EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104643/2018

Held in Glasgow on 26, 27 and 28 March 2019

Employment Judge: P O'Donnell

Mr S Cree	**Claimant** **Represented by:** **Mr E Mowat - Solicitor**
Prestwick Aircraft Maintenance Ltd	**Respondent** **Represented by:** **Mr D Hutchison - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Claimant was dismissed as defined in section 95(1)(c) of the Employment Rights Act 1996 and that such dismissal was unfair. The Tribunal awards the Claimant the sum of **£12303.17** (Twelve thousand, three hundred and three pounds and seventeen pence) as compensation for unfair dismissal. The Tribunal also makes an additional award under section 38 of the Employment Act 2002 equivalent to two weeks' wages amounting to **£824.12** (Eight hundred and twenty four pounds and twelve pence).

REASONS

Introduction

1. The Claimant brought complaints of constructive unfair dismissal, breach of contract and illegal deduction of wages in relation to holiday pay. He also sought an additional award under section 38 of the Employment Act 2002. The claim is resisted by the Respondent.

Preliminary issues

2. At the outset of the hearing, the claims for breach of contract and illegal deduction of wages were withdrawn. There being no objection from the Claimant, these claims were dismissed under Rule 52.

Evidence

3. The Tribunal heard evidence from the following witnesses:-

    a. The Claimant

    b. Jame McCaul, a fellow employee of the Claimant's who accompanied the Claimant at certain of the meetings held between the Claimant and the Respondent

    c. Julie Main, the Respondent's HR officer

    d. Vivianne Cunningham, a director of the Respondent with responsibility for HR

    e. Andrew Marshall, the Respondent's base maintenance manager who heard the Claimant's appeal.

4. There was an agreed bundle of documents prepared by the parties. References to page numbers are a reference to the page numbers of the joint bundle.

Comments on the evidence

5. The Tribunal found all of the witnesses to be credible and that they sought to give evidence in a truthful manner including accepting matters which might be prejudicial to their case.

6. Some of the witnesses (the Claimant and Mr Marshall) did have to have some points put to them more than once or had to have the Judge intervene to clarify what was being asked. However, the Tribunal considered that this arose more as a matter of the witness not understanding the question rather than them trying to evade an answer.

7. There was not a significant dispute of fact between the parties in relation to the relevant facts and any disagreement was more related to how different witnesses had interpreted events.

8. Further, the documentary evidence, in particular the notes of the various meetings (although it was accepted by all parties that these were not verbatim transcripts) tended to reflect the oral evidence from the different witnesses.

Findings in Fact

9. The Tribunal makes the following relevant findings in fact.

10. The Respondent is an aircraft maintenance company who provides maintenance and repair services to Ryanair at Prestwick Airport. They employ approximately 520 people; 400 permanent employees and 120 contractors.

11. The Claimant commenced employment with the Respondent on 28 August 2012 as a trainee mechanic.

12. At the outset of his employment, the Claimant was provided with a statement of terms and conditions of employment set out at pp31-41. This statement described the Claimant's hours of work as *"08.30 to 17.30 Monday through Friday (40 hours per week)"*.

13. In fact, the Claimant's hours of work did not reflect what was said in this statement; he worked a 5 days on, 3 days off shift pattern with 4 shifts of 12 hours each and 1 shift of 8 hours. This was part of the Respondent's annualised hours system whereby they had a shutdown over the summer months.

14. The annualised hours system was set out in a document called "The Rough Guide to PAM" which was referred to in the statement of terms and conditions. This was not a hard copy document and, instead, was available online on the Respondent's computer systems.

15. The Claimant completed his training in 2013 and was appointed as a B1 Mechanic (Grade 2) by letter dated 11 December 2013 (p42). This letter also confirmed the details of what he would be paid in this role.

16. The claimant received pay rises in subsequent years but these were not communicated by letter in the same format as that at p42.

17. The Respondent has a grievance procedure (p195) which involves three stages:-

    a. Stage 1 involves bringing an informal grievance to the immediate supervisor/manager

    b. Stage 2 is a formal written grievance to the department manager or HR department if matters are not resolved at Stage 1. An employee can skip Stage 1 and proceed straight to Stage 2 if their supervisor or manager is the subject of the grievance.

    c. Stage 3 is an appeal to the managing director.

18. The grievance procedure states that it is non-contractual and can be changed by the Respondent at any time at its absolute discretion.

19. On 20 February 2017, the Claimant visited the Respondent's HR office and spoke to Vivianne Cunningham (in the presence of Julie Main) about issues he was having in the workplace:-

    a. The complaint was about how he had been treated by two supervisors, Kyle Officer and Mark McDowall, in the preceding days.

    b. Both these supervisors had recorded file notes (pp44 & 45) about discussions they had with the Claimant regarding being in the crew room on a break when the break time had finished.

    c. The Claimant complained that he felt he was being singled out and that Mark McDowall had acted in an unprofessional manner by shouting and swearing at the Claimant, threatening to get the Claimant sacked.

d. The Claimant made a comment that *"the problem has been going on for years now*" but did not elaborate on what this meant.

e. Part of the complaint related to the fact that these two supervisors were not the Claimant's direct supervisors and that he felt they should not be challenging him as a result.

f. The Claimant was asked why he was in hangar 2 (which is where he had encountered these supervisors) and he explained that this was where his locker was located; he had previously worked in hangar 2 but had been moved to hangar 1. It was agreed between the Claimant and Vivianne Cunningham that his locker would be moved and that this would reduce the possibility of him encountering the two supervisors with whom there had been an issue.

20. There was no discussion of any other action being taken about the Claimant's complaint at that time other than moving his locker.

21. However, Mrs Cunningham did ask Andy Marshall to speak to the two supervisors about what had happened. The Claimant was not told that this was happening.

22. Mr Marshall reported back to Mrs Cunningham by email dated 9 March 2017 (p48). He stated that the supervisors told him that they had had to speak to the Claimant on a number of occasions about lateness and taking extended tea breaks. They told him that they were met with a tirade of abusive language from the Claimant. He asked the supervisors to report any further incidents to him.

23. He went to say *"It's clear however that Scott is an (sic) problem and needs to be dealt with correctly*". He stated that he had asked for the Claimant's fob records (this is a reference to the system whereby employees log in and out of the secure area where they work) to be downloaded and reviewed.

24. No disciplinary action was taken against the Claimant about his time-keeping at any time during his employment. In particular, the fob records which were reviewed did not show any issue with the Claimant's time-keeping.

25. Mrs Cunningham also spoke to the two supervisors about how they had spoken to the Claimant. However, she could not recall when this happened.

26. The Claimant was not told that the supervisors in question had been spoken to by either Mr Marshall or Mrs Cunningham.

27. On 22 March 2017, the Claimant attended the HR office and spoke to Julie Main. A note of the meeting is at pp49 and 49A.

    a. The Claimant was described as being in an agitated and stressed state; he stated that he could not continue working "like this" and that he was losing his confidence in his ability to do his job being unable to concentrate on the simplest of tasks

    b. He made reference to the fact that he had heard that Andrew Marshall and Steve Davies (another manager) were checking the Claimant's fob times.

    c. He asked for a copy of his grievance report as he had now involved a lawyer because he felt nothing was being done.

    d. The Claimant made reference to the situation affecting his family life

    e. He also raised an issue about other mechanics at his grade being asked to do exams to be promoted but that he was not being put forward for this.

    f. Julie Main stated that she had taken on board everything the Claimant had said and that they would speak to Ed Cunningham (the managing director) to try to sort matters out.

28. The Claimant went off sick on 23 March 2017. Other than to attend the various meetings described below, the Claimant did not return to work after that date up to the end of his employment.

29. On 25 May 2017, the Claimant attended what was described as a "Return to Work Meeting". A note of this meeting is at pp60-63.

a. The meeting was conducted primarily by Shane Carthy who is a HR manager with Ryanair.

    i. There is an arrangement between the Respondent and Ryanair that the Respondent can use some of Ryanair's resources where there is felt that there is a need for greater expertise.

b. Mrs Cunningham was also present at the meeting as was Julie Main as a note-taker. The Claimant was accompanied by a fellow employee, Robert Kerr.

c. In the course of the meeting, the Claimant elaborated on the issues he had been having in the workplace that he felt lead to his illness:-

    ii. He explained that issues had started two years ago with an incident involving a supervisor, Paul Nix, in which the Claimant alleged Mr Nix tried to get him sacked for refusing to do a job which the Claimant felt he was not qualified to do.

    iii. He made reference to being accused of sexually harassing a female colleague, Megan Brodie.

    iv. The Claimant alleged that he had been told by other employees that Steve Davies was *"out to get him"*.

    v. He also made reference to being told he was not working on a particular job when it had, in fact, been completed 4 days earlier.

d. Mr Carthy stated to the Claimant that the company could not address matters which had not been raised with them. He also made reference to receiving *"3rd party information"* with no name to it and if that was the case then any alleged incident had not happened.

e. There was discussion about how matters could be resolved with a view to the Claimant returning to work.

i. There was a suggestion of a meeting with the two supervisors involved but the Claimant was not sure if that would work and that something more official might be needed.

ii. The Claimant was clear that he wanted the two supervisors to stay away from him and let him get on when he returned to work.

f. The meeting concluded with the Claimant agreeing to provide details of his current medication and bringing in his doctor's certificates.

30. Mrs Cunningham wrote to the Claimant by letter dated 14 June 2017 (pp65-66) after this meeting outlining the Respondent's understanding of what was discussed. The letter made reference to the fact that the Claimant's primary concern should be to focus on his well-being but that if he wished her to investigate his complaint against Kyle Officer and Mark McDowall then he should let her know.

31. The Claimant phoned the Respondent's HR office on 15 June in response to this letter and spoke to Julie Main. A note of the discussion is at p67.

a. The Claimant was unhappy at the tone and content of the letter; he believed that the Respondent was trying to turn matters against him for being off sick.

b. He made reference to wanting matters to be dealt with through his lawyer but Ms Main explained that this was not how the Respondent dealt with matters.

c. It was suggested to the Claimant that a further meeting could be arranged and he agreed to this.

32. The Claimant had a further telephone call with Julie Main on 19 June 2017 (p69) at which meeting was arranged for the next day. During the course of this discussion, the Claimant made reference to taking legal action against Mark McDowall if nothing was done.

33. A meeting then took place on 20 June 2017. A note of this meeting is at pp70-75 and it is described as a "Follow Up Meeting".

a. The meeting was attended by Mr Carthy, Mrs Cunnigham and Ms Main for the Respondent. The Claimant was accompanied this time by Chris Seaton.

b. Mr Carthy opened the meeting by explaining that the purpose of the meeting was to follow up the previous meeting regarding the Claimant's return to work and how to resolve his grievance.

c. The Claimant made reference to another employee, Brian Gebbie, having raised a complaint about Mark McDowall. Mrs Cunningham indicated there were no complaints on Mr McDowall's file.

d. The Claimant stated that he knew that Mr McDowall had lodged a file note about him saying that he (the Claimant) had been shouting and swearing at Mr McDowall. The Claimant disputed this and said that it was Mr McDowall who was shouting and swearing. He indicated that Brian Gebbie would be a witness to this.

e. Mr Carthy responded by saying that they could not talk about others who were not in the room. Mrs Cunningham followed this by saying that without anything on file then there was no evidence and they could not do anything.

f. During the discussion, the Claimant made reference to having witnesses who could back him up but, other than Mr Gebbie, he did not provide details of these witnesses. He did say that he would speak to his witnesses.

g. The Claimant made reference to having some sort of video evidence but there was no detail of what this was.

h. Both the Claimant and Mr Seaton make reference to other employees being too scared to speak up. Mrs Cunningham responded by saying

that anyone can come to HR to report matters or put it in writing. She went on to say that anything raised with HR is confidential.

i. There was discussion about what could be done to get the Claimant back to work and he indicated that he was meeting his doctor that week.

j. The issue of a meeting with the two supervisors was raised and the Claimant indicated that he might be willing to meet with Kyle Officer but not with Mark McDowall as he did not consider this would help.

34. This meeting was followed by a letter from Mrs Cunningham to the Claimant dated 3 July 2017 (pp78-80). The letter discusses the Claimant's complaint against Kyle Officer and Mark McDowall which, Mrs Cunningham confirmed in her oral evidence, was a reference to the complaint raised by the Claimant in February 2017. Mrs Cunningham stated that she could find no evidence to support a complaint against the supervisors and so she considered this *"query"* to now be closed.

35. The letter went on to confirm that, due to the length of time the Claimant had been absent from work, she had instructed the payroll department to cease paying the company sick pay and that the Claimant would now only receive Statutory Sick Pay.

36. Mrs Cunningham, in the letter, also drew the Claimant's attention to company policy regarding the making of recordings or taking photographs of any aspect of the company's operations. This was related to the Claimant's assertion in the June meeting that he had video evidence to support his position.

37. The letter did not say that the Claimant had any right of appeal in relation to the decision to close his complaint. It did enclose a copy of the Respondent's grievance procedure.

38. The Claimant contacted the HR office and spoke to Julie Main on 4 July 2017. A note of this discussion can be found at pp81-83.

a. He was unhappy about the way the letter was worded as he felt that it made him seem like *"an aggressive idiot"*. He also disputed the accuracy of some of the assertions made in the letter, specifically that he had called Mark McDowall a *"fucking dickhead"* where it was his position that he had said that someone else had described Mr McDowall in those terms.

b. He made reference to speaking to his lawyer and that he felt that he had no option but to take legal action.

c. The Claimant asked for a copy of the first report back in February and Ms Main said that this would not be a problem.

d. He confirmed that he was speaking to his doctor and there was new medication for him to try to see if this would help him feel better.

e. The Claimant stated that he feels that he was being forced to resign because he could no longer pay his bills with the reduction in his sick pay.

39. On 21 August 2017, the Claimant sent an email to Julie Main (p85) with a written grievance. The email stated that he had submitted a formal grievance in March 2017, that he was told this would be investigated but that no decision had been made.

40. The email goes on to say that he felt that he had been victimised since refusing to carry out an engineer's inspection 3 years ago; this was a reference to the incident with Paul Nix.

41. Attached to this email was a handwritten account prepared by the Claimant setting out the detail of his grievance (pp86-98).

a. It starts by setting out the detail of the incident with Mr Nix; the Claimant felt that the time that he was being asked to carry out an inspection which should have been done by an engineer and not a mechanic so refused to do so. He alleged that Mr Nix threatened to dismiss him for gross misconduct as a consequence of this and that

this was stopped when Mr Cunningham, the managing director, became involved.

b. The Claimant goes on to allege that shortly after this management started checking his fob time and had people watching his break times and when he went to the toilet.

c. He also alleges that management were getting engineers such as Donald McDonald to pressure him to rush jobs faster than they should be done. He stated that his colleagues were not being treated in this way.

d. The Claimant set out his move to a different hangar and how he felt that this would be a fresh start and see an end to the way he was being treated. However, he alleged that the victimisation started again after 4 months with the same conduct as before, his fob times being checked and pressured to complete jobs.

e. He alleged that he was told by an engineer, Darragh Noonan, that he should "watch his back" because Mr Noonan had been in Steve Davies' office and alleged that Mr Davies said "Scott Cree is next". It was alleged that Mr Davies had said that he (Mr Davies) and Mark McDowall would make sure of this because they had "a plan" for the Claimant to be dismissed.

f. The Claimant alleged that after this he started to be harassed by Kyle Officer and Mark McDowall about break times.

g. He again raised the issues of false accusations that he had sexually harassed Megan Brodie and the fact that he was not being put forward for promotion.

42. The Claimant's Statutory Sick Pay came to an end and this was confirmed to the Claimant by letter dated 29 August 2017 (p101).

43. A further meeting was arranged for 26 September 2017; the Respondent was in its annual shutdown period when the Claimant sent his grievance in August and relevant people such as Mrs Cunningham had been on holiday.

44. The note of the meeting on 26 September 2017 is at pp121-123. Again, the Respondent is represented by Mr Carthy, Mrs Cunningham and Ms Main. The Claimant was accompanied by Mr McCaull.

    h. Mr Carthy opened the meeting by stating that the purpose was to discuss the Claimant's letter of 21 August and that it would be *"brief, 15 minutes only"*. The meeting, in fact, lasted 18 minutes.

    i. After some discussion about the Claimant's current state of health, Mr Carthy went on to say that the grievance had been closed by the letter of 3 July 2017.

    j. The Claimant replied that his solicitor could not see in that letter where it said the matter had been dealt with and that he had not been given the right of appeal.

    k. The Claimant went on to say that he had 4 witnesses who were willing to support his case to which Mr Carthy replied that the Claimant could appeal the letter of 3 July and that this should be in writing to Andy Marshall.

    l. There was no discussion of the detail of the Claimant's grievance of 21 August and the position of the Respondent, repeated a number of times, was that the Claimant could appeal the letter of 3 July.

45. On 1 October 2017, the Claimant emailed Julie Main asking for written confirmation of the outcome of the September meeting. Ms Main replied on 2 October to say that the outcome was that the original grievance was closed and he could appeal that by letter to Andy Marshall. Both emails are at p124.

46. The Claimant sent a reply to this by email dated 3 October 2017 (p127) and by letter (p128). He asserted that he did not consider that his original grievance had been dealt with properly and that he had raised a further

grievance in August. He stated that he did not intend to lodge further procedure in relation to the original grievance. The email concluded that if he did not hear from the Respondent in relation to the 21 August grievance within 7 days then he would assume they were not intending to deal with it.

47. The Respondent replied to the Claimant's letter by email dated 19 October 2017 (p129) reiterating that he should appeal to Andy Marshall.

48. The Claimant responded to that letter by email dated 15 November 2017(pp130-131). He asserted that there had been no discussion of the matters raised in his 21 August grievance at the meeting in September and he considered that the Respondent was not willing to treat the 21 August correspondence as a grievance. The only option being offered to him was to appeal and so he asked for the 21 August letter to be treated as an appeal. He went on to say that he believed that the appeal should be dealt with by the managing director in terms of the grievance policy.

49. Ms Main responded to the Claimant by email dated 17 November 2017 (p130) stating that the Claimant should put his appeal in writing to Andy Marshall. She did not consider treating the correspondence from the Claimant as an appeal. The correspondence was also shown to Mr Marshall who did not consider treating this as an appeal; he was expecting to receive a letter from the Claimant addressed specifically to him.

50. The Respondent wrote to the Claimant by letter dated 5 December 2017 (p135) stating that no appeal to Mr Marshall had been received and that it was two months past the appeal deadline but that if he did wish to have the matter reviewed then he should contact Mr Marshall no later than 11 December 2017.

51. On 8 December 2017, the Claimant hand-delivered a letter of appeal to the Respondent (p137) which was passed to Mr Marshall the same day. The letter of appeal sets out that the Claimant had raised a grievance dated 21 August and had been trying to have this resolved but he was concerned that the company was trying to avoid dealing with his complaint. It goes on to say that the only mechanism he was being offered was an appeal to Mr Marshall

in relation to the original grievance in February and so the Claimant was asking that his grievance off 21 August be treated as an appeal. The letter enclosed previous correspondence from the Claimant to the Respondent including the 21 August grievance and the accompanying handwritten statement.

52. Mr Marshall considered that his remit was limited to an appeal in relation to the outcome of the original grievance in February 2017 as communicated in Mrs Cunningham's letter of 3 July 2017 and whether the Claimant had presented any new evidence in relation to that matter.

53. A meeting was held to hear the appeal on 21 December 2017. The meeting was chaired by Mr Marshall and Mark Burns attended as note-taker. The Claimant was again accompanied by Mr McCaull. The note of the meeting is at pp156-162.

a. Mr Marshall started the meeting by asking for any new evidence and the Claimant replied to say that this had been offered at the previous meeting but was refused.

b. Mr Marshall repeated his request for new evidence and again the Claimant stated he had submitted new evidence but it was refused at the previous meeting. He made reference to the incident with Paul Nix.

c. Mr Marshall did not engage with the Claimant about that incident or any of the other matters which the Claimant raised in the 21 August grievance.

d. Instead, the discussion between Mr Marshall and the Claimant was focussed on the incidents in February 2017 relating to Mr McDowall and Mr Officer challenging the Claimant about his break times. It concluded with Mr Marshall expressing a view that there could be valid reasons why the Claimant had been challenged about his break times

e. Mr Marshall went on to state that the Claimant had *"not been dismissed"* and asked if what can be done to get him back to work.

f. The Claimant expressed the concern that he could be victimised again if he returned to work. Mr Marshall replied that no-one should be victimised but anyone can be challenged if there was a reason for this.

54. Mr Marshall sent the Claimant a letter dated 10 January 2018 with his decision (pp165-166).He stated that the information in the Claimant's grievance of 21 August was the same information received as part of the original grievance and that the Claimant had no provide sufficient grounds or evidence for him to overturn the decision of 3 July 2017.

55. The Claimant resigned by email dated 18 January 2018 sent to Mr Marshall (pp167-168). He gives the reason for his resignation as being a loss of trust and confidence with the Respondent arising from the fact that he felt that the Respondent had not given any real consideration to his complaints, with there being no investigation or discussion of the complaints raised in his grievance of 21 August 2018.

56. After his resignation, the Claimant was unemployed until the end of April 2018 when he started a job at his brother's company, receiving his first pay packet on 4 May 2018.

57. During the period he was unemployed, the Claimant had not claimed benefits. He had phoned previous employers to see if they had any work but none of them had any vacancies.

58. The Claimant had applied for a job at Chevron before he resigned from the Respondent. This was in September 2017. He had applied because he felt the Respondent was not dealing with matters and he wanted to see what other opportunities were available but his preference was to resolve matters with the Respondent and continue to work with them.

Relevant Law

59. Section 94 of the Employment Rights Act 1996 makes it unlawful for an employer to unfairly dismiss an employee. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA). The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that

there is a potentially fair reason for dismissal. There are 5 reasons listed in s98.

60. Section 95(1) of the 1996 Act states that dismissal can arise where:-

"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."

61. The circumstances in which an employee is entitled to terminate their contract by reason of the employer's conduct is set out in the case of *Western Excavating v Sharp* [1978] ICR 221. The Court of Appeal held that there required to be more than simply unreasonable conduct by the employer and that had to be a repudiation of the contract by the employer. They laid down a three stage test:-

a. There must be a fundamental breach of contract by the employer

b. The employer's breach caused the employee to resign

c. The employee did not delay too long before resigning thus affirming the contract

62. A breach of contract can arise from an express term of the contract or an implied term. For the purposes of this case, the relevant term was the implied term of mutual trust and confidence.

63. The test for a breach of the duty of trust and confidence has been set in a number of cases but the authoritative definition was given by the House of Lords in *Malik v Bank of Credit and Commerce International* SA [1997] IRLR 462 that an employer would not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

64. Section 38 of the Employment Rights 2002 provides that where the Tribunal finds in favour of a claimant in respect of proceedings listed in Schedule 5 of the Act and the Tribunal finds that the employer was in breach of its duties under section 1(1) or 4(1) of the Employment Rights Act 1996 then the

Tribunal must increase the award to the claimant by a sum equivalent to two weeks' wages and can increase the award by a sum equivalent to four weeks' wages.

65. Section 1 of the 1996 Act states that an employer must give an employee a written statement setting out specific information about their terms and conditions of employment. Section 4 provides that where there are any subsequent changes to those terms then the employer must give the employee a written statement of those changes.

Claimant's submissions

66. The Claimant's agent made the following submissions on behalf of the Claimant.

67. This was a claim for constructive unfair dismissal and the relevant definition of dismissal was to be found in section 95(1)(c) of the Employment Rights Act 1996. Reference was made to the test in *Western Excavating v Sharp* that there must be a breach going to the root of the contract showing that the employer was no longer intending to be bound by one or more essential terms of the contract.

68. In this case, the essential term was the duty of trust and confidence as defined in *Malik*.

69. The Claimant's agent summarised what he considered to be the relevant events in the chronology.

70. It was submitted that, from the chronology of events, the Respondent had acted in a manner calculated or likely to destroy trust and confidence.

71. In support of the submission that the Respondent had acted in a manner calculated to destroy trust and confidence, the Claimant's agent relied on the following matters:-

    a. Mr Marshall identified the Claimant as a problem and looked into his fob records.

b. The Respondent had avoided dealing with the Claimant's various complaints and went at some lengths to do so.

   i. They did not engage in any discussion with the Claimant about these matters.

   ii. They did not investigate the complaints.

   iii. They did not interview the witnesses who were identified.

c. It was submitted that there was no real grievance procedure at all in relation to the written grievance of 21 August 2017.

d. The appeal was only in relation to the informal complaint.

e. There was no grievance meeting and, in effect, no appeal

f. Mr Marshall did not treat the Claimant with respect

g. A conclusion can be drawn from the failure to deal with the Claimant's complaint and those of other employees (such as Chris Seaton, Brian Gebbie etc) that there was a culture of sweeping complaints under the carpet

h. The Respondent had failed to follow their own grievance procedure:-

   iv. In how they dealt with the formal grievance from the Claimant

   v. In allocating Mr Marshall as the appeal officer

   vi. It was submitted that the caveat in the grievance procedure allowing the Respondent to depart from the procedure was not what that said; it was a caveat allowing them to change the procedure but they had never done so

   vii. If the Respondent was right in what they said then it made a mockery of the whole procedure

i. They had not followed the ACAS Code.

72. It was submitted that the above factors, if not establishing that the Respondent had acted in a manner calculated to destroy trust and confidence, certainly established that the Respondent had acted in a way that was likely to do so. Either aspect would be sufficient to establish a fundamental breach of contract.

73. It was submitted that the Claimant had tried to sort out his complaints but he was not taken seriously and had no option but to resign. The reasons for his resignation are set out in his resignation letter.

74. The Claimant had tried to sort out his complaints by using the internal mechanisms within the Respondent and those internal mechanism ended with Mr Marshall's letter confirming the appeal decision. The Claimant had not unduly delayed in resigning once it was clear that the internal mechanisms were at an end.

75. The Claimant had not always intended to resign; it was not relevant that he applied for another job, this simply showed he was unhappy. The Claimant resigned with no job to go to and had continued in employment for some months after his sick pay came to an end in July 2017.

76. It was submitted that there was no reasonable and proper cause for the Respondent's action. There was a breach of the implied duty of trust and confidence which lead to the Claimant's resignation and so there is a constructive unfair dismissal.

77. Reference was made *to W A Goold (Pearmark) Ltd v McConnell & Richmond* UKEAT/489/94 as authority that good industrial relations required that employers provide their employees with a method for dealing with grievances in a timeous and proper fashion such as to allow a Tribunal to conclude that there was an implied term that employer would *"reasonably & promptly afford a reasonable opportunity to their employees to obtain redress of any grievance".*

78. There was also reference to *Blackburn v Aldi Stores Ltd* [2013] IRLR 846, specifically paragraph 25 as authority for the proposition that a failure to follow

a grievance procedure can amount to or contribute to a fundamental breach of contract.

79. The Claimant's agent also drew the Tribunal's attention to paragraphs 32, 34, 40 and 41 of the ACAS Code of Practice and submitted that in relation to the Claimant's formal grievance there was a complete failure to follow any procedure.

80. The Tribunal was referred to the updated Schedule of Loss lodged by the Claimant and the following submissions were made:-

    a. The Claimant secured employment at the end of April 2018.

    b. He tried to find employment with previous employers but he was still unfit suffering from stress.

    c. The Claimant's new employment ended in December 2018 and no losses were sought for the period after that date; it was accepted that this was a cut-off point for loss of earnings.

    d. The Claimant received no benefits in the period he was unemployed.

    e. He had not been in the Respondent's pension scheme.

    f. There should be an uplift to the compensation due to the failure to comply with the ACAS Code of Practice and this should be at the higher end of the scale due to the fact that no procedure was followed at all.

81. In terms of the additional award under section 38 of the 2002 Act, the Claimant's agent submitted as follows:-

    a. The Tribunal heard evidence that the Claimant had a contract at the start of his employment.

    b. Various aspects of that were not accurate by the end of his contract:-

        i. His job title had changed and was reflected in a later letter.

ii. Salary had increased but this was not reflected in any document; there had been no statement of changes as required under section 4 of the 1996 Act issued to the Claimant.

c. The contract itself was inaccurate in relation to working hours and annualised hours:-

i. The annualised hours program was set out in the "Rough Guide" but this was online and no written copy provided.

ii. Section 1 of the 1996 Act states that hours must be specified in the statement and not in another document

82. It was submitted that an additional award equivalent to 4 weeks' wage should be made. This should be applied after any uplift for the failure to follow the ACAS Code of Practice.

83. In terms of contributory fault, it was submitted that it was no appropriate to make such a deduction where there was a breach by the Respondent with no reasonable and proper cause. The Claimant's agent anticipated that reference would be made to the Claimant seeking legal advice but submitted this was not surprising.

84. It was submitted that there was no failure to mitigate loss. Reference was made to the cases of *Wilding v British Telecommunications Ltd* [2002] IRLR 524 and *Cooper Contracting Ltd v Lindsey* UKEAT/0184/15. It was submitted that the onus in proving a failure to mitigate was on the Respondent and that the Claimant had not been challenged in evidence as to what he could and should have done to mitigate his loss.

85. In response to the submissions made on behalf of the Respondent, the Claimant's agent made the following rebuttal:-

a. In relation to the s38 claim, it had never been put to the Claimant in cross-examination that his hours of work initially reflected what was in the written statement and then changed to annualised hours.

b. In any event, if there had been a change then a section 4 statement of change had not been issued in respect of this.

c. It was the evidence of Mrs Cunningham that there had been no discussion of the points the Claimant raised in his grievance.

d. There was no anticipatory breach relied on.

e. It was clear from the evidence of Mrs Cunningham that stage 2 of the grievance procedure applied when the August letter was sent

f. The Claimant's agent took issue with the comments on credibility:-

   i. Mr Marshall was clearly being evasive

   ii. He did not accept the criticisms made of the Claimant

   iii. Mr McCaull confirmed that Mr McDowall was a bully and that he had witness this.

g. The Claimant's comments about feeling he was being forced to resign reflected genuine concerns and the issue is when he did resign and that this was in response to a repudiatory breach.

h. There was evidence about the Claimant's attempts to mitigate and he did secure alternative employment.

i. It is not correct that the Claimant did not provide witness details; numerous names are mentioned across the documents but none of them were interviewed.

Respondent's submissions

86. The respondent's agent produced written submissions and supplemented these orally.

87. In relation to the claim for additional award under section 38 of the 2002 Act, the Respondent's agent submitted that the Claimant had been given a written statement which complied with section 1 of the 1996 Act at the start of his

employment and that he was provided with a letter updating the details of this statement in December 2013.

88. He went on the submit that section 38 was concerned with the failure to provide a written statement of employment particulars and not where any statement issued did not completely and accurately reflects the relationship between the parties.

89. It was submitted that the contract does make reference to hours but if those are not what are applied then there is no breach of section 1 of the 1996 Act. It was suggested that those hours may have been correct at the time when the Claimant commenced employment with a change to annualised hours at a later date.

90. For all these reasons, it was submitted that no additional award should be made in the event that the Claimant succeeds in his claim of constructive unfair dismissal.

91. In respect of the constructive unfair dismissal claim, the Respondent's agent submitted that it was important to break down the Claimant's grievances as the complaints varied over time. He went to set out a chronology of the various grievances raised by the Claimant starting with the complaint on 20 February 2017, the matters raised at the various meetings and the written grievance. He submitted that these different issues showed that there was not a clear and coherent grievance by the Claimant and that it was a *"moving feast".*

92. The Respondent's agent then went to set out a timeline of what he considered were the relevant events.

93. It was accepted that the Respondent's procedures were not flawless, for example, the failure to advise the Claimant of his right to appeal in the letter of 3 July 2017. However, such failings were not capable of amounting to a fundamental breach of contract.

94. It was denied that the Respondent took no steps to investigate the Claimant's complaints; it was submitted that the evidence of Mrs Cunningham showed

that the matters which made up the Claimant's written grievance had been discussed at previous meetings and drew the Tribunal's attention to when these had been discussed.

95. The Respondent's agent went on to comment on the credibility of the witnesses. He submitted that the Respondent's witness had given clear evidence and should be believed whereas the Claimant had been obstructive and evasive in his evidence.

96. It was submitted that the test which the Tribunal should apply was that to be found in the *Western Excavating* case and each of the three stages of the test was addressed in turn.

97. In respect of whether there had been a fundamental breach, it was submitted that there was no breach; the Respondent had dealt with the Claimant's original complaint of February 2017 by speaking to the two supervisors concerned; the Claimant made further accusations which were dealt with in the meetings in May and June in which those accusations are discussed but no further action was taken because the Claimant did not provide additional information.

98. It was submitted that the Respondent had investigated and carried out a process; the test is not whether that process was flawless but whether it was so unfair as to amount to a fundamental breach; the Claimant had fallen significantly short of this standard.

99. Reference was made to the case of *Morrow v Safeway Stores* EAT/0275/00 and its summary of the decision in *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84. It was submitted that there must be a fundamental breach that seriously damages trust and confidence and that the Claimant fails because he had not demonstrated actions which breach trust and confidence; the Respondent held five meetings with the Claimant which is not the actions of an employer seeking to force out an employee.

100. In relation to the question of any breach causing the Claimant to resign, it was submitted that it was not clear what the Claimant sought to say was the

breach. If it was an allegation that the Respondent had not properly investigated matters then he was aware of this in July 2017.

101. Reference was made to the Claimant's repeated comments about seeking legal advice and his comments that he felt that he was being forced to resign. It was submitted that these indicated that the Claimant was seeking to leave his employment at the expense of the Respondent and that his arguments about being forced to leave were a sham. The fact that he had looked for alternative employment supported this and reference was made to *Walker v Wedgewood & Sons* [1979] ICR 744.

102. In terms of when the Claimant resigned, the Tribunal's attention was drawn to the fact that the first complaint was made in February 2017 and the Claimant did not resign until January the following year. The Claimant had made reference in July to feeling he is being forced to resign and had been seeking legal advice from an early stage.

103. It was submitted that this showed that the Claimant intended to leave at a much earlier time but he had been hedging his bets and hoping that he could rely on enough failures by the Respondent to justify his resignation.

104. The Respondent's agent suggested that if the Claimant intended to resign he should have done so some five or six months previously. He went on to submit that even the Claimant's resignation was not immediate given that he took a week from the date of Mr Marshall's letter to submit his resignation.

105. He went on to outline a number of flaws that he said existed in the Claimant's argument.

106. In relation to the various cases relied on by the Claimant's agent, the Respondent's agent sought to distinguish these from the present case; *Goold* was a case about a significant reduction of pay and so was not relevant; *Blackburn* had a number of additional features; Wilding was a case of discrimination.

107. In respect of what was said about the Claimant resigning when the internal mechanisms came to an end, it was submitted that the Claimant had been

talking about resigning since July; he subsequently hoped to throw enough mud at the wall for something to stick but July must be when he takes the view that there is a breach and it is not plausible that we was waiting for the process to end.

108. The Respondent's agent confirmed that the Respondent did not seek to advance any *esto* case that if there was a dismissal then that dismissal was fair under s98 of the 1996 Act.

109. In relation to remedies, it was submitted that a reduction should be made for contributory fault given what was said about failings on the Claimant's part in not raising matters sooner and delays in the process which could be attributed to him. Reference was made *to Polentarutti v Autokraft Ltd* [1991] ICR 757. Any such contributory fault should reduce the compensatory award to nil.

110. In addition, it was submitted that there was no evidence that the Claimant had taken steps to mitigate his loss by finding alternative employment. He did not find work for 4 months and claimed no benefits.

111. There should be no uplift for a failure to follow the ACAS Code as this was not a case where there was no procedure followed.

Decision – Constructive unfair dismissal

112. The Tribunal agrees with the parties that the appropriate test for whether there has been a dismissal as defined in s95(1) of the 1996 Act is that laid down in *Western Excavating.* The Tribunal will address the three elements of that test in turn.

Was there a fundamental breach of contract by the respondent?

113. The Claimant seeks to argue that there had been a breach of the implied duty of trust and confidence arising from the alleged failure by the Respondent to deal with the Claimant's grievance.

114. Again, the Tribunal agrees with the parties that the appropriate test is that formulated in *Malik*; had the Respondent, without reasonable or proper cause,

acted in a manner calculated or likely to destroy between them and the Claimant.

115. The first question for the Tribunal in considering this is to determine whether there had been a failure by the Respondent to deal with the Claimant's grievance. For the reasons which will be set out below, the Tribunal was of the view that the Respondent had failed to deal with the Claimant's grievance.

116. The grievance process started with the Claimant's visit to the HR office on 20 February 2017 and, at that time, his grievance only related to his encounters with Mr Officer and Mr McDowall in the preceding days. The Claimant did make some reference to matters that had taken place earlier but the only specific matters which were raised were the interactions with Mr Officer and Mr McDowall.

117. It is quite clear from the evidence that these were the matters which Ms Cunningham believed she was addressing when she agreed to move the Claimant's locker and that this was the *"query"* which she was closing in her letter to the Claimant of 3 July 2017.

118. It was also quite clear that it was these issues (that is, those raised on 20 February 2017) were what Mr Marshall considered were the subject of the appeal that he was hearing in December 2017.

119. In these circumstances, the only complaints that were ever dealt with under the terms of the Respondent's grievance procedure were those which were raised by the Claimant on his visit to the HR office on 20 February 2017.

120. However, the Claimant raised a number of other complaints with the Respondent; there was the incident with Mr Nix from approximately 3 years previously and the alleged victimisation which they Claimant said he suffered as a result; there was a complaint that he had been accused of sexually harassing a female colleague; he complained that he was not being put forward for exams to be promoted whilst other mechanics were; he raised an issue around his fob times being checked; he stated that he had been told that Steve Davies was planning to have him dismissed.

121. These additional complaints were raised at various times; some were mentioned during the Claimant's discussion with Julie Main in March 2017 whereas others were raised during the return to work meeting in May 2017 and the follow-up meeting in June 2017. It is arguable that the raising of these issues in this way could have been considered as an informal Stage 1 grievance but neither party treated these discussions in that way at the time.

122. However, what is beyond doubt is that the Claimant raised a written grievance by his email and letter of 21 August 2017 setting out these various complaints. The Tribunal considers that this was clearly an attempt by the Claimant to engage Stage 2 of the Respondent's grievance procedure.

123. In the Tribunal's view, the Respondent failed to properly address that written grievance; although they held a meeting with the Claimant on 26 September 2017 purporting to discuss his grievance, it is quite clear from the note of that meeting and the evidence from the witnesses that there was no real discussion of the issues being raised by the Claimant.

124. It did not bode well for how the meeting was going to be conducted when Mr Carthy opened by saying it would not be a long meeting, lasting only 15 minutes; this creates the clear impression that there was never any intention by the Respondent to engage in any detailed discussion of the Claimant's written grievance.

125. It is quite clear from the note of the meeting that there was no real discussion of the issues being raised by the Claimant and the Respondent's position was that they considered that his grievance had been closed by the letter dated 3 July 2017 despite the fact that the Claimant was now raising issues which had not been the subject of that decision.

126. The only option being presented by the Respondent as a way forward was to appeal the decision set out in the letter of 3 July 2017. However, this was to ignore the fact that the Claimant was now raising a wider range of issues than had been addressed by the 3 July letter.

127. Further, the Tribunal does not consider that the fact that the Claimant had raised the complaints in his written grievance in the earlier meetings in May and June assists the Respondent in saying that they had discussed those complaints; the meetings in question were not grievance meetings; there was no suggestion that the verbal complaints made by the Claimant at those meetings were being treated as Stage 1 grievances; at the May meeting, the response from Mr Carthy to the complaints made by the Claimant was to say that the Respondent could not deal with matters which had not been raised (which, in the Tribunal's view, ignored the fact that the Claimant was plainly raising them at the meeting); at the June meeting, the Respondent took a similar approach indicating that if there was nothing on file then there was no evidence; the Respondent's clear response to the June meeting was to issue the letter of 3 July closing the *"query"* raised by the Claimant in February 2017 and did not address any of the additional complaints made at May and June meetings.

128. This is not a case where there had been some discussion or investigation of the issues raised in the written grievance but such action was said to be inadequate. This is a case where there was no discussion or investigation at all of the complaint raised by the Claimant in his written grievance; the Respondent's position from the start of the September meeting and repeated throughout was that the grievance had been dealt with by the letter of 3 July 2017 and the Claimant's only option was to appeal that decision.

129. In these circumstances, the Tribunal considers that the Respondent had not addressed the issues raised in the Claimant's written grievance at all when they met with him in September 2017.

130. However, that is not the end of the matter. It could have been possible for this to have been remedied on appeal; Mr Marshall could have recognised that the Claimant was seeking to raise issues that had not been part of the original grievance from February and taken steps for the new issues to be addressed.

131. Unfortunately, he did not do so. It was quite clear that Mr Marshall took a very narrow approach to the Claimant's appeal; he was only prepared to look at the issues raised in February 2017 and would only consider new evidence being presented by the Claimant. The notes of the appeal meeting very clearly demonstrate that Mr Marshall was unwilling to discuss anything other than the original grievance.

132. For all these reasons, the Tribunal consider that the Respondent did not address the Claimant's grievance as set out in the correspondence of 21 August 2017. This is not a case where there was an attempt to consider the complaints being raised which may or may not have been adequate but, rather, a complete failure to engage with the issues being raised in that correspondence.

133. The next question is whether that failure destroyed the trust and confidence between the Claimant and Respondent. The Tribunal has no doubt that the failure to address the Claimant's grievance did destroy trust and confidence.

134. The matters raised in the Claimant's grievance were not minor or trivial; they related to his career progression (that is, the failure to put him forward for exams); he was complaining that he had been accused of serious (if not gross) misconduct which could impact on his personal life (that is, the accusations of sexual harassment); he felt he was being singled out and targeted for unfair disciplinary action that could lead to his dismissal.

135. These were all very serious issues which were clearly having an impact on the Claimant's health; Julie Main noted that when she spoke to the Claimant in March 2017 that he was in a stressed and agitated state; the Claimant described the impact this was having on his personal and family life; the Claimant was unfit for work for a considerable period of time under the care of his doctor and receiving medication; there was no suggestion from the Respondent that the Claimant's health condition was anything other than genuine.

136. In these circumstances, given the very serious nature of the complaints being made by the Claimant and the effect these issues were having on him, the

Tribunal has no doubt that the failure by the Respondent to address the written grievance (particularly given that this was a failure to address the complaints set out in the Claimant's written grievance at all and not simply a case where action was taken but felt by the Claimant to be inadequate) destroyed the trust and confidence between the Claimant and the Respondent.

137. Under the *Malik* test, the question is whether the conduct of the Respondent was calculated or likely to destroy trust and confidence. For the same reasons as set out above in relation to whether or not trust and confidence had been destroyed, the Tribunal considers that the failure to deal with the Claimant's grievance was likely to destroy trust and confidence (and, indeed, did do so).

138. In these circumstances, the *"calculated or likely"* element of the Malik test is met and there is no need to address the question of whether the Respondent's conducted was *"calculated"* in the sense that the deliberately set out to destroy the trust and confidence the Claimant had in them.

139. However, the Tribunal will briefly address this as it did feature as part of the Claimant's case. The Tribunal can see why the Claimant may have formed the view that the Respondent's actions were deliberate; the comment by Mr Marshall in his email of 9 March 2017 that the Claimant was a problem and needed to be *"dealt"* with along with the subsequent conduct of the various meetings would certainly raise concerns in any reasonable employee that there was a concerted action by their employer to force them out of employment.

140. However, viewed objectively, the Tribunal was not prepared to draw any conclusions from the evidence that the Respondent was deliberately trying to force the Claimant out of his job; Mr Marshall's comment, although phrased in an unfortunate manner, did not necessarily mean that there was a plan to dismiss the Claimant and it could just as easily meant that he needed managed properly; there was no clear reason why the Respondent acted as

they did and a deliberate intention to force the Claimant out was not the only reason which could be inferred from the facts.

141. Finally, there is the question of whether the Respondent had a reasonable and proper cause for the failure to deal with the Claimant's grievance.

142. As stated above, there was no clear explanation from the Respondent as to why they took the approach they did to the Claimant's written grievance. To the extent that the Respondent considered that the grievance had already been addressed by the decision set out in Mrs Cunningham's letter of 3 July 2017, there are two fundamental problems with this.

143. First, the written grievance of 21 August 2017 contains complaints which were clearly and obviously not features of the grievance decided by the letter of 3 July 2017. It simply cannot be correct that the letter of 3 July 2017 addressed or decided anything other than the complaints made on 20 February 2017. The written grievance of August 2017 contained entirely new complaints and so the Respondent cannot rely on the letter of 3 July as dealing with those.

144. Second, the Respondent's grievance procedure clearly envisages a Stage 2 grievance (which is what the written grievance of 21 August 2017 must be) being raised if an employee is unhappy with the outcome of Stage 1 of the process. It must follow, therefore, that a Stage 2 grievance can be identical in terms of subject matter to a Stage 1 grievance. Indeed, in response to a question from the Tribunal, Ms Main accepted that this was the case.

145. It follows, therefore, that the Respondent's own procedure allows for an employee to raise the same issue at Stage 2 as at Stage 1and so it cannot be a proper and reasonable explanation for the Respondent to reject a Stage 2 grievance because it was the same as the Stage 1 grievance (although in this case, as set out above, the Stage 1 and Stage 2 grievances were not the same).

146. In these circumstances, the Respondent's position that they had already dealt with the Claimant's grievance by way of the letter of 3 July 2017 was not a proper and reasonable cause for their failure to address the written grievance.

147. It is correct to say that the Claimant had raised some of the issues in his written grievance in the earlier meetings in May and June 2017. However, those were not grievance meetings and, as stated above, the complaints made at those meetings were not treated as a Stage 1 grievance and no formal decision (similar to that made in the letter of 3 July) was ever made in respect of those complaints at or following the May and June meetings.

148. There is some suggestion by the Respondent that they did not have sufficient information to be able to investigate the Claimant's written grievance.

149. It is worth noting that a lack of information was not the basis for not taking forward the Claimant's grievance at the meeting of 26 September 2017; the reason given at the time was that the grievance had been dealt with and closed by the letter of 3 July 2017. However, to the extent that the Respondent seeks to say now that they did not have enough information to address the complaints made then the Tribunal does not agree that this is correct for a number of reasons:-

    j. At least one of the issues raised by the Claimant (that is, the failure to put him forward for exams to be promoted) is a management decision and does not require the Respondent to interview any employees. The Respondent could have explained the reasons for this without any need for further investigation.

    k. The Tribunal agrees with the Claimant's agent that the written grievance names a number of people who could have been interviewed about the issues raised by the Claimant (for example, Paul Nix, Darragh Noonan, Steve Davies are all named and could have been spoken to about the issues raised).

    l. The Respondent could have taken steps to investigate whether there had been any gossip or accusations being made about the Claimant sexually harassing a female colleague.

150. In the Tribunal's view, there was no reason why the Respondent could not have taken further steps to at least investigate matters.

151. In these circumstances, the Tribunal considers that the Respondent failed to address at all the Claimant's grievance of 21 August 2017 and that, having no proper and reasonable cause for this, the act in a manner likely to destroy the trust and confidence between the Claimant and the Respondent.

Did the Respondent's breach cause the Claimant to resign

152. On the face of it, the Claimant quite clearly resigned as a result of the Respondent's failure to deal with his grievance which he believed amounted to a breach of trust and confidence; his letter of resignation expressly, unambiguously and unequivocally sets out the reason why he resigned.

153. If that were the only issue to be considered in relation to this element of the *Western Excavating* test then the Tribunal would have no hesitation in holding that the Claimant resigned as a result of the Respondent's breach.

154. However, the Respondent has raised a number of points to the effect that the reason given for the Claimant's resignation was not the true reason for his resignation and these require to be addressed.

155. First, there is the fact that the Claimant had applied for alternative employment prior to his resignation. The Respondent seeks to argue that the Claimant was, in reality, looking to leave the Respondent to work elsewhere.

156. The Tribunal is not prepared to draw any conclusion that the Claimant's reason for resigning was to work elsewhere from the facts of the case; the Claimant did not, in fact, leave to go to another job and was unemployed for a number of months after his resignation; the mere fact that the Claimant had investigated the job market indicates, at most, that he was considering his options but he quite clearly continued in his employment with the Respondent for some months (in circumstances where his pay had reduced or discontinued) and sought to resolve his complaints via the Respondent's internal procedures.

157. There is nothing in the factual matrix that suggests that the Claimant had any reason to leave his employment with the Respondent for any reason other than those given in his resignation letter.

158. Second, the Respondent places some emphasis on the fact that the Claimant seeks legal advice at an early stage of the process and makes repeated reference to this.

159. The Tribunal has some difficulty in seeing how this, in any way, means that the Claimant resigned for some reason other than that given in his resignation letter. The Tribunal considers that there is nothing wrong with an employee seeking legal advice about a workplace dispute and, indeed, it is a proper and prudent thing for someone to do in order to understand what rights they may or may not have.

160. Similarly, there is nothing inherently wrong with the Claimant informing the Respondent that he has sought advice. Whilst the Respondent may have been annoyed by the Claimant's reference to this, it does not mean that he somehow had some other motive for his resignation.

161. Third, the Respondent draws attention to the fact that the Claimant makes reference to feeling he is being forced to resign at an earlier stage; this is made in the context of both the reason for his resignation and the question of the timing of it.

162. Again, the Tribunal has some difficulty in seeing how this can be said to suggest that the Claimant resigned for reasons other than those given. An employee may well express such a view to their employer where they hold a genuine belief that the employer is seeking to force them out of their employment. However, this does not mean that the employee had some other reason for their resignation and, if anything, these comments simply show the inception and progress of their thought process.

163. In the circumstances of this case, the Claimant has given very clear reasons why he resigned and there is nothing to suggest that there was some other reason for this.

164. The Tribunal, therefore, concludes that the Claimant did resign as a result of the breach by the Respondent.

Did the Claimant delay too long before resigning?

165. The first question to be addressed is when did the breach of contract occur? The Claimant argues that it occurs when the internal process is brought to an end by Mr Marshall's decision on the appeal. The Respondent, on the other hand, seeks to argue that, if there was a breach, then it occurred on July or August 2017.

166. The Tribunal prefers the Claimant's position. The facts of the case clearly show that the Claimant was seeking to use the internal process to resolve his complaints; he had made an informal complaint in February 2017; he raised other issues in the meetings of May and June which were then formalised in his written grievance of August; the correspondence which followed the meeting of 26 September clearly show him attempting to persuade the Respondent to address the written grievance; the appeal to Mr Marshall included further attempts by the Claimant to have the complaints in his written grievance addressed.

167. The Tribunal considers that the Claimant had sought to give the Respondent every opportunity to address his complaints; the last opportunity lay with Mr Marshall who, as a senior manager, could have remedied matters by having the complaints in the written grievance addressed. As stated above, he did not do so and simply took a very narrow approach to the appeal.

168. In these circumstances, the Tribunal is of the view that it was only at the end of the internal process that it would have been clear to the Claimant that the Respondent was not going to address his complaints and so it would be at that point that trust and confidence would be lost.

169. The Tribunal was not prepared to find that any breach occurred at an earlier date based on the Claimant's references to legal advice and feeling that he was being forced to resign.

170. The Tribunal has already addressed the issue of the Claimant seeking legal advice and the fact he did so does not in any way mean that there was some earlier breach by the Respondent. As stated above, there can be no criticism of an employee who seeks to inform themselves of their rights.

171. Further, there was no evidence as to what advice was or was not given to the Claimant and, indeed, such advice would be privileged. The Tribunal is not prepared to draw any inference that the Claimant was advised that there was some earlier breach entitling him to resign.

172. As regards the Claimant's reference to feeling he was being forced to resign, the Tribunal would repeat the earlier comments that this does no more than show the inception and progress of the Claimant's thought process. It is quite clear that, by his actions in seeking to follow the internal procedure, the Claimant was trying to resolve matters and maintain the employment relationship; these were not the actions of an employee who had lost trust and confidence in July or August 2017.

173. In these circumstances, the Tribunal finds that the breach occurred at the end of the internal procedure with the letter from Mr Marshall dated 10 January 2018.

174. The next question is whether the Claimant delayed too long in resigning on 18 January 2018 and the Tribunal does not consider that he did so; a period of just over a week is not too long where an employee is making such a serious decision in giving up a job he had held for some years.

Conclusion – was there a dismissal?

175. The Tribunal considers that the facts of this case satisfy the three part test set down in *Western Excavating* and so the Claimant was dismissed as defined in section 95(1)(c) of the Employment Rights Act 1996.

Was the dismissal fair?

176. The Respondent did not seek to advance a potentially fair reason for dismissal in terms of section 98(1) of the 1996 Act and so they have not discharged the

burden of proof to show that there was a potentially fair reason for the Claimant's dismissal.

177. The Claimant's dismissal is, therefore, unfair.

Decision – Additional award under section 38 of the Employment Act 2002

178. Given that the Tribunal has found in the Claimant's favour in respect of his unfair dismissal claim then the power to make an additional award under section 38 of the 2002 Act applies.

179. The question for the Tribunal is whether the Respondent failed in their obligation to provide the Claimant with a statement of written terms and conditions which complied with section 1 of the Employment Rights Act 1996 or with a statement of any changes to terms and conditions which complied with section 4 of the 1996 Act.

180. One of the specific pieces of information which must be provided in any written statement for it to comply with section 1 are hours of work. Although the written statement provided to the Claimant by the Respondent contained a provision relating to hours, this did not reflect the working hours as they operated in practice.

181. A statement under section 1 must accurately reflect the terms and conditions of employment as they operate in practice otherwise it would be ineffective and would not achieve the purpose of this statutory provision.

182. Certain information can be provided by reference to other documents but hours of work is not one of those and so the Respondent cannot rely on the "Rough Guide to PAM" (which does set out the correct information about hours of work) to comply with section 1.

183. It was suggested by the Respondent's agent in his submissions that the Claimant's written statement may have reflected the hours of work when he started employment in 2012. However, no evidence was led by the Respondent to support such a submission and the Tribunal is not prepared to make any finding that the hours of work had changed.

184. In any event, if they had changed then the Respondent had not provided a notification of this change as required by section 4 and so the Tribunal would have found that they had failed in their duty under that provisions producing the same end result.

185. In these circumstances, the Tribunal finds that the Respondent had failed in their duties under section 1 of the Employment Rights Act 1996 and so will make an award under section 38 of the Employment Act 2002.

186. The Tribunal considered the amount of award to be made. The Tribunal took account that this was in the nature of technical failing on the part of the employer; there was no suggestion that the Claimant did not know the hours he had to work or was under confusion about this. Nor was he subject to any sort of disadvantage by the error in his written statement of terms and conditions. In these circumstances, the Tribunal did not consider that it was appropriate to make an award equivalent to four weeks' wages.

187. However, the relevant statutory provisions state that the Tribunal must (emphasis added) make an award equivalent to two weeks' wages in such circumstances and this is the award made by the Tribunal.

Remedies

188. There were a number of issues that the Tribunal required to determine in considering what compensation it would be just and equitable to award in respect of the claim for unfair dismissal.

189. First, the Respondent had submitted that a deduction should be made for contributory fault on the basis that the Claimant had not raised certain of his complaints at an earlier dates and delays by the Claimant in the process, particularly in relation to the appeal to Mr Marshall.

190. The Tribunal could not see any basis on which it could conclude that any actions of the Claimant had in any way contributed to the Respondent's complete failure to address the complaint raised in his written grievance. The Tribunal may have been of a different view had this been a case where the Respondent had sought to deal with the grievance but had been stymied by

the passage of time and the effect this had on the recall of events. However, this is not what happened in this case and the Tribunal could see no conduct by the Claimant which lead to the Respondent's failure to deal with his grievance.

191. The Tribunal was not prepared to make any deduction for contributory fault in such circumstances.

192. Second, the Respondent submitted that no award for loss of wages should be made because the Claimant had not provided any evidence about his attempts to mitigate his loss. This is simply incorrect; the Claimant gave oral evidence about contacting previous employers to see if they had any vacancies and securing alternative employment in April 2018.

193. The burden of establishing a failure to mitigate loss lies with the Respondent and the Claimant was not challenged in cross examination as to what steps he could have taken or that he could have done more.

194. In the circumstances, the Tribunal was not satisfied that the Respondent had shown a failure to mitigate by the Claimant and so no deduction would be made in relation to this.

195. Third, and finally, the Claimant sought an uplift to his compensation in relation to a failure by the Respondent to follow the ACAS Code of Practice. The Tribunal agrees with the submission of the Respondent's agent that this was not a case where no procedure was followed; a limited grievance process involving the Claimant's February grievance was followed including an appeal.

196. However, there was a complete failure to follow any form of procedure in respect of the Claimant's written grievance and the Respondent had wholly failed to comply with the ACAS Code in respect of that. The Tribunal also considered that the Respondent's failure was unreasonable for the same reasons as set out above when considering whether the Respondent had reasonable and proper cause for their actions.

197. In these circumstances, the Tribunal considered that there was a failure to comply with the ACAS Code and that an uplift of 20% was appropriate to reflect the nature of the failure.

198. Turning now to the calculation of the award to be made and starting with basic award. The Claimant was 33 years of age when he was dismissed and had been employed with the Respondent for 5 complete years. He was paid £412.06 per week gross. He was therefore entitled to a basic award of 5 weeks' wages at £412.06 per week = **£2060.30.**

199. The Claimant sought damages for loss of wages from the end of his employment with the Respondent. The Tribunal agreed with the Claimant's agent that it was just and equitable for the period of loss to end with the date on which his alternative employment came to an end on 14 December 2018. This was a period of 47 weeks. The Claimant earned £353 a week net with the Respondent. The Claimant's loss of earnings are therefore 47 weeks at £353 a week = £16591.00.

200. Based on the wage slips produced by the Claimant in respect of his alternative employment, he earned as total of £8748.66 over the whole of his employment. The Claimant's net loss of wages therefore amounts to £16951.00 less £8748.66 = **£7842.34.**

201. The Claimant sought **£350** in respect of loss of statutory rights and the Tribunal considered that this was an appropriate sum to award in respect of this head of compensation.

202. The Claimant's unadjusted award for unfair dismissal is **£10252.64** and with the 20% increase for the Respondent's failure to follow the ACAS Code of Practice, the total award of compensation for unfair dismissal amounts to £12303.17 (Twelve thousand, three hundred and three pounds and seventeen pence).

203. In respect of the additional award under section 38 of the Employment Act 2002, this is two weeks' wages at £412.06 a week = **£824.12** (Eight hundred and twenty four pounds and twelve pence).

Employment Judge: Mr P O'Donnell
Date of Judgment: 03 May 2019
Entered in register: 07 May 2019
and copied to parties