EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr Mark Lawrance	v	**Borough Council of Calderdale**

Heard at: **Leeds** **On:** **16 (Reading day), 20, 21, 22, 23 August 19 & 22 November (deliberations)**

Before: **Employment Judge T R Smith**

Appearance:

For the Claimant: **In Person**

For the Respondent: **Mr Paul Smith, of Counsel**

RESERVED JUDGMENT

1. The Claimant's complaint of breach of contract is not well founded and is dismissed.
2. The Claimant's complaint of unfair dismissal is not well founded and is dismissed.

REASONS

1. Background.

   1.1. The Tribunal heard oral evidence from Mr Mark Lawrance, ("the Claimant").

   The Tribunal heard oral evidence from the following witnesses on behalf of the Claimant: –

   Ms Heidi Wilson, Strategic Housing Delivery Manager.

   Ms Nicola Law, Senior Environmental Health Officer.

   Mr Peter Broadbent, retired Environmental Health Manager.

   Statements were placed before the Tribunal from Mr Robert Holden and Ms Ann Talbot on behalf of the Claimant. As these witnesses were not called to give evidence, and their accounts were not tested in cross examination, that evidence has been given limited weight

   1.2. The Tribunal heard oral evidence from the following witnesses on behalf of the Respondent: –

Ms Julie Jenkins, Director of Children and Young People's Service.

Mr Iain Baines, Director of Adult Services and Wellbeing.

Ms Anne Collins, Elected Member of the Council.

Ms Jackie Addison, Head of HR and Organisational Development.

1.3. The Tribunal had before it an agreed bundle of documents. The bundle was extremely poorly paginated, consisting of a jumble of numbering and numbering with lettering, both capital and lower case. Better and clearer pagination would have considerably assisted the Tribunal.

1.4. During the course of the hearing it was supplemented with further documents marked X1 to X5 and again further supplemented by documents marked Y1 to Y2.

1.5. Numbers/letters in brackets are a reference to pages in the agreed bundle.

1.6. The Tribunal had full regard to all the evidence placed before it which were relevant to determine the agreed issues. A failure to mention a particular fact, argument, submission or document does not mean that the Tribunal did not consider such matters in reaching its determination.

1.7. Neither party made any application under rule 50 of the Employment Tribunal (Constitutional Rules of Procedure) Regulations 2013 at any stage during or at the conclusion of the proceedings.

The Issues

2. Introduction

2.1. At a preliminary hearing held on 07 March 2019 before Employment Judge Maidment agreement was reached as to the issues the Tribunal was required to determine.

2.2. However, by a document dated 07 August 2019 an amended list was produced by the Respondent.

2.3. The amended list incorporated a number of matters that were not mentioned to Employment Judge Maidment on 07 March 2019. The Respondent was seeking to incorporate issues that arose, not from the Claimant's claim form but from the Claimant's witness statement.

2.4. The Tribunal referred the parties to a number of relevant authorities including **Parekh -v- London Borough of Brent 2012 EWCA Civ 1630** and **Chandock -v- Tirkey UKEAT/0190/14.**

2.5. Following discussions, Mr Smith indicated the Respondent was content for the triable issues to include those in the draft of 07 August 2019. The Respondent had prepared the amended list to assist the Tribunal and the Claimant and to ensure all his concerns were before the Tribunal. It was not caught surprise by the additional issues. The Tribunal concluded, having regard to the above concession, the fact the Claimant was a litigant in person, and the overriding objective, that to stick slavishly to the list of issues agreed with Employment Judge Maidment would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence.

3. **The Finalised Agreed Issues.**

These are set out below.

3.1. Unfair dismissal

3.1.1. Had the Respondent proven a potentially fair reason for dismissal? The Respondent asserted that the reason for dismissal was gross misconduct, a reason relating to his conduct and potentially a fair reason under section 98 (2) (b) of the Employment Rights Act 1996 ("ERA96").

3.1.2. If so, in the circumstances did the Respondent act reasonably or unreasonably in treating the Claimant's misconduct as sufficient reason to dismiss him? The Claimant asserted the following grounds of unfairness:

- The Claimant was suspended by person with no authority to suspend him.
- The Claimant alleges he was not advised of the "basic details" of the complaints against him for a period of 10 weeks following his suspension.
- The Claimant alleges that "full details" of the complaints against him were not presented until 11 days before a disciplinary hearing.
- The terms of reference set for the investigating officer did not reflect the grievance which was raised.
- The allegations which formed part of a grievance lodged against the Claimant in 2015 were allegedly reopened and should not have been.
- The 2015 grievance was not reviewed and therefore the "context" of the 2017 grievance was not understood by the investigating officer.
- The investigator of the 2015 grievance (Ms Thurlbeck) was not interviewed as part of the 2017/2018 disciplinary process.
- The Respondent failed to follow its grievance procedure because some of the individuals who were signatories to the 2017 collective grievance had left their employment more than three months previously.
- The investigating officer was not impartial because the investigation notes did not reflect the recordings of the investigator interviews.
- The investigating officer was not impartial because she did not accept the evidence from Mr Broadbent and Ms Wilson that there had been employees who had been underperformers and needed to leave.

- The investigating officer was not impartial because she did not use the word "alleged" when referring to the allegations made against the Claimant.

- The investigating officer bullied the Claimant by adopting an "aggressive" and "cruel and degrading" manner of questioning.

- The Respondent refused to accede to a four-week postponement requested by the Claimant.

- The Respondent took an unreasonably long time (seven months) to conclude its investigation.

- The Respondent refused the Claimant's request to be accompanied at the disciplinary hearing by a person (Cllr Holden) who was neither a colleague nor a trade union representative.

- There was "no evidence" to support allegations against the Claimant.

- The Respondent unreasonably delayed in convening the appeal hearing.

- The Claimant alleged that prior to the collective grievance being lodged it was he who was subject to undermining and intimidating behaviour by other employees.

- The Claimant alleged that prior to the collective grievance being lodged he was not given "support or recognition" by the Respondent in relation to his handling of the "underperforming" employees.

3.1.3. Was the dismissing of the Claimant an act which was within a band of responses a reasonable employer, acting reasonably, might adopt?

3.1.4. If the Claimant's dismissal was unfair, was this an appropriate case where reinstatement should be ordered?

3.1.5. If the Claimant's dismissal was unfair, was it just and equitable to extinguish or reduce any entitlement to a basic award on account of his blameworthy conduct pursuant to section 122 ERA 96?

3.1.6. If the Claimant's dismissal was unfair, by his blameworthy conduct did he cause or contribute to his dismissal? If so, by what extent should compensation be reduced pursuant to section 123 ERA 96?

3.1.7. If the Claimant's dismissal was procedurally unfair, was there a chance he would be dismissed anyway? If so, to what extent should compensation be reduced pursuant the principal in **Polkey -v- AE Dayton Services Ltd [1987] IRLR 503**

3.2. Breach of contract

3.2.1. Has the Claimant proven that a contractual obligation existed between him and the Respondent that he would receive a payment reflecting

accrued but undertaken TOIL hours upon the termination of his employment?

3.2.2. If so, was the Respondent in breach of contract?

3.2.3. If so, has the Claimant proven the extent of any alleged loss arising from the breach of contract?

3.2.4. If so, in what amount should damages be awarded?

3.3. It was agreed due to time constraints the Tribunal would address the issue of whether the Claimant succeeded in all or part of his claim and if so, would then set out its findings in relation to both contribution and **Polkey**. It would not deal with remedy at the substantive hearing, but if the need arose, would do so at a subsequent hearing.

4. **Findings of fact.**

4.1. The Claimant commenced employment with the Respondent on 29 September 1986.

4.2. The Claimant was dismissed for gross misconduct on 15 May 2018.

4.3. At the date of dismissal, the Claimant had over 30 years continuous employment with the Respondent. He had no live disciplinary penalty on his record as at dismissal.

4.4. As at the effective date of termination the Claimant was employed by the Respondent as an Environmental Health Team Manager.

4.5. The Respondent is a large local authority with his own HR Department.

4.6. Up to date that was not clear to the Tribunal the Claimant line manager was Mr Derek Shackleton ("Mr Shackleton") until he retired. Thereafter the Claimant's line manager was Mr Peter Broadbent (Mr Broadbent), although due to his other responsibilities, on a day to day basis the Claimant also reported to Ms Heidi Wilson ("Ms Wilson").

4.7. Four senior environmental health officers reported to the Claimant as Environmental Health Team Manager. The Claimant had obtained this promotional role on 16 December 2016.

4.8. The four officers who reported to the Claimant were Mr Mark Coleman ("Mr Coleman"), Mr David Dunbar ("Mr Dunbar"), Mr Ryan Carroll ("Mr Carroll") and Ms Nicola Law ("Ms Law").

4.9. It is appropriate at this juncture to make reference to a grievance that was raised by two employees, Mr David Buckley ("Mr Buckley") and Ms Pearl Harrison ("Ms Harrison"), in August 2015 and investigated by Ms Fiona Thurbeck ("2015 grievance") as it played an important part in the Claimant's claim. The 2015 grievance raised a number of issues, one of which was how workplace supervision was conducted.

4.10. The Tribunal found that the Claimant, acting on the advice of Mr Broadbent, had been directed to help staff improve their performance by a programme of detailed weekly supervision.

4.11. The supervision was to be undertaken by two managers. The Claimant was, on most occasions, one of those managers.

4.12. In summary two employees, Mr Buckley and Ms Harrison, complained that it was intimidating to have two officers undertaking supervision. The complaint was directed against Mr Broadbent, Mr Dunbar, and the Claimant.

4.13. Ms Thurbeck, an independent investigator, upheld this element of the grievance in a report dated 30 November 2015 (BOa to BOd). She did not uphold complaints as regards alleged unfair work allocation or that staff were not treated equally. Similarly, she did not find the complaints of favouritism due to an alleged relationship involving a senior officer to be well founded.

4.14. Thus, save for one element, the 2015 grievance was rejected. As the Tribunal has observed the Claimant was only one of the officers undertaking this intensive supervision and this was at the specific direction of his line manager, Mr Broadbent.

4.15. In Ms Thurbeck's report she observed there were issues as regards staff competency (BOi and BOj).

4.16. There was no appeal from the grievance outcome.

4.17. No disciplinary action being taken against Mr Broadbent, Mr Dunbar, or the Claimant in relation to the one element of the 2015 grievance which was upheld.

4.18. The double-teaming supervision ended at about the time of the outcome of the 2015 grievance.

4.19. The Claimant had no further involvement in the management of Mr Buckley or Ms Harrison thereafter. They both left the employment of the Respondent in late 2016.

4.20. The Tribunal found, having regard to the evidence of Ms Wilson, that when she assumed management responsibilities there were concerns as regards both performance and culture within the team. She estimated that out of 22 staff there were concerns as to 12, but it simply was not possible, due to the number involved, to take formal action against every one of those staff.

4.21. On 10 August 2017 the Respondents Chief Executive received a collective grievance from the GMB union directed against the Claimant alleging bullying and harassment (E21 to E22). At the core of the collective grievance was an allegation that staff had left the Respondent because of the treatment they received, had been subject to bullying, been given unmanageable workloads, had no training or support and classed as lazy and incompetent and some suffered sexual harassment, and this included staff still employed by the Respondent.

4.22. At approximately the same time the Respondents received a complaint against the Claimant of what was classed as sexual harassment. The complaint was from Ms Melanie Tolson ("Ms Tolson") and came to light when she was being interviewed by HR as a result of her sickness absence.

4.23. Three former employees of the Respondent had left the Respondent's employment more than three months prior to the institution of the collective grievance. They were Ms Harrison Mr Buckley and Ms Rachael Kershaw (Ms Kershaw").

4.24. On or about 16 August Ms Julie Jenkins ("Ms Jenkins"), then Head of Early Intervention and Safeguarding, and a Chief Officer, was appointed as the

investigating officer to look at the concerns raised in both the collective grievance and by Ms Tolson.

4.25. The Tribunal was initially concerned that Ms Jenkins had not seen the grievance. This concern was allayed. The Tribunal was satisfied that Ms Jenkins was issued with Terms of Reference by the Respondent's Chief Executive which were in very similar terms to the collective grievance.

4.26. Ms Jenkins spoke to Ms Tolson at the same time to understand her concerns. The Tribunal found it of considerable concern, given the nature of the allegation that she made no notes of that discussion. However, given Ms Tolson's concerns were subsequently committed to writing the Tribunal did not find this error was such as to taint the investigation with unfairness.

4.27. On 18 August 2017 the Claimant was suspended by Ms Wilson on the instructions of Ms Jenkins.

4.28. The Claimant was assigned a contact/ support officer (Mr Lee) whilst suspended who telephoned the Claimant every week and provided any necessary support. The Contact officer was also a link between the Claimant and the Respondent who could obtain information for the Claimant without the Claimant contravening the terms of his suspension.

4.29. The suspension was reviewed from time to time.

4.30. Ms Jenkins interviewed a total of 11 witnesses and had four meetings with the Claimant.

4.31. The result of Ms Jenkins investigation was a recommendation that there was a disciplinary case to answer and this was notified to the Claimant by letter dated 28 December 2017.

4.32. On 04 January 2018 (D75 to D77) the Claimant was invited by letter to a disciplinary hearing arranged for 05 and 06 February 2018.

4.33. The allegations were as follows: –

"1. Failure to declare a personal relationship in relation to Nicola Law, prior to and during the interview process for the post of Senior Environmental Health Officer. [The letter then went on to refer to specific aspects of the Respondents various policies and codes which it alleged were breached]

2. The alleged bullying of members of the environmental health team over a sustained and long period of time. This has caused distress to those involved and led to many leaving the Council. Specifically, this relates to;

- *threatening new members of the environmental health team on commencement of employment within environmental health service, i.e. informing people to toe the line and if they didn't you would then leave*

- *undermining team members i.e. micromanagement of work including overly lengthy supervision sessions, minor changes to punctuation, grammar, reports and letters; criticising colleagues to other colleagues; making it known who you wanted out of the organisation.*

- *Making derogatory and personal remarks about female staff, including: comments that maternity would ruin a staff member's career; the body weight of a colleague; comments about women's breasts and bottom; and comments in respect of their sexual activity* [The letter then went on to refer to specific aspects of the Respondents various policies and codes]

3. *The alleged sexual harassment of female staff. Specifically, this relates to: –*

   - *degrading women, by making sexual remarks, directly and indirectly*
   - *unwanted and intrusive questions about the personal relationships of female staff*
   - *unwanted and unwelcome sexual attention to female staff; specifically, whilst on late night duties and sat in cars in laybys*
   - *the sexual harassment of Melanie Tolson in a hotel room in the White Swan Hotel Halifax on 25 February 2007* [The letter then went on to refer to specific aspects of the Respondents various policies and codes]

4. *The breakdown of trust and confidence in Mark as the team manager of the environmental health team and as an employee of the Council."* [The letter then went on to refer to specific aspects of the Respondents various policies and codes]

4.34. On 19 January 2018 the Claimant was sent a disciplinary pack. It comprised a report from Ms Jenkins, various documentation, and witness statements she had obtained.

4.35. On 29 January 2018 the Claimant notified the Respondent he wished to call 19 witnesses to the disciplinary hearing.

4.36. The determining officer allocated to the disciplinary hearing was Mr Iain Baines ("Mr Baines"), Director of Adult Services and Well-being.

4.37. The disciplinary hearing was commenced but was adjourned on 05 February 2018 due to issues as to whether the Claimant's representative, Cllr Holden fell within the definition of a representatives that the Respondent would permit in accordance with its disciplinary policy.

4.38. The hearing was initially rearranged for 27, 28 February and 01 March 2018 but was adjourned at the Claimant's request to allow his new representative, Mr Lee, further time to familiarise himself with the papers. No issue arises that although Mr Lee was not the Claimant's first choice, that he was selected by the Claimant of his own free will.

4.39. The disciplinary hearing was eventually held over a number of dates, 13 and 14 March 2018, 16, 17, 18 and 20 April 2018.

4.40. The hearing was recorded and a voluminous transcription was available for the Tribunal (G1 to G410).

4.41. Part of the reason for the adjournment between March and April was that Mr Baines identified, during the course of the disciplinary hearing, that there were a number of employees named in documents who might be able to give relevant evidence namely Mr Bob Pulford ("Mr Pulford"), Mr Andrew Thomas ("Mr Thomas") and Mr Shackleton. Witness statements were obtained from the three aforementioned members of staff and they were disclosed to the Claimant on 05 April 2018.

4.42. It is also proper to record that as the hearing progressed Mr Baines had cause to request further documentation from both parties.

4.43. Following the conclusion of the evidence and submissions Mr Baines wrote to the Claimant on 11 May 2018 inviting him to a meeting on 15 May 2018 when he told the Claimant he was dismissed for gross misconduct confirmed by letter dated 16 May 2018 (E25 to E37).

4.44. In essence the findings of Mr Baines in relation to the allegations the Claimant was required to answer was as follows: –

- The failure to declare a personal relationship in respect of Nicola Law prior to and during the interview process for the post of senior environmental health officer was proven and amounted to misconduct but Mr Baines concluded that no disciplinary action should be taken.

- Allegedly threatening new members of the Environmental Health Department, informing staff to toe the line or if they didn't, they would be made to leave, was found not to be proven.

- Undermining team members by micromanagement including overtly lengthy supervision sessions, minor changes to punctuation, grammar, reports and letters and criticising colleagues to other colleagues and making it known who the Claimant wanted removed from the organisation was found to be proven and the appropriate sanction was dismissal for gross misconduct.

- Making derogatory and personal remarks about female staff including comments that maternity would ruin a staff member's career, bodyweight, comments about a woman's breasts and bottoms and comments in respect of sexual activity was found to be proven and the appropriate sanction was dismissal for gross misconduct.

- Degrading women by making sexual comments either directly or indirectly was found to be proven misconduct and the appropriate sanction was a final written warning.

- Unwanted and intrusive questions about the personal relationships of female staff was found to be proven misconduct and the appropriate sanction was a final written warning.

- Unwanted and unwelcome sexual attention to female staff specifically whilst on late-night duties and sat in cars in laybys was

found proven and the appropriate sanction was dismissal for gross misconduct.

- The sexual harassment of Ms Tolson in a hotel room in the White Swan hotel in Halifax on 25 February 2007 was found proven and the appropriate sanction was dismissal for gross misconduct.

- The breakdown of trust and confidence between the Claimant and the residue of the environmental health team due to the Claimant's alleged failure to respect and uphold the conditions of service of fellow employees and follow policies was found proven and the appropriate sanction was dismissal for gross misconduct.

4.45. By a letter dated 31 May 2018 the Claimant appealed the decision to dismiss him (B68).

4.46. In summary the Claimant's grounds of appeal were: –

- the length of time taken in the investigative and disciplinary proceedings

- The flawed information gathering which the Claimant described as *"untrue, hearsay and sheer vindictiveness"*

- A conflict of interest as a result of the relationship between the investigating officer and the chair of the disciplinary proceedings

- refusal to allow the Claimant access to information and rejection of the Claimant's first choice of representation

- granting the investigating officer an adjournment to obtain further evidence

- the disparity in questioning between witnesses appearing on behalf of the Claimant and behalf of the Respondent.

5. On 25 July 2018 the Claimant submitted a grievance (B81 to B90).

5.1. The appeal was originally set for 30 July 2018 but there was apparently some difficulty in the delivery of papers and thus the appeal was adjourned.

5.2. The Claimant's appeal was eventually heard by a panel of three elected members on 03 and 04 October 2018. The appeal panel was chaired by Councillor Ms Anne Collins ("Cllr Collins"). She was accompanied by Councillors Swift and Hardy.

5.3. The panel took advice from the Council's Head of Legal and Democratic Services and determined that save for items nine and 10 in the Claimant's grievance (passing the Respondents appeal hearing case to the Claimant by another employee and failing to respond in relation to the Claimant's queries in rest of holiday and time off in lieu ("TOIL")) it was appropriate that the matters raised in the grievance were dealt with by the appeal panel. The Tribunal

accepted that was a reasonable decision. The issues in the grievance were intertwined with the disciplinary process and it was more efficient that they were dealt with together.

5.4. The Claimant declined to attend the appeal, having indicated he wished it to proceed in his absence (B140).

5.5. The appeal was by way of rehearing.

5.6. The Tribunal was satisfied that the handwritten notes of the appeal hearing were reasonable summary of the principal matters discussed (B115 to B139).

5.7. The appeal panel heard evidence from Mr Baines who sought to substantiate his decision. The panel also had before it the Claimant's appeal letter. The panel heard evidence from Ms Jenkins, Ms Addison (Head of HR for the Respondent) the recordings of evidence from two witnesses who were unwilling to attend the appeal, Ms Tolson and Ms Harrison, and from Mr Coleman, Ms Kate Ryley ("Ms Ryley"), Mr Thomas, Mr Shackleton, and Mr Broadbent. Ms Wilson was unable to attend as she was on holiday but the panel had her written evidence before it.

5.8. The appeal panel upheld the decision of Mr Baines save in relation to an element of allegation 3 (unwanted and unwelcome sexual attention to female staff on late-night duties and sat in cars in laybys). Whilst the allegation was proven the panel concluded the penalty should be reduced to misconduct, with a sanction of a final written warning, on the basis that the sexual nature of the attention could not be established.

5.9. Other than the above none of the grounds of appeal were upheld.

5.10. The Claimant was informed by email on 05 October 2018 that his appeal was unsuccessful and was sent a letter dated 19 October 2018 setting out the reasons for the appeal panel's decision.

5.11. Ms Talbot and Ms Law, two of the Claimant's witnesses submitted a grievance as regards the manner in which she was questioned by Ms Jenkins. That was investigated by Mr Stuart Smith, Director of Adult and Children Services who concluded the questioning was not aggressive.

Discussion.

6. **The Law.**

6.1. **Unfair dismissal.**

The Tribunal applied section 98 (1), 98 (2) and 98 (4) of the ERA 96 which provides as follows: –

"98 (1) – in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that either it is a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee helped.

98 (2) – a reason falls within this subsection if it…….

(b) relates to the conduct of the employee.

98 (4) –….. Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):

(a) depends on the weather in the circumstances (including the size and the administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

6.2. In **Abernethy – v – Mott, Hay and Anderson 1974 IRLR213** the Court of Appeal held that a reason for dismissal was a set of facts known to the employer or beliefs held by him which would cause him to dismiss the employee.

6.3. The Tribunal had regard to the guidance given in **British Home Stores Ltd -v- Burchall 1978 IRLR 379.**

6.4. However, the Tribunal reminded itself that **Burchell** was decided before the alteration of the burden of proof effected by section 6 of the Employment Act 1980.

6.5. In that case the first question raised by Mr Justice Arnold: *"did the employer had a genuine belief in the misconduct alleged?"* went to the reason for dismissal. The burden of showing a potentially fair reason rested with the employer. However, the second and third questions, the reasonable grounds for the belief based on a reasonable investigation, went to the question of reasonableness under section 98 (4) of the ERA 96 and there the burden was neutral.

6.6. The Tribunal had regard to the guidance given at paragraphs 13 to 15 in the case of **Sheffield Health and Social Care NHS Foundation Trust -v- Crabtree UKEAT 0331/09/ZT**.

6.7. The approach to fairness and procedure is the standard of a reasonable employer at all three stages of the **Burchell** question: - **Sainsbury's Supermarket-v- Hitt 2002 EWCA CIV 1588**.

6.8. The Tribunal reminded itself that when considering the objective standard of a reasonable employer the test was the material which was available the employer at the time or would have been available had a proper investigation

being conducted and this point was emphasised by His Honour Judge Serota QC in the case of **London Waste Ltd -v-Scrivens UK EAT/0317/09.**

6.9. Whilst the Tribunal must have respect for the opinion of the dismissing officer it is ultimately for the Tribunal and not for the Respondent to decide whether the dismissal fell within or outside the range of reasonable responses open to an employer in the circumstances.

6.10. The Tribunal also applied the guidance given in **Iceland Frozen Foods Ltd -v- James 1992 IRLR 439**: –

"The authorities establish that in law the correct approach for an employment Tribunal to adopt in answering the question posed by section 98 (4) is as follows……

(1) the starting point should always be the words of section 98 (4) themselves.

(2) in applying this section an Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair.

(3) in judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take on you, another quite reasonably take another.

(5) the approach of the Employment Tribunal, as an industrial jury, is to determine whether the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses in which a reasonable employer might have adopted stop if a dismissal falls within the band the dismissal is fair….. If the dismissal falls outside the band it is unfair."

6.11. In summary the Tribunal must ask itself all questions namely: –

6.11.1. Was there a genuine belief in the alleged misconduct?

6.11.2. Were there reasonable grounds to sustain that belief?

6.11.3. Was there a fair investigation and procedure?

6.11.4. Was dismissal a reasonable sanction open to a reasonable employer?

<u>Contributory conduct.</u>

6.12. Section 123 (6) ERA 96 states that *"[W]here the Tribunal finds that the dismissal was to any extent caused all contributed to by any action of the complainant, it shall reduce the….. compensatory award by such proportion as it considers just and equitable having regard to that finding."*

6.13. The wording in relation to any deduction from the basic award is set out in section 122(2) and differs from that in section 123 (6) ERA 96.

6.14. A reduction for contributory conduct is appropriate according to the Court of Appeal in **Nelson-v- BBC (2) 1980 ICR 110** when three factors are satisfied namely: –

6.14.1. The relevant action must be culpable or blameworthy

6.14.2. It must have caused or contributed to the dismissal, and

6.14.3. It must be just and equitable to reduce the award by proportion specified

6.15. For a deduction to be made a causal link must exist between the employee's conduct and the dismissal. In other words, the conduct must have taken place before the dismissal; the employer must have been aware of the conduct; and the employer must then have dismissed the employee at least partly in consequence of conduct.

Polkey Reductions.

6.16. Under Section 123 (1) ERA 96 the Tribunal must consider whether it would be *"just and equitable"* to make a reduction from any compensatory award.

6.17. The case of **Polkey -v- AE Dayton Services Ltd 1988 ICR 142** held that a Tribunal must consider whether the unfairly dismissed employee could have been dismissed fairly at a later date.

6.18. The **Polkey** principal applies not only to cases where there is a procedural unfairness but also to substantive unfairness, although in the latter case it may be more difficult to envisage what would have happened in the hypothetical situation of the unfairness not having occurred, see **King -v- Eaton Ltd (2) 1998 IRLR 686.**

6.19. The burden of proving that an employee would have been dismissed in any event is on the employer.

6.20. The Tribunal looked carefully at the guidance given in **Software 2000 Ltd -v- Andrews 2007 ICR 825** on the application of **Polkey**.

6.21. In summary the guidance directs that the Tribunal must assess how long the employee would be employed but for the dismissal. If the employer contends that the employee would or might have ceased to have been employed in any event had a fair procedure been adopted, the Tribunal must have regard to all relevant evidence, including any evidence from the employee (for example an intention to retire). There will be circumstances where the nature of the evidence is so unreliable that the Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. The Tribunal must have regard to all material reliable evidence even if there are limits to the extent to which it can confidently predict what might have happened. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary namely that the employment would be terminated earlier is so scant that it can effectively be ignored.

6.22. The proper approach when applying the **Polkey** principle is not to look at what the Respondent would have done if it had not made an error, rather to look at what would have happened if the correct procedure had been applied.

Submissions.

7. There was no dispute by either party as to the legal principles the Tribunal had to apply which are set out above.

8. Mr Smith made factual submissions on the matters set out in the amended list of issues and the Tribunal means no discourtesy to him by not repeating those submissions but has incorporated, where relevant, such submissions in its findings.

9. In terms of the law on the question of custom and practice he took the Tribunal to the cases of **Albion Automotive Ltd -v-Walker [2002] EWCA Civ 946** and **Garrett -v- Mirror Group Newspapers Ltd [2011] EWCA Civ 425.**

10. Mr Lawrance relied on a 10-page written submission to which the Tribunal had full regard. This addressed the evidence given and how it should be viewed. A copy is on the Tribunal file so those arguments are not repeated in detail. Again, any relevant arguments have been incorporated into the Tribunal's findings.

Discussion and Conclusions.

11. **The reason or principal reason for dismissal.**

11.1. The Claimant accepted, very fairly, that the Respondent believed that he was guilty of gross misconduct and that this was a potentially fair reason for dismissal.

11.2. In the circumstances the Tribunal found that the Respondent had discharged the evidential burden on it as to showing a potentially fair reason for dismissal.

11.3. The dispute between the parties was whether the Respondent acted reasonably or unreasonably in treating the Claimant's misconduct as sufficient reason to dismiss. The Tribunal will now turn to those issues.

12. **The agreed issues as to fairness.**

The Tribunal has addressed, below, the specific issues raised in the agreed schedule. Some of the issues contain an element of duplication or overlap and it is for this reason that, at times, the Tribunal has addressed more than one of those concerns in each section of its judgement.

13. **Suspension**

13.1. The Claimant contended his suspension was out with the Respondents disciplinary policy.

13.2. The Tribunal is satisfied that it was Ms Jenkins who took the decision to suspend the Claimant, although notification of that decision was conveyed to the Claimant by Ms Wilson.

13.3. The Respondent's disciplinary policy provides in relation to suspension as follows: –

"Decisions on suspensions should only be taken by the relevant Chief Officer with advice from a HR adviser" (F7)

13.4. The Tribunal is satisfied on the unchallenged evidence that Ms Jenkins was at all material times a Chief Officer and thus had the power to make the decision that she did.

13.5. The Tribunal did not accept the Claimant's interpretation that suspension had to be by his Chief Officer. The word *"relevant"* is imprecise and its inclusion is difficult to understand. The Tribunal is not satisfied the wording is such that a Chief Officer from another directorate of the Respondent could not suspend. Indeed, the Tribunal, applying its industrial knowledge, concluded that in many cases it would often be more appropriate for suspension to be undertaken by a person out with the department in which the employee concerned was employed, to add a layer of objectivity.

13.6. It follows the Tribunal does not accept the fact Ms Jenkins suspended the Claimant was out with the Respondents disciplinary policy. Even if the Tribunal was wrong on this finding it was not unfair for Ms Jenkins to suspend the Claimant for the reasons set out below.

13.7. At the time Ms Jenkins took the decision she had spoken to Ms Tolson (who had made serious allegations of harassment) and had also spoken to Mr Baker, the GMB official who had lodged the collective grievance. Mr Baker had provided a flavour of the allegations including acts of discrimination, and bullying. Mr Baker contended staff had left the Respondent's employment because of the treatment they had received. Given the nature and seriousness of the allegations, the Claimant's position as manager of a team from whom the allegations had mostly emanated, the fact Ms Jenkins was told the Claimant had apparently asked one member of staff why they had been meeting with the GMB, and that a number of staff feared reprisals, these were all circumstances that Ms Jenkins was entitled to take into account when reaching her decision to suspend. Alternatives to suspension were considered and suspension was kept under review by Ms Wilson, a person who was not ill disposed to the Claimant.

13.8. The Tribunal is not satisfied that the decision to suspend the Claimant was out with the Respondent's policies or a decision that a reasonable employer acting reasonably could not have taken.

14. **Details of the allegations.**

14.1. The Claimant contended there was a delay in both supplying him with what he regarded as *"basic details"* and *"full details"* of the allegations made against him.

14.2. An employee is entitled to know with reasonable precision the allegations he or she has to face so they can prepare for a disciplinary hearing. The Claimant did not take the Tribunal to any particular aspect of the Respondent's disciplinary policy which he contended was breached as regards complying with this fundamental principle of fairness. The Tribunal noted that all the Respondent's disciplinary policy required was at least 10 working days' notice of the allegations together with the supporting documentation. (F10).

14.3. As the Tribunal has already observed the Claimant was given details of the allegations against him on 04 January 2018 and the full disciplinary pack by 19

January 2018. The substance of the disciplinary hearing, putting aside the preliminary issue as regards representation, did not commence until 27 February 2018. The Tribunal is satisfied having regard to the totality of the documentation that the Claimant was fully aware of the case he had to meet. The Tribunal does not find there was any unfairness in this aspect of the conduct of the proceedings.

15. **Terms of reference and the collective grievance.**

15.1. The Claimant was right that collective grievance (E 21/22) did not exactly mirror, word for word, the terms of reference (E23/24), given to Ms Jenkins. The Tribunal having compared the two documents, side-by-side, has concluded they were very similar. The Terms of Reference required an investigation into allegations of bullying and sexual harassment by the Claimant, why staff had left, a review of the alleged inappropriate behaviour to determine if there was a case to answer, and a review of the general management of the service. This is consistent with the central concerns in collective grievance. The one matter that was not identified in the collective grievance but which did appear in the terms of reference was a review of the general management. In the Tribunal's judgement that was not a matter that caused any unfairness to the Claimant.

15.2. Given the Tribunal is satisfied the Claimant knew well before the disciplinary hearing the allegations he had to meet, and the evidence upon which the Respondent relied, (indeed it was such that he could identify 19 witnesses he wanted to call) any divergences between the grievance and the Terms of Reference, which were minimal, are not in the Tribunal's judgement a matter that caused unfairness to the Claimant.

16. **The Respondent's reliance on the 2015 grievance**

16.1. Put shortly there are three elements to the Claimant's allegations of unfairness in relation to the 2015 grievance.

16.2. One, Ms Thurlbeck, the author of the 2015 grievance, should be interviewed as part of the investigatory process.

16.3. Two, matters dealt with by the 2015 grievance should not have been resurrected and Ms Jenkins did not review the 2015 grievance in the context of the collective grievance.

16.4. Three, the Respondents failed to follow its own procedures because some of the signatories to the 2017 collective grievance had left the Respondent's employment more than three months previously.

16.5. There is an overlap between these issues and the Tribunal has dealt with these allegations in their entirety.

16.6. The Tribunal rejected the suggestion that the investigation was flawed by the failure of Ms Jenkins to interview Ms Thurlbeck. Ms Jenkins had a copy of her report and was aware of its conclusions and the reasons set out therein why she had reached those conclusions. The Claimant could not provide a credible explanation of what such further enquiry would have produced had Ms Thurlbeck been interviewed.

16.7. However, had Ms Jenkins reviewed that report carefully she would have discovered that what has been called double teaming supervision was

directly addressed in the 2015 grievance and then ceased. It was unfair on the Claimant to rely upon a matter that have been brought to the Respondent's attention, determined, and a decision then taken that no disciplinary action should be taken against any officers.

16.8. Further Ms Jenkins had evidence before her that it was Mr Broadbent, who was a manager of the Claimant, who established the double teaming. The Claimant and Mr Dunbar merely followed his instructions. It was unfair to seek to raise the matter again as part of the current proceedings. Whilst the Tribunal has noted that double teaming in supervision was raised with Ms Jenkins by some witnesses who were not party to the 2015 grievance, this does not in the Tribunal's judgement impact upon its assessment of the unfairness of pursuing this line of enquiry with the Claimant. The Tribunal will address this unfairness on the overall procedure, later in its judgement.

16.9. The issue of the allocation and division of workload had been addressed in the 2015 grievance. It was again unfair to the Claimant for Ms Jenkins to take evidence on these matters for the purposes of her investigation. That said the unfairness had no adverse impact on the Claimant as Ms Jenkins concluded on the issue of workload this was not a matter that could be taken forward to a disciplinary hearing.

16.10. The Tribunal gave very careful consideration to the Claimant's concern that Ms Jenkins interviewed members of staff who had left the Respondent's employment more than three months prior to the presentation of the collective grievance, which he contended was in breach of the Respondents policies and procedures. This would have excluded the evidence of Mr Buckley, Miss Harrison and Ms Kershaw.

16.11. The Respondent's policies in this regard are dense and do not sit comfortably together

16.12. The Respondents grievance policy provides: -

Grievances submitted more than three months following an event will not be considered by the Council <u>*under the grievance policy*</u> [Tribunal's emphasis]*"* (B147d).

16.13. The Respondent also has a Dignity at Work policy (D141 to 152) which aims to ensure that the Respondent's workplace is free from all forms of harassment and bullying. There were aspects of the matter before Ms Jenkins that related to bullying.

The policy states that it: –

"Applies in cases where the complainants have recently left the employment of this council, provided that they make their complaints within three months of leaving(sic) *Council. The council will investigate all complaints relating to harassment and bullying under this procedure.* <u>*It will not use the grievance procedure*</u> [Tribunal emphasis].

16.14. The Tribunal is satisfied that this wording is such that the grievance policy was not the applicable policy to be applied, given there were allegations of bullying and thus the Claimant cannot rely upon the time limits contained therein.

16.15. However even under the Respondents Dignity at Work policy the Respondent should not consider complaints from former employees if they have left their employment more than three months prior to raising a complaint.

16.16. That said the same policy makes it clear it should be read in conjunction with the Respondents Code of Conduct and that whilst the wishes of a complainant should be taken into account the Respondent may be bound by duty of care to investigate the matter in accordance with the Respondent's disciplinary procedures (D145).

16.17. Under the Respondent's disciplinary policy there is no time limit on considering complaints from former employees.

16.18. Ms Jenkins contended that she regarded the matter she was required to investigate as falling within the Respondent's Dignity at Work policy which gave her the option of instigating a disciplinary investigation given the alleged intentional breaches of the Respondents code of conduct, the seriousness of the allegations and the duty of care it owed to employees.

16.19. Whilst the Tribunal has some sympathy for the Claimant the Tribunal is satisfied that Ms Jenkins genuinely considered this to be a disciplinary investigation and that is evidenced by the fact that she suspended the Claimant under the Respondents disciplinary procedure. The Tribunal concluded that a reasonable employer could have adopted the position taken by Ms Jenkins (although that is not to say another reasonable employer acting reasonably might not have taken a different view) and thus, it cannot be said that the position taken by Ms Jenkins was procedurally unfair. She was entitled to interview Mr Buckley, Ms Harrison and Ms Kershaw. The weight to be given to their evidence was a matter for Mr Baines.

17. **<u>The impartiality of the investigating officer and the investigation generally.</u>**

17.1. The Claimant contended that Ms Jenkins was not an impartial investigating officer

17.2. There are some aspects of the investigation that are troubling. For example, when questioning Ms Kershaw, she asked whether she had any evidence that the Claimant took *"backhanders".*

17.3. This was never part of the collective grievance or Terms of Reference and Ms Jenkins had no basis to raise such an issue with Ms Kershaw. Ms Jenkins could not offer a credible explanation why she raised the issue. The comment led the Tribunal to very carefully examine the investigation for other matters which might indicate conscious or unconscious bias against the Claimant. That said the Tribunal has been very careful to look at the entirety of all the documentation rather than focusing on one question in over 200 pages of documentation. The Tribunal was not persuaded that Ms Jenkins was biased as is evidenced by the number of times that she interviewed the Claimant to obtain his account of the various allegations and the length of those interviews which total many hours.

17.4. The Claimant was critical that Ms Jenkins did not interview everyone within the department. The department numbered approximately 23 staff. The Tribunal is not satisfied that it was a fair criticism of Ms Jenkins that she

failed to interview all staff. She interviewed staff who appeared to be able to give her relevant information. She sought balance by interviewing, amongst others, Ms Wilson, Mr Broadbent and Mr Coleman all members of management who provided some evidence that was supportive of the Claimant.

17.5. The Claimant was critical that the investigation notes did not reflect the audio recordings. The Claimant did not take either Ms Jenkins or the Tribunal to specific errors despite being reminded on three occasions by the Tribunal of the importance of addressing all matters on the list of issues. The Claimant was offered the actual recordings of the interviews with the witnesses by the Respondent, on or about 05 February 2018 to check for any inaccuracies. He did not. In any event the Claimant did not raise the issue of the accuracy of the transcribed interviews with either Mr Baines at the disciplinary hearing and it did not form a ground of his appeal.

17.6. Whilst the Tribunal has noted on reviewing the documentation that there were occasional typographical errors, with some names being incorrect or misspelt the Tribunal was satisfied that the transcripts of the investigatory meetings were reasonably accurate.

17.7. The Claimant was critical that at times Ms Jenkins did not use the word *"alleged"* in questioning. That is correct and Ms Jenkins frankly accepted the same before the Tribunal. The Tribunal does not find that this in itself was evidence of conscious or subconscious bias. It accepted Ms Jenkins evidence on this point that it was simply a word she forgot to use at times.

17.8. The Tribunal did not accept the contention of the Claimant that Ms Jenkins was not an impartial investigator because she did not accept the evidence of Mr Broadbent and Ms Wilson. With respect the Claimant misunderstood the role of Ms Jenkins. It was for her to gather evidence and for Mr Baines to make a decision on that evidence. Ms Jenkins did gather evidence from Mr Broadbent and Ms Wilson which was placed before Mr Baines. It follows this criticism made by the Claimant was not accepted by the Tribunal.

17.9. The Claimant highlighted that exit interviews were not obtained from those who had left and had alleged they left, at least in part, due to the Claimant's conduct. The Tribunal noted in the report of Ms Jenkins she recorded she did make enquiries as to whether there were exit interviews and was advised by HR there were none, because managers were not completing the appropriate documentation. It was thus not a fair criticism to make of Ms Jenkins's investigation.

17.10. The Claimant contended that the investigation was unreasonably long taking some seven months. The Tribunal does not accept the basic premise that the investigation undertaken by Ms Jenkins took seven months to complete.

17.11. Ms Jenkins was first instructed by the Respondent's Chief Executive on 16 August 2017.

17.12. The timeline was Ms Jenkins interviewed Mr Baker on 25 August 2017. She then interviewed Ms Harrison on 12 October 2017, Ms Wilson 13 October 2017, Ms Tolson 17 October 2017, Ms Kershaw 27 October 2017, Mr Buckley 03 November 2017, Ms Ryley 08 November 2017, Ms Diane Marsh ("Ms Marsh") 14 November 2017, Mr Coleman 20 November 2017, Mr

Broadbent 27 November 2017, the Claimant 27 November 2017 and 28 November 2017, Ms Ryley, again, 28 November 2017, Ms Beverley Cooper("Ms Cooper") 01 December 2017, Mr Broadbent, again, 05 December 2017, the Claimant, again 06 December 2017, and Ms Tolson, again 27 December 2017.

17.13. She advised the Claimant on 28 December 2017 that there was a case to answer and the Claimant was notified of a disciplinary hearing date by letter dated 04 January 2018. It follows that the investigation took just over four months to complete.

17.14. The Tribunal is satisfied that given the number of witnesses to be interviewed, the factual disputes, the evidence given that led, on occasions, to the need re-interview witnesses as further information came to light, and the Christmas holiday that it cannot be said that the length of the investigation itself was unfair. There were also a series of factors that further impacted upon the speedy conclusion of the investigation. Some witnesses wanted trade union representation, which took time to arrange. Ms Jenkins had certain day to day duties that she simply could not cancel or delegate. Some of the witnesses were no longer employed by the Respondent and this impacted on arranging interviews. The Tribunal also noted Ms Jenkins was absent for two weeks in September on annual vacation. Unfortunately, whilst on holiday Ms Jenkins suffered a serious accident which required her to be airlifted to hospital. Ms Jenkins was absent from work due to ill-health from 28 September until 9 October 2017.

17.15. The length of time taken in relation to the investigation was lengthy but having regard to the timeline provided, the explanations given by Ms Jenkins, which were not challenged, the Tribunal is satisfied that it cannot be said that delay, regrettable as it was, was unfair.

17.16. The Tribunal is not satisfied that Ms Jenkins was *"aggressive"* or *"cruel and degrading"* in the manner she asked the Claimant questions either at the investigative meetings or at the disciplinary hearings. The Tribunal have noted that the allegations were denied by Ms Jenkins and the Claimant did not call his representative from the disciplinary proceedings to support his assertions. The Claimant did not take the Tribunal to specific examples of what he complained of in either the investigation or disciplinary notes. The Tribunal also noted the Claimant's assertions were denied by Mr Baines in relation to Ms Jenkins conduct at the disciplinary hearing. Further the Claimant did not raise the issue of alleged unfairness of questioning as part of his appeal. In the light of the evidence the Tribunal is not satisfied that this allegation of unfairness is made out.

17.17. The Tribunal has been careful to look at all those matters raised in relation to the investigation in the round. Other than the repetition of matters dealt with by the 2015 grievance the Tribunal is satisfied despite the concerns that it has highlighted that the investigation was reasonable in all the circumstances. It was not perfect but that is not the standard required by the law. The Tribunal will deal with the unfairness caused by the repetition of matters resolved by the 2015 grievance later in its judgement.

18. **Representation**

18.1. The Claimant complained he was denied the opportunity to be accompanied at his disciplinary hearing by Cllr Holden who was neither a colleague nor a trade union representative.

18.2. The Respondents disciplinary procedure provides as follows in relation to representation: -

"Employees have the right to be accompanied at investigative meetings and represented at formal disciplinary and appeal hearings by his/her trade union representative, or appropriate work colleague (including contact officer)…"

18.3. It was common ground that Cllr Holden did not fall within the categories of representative recognised under the Respondents disciplinary policy.

18.4. Mr Baines took advice from the Respondents Head of Legal before reaching his decision and examined the Respondents disciplinary policy. He even arranged the Respondents Head of Legal to explain the matter directly to both the Claimant and Cllr Holden.

18.5. The Tribunal cannot say that it was unfair to limit representation as set out in the policy. Indeed, the position as regards representation that the Respondent had taken is identical to that taken by many other employers.

18.6. The Respondent on informing the Claimant of the position as regards representation allowed the Claimant, in the Tribunal's judgement more than sufficient time (5 February to 13 March) to find a replacement representative and for that representative to familiarise himself with the relevant facts of the case.

18.7. In the circumstances the Tribunal is not persuaded that the Respondent's application of its policy as to representation was unfair.

19. **The Respondent refused to accede to a four-week postponement requested by the Claimant.**

19.1. On 02 March 2018 (D39) the Claimant requested a four-week adjournment to allow him further time to prepare. He said he would not be ready to proceed until 10 April. The reason the Claimant was seeking an adjournment was that he had only recently received a copy of the collective grievance and the Terms of Reference.

19.2. That application was refused by Mr Baines (D41).

19.3. The Claimant had already been granted an adjournment from 05 February until 13 March 2018 by Mr Baines to allow his new representative, Mr Lee, to come up to speed.

19.4. The Tribunal was satisfied that the decision of Mr Baines was one that a reasonable employer could have taken in the circumstances particularly given the Claimant knew of the allegations he faced on the 04 January 2018 and have a full management pack from the 19 January 2018. The Claimant therefore had almost 2 months from receiving all the documentation that the Respondent relied upon to prepare his case. In any event looking at the email chain the only new evidence that the Claimant had recently received was the Terms of Reference and collective grievance and the Tribunal did not accept it would have taken four weeks for the Claimant to address those issues, the two documents totalling two sides of

A4. Further the Claimant had approximately two weeks between the disclosure of the collective grievance and Terms of Reference before the start of the substantive disciplinary hearing. The refusal was not unfair.

20. **Delay and the appeal**

20.1. The Claimant contended the Respondent unreasonably delayed in convening the appeal hearing.

20.2. The Tribunal is not satisfied that the Respondent unreasonably delayed the convening of the appeal hearing.

20.3. The Claimant appealed the decision to dismiss him by letter dated the 31 May 2018.

20.4. The appeal hearing was convened initially for 30 July but re-arranged for 03 and 04 October 2018. The Respondents had tried to deliver the appeal papers on three occasions to the Claimant (D79). It appeared the Claimant lived down a farm track with a locked gate. Attempts were made to contact the Claimant by both HR and via Mr Lee and Mr Ashman, a trade union official who had initially supported the Claimant. Mr Ashman was eventually able to hand deliver the papers. The Claimant accepted the difficulties in delivery were not ones he could blame upon the Respondent.

20.5. Whilst the Tribunal accepted that the Respondent encountered difficulties because, under its policy the appeal panel had to consist of three elected members and there were issues as regards availability coupled with holidays which provides an explanation it does not excuse it. It is the Respondent's choice to use elected members on its appeal panel. The delay was on the cusp of excessive but the Tribunal was not satisfied this prejudiced the Claimant firstly because it had a detailed letter of dismissal from Mr Baines, secondly it had a very detailed verbatim transcript of the disciplinary proceedings, and thirdly it had investigative statements before it and heard live evidence. The reality was that had the Respondent been able to deliver the appeal papers to the Claimant in good time then the appeal date of 30 July would have gone ahead. The Claimant himself accepted that the difficulty with delivery was not wholly the fault of the Respondent. Had delivery been affected the appeal would have gone ahead in two months.

20.6. Whilst the Tribunal is critical as to the delay it cannot say that the delay was such either alone or in conjunction of other failings the Tribunal has identified that the Claimant's dismissal was unfair.

21. **The Claimant was subject to undermining and intimidating behaviour by other employees and was not appropriately supported**

21.1. The Tribunal accepted that there was evidence before Mr Baines and the appeal panel that there were difficulties with some employees, coupled with underperformance in the department. This was evident from the evidence of both Mr Broadbent and Ms Wilson and was not challenged.

21.2. The Claimant had identified three particularly difficult employees, Mr Buckley, Ms Harrison and Ms Kershaw.

21.3. However, both Mr Baines and the appeal panel were entitled to take into account that the evidence against the Claimant came from a far broader

spread of employees, some whom the Claimant himself accepted were competent members of staff.

21.4. Thus, the possibility that three particular employees had a grudge against the Claimant was considered, but for the above reason, held not to exonerate the Claimant.

21.5. The Tribunal cannot say that a reasonable employer could not have reached a similar conclusion.

21.6. The Tribunal also noted the evidence as to the training given to the Claimant. The Tribunal is not satisfied that it could be said that either Mr Broadbent or Ms Wilson were unsupportive managers. In any event even if the Claimant was not properly trained in dealing with underperforming employees and was unsupported it would not excuse the behaviour found against him by the Respondent.

22. **Appeal process**

22.1. Turning to the appeal, Counsellor Collins gave her evidence in a straightforward manner. She was not questioned at any length. She was a credible witness.

22.2. The Tribunal was satisfied that the overall decision of the appeal panel to uphold the dismissal was fair in all the circumstances even discounting the fact the appeal panel upheld the finding of Mr Baines that the Claimant undermining team members by micromanagement which, for the reasons already explained by the Tribunal, was unfair.

22.3. The elected members were independent and even though the Claimant chose not to attend spent two days listening to all the evidence, including part of the tape recordings of evidence given.

22.4. The panel clearly applied their own judgement to matters evidenced by the fact that one matter that Mr Baines found amounted to gross misconduct alleged unwanted sexual attention to female staff specifically whilst the late-night duties and sat in cars in laybys was not gross misconduct meriting summary dismissal but misconduct meriting a final written warning as the sexual element was not proven.

22.5. The Tribunal has not lost sight of the fact that the Claimant did not seek an adjournment and chose not to attend and therefore although this was a rehearing live evidence was not further challenged by the Claimant.

23. **No evidence to support the allegations.**

23.1. This issue required the Tribunal to examine the disciplinary decision reached and the basis of that decision.

23.2. The Tribunal examined the fairness or otherwise of the decision to dismiss by examining all the relevant facts at the end of the disciplinary process which included the appeal.

23.3. The Tribunal reminded itself that it had to look at what information was before Mr Baines when he took his decision or should have been before him following a reasonable enquiry. The Tribunal concluded if contentious evidence from a live witness was not challenged it was not unreasonable,

absent other significant factors, for a decision-maker to accept that evidence. Mr Baines was entitled to give less weight to challenges made to live witness evidence in submissions when they were not present to respond to those criticisms and they had not been raised directly with those witnesses.

23.4. The Tribunal has only addressed those allegations that the Respondent found proven and imposed a disciplinary sanction and has particularly concentrated its analysis on those that resulted in a finding of gross misconduct.

23.5. The Tribunal should record that it found Mr Baines to be a conscientious determining officer. He was faced with a complex case and numerous evidential disputes some of which were historical. He was not assisted by the vagueness of some of the witness evidence. He had no bias against the Claimant and was even-handed, evidenced by the fact, for example that during the course of the lengthy disciplinary hearing he called for further documents and also of his own volition requested additional witness evidence be obtained, for example from Mr Shackleton, Mr Pulford and Mr Thornes.

23.6. The Tribunal also noted that Mr Baines reminded the Claimant on a number of occasions during the course of the disciplinary hearing to ask questions. That was the action of a determining officer who was seeking to be fair to the Claimant by mentioning to him that if he did not ask questions of witnesses that would be his only chance.

23.7. Mr Baines accepted some of the Claimant's evidence, for example he accepted the Claimant's evidence there were performance issues within the department the Claimant worked within.

23.8. The Tribunal noted the carefully reasoned outcome letter provided by Mr Baines which balanced the evidence and explained why some evidence had been accepted and other evidence rejected.

23.9. Finally, the Tribunal is further reinforced in its judgement that Mr Baines was not biased against the Claimant by the fact that he rejected one allegation, that the Claimant threatened new members of the team.

24. **Allegation 1. The failure to declare a personal relationship in respect of Nicola Law prior to and during the interview process for the post of senior environmental health officer**

24.1. Although Mr Baines found this allegation proven he concluded that no disciplinary action should be taken as there had been a level of disclosure made by the Claimant to both Mr Broadbent and Ms Wilson prior to any interview.

24.2. In the circumstances, as this allegation had no influence on the decision to dismiss the Tribunal need not analyse the evidence.

25. **Allegation 2. The alleged bullying of members of the environmental health team over a sustained and long period of time. This has caused distress to those involved and led to many leaving the Council. Specifically, this relates to;**

- **Threatening new members of the environmental health team on commencement of employment within environmental health service.**

25.1. Mr Baines found this allegation was not proven. He noted that this allegation relied heavily on the evidence of Ms Harrison and there was a lack of corroboration. He found the Respondent had not satisfied him on the evidence before him that this allegation was made out.

25.2. In the circumstances, as this allegation had no influence on the decision to dismiss the Tribunal need not analyse the evidence.

- **Undermining team members i.e. micromanagement of work including overly lengthy supervision sessions, minor changes to punctuation, grammar, reports and letters; criticising colleagues to other colleagues; making it known who you wanted out of the organisation.**

25.3. Mr Buckley evidence to Mr Baines was that his complaint of micromanagement related to the 2-to-1 supervisions

25.4. When challenged by the Claimant in the disciplinary hearing he accepted it ceased at about the time of the 2015 grievance.

25.5. Mr Baines failed to look at the 2015 grievance outcome relying upon what he was told by HR.

25.6. Had Mr Baines undertaken the above exercise and weighed all the evidence carefully a reasonable employer would have concluded that elements of this allegation was dealt with in the 2015 grievance. Given it was not the Claimant who introduced the 2 to 1 supervision and that he ceased that method of supervision in the 2015 and no disciplinary action was taken against him it was wholly wrong and unfair now to use that as evidence to support a finding of gross misconduct.

25.7. The Claimant did not challenge the evidence of Mr Buckley that he had his correspondence checked. The uncontested evidence before Mr Baines was that in a regulated service where evidence had to be presented, on occasions, at court it was important that officers ensured statutory sections were correctly worded and documents were not sent to the wrong address. There was evidence before the determining officer that Mr Buckley made mistakes (G170) and there was evidence from Mr Broadbent that on one occasion Mr Buckley had prepared papers when it was apparent, he visited the wrong premises and taken the wrong photographs. Mr Broadbent also gave uncontested evidence that in addition to Mr Buckley, Ms Harrison and Mr Rowan Castle ("Mr Castle") were considered problematic staff.

25.8. Mr Shackleton's evidence was that the Claimant wanted to ensure that work was done well and if high standards were not met the Claimant would say so but he did not regard that as bullying.

25.9. In the circumstances no reasonable employer would have criticised the Claimant for checking Mr Buckley's work. In any event the Claimant ceased to manage Mr Buckley in 2015.

25.10. The fact that the Claimant regarded, amongst others, Mr Buckley as being a poor performer was based on objective evidence and had also been the

view of senior management given its concerns as to the performance of much of the department.

25.11. On the Claimant's own case Mr Bacon was not a member of staff who he regarded as a poor performer. The Claimant accepted he could not think of a reason why Mr Bacon would have a grudge against him. Mr Bacon's evidence, which Mr Baines relied upon, was that he left the Respondent because he feared he might be bullied by the Claimant, was not strong evidence as he himself accepted he had never seen the Claimant bullying or harassing anyone and it was merely his perception.

25.12. Mr Thornes, who it was common ground was well regarded by the Claimant, gave clear evidence that the Claimant had said there were some members of staff he preferred and felt would be a loss if they left and there was some, he would like to see leave the department.

25.13. On the totality of the evidence Mr Baines was entitled to conclude, particularly having regard to the evidence of Mr Thornes, that there were officers that the Claimant rated and some that he did not. That was not an unreasonable opinion given Mr Broadbent and Ms Wilson had a similar view.

25.14. The Tribunal accepts there is a difference between having a mental list of staff who are and aren't rated and discussing that list with colleagues. Mr Baines was entitled to conclude that the Claimant did express those views. However, expressing those views of who the Claimant did and did not regard as good members of the team may well have been inadvisable, and divisive and justify disciplinary proceedings but in the Tribunal's judgement no reasonable employer would regard that as gross misconduct.

25.15. No reasonable employer would have accepted that Mr Buckley, Ms Harrison, Ms Tolson, Ms Kershaw, Ms Marsh and Mr Bacon all left due to the behaviour of the Claimant given the Claimant had never managed Ms Kershaw, last managed as Ms Marsh in 2004 Ms Tolson in 2008, and Mr Buckley and Ms Harrison in August 2015 and they were not all in the Claimant's team but some in commercial, who operated out of a separate room.

25.16. Whilst Mr Buckley claimed Mr Farrell left because of the Claimant's behaviour the evidence of Mr Farrell was that he left undertake teacher training. In the circumstances Mr Baines should have placed very little weight of the evidence of Mr Buckley.

25.17. The Tribunal concluded that looking at all the evidence in the round that some of the elements of the allegation should not have been relied upon to justify disciplinary proceedings, and even that element that was proven, the Claimant expressing his views as to the merits or otherwise of staff was an opinion that no reasonable employer would have dismissed the employee for. The penalty of gross misconduct was out with the band of responses of a reasonable employer.

26. **Allegation 3. The alleged sexual harassment of female staff. Specifically, this relates to:**

- **Making derogatory and personal remarks about female staff including comments that maternity would ruin a staff member's career, bodyweight,**

comments about a woman's breasts and bottoms and comments in respect of sexual activity

26.1. The Tribunal is satisfied that Mr Baines was entitled to find this allegation proven. He had evidence before him from Ms Ryley, that the Claimant had said words to the effect that when she fell pregnant that was the end of her career. The Claimant did not challenge Ms Ryley's evidence at the disciplinary hearing.

26.2. There was corroborative evidence in support of Ms Ryley's claim that she complained to colleagues at the time about the Claimant's behaviour from amongst others Ms Tolson and Mr Bacon.

26.3. No evidence was placed before Mr Baines as to why Ms Ryley would have any reason to make up her evidence against the Claimant. Mr Baines was entitled to accept her evidence.

26.4. Ms Ryley also gave evidence that the Claimant referred to Ms Marsh as being *"poisonous"* and Ms Tolson said the Claimant called Ms Marsh a slut. The context of a conversation was the Claimant was praising Ms Marsh as a good officer but then said, "*how a person can educate themselves but at the end of the day she will always just be a slut from Lundenfoot"*. There was evidence from Ms Harrison that in reference to a ferry crossing the Claimant said there was no chance of her drowning because she had her *"own inflatables"*. Mr Baines was entitled to infer this was a reference to her chest. Whilst the Claimant contended in his evidence and submissions to the disciplinary hearing this comment was made by another person this was never put by the Claimant directly to Ms Harrison and therefore Mr Baines was entitled to accept her evidence.

26.5. Ms Harrison stated the Claimant had made a sexually pointed comment when she said she'd had an early night with reference to work not getting any sleep. Although the Claimant was to deny this and said the comment was made by Mr Hill, he never put this to Ms Harrison so she could comment upon it. Again, in the circumstances Mr Baines was entitled to accept her evidence on this point.

26.6. Ms Tolson in her investigative interview described the Claimant as a *"sex pest"*. The Claimant did not challenge her on this evidence at the disciplinary hearing. She also gave evidence about the Claimant looking women "*up-and-down*" and making reference to a woman's bottom. The Claimant did not challenge this evidence either.

26.7. Looked at in totality and having regard to the range of comments from a number of witnesses and the lack, in part of direct challenge by the Claimant the Tribunal is satisfied it was reasonable for Mr Baines to conclude such comments were made. He was entitled to reject the Claimant's contention there was collusion as there was no evidence of the same before him. On the claimant's own case some of the comments were made by staff that he rated and therefore were unlikely to have a grudge against him.

26.8. Mr Baines concluded that there was no bullying involved as the objects of the comments did not hear or know of them; it was simply poor inappropriate behaviour.

26.9. The Tribunal cannot say that in the light of the above proven behaviour the dismissal for gross misconduct was out with the band of responses of a reasonable employer particularly having regard to the Respondent's code of conduct.

- **Degrading women, by making sexual remarks, directly and indirectly**

26.10. Mr Baines relied a variety of evidence.

26.11. There was evidence from Ms Harrison that the Claimant had called a member of the office *"top totty"*, the evidence from Mr Bacon that the Claimant had made a comment that the member of staff had a *"nice pair of legs"* and another comment witnessed by Mr Coleman that the Claimant referred to a woman as *"piece of skirt"*. Mr Coleman was not challenged by the Claimant when he said he remonstrated with the Claimant about this comment.

26.12. Mr Buckley gave evidence and the Tribunal noted that he struggled to give examples of the Claimant's attitude to women but did say he had heard a couple of comments over the years where the Claimant has said he wanted to fuck or screw a particular woman. Mr Buckley was not challenged on this remark by the Claimant in the disciplinary proceedings. Mr Baines was therefore entitled to take it into account in his decision-making.

26.13. Mr Baines fairly took into account there was also evidence before him that the Claimant was respectful towards women.

26.14. Mr Baines looked at all the evidence in totality. Looked at in totality the Tribunal was satisfied that a reasonable employer could reasonably believe that the Claimant had degraded women by making sexual remarks.

26.15. What the Tribunal is not satisfied is that the comments were made directly to women. On the evidence before Mr Baines the comments were made to men and referred to women.

26.16. Even with that caveat the Tribunal cannot say that the imposition of a final written warning was out with the band of responses of a reasonable employer.

- **Unwanted and intrusive questions about the personal relationships of female staff**

26.17. The clearest evidence came from Ms Harrison when she was claimed the Claimant made a comment that she had *"an early night but not getting any sleep"*.

26.18. Although Mr Baines had evidence from Ms Marsh who said the Claimant asked a number of personal questions about her relationship when they were alone in a car during a work visit, she was not called to give evidence and Mr Baines failed to take into consideration that such evidence would carry less weight than direct oral evidence.

26.19. Whilst Ms Kershaw gave similar evidence to Ms Jenkins, like Ms Marsh, she also was not called to give evidence.

26.20. Ms Tolson did give live evidence and suggested she was asked about her private life including boyfriends by the Claimant. She was not directly challenged by the Claimant that he asked such questions.

26.21. Even allowing for the fact less weight could be attached to the evidence of Ms Kershaw and Ms Marsh it corresponded with the live evidence that Ms Tolson gave. In the circumstances having regard to the lack of challenge Mr Baines was entitled conclude that the allegation was substantiated.

26.22. Further the Tribunal cannot say that a final written warning for such proven behaviour was outside the band responses of a reasonable employer.

- **Unwanted and unwelcome sexual attention to female staff; specifically, whilst on late night duties and sat in cars in laybys**

26.23. Ms Tolson gave evidence, that Mr Baines was entitled to accept, that the Claimant tried to discuss with her extramarital affairs and about being *"naughty"* during a site visit. Having dropped Ms Tolson off he then rang and said, *"do you want to be a naughty girl cause I'd like to be a naughty boy".*

26.24. The incident was old, on Ms Tolson's evidence in the period February to October 2007.

26.25. The evidence of Ms Kershaw was less convincing. She said that on occasions the Claimant would stop his car and asked for a chat in a layby. While she thought it was somewhat strange, she thought nothing more of it. Ms Kershaw was not called to give evidence.

26.26. The reality was that this allegation hinged on the assessment by Mr Baines of the credibility of Ms Tolson against that of the Claimant. Mr Baines preferred Ms Tolson and explained his reasoning for reaching that opinion. He had the benefit of seeing both parties.

26.27. In the circumstances it was a decision open to him to find the allegation proven.

26.28. Mr Baines initially found this to amount to gross misconduct but is proper to record that this decision was overturned on appeal and although the factual basis was substantiated a penalty of a final written warning was substituted.

26.29. The penalty imposed at the end of the disciplinary process was not out with the band of responses of a reasonable employer. Indeed, in the Tribunal's judgement, given Mr Baines findings of fact, dismissal for gross misconduct could have been justified although that is not to say that a final written warning was not a penalty open to a reasonable employer.

- **The sexual harassment of Melanie Tolson in a hotel room in the White Swan Hotel Halifax on 25 February 2017**

26.30. It was common ground that there was a night noise monitoring visit involving the Claimant and Ms Tolson. Both the Claimant and Ms Tolson accepted that monitoring from a bedroom at the White Swan was not unreasonable. Neither, apparently was it uncommon in the department for officers to take their shoes off in other people's premises. Ms Tolson was on the bed in the bedroom and the Claimant was on a chair and the Claimant apparently said to Ms Tolson she had little feet and tried to touch her feet and she pulled away. The Claimant accepted in cross examination that invading a woman's body space could be seen as very serious and be regarded as unwelcome or uninvited behaviour.

26.31. Ms Tolson made no immediate complaint about the incident However the evidence before Mr Baines was such that he was entitled to find Mr

Shackleton, a witness generally very supportive of the Claimant, did recall Ms Tolson mentioning the incident to him soon afterwards and appeared upset. He wanted to refer the matter to HR but she did not agree so he did not do so. It stuck in his mind as it was such an unusual matter and one, he had not encountered in his long managerial career. Mr Broadbent recalled Ms Tolson mentioning an incident at the White Swan involving the Claimant which had upset her when he was giving her feedback following an internal interview for a job in February 2017. Ms Wilson, also recalled Ms Tolson mentioning an alleged incident at the White Swan at approximately the same time. Both Mr Broadbent and Ms Wilson was generally supportive witnesses of the Claimant.

26.32. At the disciplinary hearing the Claimant did not challenge Ms Tolson's account.

26.33. Ms Tolson also alleged that when she rejected the attention of the Claimant the Claimant piled more work upon her. Again, this was not challenged by the Claimant directly with Ms Tolson at the disciplinary hearing.

26.34. The Claimant alleged, although he never put it directly to Ms Tolson, that she made a pass at him and he reported it to Mr Broadbent. Mr Broadbent had no recollection of such a complaint when asked.

26.35. Whilst the Claimant was critical that the evidence of Ms Tolson was contradictory as to whether she was leading in relation to the White Swan complaint or whether it was himself the Tribunal was satisfied that Mr Baines was entitled to look at the core of the complaint namely what happened on that evening. Who was leading was not a matter central to credibility and in any event Mr Baines had evidence from a witness generally favourable to the Claimant, Mr Broadbent that there were only two officers qualified to deal with noise nuisance, himself and the Claimant and it was best practice, if there was a risk of litigation, that a qualified officer was present. It was not unreasonable for Mr Baines therefore to assume that it was the Claimant as the qualified officer who would lead the investigation.

26.36. Mr Baines, in the Tribunal's judgement did carefully reflect upon the evidence. He noted Ms Tolson continued to work in the Claimant's team until 2008 and did not raise a grievance.

26.37. He was entitled to find that the reason Ms Tolson raised the matter again in 2017 was because she had been told that she be moving into a team managed by the Claimant.

26.38. He noted two powerful pieces of evidence which favoured the Claimant, firstly Ms Tolson invited the Claimant into her home when he delivered some furniture for her and secondly, she had applied for a job in the Claimant's team and when challenged on that said she did it to show that she would not be appointed due to the Claimant's favouritism to Ms Law. Ms Law was appointed to the post. He also noted that there were occasions when Ms Tolson undertook further night visits with the Claimant but the Tribunal concluded that he was entitled to find that she would be obliged to do so in order to obtain her noise qualification and to gain experience in that area of enforcement.

26.39. Mr Baines did consider whether the evidence was so finely weighted that he could not make a finding one way or the other. However, he decided that on balance the allegation was made out given the reporting to Mr Shackleton soon after the event (in his decision letter he refers in error to Mr Pulford), having seen both Ms Tolson and the Claimant give their evidence and having regard to other evidence of the Claimants' inappropriate comments in relation to women. He considered he had no reason to disbelieve Ms Tolson. While she had left the Respondent's employment, she did not say that she left solely because of the Claimant but it was a combination of both being required to work with the Claimant and the disintegration of the service. He also noted that Ms Tolson was not an officer that the Claimant had ever suggested was a poor performer. The Claimant struggled to articulate why Ms Tolson would lie.

26.40. The Tribunal has concluded that on the evidence before Mr Baines it cannot be said that a reasonable employer could not reached the same decision.

26.41. The Tribunal is further satisfied that it was not outside the band of responses of a reasonable employer to regard the matter as one of gross misconduct. This was a person in a position of power using that position for his own benefit.

- **The breakdown of trust and confidence in Mark as the team manager of the environmental health team and as an employee of the Council."**

26.42. Mr Baines held trust and confidence had broken down because he found four allegations to amount to gross misconduct, the undermining of team members by micromanagement, the derogatory and personal remarks about female staff, unwanted and unwelcome sexual attention to female staff specifically on late-night duties and in laybys and the alleged sexual harassment of Ms Tolson on 25 February 2007.

26.43. He accepted when questioned by the Tribunal that this was not a stand-alone charge and he only found trust and confidence broken down because he had made previous findings of gross misconduct. He accepted trust and confidence would still have existed had he not found gross misconduct proven.

26.44. Even allowing for the fact that one allegation of gross misconduct was overturned on appeal and the Tribunal is not satisfied further allegation is made out Tribunal does accept that by its very nature a finding of gross misconduct will almost inevitably lead to a breakdown of trust and confidence between the employee and the employer.

27. **<u>The decision to dismiss</u>**

27.1. The Tribunal has reminded itself that it is not for it to decide whether it would have dismissed the Claimant but whether a reasonable employer acting reasonably could have dismissed the Claimant.

27.2. Mr Baines did not fall into the trap of assuming that simply because an allegation he found to be gross misconduct that summary dismissal had to follow. He accepted in questioning from the Tribunal that if he found a matter amounted to gross misconduct, he would consider a lesser penalty if there were exceptional circumstances.

27.3. The fact that Mr Baines found one allegation not to be proven, one allegation although proven did not merit any discipline penalty, and a number of other allegations, which were potentially serious, did not amount to gross misconduct are indicators to the Tribunal that Mr Baines genuinely sought to determine the disciplinary hearing on the facts before him and sought to weigh up the extent of any culpability that he found.

27.4. In this particular case whilst he noted the Claimant's very long service, 31 years, with no outstanding disciplinary penalties and the fact there were underperforming staff in the Claimant's department, those factors together did not, having looked at the proven allegations, amount to exceptional circumstances such that the Claimant should not have been dismissed.

27.5. Whilst the Tribunal is satisfied that Mr Baines did have a genuine belief in those matters that he held were misconduct or gross misconduct it has explained why with some of those allegations he did not have reasonable grounds to sustain that belief. That said on what remained the Tribunal is satisfied that they amounted to gross misconduct and whilst having regard to the Claimant's record, it cannot be said that dismissal was outside the band of responses of a reasonable employer.

28. **Breach of contract.**

28.1. Under the Employment Tribunals Extension of Jurisdiction Order 1994 the Tribunal has jurisdiction to make an award of damages for a breach of contract that arises or is outstanding on the termination of the employee's employment, Regulations 3 and 4.

28.2. The Claimant contended he should have been paid for hours accrued as time off in lieu which he was unable to take prior to the termination of his employment and relied upon custom and practice.

28.3. The Tribunal rejected that argument for two reasons. Firstly, the evidence of Ms Addison, the Head of Human Resources who gave clear evidence that was no such custom and practice. As a result of a disclosure exercise, payroll records were checked and only one case could be found of an employee who was paid accrued but untaken TOIL but this was regarded as exceptional because the employee was unable to take his TOIL due to long-term sickness absence prior to the termination of his employment. For custom and practice to exist it must be notorious. Here it cannot be said that the contention put forward by the Claimant was notorious.

28.4. However, more importantly custom and practice cannot oust an express contractual provision. The Tribunal is satisfied that the Respondents TOIL policy has contractual aspects, given it sets out various benefits to employees.

Paragraph 4.1.12 states: -

"On termination of employment outstanding TOIL will not be substituted the notice; it will not be paid and therefore lost if not taken prior to leaving".

28.5. This is a clause that is apt for incorporation.

28.6. Given the Tribunal has concluded this was a contractual clause then to the extent that was any custom and practice (which the Tribunal finds there was not) it was ousted.

28.7. The Claimant was not entitled to damages as he has failed to establish that there was a breach of his contract of employment by the Respondent.

29. **Contribution.**

29.1. If the Tribunal is wrong in its decision that the Claimant was fairly dismissed it then went on to consider whether the behaviour of the Claimant was culpable. In the Tribunal's judgement on the findings of fact made by Mr Baines and with particular emphasis on the incident at the White Swan hotel, the comments made about women, unwanted and intrusive questions about women's private lives are all matters that amount to culpable behaviour. There was a direct linkage between that behaviour and the Claimant's dismissal. The behaviour took place before dismissal and was known to the Respondent.

29.2. In the circumstances the Tribunal would have made a finding of contributory fault of 100% in relation to both the basic and compensatory award.

30. **Polkey.**

Given the Tribunal's primary findings it is not necessary for it to consider this contention.

31. **Postscript.**

31.1. The Claimant made it clear that he wished to prove his innocence.

31.2. Nothing in this Tribunal's judgement is a finding that the Claimant did do what the Respondent alleged. As the Tribunal emphasised to the Claimant its job was to determine whether the Respondent reasonably believed, following a reasonable investigation, that the events had occurred and then to determine not whether it would have dismissed the Claimant but whether a reasonable employer acting reasonably could have dismissed the Claimant.

Employment Judge T R Smith

29 November 2019