EMPLOYMENT TRIBUNALS

Claimant:	**Mr P Bamford**
Respondent:	**W M Morrisons Supermarkets plc**
Heard at:	**Birmingham**
On:	**13 & 14 January 2021 (and in chambers on 10 February 2021)**
Before:	**Employment Judge Flood**
Representation	
Claimant:	Mr Heard (Counsel)
Respondent:	Mr Holloway (Counsel)

JUDGMENT

The complaint against the respondent for constructive unfair dismissal is not well founded and is dismissed.

REASONS

The Complaints and preliminary matters

1. The claimant brought a complaint of unfair dismissal on 1 August 2019, following early conciliation from 2 July to 1 August 2019. The claim was due to be heard on 18 & 19 June 2020 but was converted to a case management hearing by telephone as a result of the ongoing Covid 19 Pandemic. Employment Judge Miller listed the claim for a hearing and discussed and agreed a List of Issues with the parties. The claim came before me today.

2. The parties indicated at the outset that they had narrowed the issues further in that the claimant was now only claiming that he had been constructively dismissed (and not expressly dismissed in the alternative) as it had been accepted that the legal effect of the reinstatement following a successful appeal was to cancel the express dismissal. I updated the list of issues accordingly.

3. I had before me an agreed Bundle of Documents (references to page numbers below are to pages in that bundle); a Chronology; Cast List; and List of Issues.

The parties also submitted CCTV footage of an incident involving the claimant which after several attempts was received and viewed. Mr Heard and Mr Holloway both sent in written submissions/skeleton arguments together with relevant authorities on the conclusion of the evidence.

4. Having concluded oral submissions at just after 1pm on the second day of the hearing, I decided it was in the interests of justice for the claim to be adjourned for a reserved decision. The parties applied for leave to and submitted additional submissions (primarily addressing matters relating to Polkey (below) and its impact on any award) which I received by 18 January 2021. I considered the claim in chambers on 10 February 2021.

The Issues

5. Constructive unfair dismissal

5.1. The Claimant relies on the following matters, which he contends amount to a breach of contract by the Respondent:

5.1.1. The manner in which the disciplinary investigation was undertaken by Sam Knight, including: the delays in the process, ambushing the Claimant in the investigation meeting and bias in how the witnesses were questioned;

5.1.2. How the disciplinary allegations were put to the Claimant, in that they were vague such that it was unclear which of the many allegations made he was facing and that they included an allegation involving Jacqui Cooper, despite her not making a complaint and having referred to banter with the Claimant;

5.1.3. The disciplining officer (Rob Evans) sought to railroad the Claimant, giving him little time to prepare for the disciplinary hearing;

5.1.4. Immediately before the disciplinary hearing Rob Evans spoke to Ed Herbert (whose complaint had led to the allegations against the Claimant) about the incident in question;

5.1.5. The manner in which Rob Evans carried out the disciplinary hearing: shutting down the Claimant and not permitting him to refer to certain evidence, silencing his representative and overlooking clear discrepancies in the evidence against the Claimant;

5.1.6. Rob Evans had ulterior motives for wanting to dismiss the Claimant and had predetermined the decision;

5.1.7. In coming to his decision, Rob Evans failed to take account of the Claimant's contrition, suggestion of mediation, or his 23 years' service and clean record;

5.1.8. The Respondent failed to adhere to its disciplinary procedure;

5.1.9. At no stage until the appeal did the Respondent take account of the Respondent's mental health issues;

5.1.10. Despite the Claimant lodging his appeal on 18 May 2019, the appeal outcome was not confirmed until 31 July 2019 almost 11 weeks delay).

5.2. Did the act(s) above singularly or cumulatively, amount to a breach of the implied term of trust and confidence?

5.3. Did these events happen or exist as alleged or at all?

5.4. If so, did the Respondent commit a repudiatory breach of contract going to the root of the employment contract?

5.5. If so, did the Claimant affirm or waive any such breaches?

5.6. If not, did the Claimant resign, in response to a repudiatory breach of contract?

5.7. Did the Claimant resign having obtained new employment, prior to the appeal process being concluded?

5.8. If the Claimant was dismissed, was such a dismissal fair in all the circumstances?

6. Remedy

6.1. If the Respondent is found to have unfairly dismissed the Claimant what compensation should be awarded?

6.2. If the Respondent is found to have unfairly dismissed the Claimant should any award made by the Tribunal be reduced for contributory fault?

6.3. If the Respondent is found to have unfairly dismissed the Claimant on procedural grounds, should any award made by the Tribunal be reduced in light of the fact that any such procedural flaws would not have made any difference to the eventual outcome and that the Claimant, would, therefore, have been dismissed in any event?

6.4. If the Respondent is found to have unfairly dismissed the Claimant, should any financial award be reduced by virtue of the Claimant's failure to mitigate his loss?

Findings of Fact

7. The claimant attended to give evidence and Mr R Evans, Trading Manager at and disciplinary manager, ("RE") and Ms M Hines, Store Manager at and appeal manager, ("MH") gave evidence on behalf of the respondent. I considered the evidence given in written statements and oral evidence given in cross examination, re-examination and in answer to questions from the Tribunal. I considered the ET1 and the ET3 together with relevant numbered documents referred to below that were pointed out to me in the Bundle of Documents. I also viewed and the witnesses had access to CCTV footage of the incident involving the claimant on 19 April 2019. Where there were disputes of fact, I determined these on the balance of probabilities.

8. I made the following findings of fact:

8.1. The claimant started work with the respondent supermarket chain on 1 May 1996. He was employed as Grocery Manager at its Rubery store. At times he was the duty manager responsible for the whole store and for the safety of (at times) up to 40-50 staff and all customers. The claimant's contract of employment was not in the bundle of documents (standard contracts were included but I was not referred to these). The respondent operated on its intranet site, Morori, numerous policies and procedures which applied to the claimant's employment.

8.2. The disciplinary policy was at pages 53-59, identified at 54-56 examples of gross misconduct, which included:

"*Fighting, physical assault, verbal or physical abuse, violent, threatening behaviour or unwanted conduct*; and

"*Serious breach of the Morrison's Respect in the Workplace policy including but not limited to harassment, discrimination, bullying or victimisation towards colleagues, customers, visitors, contractors, suppliers or any other person on the grounds of difference on Company premises or at a social or training event"*; and

"*Rude, inappropriate or offensive behaviour or comments towards a colleague, customer, contractor, supplier or any other person.*"

8.3. At page 56-57, the policy deals with suspension as follows:

"*It may be appropriate to suspend a colleague before, during or after an investigation, particularly in cases of gross misconduct."* ; and

"Suspension should only be taken where there is reasonably good cause, taking into account the risk that keeping the colleague in the business would have on:

- *Themselves*
- *Other colleagues*
- *The company*
- *The investigation"*

8.4. Under the heading Investigation (page 57) it states:

"*For serious matters, an investigation will be conducted as soon as possible to establish the facts and evidence and to confirm whether a there is a case to answer, and therefore if a disciplinary hearing is appropriate."*; and

"*Colleagues do not require notice to attend an investigatory meeting, nor do they need to be invited in writing, given documentation beforehand or have the right to have a representative present."* and

"*Once the investigation is complete, an investigation report should be completed and passed, along with all the facts to the disciplinary manager should any further action be deemed necessary."*

And the section relating to outcomes of investigation, includes the following:

- *"Formal action — if a disciplinary hearing is required*
    - *Colleagues will receive an invitation with copies of all documentation, detailing the allegation and possible outcome, giving at least 24 hours' notice to find representation and attend the hearing."*

Under the section headed "The allegation" on this page, it includes:

"The allegation should be sufficiently specific and include:

• What has the colleague done wrong?"

8.5. The respondent's Appeals policy was at pages 60-63 and at page 61 under the heading, "What should I expect from my Appeals Manager" provides:

"*They will respond to you with an outcome after your appeal within a reasonable timeframe; if for whatever reason this is prolonged, they will keep in close contact*"

8.6. The Respect in the Workplace Policy was at pages 64-68 and states at 64:

"*We do not tolerate any form of discrimination, victimisation, bullying or harassment"* giving examples of bullying and harassment within the policy at page 67 including:

"Unwanted physical conduct";

"Unwelcome remarks"; and

"Personal insults."

The policy has a section at page 67 entitled "Workplace banter – Is it acceptable?" which states:

"*Banter is described as the playful and friendly exchange of teasing remarks; conversation that is funny and not serious and talking to someone in a friendly and humorous way*" and

"*However, we want you to remember that one person's lighthearted and humorous banter is another person's offensive and unacceptable behaviour. While comments may never had been intended to cause upset, this will not be accepted as a defence against an allegation of bullying and harassment.*

In the majority of bullying and harassment cases the recipient of the comments or actions will determine whether behaviour has taken place."

It goes on to state at page 68 that managers have responsibilities to "*Lead by example*" and "*be aware of what's happening around [them] and listen to... colleague's feedback and respond quickly where required*".

The policy states further that:

"*Following a full and thorough investigation, where allegations of bullying and harassment are found to be true. We will take disciplinary action, up to and including dismissal with those colleagues found to be involved*".

8.7. All employees are provided with online training on this policy and at page 77 I was shown a document which suggested (and which the claimant accepted as correct) that the claimant had received training on "Leading Respect in the Workplace" on 24 August 2018.

8.8. The claimant had been issued with a final written warning for conduct on 18 December 2018 relating to a failure to complete documentation and stated that any further instances of misconduct within 12 months may result in dismissal.

Incident on 19 April 2019

8.9. On that evening the claimant was coming to the end of his shift as were other employees on site. The CCTV footage shows that the claimant approached from the shop floor towards a checkout. Mr M Pearson (Customer Assistant) ("MP") was standing behind the checkout and Mr E Herbert (Customer Assistant) ("EH) was standing opposite him next to the checkout facing him and they were having a conversation. The claimant came through the checkout and passed behind EH. As he was doing so, he put his right arm under the right armpit of EH and lifted his left arm around EH's neck and then pushed EH down to his left on to the checkout area in front of them both. There is some dispute of the level of pressure used by the claimant with him suggested this was putting his arms loosely around EH's shoulders but the respondent describing the claimant as putting EH in a headlock. The claimant acknowledged that he put EH "*in a hold of sorts*". It is clear from viewing the CCTV footage, that there was unwanted physical contact from the claimant to EH.

8.10. EH reacted by pushing the claimant off and telling him to get off and the claimant let EH go. The claimant and EH proceeded to have a conversation and the claimant put his right arm on EH's shoulder and brings EH to a loose embrace with EH putting his arm briefly around the claimant's back. The conversation continued and the claimant and EH walked away from the checkout together. Later the same evening the claimant was with EH and other employees and a trolley was pushed and hit another employee, Jacqui Cooper, in the groin area. The claimant is alleged to have said "*how's your fanny*". The claimant shortly after apologised to the group of employees. The claimant denied making this

comment to the claimant stating in evidence that he had "*no memory of making the comment and I would not make a comment like that, I share banter with her but I would never say anything sexual like that. I would never make that sort of comment to Jacqui".* Although not necessary to make a finding of fact as to what happened here, on the balance of probabilities, I find that a comment of this nature was made.

8.11. The following day EH be mailed the respondent's people manager, Ms K Hancocks ("KH") raising complaints (shown at page 69). EH alleged that the claimant had:

8.11.1. hit him in the testicles in the warehouse and at a party;

8.11.2. pretended to tackle him which had scared him;

8.11.3. on 19 January 2019 called him "fucking thick" after a misunderstood telephone conversation and threw a packet of chewing gum at him;

8.11.4. said to him "Did you not appreciate being touched in the balls", to which EH replied, "No Paul, not really";

8.11.5. some time at the end of March said to him "Oh Ed, you do have a lovely arse";

8.11.6. on 20 April 2019 placed him in a "choke hold".

The claimant had not seen a copy of this e mail until the Bundle of Documents was prepared.

8.12. On 24 April 2019 EH forwarded to KH an e mail he had been sent from MP that day (page 70) in which MP described what he had seen of the incident on 19 January stating the claimant:

"*went up and grabbed Ed's neck from the behind of Ed's back; where he was quite rough and forceful on Ed"* and further stating*, "the way he treated Ed was completely unacceptable, as I was left dumbfounded when this happened".*

Investigation

8.13. The respondent's Market Street Manager, Mr S Knight ("SK"), commenced an investigation. He conducted an interview with H Winters (Customer Assistant - Checkout) on 27 April 2019 (meeting notes pages 71-72), who was asked about the incident described at para 8.11.4 above. She is noted as saying she could see something happening and "*it didn't look very nice*" and that EH was "*upset*" but did not see any physical contact.

8.14. SK interviewed MP on 1 May 2019 (meeting notes 73-77). The notes record that MP broadly repeated his account of events set out in his email dated 24 April 2019 and that EH had said "*get off me*" to the claimant which

was "*forceful*" and "*loud and clear*". MP was asked by SK how this made him feel and he answered that it was "*disgraceful from an employee point of view I don't know what was in his head that that was acceptable. It was shocking really*". SK asked MP if he knew how EH felt after the incident and MP said EH was "*angry*" and he had "*kicked off in the car on the way home*". He was asked if he had seen any communication or banter between the claimant and EH before the incident and he said he had not. He was asked about an apology in the cash office and said "*it was not very sincere he was saying he was in a silly mood*". MP said that EH had "*burst into tears*" and said he was "*not getting respect in the workplace*". He was asked about the incident at the party. MP said that EH told him about it, but he did not see anything.

8.15. On 1 May 2019, SK interviewed EH (meeting notes 78-87). He was asked to give his account of the incident on 19 April 2019. He told SK that he had not seen the claimant during his shift, and nothing had been said between him and the claimant that he was "*not the type of person who joins in with banter*". He said he was by the tills when he felt "*one arm above my head and his arm round my neck; he was holding my wrist*". EH said he had elbowed the claimant off and said "*don't touch me*". He explained the claimant asked what was wrong, to which EH said he did not want to be touched. EH said that as they walked away together the claimant had said that next time it would be a "double" to which EH asked whether he meant a "double chokehold" to which the claimant aid yes. He was asked whether any colleagues saw the incident and the claimant said he did not know at the time but found out later.

8.16. EH went on to say that later in the shift, as he was going to the cash office with other team members, a trolley had bounced off MP's foot and into JC's groin and the claimant had shouted "*how's your fanny*". This was the first time this incident had been reported to the respondent. EH said that the claimant had apologised in the cash office saying he was in "*one of those moods*" but EH when asked by SK said he did not know who the apology was directed to and said nothing. EH said he then went to the cark park and became emotional and asked his colleagues if they had seen anything.

8.17. SK asked the claimant how he felt and it is noted EH confirmed he had "*burst into tears*", his "*anxiety was up and down*" and he did not feel "*comfortable or safe*". EH told SK that it was not the first time and "*it's already been dealt with before*". SK then asked EH about the other issues raised within his email on 20 April 2019. He was first asked about the incidents at paragraph 8.11.1 above. EH said these took place in the warehouse, at a party and on the shop floor, stating it as a "flick" which made him "*feel horrible*" and was his "*personal space*". EH went on to describe the incident at paragraph 8.11.3 above and said he "*had to shrug it off I felt disrespected. I've been called worse*". EH was asked about the party and gave his account of events and what he said happened after the party (incident at paragraph 8.11.4 above). EH was asked about discussing the incidents with MP in the car on the evening of 19 April 2019

and stated that he had "*sat in the car and cried*". SK asked EH about stating that JC "*dealt with it last happened and spoke to*" the claimant. EH responded by saying "*yes, I didn't want him to get into trouble I didn't want it formal. I thought [the claimant] had been spoken to as it had stopped, he was leaving me alone*". He went on to say that the incident on 19 April 2019 was "*one step too far*" and he "*needed to tell someone this time*". SK went on to ask EH "*you said you were intimidated by a manager*" and EH replied "*He is an inappropriate manager; he can't act and speak how he wants to*". SK asked "*you said you don't want to come to work*" and EH said "*yes because I don't want to see him*". When asked what outcome he wanted, EH confirmed he wanted "*it to stop and for him to be respectful to people, I do want something to teach him a lesson but I don't want him in trouble*".

8.18. SK interviewed JC (notes at pages 88-93) on 1 May 2019 who confirmed that she had not seen the incident involving EH and the claimant but had heard a "*squeak*" (page 89). SK asked about Mr Herbert's other allegation that the claimant had shouted "*how's your fanny"*, when a trolley knocked her. JC said "*A lot of [the claimant's] comments I just say oh shut up. I would ignore it, there was a comment made that wasn't PC and there was in the cash office. I've worked with him so long, it's healthy banter I ignore [the claimant], I don't take any notice It's just [the claimant]. It didn't cross my mind as I don't take offence*". JC said that in the cash office, she addressed the trolley incident and the claimant had apologised, saying he was in a "*funny mood*". JC said she felt the claimant was apologising for the comments in the corridor and she felt it was genuine (when asked by SK how sincere the apology was). When asked how she felt about the comments, she said she was "*not aggrieved or offended. In retrospect I think they were embarrassed, and I think they must have thought the comments crossed the line*".

8.19. She was asked about her conversation with EH in the car park at the end of the shift and said that EH was "*shaking and upset* ". JC explained that she had spoken to the claimant previously about a comment and told him that "*some people are more sensitive and to be careful*". SK asked her about the incident described at paragraph 8.11.3 above saying that EH had told her after a telephone conversation that the claimant had called him "thick" and he was not happy and she did have a word with the claimant after it. When asked about the party incident, JC said she had not seen anything but that EH had told her the claimant had touched him. She was asked again about her saying something to the claimant and stated that she had done this twice and that she did not think EH understood the claimant's sense of humour. She stated that there was an antagonistic relation between them and EH "*takes everything to heart*" and the night in question the was "*shaking and genuinely upset*". SK interviewed J Carney on 7 May (pages 94-96) who confirmed that she had not seen anything on the night of the 19 April and EH had told her he "*has always felt uncomfortable*" around the claimant. She told SK that EH described the incident to her and that he was hurt and embarrassed. She

stated that the claimant *"does speak quite crude, he makes conversations that are quite sexual towards [JC] which I think are unacceptable*".

8.20. The claimant was interviewed by SK on 7 May 2019 and the notes of that interview were at pages 97-106. When asked about the incident on the 19 April 2019 involving EH, the claimant said the description recounted by SK was a "*very exaggerated interpretation of the truth*". He stated that he put his arms around EH; there was no malice involved and although EH did not elbow him, that he told the claimant he wasn't happy and that he had a bad day and said something about his house. He later stated this was "*not aggressive just playing aro*und". He was asked about apologising after the incident and the claimant stated that the incident with EH had been nipped in the bud and if he had apologised it related to him being chirpy, not the incident with EH. SK later asked him why he would do what he did in his position and the claimant said it was an error of judgement.

8.21. SK then asked the claimant about other allegations made by EH. He firstly asked him about the allegations at 8.11.1 above to which the claimant replied "*I don't treat him any different*". When asked about the allegations at 8.11.3 above, the claimant recalled the conversation but denied making the comment that EH was thick. The claimant was questioned about EH's account of what happened at the party and the claimant said he had "*a massive pushback on that one*" and gave SK his account of the evening. He stated that he had been sitting at KH's table all night and left early. When asked about the incident at 8.11.4 the claimant said he did not remember it and if he genuinely upset someone he would be devastated. When asked about the comment allegedly make described at 8.11.5 above, he said "*I don't remember specifics I thought we got on to be honest"*.

8.22. SK asked the claimant whether JC had ever spoken to him about these issues. The claimant said the only discussion related to the phone call and when asked whether JC told him to be more careful he stated "*there was no inappropriate language*". He stated that he thought he and EH had a good working relationship. The claimant was asked about the allegation at paragraph 8.7 that he had made the comment to JC and he replied "*I have a banterous relationship with [JC] but I don't remember it*". SK asked how he thought it might be received and the claimant said "*Not well, it's a bit unprofessional*". The claimant said he felt quite upset by the allegations as he thought he and EH got on well and was "*lost for words*". After an adjournment the claimant viewed the CCTV footage of the incident and commented that it "*looks worse than it actually was*" and that he thought he would have apologised at the time. He stated with regard to EH "*that's not the body language of someone with an issue*". SK asked the claimant whether the actions or the comments to JC were acceptable and the claimant said it was "*a bit silly an error of judgement on my part, there was no malice*". When asked if he had anything to add the claimant suggested speaking to EH about the allegations and talk through the problems to mediate them. SK finished by asking whether the claimant had ever touched EH to which the claimant respondent he had "*never assaulted the*

guy, its banter and playing, to my knowledge". This interview was concluded at 5.26 pm on 7 May 2019.

8.23. No written investigation report was completed by SK. SK verbally reported his findings to RE straight after the interview he had held with the claimant. RE decided to invite the claimant to a disciplinary hearing and approximately 30 minutes-1 hour after the claimant's investigatory interview was held on 7 May 2019, he, SK and KH met with the claimant and gave him a letter dated 7 May 2019 (pages 111-112). RE was asked about the shortness of this period between SK concluding his investigation and RE explained that was how long it took for the conversation with SK to take place, for the CCTV to be viewed and the letter prepared. I accepted this explanation as true. This letter invited the claimant to a disciplinary hearing later that week on 7 May 2019 and the letter stated:

"At the disciplinary hearing you will be asked to respond to the following allegation:

1.Inappropriate and offensive behaviour towards [EH] and [JC] which is classed as gross misconduct under the equality and diversity policy"

The letter enclosed the notes taken during the investigatory interviews referred to above which were described as "statements" and enclosed a copy of the disciplinary policy. The claimant was informed of his right to be accompanied and that the allegations were serious and could result in a potential outcome of dismissal for gross misconduct. RE acknowledged in cross examination that he could have been more specific in the way he described the allegations in this letter but felt that all the statements enclosed made it clear what the claimant was being accused of doing. He was also challenged on the length of notice provided to the claimant of this disciplinary hearing but stated that the respondent usually gave 24 hours' notice of disciplinary hearings. I accepted this evidence, which is consistent with the respondent's disciplinary policy (para 8.4).

8.24. Before the disciplinary hearing took place, RE made a telephone call to EH on 11 May 2019 and the notes of this are shown at page 113-11. RE explained he wanted to ask EH how he felt about the incident and the resolution he wanted and to also check on his welfare. During cross examination, RE acknowledged that it had been a mistake to make this conversation and he should have asked SK to do this. He said he wanted to see if there were any avenue that were helpful and was trying to "*do the best for everyone*." I accepted this was RE's motivation in making the call. During the call, EH said he was still "*very upset*" and it had sent his "*anxiety crazy*". RE asked EH "*How do you feel about the incident itself. It was unprovoked. Where it goes from here*" and EH said he would leave it to managers to make good decision and then he might speak to the police. ME asked EH whether he felt difficult working around the claimant and whether he would "*be happy if you would never see him at work*". EH answered no that "*he would do it to other people maybe. It was for everyone's safety*" and would not feel comfortable. RE asked EH how long

he had been wary about the claimant and EH said at least a year and "*this incident has been enoughs enough*". RE told EH that he had viewed the CCTV and said to "*you look really unhappy, my point of view he leans into your personal space*". He was asked by RE how he felt and EH confirmed he broke down in the car park after it. When asked if he had anything to add, EH stated "*Everyone's else's point of view should be taken into account. I don't feel safe. I don't think other people would either*." RE said he was sorry to EH and that he was trying to get to the bottom of it and he then asked EH how he would feel if the claimant was sanctioned but "*was still here*". EH responded that he would not want the claimant in the building and to be moved out and would prefer the claimant not to be there. RE said he would be fair and thorough. When asked why he was apologising to EH before the disciplinary allegations had been proved, RE stated that he was trying to be empathetic and denied that he had already made his mind up. The language of the call was clumsy, but I can accept it was an attempt at empathy towards EH. The note of this call was provided to the claimant on 11 May 2019.

Disciplinary hearing

8.25. The claimant attended the disciplinary hearing on 11 May 2019 and was accompanied by Ms L French ("LF") a trade union representative. RE was there together with M Sidhu, People Manager, as note taker. The notes of the disciplinary hearing were at pages 117 to 143. RE explained the purpose of the meeting and asked the claimant whether he had the note of the telephone conversation with EH earlier that day. The claimant said he had this but asked why the conversation had to be made with LF stating that EH wanted to get people into trouble. The claimant said he had a big concern and that there were "*people in cahoots*". RE asked the claimant if was happy to continue or wanted 24 hours additional time to consider the extra statement. After a short adjournment, the claimant said he would continue but was not happy with the content of the statement.

8.26. RE then went through each of the allegations that had been raised. The first point the claimant made was about the inconsistency of the date of the incident in various statements. The claimant was asked and went on to describe the incident being that he "*playfully grabbed" EH and this was "a bit of horseplay, an error of judgement"*. He said he realised EH was not happy about it, that he spoke with EH and it was nipped in the bud and there was an embrace afterwards and there was a conclusion to the event. RE challenged the claimant as to whether this was playful and horseplay and the claimant said he had never done this before and that EH had never grabbed him but that they got on fairly well. He was asked by EH where the element of fun was and the claimant said that they were all *"gearing up to get out*" and it was a silly mistake with no malice or aggression. There was a discussion between the claimant and RE about what the definition of the word assault was and then RE stated that he was not focusing on the definition but on the behaviour, asking the claimant about a duty manager putting a colleague in a head lock. The claimant stated that if there had been aggression he would not have done it in front of anyone.

The claimant denied saying that the claimant was "*fucking thick*" or that he had hit the claimant in the testicles. He also denied making a comment to the claimant after the party or throwing chewing gum at him.

8.27. The claimant was asked why he did not deny some of the incidents in the investigatory interview but just say he could not remember. The claimant said he had been caught completely cold at the investigatory interview and his wording might not have been the best. When asked about whether he had discussed matters about his conduct with EH with JC in the past, the claimant said he had not. He also asked why statements had not been taken from two other employees whose names had been mentioned as having spoken to the claimant in the past about similar issues. RE said that if they found any "*gaps*" in the investigation, the respondent could "*look into that*". This does not appear to have been raised again by either RE or the claimant.

8.28. The claimant was asked how he felt when he read how EH felt and he said it was upsetting he felt like that and that he would like to speak to him and mediate. He was asked about and denied making the comment "*How's your fanny*" stating that he had no knowledge and could not remember this. RE went on to discuss with the claimant about him being in a position of responsibility and how individuals react in different ways to certain acts. RE then asked the claimant whether he thought he was encroaching on EH's personal space, and whether this was "*controlling behaviour*" and the claimant responded that he was a "*hugger*". The claimant noted that EH still had him on Facebook and the relevance or otherwise of this was discussed between the claimant, RE and LF. The claimant denied that the incident described at the party had taken place and suggested that KH, whose table he sat on at the party, might be able to provide a statement to confirm that the things said in EH's statement were untrue. He also again suggested mediation and stated that he was upset as it had been made to sound like he was bullying and harassing. The claimant was asked about MP's reaction and statement and said he thought that on the CCTV footage, MP did not look shocked. The claimant raised the fact that the statements described matters that people had been told by EH and that there were some contradictions. He also suggested that the individuals who were interviewed had been talking to each other and he was concerned that they were all friends.

8.29. He was asked if he understood what EH had stated in the telephone call today that he felt it was an unsafe environment and the claimant said "*not really, I thought it was dealt with. It is upsetting*". RE told the claimant that he had to decide whether there was a pattern of behaviour and he made reference to the Respect in the Workplace policy. The claimant concluded by stating he had 23 years of unblemished conduct and had made an error of judgment for which he was sorry and would like to talk and mediate. The hearing was adjourned for RE to make a decision. RE said he knew of the claimant's mental health issues and took account of these at all times, taking the meeting slowly and asking the questions in different ways. He also asked the claimant if he needed more time and that the claimant

could have asked for a break or adjournment at any time and this would have been given. I accepted what RE said on this.

8.30. The basis for RE's decision was at paragraphs 93 to 95 of his witness statement. He read the disciplinary meeting notes, the investigation documentation, and the CCTV footage and took into account the information provided by the claimant. He considered the claimant's length of service and disciplinary record and explained when asked in cross examination that he considered the claimant's length of service as an aggravating factor as he should have known better. The focus of his decision were the allegations he felt were corroborated by a number of individuals and visible on CCTV. He decided that the claimant had

"engaged in inappropriate and offensive behaviour towards [EH] and [JC], which amounts to gross misconduct under the Respect in the Workplace policy. In particular, I believe that:

(a) the Claimant had inappropriately touched [EH] on 19 April 2019;

(b) the Claimant had made inappropriate comments to [JC], in particular saying "how's your fanny" on 19 April 2019; and

(c) The Claimant had had a phone call with [EH] on 18 April 2019, following which he subsequently said to [EH]"fucking thick" "

8.31. RE formed the view that although the claimant said that he had acted playfully, having reviewing the CCTV, RE did not believe that the incident was playful. He had not considered it relevant whether there was any malice in the claimant's actions and concluded that it was inappropriate conduct whether there was any malice or not. He found that the fact that both EH and JC had confirmed that inappropriate comments were made towards JC, convinced him the comment was made. He concluded that whilst JC may not have been offended, this did not excuse the inappropriate language. He also concluded that JC had spoken to the claimant about his conduct before, and that EH said the inappropriate conduct stopped after this, which RE thought implied that the claimant was aware that he was behaving inappropriately. He took into account the claimant's seniority and management role and that he was responsible for the welfare of staff. RE considered that EH was distressed by the Claimant's actions and that the claimant, although offering to mediate had not demonstrated that he was aware of the seriousness of his actions. He took the decision to dismiss the claimant having determined that as the claimant had not appreciated his behaviour was wrong that a sanction less than dismissal was not appropriate.

8.32. The claimant was advised of the decision and provided with the letter of dismissal set out at page 144-146 which confirmed he had been dismissed with effect from 11 May 2019.

8.33. A few days after his dismissal the claimant applied for a job at B & M, he thought probably around 14/15 May. He explained that he was interviewed

three times and was offered a position of Deputy Store Manager on 22 May 2019 (contract and offer letter at pages 208-16). The claimant was on holiday and out of the country between 23 May and 30 May 2019. He started his new role on 3 June 2019 (page 223).

Appeal

8.34. The claimant appealed in a letter dated 18 May 2019 (pages 147-148). This letter sent out 10 grounds for appeal contending that:

8.34.1. He was not given a reasonable, fair and thorough hearing and the respondent was in breach of its policies;

8.34.2. He was not suspended indicating that he did not pose a threat in-store;

8.34.3. RE was biased against him and had manipulated the key witness;

8.34.4. The witnesses of the investigation were friends of the key witness;

8.34.5. There was an inconsistency of the dates of the allegations and these were not resolved during the investigation;

8.34.6. Some of the witness statements contained lies but the claimant was not allowed to expose or challenge these;

8.34.7. There was a sub-agenda to manage him out of the business:

8.34.8. RE based his investigation on assumptions and opinion

8.34.9. There was an orchestrated bullying campaign against the claimant and

8.34.10. The claimant's record of service was not sufficiently considered and the sanction of dismissal was too severe.

8.35. The claimant stated that he hoped he would be reinstated and:

"at which point it is my intention to offer my immediate resignation. I would then expect a full and final settlement of monies owing for my notice period. After 23 years of loyal service I do not wish to bring the company name into disrepute, nor do I ask for any further compensation and only want what I am owed. I do not wish to re-enter the Store at any time as I feel my safety could be compromised and therefore ask this meeting is conducted off site. I would also ask that as my service is then clean a true future reference would be given."

He confirmed that his mindset when he wrote this letter was that he was not going to carry on working for the respondent. He said that he was on

holiday and out of the country between 23-30 May 2019 and that correspondence should be sent via LF.

8.36. The respondent appointed a store manager from a different store, MH to conduct the appeal. On 28 May 2019 MH invited the claimant to an appeal meeting (letter at page 149) to be held on 6 June 2019. She had an appeal pack containing the notes of the investigation and disciplinary meetings and she viewed the CCTV footage. The claimant attended the meeting on 6 June accompanied by LF. The claimant produced a further written statement at the appeal hearing (page 162-4) which set out more points on each item raised. He made a new contention that RE was trying to get the claimant out of the business because of issues around performance management, the fact that the claimant was employed on an older more favourable contract of employment and that RE was looking for someone to blame for management shortfalls. He expanded further on some grounds for appeal and concluded by stating again that if the original decision was overturned, he would resign and would expect to be paid for his notice period and to have a reference provided.

8.37. During the appeal hearing these matters were discussed and the claimant was also asked about mental health issues as these had been raised. There was some discussion about the apparent change of opinion of EH from the first investigatory interview as to not wanting the claimant to get into trouble, to when he spoke to RE later that he wanted him sanctioned and could not work with him. The claimant was asked about the respondent not interviewing who he thought were relevant witnesses and he explained how he felt there was inconsistencies in dates. He expanded further on his allegation that he was being managed out of the business. The claimant also explained that he felt that RE had made assumptions and misinterpreted the CCTV. The claimant made the point that the 5 witnesses who were interviewed were direct reports of his and they were unhappy with him correcting their work. He also explained that he felt his offer of mediation had not been adequately considered or that his long service had not been considered.

8.38. When asked whether he would consider returning to work if reinstated, the claimant told MH that he would have to think about it but he would not feel right working with EH. He confirmed that it was still his plan to resign at this time. MH adjourned the appeal hearing to conduct further investigations. The claimant said he felt happier with the way the appeal was heard and that MH "*seemed fair and more receptive to what I had said*". The claimant said in oral evidence (although this was not in his written statement) that after this appeal meeting but before the outcome meeting he had been to a wedding where some senior managers were also in attendance who had been talking about his case and this further made him lose faith and trust and reaffirmed his decision to resign. I accept the claimant's evidence on this point, although this is not pleaded as an act constituting or contributing to a breach of contract on the respondent's behalf and I will not consider it as such.

8.39. At the end of the meeting MH told the claimant that the hearing would not be concluded that day but she would need to consider the matter and may need to conduct further investigations. She asked the claimant how he would like to be contacted and he confirmed that this should be through LF. It is noted by MH at page 161 that she will do this as quickly as she can. There is a note of which dates are better for the claimant (Sundays and Thursdays) and it is noted that LF was on holiday on 17 June 2019. MH stated that she informed the claimant that she would be on annual leave from 24 June until 8 July. This is not recorded in the notes. MH said that this was in a conversation after the meeting which did not form part of the main meeting. I accepted the evidence of MH that she did this. MH was a straightforward and compelling witness and this was consistent with her other evidence and the documentation.

8.40. MH was asked about the handwritten notes she made during the first appeal hearing during cross examination, in particular the notes made at page 165 on the claimant's appeal letter. It was suggested that MH accepted that RE had been biased but changed her mind on this for the appeal letter. MH accepted that the notes suggested this, but the issue of bias was something she wanted to further investigate by speaking to RE. She confirmed that her conclusions on this matter were as set out in the appeal outcome letter, and not the notes. MH was also asked why she was unable to deal with or progress the claimant's appeal in the period between 8 June 2019 and 24 June 2019 (when she went on annual leave). She explained that she spent some time reviewing and deliberating and was trying to fit the appeal in with her main responsibilities as a store manager. The delay in meeting with RE was also due to availability issues of both her and RE as they were at different stores and had to work around different shift patterns. I accepted her evidence on this matter. MH thought that the note taker at the original hearing had updated the claimant's representative LF in between the two hearings but she could not recall precisely when.

8.41. MH spoke to RE in an investigation meeting on 11 July 2019 (notes of meeting at pages 171-8). RE was asked about his rationale for phoning EH again and RE said he was trying to understand the impact of what had happened on EH and to see whether there was any way they could work together to resolve the situation. RE said he understood that was not appropriate given how upset EH appeared to be. RE was asked and explained that the claimant had not been suspended as due to rotas EH and the claimant were not due to be working on the same shifts before the disciplinary hearing (although this did happen as the hearing was postponed). RE then explained his decision to dismiss referring to the fact that the claimant had not denied some of the allegations (saying he just could not recall), and that the CCTV footage showed the incident clearly. He told MH he felt the claimant had been bullying EH.

8.42. MH's conclusions on the grounds of appeal were at paragraphs 35 – 40 of her witness statement. In summary she concluded that the claimant had committed the acts of misconduct alleged on 19 April 2019 in his actions

towards EH and in respect of his comments to JC. In cross examination, MH stated that in hindsight she may have reached a different conclusion on the JC comment, given that JC had confirmed she was not offended, although clarified that how other people hearing a conversation might feel was a relevant factor. She concluded that had she been the dismissing manager she would have dismissed the claimant for the incident involving EH on its own. MH also stated in cross examination that she maintained this view and even if the actions had been without malice, it was still a breach of policy and misconduct.

8.43. However, she concluded that there had been procedural errors in the decision to dismiss the claimant. She was concerned that RE should not have conducted further investigations by discussing the matter with EH but should have handed this back to the investigating manager. She did not find any improper or inappropriate conduct in what was said to EH by RE. She concluded it would have been best practice to suspend the claimant but this did not impact whether or not the conduct amounted to gross misconduct. She accepted that there had been some inconsistency of dates which should have been passed back to be investigated before the decision was made (although also concluded that the errors in dates made no material difference). She also considered that mediation should have been considered further during the process. MH did not accept that the EH should have been suspended during the investigation, and concluded that there was no evidence that witnesses had conspired together to concoct evidence (as the claimant admitted to the main incident and there was CCTV footage of it). She did not accept that there was a sub agenda to manage the claimant out or that there was an orchestrated bulling campaign nor that RE had been biased or made his decision on incorrect assumptions.

8.44. MH concluded that the dismissal should be overturned and substituted with a final written warning. Her decision was communicated to the claimant in an appeal outcome meeting on 11 July 2019 attended by MH, the claimant, LF and J Bramall as note taker (meeting notes pages 179-80). MH explained what she had done so far and informed the claimant that she was "*not happy with the procedure and I am looking to overturn*". She informed the claimant that she believed that 2-3 appeal points were valid. MH asked whether the claimant had considered whether he would return to work and if he would consider working in another store. The claimant is noted as responding by saying:

"*Initially would of considered but not now with mental state would feel fragile would have to speak to wife before 100%*"

MH suggested mediation which the claimant was supportive of. The claimant was asked whether he had anything else to raise. He told MH that he now had another job on a salary that was lower but he "*needed a job to provide*". MH agreed to meet with the claimant the following week.

8.45. MH met the claimant again on 18 July 2019 (same attendees as 11 July 2019 meeting) and the notes of this meeting are at pages 181-5. MH started by asking the claimant whether he had thought about returning to work but the claimant said that this was not possible. He is noted as saying "*In heart love to come back but in my head can't*". He explained he did not think it was possible to have a fresh start. MH told the claimant that he would be reinstated on existing terms and conditions and if he wanted to leave, he would need to give four weeks' notice. MH asked the claimant if he could work his notice period at another store. The claimant said this was not possible. The claimant was told he would not be paid notice if this was not worked and would not receive pay for accrued holiday. The claimant confirmed he was still handing his notice in and had no intention of returning. He thanked MH and JG and said that it was a "*weight lifted*" as he had not felt it had been fair until now.

8.46. The claimant gave evidence that "*The 2 months' delay between the decision to dismiss me on 11 May and the decision to offer to reinstate me on 11 July served only to exacerbate matters*" and when asked by Mr Heard in re-examination whether the delay in the appeal had any influence on his decision to resign he said, "*it did as I had no idea what was going to happen and had mortgage to pay and bills to pay and I could not just sit there doing nothing*". I do not accept the claimant's evidence on this issue and find that the delay did not influence his decision to resign. I accept that the claimant sought new employment quickly after his dismissal because of a need to meet financial commitments. That is self-evidently so and understandable. However at the point he sought and was offered new employment, on 22 May 2019, there had been no real delay in the appeal (the claimant having only submitted his letter of appeal on 18 May 2019 within which he informed the respondent in his letter of appeal that he would be on holiday until 30 May 2019). The claimant did not raise the issue of delay at either of the three meetings he had with MH during the appeal process; in his claim form (page 10) or apparently at any point before the list of issues was prepared by his solicitors in June 2020.

8.47. The outcome letter was sent to the claimant by MH on 31 July (pages 186-8). The claimant was reinstated with back pay up to 22 July 2019.

The Law

9. Section 94 of the Employment Rights Act 1996 ("ERA") sets out the right not to be unfairly dismissed.

10. Section 95 (1) (c) ERA says that an employee is taken to have been dismissed by his employer if the employee terminates his contract of employment (with or without notice) in the circumstances in which he is entitled to terminate if not notice by reason of the employer's conduct i.e. constructive dismissal.

11. If dismissal is established, then the Tribunal must also consider the fairness of the dismissal under Section 98 ERA. This requires the employer to show the reason for the dismissal (i.e.: the reason why the employer breached the contract of employment) and that it is a potentially fair reason under sections

98 (1) and (2) and where the employer has established a potentially fair reason then the Tribunal will consider the fairness of the dismissal under section 98 (4), that is:

11.1. did the employer act reasonably or unreasonably in treating it as a sufficient reason for dismissal; and

11.2. was it fair bearing in mind equity and the merits of the case.

12. Roberts v West Coast Trains Ltd [2004] IRLR 788, [2005] ICR 254, the Court of Appeal confirmed that there is no 'dismissal' for the purposes of the legislation if there is a successful appeal. This has the effect of negating the original decision to dismiss.

13. It was established in the case of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 that the employer's conduct which can give rise to a constructive dismissal must involve a "*significant breach of contract going to the root of the contract of employment*", sometimes referred to as a repudiatory breach. Therefore, to claim constructive dismissal, the employee must show:-

13.1. that there was a fundamental breach by the employer;

13.2. that the employer's breach caused the employee to resign;

13.3. that the employee did not delay too long before resigning, thus affirming the contract of employment.

14. Malik v Bank of Credit and Commerce International SA [1997] IRLR 462, [1997] ICR 606. The implied term of trust and confidence was summarised 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."

15. If the act of the employer that caused resignation was not by itself a fundamental breach of contract, the employee may on a course of conduct considered as a whole in establishing constructive dismissal. The 'last straw' must contribute, however slightly, to the breach of trust and confidence (Omilaju v Waltham Forest London Borough Council[2004] EWCA Civ 1493, [2005] IRLR 35, [2005] 1 All ER 75).

16. It was confirmed by the Court of Appeal in the case of Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, [2018] IRLR 833 in an ordinary case of constructive dismissal tribunals should ask themselves:

16.1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

16.2. Has he or she affirmed the contract since that act?

16.3. If not, was that act (or omission) by itself a repudiatory breach of contract?

16.4. If not, was it nevertheless a part…of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?

16.5. Did the employee resign in response (or partly in response) to that breach?

17. Folkestone Nursing Home v Patel [2019] ICR 273 provides:

"…*it is clearly implicit in an employment contract conferring a contractual right to appeal against disciplinary action taking the form of dismissal that, if an appeal is lodged, pursued in conclusion and is successful, the effect is that both employer and employee are bound to treat the employment relationship as having remained in existence throughout." and*

18. An employee, successful on an internal appeal, may have grounds for a claim of constructive dismissal "*if there is some feature of the employer's handling of the appeal which constitutes a breach of another important term of the contract, including the duty to maintain trust and confidence*".

19. Strouthos v London Underground Limited [2004] EWCA Civ 402: "*It is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed, and that evidence should be confined to the particulars given in the charge.*"

20. Where relevant I have also considered the ACAS Code of Practice on disciplinary and grievance procedures ("the ACAS Code"), link here:

https://www.acas.org.uk/acas-code-of-practice-for-disciplinary-and-grievance-procedures/html

Conclusion

21. The parties had already agreed that on correct application of the caselaw set out above that the result of the claimant's successful appeal was that the original dismissal on 11 May 2019 had no effect and the claimant remained employed up to the point of resignation which took effect on 22 July 2019. I concur with this. As there was no express dismissal in this claim, I must consider whether the claimant has established that he was dismissed by virtue of section 95 (1) (c) ERA in that he resigned in circumstances in which he was entitled to treat himself as dismissed.

22. I have considered each of the matters relied upon as being a fundamental breach of contract (issues 5.1.1 to 5.1.10 above), looking at whether such events happened as alleged (issue 5.3 above) and then considering whether they amounted to a breach of the implied term of trust and confidence (issue 5.4). I will consider the question of whether there was a breach of the implied term of trust and confidence on each allegation individually and also on all cumulatively (issue 5.2). I then must go on consider whether the claimant affirmed or waived any such breaches (issue 5.5) and whether the claimant resigned in response to any breach that is found (issue 5.6). As part of this I will consider whether the claimant resigned, having obtained new employment, prior to the appeal process being concluded (issue 5.7). Looking at each

individual allegation:

22.1. The first matter that is relied upon is "*the manner in which the disciplinary investigation was undertaken by SK, including: the delays in the process, ambushing the Claimant in the investigation meeting and bias in how the witnesses were questioned*". There are various aspects to this:

22.1.1. I firstly considered whether there were any delays in the investigation. The claimant submits that there were 12 days from 19 April 2019 until the first investigatory interview. This is incorrect. The incident took place on a Friday evening, 19 April. EH sent an e mail of complaint to KH in HR the next day, Saturday 20 April (para 8.11) and a further e mail was sent by EH with additional evidence on Wednesday 24 April (para 8.12). The investigation started 8 days after the incident, the following Saturday 27 April 2019 (para 8.13). It proceeded promptly with investigatory interviews taking place during the following week and concluding with the investigatory interview with the claimant on 7 May 2019 (paras 8.14-8.23). There was no undue delay in commencing or carrying out the investigation, which presumably had to be done to fit with shifts, working hours and individual availability. There does not appear to be any divergence from the respondent's policy on investigations (para 8.4) or the ACAS Code.

22.1.2. I next considered whether the claimant was "ambushed" in the investigation meeting on 7 May 2019. There is no requirement for advance notice of an investigation meeting in the respondent's disciplinary policy (para 8.4) nor in the ACAS Code. I do not conclude the claimant was ambushed at all.

22.1.3. The claimant next complains that he should have been shown CCTV evidence before being interviewed, but I fail to see how this caused the claimant any disadvantage. The claimant was asked for his response to the allegations made and his responses were recorded in the notes; there was then an adjournment and the CCTV evidence was viewed and the claimant was then asked for his comments on what he saw and given opportunity to comment. The claimant's response around the incident was broadly the same when this was described and then shown to him (paras 8.20 and 8.22) that the account was exaggerated; there was no malice and it "*looks worse*" than it was. The claimant was aware of what was being referred to before being shown the CCTV.

22.1.4. The claimant next points to the manner of questioning adopted by SK suggesting that he was "leading" the witnesses, showing bias. I do not accept that there is any merit in this argument. I accept Mr Holloway's submission, that managers should not be expected to adopt the standards of legal representatives in the way they ask questions. His questioning

style was consistent with all interviewees, fair and appropriate. Lastly the claimant says that SK failed to look for exculpatory evidence and interview relevant witnesses (KH and two others who are said to have raised similar matters with the claimant in the past). I conclude that at best these three additional witnesses were of indirect and limited relevance to the investigation. KH was present at the investigatory interview and no comment was made by the claimant or KH when the claimant indicated he had been sitting with her on the evening of the party (para 8.21). The claimant did not raise the issue of KH providing relevant evidence then. His account appears to have never been further disputed by the respondent and the events of the party seem to have played little part in the decision to dismiss, if any. The claimant asked whether the other two managers had been interviewed during his disciplinary hearing (para 8.27) but it is not entirely clear what evidence those witnesses could provide on the key allegations (as it does not appear they were present).

22.1.5. Overall, I conclude that the manner in which the investigation was carried out was thorough, reasonable, appropriate, did not show bias and did not amount to a breach of the implied term of trust and confidence.

22.2. The claimant next points to the way the disciplinary allegations were put him, in that "*they were vague such that it was unclear which of the many allegations made he was facing and that they included an allegation involving Jacqui Cooper, despite her not making a complaint and having referred to banter*". Mr Heard refers me to the Strouthos case regarding the importance of precision when framing a disciplinary charge. RE accepted and I agree that the allegations could have been put more clearly (perhaps setting out each incidents relied on identifying them by date). Mr Heard suggests the claimant should have been provided with the e mail sent by EH (para 8.11) and this might have been a helpful document for him to see. However, the claimant had the "statements" or notes of interviews taken by SK, which read with the invitation letter contained full details of what the claimant was accused of. Certainly it was clear to everyone what the main incident of complaint related to (the 19 April 2019 incident involving EH which he was shown on CCTV). Mr Heard also submits that the charge about the comment made to JC was "trumped up" and there was no case to answer given the fact that JC did not take offence. The way the allegation is written in the letter refers to "*inappropriate and offensive behaviour towards*" JC, so again could have been put more clearly. However, I do not accept the underlying contention that JC's lack of offence means it cannot amount to inappropriate and offensive behaviour at all. Other employees were present when the comment was made. Although not offended herself, JC acknowledged that others were embarrassed and thought the comments "*crossed the line*" (para 8.18). The claimant acknowledged that such a comment, if made, would not be well received and was unprofessional (para 8.22). Even if the respondent's Respect at Work policy permitted workplace

banter (para 8.6), the policy makes it clear that different individuals may respond in different ways to banter. An allegation that the claimant made the comment "*How's your fanny*" in the presence of other employees at work is clearly something within the realms of inappropriate behaviour which merited disciplinary action being commenced. The apparent speed between concluding the investigation and commencing disciplinary proceedings does not suggest that RE had predetermined the outcome. RE concluded (reasonably) on the evidence he had seen that there was a case to answer. This was just the first stage of the disciplinary process following the initial investigation. The claimant had the opportunity to refute and challenge all allegations during the remainder of the disciplinary and appeal process, which he did. The claimant has not been able to show that these flaws in the way that the charges were put to the claimant amounted to conduct which was calculated or likely to destroy or seriously damage trust and confidence. There was room for improvement but there is no cogent evidence that comes near to suggesting errors were of the nature claimed.

22.3. The claimant next suggests that RE sought to railroad the claimant, giving him little time to prepare for the disciplinary hearing. It is correct that the disciplinary hearing was held within 2 days of the claimant's investigatory interview but I accepted RE's evidence that this was usual (para 8.23). The respondent's disciplinary procedure makes reference to at least 24 hours' notice being given of a disciplinary hearing (para 8.4). The claimant was asked at the outset of his disciplinary hearing whether he was happy to continue or wanted an adjournment. He was accompanied and supported by a trade union representative. The claimant did not ask for a delay to the start of the hearing or adjournment either before or during the hearing. Whilst this was a quick turnaround, I do not conclude that this amounts to conduct calculated and likely to destroy or seriously damage trust and confidence.

22.4. The claimant next relies on RE speaking to EH about the incident in question and obtaining additional evidence immediately before the disciplinary hearing. RE acknowledges that this should not have been done and was a "mistake". I agree that this was not an ideal way to proceed and did cast a shadow over the process from the claimant's perspective. The respondent's disciplinary procedure does not have express reference to different managers conducting investigation and disciplinary matters but it does make reference to the disciplinary manager being independent. The ACAS Code of Practice also provides that "*In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing*". The respondent had already appointed a separate investigation manager, SK, and it might have been better if he had contacted EH if further information was needed by RE. It is suggested that this was done by RE to "*achieve an embellishment of EH's evidence to make it easier for RE*" to dismiss the claimant. I am not convinced at all that this was the motive of RE and accept his explanation that he was trying to do his best for everyone and see if any alternative solutions might work (para 8.24). The claimant had full access to the information obtained from EH. The claimant still had the opportunity to put his position across during

the disciplinary hearing and did so. The claimant expressed his concern about what had taken place at the outset of the disciplinary hearing. This was also one of the factors which led MH to decide to overturn the claimant's dismissal on the grounds that it was procedurally unfair. However, acknowledging that this could have been done better, is not the same as the conduct being a fundamental and repudiatory breach of contract. I cannot conclude that this act of itself amounted to conduct which (viewed objectively) was calculated and likely to destroy or seriously damage the relationship of trust and confidence.

22.5. The claimant next relies on the "*manner in which RE carried out the disciplinary hearing: shutting down the claimant and not permitting him to refer to certain evidence, silencing his representative and overlooking clear discrepancies in the evidence against the claimant*". I do not accept that my findings of fact on the way the disciplinary hearing was carried out (paras 8.25-8.29) support a conclusion that any of these factual allegations are correct. The claimant was given ample opportunity to say what he wanted to say during a lengthy hearing, as was his trade union representative and similar conclusions apply here on the manner of questioning as those reached at para 22.1.4 above. The points made by the claimant about not speaking to KH and the other two witnesses are also addressed at para 22.1.4 above, and I consider these matters are at best only indirectly relevant to the main allegations. RE challenged the claimant on what he was saying during the disciplinary meeting but I do not consider this was inappropriate. The point made regarding the claimant and EH being Facebook friends, for example, was discussed during the hearing (para 8.28 above) and considered but ultimately not considered a key factor. I do not consider that any of the matters raised amounted to conduct designed or likely to destroy the relationship of trust and confidence. The disciplinary hearing itself was conducted in a broadly reasonable manner.

22.6. The claimant suggests that RE had ulterior motives for wanting to dismiss the claimant and had predetermined the decision. The claimant asserted that the fact that he was employed under a different contract of employment and him being "cheaper to replace" was this motive. The claimant has not produced any cogent evidence to support this bare assertion and I do not conclude that this was the case. This allegation is not made out on the facts found.

22.7. The claimant also contends that in coming to his decision, RE failed to take account of the claimant's contrition, suggestion of mediation, or his 23 years' service and clean record. I accepted RE's evidence that he did take account of the claimant's length of service in making his decision but that he considered this an aggravating rather than a mitigating factor (para 8.30). This was considered, albeit it was discounted as a mitigating factor. I also accepted his evidence that he did consider the claimant's disciplinary record (para 8.30). The claimant suggests that RE did not take account of his contrition but RE reached the conclusion that the claimant did not in fact exhibit sufficient contrition or awareness of the impact of his behaviour, in particular as related to the incident on 19 April 2019 involving EH,

concluding it was "horseplay" and "without malice". The issue of remorse was considered by RE just perhaps not in the way the claimant had hoped it would be (para 8.31). The claimant suggested mediation on more than one occasion and it perhaps might have been helpful if this had been specifically explored with impacted employees. However, RE (reasonably) reached the view that given his own conversation with EH that day, this was not something that would solve the situation (para 8.31). I do not find that any of these matters and the way they were approached by RE amounted to conduct designed or likely to destroy or seriously damage trust and confidence.

22.8. The claimant points out that the respondent failed to adhere to its disciplinary procedure. In the first instance the claimant does not appear to suggest that the disciplinary procedure was contractual and that accordingly the respondent was in breach of any express terms of the claimant's contract of employment. Rather it is suggested that by failing to adhere to its disciplinary procedure, it was in breach of the implied term of trust and confidence. I accept that a disregard for an employer's own policies and procedures could amount to conduct of this nature. However, in this case, I do not conclude that the respondent was in breach of its disciplinary procedure in such a manner. The claimant suggests that the claimant did not actively look for evidence to support both sides of the events. I do not conclude the evidence supports that is the case and I refer to paragraphs 22.1.4 and 22.5 above. SK contacted all those who are said to have directly witnessed the incidents complained of and gave the claimant ample opportunity to set out his version of events. The claimant complains that an investigation report was not completed. It is correct that no written investigation report was done (para 8.23 above). The respondent's disciplinary procedure makes reference to an investigation report being "completed and passed" to the disciplinary manager (para 8.4). This does suggest the existence of something physical, but it does not explicitly say this is the case. I accepted RE's evidence was that the report was verbal report together with copies of all the statements or notes of interviews he obtained. Whilst a written report might have been better, I do not consider that its absence is sufficient to put the respondent in breach of its own policies in any way nor in breach of the obligation of trust and confidence. The investigation's findings were reported to RE on 7 May 2019 (para 8.23). The claimant again relies on the problem with lack of specificity on the allegation he faced and suggests this is a breach of the respondent's disciplinary procedure. However, for similar reasons as those I set out at para 22.2 above, I do not accept that the lack of detail here amounts to conduct that is calculated or likely to breach the relationship of trust and confidence. The claimant and his trade union representative were aware what allegations he was facing and these largely related to conduct towards EH on 19 April 2019 and further allegations set out in the documents he was provided with on 7 May 2019 by the time the disciplinary hearing took place. The claimant was able to set out his version of events and submissions on each matter during the hearing. I deal with the issue regarding the delays in communicating the appeal outcome to the claimant at 22.10 below.

22.9. The claimant suggests that at no stage until the appeal did the respondent take account of the respondent's mental health issues and says this is a breach of trust and confidence. This contention was not pursued in any detail during the Tribunal hearing and I accepted RE's evidence that he was aware of the claimant's mental health issues and did take account of these during the disciplinary hearing. Therefore; this allegation is not made out by the claimant and goes no further.

22.10. The claimant lastly contends that despite "*lodging his appeal against dismissal on 18 May 2019, the appeal outcome was not confirmed until 31 July 2019, almost 11 weeks delay"*. Firstly, the claimant was informed that he would be reinstated to his role after the appeal hearing on 11 July 2019 (para 8.45) so the period of time between appeal submission and outcome is 9, not 11 weeks. It is worthy of note that the claimant told the respondent that he would be on holiday and out of the country until 30 May 2019 (para 8.35). He was invited to an appeal hearing on 28 May 2019 (para 8.36) and attended that hearing on 6 June 2019 (para 8.36) so at least until the hearing took place, the claimant cannot reasonably have expected an outcome to be provided. I acknowledge that the 5 weeks between 6 June and 11 July must have felt like a long time for the claimant to wait despite this. I have next gone on to consider whether that delay was unreasonable in the circumstances and was conduct calculated or likely to destroy trust and confidence. I accepted the evidence of MH that she had informed the claimant that she would be on holiday after the appeal hearing and that further investigations would take place (para 8.39). There is no evidence of any e mail from the claimant chasing the respondent for the outcome of the appeal or asking what was happening. Although I was not able to make any specific findings of fact on this, the lack of any contact from the claimant suggests that he was aware that matters would be delayed, and this could well be as the respondent suggests due to communication between the claimant's representative LF and HR at the respondent (para 8.40). The claimant expressly asked for contact to be made through LF in his appeal letter and at the end of the first appeal hearing (para 8.39). Therefore; I conclude that the respondent complied with its appeal policy of keeping within a reasonable timeframe and in close contact (para 8.5). On balance I conclude that the delay, although unfortunate, was not unreasonable in the above context and given the apparently detailed consideration of the claimant's appeal by MH. I also conclude that it did not amount to a breach of the implied term of trust and confidence. Delay was not a deliberate or calculated act or likely to damage the relationship of trust and confidence given the surrounding circumstances.

23. On the issue of whether the claimant affirmed or waived any breaches Mr Heard acknowledged in his submissions that the claimant having decided to appeal, following the principles set out in the case law above, that any breaches which might have occurred before appeal were waived or affirmed by the decision to appeal. Nonetheless, following the directions given in the Omilaju and Kaur cases set out above, as the claimant relies on a further act which took place after the decision to appeal, I have looked at the questions posed by the Court of Appeal in Kaur (para 16 above). He says that the most recent act or

omission which caused or triggered his resignation was the delays to the appeal process set out at paragraph 22.10 above. I have first considered whether this delay caused or triggered his resignation. I refer to my findings of fact at para 8.46 that the delay did not play any part in the claimant's decision to resign his employment. I am also persuaded to reach this conclusion by my findings that that the claimant had in fact decided to resign his employment some time before the issue of delay arose: in his letter of appeal submitted on 18 May 2019 (see para 8.35); in the statement he prepared for the appeal hearing (para 8.36); during that appeal hearing on 6 June 2019 (see para 8.38) and following a wedding held after this hearing (also para 8.38). The claimant had also promptly sought and obtained alternative employment and had started working very shortly after his appeal was submitted (para 8.33). The claimant later indicated he was wavering in this decision at the appeal outcome meeting on 11 July 2019, albeit he was still seriously doubtful whether it would work and needed to discuss with his wife (para 8.45), but again on 18 July 2019 it was very clear that he had no intention of returning. The claimant had decided to resign well before the appeal process had been concluded, having obtained new employment and decided he did not wish to return to the respondent, even if his appeal was upheld. Any delay to notification of the appeal did not play a part in this decision, so did not trigger or cause his resignation.

24. Although it is not necessary for me to consider the remaining questions set out at para 16 above, for completeness I note that I had already concluded at paragraph 22.10 that the delay was not by itself a repudiatory breach of contract. I have considered whether the delay contributed to (however slightly) and was a part of a course of conduct that, viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence. Looking at my conclusions set out above, the matters that did cause me some concern were the lack of clarity in the way the disciplinary allegations were drafted (para 22.2) and RE speaking to EH about the incident in question and obtaining additional evidence immediately before the disciplinary hearing (para 22.4). These issues were procedural flaws before the disciplinary hearing carried out by RE. The later act (or omission) which is now complained about by the claimant relates to a delay in finding out the outcome of his appeal from MH. The claimant had already informed the respondent in his appeal letter that he did not intend to return to his employment, even if he was reinstated. The actions of RE, I accept, did play a part in the claimant's decision to resign. The actions of MH did not (see conclusions at para 23 above). MH was an entirely independent manager (which is made very clear by the fact she was prepared to overturn the original decision of RE on procedural grounds). The claimant was satisfied with the outcome of the appeal in that his dismissal was lifted. However, by this stage he had already concluded he would not return to work.

25. All the acts relied upon, even viewed as a course of conduct, would not cumulatively amount to conduct calculated and likely to destroy or seriously damage the relationship of trust and confidence. The claimant did not resign, in response to a repudiatory breach of contract. The claimant was not constructively dismissed by the respondent, it cannot be an unfair dismissal and the is claim dismissed.

Employment Judge Flood
18 February 2021