that it was conduct likely to seriously damage of destroy the duty of mutual trust and confidence because the claimant should have known his approach to his PMDR that year was poor as it was deliberate decision based, as he said, in response to what he considered Mr Button's overbearing attitude.

123. It is clear that the claimant took great exception to being awarded a box 3. The claimant has a high opinion of his abilities and if any criticism is levelled at him he has a tendency to respond by raising allegations against others. This has been demonstrated in respect of almost every person who has given evidence against him either in these proceedings or during the investigation into his alleged misconduct. Having seen the evidence collated during the investigation into his grievance the claimant concluded that Mr Button had lied and fabricated evidence. He considered these to be serious offences and ones that should be investigate by the department irrespective of the outcome of his grievance. He raised a formal complaint which was considered by two senior members of the department. They took the decision that there was no evidence to support the claimant's allegations as the facts were that there was a difference in what the claimant said and what Mr Button said. They determined that carrying out a new investigation would serve no useful purpose and advised the claimant of this. When they refused his request on a second occasion he wrote a formal letter of complaint to the Director General of the department who also

refused his request for the same reasons. It is the claimant's case that by failing to carry out an investigation into the serious allegations he raised the respondent was not only covering up for Mr Button but was in fundamental breach of his contract. Ms Balmer has submitted that the claimant has a tendency to over-react to criticism and I am inclined to agree with her. The determination with which the claimant pursued his complaint against Mr Button was evidence of his own personal intent to make Mr Button pay for what he considered to be an injustice to him. In oral evidence he suggested that Mr Button's diary entries were made up because he had not produced them to Ms Griffiths during the investigation into his grievance. This is pure speculation on the part of the claimant, Mr Button produced a note of events for Ms Griffiths and he was not required to provide evidence to show that he was telling the truth, his note was his own aide memoire.

124. In deciding this aspect of the claimant's complaint I have consider whether the decision not to investigate the claimant's complaint against Mr Button was unreasonable. I find that it was not. I make this finding because the inconsistencies in the accounts of the claimant and Mr Button came about as an investigation into the claimant's grievance. As I have previously stated people have different recollections of events and in this matter it was a case of one person's word against another. The claimant maintains that telephone records should have been obtained but I find that these would have shown nothing more than whether a conversation took place or not. Establishing that a call did not take place would similarly not result in a finding that someone was lying, they may have been mistaken. The claimant also suggests that others in the office should have been asked if his views of PMDR had been disruptive, this is a purely subjective question and one on which Mr Button was entitled to form his own subjective view irrespective of the views of others. I find that the respondent's decision not to open a new investigation into the complaints raised by the claimant against Mr Button was not unreasonable and to do so would have served no useful purpose at all because the issues had already been explored during the grievance investigation and no conclusion reached. It is therefore not a fundamental breach of the duty of trust and confidence.

125. The claimant throughout these proceedings has approached them as if he was dealing with a criminal case, forensically analysing words and seeking to discredit others without fully appreciating what he needs to show in order to succeed in his claim of constructive unfair dismissal. It is clear that the claimant took great offence to being awarded a box 3 marking and lay the blame for that at the door of Mr Button. Having done so he was determined to make sure he paid for it and when the respondent refused to pursue his allegations against him he took matters into his own hands and told him what he thought of him. Although the claimant agreed to move on following his informal warning from Mr Owen, I find that he was unable to do so and his sense of injustice continued which impacted on his behaviour at work and resulted in justified disciplinary action against him.

126. There has been no course of conduct that viewed cumulatively would amount to a repudiatory breach and nor was there any single fundamental breach either now or in the past. It is true that the claimant resigned as a result of the disciplinary action taken against him, but that action was justified in all the circumstances and therefore his claim of constructive unfair dismissal is not well founded and is dismissed.

_____
Employment Judge Sharkett

Date_1 July 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

4 July 2019
FOR THE TRIBUNAL OFFICE

[JE]