Case Number : 1400986/2019

EMPLOYMENT TRIBUNALS

Claimant: Jordan Stranack

Respondent: StreetSharp Ltd

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the ***Judgment*** sent to the parties on 6 August 2020, is corrected with the Respondent's title as set out below

"**StreetSharp Ltd** "

.....
Employment Judge Housego
Date: 28 September 2020

Important note to parties:

Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

Case Number : 1400986/2019

EMPLOYMENT TRIBUNALS

Claimant: Jordan Stranack

Respondent: StreetSharp Ltd

Heard at: **Southampton (by CVP)** **On: 03-06 August 2020**

Before: **Employment Judge Housego**

Representation

Claimant: In person
Respondent: Joseph England, of Counsel, instructed by Ashfords LLP

JUDGMENT

The claim is dismissed.

REASONS

1. Mr Stranack claims that his resignation on 13 March 2019, effective 29 March 2019, was a constructive dismissal. The Respondent denies this was so.

Law, and test to be applied.

2. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

3. If the Claimant's resignation is found to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides *"…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and 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".

4. I have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Marshall Specialist Vehicles Ltd v Osborne [2003] IRLR 672 EAT and Sutherland v Hatton [2002] IRLR 263 CA.

5. The test to be applied in constructive dismissal cases was set out in by the Honourable Mrs Justice Simler DBE (as she then was) in Conry v Worcestershire Hospital Acute NHS Trust [2017] UKEAT 0093_17_0911:

> *"18. In London Borough of Waltham Forest v Omilaju [2005] IRLR 35 the Court of Appeal (Dyson LJ) set out the approach to constructive dismissal where the breach relied on is of the implied term of trust and confidence:*
>
> > *"14. The following basis propositions of law can be derived from the authorities:*
> >
> > *1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] IRLR .*
> >
> > *2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, Malik v Bank of Credit and Commerce International SA [1997] IRLR 462, 464 (Lord Nicholls) and 468 (Lord Steyn). I shall refer to this as 'the implied term of trust and confidence'.*
> >
> > *3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, 350. The very essence of the breach of the implied term is that it is 'calculated or likely to destroy or seriously damage the relationship' (emphasis added).*
> >
> > *4. The test of whether there has been a breach of the implied*

term of trust and confidence is objective. As Lord Nicholls said in Malik at p.464, the conduct relied on as constituting the breach must 'impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer' (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para. [480] in Harvey on Industrial Relations and Employment Law:

> *'[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship.'*

15. The last straw principle has been explained in a number of cases, perhaps most clearly in Lewis v Motorworld Garages Ltd [1985] IRLR 465. Neill LJ said (p.468) that 'the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term' of trust and confidence. Glidewell LJ said at p.469:

> *'(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See Woods v W M Car Services (Peterborough) Ltd [1982] IRLR 413.) This is the "last straw" situation'.*

16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim 'de minimis non curat lex') is of general application…

…

20. I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the

implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

22. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective (see the fourth proposition in paragraph 14 above)."

19. The repudiatory breach relied on need not be the sole cause of the employee's resignation. Provided the employee accepts the repudiatory breach as bringing the employment to an end, it does not matter if the employee also objects to other actions or omissions by the employer not amounting to a breach of contract (see Nottinghamshire County Council v Meikle [2004] IRLR 703)."

5. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without*

giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

6. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").

7. The issue is whether the Respondent was guilty of a fundamental breach of contract (a lesser breach will not suffice), whether the Claimant resigned in response to such a breach, in good time and without affirming the contract. An employer is expected to follow a reasonable procedure throughout a disciplinary procedure (Sainsbury's v Hitt) as well as the Acas Codes, and the *"last straw"* does not have to be a breach of contract.

8. The burden of proof is the civil standard, that something is more likely than not to be so, and the burden of proof is on the Claimant, save for any assessment of reasonableness or fairness, which is a value judgment for me to make, objectively. When I assess the actions of an employer I do not substitute my view for theirs. In many cases there is a band of reasonable responses for an employer to any given situation.

Evidence and the hearing

9. I was provided with a bundle of documents of nearly 200 pages, and some video clips posted by Mr Stranack to his Snapchat account. There was extensive video evidence of the workplace which it was not necessary for me to view. Mr Stranack provided a short witness statement setting out his case, which is to be found in a careful case management order of Employment Judge Livesey dated 07 October 2019, and in the claim form. For the Respondent, there were witness statements from Rebecca (Becky) Wilson, at the time a Business manager for MacDonald's Restaurants Ltd., from Fiona Wilson, a First Assistant Manager, from Charlotte Burkin, a Shift Manager, and from Troy-Laine Mitchell, a part-time Shift Manager, all save Ms Wilson at the store where Mr Stranack worked. All gave oral evidence and were cross examined by Mr Stranack.

10. Mr Stranack's correspondence with the Tribunal indicated that he has dyslexia, and at various times through the hearing I checked to see whether Mr Stranack needed any adjustment. He said that he needed none. Because parties find CVP hearings tiring, I ensured that there was a break about every hour. In his case management order of 07 October 2019 EJ Livesey had set out a proposed timetable. I ensured that we adhered to this, so that Mr Stranack was not taken by surprise by anything. Day 1 ended early, and I ceased the day's hearing at 2:45 when the questions for Mr Stranack had ended, and when he had used

the opportunity to address further any matters of fact raised in his cross examination. I ensured that he knew the order of witnesses for the following day, and in straightforward terms explained to him the way questions needed to be asked: simple, not statements or submissions, and short, and with a ? at the end. On the second day the evidence for the Respondent ended at 2:15. To adhere to the timetable, because Mr Stranack had found the cross examination very stressful, and to give Mr Stranack time to consider what he would say in submissions, I suggested submissions should be made the next morning. Counsel for the Respondent said that he could prepare written submissions, either that afternoon, or by 9am on day 3. It was agreed that his instructing solicitor would email them both to me and to Mr Stranack by 9:00am on day 3, and then Counsel would speak to them. The Claimant was to check his email as it might be possible for Counsel to send in his submissions by 4pm. If Mr Stranack needed more time to peruse those submissions he would have it, and if he needed time to consider after Counsel's oral submissions that could also be accommodated. Mr Stranack was content with this procedure. In the event Counsel's submissions were received both by me and by Mr Stranack before 4pm, and so Mr Stranack had ample time to consider them. He did not want time to consider further after Counsel's 25 minute submissions.

11. Accordingly Counsel for the Respondent gave submissions first, at the start of day 3, followed by Mr Stranack. I made a full typed record of proceedings, and do not summarise those submissions in any detail, and the submissions of Counsel for the Respondent are also in writing. It suffices to say that the Respondent says that matters in November 2018 were nothing to the point, and in any event were fair, that the Respondent has clear policies on social media and the disciplinary policy is crystal clear about bringing the brand into disrepute. They say that Mr Stranack can have no complaint about disciplinary action being taken for him using his phone at work, and posting such a video on Snapchat. They also say that some of the matters about which he complained post dated his resignation, so could not have caused it. They say that his complaint of inconsistency could not be made out, as he was comparing his treatment with that of someone employed by MacDonald's Restaurants Ltd., which was a wholly different legal entity and employer. They say that other matters were simply not made out. Mr Stranack thought that Mr Brookes, in the vernacular, had it in for him, and that he was treated by management neither fairly nor as others were, for the nine reasons given.

12. The issue is whether the Respondent was guilty of a fundamental breach of contract, specifically breach of mutual trust and confidence and breach of procedures, and whether the claimant resigned in response to such a breach, in good time and without affirming the contract.

13. In assessing the evidence I heard and read, I noted that the evidence of the Respondent's witnesses was consistent over time, and with each another, was coherent and plausible and not at variance with any documentary evidence. I noted that Mr Stranack, while doubtless having a strong sense of grievance, was not consistent, nor plausible in his evidence. His observation that the letter of suspension was *"null and void"* because of the address given, even though

it was handed to him is one example. So is his answer to why he might have taken his phone to the female toilet – first to watch a video while in there, and then perhaps to make or receive an emergency call. Mr Stranack said that he had no opportunity to take legal advice as he was working nights and asleep in the day: but he was off sick from 15 February to 03 March, and had a clear suspension letter telling him why he was suspended, but sought no advice. The evidence about the coffee machine varied. In his cross examination of the Respondent's witnesses when a reply was given that if there was mould it was as much his fault as anyone's (because he was a crew trainer, cleaning was at night and he was responsible for making sure the crew knew how to do things like that – all of which is the case) he said the photo was taken when he was suspended, but did not say by whom or when it was taken or how he got it. The photo itself in the bundle (103) is annotated by Mr Stranack to state *"Date and time: 4th February 2019 … This is mould that has been in the coffee beans for a month…".* He was not suspended until 15 February. If he knew it had been there a month why, rhetorically, had he done nothing about it? If he means it must have taken a month then there is still the issue of why he hadn't noticed before.

Mr Stranack's reasons for saying that he was unfairly dismissed

14. In the Case Management Order of 07 October 2020 nine reasons were set out by Mr Stranack why he considered the Respondent had breached the contract in a fundamental way. They are as follows. Mr Stranack says that the second of these was the *"final straw":*

    1. Failing to comply with the grievance procedure; the Claimant complains that no action was taken in respect of his grievance of 11 March before he resigned on 13 March;

    2. Mr Brookes *"stalking"* the Claimant on CCTV. The Claimant alleges that Mr Brookes watched his movements and at the investigation meeting asked him questions about his activities on 07 March, including why he went to the toilet;

    3. Suspending the Claimant on 05 March and not Mr Hassan who was guilty of the same or similar conduct;

    4. Requiring the Claimant to attend a meeting at unreasonably short notice. The Claimant was invited to a meeting on 07 March by a letter dated 05 March which was sent to the wrong address (his mother's). The Claimant alleges that he raised the unfairness of the lack of notice at the meeting of 07 March but it proceeded;

    5. Mr Brookes' disclosing the investigation into the Claimant's conduct to the workforce as a whole in and around March 2019;

    6. Inconsistency. The Claimant alleges that he was investigated for allegations which, in part, concerned his use of his phone whilst at work. He claims that

others were similarly guilty, but that no action was taken against them.

7. Failing to address the Claimant's concerns about Mr Brookes watching him on CCTV. The Claimant says he raised these concerns with Ms Hunter at the investigation meeting on 07 March and he complains that she failed to take any action.

8. Failing to adhere to health and safety and food hygiene regulations. The Claimant says that the CO^2 alarm sounded on consecutive days for several weeks in early 2019. The Claimant says that he reported this on 26 January 2019 but alleges that no action was taken in respect of it. He alleges that he found mould on the coffee beans in the coffee machine which he raised with the shift manager, Ms Perkins (this is actually Ms Burkin), on 4 February 2019 but, again, no action was taken;

9. Incorrectly identifying the Claimant on a video on social media. Mr Stranack says that Mr Brookes alleged that he was shown in one of the videos which Mr Stranack claims was incorrect.

Chronology

15. The relevant dates are as follows:
    - 15 July 2015: Mr Stranack started work for MacDonald's Restaurants Ltd.
    - In November 2018 Mr Stranack was suspended and there was a disciplinary matter about the turning off of the multiplex machine, unrecorded cigarette breaks, using the female toilet and giving away food or drink. No action was taken.
    - Mr Stranack raised a grievance about Mr Brookes looking at him on CCTV.
    - 04 December 2018, the outcome letter from Amy Cridland (96) was that Mr Brookes was not bullying him in so doing, and that the use of CCTV was proper and in accordance with the company policy.
    - 26 January 2019: Mr Stranack says he reported the CO^2 alarm was malfunctioning.
    - 04 February 2019: Mr Stranack says that he reported mouldy coffee beans in machine.
    - 15 February 2019: Mr Stranack was suspended by Ms Hunter, she having been shown a video posted on Snapchat by Mr Stranack.
    - Mr Stranack was off sick from 16 February until 03 March 2019.
    - 05 March: letter sent for disciplinary meeting on 07 March.
    - 07 March: investigation meeting, conducted by Ms Hunter, a Business Manager from another restaurant.
    - 11 March: Mr Stranack emailed a grievance to head office.
    - 12 March: a second investigation meeting with Ms Hunter.
    - 13 March: Mr Stranack resigned with effect from 29 March. Head office replied to the grievance letter.
    - 18 March: TUPE transfer from MacDonald's Restaurants Ltd to

Respondent.

- 29 March: Respondent (Mr Lamb) gave Mr Stranack a final written warning. Mr Stranack left work that day at the end of his notice period.
- In September 2019 Mr Stranack posted photos said to be of a mouldy coffee machine and an unattended alarm for CO^2.

Policies

16. MacDonald's Restaurants Ltd has a clear disciplinary policy (57 onwards) and on social media use (71 onwards). It has a privacy statement (63 onwards). It expressly covers CCTV recordings (64). The policy on social media makes it clear that any private post that is associated with MacDonald's is regarded as a work related post, and that if there is the possibility of reputational damage to the brand it is a disciplinary matter. In particular there is a blanket ban on the use of the company logo without prior written agreement from the legal team. There is an express right to monitor employees' social media and take action about any comment made (74). There is the express requirement to have regard to the need not do damage the brand, or bring the company into disrepute (74). There are a series of matters identified in the disciplinary procedure as gross misconduct. Amongst them is activity on social media sites which in the reasonable opinion of the company could damage it (61 and 77).

17. Mr Stranack resigned when employed by MacDonald's Restaurants Ltd., but left when employed by the Respondent: the same contract and policies applied throughout because it was a tupe transfer.

Facts

18. Mr Stranack was employed at a MacDonald's store from 15 July 2015. He was a crew leader, which is not a management role, but involves some supervisory responsibility. It is perhaps best illustrated by the uniform. Mr Stranack wore the same dark shirted uniform as those serving customers and cooking, and not the white shirted management uniform.

19. The store at which he worked was owned by MacDonald's Restaurants Ltd. On 18 March 2018 it became a franchise of the Respondent, a company owned and run by Matthew Street, which (including this franchise) runs three MacDonald's outlets. All agree this was a TUPE transfer. Mr Stranack has always worked nights.

20. In November 2018 Mr Stranack was called to a disciplinary hearing about the turning off of the machine that mixes soft drinks - *"multiplex"*. CCTV was viewed to see who had turned it off. This showed other matters of concern about Mr Stranack. He was seen entering the female customer toilets with his phone. Use by staff of phones at work is not permitted. Managers are permitted to use phones, as there is much management conducted in one way or another through smartphones. He was also seen going outside for a cigarette break, but this was not shown on his time record. Mr Stranack objected (and still

objects) that this breached his right to privacy. No action was taken in respect of any of these matters. Mr Stranack says that from then on Mr Brookes was out to get him, and that the episode with the Snapchat post was just a pretext, and that the whole process was the culmination of bullying behaviour which caused him to resign.

21. Mr Stranack's view was that it was an invasion of his privacy to record him going to the toilet. He took his phone with him, but said that might have been to watch a movie while he was *"doing his business"* in the toilet. Or he said he might have had to go there to make or receive an emergency call. This is incomprehensible: CCTV can be monitored for a variety of reasons. The multiplex machine had been turned off. It was to find out who turned it off that the CCTV was viewed. But there needs be no reason – it is entirely reasonable for management to view CCTV on night shifts to ensure all is being done well.

22. It was certainly understandable that the employer should want to find out why Mr Stranack was going into the female toilet with his mobile phone, on both counts. Any manager would want to know why a male member of staff was choosing the female toilets. (Mr Stranack said that the toilet seat in the male toilet was broken.) Staff are not permitted to use mobile phones at work. This is a blanket ban. Management use smartphones for management tasks. Occasionally a manager will ask a member of staff to photograph something. Ms Hunter had asked Mr Stranack to clean the back store during a night shift, and to send a photograph of it when done. Mr Stranack thought this undermined the whole argument that phones were not to be used. It does not – it was a management instruction to do so.

23. Mr Stranack, in his cross examination, said that like anyone else he might have been going to watch a movie while in the toilet. It is no part of a toilet break to watch a film on a phone, still more on a phone not allowed to be in use while at work. Mr Stranack then said that he might have been going to make or receive an emergency call. He did not say that he had been doing so. In any event, the point made in reply to his question was self evidently right – yes, an emergency call is fine, but tell management you need to make or receive one first. Then the manager knows where he is.

24. If viewing lots of CCTV the viewer may see things not previously known – such as cigarette breaks and check them: to find them not recorded in the time log.

25. None of this has any relevance to the resignation, save that Mr Stranack feels that Mr Brookes, who had viewed the CCTV in November 2018, was *"stalking"* him in the CCTV and that was why he was, he says, targeted in February 2019.

26. On 15 February 2019 Ms Hunter was shown a Snapchat post by a colleague of Mr Stranach. It had Mr Stranack's name on it, so that it was clear that he posted it. It shows someone working in a MacDonald's kitchen. A bun is placed on the worksurface, and sauce squirted on it from some feet above, then a handful of lettuce is grabbed from the container and thrown onto it violently, from a height. The caption is *"How to make a cheeseburger"* with two laughing

emojis. Ms Hunter told Mr Brookes, who told her he was already aware of it.

27. Ms Hunter was told by Mr Brookes to suspend Mr Stranach. She was given a letter to give to him. Later on 15 February 2019 she read it to him, and then handed it to him. It had his mother's address on it. Mr Stranack immediately said that for this reason it was *"null and void"*. He was, nevertheless, suspended.

28. Ms Hunter later knew that Mr Hassan was the person shown in the video. She did not know until after Mr Stranack had left his employment that Mr Hassan had also posted it. Mr Hassan left the Respondent's employment in April 2019. No disciplinary action had been taken against him by then. No evidence was given to me about why or when he resigned, or when it was found out that Mr Hassan had also posted it.

29. Mr Stranack was off work from 15 February 2019 until 03 March 2019, with a fit note stating the reason was *"depressed mood".* He was called to an investigation meeting on 07 March 2019 by a letter dated 05 March 2019. Again, this was addressed to his mother's address, and posted. He gets on well with his mother, and there was no delay to him getting the letter, and he attended the meeting. He did not complain about inadequate notice at the time. He now complains this could have been a breach of his GDPR rights if his mother had moved.

30. At the meeting on 07 March Mr Stranack did not mention any issue with the CO^2 alarm or the coffee machine, or raise any issue about the notice given to him about the meeting of 07 March.

31. He raised a grievance by email (123) on 11 March 2019 to head office, sent at 17:05. It was about being *"stalked"* by Mr Brookes. The response was from head office at 14:23 on 13 March 2019. It said that there was to be a change of ownership, so what process should be used was being considered.

32. The next investigation meeting was on 13 March 2019 at 17:45, also with Ms Hunter. There is no possible justifiable criticism of delay between 11th and 13 March 2019 in the handling of the grievance.

33. Mr Stranack then resigned by letter addressed to Mr Brookes, delivered on 13 March 2019, the same day as his second investigation meeting, to leave on 29 March 2019. That letter (138) said that there was a culture of bullying, and he named the addressee, Mr Brookes, and Lauren Neal and Ms Hunter as the people bullying him. He stated that suspending him for a posting on a private Snapchat account, and Jess Philips then asking his colleagues about a private post, was totally unacceptable to him. He gave no other specifics.

34. On 29 March 2019 he was given a final written warning: of no consequence as he had already resigned and was leaving that day.

35. No-one in management has any recollection of Mr Stranack reporting a faulty

CO^2 alarm. The same is the case for the asserted mould on the bean hopper. There is no email or any other record of either. Mr Stranack first brought these up in his Facebook post of September 2019, six months after leaving his job. I find as a fact that Mr Stranack did not report either event to management at any time when employed. Mr Stranack's evidence about when the photographs were taken varied. As crew trainer he should have been training staff on cleaning. There is a time when the night shift (which has lower staffing levels) can be very busy, but by 3am or so it is usually quiet. Since Mr Stranack worked nights regularly, and his case is that mould takes some time to grow, it was not clear why this was not his failing as much as anyone else's. What was seen was white: the open hopper was next to the coffee whitener container, and whether this could have been spilled coffee whitener could not be examined in any detail, as the photos were not shown to the Respondent until months later. Mr Stranack's response when this was suggested in reply to his questions in cross examination was that these were taken when he was suspended. If so it is not clear by whom, or how he got them. There is no connection between these photographs and Mr Stranack's resignation, and nor is it clear how this could be a breach by the Respondent of a fundamental term of Mr Stranack's contract.

36. Mr Stranack provided a lot of photos designed to show poor maintenance, and the witness statements of the Respondent's witnesses deal with them in some detail. There are some fundamental problems with them. First, if there was any issue, why did Mr Stranack not take it up with his manager on the night? He was not supposed to use his phone at work so why was he taking photos on one? If there was a problem and managers were not dealing with it, why did he not escalate this by sending the photos to a senior manager? In any event the explanations all seem entirely coherent – for example a proper clean will involve the floor being very wet, then mopped: taking a photo when wet (and with bollards saying wet floor in shot) is not reason to think anything is awry.

37. The CO^2 alarm has a red light and a sound for level 2 – evacuate. It has a flashing blue light for level 1 – ventilate and call engineer. The photo shows a blue light illuminated but whether it is flashing or not cannot be determined from a still photo. Mr Stranack said the he had provided a video of it, but it was not before me. Ms Hunter said it has occasionally gone off, but if this was one such occasion the door is shown open (which is all ventilation requires), and this would mean no more than that the alarm worked. Ms Hunter could not recall the alarm going off very often, and I accept her evidence.

38. Snapchat is a social media site on which people can share photos and short videos. This is either in an ephemeral form – the image or video disappears from the recipient's phone after being viewed – or on the sender's *"story"*, which lasts 28 days. Such images or videos may be screenshotted or saved – that is the image or video is captured as a photo of the screen on which it is displayed, or moved to the memory of the recipient's smartphone – and then the recipient owns it. This is self-evidently possible as it was shown to me by the Respondent.

39. The Claimant says that this was a private group not a posting to the world. He says that everyone in the group was connected to MacDonald's so no member of the public saw it. Whether this is so or not, the image would make any viewer thing the less of MacDonald's whether it was filmed as a poor joke or was intended to be real. The sender is not in control of the content once sent. In any event, circulating colleagues breaches the policy too.

40. It is noteworthy that Mr Brookes was responsible for the November 2018 disciplinary matter and there was no sanction. Mr Stranack did not say there was any reason why not: it was he who turned off the multiplex machine, he did take his phone into the female toilet and he was taking unrecorded breaks. This does not accord with Mr Stranack's account that Mr Brookes was looking to get him dismissed, or otherwise to bully him.

41. None of the nine reasons put forward by Mr Stranack withstand scrutiny.

42. The first – *"delay"* between grievance on 11 March and first investigation meeting on 13 March is unsustainable as a complaint. There was no delay. The grievance was not sent until 17:35 on 11th and the reply was sent within 48 hours. Mr Stranack did not refer to it in his resignation letter. There is no breach of contract at all, let alone a fundamental breach. If the delay complained of is of 30 days for a full response to that grievance and the absence of an appeal, those post-date the resignation (of 13 March) and so could not be the reason for it.

43. The second, of *"stalking"* the Claimant by Mr Brookes is not referred to in the claim form, which simply repeats the resignation letter. Mr Stranack was not questioned about the CCTV on 07 or 13 March 2019, which was all about the Snapchat video. Use of CCTV to monitor employees at work is within the terms of a reasonable policy, and there was every reason to use it for checking on night workers. When looking at one thing, seeing others is entirely possible. It was all months before, and so does not, even if the allegation was made out, enable a constructive dismissal claim to succeed. If it be that the claim is of excessive viewing of CCTV in February 2019, I find that given the history, and that Mr Stranack worked nights when senior management might well miss things, extensive examination of the CCTV was entirely reasonable.

44. The third is that a colleague, Cain Hassan, did something similar – in fact filmed the video, which Mr Stranack says he merely reposted – but he was not suspended. I find that the explanation of the Respondent is what happened: they simply did not know that Mr Hassan had any connection with it (and I make no finding of fact that Mr Hassan was involved in any way: I heard no evidence from him). Mr Hassan was asked about the video, and said he knew nothing about it. There was no reason why the Respondent should not have believed him at the time. Mr Stranack showed the Respondent no evidence of connection with Mr Hassan. Mr Stranack appears to have told Mr Lamb of this on 29 March 2019, but as this was Mr Stranack's last day that knowledge (or rather, accusation) cannot be seen as a breach of contract by the Respondent. I was told that Mr Hassan left the employ of the Respondent in April 2019: there

is simply insufficient evidence to consider that there was inconsistent treatment.

45. Mr Stranack also claimed that Megan Lancaster, another colleague, had posted something far worse than his video, a photo of a colleague of oriental ethnicity with a demeaning name tag attached. Again I make no finding of fact that she was responsible for the photo I was shown, but even if she was, there is no way that Mr Brookes (or any one else in the Respondent) could have known before Mr Stranack so asserted in these proceedings: and that was for this hearing, as it is not in any pleading. (There was no application to amend to include this allegation, but I deal with the point for completeness.)

46. The fourth is that Mr Stranack says that he was given inadequate notice of the meeting of 07 March. Mr Stranack is greatly exercised by the fact that the notice was sent to his mother's address and not to his. Plainly this was an error. In fact no harm was done, and Mr Stranack got the letter as if it had been sent to his address. He gets on well with his mother, and is shortly to go and live in her home. He attended the meeting on 07 March. He did not ask for an adjournment. He did not then say the notice was too short. It was an investigation meeting not a disciplinary hearing. He did not raise this in his grievance of 11 March, or at the meetings on 12 or 29 March. He knew exactly what was to be investigated, for it was clear from his suspension letter, which was read to him when he was suspended, on 15 February. His approach to that suspension letter was that it was *"null and void"* because addressed to his mother's address, even though it was read to him and then handed to him. He maintained this at the hearing: it was not an ill-advised then abandoned knee-jerk reaction. Plainly it is not so.

47. Allegation 5 is that Mr Brookes was said to have told everyone in the workforce about his suspension. As the Snapchat was sent to his colleagues, and several had been interviewed about it, everyone would have known anyway. There is no evidence other than Mr Stranack's suspicion and this allegation cannot be found proved.

48. Allegation 6 is one of inconsistency: that colleagues were as guilty as he, but not subject to disciplinary action. He named Cain Hassan, who he said had taken the video. The Snapchat had Mr Stranack's name on it. At the time Mr Hassan denied taking or posting it, but there was clear evidence that Mr Stranach had done so. There was no unfairness in taking action against Mr Stranack alone. Ms Lancaster is said to have taken a picture photoshopped to add a racially offensive name badge, but (if it was so: I make no finding of fact) that has nothing to do with this Respondent. It could not be a liability inherited from the transferor, because this was not mentioned until September 2019 at the earliest, and so there is no evidence that (if it is so) the Respondent knew of it until months after Mr Stranack had left. Because neither transferor nor transferee knew of the asserted post by Ms Lancaster until long after Mr Stranack had left there can be no inconsistency of treatment.

49. Allegation 7: not dealing with concerns raised about Mr Brookes' asserted excessive viewing of CCTV of Mr Stranack. The notes of meetings, which are

as near as may be to transcripts, do not record this being raised at all in 2019. Mr Stranack signed every minute note, as did the person taking the meeting and an observer. Mr Stranack does not say the notes are inaccurate or incomplete. It was not referred to in the resignation letter. It appears first to arise as an issue in the case management hearing in October 2019. There is no evidence save Mr Stranack's statement some months after resigning that that it was a reason for resigning, and I find that it was not. Mr Stranack lodged his grievance about this in 2018, and it was dismissed on 04 December 2018 by Ms Cridland. In any event, if this was a reason for resignation Mr Stranack had delayed too long, or had affirmed the contract by continuing to work. In any event if CCTV was viewed by reason of investigation of Mr Stranack after the Snapchat matter arose I find it reasonable so to do, as set out above.

50. Allegation 8: my findings of fact (above) mean that this allegation, about asserted failure to deal with claimed health and safety matters, cannot succeed. In addition, at no time did Mr Stranack make any such allegation while employed by the Respondent. There is no record of him raising either matter in the course of employment. I accept the evidence of the Respondent's witnesses that he did not. He did not raise this in either of the investigation meetings. It does not feature in his resignation letter, or grievance and he did not tell Mr Lamb of either matter on 29 March. Even if all had been as Mr Stranack says, it was not part of his reason for resigning. There is no connection between such matters and the Snapchat video. There is no connection with the bullying Mr Stranack claims in his resignation letter to be the reason he resigned. There is no fundamental breach of contract by the Respondent (or for which it is liable if by the transferor).

51. Allegation 9: is that Mr Stranack was, he says, wrongly identified as the person in the video. It may well be that the Respondent thought it was Mr Stranack in the video, when it was in fact a video of Mr Hassan. But the matter causing the investigation was the posting of the video, and that had Mr Stranack had clearly done, as he his name was on it, and more than one person told management of it. The very fact that management was told by people to whom Mr Stranack had sent it is an indicator that even his colleagues thought it was unacceptable.

52. Accordingly Mr Stranack has not succeeded in showing that there was a fundamental breach of contract by the Respondent, nor that he resigned by reason of the matters of which he complains. For or some of them he delayed too long, even had they been as he claims. Therefore the claim of constructive unfair dismissal fails. (In parentheses I note that had there been a finding of a fundamental breach of contract, the Respondent sensibly concedes that the resignation would have been for that reason, and in good time, with no affirmation.)

53. I was asked to deal with the issue of a possible *Polkey* reduction, should the Claimant succeed. Had Mr Stranack not resigned, while he was keen on working for the Respondent, I find that it was highly likely that he would have left within a few months. Either he would have been dismissed for another disciplinary matter after an entirely justified final written warning for the

Snapchat video, or he would have decided that he did not want to work with the colleagues who had shown the Snapchat video to management and with managers whom he did not trust. There is strong likelihood of a further matter because of the approach of Mr Stranack to his former employer at the time and since. He has repeatedly breached a ban on attending the restaurant and has become aggressive when in the restaurant to the extent that the police have been called on occasions. That antipathy to his former employer would inevitably resulted in his departure in short order for one reason or another.

54. I record that Mr Stranack was a model of politeness and courtesy during the conduct of the hearing.

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Employment Judge Housego

Date: 06 August 2020
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