EMPLOYMENT TRIBUNALS

Claimant: Mr J Hall

Respondents: Newcastle University

Heard at: Newcastle (by video link) **On:** 2 and 3 November 2020

Before: Employment Judge S Shore

Appearances
For the claimant: Mr D Robinson-Young, Counsel
For the respondent: Mr D Dunn, Counsel

RESERVED JUDGMENT ON LIABILITY

1. The claimant's claim of unfair dismissal was not well-founded. The respondent did not dismiss the claimant.

2. The claimant's claim of breach of contract (failure to pay notice pay) is not well-founded. The respondent did not breach the claimant's contract of employment.

REASONS

Introduction

1. The claimant was employed as a Security Officer by the respondent from 1 March 2006 to 15 July 2019, which was the effective date of termination of his employment following his resignation. The claimant started early conciliation with ACAS on 14 July 2019 and obtained a conciliation certificate dated 29 July 2019. The claimant's ET1 was presented on 25 October 2019. The respondent is a University employing approximately 6,000 staff.

2. The claimant presented claims of:

    2.1. Constructive unfair dismissal (contrary to section 94 of the Employment Rights Act 1996), and;

2.2. Breach of contract (failure to pay notice pay) contrary to Article 4 of The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

3. The claimant's case is that the way that the respondent dealt with a disciplinary matter that arose from an incident at a student accommodation block on 12 December 2018, which resulted in his being given a final written warning, and the way the respondent handled a grievance filed by the claimant, which was ended by an appeal decision dated 7 May 2019, the respondent had broken the implied duty of trust and confidence between employer and employee, entitling him to resign without notice and claim unfair dismissal. He also claims breach of contract (a failure to make a payment of notice pay).

4. This case was originally listed for a final hearing on 21 and 22 April 2020, but was adjourned because of the pandemic. A private preliminary hearing was held on 21 April 2020 when Employment Judge Sweeney discussed the case with the representatives of the parties and made case management orders, including listing the case for a video hearing by CVP with a time estimate of two days to include remedy.

5. I can see from the note of his discussion with the parties that at the date of the preliminary hearing, the claimant's representative had recently received a DVD of the incident that resulted in the claimant receiving a final written warning. The representative wished to take the claimant's instructions on the recording and asked for an extension of the date for exchange of witness statements.

6. The extension was granted by EJ Sweeney. The parties had exchanged bundles at this point and the recording was not in the bundle. No application was made by either party to add the recording to the bundle before the hearing date. The Tribunal was not provided with a copy of the recording.

7. The respondent submitted a draft list of issues, which I read on the evening before the hearing. I redrafted them and sent them to counsel on the morning of the hearing. The draft issues were agreed by the parties' representatives:

<u>Unfair Dismissal</u>

1. *Was the claimant dismissed?*
2. *Did the respondent:*

    2.1. Unfairly and unreasonably issue the claimant with a final written warning;
    2.2. Deal with the claimant's disciplinary procedure unfairly or unreasonably;
    2.3. Deal with the claimant's grievance unreasonably?

3. *Did that breach the implied term of trust and confidence? The Tribunal will need to decide:*

3.1. Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
3.2. Whether it had reasonable and proper cause for doing so.

4. *Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.*
5. *Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.*
6. *If the claimant was dismissed, what was the reason or principal reason for dismissal (i.e. what was the reason for the breach of contract)?*
7. *Was it a potentially fair reason?*
8. *Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?*
9. *The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.*
10. *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:*

    10.1. there were reasonable grounds for that belief;
    10.2. at the time the belief was formed the respondent had carried out a reasonable investigation;
    10.3. the respondent otherwise acted in a procedurally fair manner;
    10.4. dismissal was within the range of reasonable responses.

11. *If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?*
12. *If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?*

<u>Remedy for unfair dismissal</u>

13. *Does the claimant wish to be reinstated to their previous employment?*
14. *Does the claimant wish to be re-engaged to comparable employment or other suitable employment?*
15. *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.*
16. *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.*
17. *What should the terms of the re-engagement order be?*

18. *If there is a compensatory award, how much should it be? The Tribunal will decide:*
19. *What financial losses has the dismissal caused the claimant?*
20. *Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*
21. *If not, for what period of loss should the claimant be compensated?*
22. *Does the statutory cap of fifty-two weeks' pay apply?*
23. *What basic award is payable to the claimant, if any?*

Breach of Contract/ Notice pay

24. *What was the claimant's notice period?*
25. *Was the claimant paid for that notice period?*
26. *If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?*

Law

8. For the purposes of the unfair dismissal claim, the relevant sections of the Employment Rights Act 1996 are ss.95(1) and 98.

"Section 95: Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

"Section 98 Employment Rights Act 1996

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

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

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

(2) A reason falls within this subsection if it-

(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) Relates to the conduct of the employee,

(c) Is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a)“capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)“qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was 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.”

9. The House of Lords established that there is an implied term of trust and confidence between employer and employee in ***Malik v Bank of Credit and Commerce International SA*** **[1997] ICR 606**.The term (often referred to as 'the T & C term') was held to be as follows:

> *“The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”*

10. The test was refined by the EAT in ***Leeds Dental Team Ltd v Rose [2014] IRLR 8***. As Judge Burke put it:

> *"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered*

objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

11. I was referred to a number of precedent cases by counsel, which I have quoted in this decision where appropriate:

    11.1. **Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27**;
    11.2. **A v B [2003] IRLR 405**;
    11.3. **Lenlyn UK Ltd v Kular UKEAT/0108/16/DM**
    11.4. **Agoreyo v LB Lambeth [2017] EWHC 2019**;
    11.5. **Blackburn Stores v Aldi [2013] ICR D37**;

Housekeeping

12. The claimant gave evidence in support of his claim and adopted a witness statement that ran to 52 paragraphs upon which he was cross-examined. The respondent called three witnesses. Michael Currer is a Financial Accountant with the respondent and carried out the investigation into the disciplinary matters alleged against the claimant. His witness statement ran to 15 paragraphs. David Watt is Head of Strategic Projects in the Estate Support Service and chaired the disciplinary and grievance hearings involving the claimant. His statement consisted of 28 paragraphs. Iain Garfield is Director of Estates and Facilities and heard the claimant's grievance appeal. His statement consisted of 16 paragraphs.

13. The parties produced an agreed bundle of 277 pages. If I refer to a pages in the bundle, the page number(s) will be in square brackets. The bundle identified one of the students involved in the incident on 12 December 2018. I will refer to that student as BG, which are not his actual initials. I have also not identified the building in which the incident happened.

14. At the end of the evidence, I heard closing submissions from Mr Robinson-Young and Mr Dunn. Both produced helpful skeleton arguments, which I considered. The hearing was conducted by video on the CVP application and mostly ran smoothly, with some technical issues. I am grateful to all who attended the hearing for their patience and good humour in the face of the technical glitches.

15. I was conscious of the tight timetable that we would be facing and asked the representatives for estimates of how long evidence would take. After he had given his estimate, Mr Robinson-Young stated that he had seen some of the footage from Body Worn Video (BWV) camera worn by the claimant on 12 December 2018.His submission was that it was essential that I saw the footage. Mr Robinson-Young had been sent the footage on Friday 30 October 2020. I read the note of the preliminary hearing on 21 April 2020 [34c-34f]. There was no indication that the video footage was to be produced at the final hearing. Disclosure had taken place. No application for the video to be produced at the hearing had been made. It had not been added to the bundle. I considered whether I could achieve a just and fair hearing without the footage. I had read the statements and bundle and considered that the issues in the case were about what the respondent had done in the disciplinary and grievance procedures, and whether its actions were reasonable or not. The case did not require me to rehear the disciplinary or grievance hearings.

16. I therefore decided to refuse the application for the video evidence to be admitted. Mr Robinson-Young made no application for an adjournment.

17. I ran through the claims and issues with the representatives. The claimant's claims were of unfair dismissal and breach of contract.

18. After I had announced that I would be making a reserved judgment, I listed a remedy hearing with the parties for one day on Friday 5 March 2021. That date can now be vacated.

Findings of Fact

19. All findings of fact were made on the balance of probabilities. If a matter was in dispute, I will set out the reasons why I decided to prefer one party's case over the other. If there was no dispute over a matter, I will either record that with the finding or make no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine.

20. It was never disputed by the respondent that the claimant had been good at his job. He had been employed as a Security Officer from 5 March 2007, having been initially employed in 2006 in a different role. He was part of a team of between 12 and 15 Security Officers. The claimant had worked in security at Newcastle Airport for 14 years before working for the respondent.

21. I found the way that the claimant gave his oral evidence was somewhat evasive. The first example I noted followed his confirmation that he had 28 years' experience in security. He was asked if he knew the procedures of the respondent, which he confirmed he did, but when asked if he was aware of the procedures in violent or aggressive situations, his reply was that he tried to avoid them and that every situation was different. He was then asked if he agreed that he would have a good idea how to deal with such an incident, his first response was to comment that if he and his colleagues were together in a group, it would calm down. It was only after avoiding the question on a couple of occasions that he admitted having a good knowledge of the respondent's procedures.

22. This example was illustrative of the claimant's attempts to avoid having to admit the extent of his experience and expertise, which I find to be substantial, given his length of service in the industry and level of qualification.

23. The claimant was equally evasive when asked about his training. He was asked if he was Security Industry Authority (SIA) trained. His response was that he had been trained in 2009, but not since. He said he was level 2 trained. He then went on to admit that he had obtained a level 3 BTEC qualification in self-defence, restraint and combat instruction in 2017. He later said he was a 5th Dan in Judo. He had told his line manager, Shed Coulthard, about his 2017 qualifications.

24. Insofar as his training related to the incident on 12 December 2018, the claimant confirmed that his 2017 training had included conflict management, which included training in how the body responds to stressors. He added that the 12 December incident was "beyond conflict resolution".

25. The claimant was taken through the respondent's contract and policy documents. These included a Use of Body Worn Video Policy dated 10 May 2013 [35-36], which the claimant confirmed he had received and was familiar with. He was also taken to a Security Standard Operation Procedures (SOP) – Use of Body Worn Video document dated 9 May 2018 [55j-55t], which the claimant said he had never seen before the document appeared in disclosure for this case.

26. I find that the respondent did not show to the required standard of proof that the claimant had received the SOP, because it could not produce an email to or receipt from the claimant to confirm it had been sent to him. However, the claimant's case went further. Paragraph 12 of his witness statement included the statement that "…Officers had no formal training, instruction or information on the SOP to explain what they can actually do in regard to BWV." I find that the claimant did not meet the required standard of proof on this assertion. At various points of his evidence, he demonstrated that:

    26.1. He knew how to operate the BWV;

    26.2. He knew when to operate the BWV;

    26.3. He knew to give a warning to parties when BWV was being used;

    26.4. He said in paragraph 12 of his witness statement in response to the charge that he had not activated BWV on entering the flat that the SOP for its use are "vague". That is a clear indication that he is trying to justify not turning on the BWV on entering the flat by referring to the vague nature of the SOP. I find that he was therefore aware of the content of that aspect of the SOP on 12 December 2018;

    26.5. He described how he had been told about aspects of the policy by managers (for example in paragraph 12 of his statement where he recalled how Officers had been advised about potential breaches of the Human Rights Act);

    26.6. He confirmed he had seen and understood the BWV Policy [35-36]

    26.7. He was aware of the Human Rights Act implications of using BWV;

    26.8. He was aware of the GDPR implications of using BWV.

27. I therefore find that the claimant was an experienced, well-qualified Security Officer who was familiar with the use of BWV. I viewed his actions on 12 December 2018 in the light of that finding.

28. It was undisputed that on 12 December 2018, an alarm went off at a student accommodation block at approximately 02:30am. The claimant and his partner, Dave Goldsmith, attended the site in a car. They went to the control panel to switch the alarm off. The claimant then went to the block where the alarm had been triggered. The alarm was a refuge alarm for use by people who may have been unable to escape the building in an emergency because of disability. When the claimant arrived, he saw a male student (BG) and a female student. The female

student was trying to calm down BG. BG was leaning against the alarm and had triggered it. He was very intoxicated.

29. The two students then entered the flat. The claimant says he then heard a "commotion" from inside the flat and entered it. I have to regard the claimant's witness statement as his definitive evidence on the events of 12 December 2018 because it was made in contemplation of this hearing and with the benefit of seeing all the documents in the bundle.

30. Paragraphs 6 to 12 of the claimant's witness statement deal with the incident on 12 December. The claimant gave the following account:

    30.1. There were approximately 8 students in the flat when he entered;

    30.2. He saw 2 male students fighting on the floor (one was BG, who the claimant later identified as the aggressor);

    30.3. He approached the students and requested that they stopped fighting;

    30.4. He then entered a bedroom in the flat, turned on his BWV camera and requested assistance from colleagues by radio;

    30.5. He then attempted to separate the two fighting students;

    30.6. An assault was taking place. There was a breach of the peace and he thought he was lawfully obliged to intervene;

    30.7. He told one of the students to walk away, but BG would not move;

    30.8. The claimant "moved" [BG] into one of the bedrooms in the flat;

    30.9. After he separated the students, the claimant advised BG that he was on camera and that he could arrest him for what he had just done. BG replied that he "did not give a fuck.";

    30.10. The other student wished to return to his room;

    30.11. BG was belligerent and the claimant restrained him against the corridor wall. One of the female students in the flat asked the claimant to remove BG, which he did. BG was not resident in the flat and was a trespasser;

    30.12. Once outside the flat, BG attempted to assault the claimant, who placed BG in a restraint lock on the floor. BG continued to make threats throughout the incident, but the claimant said that he saw little point getting into an argument with him because BG was so irate, he was unable to comprehend what was being said to him;

    30.13. The claimant's colleagues arrived and BG was released to them. BG threatened to have the claimant shot;

30.14. He denied that he ever held BG by the neck. He said contact was with BG's sternum as prescribed in conflict management techniques. As BG was leaving the flat, he was "petulant and stopped in front of [the claimant]" and went to strike him. The claimant defended himself and restrained BG in a safe manner, as he was concerned about 'body positional asphyxiation';

30.15. His actions were reasonable, necessary, appropriate and proportionate;

30.16. He addressed the subsequent disciplinary charge of failing to activate BWV on entering the flat by stating that the SOP on the use of BWV was vague.

31. The claimant said in paragraph 13 of his witness statement that the respondent's case is that Officers were trained in undertaking dynamic risk assessments and the use of de-escalation techniques where possible, but whilst the respondent's training manual states that such training should be carried out every 12 months, "this had never happened since my initial training in 2009". I have addressed the issues of the claimant's training elsewhere in these reasons. I note the careful wording of the claimant's statement. His complaint is of a lack of training, but he does not link the lack of training to any lack of expertise. I find that the tone of his evidence was that he was an expert who knew everything that needs to be known about security issues. That tone was reflected in his description of management at the respondent as "idiots"; the fact that Mr Robinson-Young was instructed to ask every respondent witness what experience they had in the security industry, and; the claimant's assertion that his line manager, Mr Coulthard, should have been used as an advisor or expert witness. I find that claimant demonstrated no evidence that a lack of training was at the root of the respondent's decision to instigate disciplinary proceedings against him or the reason why he was given a final written warning.

32. The student, BG, complained to the respondent about the claimant's conduct. It was initially alleged that the claimant had broken BG's arm and there was even an allegation that the claimant had broken BG's leg. Another Security Officer took BG to hospital and he was advised to contact the respondent to progress his complaint. The undisputed evidence was that he never returned to progress the complaint. The respondent was never advised of what, if any, injuries BG sustained.

33. The claimant prepared a report into the incident [72] and handed over his BWV footage to his supervisor, Graham White. In his report, the claimant gives an account of the incident. In that account he does not say exactly when he activated his BWV camera, but at the end of the report, he stated that "Throughout the incident I deployed my Body Worn Video which I handed to my supervisor as soon as possible."

34. On 14 December 2018, the claimant attended a meeting with Mr Knowles and Ian Freeland at which, he was suspended. The suspension was confirmed in an email of 14 January 2018 [71] in which it was explained that the suspension was because allegations of serious misconduct had been made against him:

34.1. The use of unnecessary force and potential violent physical behavior against a student, and;

34.2. Failure to comply with agreed working practices i.e. risk assessment procedures.

35. It was submitted by Mr Dunn that the claimant never challenged the fact of his suspension at the time of the disciplinary process or included it in the instances of alleged breach of the duty of trust and confidence. It was submitted that the suspension was reasonable. I find that Mr Dunn's submission that the claimant never challenged his suspension at the time to be correct. I therefore find that that he did not meet the standard of proof required to show that the suspension was a matter that was in his mind when he decided to resign.

36. In assessing the reasonableness of the respondent's actions in this case, I have used the guidance in **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR** 23. If a step taken by an employer in disciplinary proceedings was one that was open to a reasonable employer acting reasonably, that will suffice. I find that the decision to suspend the claimant on 14 December 2018 was within the band of reasonable responses because the matters that were alleged could potentially lead to summary dismissal, as evidenced by the fact that the claimant was given a final written warning as an alternative to dismissal.

37. The respondent appointed Michael Currer to carry out the interview into the disciplinary allegations against the claimant. Mr Currer's unchallenged evidence was that he was approached to conduct the investigation on 14 December and his appointment was confirmed on 21 December 2018, which was the last day before the University broke for the Christmas and New Year vacation. The claimant implies criticism of the respondent because he was not interviewed until 31 January 2019 and no reason was given for the delay. I find that there was no undue delay in the unchallenged circumstances set out in Mr Currer's evidence. On 22 January 2019, he interviewed a number of the claimant's colleagues who had been on duty on 12 December 2018. I find that given the claimant's length of service with the respondent, he could not have had any reasonable expectation that the investigation would proceed out of term time. I also find that the claimant's assertion that he had assumed that no action would follow the incident because of the alleged delay in investigation not to be reasonable.

38. I also make the finding above because of the contents of the claimant's statements that he submitted to Mr Currer before their meeting on 31 January 2019. The first statement, which is undated, [72] makes no mention that the claimant was in any way surprised at being summoned to a n investigatory meeting. Neither does it complain about delay. I also find that there was no unreasonable delay in the disciplinary process.

39. The claimant's second statement was dated 25 January 2019 [85-86] and made no mention that he had expected no disciplinary action to be forthcoming or that there had been undue delay in the process. Given that Mr Hall demonstrated an ability to voice an opinion at the time and during this hearing, I cannot find that he had the alleged delay in his mind at the time that he said he did. He did complain about a breach of his rights "under Article 2 of the Human Rights Act, as the university has

failed to supply a continual training programme for Control & Restraint as retention of techniques drops by 65% over 3 months."

40. I find that at the investigation interview on 31 January 2019 [87-91], the claimant was represented by a colleague, Keith Weightman. I find that the claimant never complained about any inaccuracy in the notes of any meeting he attended, as he was given (and took) the opportunity to confirm and amend notes of meetings before they were finalised. He never complained about the standard of representation he received from Mr Weightman. I therefore find that the notes of all the meetings attended by the claimant can be accepted as an accurate non-verbatim record of those meetings.

41. On 31 January 2019, Mr Currer was investigating two matters:

    41.1. The alleged use of unnecessary force and potential violent physical behaviour against a student (BG), and;

    41.2. Failure to comply with agreed working practices (i.e. risk assessment procedures).

42. The claimant gave an account of how he came to be at the student accommodation, how he saw BG and the female student and how he separated BG and the male student whom BG had attacked. Mr Hall was asked if BG had calmed down after he had been placed in a restraint hold. He confirmed that he had. In answer to a question about why the situation had become inflamed again, the claimant said that the student who was the victim of the attack wanted to get to his room and had to pass the clamant and BG. One of the female residents of the flat said that she wanted BG removing from the flat. BG started to leave, but stopped short of the door and the claimant "shoved him out."

43. Once outside, BG raised his hands to the claimant, who placed him in a restraint hold. His representative said that the claimant "is not just trained to carry out control and restraint, but is an accredited instructor and also a 5th Dan in judo." The claimant said he had switched on his BWV "before he entered the door." He then clarified his statement by saying that he would only switch on his BWV if there was an issue over someone being harmed.

44. The claimant approved the notes of the meeting on 5 February and chased an outcome on 21 February. Mr Currer prepared an investigation report dated 6 March 2019 [92-95]. The Findings of the report [94-95] were:

    44.1. Without BWV footage, no conclusion could be reached as to whether the claimant should have intervened without backup (a breach of Security Patrols Risk Assessment;

    44.2. The BWV was not switched on early enough and this hindered the gathering of evidence;

    44.3. There was a lack of evidence as to whether excessive force was used.

45. The Conclusions and Recommendations part of the report [95] stated:

45.1. The claimant's dynamic risk assessment of the situation should be accepted in the absence of better BWV evidence;

45.2. Consideration should be given to taking further action against the claimant on the basis of his lack of intervention in ensuring his BWV was switched on earlier, and;

45.3. Further action should be considered for failure to use de-escalation techniques as per the respondent's own policy.

46. The Report was sent to the claimant in an email dated 13 March 2019 [96] from the respondent's HR department together with supporting documents and relevant procedures. The claimant never disputed that he had received all these, so I find that he did. For a professional HR advisor, the email was not drafted very clearly. Mr Currer had recommended that disciplinary matters be put to the claimant that were materially different to those he had been asked to investigate. The email of 13 March did not set out exactly what allegations the claimant was to face at a disciplinary hearing on 22 March 2019, but did refer to the report. The claimant did not complain about this fact, so I find it not to be relevant to the issues I have to determine.

47. The claimant was told that his disciplinary hearing would be chaired by his manager, Shed Coulthard. He was warned that if the case was proven against him, and was deemed to constitute gross misconduct, he may be dismissed. The claimant's response was an email dated 14 March 2019 [98], recommending the HR professional to buy a book about physical intervention by the person who had trained the claimant and Mr Coulthard.

48. On 15 March 2019, the claimant submitted a grievance against Mr Coulthard, John Knowles, Ian Freeland and Graham White, who were all managers in the Security Team. Mr Coulthard was the senior manager. The claimant's first comment was that he could not believe Mr Coulthard was going to chair his disciplinary hearing (although he had not said anything about this in his email of 14 March).

49. I think it is important to track the nature and extent of the grievance filed. The claimant said:

49.1. Messrs Coulthard and Knowles had victimised him;

49.2. He did not believe that they had forgotten the issue of the previous grievances he had raised against them and had been waiting for their chance to see him dismissed;

49.3. Mr Coulthard should not chair his disciplinary hearing. He was not impartial;

49.4. "They" (from which I can only find that the claimant meant Messrs Coulthard and Knowles) had failed to tell Mr Currer that the police were involved. This had been omitted from Mr Currer's report;

49.5. It had never been clarified whether BG's arm and/or leg had been broken;

49.6. None of the students in the flat had been interviewed;

49.7. “They” (again, I find this to mean Messrs Coulthard and Knowles) had jumped on the situation and “verifies the point I made in my supporting statement that the University rewards bad behavior.”;

49.8. “They” (Coulthard and Knowles) had failed to provide refresher training in Control & Restraint and Conflict Management;

49.9. “They” (Coulthard and Knowles) had failed to provide suitable and sufficient risk assessments for Control & Restraint and Conflict Management. There should be a Manual Handling Risk Assessment and Risk Assessment for Operational Activity of Physical Restraint, which would state the roles and responsibilities of management “all the way up to director level.”

49.10. They (Coulthard and Knowles) had not formulated a policy for the implementation and use of control and restraint.

49.11. There had been a failure to oversee the keeping of training records.

49.12. All the above were management competency issues;

49.13. Mr Freeland had been a party to the victimisation by instructing Mr White to send the claimant home [on 12 December 2018] when he was quite happy to finish his shift. He believed this was the start of the process of his suspension. He compared his case to that of another officer on 11 February 2019 and said that he had been treated differently;

49.14. The respondent regularly used officers in the CCTV control room who were unlicensed for CCTV work, which “would be against the Data Protection Act”;

49.15. If Mr White had been concerned about the claimant’s welfare, he would have made sure he had been escorted home on 12 December;

49.16. Mr White had said that all officers involved had made statements, but Dave Goldsmith had not been asked;

49.17. Mr White had not entered details of the incident on 12 December in the “occurrence book” or Daily Situation Report, which was against operational procedures and could lead to accusations of perverting the course of justice;

49.18. Mr White’s actions reinforce his claim of victimization;

49.19. There was “some form of connivance amongst the four people he had raised grievances against.

50. The HR professional accessed the claimant’s training record. No witness referred to it in evidence in chief or was asked about it in cross examination. I can therefore not

make any findings about what it might disclose about the training the claimant may, or may not have received regarding the aspects of his duties that were brought into question on 12 December 2018.

51. The bundle contained correspondence between the HR professional and Mr Coulthard about the claimant's training: he emailed her on 18 March with a copy of the respondent's Risk Assessment – Patrolling Policy and advised that there was no stand-alone policy on physical intervention. He said all officers were trained in it as part of their SIA qualification and that the claimant is a fully accredited physical intervention instructor and should have a greater insight into its use than other officers. That statement was never challenged by the claimant and I therefore find it to be accurate. The risk assessment he had attached dealt with when physical intervention should and should not be used.

52. The risk assessment was in the bundle at pages 105 to 109. There was an exchange of emails between the claimant and Mr Coulthard which I find is irrelevant to the matters I have to determine in this case. I also find the letter dated 20 March 2019 [116a-116b] that the claimant's wife wrote to the vice-chancellor of the respondent to be irrelevant, other than noting that she accuses the respondent's HR department of victimising the claimant in addition to the four managers that the claimant had already accused of victimisation.

53. In the light of the claimant's grievance, Mr Coulthard was removed as the chair of the disciplinary hearing and replaced by David Watt. Mr Watt was also assigned investigate and to chair the hearing into the claimant's grievance. The revised notes of the meeting were not disputed [132-136].

54. I found Mr Watt's evidence in chief on the grievance procedure to be lacking in detail and I was referred to no documents that had been created as part of his grievance investigation. To be fair, the claimant's evidence in chief on the grievance process was even briefer.

55. Given the paucity of evidence in chief, I base my findings on the written record of the meeting. I find that it would not have been clear to anyone reading the claimant's grievance what connected the complaints I have set out in paragraph 49 above to the disciplinary procedure that was in motion.

56. The claimant said in oral evidence that he had filed two grievances in 2017. This was the first time that he appears to have said this. The late disclosure of a potentially vital piece of information reduces my perception of the claimant's credibility.

57. The claimant said he through Messrs Coulthard and Knowles were victimising him because he had put in a grievance against Mr Coulthard two years previously. Nothing had been done. The victimisation claim was his defence to the disciplinary allegation about control and restraint. The claimant confirmed that he had received the outcome of the 2017 grievance whilst away on holiday and had not appealed its outcome. He was asked if he had contacted HR to see if he could put in an appeal out of time and responded that he had been in that situation before. I find that to be an evasive answer that is consistent with the way the claimant gave evidence in this hearing.

58. At the hearing, Mr Watt attempted to clarify what the claimant's case was about and asked for examples. I find that the examples given were brief, lacked detail, lacked any kind of connection to the grievance letter he had submitted and would not have given any reasonable manager enough to come to a conclusion that the four managers about whom the claimant had complained had conspired to victimise him. I would characterise the claimant's complaints as expressed in the meeting to be a series of fairly minor gripes that had nothing to do with the substance of the disciplinary matters he was facing. I further find that there was nothing in the grievance that would give any reasonable manager enough to even come close to deciding that because of the 2017 grievance that the claimant had not even tried to appeal, he was targeted for dismissal.

59. I find it improbable that Mr Coulthard and others would wait for two years to carry out their plan. The claimant said that he had no reason to believe that Messr's Currer, Watt or Garfield (who heard the appeal) were involved in the conspiracy, which makes one wonder what the conspirators could have hoped to achieve, as none of them made the decision to investigate the incident, none of them appointed the investigating officer, grievance and disciplinary chair or appeals officer. None of them gave evidence in either procedure.

60. The claimant's position is immensely weakened by the fact that one of his complaints about the disciplinary matter was that Mr Coulthard should have been asked to give what would have been expert evidence on the security management issues raised by the incident on 18 December. He felt that the matter should have been decided "behind closed doors" at a meeting that he wouldn't have attended and at which he expected Mr Coulthard to give an expert opinion that would exonerate him. I asked him to clarify his position and he admitted it was "paradoxical". I have to go further and describe it as implausible.

61. I should also note that I find that Mr White's compassionate act of sending the claimant home after the incident could not possibly be considered as a detriment.

62. I find that Mr Watt was credible when he said that he did not decide what to do about the grievance until after he had heard the disciplinary matter. I make that finding because he was consistent in his oral evidence and did not vary his account when asked about the point a number of times by Mr Robinson-Young. I also find that it was not outside the band of reasonable responses for Mr Watt to hear the grievance and disciplinary hearings. Nor do I find that it was outside the range of responses to hold both on the same day. There is nothing in legislation, the ACAS Code of Conduct or case law that suggest what the respondent did was unlawful. I find that there was no breach of the duty of trust and confidence in the way that the disciplinary and grievance hearings were carried out.

63. Mr Watt went on to chair the disciplinary hearing on the same date as the grievance. I find the revised notes of the disciplinary hearing on 25 March 2019 [143 – 148] to be an accurate non-verbatim record of the hearing because the claimant had the opportunity to amend the original notes and raised no objection as to the accuracy of any of the notes in this hearing.

64. The hearing viewed four clips of BWV evidence. I note that this was the first time that the claimant had seen the video footage he had taken on his BWV, but he made

no issue of it at the time and did not raise it as part of his reason for resignation, so I will say no more about that fact. The claimant did, however, comment at the disciplinary hearing that he thought he had turned his video on before the point at which the footage started. From Mr Robinson-Young's cross examination of Mr Currer, it became apparent that the claimant's video camera had been turned on after he had entered the student flat and seen BG and the other student fighting and after he had separated them. The first video images were of BG approaching the claimant and the claimant raising his hands.

65. I found Mr Currer's recollection of the video footage to be a little vague. Mr Watt gave much more fluent and cogent evidence about what was in the video footage. I find his evidence about what he saw on the video at the hearing to be credible. The issue in this case about the video footage is not about what it contained, but how it was interpreted. I prefer Mr Watt's evidence on the interpretation of the video because his evidence was internally consistent and he remained consistent under intense cross-examination. His written and oral evidence boiled down to two conclusions:

    65.1. The claimant had not switched his BWV on early enough in the incident. Specifically, he should have switched it on before he entered the flat, and;

    65.2. After he had separated the fighting students, the incident had de-escalated. They were separated and BG was on his way out of the flat. The claimant had radioed for help, which was minutes away, and need not have engaged with BG until colleagues arrived. Instead, he shoved BG out of the flat, after he stopped walking out, and then restrained him.

66. The claimant's case is that it was one incident that was highly charged and that when judged as a whole, he did nothing wrong. In fact, he was praised for the way he had separated the two students when he entered the flat. I disagree with the claimant. I do not agree with Mr Robinson-Young's submission that this was a single incident and that BG was an angry drunk who would be especially difficult to deal with. As I have already indicated, I find the claimant to be an experienced and trained security officer and whilst most of society would find the incident that the claimant found on that night to be intimidating, I find that it was not particularly unusual for a person of the claimant's experience and training. He agreed that BG calmed down after he had been separated from the other male student. I find that the incident on 12 December 2018 can be split into three distinct elements:

    66.1. **Meeting BG and the female student outside the flat**. No one suggested that this encounter should have required him to turn on his BWV;

    66.2. **Hearing a "commotion", entering the flat and splitting the two fighting students**. Much was made of whether he had heard a commotion or an altercation. I find the distinction irrelevant, as whatever the claimant heard, he decided to enter the flat alone, not knowing what was on the other side of the door. It is therefore a simple matter of logic to find that if an experienced security officer was

prompted to enter a flat, it was because he was concerned that people were at risk inside. It therefore follows that he should have switched his BWV on before he entered. The first reason he should have used BWV on entry is that he may have entered on a scene of serious violence that required immediate action. The BWV would have been vital evidence in any subsequent criminal investigation or any enquiry into disciplinary consequences for himself or any of the students involved (particularly BG in this case). The claimant's account that he did not use it because of concerns about data protection of the inhabitants of the flat is not credible because at the point before he had seen the footage, he believed he had switched the video on. He would not have thought he had switched it on if he had not believed at the time he says he had thought he had switched the camera on that the use of BWV was justified. I find that he has manufactured reasons for not switching on the video before he did to bolster his case, and;

66.3. **Removing BG from the flat**. I find that Mr Watt was reasonable in concluding that the situation had calmed down and that the claimant's actions in shoving BG out of the door re-ignited the situation. I find that Mr Watt's conclusion that the claimant had no need to physically engage with BG again by shoving him out of the door and putting him in restraint was a failure to de-escalate was reasonable in all the circumstances. Help was on its way (and arrived within minutes), BG was leaving the flat of his own volition and the claimant did not need to re-engage with him.

67. I find that there was no criticism of the claimant's actions (other than the failure to switch on his BWV earlier) in phases one and two of the incident. I find that was a reasonable conclusion to draw. I find that Mr Watt decided that the claimant separated the fighting students in an appropriate manner, but having done so, he failed to de-escalate the situation.

68. I find that the claimant cannot credibly say that the failure of the respondent to produce documented training records about the matters that he has raised in this tribunal exonerate him from his responsibility for the two disciplinary matters that he was found to have committed. It is possible that another chair on another day may have exonerated the claimant entirely, but I find that Mr Watt's decision was within the band of reasonable responses. His unchallenged evidence was that the matters proven against the claimant warranted dismissal, but that he commuted the sanction to Final Written Warning. That fact alone fatally undermines the claimant's claim that there was conspiracy against him amongst senior managers in his team to have him dismissed.

69. I find the impact of the alleged failures to follow its own procedures on the part of the respondent to be a mixture of issues that are irrelevant to the disciplinary process (for example, the allegation that unlicensed officers were staffing the CCTV cameras) and matters that were made otiose by the claimant's own experience, training and knowledge.

70. I find the claimant's reason for not appealing the disciplinary decision not to be reasonable. He said he did not even try because he knew what the response would

be. His claim before this Tribunal is that the respondent acted so badly that it destroyed the implied term of trust and confidence. I find that any reasonable employee would have at least tried to overturn Mr Watt's decision on appeal. In making that finding, I was mindful of the fact that the claimant appealed Mr Watt's grievance decision.

71. Mr Watt wrote to the claimant on 28 March 2019 [149-150] with the outcome of the disciplinary hearing. Whilst I acknowledge that Mr Hall does not agree with Mr Watt's conclusions, I do not find that the conclusions were outside the band of reasonable responses. It is not my task to re-hear the disciplinary process and re-make the decision. The time limit for an appeal was 10 working days from the date of the latter, which would have expired on 10 April 2019.

72. He appealed the grievance outcome (which had been dated 5 April 2019) on 15 April 2019 [158-159] and mentioned that he had not appealed previous grievance outcomes because they had been sent whilst he was on holiday and the time limit had expired before he had returned. He did not say, however, that he had submitted an appeal out of time and that it had been refused on the basis that it was submitted late. He only said that "past experience told me I would be wasting my time." That could mean any number of things.

73. I find the appeal against the grievance outcome to be nothing of the sort. It was a challenge to the disciplinary process. It was never put as part of the claimant's case that the letter of 15 April 2019 was, in fact a disciplinary appeal, or should have been treated as such by the respondent, so I have not considered that point. I find that the grievance appeal contained very little indeed that could reasonably have been considered an appeal against Mr Watt's findings.

74. The claimant's grievance appeal was chaired by Iain Garfield, director of Estates and Facilities for the respondent on 3 May 2019. The claimant was represented again by Mr Weightman. The claimant's submissions to Mr Garfield were a series of new allegations about procedural, regulatory and health & safety matters. They appear to me to be allegations of procedural health & safety failings on the part of the respondent, rather than allegations that he had been singled out for detrimental treatment because he had raised a grievance against Mr Coulthard in 2017. When specifically asked, the claimant said he found it difficult to provide examples of victimisation [166].

75. Mr Weightman said that Mr Hall did not want to return to his job. The claimant added that he could not work "for those lot" (meaning the management team of the security department). He would not consider mediation. Mr Weightman suggested redeployment may be an option. I find this statement evidences the claimant's dissatisfaction with the management team in the security department, but does not evidence a complete breakdown of trust and confidence in the respondent as a whole, as his representative was still indicating that the claimant would look at an offer of redeployment in a different department.

76. Mr Garfield wrote to the claimant on 7 May 2019 [168-170] with the outcome of the grievance appeal. Mr Garfield noted that the appeal had been on the grounds of new information and an unreasonable outcome to the hearing at first instance. Mr

Garfield noted that there was no new information produced. I find that to be a reasonable conclusion to draw from the documents and evidence I saw and heard.

77. Mr Garfield also noted that the claimant had been unable to identify any specific tangible evidence of victimisation towards himself by the four people he had raised a grievance against. Again, I find that to be a reasonable conclusion to draw from the documents and evidence I saw and heard. Mr Garfield set out his detailed reasons for rejecting the appeal in seven paragraphs [169-170] that I do not need to reproduce here. I find each of the reasons to be proportionate and reasonable on the evidence that the claimant produced to Mr Watt and Mr Garfield.

78. I have no doubt that the claimant feels a deep sense of injustice about the way he was treated by the respondent from 2017 until his resignation, and there are some grounds for his feeling the way that he does (for example, the lack of training in accordance with the respondent's own policies). However, I have no hesitation in finding that the manner in which the respondent dealt with the claimant's 2019 grievance and appeal did not constitute a fundamental breach of the duty and trust of confidence of itself. I also find that the way in which the respondent dealt with the grievance and appeal was *any* form of breach of the duty that could be taken with any other alleged breaches to form a fundamental breach.

79. The claimant attended a Welfare Meeting on 27 June 2019 that followed an occupational health assessment. At that point, he had been absent from work since April 2019 due to ill health and had a GP note certifying his absence to 27 June 2019. The claimant told the meeting that his confidence in the management of the security team was "through the floor". The response of the Head of Estates Customer Service was to tell the claimant that if he was return to work, he had to find a way of working with management. His response was that he didn't think he could return to work and had enquired about early retirement. Later in the meeting, he added that he had decided "a long time ago" that he was going to leave. He did not wish to return. He did not think mediation would work. The respondent agreed to chase the relevant pension and holiday pay figures if the claimant wished to resign.

80. He resigned by letter sent by email dated 15 July 2019 [182] with immediate effect. He said he had lost complete trust and confidence [in] the university management and believed that it had been both unfair and unreasonable in dealing with both his disciplinary and grievance. The respondent did not receive it immediately, but confirmed the claimant's effective date of termination as 15 July 2019. I make a finding that this was his effective date of termination.

81. A pension quotation was sent to the claimant on 18 July 2019 [185].

82. I summarise my findings of fact as follows:

    82.1. The claimant was an experienced security officer who has been trained to a high standard;

    82.2. He was not given the refresher training that the respondent's policies and procedures required;

82.3. That failure is a breach of contract, but not a fundamental breach of itself, given that the claimant went on additional training to a higher level than that which he needed in 2017 with the knowledge and approval of his line managers. His evidence was that he was fully confident in his own abilities;

82.4. The claimant's grievance in 2017 against Mr Coulthard was finalised and resolved. It may not have been to the claimant's satisfaction, but he did not appeal. His reason for not doing so was not reasonable;

82.5. There was no evidence presented to the respondent in the 2018/19 disciplinary process or grievance process that the claimant had been victimised by any of the managers that he had complained about;

82.6. There was no evidence presented in this hearing that came anywhere near to meeting the required standard of proof to show that the claimant had been victimised or even suffered a detriment because he had submitted a grievance in 2017;

82.7. The claimant's grievance was adequately investigated and the conclusions that Messrs Watt and Garfield came to were within the band of reasonable responses. The claimant's allegations were inconsistent, vague and showed no causal link between the allegations he made and their link to the 2017 grievance;

82.8. There were some things in the disciplinary investigation that might have been done differently. Examples would be the failure to interview student witnesses and/or the failure to interview Mr Goldsmith at the time, but none of these matters would have had any material effect on the outcome of the disciplinary proceedings, as they would have had little to add to the basic issues of whether the claimant had switched his BWV on early enough in the incident and whether he had failed to de-escalate the situation. His BWV evidence was enough to pinpoint the moment when it had been switched on and was agreed. The respondent had no issue with how the claimant had separated the two fighting students. It was clear that the issue of de-escalation happened as BG was ejected from the flat, which did not appear to have been witnessed by any of the other students apart from BG (who it was agreed was intoxicated) or any of the claimant's colleagues. Again, the BWV evidence would have been sufficient;

82.9. The respondent's decision to impose a final written warning as a sanction was within the band of reasonable responses, as was its decision to find that the claimant had committed the disciplinary offences. Nothing in the claimant's complaints about training inadequacies impacts the reasonableness of the respondent's actions to a degree that makes them unreasonable;

82.10. The claimant's focus during the disciplinary process was whether he had used legitimate force to defend himself. That was irrelevant to the issue of whether he switched on his BWV in time. I also find it was

irrelevant to the issue of de-escalation. I find that the situation had calmed down until the claimant shoved BG out of the flat. It was this action that caused BG to react and approach the claimant. The failure to de-escalate happened before the claimant restrained BG. No charge was put at the disciplinary hearing that arose from the act of restraint;

82.11. I am somewhat surprised that the respondent did not take any action against BG, but note that whilst the police declined to take any allegations against the claimant any further, no evidence was given by the claimant that I can recall that indicated that the police had decided to take any proceedings against BG for the threat to kill matter that the claimant complained of. I do not find that the failure of the respondent to take action against BG to be any form of breach of the duty of trust and confidence, and;

82.12. I find that there was no fundamental breach of the duty of trust and confidence implied into the claimant's contract of employment with the respondent arising from the disciplinary or grievance matters that were resolved in 2019.

Assessment and Conclusions

83. In the case of **Agoreyo v LB Lambeth [2017] EWHC 2019**, at §100, the Court highlighted that when a claimant contends that a respondent's actions constitute a breach of the implied term of mutual trust and confidence:

'This decision [in Gogay] was criticised by Hale LJ, with whom Peter Gibson and May LJJ agreed: having referred to the contractual obligation "not, without reasonable and proper cause, to conduct oneself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee", she said:

"[55] Did the authority's conduct in this case amount to a breach of this implied term? The test is a severe one. The conduct must be such as to destroy or seriously damage the relationship"

84. The **Malik** test is therefore appropriate. The burden lies on the claimant regarding both limbs. It is notable that the Court of Appeal referred to the test as being a 'severe one'.

85. I agree with Mr Dunn's submission about the grievance procedure that the case of **Blackburn Stores v Aldi [2013] ICR D37** is relevant. Richardson HHJ found [§25] that:

'In our judgment failure to adhere to a grievance procedure is capable of amounting to or contributing to such a breach. Whether in any particular case it does so is a matter for the Tribunal to assess. Breaches of grievance procedures come in all shapes and sizes. On the one hand, it is not uncommon for grievance procedures to lay down quite short timetables. The fact that such a timetable is not met will not necessarily contribute to, still less amount to, a breach of the term of trust and confidence. On the other hand, there may be a wholesale failure to

respond to a grievance. It is not difficult to see that such a breach may amount to or contribute to a breach of the implied term of trust and confidence. Where such an allegation is made, the Tribunal's task is to assess what occurred against the Malik test'

86. I make the following findings on the issues by applying my findings of fact and the law:

Unfair Dismissal

87. I find that the claimant resigned, but he did not meet the standard of proof to show that he terminated the contract under which he was employed (without notice) in circumstances in which he was entitled to terminate it without notice by reason of the respondent's conduct.
88. I find that the respondent did not unfairly and unreasonably issue the claimant with a final written warning.
89. I find that the respondent did not deal with the claimant's disciplinary procedure unfairly or unreasonably.
90. I find that the respondent did not deal with the claimant's grievance unreasonably.
91. I find that the respondent did not behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between it and the claimant.
92. I do not need to make findings on the issue numbered 3.2 to 23 above.

Breach of Contract

93. I find that the respondent did not breach the claimant's contract, making him eligible for notice pay.
94. Both of the claimant's claims fail.

Employment Judge Shore
12 November 2020