EMPLOYMENT TRIBUNALS

Claimant: **Mr I. Abiodun**

Respondent: **Waltham Estate Resident Management Limited**

Heard at: **London South (via CVP)** **On: 03 to 06 and 09 to 10 January 2023 inclusive**

Before:

Employment Judge T.R. Smith

Representation

Claimant: **Mr O. Onibokun (consultant)**

Respondent: **Ms Jervis (consultant)**

Written reasons supplied pursuant to Rule 62

JUDGMENT

1.The claimant's complaint of constructive unfair dismissal is well found.

2.The claimant did not cause or contribute to his dismissal by reason of culpable conduct.

3.No deduction is appropriate to any compensation that may be awarded applying the principal of Polkey-v- A E Dayton Services Ltd.

4.Pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992the tribunal is satisfied that the section applied to these proceedings, a relevant code of practice applied and the respondent failed to comply with that code and the failure was unreasonable such that it would be just and equitable increase any award it may make to the employee by 25% .

The issues.

Unfair dismissal

1.1 Was the claimant dismissed?

1.1.1 Did the following things happen:

1.1.1.1 Did Mr Michael McGarry fail to implement the findings of the grievance outcome letter dated 30 November 2017 despite repeated requests from the claimant to do so?

1.1.1.2 Did Mr McGarry fail to appoint an external HR company to re-investigate the claimant's first grievance against Ms Agnes Onayemi despite stating he would do so in an email dated 01 February 2018, and , instead appointed them to investigate the claimant for things already investigated on 16 October 2017 by Mr Michael Anderson?

1.1.1.3 Did Mr McGarry state in correspondence on 29 January 2018 that there might be an additional issue relating to a possible breach of the Fraud Act and Bribery Act ?

1.1.1.4 Did Mr McGarry fail to investigate the claimant's grievance dated 30 April 2018, despite stating that it would be passed to Peninsula to handle?

1.1.1.5 Did Mr McGarry and Ms Onayemi fail to follow the respondent's disciplinary policy when they suspended the claimant without regard to its disciplinary policy and procedure at para 3.3 of Appendix 3 on 16 May 2018. In particular did they fail to

supply the claimant with reasons for his suspension, and delay provided a letter confirming suspension until 17 May 2018?

1.1.1.6 Did Mr McGarry and Mr Tarek Maghari fail to inform the claimant in the investigation meeting invite letter dated 11 July 2018 what the concerns were about his conduct before the investigation meeting. The claimant asserted this was contrary to paragraph to 9.2 of the respondent's disciplinary policy and procedure

1.1.1.7 There was no evidence available or supplied to substantiate the 6 allegations against the claimant which were to be progressed as disciplinary matters to a disciplinary hearing in September 2018. The claimant asserted this was contrary to paragraph 3.3 of the respondent's disciplinary policy and procedure.

1.1.1.8 Did the respondent failed to give the claimant a minimum of five working days' notice for his disciplinary hearing on 24 August 2018, scheduled for 28 August 2018 as required under paragraph 13.1 of the respondent's disciplinary policy and procedure?

1.1.1.9 Was no response received to the Claimant's subject access request made on 05 September 2018 and did the respondent threaten to proceed with the disciplinary hearing in his absence?

1.1.2 Did the acts / omissions at 1.1.1.1 – 1.1.1.9 above breach the implied term of trust and confidence? The tribunal will need to decide:

1.1.2.1 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

1.1.2.2 whether it had reasonable and proper cause for doing so.

1.1.3 Did it breach the claimant's contract of employment?

1.1.3.1 The claimant asserted that those acts / omissions at 1.1.1.1 – 1.1.1.4 were contrary to paragraphs 1.3 and 6.2 of the Respondent's grievance policy and procedures which were incorporated into his employment contract.

1.1.3.2 The claimant asserted that those acts / omissions at 1.1.1.5 – 1.1.1.8 were contrary to paragraphs 9.2, 13.1 & 3.3 of Appendix 3 of the respondent's disciplinary policy and procedures which were incorporated into his employment contract.

1.1.3.3 The claimant asserted that those acts / omissions at 1.1.1.9 were contrary to the data protection term in the claimant's employment contract together with the respondent's Data Protection Policy.

1.1.4 Was the breach a fundamental one? The tribunal would need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

1.1.5 Did the claimant resign in response to the breach? The tribunal would need to decide whether the breach of contract was a reason for the claimant's resignation.

1.1.6 Did the claimant affirm the contract before resigning? The

tribunal would need to decide whether the claimant's words or

actions showed that he chose to keep the contract alive, even

after the breach.

1.2 If the claimant was dismissed, what was the reason or principal reason for dismissal?

1.2.1 The respondent said the reason was conduct namely an assault by the claimant on Mr McGarry on 16 May 2018 and in the alternative for some other substantial reason namely a fundamental breakdown of trust and confidence between the claimant and the respondent.

1.2.2 Did the respondent acted reasonably in all the circumstances in treating that as a sufficient reason(s) to dismiss the claimant?

1.3 Given the shortness of time the tribunal indicated that the issue of remedy, if necessary, would be addressed as a subsequent hearing, but in the substantive hearing the tribunal would determine the issue of contribution, the chance the claimant would have been fairly dismissed anyway (the Polkey question), and whether the ACAS code of practice on disciplinary and grievance procedures applied, and if so whether either party was in breach.

The evidence.

2.The tribunal heard oral evidence from :-

2.1.The claimant himself.

2.2.Mr Philip Morris

2.3.Mr Dino Frimpong

3.For the respondent, the tribunal heard oral evidence from: –

3.1.Mr Michael Mc Garry

3.2.Ms Agnes Onayemi

4.The tribunal also had before it two bundles. The first was described as a core bundle and totalled 592 pages. The second was described as a supplemental bundle and totalled 916 pages. The two bundles were not numbered consecutively. The tribunal therefore referred to the core bundle as CB1 and supplemental bundle as SB1. All references are to the core bundle unless otherwise indicated

5.At the start of the hearing both parties asked for two documents to be added to the supplemental bundle, SB1 which were numbered pages 917 to 919 and the tribunal acquiesced to that request.

6.The tribunal reminded the parties that it would only look at those documents it was specifically taken to in evidence.

Findings of fact.

7.The tribunal has not sought to resolve each and every dispute, and there were many, as to fact. It has only addressed those matters relevant to determine the issues agreed between the parties.

The key personalities

8.Mr Lawrence Carmichael, Mr Frimpong's predecessor as chairperson.

9.Mr Dino Frimpong, board member from August 2012 and subsequently chairperson from 2016, the latter appointment ending 06 December 2017.

10.Mr Michael McGarry, chairperson from 06 December 2017.

11.Mr Michael Anderson. HR adviser to the respondent (consultant).

12.Mr Philip Morris, finance manager until 21 or 22 March 2018 and qualified accountant (consultant).

13.Glester Byfield, Mr Morris's replacement.

14.Ms Agnes Onayemi, treasurer from November 2015 until 20 November 2019, when she assumed the role of chairperson.

15.Mr Tarek Maghari member of the respondents HR subcommittee.

16.Ms Joy Vasoodaven HR consultant from Face2face, who conducted an investigation in April 2018.

17.Ms Chrystine (sic) Gittens HR consultant from Face2face who conducted an investigation in July/August 2018.

18.Mr Festus Onyeji , board member.

Background

19.The respondent is a registered mutual society responsible for the housing management functions of 238 properties. It provides those services pursuant to a management agreement between itself and the landlord, Lambeth Council.

20.The board of the respondent comprises residents of the estate, who in turn are elected by other residents.

21.The chair, from time to time of the respondent's board was the claimant's line manager.

22.Neither the chairperson nor the treasurer were employees of the respondent, they were officeholders.

23.The respondent was a very small employer, employing at its highest, during the claimant's employment, 7 people, one of whom was the claimant.

24.The claimant commenced employment with the respondent on 03 October 2012 and that employment continued until he resigned on 11 September 2018.

25.The claimant was the respondent's estate director. In reality, given the size of the respondent, he was effectively its chief operations officer.

26.He was issued with a contract of employment (91/99). He worked part-time, latterly 28 hours per week.

Events leading to the first grievance.

27.The claimant, in 2017 championed bringing the respondent's payroll function in-house from Lambeth Council. Payroll fell within the responsibility of the claimant under the respondents delegated financial procedures (see section 6)

28..Bringing payroll in-house was not a resounding success. Such was the problem that initially Mr Morris had to personally pay staff salaries out of his own funds whilst matters were resolved. The difficulties, of varying magnitude were not completely resolved until August 2017. Not unnaturally the difficulties following the payroll transfer caused concern to the board, in particular its treasurer.

29.Ms Onayemi raised her concerns, in respect of the payroll transfer at a special general meeting held on **12 April 2017** at which the claimant was in attendance. Ms Onayemi was recorded in the minutes as stating that the claimant's actions were *"tantamount to disciplinary"* and a cost analysis that had been promised by the claimant in respect of the transfer had not been undertaken. Ms Onayemi must have expressed her views with vigour as the notes record that the vice chairman urged her *"to adopt a more conciliatory and less accusatory tone during meetings…"*.(301/302)

30.She followed up her concerns in an e-mail of 17 April 2017 (320) requesting an investigation.

31.The payroll difficulties were again discussed, this time at a board meeting held on 10 May 2017 (329/332**)** .

32.It is also pertinent to note, for reasons that will become apparent later, that at this meeting Ms Onayemi sought to co-opt Mr McGarry onto the board, but her proposal, was rejected..

The first grievance.

33.The claimant raised a formal grievance (the first grievance) against Ms Onayemi by email dated 15 August 2017 (338/339).

34.At that stage the nub of the grievance was the claimant believed he was subject to *"incessant baseless personal accusations and non-constructive scrutiny"* by Ms Onayemi. He expressed the view he had no confidence in Ms Onayemi as the respondent's treasurer.

35.On **20 September 2017** Ms Onayemi raised concerns with Lambeth Council's lead commissioner for housing, Ms Lynette Peters (342/350). The concerns were wide ranging and included allegations that the claimant did not like to be challenged as regards finances, he meddled in board matters, he failed to fulfil his duties, and made reference to his involvement in the payroll transfer.

36.Ms Peters determined that Ms Onayemi's concerns were best dealt with by the respondent and so returned it to the respondent.

37.Mr Frimpong, the then chair person ,commissioned Mr Michael Anderson of Watmos Community Housing to carry out an investigation into both concerns. The claimant's letter was clearly a grievance. The tribunal should say that it is not convinced that Ms Onayemi had any right to bring a grievance against the claimant under the respondent's grievance policy as it only provided redress to employees. However this was not a point taken by the claimant and for clarity the tribunal will use the word "grievance" as it was used by both parties.

38.During the course of Mr Anderson's investigation he sought to clarify with both parties their principal concerns, which changed somewhat from the original written documents.

39.In summary Mr Anderson found the claimant's grievance fell into four categories.

39.1.Firstly emails sent by Ms Onayemi on 14 and 15 August 2017 which the claimant regarded as containing baseless personal attacks upon him.

39.2.Secondly Ms Onayemi's refusal to sign a cheque in April 2017 so he could be paid his salary, as the in-house payroll system was not functioning.

39.3.Thirdly the letter of complaint sent by Ms Onayemi to Lambeth Council which the claimant alleged was a breach of confidentiality and could cause him reputational damage with the council.

39.4.Fourthly comments made by Ms Onayemi about him at recent board meetings, which he considered to be unacceptable and unsubstantiated personal accusations.

40.Mr Anderson considered that Ms Onayemi's grievance essentially centred upon a total of 16 issues, 15 of which were directed at the claimant and one against Mr Morris

41.Mr Anderson produced a report in respect of Ms Onayemi's grievance and his findings were sent to Mr Frimpong on 30 October 2017**.** The relevant pages are 351/362. He found insufficient evidence to substantiate any misconduct by the claimant.

42.In a covering email from Mr Anderson to Mr Frimpong dated 30 October 2017 (917/918) Mr Anderson explained that it was up to the board to decide how to take matters forward as regards Ms Onayemi. Two possible options were, firstly to take action in accordance with the respondent's board member code of conduct or secondly to agree an amicable way forward with both parties.

43.The tribunal was not taken to Mr Anderson's documentation in respect of the claimant's grievance, other than a letter dated 30 November 2017 from Mr Anderson to the claimant (381/382) Put succinctly all four of the claimant's grievances were upheld. It is probable, on the basis of the oral evidence, the claimant was told this result on 30 October 2017, when Mr Anderson wrote to Mr Fimpong.

44.On 06 December 2017 a board meeting was held.

45.Notes of a board meeting (383) recorded the report received from Mr Anderson and that the findings would be brought to a subsequent board for a decision.

46.At the same meeting Mr McGarry was appointed chairman of the respondent's board. It is proper to record that there had been previous disagreements between the claimant and Mr McGarry in 2014 which had resulted in the then chair of the board, Mr Lawrence Carmichael writing to him on 22 July 2014 (268) as to his conduct, particularly him contacting Lambeth Council suggesting the claimant in some way had manipulated a planning application and had suggested some form of "dodgy dealing" by the claimant in respect of the use of a credit card.

As has already been noted there was animosity between the claimant and Ms Onayemi in respect of their grievance and counter grievance

47.It is also appropriate to record that Ms Onayemi nominated Mr McGarry for the chairperson role and was supported by her daughter .As already noted she had previously sought to have Mr McGarry co-opted to the board, unsuccessfully.

48..The tribunal found on the basis of the totality of the evidence it could infer that Mr McGarry and Ms Onayemi were both ill disposed towards the claimant and where

their interests clashed with those of the claimant there were more likely to support each other.

49.There was no formal handover between Mr Frimpomg and the incoming chairperson Mr McGarry.

50.However the tribunal was satisfied that by 07 January 2018 at the latest, Mr McGarry had all relevant documentation as regards the claimant's first grievance including the Anderson report and recommendations.

51.By email dated 10 January 2018**,** the claimant requested Mr Mc Garry to inform him of what steps would be taken in respect of his successful grievance.

52.Unknown to the claimant Ms Onayemi had purportedly "appealed" the outcome of the claimant's grievance and the board agreed there would be a reinvestigation. The respondent could not identify what policy gave Ms Onayemi the right of appeal although nothing turns upon the matter as it was not an issue the claimant relied upon as a reason for his resignation. In evidence, other than Mr Mc Garry asserting that he considered that Mr Anderson's report was biased, no cogent explanation could be given for this course of action. This reinforced the tribunal's assessment that Mr McGarry and Ms Onayemi would support each other against the claimant.

53.On 25 January 2018 the claimant was informed by Mr McGarry, in an email (402) that the board had resolved to employ an independent HR company to carry out a thorough investigation of outstanding issues and to make recommendations. Read in context that clearly told the claimant that matters were to be reinvestigated by another HR professional.

54.On 29 January 2018 Mr McGarry emailed the claimant. (405). Whilst reiterating that there would be an investigation he also stated *"However, there might be an additional issue, relating to a possible breach of the Fraud Act and the Bribery Act. The minutes of the emergency board meeting, held on 24 January 2017**,** are confidential. Therefore I am unable to provide you with a copy".*

55.The inference the claimant drew, and the tribunal considered reasonably, was that there were serious concerns about himself. The reference to being unable to provide the claimant with a copy clearly anticipated that the claimant would consider the allegation related to him and would want to know further details. Mr McGarry

accepted that the claimant's interpretation was correct as he did consider the claimant had been involved in some form of illegality.

56.The claimant responded on 30 January 2018 and said such allegations should be referred to Lambeth Council's fraud department immediately. The respondent did nothing. The claimant was left with a series allegation affecting his professional reputation simply hanging in the air.

57.By email dated 01 February 2018 Mr McGarry wrote to the claimant (403). He said *"I am currently in discussions with a reputable HR company, to investigate yours and Agnes'* [Ms Onayemi] *grievances. I am unable to provide you with any further details at the present time. I appreciate this fresh investigation is taking rather a long time"*

58.The claimant believed, and in the tribunal's opinion reasonably, that both grievances were to be re-investigated. In fact this was untrue as nothing was done.

59.On 14 February 2018 the claimant commenced a period of sickness absence, not returning until 05 April 2018.

60.In the interim, on 21 March 2018 the respondent, at a board meeting, resolved to dispense with the services of Mr Morris and HR advisers were appointed by the respondent, Face2face.

Return to work and the first Face2face investigation.

61.On the claimant's return from sickness on 05 April 2018, two meetings were held between the claimant and Ms Vasoodaven ,a representative of Face2face.

62.The first in time was a return to work meeting which was then followed by an investigatory meeting. Notes were retained of both meetings (425/445).

63.The claimant raised with Ms Vasoodaven that he was awaiting action as regards his successful grievance.

64.Following the return to work meeting, on which nothing turns was then what was described as an investigative meeting between the claimant and Ms Vasoodaven.

65.The terms of reference given to Ms Vasoodavan by the respondent can be summarised as follows: –

65.1 to look at the circumstances surrounding the switch of payroll providers, allegedly without informing the board

65.2.to investigate the claimant allegedly saying he been told to undertake the switch by another board member, when no such instruction have been given to him.

65.3.To investigate alleged unauthorised absence by the claimant between 22 to 28 March 2018.

66.The first two matters were the same complaints that Ms Onayemi had previously raised against the claimant and had been rejected by Mr Anderson. To this extent the claimant was right to say that concluded matters were being raised again against him.

67.An investigation report was produced on 19 April 2018 (442 /445) but for reasons that are not altogether clear a decision was taken to suspend the claimant on 23 April 2018 (446/447) (the first suspension). The reason for the suspension was the claimant had been absent without authorised leave. The tribunal was at a loss to understand why it was necessary at this late stage to suspend the claimant, given the matter had already been investigated by Face2face and a report produced.

68.The report was remarkably brief.

69..Other than the claimant ,it was noticeable that Ms Vasoodavan only spoke to Mr McGarry and Ms Onayemi despite the claimant saying his annual leave had been approved by the previous chair Mr Limpong. Again, however nothing turns on this point because it was not part of the claimant's reasons for resignation.

70.Ms Vasoodaven recommended the claimant received a first formal warning letter for unauthorised absence from 23 to 26 March 2018 and for taking holiday from 27 March to 04 April 2018.

71.Mr McGarry decided to pursue a disciplinary route. The claimant was issued with a first written warning (456) **dated 04 May 2018 .** However no disciplinary hearing had been convened, let alone held **.** Again, nothing turns on this point because it was not part of the claimant's reasons for resignation.

The second grievance

72.In the interim, on **30 April 2018** the claimant raised a grievance which was directed against *"the board past and present"*

73.The claimant complained nothing had happened in respect of the outcome of his first grievance against Ms Onayemi. He complained that allegations that had already been raised against him and found to be unsubstantiated by Mr Anderson had been raised again. He also complained of the decision to suspend him and alleged breaches of confidentiality as he contended his suspension was well known before he was formally notified. He said that he believed that the respondent's behaviour was calculated or had the effect of destroying the relationship of trust and confidence and he could only conclude that the intention was to force his resignation or dismissal.

74.The respondent accepted it did nothing with the second grievance. The tribunal will examine the reasons relied upon by the respondent for its failure to act, later, in his judgement.

Return to work

75.The claimant suffered a second period of ill-health and returned to work on 14 May 2018.

76.A return to work meeting was held between the claimant and Mr McGarry on 14 May 2018.

77.On 16 May 2018 Mr McGarry sought to verbally suspend the claimant again (this being the second suspension) and called the police to remove the claimant. The tribunal will return to this incident later in its judgement.

78.The claimant was handed a letter that day, which read *"Mr Michael MacGarry (sic) WERMO chairman and your line manager has asked you to leave the office, please leave without delay"* (470)

79..As a result of the incident on 16 May 2018 Face2face were commissioned once again. This time the representative was Ms Chrystine (sic) Gittens who conducted the subsequent investigation.

80.Mr Maghari wrote to the claimant on 11 July 2018 inviting him to an investigative meeting. The claimant was not told details of the allegations that he faced other than that there were some *"further concerns"* which could lead to a formal disciplinary process

81.At the investigative meeting on 17 July 2018 the claimant was asked for comments upon nine allegations.

82.The claimant specifically asked what was happening about his second grievance. The investigative officer told the claimant she knew nothing about any such grievance. The claimant gave a detailed answer the allegations and also pointed out there were two witnesses present on 16 May, a Mr Michael Douglas and a Mr Trevor Auguste

83.An investigative report was finalised on 03 August 2018 which recommended a number of matters proceed to a disciplinary hearing. (488/499)

84.The respondent wrote to the claimant on 24 August 2018 (500) by recorded delivery inviting him to a disciplinary hearing scheduled for 28 August 2018. The letter was signed for 25 August.

85.The claimant was required to respond to the following allegations: –

1.“It is alleged that you displayed threatening behaviour towards your line manager Michael McGarry on 16th May 2018.

2. it is alleged that, without reasonable excuse, you made threats of violence and/or behaved in a threatening manner towards your line manager. Further particulars being:

(a) It is alleged that on Wednesday 16th May 2018, following a verbal suspension, you were in a state of high temper. It is alleged that in response to the verbal suspension, you refused to accept Michael McGarry's authority.

3. It is alleged that you have failed to follow reasonable management instructions issued by Michael McGarry regarding conversations with Phil Morris on Monday 26th March

2018. Further particulars being that although you had been instructed not to speak to Phil Morris, it is alleged that you maintained contact with him and arranged or sought

to make arrangements for a handover.

4. It is alleged that you failed to inform the Management Committee or your Line Manager of the rent improvement plan agreed with the Council.

5'. It is alleged that you were under a contractual obligation to produce time for the period of'1st January 2018 to 12th February 2018 when your sickness absence commenced. We consider this constitutes insubordination.

6. It is alleged that you failed to follow company rules and procedures. Further particulars being:

(a) It is alleged that you failed to ensure that Phil Morris had set up a BACS arrangement, according to the request of the 'Board' and instead, allowed him to set up a NatWest Bankline account. As you are his line manager, this is your duty.

(b) It is alleged that you allowed Phil Morris to remove company property namely, the company laptop, from the premises without authority or reasonable excuse".

86.The claimant responded on 27 August 2018 pointing out that there appeared to be a number of omissions or incomplete copies of documents referred to in the enclosures. He also made the point, correctly, that he was entitled to 5 clear working days notice of the hearing. The claimant also asked for access to his laptop. He had been denied access since he was suspended on 16 May. He contended it contained information that was relevant to his defence.

87.It is proper to record that under the respondent's disciplinary procedure the claimant was required to supply evidence that he intended to rely upon in his defence at a disciplinary hearing at least three working days prior to the hearing.

88.The claimant was advised by Mr McGarry on 03 September 2018 (506/507) that the hearing would be adjourned. Mr McGarry included in his letter a statement that the hearing had been postponed once at the claimant's request and no further postponement would be granted. Pausing at that juncture that was somewhat unfair, the claimant had simply insisted the respondents followed their own policy.

89.He was asked what information he wanted from his computer and was directed to supply the respondent with a list by 05 September 2018.

90.The documents apparently missing from the disciplinary invite were sent to the claimant.

91.The claimant responded to the letter of 03 September 2018 on 05 September 2018 and set out a list of what he wanted. Confusingly the claimant headed the letter "subject access request" and made reference to the data protection act but it was

clear from the contents the claimant wanted the information so he could defend himself at his disciplinary hearing as he said "*Please supply the data about me that I am entitled to under data protection law relating and as agreed in your letter dated 3 September 2018 as part of the disciplinary hearing scheduled for 11 September 2018."*

92.The respondent then did nothing. Thus the claimant had requested information and was not told prior to disciplinary hearing when the information he required to defend himself would be available. The claimant described this as the *"breaking point"* which led to his resignation.

93.A disciplinary hearing was scheduled for the 11 September 2018**.** The claimant resigned on that day. (510 /523). The tribunal did not analyse that letter given the agreed issues.

94.The respondent then wrote to the claimant asking him to reconsider his decision. He declined but provided a detailed response to the nine allegations that had been raised against him.

Submissions

95.The tribunal was grateful for the short and succinct submissions made by both representatives.

96.It means no disrespect by not repeating those submissions but has picked up the relevant arguments in its conclusions.

Incorporation of policies

97.It was common ground that there was implied into the claimant's contract of employment a duty of trust and confidence.

98.Both parties adopted the definition given in **Malik -v- Bank of Credit and Commercial International SA 1997 IRLR 62** in where the term was defined as follows: –

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

98.There was a dispute between the parties as to whether the respondents disciplinary and data protection act policy were incorporated into his contract.

99.In the leading case of **Hallett -v- Derby Hospitals NHS Foundation Trust 2018 EWCA 796** the principles governing the incorporation of documents into a contract of employment was summarised. In essence the tribunal had to look at what the parties intended, on the basis of the words used and their context. Even if the parties had expressly or impliedly agreed that a document should form part of the contract between them the terms must then had to be apt for incorporation.

100.This latter principle is well illustrated by the case of **Keeley -v- Fosroc International 2006 IRLR 961. Keeley** was a case where the Court of Appeal held that even though a handbook had been expressly incorporated into the contract it did not mean that the entire contents of the handbook had contractual effect.

101.There is no single test to determine whether documents such as disciplinary procedures have contractual effect.

102.Generally speaking a code or policy is only regarded as having contractual effect if it may be regarded as conferring rights on an employee, standards of good practice do not generally have contractual effect see **Wadsworth London Borough Council -v D'Silva 1998 IRLR 193**

103.Thus an enhanced redundancy policy in a handbook might well have contractual effect but trigger points in a sickness absence review policy might not, as they could be regarded as simply procedural.

104.Starting with the disciplinary policy the contract made reference to the respondent disciplinary and grievance procedure but did not state it was contractual merely that *" WERMO disciplinary and grievance procedures are detailed in separate documents which will be provided to you upon your appointment"*

105.Of course written particulars of employment must, by law include a note specifying any discipline rules applicable or refer the employee to such a document specifying such rules which is reasonably accessible to the employee.

106.In terms of data protection the claimant's contract simply rehearsed the claimant consented to the respondent retaining personal data.(98).

107.When the tribunal stood back, firstly looking at the disciplinary policy it could not discern any intention to expressly incorporate it into the claimant's contract of employment. Even if the tribunal was wrong on that, the policy itself was not apt for incorporation. It was procedural, setting out standards of good practice rather than conferring any specific rights on an employee.

108.The position in respect of the data protection act policy, from the claimant's perspective was even weaker. For the same reasons as the tribunal found in respect of the disciplinary policy it found it was not expressly incorporated into the claimant's contract of employment.

109.That said the disciplinary policy was not wholly irrelevant because when a tribunal is asked to determine whether there has been a breach of the implied duty of trust and confidence a breach or breaches of noncontractual policies has the potential to amount to a breach of that duty. An example may illustrate the point. An employer has an equality and diversity procedure. It is noncontractual. An employee suffers acts of discrimination which are contrary to the terms of the policy. The employee resigns. Depending on the facts, the employee might be able to show a breach of the implied duty of trust and confidence.

110..Before turning to the specific acts or omissions upon which the claimant relied it is appropriate to briefly summarise the legal principles the tribunal adopted in respect of constructive unfair dismissal

111.Section 95 (1) of the Employment Rights Act 1996 defines dismissal as follows: –

"(1) for the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) …

(c) the employee terminated 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."

112..For an employee to succeed in a claim of constructive dismissal the employee must satisfy the following four conditions on the balance of probabilities.

112.1.One, there must be a breach of contract by the employer. This may be either an actual or anticipatory breach.

112.2Two, that breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justifies the employee leaving.

112.3.Three, the employee must leave in response to the breach, that is, it must have played a part in the employee's decision, and not some other unconnected reason, see **Wright -v- North Ayreshire Council [2014] ICR 77.** Where the employee has mixed reasons for resigning the resignation will constitute a constructive dismissal if the repudiatory breach relied upon was at least a substantial part of those reasons, see **United First Partners Research-v- Carreras [2018] EWCA Civ 323**

112.4.Four, the employee must not delay too long in terminating the contract in response to the employer's breach, or do anything else which indicated acceptance of the change to the basis of the employment, otherwise the employee may be deemed to have waived the breach. Whether an employee has waived the breach, is fact sensitive. There is no fixed time within which the employee must make up his or her mind. Factors that may be relevant include the nature of the breach, whether the employee has protested and what steps, if any, the employee has taken after the alleged breach to show an intention still to be bound by the contract.

113.Reasonableness of an employer's conduct is to be considered under Section 98 (4) of the Employment Rights Act 1996 and not to determine whether there has been a dismissal. That said reasonableness may not be wholly irrelevant, and may have some evidential value in a constructive dismissal claim, see **Courtaulds Northern Spinning Limited -v- Sibson 1978 ICR 329.**

114.There can be a constructive dismissal if there are a series of events that occur over time which, when considered together, show that there has been a repudiatory breach of contract. In such a case the last action of the employer which leads to the employee resigning need not in itself be a breach of contract. The question the tribunal must answer is, does the cumulative series of acts taken together amount to a repudiatory breach of the contract, see **Lewis -v- Motorworld Garages Ltd 1986 ICR 157.**

115.This has been further explained by the Court of Appeal in **Omilaju -v- Waltham Forest London Borough Council 2005 ICR 481** where it was held that a relatively

minor act may be sufficient to entitle the employee to resign and leave the employment if it is the last straw in a series of incidents. The final straw need not be of the same quality as the previous acts relied upon but it must contribute something to the breach and be more than trivial.

116.The approach where it is argued that dismissal was fair was summarised in **Bournmouth University -v-Buckland 2010 ICR 908 CA** as follows: –

117.1.Firstly in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence, the unvarnished **Malik** test applies.

117.2.Secondly if acceptance of breach entitled the employee to leave, they have been constructively dismissed

117.3.Thirdly it is open to the employer to show that such dismissal was for a potentially fair reason.

117.4.Fourthly if the employer does so, it will then be for the tribunal to decide whether dismissal for that reason, both substantially and procedurally, fell within the range of reasonable responses and was fair.

118.It is against the above legal principles for the tribunal then analysed the factual matrix. For ease of reference the tribunal has utilised each of the grounds set out in the list of issues.

Did Mr Michael McGarry fail to implement the findings of the grievance outcome letter dated 30 November 2017 despite repeated requests from the claimant to do so?

119..The tribunal found Mr McGarry did so fail. It then looked at the explanation and submissions put forward on behalf of the respondent

120.The respondent sought to argue that the claimant had no particular interest in pursuing the grievance and affirmed any breach, given the delay between the grievance outcome letter and in pursuing matters in January 2018.

121.The tribunal rejected that submission.

122..His grievance had been upheld against Ms Onayemi She was a board member and disciplinary matters involving board members had to be taken by the board.

123..The annual general meeting took place in December 2017, which led to a change in officeholders, and he was therefore waiting for Mr McGarry, as the new chairperson, to action matters ,which he considered would occur at the next ordinary general meeting, on 11 January 2018. This was wholly consistent with the note of the board meeting held on December 2017

124..The claimant specifically chased on 10 January 2018 (387), just before the board meeting. The claimant specifically asked Mr McGarry to set out what course of action he proposed to take, given the seriousness of the allegations and findings also enclosed a copy of Mr Anderson's report of 30 October 2017 .

125..Although the respondent subsequently instructed Face2Face, the claimant's first grievance was not re-investigated despite the express assurance given to the claimant. He was lied to.

126..Whilst the tribunal did not find there were repeated requests made by the claimant, he made a clear request and had a grievance against a board member upheld but the respondent then failed to implement its findings without any reasonable justification.

127..The respondent could not demonstrate any reasonable and proper cause for its inaction

Did Mr McGarry fail to appoint an external HR company to re-investigate the claimant's first grievance against Ms Agnes Onayemi despite stating he would do so in an email dated 1 February 2018, and instead appointed them to investigate the claimant for things already investigated on 16 October 2017 by Mr Michael Anderson?

128..This allegation flows from the first allegation made by the claimant .

129..The respondent did not dispute the contents of the email 01 February 2018 (403) sent to the claimant by Mr McGarry, the crucial section stating *"I am currently in discussion with a reputable HR company, to investigate <u>yours</u> (tribunal's emphasis) and Agnes's grievances."*

130.The tribunal found the respondent did not reinvestigate the claimant's proven first grievance

131.It deployed a number of arguments as to why no such investigation took place, none of which the tribunal found credible.

131.1.Firstly it stated that any such action against Ms Onayemi would be confidential. Confidentiality cannot have anything to do with matters, given there was no reinvestigation.

131.2.Secondly the respondent said no investigation was undertaken because the first grievance had been amicably resolved, at the latest at the board meeting on 11 January 2018. That simply was not credible as if so, there was no reason for Mr McGarry to promise the claimant a further investigation after the board meeting.

Allied to this the respondent's own response (page 70 paragraph 8) was at variance to the evidence given by Mr McGarry. The respondent stated *"the claimant's grievance against Ms Onayemi were upheld. Ms Onayemi and the claimant agreed to reach an amicable agreement and therefore, the claimant attended Ms Onayemi's home and resolve the grievance. However, during the next board meeting the claimant advised that he had not reached a resolution".* The reference to the board meeting must be a reference to the meeting on 11 January 2018. Thus on the respondents own documentation, mediation had been rejected at the board meeting .In the circumstances Ms Jervis's submission that the claimant was in some way at fault for not chasing a mediation meeting was unattractive and rejected by the tribunal.

In the tribunal's judgement looked at in context no reasonable employer could reasonably believe the claimant regarded his first grievance against Ms Onayemi has been amicably resolved.

131.3.Thirdly the respondent contended it had not reinvestigated because the claimant had not appealed his grievance outcome. Again that lacked credibility. There was no reason for the claimant to appeal the outcome of his grievance against Ms Onayemi when all elements of his complaint had been upheld. In the circumstances Ms Jervis's submission that the respondent had reasonable and proper cause for doing nothing was not accepted by the tribunal.

Did Mr McGarry state in correspondence on 29 January 2018 that there might be an additional issue relating to a possible breach of the Fraud Act and Bribery Act ?

132. The tribunal is quite satisfied that Mr McGarry did indeed raise this matter with the claimant in an email of 29 January 2018.

133.At first the tribunal was concerned given the reference to the words “possible” and “might” with no specific reference to the claimant.

134.However those concerns were allayed because on Mr McGarry’s own evidence he intended the claimant to believe that there were serious concerns as to the claimant’s behaviour which he was not prepared to disclose, and, that is how the claimant interpreted the email.

135.This is illustrated by the fact the claimant suggested the concern was referred to Lambeth Council’s fraud department.

136.Despite the claimant’s suggestion and the gravity of the allegation Mr McGarry made no referral.

137.Mr McGarry’s explanation, that nothing could be done because the claimant resigned was in the tribunal’s judgement simply not credible. Between the email of 29 January 2018 and the claimant’s resignation the respondent was perfectly able to instruct external advisers to look at two separate matters so there is no reason why the fraud and bribery allegations could not be investigated

138.The claimant’s interpretation that this in effect was a threat to scare him carried weight given the respondent then did nothing about what was a very serious allegation.

139.The respondent had no reasonable proper cause to make such a serious allegation and then to do nothing.

Did Mr McGarry fail to investigate the claimant’s grievance dated 30 April 2018, despite stating that it would be passed to Peninsula to handle

140.This was a reference to the claimant’s second grievance, principally directed against Mr McGarry. Mr McGarry accepted that he informed the claimant that his second grievance would be investigated by Peninsula.

141.In the respondent’s own pleading (74) it was expressly admitted that it did not address the claimant’s second grievance.

142.The tribunal therefore had to examine whether the respondent had reasonable and proper cause.

142.1.Firstly Mr McGarry said it was not investigated because the grievance was copied to current and past board members and the respondent considered the claimant had acted in an unreasonable manner by submitting his grievance. The respondent's grievance policy did not explain what steps should be taken if the person against whom the grievance was raised was the chair of the respondent's board. The claimant was entitled to draw the board's attention to his grievance, given his grievance against Ms Onayemi had not been actioned or reinvestigated, despite the promise to the contrary by Mr Mc Garry, and the claimant knew this from the information he obtained from Face2face on 05 April 2018**.** He had every reason to believe, as turned out to be the case, that Mr McGarry would bury the grievance

142.2.Secondly Mr McGarry said he considered it was a grievance about the first grievance that the claimant had accepted should be mediated. The tribunal did not accept that. Looking objectively at the second grievance it was not identical to the claimant's first grievance and in any event the tribunal had found there been no agreement to mediate his first grievance.

142.3Thirdly he said he decided not to refer to Peninsula because the grievance was baseless. With respect it was not the him to make such a decision. On the face of the document the claimant had raised allegations. There may have been a requirement for further particularisation but that could have been undertaken in the course of the grievance process.

143.In the tribunal's judgement the above excuses were invented by the respondent to explain why it took no action despite the express representation given to the claimant to the contrary. The respondent had no reasonable proper cause for promising the claimant to investigate the second grievance but then doing nothing.

Did Mr McGarry and Ms Onayemi fail to follow its disciplinary policy when they suspended the claimant without regard to its disciplinary policy and procedure at para 3.3 of Appendix 3 on 16 May 2018. In particular did they fail to supply the claimant with reasons for his suspension, and delay provided a letter confirming suspension until 17 May 2018.

144.Paragraph 3.3 of Appendix 3 to the respondent's disciplinary process (165) provided:

"Details of the suspension will be confirmed in writing by the employee's line manager and will include:

- *the requirement for the employee to be available to attend any investigatory interview that may be called at short notice*
- *a clear instruction that the employee will not visit any Waltham estate RMO premises during the period of suspension nor make any contact with any other Waltham estate RMO employee except employee representatives, without prior permission from the suspended employees line manager"*

145.There is nothing either in the claimant's contract or in the disciplinary policy that specified that the reasons for the suspension had to be given although the fact that the claimant had been suspended was a requirement. Mr McGarry told the claimant to get out of the office on 16 May 2018. He did not tell the claimant he was suspended. Mr McGarry agreed that the letter given to the claimant dated 16 May 2018 (470) did not comply with paragraph 3.3 of appendix 3.

146.For clarity the tribunal did not find claimant was correct that he only received a letter of the following day 17 May. He received it the previous day, 16 May 2018.

147.Under the respondent's own policy suspension should have been confirmed in writing and it was not. There was thus a breach of the respondent's own policy.

Did Mr McGarry and Mr Tarek Maghari fail to inform the claimant in the investigation meeting invite dated 11 July 2018 what the concerns were about his conduct before the investigation meeting. The claimant asserted this was contrary to paragraph to 9.2 of the respondent's disciplinary policy and procedure

148.Paragraph 9.2 of the respondent's disciplinary policy and procedure provided: –

"The employee will be advised that the matter is being investigated, unless there are overriding and compelling reasons why that would prejudice the investigation".

149.The claimant was told he was being investigated by letter dated 11 July 2018 (486/487). In the tribunal's judgement he misunderstood the respondent's

disciplinary policy. It does not impose any requirement that details of the matter to be investigated had to be disclosed at the investigatory stage..

150.It follows that the respondent did not breach its policy as alleged by the claimant.

151.The claimant's assertion that the respondent breached its own policy is unfounded

There was no evidence available or supplied to substantiate the 6 allegations against the claimant which were to be progressed as disciplinary matters to a disciplinary hearing in September 2018. The claimant asserted this is contrary to paragraph 3.3 of the respondent's disciplinary policy and procedure

152.Paragraph 3.3 of the respondent's disciplinary policy and procedure provided-

"Managers will take reasonable steps to achieve the required improvement in an employee's conduct before invoking the disciplinary procedure. Any decision to invoke the disciplinary procedure and resultant action taken, however,will be based upon the evidence available and advice provided by human resources adviser, where appropriate".

153.Paragraph 3.3, in the tribunal's judgement, breaks down into two separate segments. The first is that a decision to hold a disciplinary hearing must be based on the evidence. Advice from HR adviser may, but need not be, obtained. Secondly any sanction must be based on the evidence available and again advice from an HR adviser may, but need not be, obtained.

154.Given there was no actual disciplinary hearing it is the first element of the policy that must be examined.

155.The tribunal is satisfied that Ms Gittins from Face2face investigated the nine allegations as is evidenced by her investigative report (488/499) dated 03 August 2018. She applied her mind to matters and weighed up the evidence and determined, for various cogent reasons, that there were insufficient grounds to proceed on three of the allegations. For example she rejected a potentially serious allegation that the claimant used the respondents credit card for personal use.

156.In the tribunal's judgement this showed a level of selectivity and application of the appropriate test as to whether to proceed.

157.She made recommendation that six of the allegations should be pursued and tested at a disciplinary hearing and the respondent accepted that recommendation. They were entitled to accept the recommendation of HR professional.

158.The tribunal looked at the investigating officer's report in respect of the six allegations that were pursued .As may be expected, the evidence in respect of some were stronger than others. However the claimant's case was that there was no evidence available or supplied to substantiate the six allegations to proceed. The tribunal disagreed

159.The claimant misunderstood the respondent's policy. He said in evidence that the matter should not have proceeded unless the evidence was *"conclusive".* That is not what was required at this stage. All that is required was a prima facie each case.

160.It follows that the respondent did not breach its policy as alleged by the claimant.

Did the respondent failed to give the claimant a minimum of five working days' notice for his disciplinary hearing on 24 August 2018 scheduled for 28 August 2018 as required under paragraph 13.1 of the respondent's disciplinary policy and procedure

161.Paragraph 13.1 of the respondent's disciplinary policy and procedure provided in respect of a disciplinary hearing;-

"The employee will be entitled to a minimum of five working days notice of a hearing, in writing. The letter will state the allegation against the employee, the location, date and time of the hearing and remind the individual of their right to be accompanied. If the employee is unable to attend at the time specified, a reasonable alternative will be proposed by the manager…"

162.This had to be read in conjunction with clause 6.1 of the policy that required the respondent to supply the claimant with details of the allegations, documents, and any statements it relied upon.

163.The disciplinary invite letter dated 24 August 2018 was received at the claimant on 25 August 2018 with a hearing scheduled for 28 August 2018.The claimant was not given adequate notice in accordance with the respondent's own policy.

164.It is true that the respondent then agreed an adjournment evidenced by letter of 03 September 2018 (506), but only after claimant had expressly protested about the breach of policy.

Was no response received to the Claimant's subject access request made on 05 September 2018 and did the respondent threatened to proceed with the disciplinary hearing in his absence

165.Under the respondent's disciplinary policy and procedure , paragraph 16.2;-

"Information to be presented by the employee [ie at the disciplinary hearing] *must be given to the line manager at least three working days before the date of that hearing and should include*

- *any statements that will be presented in the names of any witnesses that will attend*
- *any supporting documentation."*

166.On 27 August 2018 in an email (503/504) the claimant made it clear he needed access to his laptop to obtain documents to use in his defence.

167.Sight must not be lost of the fact the claimant was absent from work and could not speak to fellow employees and had no access to his computer.

168.On 03 September 2018 the respondent replied asking for a list of what was required by Wednesday 05 September.

169.The letter did say that as the claimant had postponed the first hearing once no further postponements would be granted and if he failed to attend the rescheduled hearing it would proceedings absence. That was wholly disingenuous. The first hearing had been postponed because the respondent accepted it breached its own procedure by trying to proceed. In the circumstances the threat was inappropriate.

170.The claimant responded on 05 September 2018 with a list of what he wanted which included emails and various minutes of board meetings and again requested details of documentation in respect of his grievances. He however said it was a subject access request under the data protection act.

171.In these particular circumstances it was clear why the claimant was requesting the information namely so he could comply with the respondents own disciplinary policy to submit evidence for his disciplinary hearing as part of his defence. By the

morning of the hearing the evidence he requested had not been supplied by the respondent to him and he been given no reason as to why it was not to be supplied.

172.The respondent's case now was that it was entitled to insist upon a £10 fee and had 40 days to respond. . This was never communicated to the claimant. In any event the respondent knew why the claimant had made the request, in response to an instruction from the respondent . The claimant was entitled therefore to expect to be told if the information could not be supplied by the disciplinary hearing and if so why . The respondent simply did nothing.

173.The respondent was not helped by the various explanations it gave for doing nothing.

174.It said the claimant did not require any information to defend himself. The tribunal had little hesitation in rejecting that. There was a real probability that there would be emails relevant to his defence, such as in respect of the rent improvement plan, who initiated contact following Mr Morris services being dispensed with, what instructions there were from the board as regards BACS payments and what agreement had been reached with Mr Morris as regards the use of a laptop. To label the request as a "hopeless" attempt by the claimant to persuade the respondent to drop the disciplinary hearing did not do justice to the claimant.

175.The tribunal considered the true reason was that Mr McGarry was ill disposed to the claimant and was not prepared to look at matters dispassionately. The tribunal noted that in cross examination he said words to the effect that the reason the information wasn't supplied was because it was too onerous. The claimant was never told that or told to limit his request.

176.As the claimant put it, in his witness statement this lack of information was the final straw that led to him resigning because he was being expected to go into a disciplinary hearing with no evidence to support his defence.

177.The tribunal was not satisfied respondent had reasonable proper course for failing to comply with the claimant's requests

Has there been a breach of the implied term of trust and confidence.

178.As the tribunal has already held the claimant cannot show either of the two express clauses that he relied upon were incorporated into his contract.

179.He must therefore show a breach of the implied term of trust and confidence

180.This was defined by the Court of Appeal in **Eminence Property Developments Ltd-v-Heaney 2010 EWCA Civ 1168,** as follows: –

"Whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract"

181.The claimant has shown such a breach. Whilst Ms Jervis was right to draw the tribunal's attention to the decision in **Leach -v- The Office of Communications** that the label of trust and confidence should not be invoked too easily the tribunal is satisfied that it is has not done so having regard to the cumulative proven acts or omissions by the respondent

182.The claimant was entitled to look at matters cumulatively and they all arose over a relatively short time period of less than a year.

183.The claimant was entitled to expect that the grievance finding in his favour against Ms Onayemi would be progressed and if reinvestigated that reinvestigation would proceed promptly and he would be kept informed of the outcome. Nothing of the kind happened. The failure to do so was a fundamental breach and the respondent has not demonstrated reasonable and proper cause for its acts or omissions

184.An allegation of possible fraud and bribery was made against the claimant and despite the seriousness of that assertion and his request for it to be investigated nothing whatsoever was one. The tribunal found such an allegation to be particularly serious for a professional person in the position of the respondent. This was a fundamental breach and the respondent has not demonstrated reasonable and proper cause

185.No action whatsoever was taken in respect of the claimants second grievance, a matter aggravated by the indication made to the claimant by the respondent that it was to be progressed. This was a fundamental breach and the respondent has not demonstrated reasonable and proper cause As was said by the EAT in **WA Goold (Pearmak) Ltd v McConnell and anor 1995 IRLR 516, EAT,** an employer is under an implied duty to *'reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have'.*

186.The respondent did fail to follow its own procedure in respect of the suspension of the claimant on 16 May 2018 and when giving the claimant notice of the disciplinary hearing although the tribunal did not find either of these amounted to fundamental breaches of the implied duty of trust and confidence. They were less serious breaches but were relevant to the global picture and taken together with the other proven acts there was a fundamental breach of the implied duty of trust and confidence.

187.The respondent failed to reply to the claimant's letter asking for documentation so he could prepare his defence to allegations of gross misconduct. Whilst it was labelled a subject access request, as the tribunal have already explained, in the particular circumstances it was clear the claimant wanted information to defend himself for the hearing listed for 11 September which the respondent said would not be adjourned. He was not provided with what he asked for or given a reason why could not be provided.

188.The tribunal considered that was a fundamental breach in these very fact specific circumstances but even if it was wrong on that point the claimant could rely upon the matter as a "last straw". It contributed something to the dismissal and was a sort of act anticipated in **Omilaju**

189.Looking at the proven acts or omissions of the respondent a reasonable person was entitled to conclude that the respondent no longer regarded itself bound by the contract. This was just the sort of case anticipated in **Lewis -v- Motorworld Garages Ltd 1986 ICR 157.** There was no reasonable and proper cause for the conduct the tribunal has been critical of and in addition the tribunal found the conduct was calculated or likely to destroy or seriously damage trust and confidence**.**

What was the main reason for the claimant's resignation?

190.It was put to the claimant that the principal reason for his resignation was not the respondent alleged behaviour but the fact he suffered from poor health and did not get on with Mr McGarry and Ms Onayemi.

191.Whilst the claimant had suffered from periods of ill-health in 2018 they were stress-related which he attributed to his difficulties with the respondent. There was no evidence placed before the tribunal that the claimant had a long term sickness record.

192.Whilst the claimant clearly saw Mr McGarry and Ms Onayemi, as in his opinion, overreaching their responsibility namely the board were responsible for strategic matters and he was responsible for operational matters he was prepared to seek to resolve matters by means of the internal grievance procedure.

193.Nor was the tribunal satisfied that the claimant resigned because it was inevitable he would be dismissed. The claimant actively participated in the disciplinary proceedings. For reasons the tribunal will discuss, later in its judgement, the allegations against him were not clear-cut.

194.The claimant had no job to go to and was a married man with bills to pay.

195.The tribunal is satisfied that the principal reason that the claimant resigned was because of the respondent's breach of the duty of trust and confidence.

Affirmation.

196.Ms Jervis made very limited submissions on this point and there were no submissions from Mr. Onibokun. The tribunal relies upon its previous findings. There was a fundamental breach of contract up to dismissal namely the failure to supply the claimant with the information he requested to defend himself at the disciplinary hearing. In the alternative it was the final straw that again subsisted up to the date of resignation. The claimant was entitled to have regard to the fact the respondent was breaching its own procedure in not permitting him to put forward a defence in accordance with the time periods set out in its own policy. The claimant was entitled by that stage to consider, as a reasonable person would have considered, that objectively the respondent had destroyed trust and confidence. Given the claimant then immediately resigned there can be no affirmation.

Was the dismissal fair?

197.The burden of proof is upon the respondent to establish the reason or principal reason for dismissal. It does not need to be right,, a reasonable belief will suffice and that is a low threshold as was emphasised in **Abernethy – v – Mott, Hay and Anderson 1974 IRLR213** where the Court of Appeal held that a reason for dismissal was a set of facts known to the employer or beliefs held by him which would cause him to dismiss the employee.

198.The tribunal is satisfied that the respondent has shown that it was conduct that led in its mind to the termination of the claimant's contract of employment.

199.Although the respondent can establish a potentially fair reason, as Ms Jervis very properly conceded, that due to the lack of any form of procedure the dismissal inevitably would be procedurally and substantially unfair.

Polkey/contributory contributory conduct

200.Ms Jervis argued that any award should be reduced by 100% on the grounds of Polkey or contributory conduct.

201.She addressed both issues together but the tribunal reminded itself that they are not identical.

202.The tribunal therefore consider it appropriate to record the law it had applied in respect of, firstly, Polkey and then contributory conduct.

Polkey

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

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

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

206.The burden of proving the claimant would have been dismissed in any event is on the respondent. Provided the claimant can put forward an arguable case that he or she would have been retained were it not for the unfair procedure, the evidential burden shifts to the respondent to show that the dismissal might have occurred even if a correct procedure had been followed, see **Britool Ltd -v- Roberts 1993 IRLR 481.**

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

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

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

Contributory conduct.

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

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

211.1.The relevant action must be culpable or blameworthy

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

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

212..For a deduction to be made a causal link must exist between the employee's conduct and the dismissal. In other words, the conduct must have taken place before

the dismissal; the respondent must have been aware of the conduct; and the respondent must then have dismissed the claimant at least partly in consequence of conduct.

Application of the law

213.Although not known to the claimant at the time, and so therefore cannot be relevant to his resignation, the respondent had already determined, even prior to receipt of the disciplinary investigative report that the claimant was guilty of gross misconduct. This is evidenced from the letter of Mr Maghari to Peninsular (supplemental bundle 425 to 433) where he'd wholly prejudged matters and concluded by saying "*Board members are of the opinion that Iddy* [the claimant] *should be dismissed on the grounds of gross misconduct, due to his unacceptable behaviour towards Michael McGarry"*

214.Thus the whole disciplinary hearing would have been a sham whatever the claimant had said.

215.The claimant did demonstrate in his letter at termination that he had a potential defence to all charges

216.In terms of the factors relied upon by Ms Jervis to support her submission as to a 100% reduction she concentrated in cross examination upon the incident of the 16 May 2018 and what was said to be insubordination relating to an alleged failure by the claimant to follow an instruction given by Mr McGarry in relation to contact with Mr Morris, production of timesheets and a failure to action on occupational health report on an employee It is for this reason the tribunal has not dealt with each and every of the allegations set out in the disciplinary invitation letter.

217.On the evidence before the tribunal there was no doubt that there was an acrimonious meeting between the claimant and Mr McGarry on 16 May, which probably lasted about 30 to 40 minutes.

218.The claimant himself described it as "*fractious"*

219.Mr McGarry asserted that he was assaulted and that was an act of gross misconduct. He could point to a mark on his leg.

220.Other than the claimant and Mr McGarry the investigating officer also took a statement from Ms Char . Her evidence was not particularly damaging to the

claimant. She did not say the claimant used bad language or threatened Mr McGarry. She said the claimant shouted, which he accepted, the words *"bear me witness bear me witness".* That was consistent with the claimant's account that he did not want to be alone with Mr McGarry and wanted witnesses to see what was happening. She did not make reference to any deliberate assault

221.It would appear that Mr McGarry did go into the claimant's office to call the police and the claimant tried to enter, he said because he couldn't leave without his car keys and wallet which were in the office.

222.There was some pushing of the office door by the parties which Ms Char Henry said was because the claimant was trying to get into his office. In the tribunal's opinion it is likely that it was during this that Mr McGarry obtained some bruising to his leg.

223.There was no suggestion of any blows or even threatened blows.

224.It is clear the claimant drew to the investigating officer's attention to potential witnesses, Michael Douglas and Trevor Auguste. (140 SB) although , surprisingly neither were interviewed.

225.It was left to the claimant to provide the investigating officer with a copy of Mr Auguste statement.

226.The statement provided by Mr Auguste did not suggest that the claimant had assaulted Mr McGarry.

227.Mr Douglas's statement recorded that Mr McGarry told the claimant he wanted him to leave and the claimant was suspended and he tried to close the office door whilst at the same time the claimant pushed the door to get into his office. (472).

228.The tribunal noted that although Mr McGarry claimed that he had a dictaphone recording (see his email 16 May 2018**,** 461) of the whole incident involving himself and the claimant he never provided this to the investigating officer. Mr McGarry's account that as the investigating officer had a statement from Ms Char it was not required, stretched credibility. It was a vital piece of evidence which could have had adverse effects for the claimant or alternatively have exonerated him.

229.Whilst Ms Jervis was correct that it was never put to Mr McGarry that he was the aggressor the claimant had maintained that was the case in his investigative interview (SB 136).

230.In the tribunal's judgement there were very clear evidential disputes and questions as to the adequacy of the investigation in respect of the central allegation of gross misconduct surrounding the events of 16 May 2018.

231.This was a classic case where a full disciplinary hearing would have been vital to determine the truth or falsity of the various allegations. It was not clear cut. Numerous evidential issues arose. How did the bruising to Mr McGarry's leg arise? Was it deliberate or accidental? Were either party engaged in threatening and abusive behaviour? Was the claimant's explanation that he needed to go into his office before he left to get his keys and wallet credible? Was the investigation fair and reasonable given that two key witnesses were not even interviewed by the investigating officer, despite having her attention specifically drawn to their presence. There were both procedural and substantive issues that required determination

232.Turning to the allegations of insubordination in respect of, timesheets, speaking to Mr Morris and failing to action on occupational health referral.

233.The respondent could show the claimant was expected to maintain timesheets having regard to a variation to the claimant's contract dated 06 July 2015

234.The claimant accepted he maintained timesheets on his laptop but an evidential dispute existed, as the claimant contended he left them for Mr McGarry in February when he went on holiday. Prior to that he had not submitted timesheets since Mr McGarry became chairperson because he not made a claim for time off in lieu or overtime and it not been asked for them.

235.Again there was a clear evidential dispute which required resolution by means of a disciplinary hearing.

236.There was no dispute the claimant was aware that the respondent had dispensed with the services Mr Morris who provided accountancy advice to the respondent which included the monthly management accounts, budgets and annual accounts together with strategic financial management as required.

237.There is no doubt, as Mr Morris himself accepted, that he contacted the claimant (and not the other way round) following the termination of his contract because he believed there was important information that needed to be handed over to his successor. Mr Morris expressed concern that the respondent needed to speak to Lambert Council because the respondent had not been complied with a gas servicing key performance indicator and that had not been disclosed and he considered it should be drawn to the council's attention along with a robust action plan. That is wholly consistent with an email sent by Mr Morris to the claimant on 28 March 2018 (supplemental bundle 268/269)

238.An evidential dispute existed as to whether the claimant was ever expressly told Mr Morris was not to engage in any form of hand over and the claimant was not to talk to him. It was of note that on the date, 26 March 2018, when Mr McGarry claimed he gave instructions to the claimant not to have any conversation with Mr Morris about business matters the claimant actually wasn't at work but was absent due to ill-health.

239.The claimant considered that as he was being contacted by Mr Morris and he had a responsibility for business continuity he ought to at least listen what was said.

240.Again there was a clear evidential dispute that needed testing at a disciplinary hearing.as to what instruction if any been given to the claimant, whether it was a reasonable management instructions, and whether he was "maintaining contact" with Mr Morris as alleged

241.The claimant accepted he had not immediately made an occupational health referral for an employee as requested but explained that he had to ensure that the appropriate consent forms had been completed by the employee before such a referral could be made. Whether true or not would be an evidential dispute that would require a full disciplinary hearing.

242.Starting with Polkey the respondent can prove the claimant would have been dismissed in any event but that was because the respondent decided whatever the claimant said he would be dismissed. Polkey requires a respondent to show that the claimant would have been dismissed following a fair substantive and procedural process .

243.Polkey in any event is normally more appropriate to a case where there has been a dismissal following a process, for example such as redundancy and then due to a procedural or sometimes a substantive error the dismissal is found to be unfair and the tribunal then has to reconstruct what would have happened had a fair process being followed.

244.Here the tribunal is being invited to engage in what has been referred to in case law as a "sea of speculation". The tribunal has no reliable evidence upon which it could fairly determine there should be a Polkey reduction let alone of what magnitude.

245.Turning to the issue of contribution the respondent has not surmounted the first hurdle namely having shown that there was culpable conduct. The evidence is arguable and there are no express admissions or other hard evidence such as CCTV.

246.In the circumstances therefore the tribunal declined to make a deduction for contributory conduct.

Trade Union and Labour relations (Consolidation) act 1992

247.Section 207A (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides: –

"(2) if, in the case of proceedings to which this section applies, it appears to the employment Tribunal that-

(a) the claim to which the proceedings relate concerned the matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%".

248.The tribunal has reminded itself that any uplift is only if the tribunal considers it just and equitable and a 25% uplift must be for the most severe cases.

249.The tribunal is satisfied that the claimant's second grievance fell within the ambit of the ACAS code of practice number one. The respondent is in breach of paragraph 33 as it failed to arrange for a formal meeting to be held without unreasonable delay. It is also in breach of paragraph 40 in that any decision should be communicated to an employee in writing without unreasonable delay.

250.Here the respondent made no attempt whatsoever to comply with the code of practice. There was no meeting with the claimant let alone any decision in writing. The respondent simply ignored the grievance and did nothing. Worse than that the claimant was led to believe that something was being done which was untrue. The respondent has not demonstrated that its failure was reasonable.

251.In these particular circumstances the tribunal considered that it was just and equitable to exercise its discretion and an award should be at the top of the scale and in this particular case, somewhat unusually, a 25% of award was appropriate.

252.A remedies hearing will be convened and the tribunal has made separate case management orders.

Employment Judge TR Smith

03 February 2023