EMPLOYMENT TRIBUNALS

Claimant: **Mr D West**

Respondent: **Redditch Borough Council**

Heard at: **Birmingham (parties, representatives and witnesses attending via Skype for business)**

On: **29 & 30 June and 3 July 2020**

Before: **Employment Judge Flood**

Representation

Claimant: Mr Mensah (Counsel)
Respondent: Mr Dracass (Counsel)

RESERVED JUDGMENT

The claimant's complaints of unfair dismissal and breach of contract fail and are dismissed.

REASONS

The Complaints and preliminary matters

1. The Claimant brought a complaint of unfair dismissal contrary to section 94 of the Employment Rights Act 1996 ("ERA"). The Claimant also brought a complaint of breach of contract.

2. A bundle of documents had been prepared and agreed by the parties ("the Bundle"). Unless otherwise stated, references to page numbers in this document are to page numbers in the Bundle.

3. During the hearing, I asked the parties for their views as to whether a sound recording produced by the claimant at his disciplinary hearing (which he says was the noise played at the briefing on 29 April 2019 where the incident at the heart of the claim took place) was available and should be played to the Tribunal. The respondent did not accept that this was the sound played at the briefing. The respondent had the full recording of the disciplinary hearing where it was played, and it could be extracted from that. Both parties were

content for the recording to be disclosed and sent to the Tribunal which it was after submissions concluded. I indicated that I would listen to the recording and bear in mind what both parties said about the nature of it which would be considered and taken into account as part of my fact-finding exercise. I was aware that this had perhaps more relevance to the breach of contract claim and Mr Mensah raised and I confirmed I was aware of the issue of the Tribunal not falling into the "substitution" mindset when considering the unfair dismissal claim (see paragraph 17 below)

4. Having concluded the evidence at 4pm on the second day of the hearing, the claim was adjourned and reconvened on 3 July for submissions to be made and a reserved decision was then made.

The Issues

5. The issues which needed to be determined were:

Unfair dismissal - conduct

5.1. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

5.2. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

a) there were reasonable grounds for that belief;
b) at the time the belief was formed the respondent had carried out a reasonable investigation;
c) the respondent otherwise acted in a procedurally fair manner;
d) dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

5.3. Does the claimant wish to be reinstated to their previous employment?

5.4. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

5.5. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

5.6. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

5.7. What should the terms of the re-engagement order be?

5.8. If there is a compensatory award, how much should it be? The Tribunal

will decide:

a) What financial losses has the dismissal caused the claimant?
b) Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
c) If not, for what period of loss should the claimant be compensated?
d) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
e) If so, should the claimant's compensation be reduced? By how much?
f) If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
g) If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
h) Does the statutory cap apply?

5.9. What basic award is payable to the claimant, if any?

5.10. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Wrongful dismissal / Notice pay

5.11. Was the claimant guilty of gross misconduct? i.e did the claimant do something so serious that the respondent was entitled to dismiss without notice?

Findings of Fact

6. The claimant gave evidence by way of a witness statement and orally in response to cross examination, re-examination, and Tribunal questions. The respondent's witnesses gave evidence in the same manner and were Ms H Mole, Business Transformation Manager and investigating officer in the claimant's case ("HM"), Mr G Revans, Head of Environmental and Housing Property Services and the dismissing officer ("GR") and Ms J Brunner, elected Councillor and member of the appeal panel ("JB"). I have considered the relevant parts of the Bundle.

7. The oral evidence given by the claimant was in many respects broadly consistent with his witness statement and claim form. I accepted much of what the claimant said as I did not find the claimant to be inherently a dishonest witness on all matters. However, his account of how he came to access the WhatsApp message in the briefing and the deletion of WhatsApp messages was inconsistent and confused (see paras 8.12, 8.22 and 8.24 below). In one key respect I did not accept that the claimant gave an honest account of what took place at the briefing and following it. He has consistently stayed with the same account of events since the investigatory hearing and did not deviate from this either during the internal processes at the respondent nor at the Tribunal hearing. For the reasons I set out below I did not find this account convincing, plausible or reliable. I found the oral evidence of HM, GR and JB to be honest, consistent with their witness statements, with the respondent's pleaded case, with each other and with

contemporaneous documents. GR, in particular, was a clear, straightforward and compelling witness whose evidence I have accepted in its entirety. There was not that much discrepancy between the accounts of the witnesses attending the Tribunal hearing (as the main factual dispute was in relation to matters taking place before the investigation, disciplinary hearing and appeal) but for the reasons set out above, where there was any discrepancy I tended to prefer the evidence of the respondent's witnesses.

8. On the relevant evidence raised, I make the following findings of fact:

8.1. The claimant had worked with the respondent since 2000 and at the time of his dismissal was carrying out the role of Electrician/Multi Trade Operative at the respondent's Crossgate site. He was part of the Equipment and Adaptions ("E&A") team whose job was to repair and maintain the respondent's housing stock by diagnosing work required, fixing and repairing properties.

8.2. The claimant's contract of employment was at page B51- B61. I was referred to various policies and procedures of the respondent that applied to the claimant's employment. The disciplinary policy was at pages B1-B27. The Dignity at Work Policy and Procedure was at B28-38. The Code of Conduct was at pages B39-50. The claimant had a clean disciplinary record.

Incident at staff briefing on 29 January 2019

8.3. The claimant was invited to and attended along with over 100 other employees a staff briefing to the respondent's Housing team to presented by Sue Hanley, the Deputy Chief Executive ("SH"). During the meeting, the claimant accessed a mobile phone he had with him and opened a WhatsApp message. As a result of this sounds were played at high volume. The length of time that the noise played out is not clear, but the parties agree that this was between 3 and 30 seconds, by all accounts a short period of time. It is accepted by all that this was done accidentally, and the noise was not played deliberately to the briefing. What those sounds were is fervently disputed. The respondent's position is that sounds were of a sexual nature and were the sounds of a female in the act of sexual intercourse having an orgasm. The claimant says the sounds were those of a goose calling and the message was not of a sexual nature although he says, *"it could potentially have been mistakenly misinterpreted as such"* (para 10 claimant's witness statement). The claimant attempted to stop the sound by *"frantically tapping the screen"* (para 8 claimant's witness statement) and he says in doing so, he deleted the message in its entirety from the phone. This is also disputed by the respondent. There was some disruption to the meeting and the noise was heard by some attendees and there was some laughing.

8.4. As the claimant brings a claim for breach of contract, to determine this issue, I must make findings of fact on two disputed matters. Firstly whether the sound played by the claimant was of a sexual nature. Secondly whether the claimant accidentally deleted the message in question by tapping his phone during the briefing.

8.5. On the balance of probabilities and having considered all the findings of fact made below, I find that the sounds played were of a sexual nature. I make this finding because:

a) The evidence gathered during the investigation by the respondent indicated that 5 separate attendees at the briefing said they heard sounds of a sexual nature (see para 8.11).
b) The claimant is the only witness account provided by someone at the briefing who suggests the sound was that of a goose (para 8.13). I also note at the time the noise was played the claimant says he did not know what the sound was (paras 8.13 and 8.24).
c) All the witness accounts that the claimant relies upon to support his case reported that they could not make out what the sound was (para 8.28). There was no positive evidence from any of these individuals that the sound was <u>not</u> of a sexual nature.
d) The message that is said to have been sent to the phone on 29 January 2019 with the video playing the sound has (it is said) been deleted from both the phone it was sent from and to, leaving no contemporaneous record on either phone of the message. The lack of any physical record showing the time and date and showing the message is concerning. I find it unlikely that this was not able to be produced on ether the sender or recipient's phone. If produced, this could have been very important evidence and the fact that the claimant did not produce it raises doubt on his account of what took place.
e) Having heard the sound the claimant says was the sound played on 29 January 2019 (which he also played at his disciplinary hearing) it does not seem likely to me that this could reasonably have been interpreted by anyone listening to be of a sexual nature. I have concluded this sound was not the one played at the briefing but was something else possibly something found by the claimant himself or indeed (as he says) sent to him by the original sender of the message (but was not the original message). I do not accept that this was the same sound that was played in the briefing. This again casts doubt on the claimant's account of what took place.
f) The claimant's extreme reaction to the incident involving the sound being made which he describes during the investigation meeting and disciplinary hearing (paras 8.13 and 8.22 below), suggest he was aware there was a sexual element to the sound.

8.6. As to whether the claimant deleted the WhatsApp message in question during the briefing itself by repeatedly tapping his phone, on the balance of probabilities I find that this did not take place as the claimant suggests. I make this finding because:

a) The claimant did not mention the fact that he no longer had the message because he had accidentally deleted it at the meeting with IR on the morning after the incident (para 8.8). The first time this is raised is during the investigatory meeting with HM on 18 February 2019 (para 8.12).
b) The claimant was unable to produce any convincing evidence as to how the WhatsApp message was accidentally deleted at the three meetings where this was discussed at the respondent (investigatory meeting,

disciplinary meeting and appeal meeting). He was invited to demonstrate how this could have happened at the disciplinary hearing and he did not have WhatsApp on his phone to demonstrate the process (para 8.21). Given that this was an important element, it is surprising that the claimant did not have the phone available to demonstrate what had happened.

c) It is not plausible that the claimant was able to go through the process of deleting the WhatsApp message by "*frantically tapping the screen*" as he contends he was doing (para 8.3), whilst not being able to clearly see what was on the phone as he also suggests (paras 8.23 and 8.24). Even on his own account he needed to tap and hold the message that was to be deleted and then tapping delete. I do not find that even this process was likely to have been done accidentally by tapping the screen in the way that the claimant describes, if he was unable to see the phone clearly.

d) His own evidence is inconsistent as to how the message was deleted. At one says he was "*frantically tapping the screen*" (paragraph 3, claimant's witness statement); then he contends that to delete the message "*it was a simple case of tapping and holding the message you wanted to delete and tapping delete*" (paragraph 20 claimant's witness statement and page 102). At another point he says "*if you repeatedly tap on a WhatsApp message it will delete*" and also says "*It's tap to highlight and it taps and slides and its gone*" and further says "*If you tapped the message 5 times it would delete*" (para 25.2 claimant's witness statement). He finally says "*To be honest, I didn't even see the picture at the time. All I heard was the noise and I frantically tried to switch it off*" (para 25.4 claimant's witness statement). This is an important element of explaining how the claimant did not have any record of the actual message he was sent during the briefing, so his confused account casts doubt on what he says happened.

8.7. As the meeting came to a close, a manager who was at the meeting and heard the sound believing it to be of a sexual nature, Mr I Roberts (Repairs and Maintenance Manager) ("IR") spoke to various members of staff about the incident. He received complaints from 5 individuals who were said by IR in his written account of the incident to have been "*disgusted*" and "*offended*" (page B94). It is acknowledged by all that these were not formal complaints and were not made in writing or under any formal procedure of the respondent. He spoke to Dave Clarke (senior tradesperson of the team and the claimant's line manager) ("DC") and mentioned what he had heard (including the nature of the sound) and that he thought it came from the area where DC's team were sitting (including the claimant). DC had not heard the noise, but IR said that DC was concerned and embarrassed that the sound could have come from one of his colleagues. IR then went to speak to SH to apologise and was told by her that she had not heard anything. He also spoke to Judith Willis ("JW") who had been sitting with SH at the front who said she heard something but thought that it was the noise of children shouting coming from outside.

8.8. The following day, 30 January 2019, DC asked the claimant and his colleagues in the morning whether anyone's phone had gone off at the

briefing and the claimant told DC that his had. The claimant recalls DC saying that there had been complaints (although he said he did not know exactly what the complaints were) and they agreed to go and see IR to discuss the matter. At approximately 8-8.10 am, the claimant along DC, went to see IR (who was DC's one up line manager). A note of that meeting prepared by IR was shown at page B91. The claimant told IR that it was his personal phone (rather than his work phone) that had made the noise at the meeting. He apologised and told IR that he had in panic tried to switch his phone off as soon as possible. IR told the claimant that the sound played was of a sexual nature. The claimant appeared shocked and then said to IR that he did not know what the sound was and that he did not know what the message was until he had opened it and that he was then too late in stopping everyone hearing the message. He apologised again several times and said that if he had known that offence had been taken, he would have apologised to those offended immediately. IR then explained to the claimant that this was a serious breach of the Dignity of Work policy and could be gross misconduct and that an investigation would now be taking place.

Investigation

8.9. IR then contacted GR (his line manager) and informed him of the incident. GR told IR that he should speak to Human Resources about a potential disciplinary investigation. IR and GR spoke again the next day and they discussed who would investigate the matter and they agreed that HM would be asked to do this (although GR said it was his decision to appoint HM). This was the first disciplinary investigation HM had undertaken. GR also spoke to HR and then he took the decision that the claimant would be suspended. GR met with the claimant on 1 April 2019 and informed him that he was suspended, and that HM had been appointed to investigate. The suspension was confirmed in a letter sent to the claimant the same day (page B65-66). GR was asked in cross examination whether he had already made up his mind that the claimant had committed a "*serious breach*" of the Dignity at Work policy when he suspended the claimant (with reference to the wording used in this letter). GR denied that this was the case as the allegations had not yet been proven. He said he had not made up his mind and he wanted to hear the evidence on both sides at the disciplinary hearing. Following this suspension meeting, the claimant had an informal meeting with IR during which the claimant discussed with IR the incident and other personal matters. IR did not discuss with the claimant that he had reported the incident to GR. I did not hear anything further about what was discussed during this meeting on 1 April 2019.

8.10. HM commenced her investigations by speaking to IR about what had happened, and IR provided HM with details of people who had been present at the briefing. HM decided to contact the 5 individuals who had complained to IR and whose names she had been given by him. She also decided to get in touch with what she described as "*a representative sample*" of the 100 people who were there. She explained that she had decided to get in touch with approximately 10% of the people attending the briefing. There was no attendance list in existence. HM asked IR to

provide her with some names of people who were there. On 5 February 2019 HM sent an e mail to 13 people and a copy of that e mail was at page B89 (a more legible copy was e mailed to me from Mr Dracass during the hearing). It asked the recipients to

"provide me with a short statement related to a recent briefing you attended on 29th January 2019 in the Council Chamber. I have been led to believe an incident occurred which could be deemed by some to be offensive. With this in mind the statement should comprise of answering the following questions:-
1.Did you hear anything?
2.(If yes) what did you hear?
3.(If yes) how did it make you feel?"

HM was asked in cross examination why she chose to seek informal statements rather than interview the witnesses formally under the respondent's disciplinary procedures which (at page B19). HM said that she did not think it was relevant who the people who had complained were. HM discussed the decision not to proceed with formal interviews but to take informal statements with HR and had discussed the wording of her mail with HR as well (when it was put to her that her e mail could have been more "neutral"). HM was also asked about the proportion of those contacted who were "*front line*" staff (who like the claimant did not generally have e mail addresses) and administrative staff and whether this was really a representative sample of attendees. HM responded that she regarded all those she contacted as just staff and did not make a distinction between front line and other staff. She was also asked why she did not prioritise those who were sitting closest to the claimant and said that her aim was to get in touch with people who had been at the briefing wherever they were sitting and ask them if they had heard anything and if so what it was. She did not consider it was key whether the individual was close to the area or not.

8.11. HM received 8 replies to this e mail (6 people did not reply, and she did not follow up or chase responses). She cut and paste the content of the e mails she received from the responders and these are shown pages B92 and B93- B100. The claimant also met with one of the individuals named by IR as being there (who did not have an e mail address) and asked him the same questions verbally. His responses as noted by HM are at page B93. Of the 9 responses received, 5 stated that the noise heard was of a sexual nature (1 of these stated that it started out sounding like a baby crying); 2 stated they thought it was a child/baby crying (1 of these 2 said it escalated from this to a noise of a sexual nature) and the other 3 did not know or say what the noise was.

8.12. HM wrote to the claimant on 7 February 2019 confirming that she had been appointed to investigate and inviting him to an investigation meeting (letter at page B67-B68). The claimant said in evidence that he understood the nature of the allegation having received this letter. He was given the right to bring a colleague/trade union representative to the meeting. The claimant attended with Jim Green ("JG") who although was a trade union representative attended with the claimant in the capacity of

work colleague. The meeting was held on 18 February 2019 and was tape recorded. The transcript is at pages B76-B88. The claimant told HM during the meeting that he had his wife's phone with him that day. He explained that his wife had been unwell, and he took the phone to work at her request so she could contact him via her sister's phone when she had medical appointments. He said the phone was on during the briefing but was on silent. He explained that he opened the phone to check for messages from his wife and then opened Whatsapp and inadvertently opened a message and a noise started playing. He said he was then panicking to turn it off and kept tapping the screen and eventually the noise stopped. HM asked the claimant whether he still had the message he had been sent. It was at this point that the claimant told HM that the message sent had been deleted accidentally when he was trying to turn it off and he did not have a record of it.

8.13. The claimant went on to tell HM that he had been resent the message in question from the sender (his wife's friend Mr Fenwick) but that he did not have a copy of the message showing what date and time the message came through. He told HM that at the time he did not think anything had been said about the message by anyone but was aware some people had been laughing. He said he was "*embarrassed*" but he only found out that some people had been offended by the sounds the next morning when he met with IR. He then said he was "*appalled*" with himself but that it was a genuine mistake and accidental. Towards the end of the meeting the claimant said that the message that he said had been retrieved by being resent was not sexual in any way and the noise playing was a goose. He told HM that he lived near a pond and that geese flying over it had been disturbing his wife whilst she was at home off sick and so her friend sent her a message playing the sound of a goose. He accepted that the message sent after the briefing did not have the date and time of the original message sent on 29 July 2019. The claimant told HM that he did not know what the noise was at the time he played in the briefing and it was only upon being sent the message by Mr Fenwick that he realised what it was. HM did not ask to see or hear the message the claimant says was resent to him and explained that she did not believe that this was evidence of the original message that had been sent and so was not relevant. She was asked in cross examination why she did not decide to play this message to the various witnesses she had contacted to get their view on whether it was the same noise. She said that in her view as there was no indication that this was the same message, she did not believe that it would have helped the investigation.

8.14. The claimant read out a written apology in the meeting and asked for his good service and character to be considered. He said that he had made a mistake and that he was "*really ashamed*" of it. When asked in cross examination why he felt ashamed, if what had happened was as he suggested innocuous, the claimant said that he had by that stage had two weeks to think about it and he was regretful of his behaviour and wanted to apologise. He said he was embarrassed at the time for disrupting the meeting and then became appalled and ashamed that he had put himself in that position.

8.15. JG asked HM a question as to whether HM had spoken to anyone that was sitting near the claimant and suggested that she could contact John Slade ("JS") as he had been sitting next to the claimant and had seen the claimant trying to turn the phone off. HM did not contact JS after the meeting and when challenged about this in cross examination she said that she had contacted and had a response from an employee who was sitting on the other side of the claimant (page B93) so did not believe it was necessary to contact JS as she had enough information.

8.16. HM contacted IR by e mail after the meeting and asked him to provide a statement of what he witnessed at the briefing and after and also asked him to give an account the meeting he held with the claimant the next day. That e mail was at page B90 (a better copy again having been provided during the hearing). That e mail was signed off "H x" and HM explained that she had done this in error having sent the mail from her phone in the evening. IR's statements are at B91 and B94-B95. In his statement regarding the incident itself IR said that the nose he heard "*was of a female making sexual noises whilst engaged in sexual intercourse. I clearly heard at least 3 to 4 sexual moans before the phone was silenced"*.

8.17. HM also carried out some research as to whether it was possible to delete a WhatsApp message in the way the claimant had described and said that this research led her to conclude that it was "*highly unlikely that this was possible*". HM prepared a report of her investigation and this report was shown at pages B69-B105. This was detailed and set out various sections showing a description of what happened, what the findings were, what the explanation was, what standards of conduct/behaviour were said to have been broken, mitigating circumstances, disciplinary record and the process taken to investigate. It included a number of appendices which contained the transcript of the investigatory interview; copy of email sent asking for informal statements; a file note made by IR of the meeting between IR and the claimant on 30 January; the informal witness statements received (in the form of a cut and paste copy of the contents of the e mail replies she received to her e mail of 5 February) and the named signed statement of IR; a summary of the research conducted by HM on deletion of WhatsApp messages and finally a summary. HM concluded that three policies had been breached namely the Dignity at Work Policy and Procedure (Appendix 5); the Officers Code of Conduct (Appendix 6 - page 7) and the RBC Disciplinary Policy (Appendix 7, page 3, section 4). She sent this report to GR.

Disciplinary hearing

8.18. GR received the investigation report produced by HM on or around 14 March 2019. He decided that having considered the report there was a case to answer and he wrote to the claimant on 18 March 2019 inviting him to a hearing and providing the claimant with the investigation report prepared by HM and an agenda for the meeting (page B106-B109). This letter also indicated that the claimant could call "*any witnesses named in the report*" and asked him to confirm the name of who he would be calling

by completing a form.

8.19. Before the hearing took place, the claimant sent an e mail to GR on 22 March asking for a copy of the seating plan for the briefing on 29 January and asking where those witnesses who had given statements were sitting in relation to him. He asked about the process for contacting such witnesses by the investigating officer and whether these were the individual who had initially complained. He also asked whether these witnesses could be called by him to attend the disciplinary hearing (page B110). The claimant explained that he wanted to know where people were sitting as he said that if they had been nearby "*they would have witnessed me struggling to stop the sound and would have appreciated what it was - a goose honking.*" (paragraph 23 claimant's witness statement). GR passed this mail on to HR and informed the claimant he had done so (B111). HM emailed the claimant in response on 27 March 2019 (page B112). She told the claimant that she did not have a seating plan. She explained that she contacted 14 people who had attended the meeting "*which consisted of 5 who had raised concerns following the meeting, the remainder were chosen by me randomly or through gathering evidence believed they were within close proximity of alleged noise*". She informed him that she was unable to tell him who had given statements. The claimant got in touch with HR again and spoke to Jayne Morcom ("JM") on 28 March 2020. JM emailed HM to tell he that she had informed the claimant that "*he could call witnesses to attend the hearing, he thought we would have all the witnesses we gathered evidence from at the hearing but we won't*" (e mail to HM confirming the content of this conversation at page B113). JM told the claimant she would contact IR to ask who was sitting near the claimant. JM followed up on this conversation by e mailing the claimant on 2 April 2019 and provided him with three names given by IR of people IR recalls were sitting near the claimant and these were: Chris Gardner, Jon Slade and Liam Slade (page B115). The claimant said he had the impression after this exchange of emails that he could not call any of the people who had made complaints as witnesses.

8.20. The disciplinary hearing took place on 11 April 2019. The meeting was recorded, and a transcript was produced which is at pages B118-162. GR chaired the meeting and HM and JM also attended. The claimant attended and was accompanied by JG. HM was the first witness and she explained the contents of her investigation report. GR asked her some questions about how she carried out her investigation and then the claimant questioned her. He asked about how many "front line" employees as opposed to administrative employees had been asked for a statement. He also questioned HM as to why anonymous statements were taken. There was a discussion about where individuals who had provided witness statements were in the room. There was a short adjournment when the claimant and JG left the room and HM then matched up the statements to where the individual was sitting in the room. The discussion as to where individuals were sitting continued after the adjournment. The claimant then challenged HM as to why individuals were not told that their statements would be used in disciplinary action. HM said that the statements were gathered informally so she did not

believe it was necessary to inform the witnesses.

8.21. The claimant then asked about the research done by HM about whether it was possible to delete a WhatsApp message by tapping a phone continuously. GR also indicated that he had done some research and that he found it was difficult on an Android phone (which was the type of phone the claimant had) and he offered to demonstrate this on his phone and gave the claimant the chance to demonstrate how this was done if he had his own phone with him. The claimant then said he did not have WhatsApp on his phone. When asked why this was the case in cross examination the claimant said that he had recently taken over his wife's phone (the same one he had on the day in question) but he never had the WhatsApp application so it was not on the phone at this time. GR went on to demonstrate on his phone (an iPhone) how messages were deleted which he said involved a number of stages before deletion took place. GR said he had tried it on an Android phone as well and the process was similar. The claimant said that his phone had a different process where if you tap to highlight, and then tap and slide a message, it is deleted. The claimant went on to demonstrate the process of deleting a text message on his phone but was not able to do this for a WhatsApp message. There was a further discussion about the process of deleting on the claimant's phone, but it was clear that there was some difference of opinion about the process of deleting and how many stages this involved.

8.22. The claimant went on to set out his version of events as to the incident. He explained again that he had his wife's phone with him so she could contact him and as the meeting was ending, he took the phone out to check whether she had contacted him. He then said he stated scrolling through WhatsApp and then said that he opened a message. When giving his evidence at the Tribunal the claimant said he may have mistakenly opened WhatsApp when trying to look at messages or to check if he had any calls from his wife as he had clicked on the "*wrong green icon*". He said that the phone was on silent and set to vibrate but that he did not realise that the media volume was different to the phone volume. He said the noise came out "*at full pelt*" and that he then panicked and tried to adjust the volume buttons at the side. He said than when nothing happened, he started to tap the phone and the noise stopped. He said that people were laughing around him and that he was "*embarrassed*" and "*horrified*". When asked in cross examination why he was horrified if the sound was innocent and been played by accident, the claimant said he had caused a disturbance and he felt a lot of regret about that.

8.23. The claimant was then asked by GR whether he still said that the noise played was of a goose and the claimant confirmed that he did. He said he had the noise on his phone and offered to play it and was permitted to do so. He went on to explain that had had recently moved to a new home which was near a trout pool and that lots of birds come over his house including geese. He said that the geese had been disturbing his wife (who was at home off sick) and the message was a joke sent to his wife from her friend relating to that. He was asked by GR about whether he knew what the content was (as the message he showed to

GR had a had a picture of a goose on it). He said that he didn't see it (he did not have his glasses on) and all he heard was the noise which he was frantically trying to switch off.

8.24. The claimant confirmed that he had attended Dignity at Work training. He acknowledged that he should not have been scrolling through the phone in such an important meeting. He explained at this point that he had been looking through WhatsApp as he had been showing his friends some pictures there earlier of his dog and him when he was a child (as this had been used at his recent birthday celebration). The claimant was then asked by GR that if it was a goose, why he was so embarrassed by it. He said again he did not know at the time what the noise was and could not see a picture of a goose. He said he only found out what it was when he told his wife on the Friday after the incident (when he was suspended) and she then contacted her friends to see if anyone had sent her a message. The claimant was then asked by GR why he thought other people had thought the noise was of a sexual nature and no-one who heard it said it was the sound of a goose. The claimant could not explain this but said that he said that maybe they did not have prior knowledge of what the sound was (unlike GR who had been informed what the noise was before listening to it). He was asked about what would happen if the same noise went off in a tenant's home. He said he would not have taken that phone into a property.

8.25. The claimant was taken through the content of the informal statements given by GR. He acknowledged that there had been talking at the presentation and that he had had four or five drinks of water. He also acknowledged that there had been sniggering by his colleagues when the noise came out of the phone. He was asked about the length of the noise and he said it was no more than three to four seconds in duration. He again apologised but when going through the various statements he said that he believed people had misinterpreted what they had heard.

8.26. Various witnesses attended the disciplinary hearing. IR was the first and he set out his version of events telling the hearing that he heard what he thought was a telephone ring tone of "*a lady making sexual moans during intercourse*". He said as soon as the presentation was finished, he approached Dave Clarke and asked him to investigate. He said that one person came over to complain to him and said she was offended and disgusted at the phone call and the muttering. He then said he walked to the other side of the room and talked to other colleagues who said they were disgusted. IR said he went to apologise to the presenter and the person sitting with her and was told by them that they had not heard the noise. During the hearing, GR asked IR whether the noise he heard could have been a goose and IR replied "*No, no way, no, I lived in a property with three acres of land with a great big lake in the middle of it and it was frequently visited by Greylag geese and Canada geese. I know the sound of a geese and it wasn't"*. He was asked by HM whether there was any doubt in his mind that the noise was sexual, and he replied, "*No doubt whatsoever*."

8.27. There was a discussion during the disciplinary hearing about whether

the claimant was part of a group of employees known at the "jokers". The claimant said he was surprised at that and that he had not been aware of it. IR said that the claimant and his team were good workers but that their reputation was one of being the jokers. The claimant then questioned IR and at one point again asked him if he was sure of what he heard, and he replied "*I know exactly what I heard. I don't think I heard*" and that "*I heard it 100% without a shadow of a doubt*". The claimant asked IR why he told SH the noise was of a sexual nature when she had not heard it. IR explained that he wanted to apologise to her. He again stressed that he "*knew*" the noise was of a sexual nature. He said he was not trying to sway her opinion and he was not the investigating officer. The claimant challenged IR about having a long meeting with him the morning after the incident where matters of a personal nature were discussed when the claimant did not know that he would be giving a witness statement against him.

8.28. The claimant was then given an opportunity to call witnesses and he called Paul Morris ("PM"), Clive Beasley ("CB") and Steve Ballard ("SB") who were all siting near the claimant at the presentation. The claimant acknowledged in cross examination that he was able to call anyone he wanted to at the hearing. He said he had decided to call these three people because he was following the guidance of JM who had suggested he might want to contact people who were sitting near him. He did not contact JS who was sitting next to him because some of the written responses received from witnesses which he had seen had been critical or "slated" Mr Slade's behaviour during the briefing, so he did not think that would be helpful to him. All 3 confirmed that they heard a noise but could not say what the noise was. PM said he was sitting behind the claimant and that the noise he heard was "*like a silly ring tone*" that lasted "*three or four seconds*" but that he "*couldn't make it out*" and it was "*not a bell*". CB said he was behind the claimant and he heard a "*loud noise*" and that he "*didn't take much notice of it*". He said he was not offended by it and he saw the claimant trying to turn the phone off. SB said he was sitting on the same row as the claimant but at the opposite end and he heard a "*commotion*" but that he was "*a bit far away to make out what it was*". He said he heard "*some people laughing*". He also said that he was not offended by the noise. He said he saw the claimant "*having a bit of a frantic on the, on the buttons*". DC then attended the disciplinary hearing as a character witness, and he spoke about the claimant's qualities both personally and as an employee of the respondent. He also explained that having been asked by IR after the presentation to find out where the noise came from, he had got his team together and that the claimant admitted straight away that the noise came from him.

8.29. The claimant was given the opportunity to sum up at the close of the disciplinary meeting. He asked for consideration to be given to his long career at the respondent and that he was going through a difficult time with his wife's illness. He stated that he hoped his "*nineteen year career Is not going to be based on three or four seconds of noise that is open to misinterpretation by, by some, others not and it has already had a massive impact on my life*". He explained that the incident was accidental and that he did not intend to offend anyone. The meeting was then

adjourned for a decision to be made. GR did not make any further enquiries following the meeting.

Decision to dismiss

8.30. At paragraphs 11-13 of his witness statement GR gives an explanation as to how he reached his decision. He decided that having considered the evidence he was unable to accept the explanation given by the claimant as to what the noise was that had been played or how it had come to be deleted. He did not believe that the noise played by the claimant during the disciplinary hearing "*could reasonably have been mistaken by several people as being the sounds of sexual intercourse or similar.*" During cross examination GR also said that he did not think that sound he was played at the hearing sounded like a baby crying either but sounded like a goose. He told the Tribunal that the witnesses who had provided informal statements were sure about what they had heard and the evidence he heard from IR who was definite about what he heard was convincing.

8.31. He went on to so that he decided that the claimant "*had concocted a rather implausible story to try and avoid any consequence for what had happened and had then continued to elaborate on that story, rather than having been honest about what had actually happened.*" GR determined that the claimant had breached the disciplinary policy in relation to acceptable behaviour, the Dignity at Work Policy and Procedure and the Officer Code of Conduct in relation to matters of equality by playing an inappropriate sound in the briefing. He did not conclude it was deliberate. He went on to say that "*given my view regarding Mr West's honesty in relation to what had happened, which I considered to be a serious breach of confidence and trust undermining the employment relationship, Mr West's conduct amounted to gross misconduct*". GR explained that he did not believe that the claimant was honest with him over the nature of the sound played or the fact that it had been deleted. He explained that he had reached the view that it was very difficult for a WhatsApp message to be deleted accidentally by tapping the phone. He said that had the claimant been able to demonstrate how he had managed to delete this, he may have decided differently. When asked in cross examination he said that the comments made by IR about the claimant being part of a group known as the jokers did not form part of him reaching his decision to dismiss. It was also put to GR in cross examination that the true rationale for the decision was that the claimant was not paying attention to the presentation and was one of a group who were messing around. He was asked to comment on the extract from the dismissal letter on page B174 where this was set out. GR denied this was the reason for dismissal but said that this was just part of the background evidence he considered.

8.32. GR went on to consider the appropriate sanction and his evidence on how he made that decision is at paragraph 13 of his witness statement. He said he took into account that the claimant had admitted that the sound came from his phone and had apologised. He also said he had considered the character reference given and that the claimant had no previous disciplinary record and said that he took both factors into

account. However, he decided that these were not "*sufficient mitigation to depart from a sanction of summary dismissal which would normally be applied to a finding of gross misconduct*". In response to questioning GR said that he had considered imposing either a final written warning or dismissing. He said that the fact that he believed that the claimant had not been honest meant that there was a loss of trust and confidence and so he took the decision to dismiss. When asked which of the categories of gross misconduct, the claimant's actions fell under with reference to the respondent's disciplinary procedure (page B3) GR said that he considered that the claimant had committed a "*serious infringement of equal opportunity rules and principles, a serious breach of the Code of Conduct and a serious breach of confidence and trust*". He said that speaking hypothetically if the claimant had admitted that he had played an inappropriate clip he could potentially have been given a final written warning.

8.33. The claimant was informed of the decision at a reconvened hearing on 18 April 2019 (transcript of meeting at page B166-172) and this was confirmed in writing by letter of the same date (page B173-175). During the meeting where the claimant was given the outcome, GR told the claimant that "*If I believed that you'd been honest with me I think the decision would have been a different one*" The claimant was given the right to appeal and appealed by letter of 2 May 2019 (pages B179-B183). The claimant appealed on several grounds. He complained that he was not provided with information about where people were sitting at the presentation in advance and was not given the opportunity to call witnesses who made statements. He also said that people he had suggested to contact had not been contacted. The claimant complained about being included in a group called the jokers by IM when there was no evidence to substantiate this. He complained that no other individuals had been disciplined in relation to the incidents even though other people were said to have been disruptive during the briefing. He also complained about IR having met with him for 2 hours discussing his situation the day after the event without disclosing that he had been offended by the incident (and suggested this meant he was not impartial). He also complained that those who had given statements were not informed that these would be used against him in disciplinary proceedings. He also indicated that he had new evidence about how a WhatsApp message could be deleted and provided contact details for the person who he says sent the message to his wife's phone who could answer any questions.

Appeal

8.34. The Claimant's appeal was arranged to be heard by the respondent's Employment Appeals Committee on 31 May 2019. The claimant was notified of the date and the procedure that would apply by a letter sent on 23 May 2019 (pages B185-B186). I saw an agenda for the meeting at pages B187-B200. This contained a summary prepared by the claimant of the basis for his appeal; an index of relevant documents including the various policies of the respondent referred to above, a transcript of the disciplinary hearing and investigation meeting and outcome letter.

Various e mails sent to and from the claimant were also included. The claimant had also prepared a document which he said explained how you could delete a WhatsApp message by tapping the phone screen 5 times (page B197). The claimant also enclosed a document in the form of a petition which had been signed by 39 employees who were at the presentation with a statement at the top saying that the employees who signed confirmed that:

"*during an employee meeting held at Redditch Town Hall on 29 January 2019 , a noise was heard which is now known to have been produced from the mobile telephone of then Redditch Borough Council employee David West. The list of signatures below belong to current Redditch Borough Council employees who attended said meeting, all of whom formally confirm that the noise they heard was so unintelligible that it could not clearly be defined. Furthermore no offence was taken upon hearing the noise, indeed all signatories consider the incident to have been purely accidental*"

8.35. The appeal hearing was chaired by JB, an elected councillor for the respondent who was on its Employment Appeals Committee ("Committee"). She was trained and had experience of dealing with appeals. JB said that the appeal hearing amounted to a complete rehearing of the decision to dismiss and not a review of that decision and that the Committee had the power to uphold or dismiss the claimant's appeal. At the appeal hearing, GR presented the management case as to why dismissal had been appropriate, and the document prepared by GR is at pages B201-B206. The Committee also heard from IR. The claimant was then able to put forward his representations as to why he said the decision was unfair and this broadly followed what he said in his appeal letter. The claimant called Mr Fenwick as a witness who he says was the friend of his wife who had sent the message to her on 29 January 2019. The claimant played a recording at the appeal hearing which he says is the sound that played out during the briefing (also played at the disciplinary hearing). Mr Fenwick told the appeal hearing that this was the same sound in the message that had been sent to the claimant's wife and that he had resent the message to the claimant shortly after. Mr Fenwick also said that he cleared his messages weekly and that is why the message was not retained on his phone. IR heard this recording in the appeal hearing, and he told the Committee that this was not the sound that was played in the briefing.

8.36. The Committee chaired by JB concluded that neither the claimant nor Mr Fenwick were able to produce any documentary evidence showing that this was indeed the message that was sent or played at the briefing. She also said that having heard the recording at the appeal hearing, her view was that this was unlikely to have been mistaken for sounds of a sexual nature. JB said in response to questioning that the Committee had considered the "petition" provided by the claimant as part of its deliberations and did not believe that those who had signed the petition had been misleading or dishonest. She did not accept that it was dismissed by the committee but said that it played a part in the decision making along with the other statements provided during the investigation.

JB concluded that the claimant was unable to demonstrate how it was possible to delete the WhatsApp message accidentally in the way suggested. JB confirmed that "*having considered all the representations made, and the available evidence, none of the members of the committee were persuaded of the truthfulness of Mr West's explanation as to what had happened, or the evidence offered by Mr Fenwick*". JB said that she could not determine whether the claimant was dishonest but that the claimant did not appear to be credible in the evidence that he gave because he was unable to substantiate his claim that the message sent during the briefing was that of a goose. JB said that the claimant was also unable to demonstrate how it was as easy as he said it was to delete the message. She also said that although she could not determine whether Mr Fenwick was dishonest, the Committee also determined that he was not credible as he was unable to produce the original message sent. She denied that the appeal hearing was just a rubber stamp of the decision to dismiss.

8.37. The claimant's appeal was dismissed, and he was notified of this decision in a letter dated 10 June 2019 (page B207-B208). The claimant was also sent a CD of the recording of the appeal hearing.

The Relevant Law

9. The Claimant complains of unfair dismissal contrary to **Section 94 of the ERA**. The Respondent alleges that the dismissal was on the grounds of gross misconduct. The employer must (a) show the reason for the dismissal and that it is one of the potentially fair reasons set out in **section 98(1) and (2)** and; (b) if the employer has done this, then the Tribunal must then determine whether dismissal was fair or unfair under **section 98(3A) and (4)** depending on the circumstances including the size of the administrative resources of the Respondent.

10. Conduct is one of the six potentially fair reasons for dismissal set out in **section 98**. If a dismissal is asserted to be on the grounds of conduct, then the test laid down in **British Home Stores –v- Burchell [1978] IRLR 379** requires an employer to show that:-

    10.1. it believed the employee was guilty of misconduct;

    10.2. had reasonable grounds to hold that belief;

    10.3. it formed that belief having carried out a reasonable investigation, given the circumstances.

11. In determining the question of reasonableness it was not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it had to ask whether "*the dismissal lay within the range of conduct which a reasonable employer could have adopted*" as set out in the case of **Iceland Frozen Foods v Jones [1982] IRLR 439**.

12. The "range of reasonable responses" test applies not only to the actual decision to dismiss, but also to the procedure adopted by the employer in

putting the dismissal into effect - **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.**

13. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: **A v B [2003] IRLR 405**.

14. A fair investigation requires the employer to follow a reasonably fair procedure. Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and the appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

15. **Burdett v Aviva Employment Services Ltd [UKEAT/0439/13]** per HHJ Eady - "*it will be for the Employment Tribunal to assess whether the conduct in question was such as to be capable of amounting to gross misconduct (see Eastland Homes Partnership Ltd v Cunningham UKEAT/0272/13/MC per HHJ Hand QC at paragraph 37). Failure to do so can give rise to an error of law: the Employment Tribunal will have failed to determine whether it was within the range of reasonable responses to treat the conduct as sufficient reason for dismissing the employee summarily.*"

16. **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38) - Even if the Tribunal has concluded that the employer was entitled to regard an employee as having committed an act of gross misconduct (i.e. a reasonable investigation having been carried out, there were reasonable grounds for that belief), it will still need to consider whether it was within the range of reasonable responses to dismiss that employee for that conduct. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors.

17. Tribunals must not put themselves in the position of the employer and consider what they themselves would have done in the circumstances. It must not decide what it would have done if it had been management, but whether the employer acted reasonably. A decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer. — **Grundy (Teddington) Ltd v Willis 1976 ICR 323, QBD; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA, .**

18. In a claim for breach of contract, the question for the Tribunal is whether there has been a repudiatory breach of contract justifying summary dismissal. The degree of misconduct necessary in order for the employee's behavior to amount to a repudiatory breach of contract is a question of fact for the Tribunal to determine. The test set out in **Neary and anor v Dean of Westminster [1999] IRLR 288** is that the conduct:
"*must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain [the employee] in his employment*".

In **Briscoe v Lubrizol Ltd 2002 IRLR 607, CA**, the Court of Appeal approved the test in Neary above and stated that the employee's conduct should be

viewed objectively, and so an employee can repudiate the contract even without an intention to do so.

In the case of **West London Mental Health NHS Trust v. Chhabra [2014] IRLR 227,** the Supreme Court confirmed that in order for misconduct to amount to gross misconduct there does need to be some sort of "willful" or deliberate breach of the employee's duties.

Mgubaegbu v Homerton University Hospital NHS Employment Foundation Trust UKEAT/0218/17 (18 May 2018, unreported) Choudhury J The Tribunal must make its own findings of fact in relation to the breach in order to determine whether that breach was sufficiently serious to warrant immediate termination.

Conclusion

19. When considering the claimant's complaint of unfair dismissal and the issues relevant to that, I find that the Respondent has discharged the burden of proof in establishing that conduct was the reason for dismissal.

20. Firstly, I am satisfied that the dismissing officer, GR genuinely believed that the claimant had breached the policies of the respondent when he played the sound at the briefing and that by being dishonest about what had happened during the investigation and disciplinary process he had undermined the trust and confidence inherent in the employment contract (paras 8.30 and 8.31 above). The appeal hearing chaired by JB also considered the matter, and I was also satisfied by the genuineness of her belief that the claimant was guilty of misconduct as alleged (para 8.36 above). The suggestion that the belief held by GR the claimant had deliberately concocted the story to conceal what had happened was not held genuinely by GR does not stand up to scrutiny. GR gave clear and convincing evidence at the hearing as to what he had concluded at the time of dismissal and there is no evidence which casts any doubt as to the genuineness of this belief. The suggestion that the dismissal was in fact because of the claimant not paying attention to what was being said in the briefing (and because he was part of the group known as the "Jokers" is also not supported by the evidence, in particular the clear and convincing evidence of GR. GR was clear in his evidence that this did not play a part in the rationale for his decision to dismiss (para 8.31) but was just part of the background to the events.

21. Secondly, when considering whether the respondent had reasonable grounds for that belief, I have also concluded that it did. Firstly, it was not in dispute and the claimant admitted from the outset that he was responsible for the noise being played during the briefing (para 8.8). The issue that was not admitted was the nature of the sound that was played. The respondent concluded that this was of a sexual nature having considered the claimant's explanation and then also considered the statements and evidence it heard from other attendees at the briefing (para 8.30). The disciplinary hearing heard from IR who provided it with firm evidence of what he said he had heard (para 8.26). It had the written statements of the other witnesses (paras 8.11 and 8.25). It also had the evidence of claimant himself (para 8.22-8.25) and the claimant's witnesses at the hearing (para 8.28) (although contrary to

what Mr Mensah submits their evidence was not that "they did not hear the sound of a woman having an orgasm" but was that they did not know what the sound was). Their evidence did not particularly further the claimant's version of events. The claimant was the only person present at the briefing who contended the noise was of a goose and did not even think this himself at the time the sound was first played (paras 8.13 and 8.24). I am satisfied that all accounts were considered but given that there was significantly more positive evidence that the sounds were of a sexual nature, the belief that the respondent reached was one which was reasonable to have reached in the circumstances.

22. The next matter related to its finding that the claimant had been dishonest in his explanation of what had taken place in that the sound played was that of a goose and that the message had been deleted by accident at the briefing and was no longer available. GR was clear as to how he reached this conclusion in his evidence (para 8.31) and I am satisfied that he did this based on the evidence that he had considered. He did consider his own research as to how a WhatsApp message could be deleted but also considered that the claimant's inability to demonstrate to him how this could be done on the phone in question was significant. Having listened to the sound the claimant alleged had been played at the briefing and concluding that this was the sound of a goose and could not realistically been mistaken for sounds of a sexual nature, and having considered evidence on the witnesses who were there, he reached the conclusion that the claimant's account was not credible and that he had therefore been dishonest. Mr Mensah points to the fact that the briefing was noisy and contends that the refusal of GR to accept that it was cast doubt on his assessment of the nature of the noise played. However, I did not conclude that GR had in some way closed his mind as to what the nature of the noise was at the disciplinary hearing or disregarded the surroundings. He considered all the accounts and reached a rational conclusion based on those accounts (paras 8.30 and 8.31). There were reasonable grounds for the respondent's belief, and it was not outside the band of reasonable responses for that belief to have been formed from the matters considered.

23. Thirdly when considering whether the belief that the respondent had was formed following a reasonable investigation, I have also found that it was. The investigation carried out by HM was detailed and thorough and carried out in good faith. Other employers may well have carried out the investigation differently and taken different steps but what HM did was plainly not outside the band of reasonable responses that an employer may take. Mr Mensah makes criticisms of the investigation in his submissions describing it as "woeful and wholly inadequate". I will address these in summary below. To start with the fact that there was no formal complaint made to the respondent under any of its policies to trigger the investigation is not a relevant consideration to the quality of the investigation. The respondent became aware of the incident (IR having received verbal complaints) and determined that there was something that needed to be investigated. A formal complaint is not required before an employer decides to investigate any matter in relation to its employees. The main criticisms and my conclusions as to whether these apply and put the investigation outside the range of reasonable responses are as follows:

a) Failure to follow the respondent's investigatory procedure/use of informal statements

I was referred to the respondent's disciplinary procedure and the claimant submits that the investigatory procedure set out at page B19 was not complied with in that the witnesses to the incident were not formally interviewed in accordance with the processes set out here. It is submitted that this makes the procedure unfair to the claimant. It is correct that the witnesses were not interviewed, and the steps set out in this process were not followed. HM explained that she chose not to investigate in this way and instead asked for e mail responses from witnesses as she did not believe who had complained was relevant (para 8.10). It is perhaps unfortunate that having set out a clear process for itself carrying out witness interviews and having detailed guidance on this, that the respondent did not then follow these processes. Nonetheless the path chosen by HM and the respondent was not an unreasonable one. Asking for written accounts of the witnesses at the briefing as to what they saw and heard extracted the required information and provided clear information as to what each person asked said they had witnessed/heard. This may not have been as forensic as it could have been had formal recorded interviews taken place, but it was in no way outside the range of reasonable responses as to how an employer might have addressed this matter. I am reminded that the document setting out the processes for investigation and discipline were best practice guidelines and did not exclude different approaches being taken (page B9).

b) Not informing the claimant of the names of those who had complained against him

Whilst the claimant did not have named statements provided to him as part of the investigation report, I accepted that as submitted by Mr Dracass, by the time of the disciplinary hearing, he had a pretty good idea of which employees had made the complaints against him. The statement at Appendix 3c of HM's investigation report (which was identified as being IR's) clearly listed the names of 5 employees who had complained. This was provided to the claimant as part of his invitation to a disciplinary hearing (para 8.18 above). He was told in this invitation that he was able to call witnesses and given a form to fill in to notify who these were (para 8.18). In the correspondence the claimant had with HM and JM in between receiving this invite and attending the disciplinary hearing also provided further information (para 8.19). The claimant contended that he was left with the impression that he could not call any of these witnesses at the disciplinary hearing, but the respondent did not at any time say that he could not do this. If he had wanted to contact each of the named individuals he could have done so (albeit that the statements provided by them do not suggest that they would have provided evidence that would have supported his case). It might have been better had the respondent provided named statements to the claimant but its decision not to do this does not fall outside the range of reasonable responses as to how this should be approached given all the circumstances above. I do not believe this impacted on the fairness of the procedure overall.

c) Not listening to the recording of what the claimant says was the sound played at the briefing/not playing this to witnesses

The claimant suggests that had the sound been played by HM to the witnesses she had been in contact with, they may have confirmed that this was indeed the sound that they heard and supported his case. We will now never know whether this was the case. The crucial factor here is that the recording that the claimant said he had at the investigatory meeting on his own account was not the actual message sent to him that day (para 8.13). He says it was resent to him by the original sender of the message. There was no independent verifiable evidence to support this, such as a copy of the sent or received message still present on a phone. The decision of HM not to listen to this message nor to ask for it to be played to the witnesses was a rational one and was not something that was outside the range of reasonable responses. In any event at the disciplinary hearing, the claimant was permitted to play this recording (para 8.23) and it was considered carefully by GR when reaching his conclusion (para 8.30). Moreover, at the appeal hearing it was played again and indeed was played to IR who had been present at the briefing (who confirmed it was not the sound he heard) (para 8.35). I conclude that the decision not to play this to witnesses at the investigation stage was not one which was unreasonable or outside the range of reasonable responses and did not impact on the fairness of the procedure or the reasonableness of the investigation.

d) Not contacting JS/other witnesses sitting close to the claimant for a statement

HM explained her decision not to contact JS as being she already had a statement from someone who was sitting near the claimant (DS) which was broadly supportive of the claimant's account (para 8.15). The claimant himself had the opportunity to call JS to attend to be a witness at the disciplinary hearing but chose not to do so (in part because he felt it may damage his case) (para 8.28). The failure to get in touch with JS was supported by a clear rationale and plainly not outside the range of reasonable responses. Although the four witnesses the claimant called had not been interviewed by HM during the investigation, they did attend the disciplinary hearing and were questioned by GR (para 8.28). Not contacting them earlier made no difference at all to the quality of the investigation followed. It was plainly not outside the range of reasonable responses.

e) Selection of witnesses to contact and whether this representative of workforce/split between front line and non front line staff

HM explained her rationale for contacting witnesses (para 8.10) which I accepted. I accepted that there was no attendance list. HM was provided with names from IR who attended the briefing. These included all the people who had made complaints to him but also other individuals who did not. Whilst another employer might well have adopted a different approach, I do not conclude that what HM did in choosing her sample selection was outside the range of reasonable responses. It was clearly a reasonable approach to contact those who had made complaints to IR. I fail to see that the distinction between front line and non front line staff has any particular relevance to who was contacted. Had she widened or increased the number of people she contacted, this may have led to more responses who did not hear a noise of a sexual nature or indeed the opposite. However, the approach taken was

within the band of reasonableness.

f) No follow up with witnesses after statement had been provided

HM did not follow up with any questions to witnesses who had provided statements to clarify any matters, to ask for formal statements or indeed to chase up those individuals who did not reply (para 8.11). This may have tied up or clarified some of the matters that Mr Mensah now highlights as being flaws in the investigation but I am not satisfied that not doing this puts the investigation as a whole outside the range of reasonable responses. HM had the accounts of various people (para 8.11) and each person's interpretation as set out in their written response was something that could be assessed by the disciplinary hearing officer in the usual course. The quality of evidence obtained during an investigation need not be perfect for it to be considered and weighed along with other factors.

g) Not considering where witnesses were positioned/room layout/their hearing

I am not satisfied that identifying precisely where each witness was position relative to the claimant or to assess their standard hearing would have added significantly to the respondent's understanding of what took place or the assessment of the disciplinary officer of what the sound was. There was in fact considerable discussion about where the witnesses were positioned at the disciplinary hearing itself (paras 8.20). In the end the GR was satisfied that a sufficient number of people had positively identified the sound as being of a sexual nature (as opposed to others (some of whom who were closer to the claimant who said they were unable to identify the sound)(para 8.30). This matter formed part of the investigation and decision-making process and any issues in not considering further is not something that puts the investigation outside the range of reasonable responses.

h) Not asking the claimant to demonstrate deleting a WhatsApp message in the investigatory meeting/conducting independent research into deletion of WhatsApp

I fail to see how this is a relevant factor as the claimant was given the very clear opportunity to do this at the disciplinary hearing but by this stage no longer had this app on his phone and could not do so (para 8.21). The decision to try and ascertain how easy it was to delete WhatsApp messages from various phones by conducting research (carried out by both HM and GR) does not seem to me to be an unreasonable step in trying to understand what might have happened and whether the claimant's version of events stands up to scrutiny. The claimant carried out a similar exercise in advance of the appeal hearing. None of this would appear to me to outside the range of reasonable responses.

i) Asking for statements in a leading manner/amending statements/using wording which suggests the matter had already concluded

I do not conclude that HM was leading the witnesses or somehow suggesting that they make statements of a certain nature when she e mailed them (para 8.10). The same wording was used for all recipients and at least two of the responses did not report noise of a sexual nature. The wording was simply

reflective of the complaint. There is really no evidence to suggest that the statements were in any way amended in substance and I am entirely satisfied that HM simply cut and paste the contents of the e mail replies removing simply the header and footer.

j) Involvement of IR in the investigation

The claimant appears to suggest that the fact that IR had some involvement in the initial stages of the investigation and disciplinary process and also provided a statement meant that his account of events was somehow impartial and could not be relied upon. It is correct that IR had some involvement in the very early stages of the investigation in that he was the one that reported the matter to GR and they had a discussion about who should conduct the investigations and about the claimant's suspension (paras 8.9 and 8.10). He was one of the senior managers in the area in which the claimant worked, was the claimant's one up line manager and reported to GR. This does not appear to be an unusual course of action. He also provided some names of attendees of the briefing to HM. Again, given it was him who had escalated the complaints he had received and was in fact present at the briefing, this does not seem to be a concern. This was the extent of his involvement in the matter and from then on, he became an important witness of fact to the events in question. He was an individual who was at the briefing and was confident that the sounds he heard were of a sexual nature (para 8.26). He also had the 5 complaints made to him. His role at the disciplinary hearing was broadly to act as a witness of fact and I do not see any evidence that suggests anything other than this took place. The suggestion that he imposed his views on other witnesses is entirely unsupported by any evidence. The fact that he said what the noise was to SH, JW and DC does not seem to have played any part in any decision making as none of these individuals were asked to provide their accounts of the briefing.

24. The claimant contends that a meeting was held with IR on 30 January 2019 and complains that IR was not clear about him being one of his accusers at that meeting. However, this was when the claimant decided to go and to see IR along with DC the morning after the incident itself and where he first heard of the complaints and allegations made against him (para 8.9). Mr Mensah says that this was not a verbatim note of the meeting, but I am not sure this was ever suggested to be so. The claimant does not directly contradict anything that is recorded as having been said during this meeting and indeed relies on the note himself (see paragraph 6 of the claimant's witness statement). The 2-hour meeting between IR and the claimant on 1 April 2019 appears to have been an informal meeting which took place after the claimant was suspended (para 8.9). No reference to what was discussed in that second meeting seems to have been made or taken account of either at the disciplinary or appear hearing or indeed at the Tribunal.

25. To that end whilst the claimant has pointed to what he says are a number of problems with the investigation, I do not consider that any of these matters are significant when looking at the quality of the investigation overall. None of these matters bring what the respondent did during the investigation outside the range of reasonable responses. Other employers may have approached the matter differently and may have addressed some of the points above in a different manner. However, I conclude that the investigation undertaken by

the respondent was a reasonable one.

26. When looking at whether the dismissal was reasonable in all the circumstances, I must firstly consider whether the dismissal was procedurally fair. My conclusion is that it was. The investigation is dealt with in detail above and I have concluded it was a reasonable investigation. The disciplinary hearing conducted by GR was full, lengthy, thorough, and extremely detailed (paras 8.18-8.29). The claimant was given every opportunity to explain his case and to set out his side of the story. He had all the information from the investigation well in advance. He was aware of the allegations made against him. He had the opportunity to question the witnesses called by the respondent (which he did at length). He was able to call his own witnesses in support. He was given the opportunity to have a colleague present. He had the chance to appeal against the decision and a full fair and detailed appeal was held where again he was able to call witnesses and produce additional evidence (paras 8.34-8.30). This was on any account a full and fair process and was in no way outside the range of reasonable responses.

27. The next issue to determine is therefore whether dismissal was within the range of reasonable responses. The claimant had an unblemished employment record and 19 years of good service. This appears to be an incident which was wholly out of character. He apologised for his actions (albeit he did not admit that the sound he had played had been of a sexual nature). The decision to summarily dismiss was a harsh decision with serious implications on the claimant. I have every sympathy for the claimant having lost his job after such a long period of employment without incident. However, whether the Tribunal believes the decision was harsh or not is not the test I must apply. I was reminded and am aware that I must not substitute my own decision for that of the employer. Although harsh, it cannot be said that this decision is in any way outside the range of reasonable responses. The respondent did consider alternatives to dismissal as part of its consideration and indeed GR's evidence was that had the claimant been honest with him about what had happened, he may have given him a final written warning. GR was clear that he considered all mitigating circumstances before deciding to dismiss (see para 8.32 above.) A different employer may have decided that on balance a final written warning was appropriate. This employer did not. Both sanctions were within the range of reasonable responses.

28. On these grounds, I find that the claimant's complaint of unfair dismissal fails and is hereby dismissed. As there is no finding of unfairness, it is therefore not necessary to consider what the percentage chance of a fair dismissal was, nor whether the claimant's conduct contributed to his dismissal.

Breach of contract claim

29. The issue to determine here is whether there has been a repudiatory breach of contract justifying summary dismissal. I am required to decide on the facts as I see them on the balance of probabilities. I must then conclude whether there was a fundamental breach of contract and whether that breach was sufficiently serious to warrant immediate termination. The breach of contract that the respondent relies upon is that it says the claimant breached the

respondent's Disciplinary Procedure in relation to unacceptable behaviour, its Dignity and Work policy and Procedure and the Officer Code of Conduct in relation to matters of equality by playing a sound of a sexual nature in the briefing of 29 January 2019. It also says that the claimant was dishonest in the explanation he gave the respondent as to what happened relating to the incident which was a serious breach of confidence and trust.

30. Firstly, based on my findings of fact at paragraphs 8.5 and 8.6 above, the claimant did commit acts of misconduct that put him in breach of his contract of employment. Both matters that led to the claimant's dismissal were incidents of misconduct. The first relating to the playing of the sound of a sexual nature during the briefing on 29 January 2019 was a breach of his obligations to comply with the respondent's policies and procedures with respect to disciplinary matters, Dignity at Work and the Officers' Code of Conduct. Accessing a message and allowing a sound of a sexual nature to be played (even accidentally) at a briefing attended by other employees was in my view a serious infringement of equal opportunity rules and principles and a serious breach of the respondent's Dignity at Work Policy and Procedure in that it was not behaving "*in a way that respects the right and dignity or others*" (page B31). It was also a breach of the Officer's Code of Conduct in that it was not complying with policies related to equality issues. The second matter is that having found that the claimant telling the respondent that the sound played was that of a goose (when it was of a sexual nature) and saying that he deleted the message sent accidentally by tapping the message in the briefing when this did not happen, I conclude that the claimant was dishonest. This amounts to a breach of the implied term of trust and confidence inherent in the employment contract

31. The main issue to address therefore is whether that misconduct is of sufficient seriousness justify summary dismissal. I have looked at whether it was deliberate conduct which undermined the trust and confidence inherent in the contract of employment. This would need to involve conduct so serious as to make any further relationship impossible. As to the playing of the sound of a sexual nature in the briefing, the claimant did not deliberately play the sound to cause offence or for any other reason. He did access the message with the sound on it in the briefing, with many other employees present which breached the procedures referred to above, but I accept that there was no deliberate act to play this out loud. However, having made the findings of fact on the claimant's honesty as to his explanation as to what happened, this element of the breach of contract committed did involve a deliberate act. I too have reached the conclusion that the claimant deliberately created the story about having been sent the sound of a goose to minimise the seriousness of the incident and to avoid or lessen the sanction. Unfortunately for the claimant, this choice made the situation worse for him as his actions led to the conclusion that he had been dishonest. It was this that ultimately led his employer to conclude that continued employment was impossible, and I also reach this conclusion. I find that the combination of the accessing the message in the briefing (which led to the accidental playing of a sexual sound) coupled with the claimant's dishonesty in the investigation and disciplinary process was, taken together, conduct that was so serious as to make future employment with the respondent impossible. The necessary trust and confidence required to be able to continue to employ the respondent

was lost and the respondent was justified in accepting that breach and terminating the claimant's contract with immediate effect. The claimant's breach of contract claim therefore fails and is dismissed.

Employment Judge Flood
16 July 2020

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