CASE NO: 2601436/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr Ashley Fenyn

Respondent: Games Workshop Limited

Heard at: Nottingham

On: 11, 12 and 13 April 2023

Before: Employment Judge R Broughton (sitting alone)

Representation
Claimant: Mr Gunstone - counsel
Respondent: Mr Starcevic - counsel

JUDGMENT

The claim of constructive unfair dismissal is **not well** founded and is dismissed.

The claim for wrongful dismissal is **not well** founded and is dismissed.

REASONS

The claim

1. The claim was presented on 21 June 2022 after a period of Acas early conciliation from 22 March 2022 to 2 May 2022.

Issues

2. The claimant pursues claims of unfair constructive dismissal and wrongful dismissal.

3. After some discussion at the start of the hearing, it was agreed that the Tribunal would deal with both liability and remedy during this hearing (time permitting) however, during the course of the hearing, the parties came to an agreement by consent about the sum to be awarded should the Tribunal decide in the claimant's favour. The parties produced a signed agreement which they explained had taken into account contributory fault and Polkey. Neither party wanted the Tribunal to determine those issues and more broadly, to make any determination in respect of remedy and by agreement were not going to put forward evidence or submissions on remedy issues. This judgment therefore by agreement of the parties is limited to findings of fact on issues of liability only and if the

claimant succeeds, it is agreed that the judgment will record the agreement reached on remedy.

4. The issues for the Tribunal to determine are therefore:

Unfair dismissal

- *Did the decision by the respondent to issue the claimant with a first written warning and the conduct of the disciplinary process breach;*

  the implied term of trust and confidence and/or

  an implied term to conduct a disciplinary process fairly

- *Did the respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent;*

- *If so, did the respondent have reasonable and proper cause for doing so.*

- *Was the breach a fundamental one? Was the breach was so serious that the claimant was entitled to treat the contract as being at an end.*

- *Was the reason for the breach of contract a potentially fair reason?*

- *Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant, including following a fair procedure?*

- *Did the claimant resign in response to the breach? Was the breach of contract a reason for the claimant's resignation.*

- *Did the claimant affirm the contract before resigning?*

Wrongful dismissal / Notice pay

- What *was the claimant's notice period?*

- *Did the respondent constructively dismiss the claimant without notice?*

Evidence

5. The parties produced an agreed bundle of documents numbering 258 pages. There was some additional disclosure taking the bundle to 264 pages. There was also a separate 35 page remedy bundle.

6. The claimant gave evidence under a sworn affirmation and was cross examined.

7. The respondent called 5 witnesses; Julian Flowers, Plastics Manufacturing Manager and Disciplining officer, Joanna Sisson, People Partner, Elizabeth Genders, People Advisor, Neil Coombe, Manufacturing Operations Manager and David Musson, currently Global Head of Manufacturing. They all gave evidence under a sworn affirmation or oath and were cross examined.

Findings of fact

8. All findings of fact are based on a balance of probabilities. The burden of proving that there was a breach of contract rests with the claimant.

9. The claimant was employed from 12 March 2018 to 7 March 2022 as a Material Flow Manager.

10. The respondent manufactures miniature war games and is based in Lenton in Nottingham. The claimant reported into David Musson, the Head of Manufacturing until March 2021 and thereafter he reported into Neil Coombe, the Manufacturing Operations Manager.

11. The department operated three shifts; a morning, afternoon and night shift.

12. Damian Haczynski (**DH**), was employed by the respondent as a Very Narrow Aisles fork lift truck driver (VNA) driver and reported into Mark Smith, a Cell Manager. Mr Mark Smith in turn reported into the claimant.

Contract of Employment

13. The claimant was employed pursuant to the terms of a contract of employment dated 25 May 2021 [p.84 – 98].

Pay Policy

14. The respondent has a Pay Policy dated June 2021 (version 1).The Pay Policy expressly provides that it does not form part of an employee's contract of employment. It includes the following provisions [p.59 – 75]:

Paragraph 4 Wages and Salaries

"Staff should be paid a fair wage or salary for the job they perform…

Managers are responsible for ensuring that wages and salaries remain fair across their people and areas, as well as being consistent across similar jobs in Games Workshop"

Paragraph 5 Annual Pay Reviews

"Any increase in pay will be subject to business performance and always at the absolute discretion of Games Workshop .

…

Employees will not be eligible for an increase in pay during an Annual Pay Review:

- *If they are the subject of a formal disciplinary process*

Paragraph 6 Responsibility and Changes

"Where an employee takes on increased responsibility or has a change of job, they should be paid fairly for such an increase in responsibility or for the new job they will be performing. Managers are responsible for determining an appropriate wage or salary in these circumstance in accordance with section 4 ***and should obtain approval from the Chief Financial Officer and Chief Executive Officer*** *in respect of any changes to pay".*

Paragraph 7 Group Profit Share

"An employee will not be eligible if:

- *They are the subject of a formal disciplinary process…"*

Tribunal stress

<u>Salary Increase Approval Process</u>.

15. It is not in dispute that any salary changes require approval from the CFO and CEO. The agreed process by which the claimant would obtain approval for a pay-rise for a member of his team is to first make a direct request to his direct line manager who should then escalate the request to Rachel Tongue the CFO and CEO on the Executive team.

<u>Recruitment process</u>

16. The Recruitment Policy from September 2021 [p.253] provides as follows;

"Advertising vacancies

It is our policy that all vacancies will be placed on our careers site and on a range of national boards to help us attract the widest pool of candidates. This is where external and internal candidates can access a role. ***If the role is specifically to be advertised internally, <u>the hiring manager</u>*** *can notify the recruitment team of this and they will make sure the role is sent out via our job opportunities email, to help promote it" Tribunal stress*

<u>2018</u>

17. In March 2018 there were only 2 people including DH, working the night shift in the Materials Control area of the Material Flow Department (**Department**). Those working on the night shift at this time were not required to pack goods, only receive in boxes of plastic generated by the Injection Moulding Department into the warehouse and ensure they were stored or loaded. There was no supervisor required for the night shift given the nature of the work and the limited staff. The two staff reported into the Material Control Cell Manager, Mark Smith who worked on the morning shift and with whom they would carry out a handover each morning.

18. The respondent's business however grew and in 2018 those working on the night shift began packing goods in readiness for a second factory planned to be operational in December 2018/ January 2019. The number of staff (including agency staff) on the night shift increased to 5.

19. DH took on responsibility for supervising the night shift from about July 2018. He effectively the Tribunal accept, became a Team Leader/Supervisor which involved him taking on duties such as coordinating workloads and acting as the health and safety representative. Although this meant extra responsibility, he did not receive any additional remuneration and his job title was not changed.

20. The claimant alleges, that during 2018 he had regular conversations with Mark Giles, Health and Safety Manager UK and CE about health and safety concerns and that it was a requirement that all shifts should have a recognised supervisor at all times and thus the supervisory duties DH was carrying out, was an important role to the business.

21. Mark Giles did not give evidence on behalf of the respondent. The respondent disputes that a Supervisor was required on the night shift for health and safety reasons.

22. On 1 March 2020 Mr Watson, Group Health and Safety and Environment Manager sent an email to the claimant in which he referred to there being no Supervisor in 'Goods In' and of an operative seen walking around wearing headphones and how this shows how standards slip without a recognised supervisor, He was referring specifically to the 'Goods In' department which he refers to as the inherently most hazardous area in the factory where there is a need for a recognised team leader at all times.

23. Mr Musson accepts in his oral evidence [w/s para 10] that he had a conversation with the respondent's Health and Safety Team in respect of having a *"go to"* person on each shift in the case of Health and Safety matters but he denies being pressed by the Health and Safety Team about this on multiple occasions. He accepted the need for such a 'go to' person but did not accept that it would necessarily require a Supervisor.

24. On balance the Tribunal accept the claimant's evidence that he had discussions with Mr Giles about the need for someone to act as a health and safety representative on the night shift, this is consistent with DH assuming that responsibility, albeit informally in 2018, and the undisputed evidence of the claimant that it was arranged for DH to undertake the IOSH Working Safely training and the conversation Mr Musson accepts he had with the Health and Safety team.

<u>2019</u>

25. Toward the end of January 2019 there was a reduction in the work load and the numbers working on the night shift and thus there was less reliance on DH to perform Team Leader duties.

26. DH raised a concern with the claimant on 12 February 2019 however that he was having difficulty establishing his authority on the night shift [p.163]:

    "…*many times I was gently pointed out by my present [sic] and some previous employees that I am only a driver and have no obligation to listen to me. I think with a clear definition of what full positions [sic] would help in this* …"

27. The claimant replied on 5 March 2019 [p.163]. The claimant referred to having spoken to Mark Smith, Cell Manager about formalising his position as the senior member of the team; "*in the same way that Marek was for the pm shift*" and that he and Mark Smith agreed that it seemed; *"like the fair thing to do".* The claimant went on to explain that he would need his manager to agree to any kind of pay increase and that unfortunately there had then been a period of uncertainty about how long the night shifts would employ higher numbers of staff with the numbers dropping back to only two staff. When the second factory opened, the extra packing that had been done on the night shift could now be done on the day shifts.

28. Within this email the claimant then went on to make the following comment:

    "I still feel that as the longest serving and most experienced person on nights, your performance and extra responsibility should be recognised. This is something that I'm working on at the moment, as there are a number of staff now, whose roles have grown or changed…"

29. The claimant clearly considered that it was not fair that DH was not receiving additional remuneration and some formal recognition for the additional supervisory duties he was

still performing.

30. The claimant alleges that he raised this issue informally with Mr Musson at the time however with a drop in numbers employed on the night shift in 2019 there was less urgency to resolve this situation for DH.

31. Mr Musson in cross examination accepted that 'responsibility pay' for DH was being contemplated as early as March 2019 and he accepted that he was aware that DH was working at a level above that of an operative albeit "*not fully aware*" in 2018 "*there may have been conversations about it."*

32. Mr Musson in response to a question from the Tribunal gave evidence that he 'may' have been aware that DH was doing a supervisor role in 2018. At the time Mr Musson only had 3 direct reports including the claimant (with Cell Managers reporting into the claimant). Mr Musson gave evidence that he normally had weekly or daily catch up meetings with his 3 direct reports and that he would walk around the factory on a daily basis to 'gauge' how the factory was doing.

33. The Tribunal do not find it plausible that Mr Musson would not have known that DH was carrying out the role of a Team Leader/Supervisor from as early as 2018. The Tribunal find that he was aware and was content for DH to carry out this work but no steps were taken to reward him for this additional responsibility in 2018 . In part the Tribunal accepts that this was because of the uncertainty over the requirements for the night shift. The written Pay Policy was not in place at this time although the respondent witnesses do not dispute that regardless of a written policy, it is only fair and reasonable to recognise additional responsibility with additional pay unless perhaps it provides a development opportunity and the employee accepts the additional responsibility on that basis.

34. However, the Tribunal find that it was more than a development opportunity for the benefit of DH, it met a real need the respondent had for a '*go to'* person on the night shift to supervise amongst other things, that health and safety requirements were being met.

<u>February– October 2020</u>

35. The claimant around the end of February 2020 put forward a proposal to Mr Musson to create new roles in the Department including a Senior Operative role which he felt was appropriate for DH. However, as a result of the Covid pandemic the respondent shut down its business operations between March and May 2020. There was during this period therefore no further progress with respect to resolving the situation for DH.

<u>10 August 2020 - letter of concern</u>

36. The claimant was issued with a Letter of Concern on 10 August 2020 [p.57-58], as did his line manager Mr Musson.

37. There had been an internal audit which found that the costing structure with a supplier (Great Bear) had not been fit for purpose . Following the claimant's arrival into post a new agreement was entered into from November 2018, but while the new costing methods more accurately reflected the service provided, there were some concerns including lack of appropriate documentation around the new charging structure.

38. The letter did not state that it was a formal disciplinary sanction in fact it specifically stated; "*I would like to advice you that any further instances of this nature* ***may result***

in disciplinary action *" Tribunal stress.* It was the Tribunal find an informal warning. The claimant however felt that it was harsh given that he had been in role for less than 12 months and given his relative lack of experience but accepted that there were learning points "*given in a constructive fashion".*

39. The Letter of Concern has no direct relevance to the events in question other than it was put to the claimant that he retained a sense of umbrage about this action (although it was not put to the claimant in cross examination, that this was a factor in his decision to resign) and highlights an alternative to formal disciplinary sanction available to the respondent.

October 2020

40. The numbers on the night shift increased in October 2020 to 5, including 3 agency staff recruited.

November 2020

41. DH then contacted the claimant again on 13 November 2020 [p.165] asking for a update about a pay rise and wanting to liaise directly with the claimant rather than through the Cell Manager.

42. The claimant informed DH on 16 November 2020 that he had put forward a proposal to his Line Manager for the creation of some new roles in the departments which would include a Senior Warehouse Operative.

December 2020

43. DH chased again for an update about his pay on 1 December 2020, now expressing some impatience with the lack of progress [p.165]. The claimant responded on 4 December 2020 informing DH that he was waiting for some answers and that he will chase these up.

Senior Operative role approved

44. DH then chased the claimant again on 20 December 2020 for an update [p.166] and then on the **22 December 2020** the claimant had an exchange of emails with Mr Musson.

45. The claimant's evidence is that he was asking Mr Musson in his email of the 22 December [p.76] about the new Senior Operative roles and Administrative roles and also enquiring about a benchmarking exercise for all roles [p.76]. The benchmarking exercise it is accepted, related to an exercise to ensure the pay structure for a new facility the respondent had opened near East Midlands Airport (the respondent's East Midlands Gateway (**EMG**)), was in line with other manufacturers nearby for the purposes of staff retention.

46. Mr Musson replied to the claimant's email confirming that the pay bands had been approved and that the; "*…plan is to introduce them from June 21. A long side [sic] EMG*". He also stated in that email:

"The cell manager for Leenside can be advertised for mid Jan. The rest to be introduced with the pay bands in June - 12" [p.77]

47. Mr Musson's evidence in chief is that this email exchange had nothing to do with the

situation with DH and was only about the EMG facility however under cross examination he accepted that the "*rest to be introduced in June*" was a reference to the creation of the new roles and that while the pay bands had been approved, the new roles (including that of Senior Operative), had not been approved by the Executive. Mr Musson under cross examination initially did not accept that his wording; "*rest to be introduced with the pay bands in June - 21*" would appear to indicate to the reader that the new jobs had also been approved however, later in cross examination he accepted that he did not know whether or not the claimant had understood from his email that the new roles had also been approved (as well as the pay bands).

48. The claimant's evidence is that he understood from the 22 December 2020 email from Mr Musson [p.77] that the new roles of Senior Operative (and Administrative Operative) had been approved but would not go 'live' until June.

49. The Tribunal find that the way the email is worded, it would objectively be reasonable for the recipient of that email to form an impression that the new roles had been approved hence the plan to introduce them in June 2021. In terms of context, the claimant's email [p.76] had specifically asked for an update about 'approval', he is not told approval has not been given or is pending but the wording is affirmative; "*the rest **to be** introduced…" (Tribunal stress),* not *'may be'* or *'subject to final approval'.*

50. The claimant in re-examination clarified that when the pay bands had been approved for the roles and once the jobs had gone 'live' he believed he would be able to slot incumbents into the new roles. The claimant accepted that he had not however formally outlined who those incumbents would be at that stage to Mr Musson only the possibility of promoting incumbents. The claimant clarified that he did not at this stage believe approval had been given to move DH specifically into one of the new roles, it was a "*discussion with DH more about a possibility".*

51. The claimant informed DH on **23 December 2020** that the creation of the Senior Warehouse Operative role had been approved with effect from June 2021 [p.166]:

"*The Senior WH Operative role has been approved, but the start date has been pushed back to June next year … Because of this,I've sent a separate request to award you ' responsibility pay' in the same way that Marek was paid when he looked after the PM shift when it was still small) . I've asked for this to be back dated to when the extra members of the **Night Shift started a few months back**. … hopefully the approval will come early in the new year." Tribunal stress*

52. 'Marek' was a reference to Marek Drygala who, when the claimant joined in 2018, had been leading a small afternoon shift and received a 16.67% uplift in his pay to reflect the supervisory duties he had taken on.

53. The claimant also informed DH that he had requested 'responsibility pay' for him to be back dated and he hoped approval would be forthcoming in early 2021. The claimant's undisputed evidence which the Tribunal accept, is that while the claimant drafted an email to Mr Musson asking him to seek Executive approval, that due to an oversight it was not actually sent and the claimant only realised this in early February 2021.

<u>**February 2021**</u>

54. On **3 February 2021** [p.168] the claimant realised the email he had drafted about responsibility pay in December, had not been sent and sent it on to Mr Musson.

55. The claimant identified a number of emails from DH in his inbox on **17 February 2021**

(timed at 17:01) on staffing issues and while responding to those informed him that he had chased again about a pay increase [p.170]:

"***I've chased again about a pay increase for you****. I have to get multiple levels of approval before I can enter it into the People Team System. I've proposed that it be back dated to October (when the nights team grew larger)" Tribunal stress*

56. The claimant does not assert however that he informed DH that due to his oversight the request for responsibility pay was not sent in December and only sent in February 2021.

57. On 17 February 2021(timed at 17:02), after the email from the claimant to DH of the same date [p.168], the claimant chased Mr Musson for an update copying in Ms Sisson of HR. He received no response from either Mr Musson or HR. The claimant sent another email on **5 March 2021** [p.168] ; "*Just keeping this on your radar…"*. Mr Musson does not dispute that he received those emails

58. The claimant did not receive any response to either the 17 February or 5 March 2021 emails from HR or from Mr Musson. Ms Sisson in cross examination referred to having monthly catch up meetings with the claimant and Mr Musson and recalled at least one where the claimant said he was still chasing 'responsibility pay' and she said she would raise it in her meeting with Mr Musson. However, she could not recall if that meeting went ahead. The Tribunal find on balance that no further action was taken either by Ms Sisson or indeed Mr Musson.There are no emails to indicate otherwise and no feedback provided to the claimant to confirm Ms Sisson had raised this issue with Mr Musson. Mr Musson may have not actioned this because he was shortly to start a role as Global Head of Manufacturing and relinquish this management role. Mr Musson gave evidence that in terms of what he did to ensure DH was paid fairly, he was part of the wider plan to introduce the new roles alongside the bench marking exercise but accepted that paying him responsibility pay did not actually have to wait for a formal change of job role. However no action was taken by Mr Musson to obtain the necessary approval for responsibility pay.

<u>March 2021.</u>

59. The claimant's Line Manager changed in March 2021 to **Neil Coombe**, Manufacturing Operations Manager. Mr Coombe reported into David Musson.

60. Mr Musson in cross examination could not recall in his handover to Mr Coombes whether a discussion about DH being given one of the new roles and enhanced salary was discussed but accepted that he could have discussed it.

61. Mr Musson however had known since 2018 that DH had been carrying out supervisory duties and although he accepted in cross examination that DH should have been paid fairly the Tribunal find on the evidence, that he did nothing to assist the claimant secure 'responsibility pay' for DH. He did not escalate this for approval and it remains unclear to the Tribunal why not. In response to a question from the Tribunal about why nothing was done before December 2021 to recognise the claimant's additional responsibilities, his answer was vague;

" *maybe it was looked at but would form part of proposal and would be signed off then – maybe part of the wider plan and not approved or was taking time to approve"*

62. When asked whether he was talking about a plan to look at 'responsibility pay' for him he stated;

" plan to look at jobs around the factory – looking at senior roles across the factory – not just one area – so not necessarily looking at responsibility pay but would as well. Managers come to me for responsibility pay and I would go through my line manager, Max Bottrill and after 2021, it was Neil Tomlinson for responsibility pay."

63. Mr Musson continued to give vague evidence about what he actually did;

" …*maybe I had a conversation at the time, and it was I cannot approve it, I can only have conversation with the right person to seek approval"*

64. When asked whether he was alleging that he actually had such a conversation with his line manager, he merely gave evidence that;*" I would be surprised if I didn't".*

65. Mr Musson could not point to any emails or other documents evidencing any escalation of this request.

66. Mr Musson was not able to provide any details about any alleged conversation took place or explain why the outcome of any such discussion was not relayed to the claimant or DH. Mr Musson does not allege that he told the claimant approval had been refused.

67. Mr Musson also fails completely to mention in his evidence in chief that he had taken any steps to obtain approval for DH while seeming to acknowledge that he should have done so. In response to a question from the Tribunal he stated that if DH was carrying out the supervisors tasks (which he gave evidence he had no reason to believe DH was not doing) that DH "*completely"* deserved 'responsibility pay' for it and that he would therefore be surprised if he had not raised it because it would have been the "*fair thing to have done".*

68. That he took any steps to ensure DH was paid fairly, appears inconsistent with his own evidence in chief at paragraph 5 of his statement where he fails to mention having taken any steps but seems to imply that the focus was on the benchmarking exercise;

*"I first became aware of the claimant's desire **to award [DH] responsibility pay** and a higher role on or around **3 February 2021** …it may be that the claimant and I had a conversation regarding this **just prior to this email** but cannot recall specifically… I did not respond to the claimant's emails. It was around this time that I was involved in a salary banding review. .." Tribunal stress*

69. The Tribunal do not find it plausible however that Mr Musson was only aware in February 2021 or just prior to it [p.168- 169], of the request by the claimant to award DH 'responsibility pay'.

70. Mr Musson in response to questions from the Tribunal, explained that the situation with DH was the same situation which applied to Mr Drygala and that he had escalated a request for 'responsibility pay' for Mr Drygala which was awarded. In terms of what DH was not treated the same, he answered only that; "*I'm not sure– I would have had a conversation – I would have followed the same route."*

71. Mr Musson acknowledged under cross examination, that treating DH fairly would have involved escalating the request for 'responsibility pay'. The Tribunal find that Mr Musson failed to do that and has no satisfactory explanation for not doing it.

72. The Tribunal find that the failure by Mr Musson to escalate this request would no doubt have contributed to the frustration DH increasingly felt about his treatment and the

delay in resolving it.

Mr Coombe

73. The claimant alleges that he met with Neil Coombe on 12 March 2021 and that he was asked what Mr Coombe could help him with to which he replied; the ability to pay people correctly and that he mentioned that there were two parts to that; push forward the two new roles including the Senior Operative role and take over the formal request he had made to Mr Musson by email in February and March about increase in pay for DH. He alleges that he made a verbal request at this meeting for 'responsibility pay' for DH [w/s para 26].

74. The claimant produced in March 2021 a proposed structure diagram for Mr Coombe [p.83D] which showed DH in one of the new roles of Senior Operative. The evidence of Mr Coombe is that he had asked the claimant for this and that he had done so is supported by an email on 19 March 2021 from the claimant referring to knocking things off his 'to do list' [p.82]. The diagram shows the names of 11 people in yellow which the claimant wanted to put into new roles. Mr Coombe felt unable to comment on whether the claimant had believed those roles to have been already approved or not and denied that the claimant had told him that DH was carrying out work he was not being remunerated for. Mr Coombe's evidence is that he does not recall a discussion with the claimant on 12 March 2021 about 'responsibility pay' for DH.

75. Mr Coombe in his evidence in chief alleges that he did not become aware of the communications between DH and the clamant about DHs situation, until September 2021 [w/s para 12] but that he had been aware from about June 2021 that DH was already performing a Supervisor role. He stated in cross examination that in June 2021 he was aware not only that he was performing those duties, but doing it on an Operatives wage. However, in cross examination Mr Coombes gave evidence that he "*could not recall*" being told that DH had carrying out the supervising duties for a long time but "*other people in yellow had being dong the role for a long time",* which seemed to indicate that he did not consider DH was a special case. He later firmed up his evidence under cross examination to flatly deny having been told about this prior to June 2021.

76. However, under cross examination when asked whether he accepted DH had been treated 'shabbily' by not being paid for the work he was doing, Mr Coombe gave evidence that;

*"From March 2021, on reflection**, I could have acted quicker** to get his Responsibility Pay . I would have acted sooner then December 2021 but in the summer we were pushing for new roles and if approved [DH] would I'm sure be a candidate for those positions." Tribunal stress*

77. This admission does not appear consistent with his evidence that he not been made aware in March of the situation regarding DH.

78. Mr Coombe in his evidence in chief also refers to usually having weekly meetings with the claimant to discuss his operational role as well as the welfare of the claimant and his team, and having almost daily ad hoc interactions and speaking on a regular basis.

79. The claimant gave a detailed account of the alleged discussion with Mr Coombe on 12 March 2021 and of course this followed on from two emails where he had chased Mr Musson (including the one only about a week before, on 5 March 2021). He also refers in an email on 18 March 2021 to DH, to having raised this issue with Mr Combe. That

he would actively mislead DH Is not consistent with what is said about the claimant by the respondent's witnesses. Mr Coombes described the claimant as approachable and straightforward [w/w para 4]. Mr Musson also confirmed in cross examination that he held a positive view of the claimant during his direct management of him.

80. The Tribunal find that it is more likely than not that the claimant raised this issue with Mr Coombe when they first met on 12 March 2021. The Tribunal also do not find it plausible that Mr Coombe spoke to the claimant almost daily and had regular weekly meetings, and yet was not aware of the situation with DH. The Tribunal also do not find it plausible that Mr Coombe who was aware from the proposed diagram provided on 19 March [p.82] which role the claimant was proposing for DH, that Mr Coombe was not told or failed to enquire what his current role was and more generally aware of the current arrangements for a Supervisor on the night shift.

81. The claimant also asserts that he was told at this meeting on 12 March 2021 by Mr Coombe, that the new roles were 'still part of the plan' .That this was his understanding is consistent with what he tells DH shortly after this on 18 March meeting. The Tribunal accept that this is what he was told at this meeting.

82. DH informed the claimant by email on 18 March 2021 [p.172] that he was considering applying for another role, as Materials Control Cell Manager on the afternoon shift and thus wanted to know the situation about the plans for him as a Senior Operative on the night shift. The claimant replies on 18 March stating that his plan was to make DH a Senior Operative automatically with no application needed when the roles become live in June 2021 [P.172]:

"My Plans at the moment are still to make you a Senior Operative (automatically with no application needed) when these roles become live in June. I've checked with my manager and they are still part of his overall plan/budget.

I've requested a pay increase (and have chased several times) to temporarily cover you until that point, as you are already performing most of these duties. I have a new direct manager now, so have asked him to take this over for me."

<u>**June 2021**</u>

83. On 9 June 2021 the claimant informed DH that although told originally that he could allocate people to the new roles they were already performing, he had now been told that the roles should be advertised internally [p.171];

"Unfortunately, having originally been told that I could just allocate people to these roles that were already doing the tasks; it's now been confirmed that I need to advertise them. I'm going to do this only internally and for as short a time as possible , ***as I still know for most of the positions, who I think the best person is****….". Tribunal stress*

84. The claimant asserts that this email came out of a discussion with Ms Sisson . The Recruitment Policy allows for the hiring manager to identify whether the role is to be specifically internally advertised. The claimant accepted under cross examination that there had to be a recruitment process whether external or internal (ie a competitive process), rather than just slotting incumbents into roles. However, his evidence is that he had told DH that he could slot people into roles because he had reason to believe this, he asserts that he had discussions in late 2020 with Ms Sisson which lead him to believe that he could do so and that there was a precedent within the business for this. He cites as an example the promotion of Ms Strycharz to Warehouse Planner and Lynda Hanlon from VNA to stock controller. He had the approval of the Executive to

move them into the new roles without any formal recruitment process.

85. Mr Musson in cross examination confirmed that he believed those two employees had indeed been promoted into those roles without going through a formal/ competitive recruitment process.

86. Ms Sisson gave evidence that she was not aware of the specifics of those cases but had after hearing the claimant's evidence in this Tribunal, checked the respondent's files and located an 'amendment form'. This is a form which is completed to change someone's job title and/or salary. The manager completes the form and HR sign it off before it passes to the People Team to process alternatively it is completed by the recruitment team if there has been a recruitment process. This form for Ms Strycharz had been completed by the recruitment team which she alleged indicated there had been some recruitment process carried out, although she could not say what. Ms Sisson gave evidence that she could not however locate any information on Talentlink, which is a recruitment system the respondent uses, although entries are deleted after a period of time which she believed to be 2 years. She had not however been involved in that process and confirmed that she could not comment further on whether there Ms Strycharz had been 'slotted' in.

87. The Amendment Form and some other emails were disclosed by the respondent and without objection included within the bundle [p.259 – 264]. An application was made to allow the claimant to be recalled to comment on those documents. After hearing representations from both sides, which included the respondent confirming that it was not asserting that there would be any prejudice caused to the respondent by allowing the claimant to comment on this late disclosure, it was granted.

88. The claimant's evidence was that the job change was approved by Mr Musson and the form was completed by him, while he had no recollection of filling in the form, he pointed out that it states that it was completed by the claimant. He asserts that he had completed such forms on a number of occasions and he selected which HR adviser he wanted to work with. The respondent did not produce any evidence of any job advertisement placed or applications received from employees for this role.

89. Taking into account the documents, the evidence of the claimant and of Mr Musson, the Tribunal find on balance that it was the claimant who completed the Amendment Form and that no competitive recruitment process was undertaken.

90. Ms Hanlon was a member of the respondent's stock control team based at a warehouse owned by Great Bear, a third party warehouse provider, to carry out stock control. As the respondent was ending its contract with Great Bear Ms Sisson gave evidence that the respondent needed to find a role for her. The claimant wrote on 12 March 2021 to Ms Sisson stating;

"I'm going to change Lynda Hanlon's job from Materials Control Operative (VNA) to Production Stock Controller'… her salary won't change at this point, as it already fits into the new band of 2 - 25k.."[p.263].

91. Ms Sisson gave evidence that there was a vacancy and no impact on salary and Ms Sisson agreed to put her into that role without advertising it and in doing so avoid making her redundant. The claimant refutes that Ms Hanlon would otherwise face redundancy in that the respondent would have simply stopped using one of 6 or so agency staff to ensure she had a role

92. Ms Sisson in terms of Ms Hanlon, does however express concern about not advertising

the role in response to the claimant's email [p.263];

"My only question / concern would be around not advertising it as a vacancy and giving other people the opportunity to apply/develop their skills.

Is this more to do with finding Linda a role as she is no longer needed at Great Bear?" [p. 261]

93. The claimant confirms that finding her a role is "*definitely part of it*". [p.261].

94. The Tribunal find that in respect of Ms Hanlon there was no recruitment policy followed but that in her case this was in part because the respondent considered that it needed to fit her into a role within the respondent's organisation. However, Ms Sisson clearly identified on this occasion that special circumstances justified not doing so .

95. Ms Sisson gave evidence under cross examination that she had discussions with the claimant in their regular one to one meetings and if there was a promotion or salary rise being proposed, then she would say it should be advertised to ensure a fair process and if it comes within headcount it can be advertised within that department. She confirmed that a manager does not need to seek HR approval to advertise a new role internally but does require approval from the Executive to fill a vacancy.

96. The Tribunal find that there had been occasions which the claimant had knowledge of, where employees had been 'slotted' into other more senior roles where they had been carrying out those duties and the new role had been approved by the Executive team.

97. The Tribunal find that given this had happened on previous occasions, the claimant's belief that he could slot in 'incumbents' into these new roles without any competitive process was genuinely held but do not accept that he had been told expressly by Ms Sisson that on this occasion there was no need to follow any competitive process, even if that was only internally. That is not her evidence and not consistent with the concern she had expressed previously in the case of Ms Hanlon.

98. The claimant gave evidence under cross examination that his email of the 9 June 2021 to DH was sent because he had a shortlist in his mind for the roles but it was still not guaranteed and "*someone could come in and shine very brightly".* On any reasonably objective basis however, the 9 June 2021 email the Tribunal find gave a very clear indication, (particularly when read in the context of the previous exchanges with DH), that the claimant had DH in mind for the new Senior Operative role. The claimant in cross examination conceded that DH could have "*misconstrued*" that he was bound to be appointed.

99. The claimant alleged in cross examination that he had decided to restrict the competition to internal candidates and advertise it for a short time, not to restrict competition but with the aim of reducing the workload involved in processing lots of applications. Although the claimant under cross examination gave evidence that he probably would not have conducted the interviews and thus decided on the successful candidates, he does not explain that to DH in the 9 June email. Further, the Tribunal do not find his evidence that he would have had no influence in the selection process (which he alleged was likely to be carried out by Cell Managers), as plausible. Not only do the Cell Managers report into him but he expressly states in his 9 June email to DH that he knows **he** knows who 'best persons' are.

100. While the claimant therefore made reference to past occasions where employees had been allocated into new roles without a selection process and that he had understood

initially, from Ms Sisson he could do that for these new roles, his evidence in cross examination was that this was not his intention after he had been told that there had to be a competitive process.

101. The claimant gave evidence under cross examination however, that he told the claimant that he would be advertising internally for a short time to *"reassure"* him that there was still a role coming up he could apply for and it was "*important information for where his mind was at the time".*

102. The Tribunal do not find that the claimant was being candid in his responses to this line of questioning and that in truth the claimant was intending to reassure DH that he would be appointed after a short internal advertising process which was presented the Tribunal find in the 9 June email, as necessary to pay 'lip-service' to a fair and competitive process.

103. Despite conceding that DH may have "*misconstrued*" that the intention was to automatically appoint him to the role, the claimant was not prepared to accept under cross examination that he would have worded that email any differently today in the same circumstances, commenting that it would be "*difficult to say*".

104. Mr Coombe in accordance with his time line [p.188] had checked in June 2021 whether the Supervisor roles were approved and found out they were not. However that does not appear consistent with the claimant having been told in June 2021 that the roles would need to be advertised leading to his email to DH on 9 June 2021 [p.171]. Further, in terms of the reasonableness and credibility of the claimant's asserted belief that he was operating in the belief the roles had been approved, it is notable that the position remained unclear to Mr Coombe in June, necessitating him to make further enquiries to "be clear" if the role was approved as part of the banding review.

105. In or around July 2021 the claimant alleges in his evidence in chief [w/s para 31] that he had a conversation with Mr Coombe who informed him that: " *the proposal to appoint Supervisors was likely to be acceptable to Neil Tomlinson…but that the whole proposal was stuck because of a request for a 'line Lead' in packing"*.

106. The fact that the claimant put forward a proposed structure to include who would be appointed into the new roles, indicates that even if the claimant understood approval had been given for the creation of new Senior Operative roles, a number of important details had still not been approved, namely in which departments they would be appointed and how many roles would be created. Hence the paper submitted by Mr Coombes where he sets out the claimant's request for 5 supervisors in his team.

107. The Tribunal accept on balance that the claimant had believed from the email from Mr Musson that the plan to introduce the new roles in June 2021 had been approved by the Executive and this 'plan' [claimant's w/s para 26] was confirmed in March 2021 by Mr Coombe. However the detailed job specifications and how many roles would be created was still being considered hence the claimant produced an organisation chart '*of how that might look'* to Mr Coombe [w/s para 26]. The Tribunal find however that the claimant had deliberately led DH to understand that he would be given one of the new roles, regardless of the details left to be confirmed and regardless of having been told that he would need to open up the roles, at least to internal competition. He did this the Tribunal find with the best of intentions, believing that this was necessary to give DH reassurance and no doubt because he believed DH would be considered the best candidate and would be successful in that process and that he deserved to be, however such reassurance was premature and unfair to other potential applicants.

August 2021

108. The new Global Head of Supply Chain and Logistics, Neil Tomlinson wanted to review all the plans the Manufacturing departments had for new projects and recruitment.

109. The claimant now informed DH in August 2021 that the Senior Operative role was renamed Supervisor and was under review again.[w/s para 31 and p.174]

110. On 12 August 2021 DH chased the claimant again:

*"…I was to ask you how see station [sic] . **Also you promise me some back pay** and same still nothing [sic]. Have got any update [sic]" Tribunal stress.*

111. The claimant replied on 26 August [p.174];

"The last information I had was that the senior role (now renamed Supervisor) is under review again, due to the fact that we now have a new executive for Manufacturing (Neil Tomlinson) who wanted to see all of the plans Manufacturing had for new projects ,recruitment etc…

***In terms of the temporary increase in pay I requested for you (including back pay) I've now given the proposal to two different managers for approval and neither has responded to me. Unfortunately I think it's their way of saying it won't happen**, but I will push again." Tribunal stress*

112. The claimant forwarded the email from DH to Mark Smith, his direct report on 26 August 2021 [p.174] and then following an exchange about it being a shame not to reward people for their hard work, the claimant writes to Mark Smith [p.175];

" I completely agree it's one of the things that I'd kind of been warned about before I joined. It's really frustrating as one of the key points I asked Neil to help me with when he took over was to ensure staff were paid fairly…"

113. In response to a question from the Tribunal about whether he considered this message to his direct report, to be inappropriate, the claimant gave evidence that;

"Myself and Mark [sic] would have honest communications – my frustration showed for the first time, before that I had kept an even keel and neutral "

114. The Tribunal find in this statement a tacit acceptance that being in a senior management position to Mr Smith he should have retained a 'neutral' stance, had failed to do so on this occasion and justified this as a consequence of his frustration.

115. Mr Coombe in re- examination gave evidence that he had no recollection of what he and the claimant discussed about DH during the period September to November 2021.

116. It was clear in August /September 2021 that the new roles were to be reviewed and considered in the next financial year.

117. The claimant does not in his evidence in chief allege however that he had raised the issue of responsibility pay with Mr Coombe again after the first meeting on 12 March 2021 before raising it again with him much later in December 2021. This may well have been because the claimant anticipated that at some point in the period from March 2021, he would be in a position to offer DH a promotion into the role of Senior Operative and he was concentrating his efforts on that and restarted discussions about

responsibility pay only when it became clear those roles were being put on hold until the financial year.

Autumn 2021

118. Later in 2021 after the Covid shutdown, packing volumes increased which lead to a need for packing on the night shift in the second factory and an expansion of the numbers of those employed on the night shift to 6 or 7 staff and an expansion of duties to include deliveries in and back out to the new warehouse .

October 2021

119. DH continued to act as a supervisor which now included supervision of third party HGV drivers. From October 2021 DH assumed responsibility for the night shift in the second factory.

December 2021

120. The claimant had a discussion with Mr Coombe which he confirmed in an email on 2 December 2021 about uplifting DHs pay and backdating it to 4 October 2021 and that DH would be a prime candidate for the proposed Supervisor role [p.242].

6 December 2021 – 10 January 2022

121. The claimant was absent on sick leave from 6 December 2021 and returned to work on 4 January 2022.

122. During this sickness absence Mr Coombe approved the claimant's proposals for 'responsibility pay' for DH . Under cross examination Mr Coombe gave evidence that he did not raise back pay for DH (in addition to ' responsibility pay' going forward) because it could not have cross his mind to do so. However the Tribunal find that it did but he expressly asked his line manager to ignore the request from the claimant for back pay despite knowing that DH had been performing these extra duties for some time, probably because due to the concerns over cost, he felt that they could get away without doing so if they authorised responsibility pay going forwards. This is not the Tribunal find, consistent with the approach to fair pay as set out in their Pay Policy. Mr Coombe wrote on the 3 December 2021 to Mr Tomlinson [p.244]:

"We've had a Mat Control Night Shift for 12 months which has been effectively run by an operative. That operative has been carrying out tasks and duties you would expect from a Supervisor role (and in some cases Cell Manager).

***Ashley and I have** paused progressing this as we (Manf) have been discussing for some months now introducing the Supervisor role across certain areas – but we know that adds a chunk of cost and we're managing cost carefully at present.*

***I don't want to wait any longer in the case of Damien[DH]** .He is and has been doing supervisor duties for some time and has the responsibilities that go with it. **A key role** on Night Shift where you don't have senior managers on site for immediate support .**We need** to formally recognise what he is doing and formally put a supervisor in place in Nights. ALL other nights shifts across our factories have formally recognised supervisor/cell manager leadership.*

*Therefore **we would** like to increase his pay to £25,000 to reflect the fact that is doing the Supervisor role, has seen doing it for some time and **we are very happy with how***

he is performing (ignore the bit about backdating below from Ashley*…" Tribunal stress*

123. Mr Tomlinson responds on 3 December [p.244] referring to the "*awkward bit*" being this being seen as the creation of a role which " *in theory we'd need to advertise"* and asks him to check with Ms Sisson in the people team to agree that "*we somehow confirm Damien in the position without going having to [sic] to advertise."*

124. Mr Coombe after speaking **with Ms Sisson** then follows up with another email on 10 December 2021 [p.244] in which he proposes 'responsibility pay' for DH increasing his current salary by another £4,500 pa and document his additional responsibilities to *ensure;"… we formally have a 'leader' and will ensure that the person is fairly compensated…*"

125. Mr Coombes goes on to state that the pay to continue; "*until such a time as we decide to stop it ie we get Supervisor formally approved and* ***then recruit appropriately****…*" Tribunal stress

126. Mr Tomlinson approves the plan on 10 December and on 13 December 2021 Mr Coombes confirms that he will require Ms Tongue's approval and sets about getting that [p.244]. That approval from Ms Tongue is confirmed on 13 December 221 [p.243]

127. Mr Coombe in cross examination confirmed that it took him only about 10 days to pursue the application with the Executive team to get approval for 'responsibility pay' however, on his own evidence, he had been aware that the claimant was not being paid for the job he was doing since June 2021 and he knew by September 2021 that the proposal to introduce the new Senior Operative role was paused.

128. However, Mr Coombe sent a further email on 15 December 2021 [p.243] in which he now refers to having been ' digging' into DH and notes that; *"he's had the best part of 3 weeks absence this year in addition to Covid absences (and I'm not sure it's been managed under [sic] the absence policy). He had a LOC [Letter of Concern] raised against him in April …Amazing what you learn when managers are off and you end up looking after stuff directly…"*

129. On the 22 December Mr Coombe informs Mr Tomlinson that he is not proceeding with the request for approval despite DH "*carrying responsibility which should be rewarded"* [p.243]. He has significant reservations about the "*behaviour and attitude*"..

130. Ms Sisson made Mr Coombe aware of these concerns about DH. The claimant asserts that Ms Sisson had been aware of the proposals which had been discussed during the People Plan meetings she had held with the claimant and she had not objected previously to DH carrying out the supervisor duties.

131. There is what counsel for the claimant refers to in his written submissions as evidence in Mr Coombe's statement (para 16 and 17) which are "*not quite"* consistent with Ms Sisson's statement (para11). Ms Sisson states she made Mr Coombe aware of issues with DH's absence and was asked by Mr Coombe to then investigate this further and then made him aware of the Letter of Concern. Mr Coombe states that as part of his usual catch up sessions with Ms Session she made him aware of the absence issue **and** Letter of Concern. The Tribunal do not consider anything much turns on whether Mr Coombe was informed about the issues at the same time or whether he requested Ms Sisson investigate further. He was the Tribunal find, supportive of the request until he was presented with information he had not been previously aware of. Further, the Tribunal find on balance, that Ms Sisson was not aware of the situation with DH on or

before 10 December 2021, because Mr Coombe had checked the position with her and gone on to confirm what pay rise he was seeking for the claimant in his 10 December email [p.244], only later seeking raising concerns about his conduct on 15 December 2021.

132. Ms Sisson confirmed under cross examination that there is no policy in place which states people with a Letter of Concern should not get a pay rise, she did not discuss the application of the Pay Policy with Mr Coombes and no one in HR discussed the concerns with DH. Ms Sisson denied knowing about DH doing extra duties until she was copied into the emails to Mr Musson in 2021. Ms Sisson undisputed evidence which the Tribunal accept, is that she did not discuss with DH why 'responsibility pay' was not approved because she was not aware that he had any expectation of it however despite the terms of the Pay Policy, she did not check what his expectations were.

133. The concern over absence was because DH was identified as one of a number of employees who had been isolating a number of times on full pay (3 or 5 times) and that his levels of 'normal' sickness reduced during this period and increased again afterwards. Ms Sisson thought DH may have received warnings for this issue however that is not supported by the documents, and Mr Coombe had referred in his email on 15 December 2021 [p.243] to not being sure that DH had been managed under the absence policy. The Tribunal find that there were genuine concerns with his rate of Covid absence but not that he had received any warnings for it.

134. The Letter of Concern it is not in dispute was issued because of aggressive and inappropriate language toward a female colleague.

135. The decision to withdraw the approval for responsibility pay was an Executive decision made ultimately by Neil Tomlinson and Rachel Tongue.

<u>February 2022: grievance</u>

136. No doubt frustrated by the delay in resolving his situation and unaware of why the pay rise had not been, DH raised a grievance with Mark Smith and discussed it with him on the evening of the 31 January 2022.

137. The claimant accepted under cross examination that Mr Smith came to his office and informed the claimant that DH was raising a grievance " *for not getting paid for the role he was covering".*

138. On 1 February 2022 Mark Smith sent a note of what DH had discussed with him the evening before to Ms Sisson, Ms Genders and Ms Miles [p.182]. This email was also copied into the claimant however his evidence under cross examination is that he "*missed it".* It seems that there were a number of occasions for whatever reason when according to the claimant, he missed emails which had been sent to his work email. That appears to be down to a lack of diligence on his part because he does not deny that were sent to his correct email address and he accepts to having missed others sent by the claimant. It would however be reasonable the Tribunal find, for the respondent to have proceeded at that stage on the understanding that the claimant seen the email setting out the grievance raised verbally with Mr Smith.

139. The email was brief stating;

"Been working as a supervisor on nights since October 2020. Have not been paid for this extra reasonability.

I expect to receive a pay rise ***in line with what had promised me****. Job role to change to supervisor. Back pay to October 2020" Tribunal stress.*

Investigation:11 February 2022

140. On 11 February 2022 [p.183] DH was interviewed about the grievance.

141. He explained at this meeting that in 2018 when 2 more people joined the night shift the claimant asked DH to be in charge but for no extra pay because he was not trained. In 2020 the night shift became permanent and since then DH acted as supervisor doing various duties which included managing the shift.;

142. DH provided copies of email exchanges with the claimant and stated:

"*…in 2020 he said 100% it will be sorted from June 2021, said it was in the budget, I didn't need to apply as 100% ready…"* [p.184]

143. Mark Smith was then interviewed [p.185]. He gave evidence that if DH had not been acting as a Supervisor when there were more than 2 people on night shifts, Mark Smith himself would have had to supervise the night shift however as he would not have been able to do 16 hour shifts all the time or move to nights the respondent would have needed to recruit someone else. He also confirmed that DH was doing the role as Marek Drygala when he became a manager, albeit Mr Smith felt that Mr Drygala probably did it to a lesser extent.

144. Neil Coombe was then interviewed [p.187]. He gave evidence that the claimant had spoken to him about needing a Supervisor and that it was approved in December 2021 however there had been issues about DH's absence and a Letter of Concern. Mr Coombe had not been aware of the behaviour issues and stated;

"I wasn't aware this went back to 2019, when Ashley first asked me I took it to mean it was within that year . ***This seems incredibly messy as we've implied he'll get more****" Tribunal stress*

145. Mr Coombe also accepted that although DH was not offered the supervisor role because of the concerns raised by Ms Sisson, he was still in post performing those duties; "*You're right, that probably leads to the management capability we have in MC*." He produced a time line of events as he understood them to be [p.190] however the claimant complains that it was inaccurate in a number of material respects;

- That it is not correct that he discussed the job specification for Supervisor in summer 2021, because the claimant had to submit a finalised version by May to advertise it in June 2021

- It is not correct that the claimant informed him that DH was doing a supervisor role in summer 2021, it was on 12 March 2021 at their first meeting when he also had requested responsibility pay for DH

- Mr Coombe had made reference to the claimant sending a formal request for a pay uplift for DH on 2 December 2021 but had neglected to refer to their prior discussion

- That Mr Coombe gave an inaccurate impression that rather than a joint belief that the matter should not delayed and joint support for the proposal, he portrayed this as something the claimant was proposing and that it was the

claimant who had felt it could not wait any longer to resolve

146. The Tribunal find that the above criticisms of the information Mr Coombe supplied were correct. It would be more plausible to complete the job specifications prior to the date the jobs were to go 'live' and the findings of fact on the remaining issues are as addressed above.

147. As part of the investigation into the grievance of DH the claimant was then interviewed by Paul Foreman, Metal and Resin Manufacture Manager [p.192]. The claimant was asked generally about the background to the situation and about Mr Drygala.

148. The claimant complains that the grievance raised by DH was not explained to him. He was told however at this meeting that DH had raised a grievance about 'pay and job title'. The claimant did not mention that he had not seen Mark Smith's note of the grievance.

149. At this point there is no criticism put to him about his management of this situation.

<u>18 February 2022 meeting</u>

150. The claimant was then called into a meeting on 18 February with Ms Genders chaired by Paul Foreman [p.194]. He took a number of emails into the meeting with him [p,163-177].

151. It is a very brief meeting. The Tribunal accept the claimant's undisputed evidence that he expected that this would be to inform him of the outcome of the grievance. He had not been given any indication in writing or otherwise that it was any other type of meeting. It was however a meeting to inform the claimant that the decision had been taken to start disciplinary proceedings against the claimant. Mr Musson denied in cross examination that he had any involvement in that decision and he was not challenged on that evidence.

152. The notes record that he is told;

*" **Understand you didn't intend to promise anything** to Damian **however the emails are misleading** and do indicate that Damian will be appointed into the role ultimately leading to **a cost to the business**, **the level of communication between employee and manager wasn't appropriate."** Tribunal stress*

153. The claimant alleges that the above was **not** said and those words were added later to the notes. He alleges that he asked where he had overstepped the mark and was told (which is not recorded in the notes): *"there is being open and honest, but your communication with [DH] has led to a cost to the business".*

154. Ms Genders in her evidence in chief maintains that she did state the disputed words as they are recorded.

155. Ms Genders also in her evidence before this Tribunal accepts that there was some discussion after the meeting had been 'officially adjourned' when the claimant asked Mr Foreman where had had overstepped the mark and she had replied along the lines that; "*there was being open and honest but as a senior manager, you have a responsibility not to mislead [DH]".*

156. The claimant under cross examination denied that he had asked this after the meeting had ended because it was such an important point. However, he does state [p.200] at

the meeting on 28 February 2022, that he had asked where had overstepped the mark; "*at the end*" . This appears to be consistent with Ms Gender's recollection of the meeting and when the 'open and honest' comment was made.

157. The claimant explains in the meeting on 28 February 2022 that he had been caught ' on the hoof by the meeting' on the 18 February.

158. Taking into account that the claimant stated that the 'honest and open' comment coming 'at the end' of the meeting on 18 February, that he had not personally taken any notes of the meeting to aid his recollection immediately afterwards, and the candid acceptance by Ms Genders that the 'open and honest' comment had been made by her, on balance the Tribunal prefers the evidence of Ms Genders and specifically not only when the 'open and honest' comment had been said (and why it had not been recorded), but that the notes accurately record others comments made, including that the emails the claimant had sent to DH were misleading, were not appropriate for a manager and led DH to believe that he would be appointed into the role.

Outcome of grievance

159. The outcome of the grievance process for DH was that he was awarded 'responsibility pay' to take him to the level of a Supervisor's salary which Mr Coombes believed would be an increase per month of about £300 to £400 gross. This was to be paid until May 2022 when the respondent planned to formally recruit for Supervisors for the night shift . He also received backdated pay to October 2020 which equated to £5,796.61 [p.234].

160. DH was not successful in the recruitment process and then returned to an operative level in Summer 2022 and then left in later Summer/Autumn 2021.

Invitation

161. Mr Foreman sent an email to Mr Musson on 23 February 2022 [p.234] which sets out the reasons why the claimant had been put forward for disciplinary action, which in summary are;

- The conversations with DH were deemed inappropriate and should have been handled in a completely different way
- It has led to the respondent paying out £5,796.61
- Putting someone in a role of responsibility which could have been managed differently
- Leading DH to believe he should be paid and put into a role and that it was either his managers or the respondent as whole stopping it .

162. Ms Genders in cross examination confirmed (which was not challenged) and is accepted by the Tribunal, that the cost to the business referred to, was the backdated pay of £5,796.61 and not the 'responsibility pay' going forward DH would receive.

163. The email also referred to the Manufacturing Management Team with the help of People Team needing to discuss how and what the process should look like for putting someone in a position of responsibility outside the normal recruitment process, an acknowledgment the Tribunal accept that no clear process was in place.

164. On 23 February 2022 the claimant was invited to attend a disciplinary hearing with

Julian Flowers, Plastic Manufacturing Manager on 28 February 2022 [p.196]. The letter set out the alleged misconduct as follow;

*"with regards to **poor conduct** as a result of a grievance raised by [DH] ; partly caused by **misleading information** and emails sent by yourself which has resulted **in a cost to be business."** Tribunal stress.*

165. The claimant complains that he was not told what investigation had taken place and complains that it was unclear what the misconduct was and that while Ms Genders on the 18 February had said it had been 'honest and open' communication, this letter accused him of sending '*misleading*' information. He also complains that it was not explained which emails had been misleading and whether the cost to the business arose from his communication or was a necessary cost that the respondent would have incurred in any event.

166. The reason for the hearing the Tribunal find was consistent with what had been said to the claimant at the 18 February 2022 meeting, that his communications had been misleading and inappropriate. It is possible to provide information honestly but either it is not sufficient to give a fully accurate picture or otherwise unintentionally gives the wrong impression. The invitation however fails to explain which specific emails had been misleading however there are not many emails to consider. The failure to confirm whether the cost would have been incurred in any event while not addressed in this letter, was discussed as part of the disciplinary hearing.

167. The invitation letter informed the claimant of his right to have a companion and referred to there having been an investigation. It is not in dispute that it enclosed a copy of the investigation meetings with DH, Mr Smith, Mr Coombes and the claimant, along with the emails he had produced and others had produced. The claimant confirmed that the entire pack of evidence was that set out at pages 163 – 197, which included the time line produced by Mr Coombe.

168. The emails which were to form part of the disciplinary process were sent to the claimant prior to the disciplinary hear and he had the chance to comment on them in full at the disciplinary hearing.

169. The claimant under cross examination accepted that when he received the invitation letter he was aware that the emails he had sent DH had led DH to believe he would get a promotion and increased pay and that this was the conduct in issue; "*yes, why I disagreed with it."*

170. There was the Tribunal find no particular complexity to the charges. There could perhaps have been more clarity, however the claimant had sufficient information to understand what he needed to address at the hearing.

171. The claimant wrote on 23 February 2022 [p.198] asking for a copy of the grievance on the basis that it had not been read or explained to him at the grievance hearing. An email was sent to him on 23 February 2023 [p.199] containing the exact same information which had been contained in the email from Mark Smith on 1 February 2022, which he been copied into [p.182]

172. The Tribunal find that by the time he had the invitation letter to the disciplinary hearing, he was aware of what the charges against him were in sufficient detail for him to answer to the charges. There was no material change to the nature of the offences, he was not now for example being accuses of dishonesty.

173. The claimant accepted that the respondent had complied with its disciplinary policy in terms of the notice he was given for the disciplinary hearing (a minimum of 2 days) [p.71].

Disciplinary hearing : 28 February 2022.

174. The claimant attended a disciplinary hearing accompanied by Mr Giles, Health and Safety Manager [p.200 – 208] chaired by Julian Flowers, Plastic Manager with Cherry Miles from People team.

The notes of the hearing

175. The claimant was sent the notes of this meeting on 7 March and sent an email with his comments about what he believed required correction [p.212]. He identified 3 areas which he stated required some correction, none of those are significant. The claimant overall felt that the notes were overall a 'pretty good reflection' of what was said although some entries made no grammatical sense.

Preparation for the hearing

176. Mr Flowers received the relevant emails before the hearing. His evidence under cross examination was he did not have any of the interviews from the grievance investigation or the 18 February 2022 grievance outcome hearing notes. Counsel for the respondent submits that given the passage of time, he has failed to remember having been sent them. In his evidence in chief he had referred to having read the documentation relating to the grievance and investigation process.

177. The unchallenged evidence of Ms Genders under cross examination was that she sent to Mr Flowers the same documents she sent to the claimant and it is not in dispute that the claimant had the investigation notes.

178. The Tribunal note that at the commencement of this disciplinary hearing the claimant is asked if he has received the investigation notes and Mr Flowers checks with him that he has read them. Mr Flowers comments [p.214]; "*In the investigation information there is a lot of written stuff from yourself* …" and later in the meeting Mr Flowers acknowledges and expresses his understanding of the requirement for DH to carry out the additional duties and the frustration felt but clearly his focus is on the way the claimant communicated about this situation with DH.

179. The Tribunal find on balance, that Mr Flowers had been sent the investigation notes and read them but probably could not recall because his focus at this meeting was clearly on the communication between the claimant and DH rather than the background, which he accepts had created some frustration. Counsel for the respondent does not identify anything specifically in those notes which Mr Flowers had failed to take into account, in his cross examination or his submissions, but submits any inability to recall reading the notes, revealed a lack of proper preparation. Counsel also submits that Mr Flowers was distracted by matters not put to the claimant, however he did not put that allegation to Mr Flowers.

The hearing

180. There is a discussion at the disciplinary hearingabout the Health and Safety need for the role of supervisor on nights which appears not to have been fully recorded [p.201] however, Mr Flowers is recorded as stating that he understands the requirement of the Supervisor role but questions whether the claimant had been 'dangling a carrot' by

telling DH he was going to 'sort it'.

181. Early in the meeting Mr Flowers remarks that the focus is on the claimant's communication with staff and makes it clear that the issue of the cost to the business is not something he is focussed on [p.214];

" *…I do appreciate that the cost potentially would have been incurred anyway and so my focus is more around the dialogue…"*

182. The evidence in chief of Mr Flowers was that whether or not there was a cost would not add any weight to the decision [w/s para 21] and in cross examination the claimant accepted that; "…*costs had no bearing on the warning, so it was down to the emails*."

183. The claimant at the outset raises the absence in the notes of the 18 February hearing about the comment that his communication had been *"too open and honest*". Mr Flowers suggests that the difference in what was said and what is written in the letter is noted.

184. Mr Flowers gave evidence, which was not challenged, that this sort of issue of staff stepping up happens a lot and this is managed by being clear that if they want to do more and develop that is fine but they cannot expect more pay and the role of a senior manager is to resolve issues and shield operatives from challenges and not ' walk them through the process'.

185. In terms of the integrity of the recruitment process, Mr Flowers explained in cross examination that while this was not specifically mentioned in the invitation letter, he considered this fell under the allegation of the claimant's communication with DH being misleading, in that he gave him the impression DH would be given the role. The Tribunal find that this was also mentioned in the meeting on the 18 February 2021, when it was said that his emails indicated that DH " ***will*** *be appointed into the role".* The claimant was therefore aware of this concern in advance of this hearing.

186. It is put to the claimant whether he believes that informing DH that he could put him into the role (which would be a permanent role) with reference to the email of the 9 June 2021 [p.171]; "*devalues your recruitment and integrity*" . The claimant responds;

"*Does it devalue the application process? I don't know. Other roles in my department where a person is already doing the role had done the same"*

187. However, he had been told that he needed to go through a recruitment exercise, he acknowledges that and goes on to accept however that he can see how DH could have construed the email in that way: *"I can see how DH can construed [sic] it that way".*

188. The claimant is also asked whether his email of the 26 August 2021 [p.174] showed that he had *"disassociated"* himself from the management team and revealed his frustrations. The claimant responds that the email explains that he was struggling to get approval. Mr Flowers then refers to his communication style in his emails to DH and Mark Smith. The claimant's email to Mark Smith on 26 August 2021 [p.175] is read out and he is asked whether he accepts his email style undermines the senior management team to both Mark Smith and to DH. The claimant defends his communication on the grounds that his reports need to have trust in him to push things up and the alternative is staff think that he is lying or procrastinating.

189. The claimant is also asked about his email of the 5 March 2019 and [p.163] and whether it was appropriate to refer to the treatment of another employee (Mr Drygala). The

claimant defends it on the basis that he did not reveal the salary of that colleague but everyone knew he was acting up and what the claimant was doing was telling DH that he was supportive of his request. The Tribunal accept however that indicating that another employee is receiving the treatment that DH should receive is potentially divisive and demotivating while matters are still being addressed by the management team. While what he told DH may well be correct, the Tribunal accept that an employer may quite reasonably expect a manager to make that observation within the confines of the senior management team when advocating for the fair treatment of DH.

190. Mr Flowers put it to the claimant that what he should have said to DH was to offer options but not make promises and comment on his feelings.

191. While Mr Flowers acknowledges the frustration felt he asks the claimant whether he thinks the dialogue was helpful for DH and what on reflection he would do things differently . The claimant responds that he only discussed things with DH which he felt would not change, he wanted to give him reassurance and he was concerned about losing a supervisor on the night shift and that;

" …I copied Jo into email. I should have found the email and kept going. I would have hounded Dave for longer"; and

*"The honest answer is I have showed them both I take it seriously. **If they choose to think badly of the SMT that's for them**. I am not sure what else to tell them..".* [p.205] Tribunal stress

192. The claimant does appear to acknowledge that on reading the emails now he can understand how DH misconstrued them:

"I tried to keep them even tone and factual as much as I can. I can understand he can misconstrue it. Tried to keep my emotions out of it. I can understand reading back now " [p.205].

193. There is also a discussion and acceptance that there is no written policy to support managers in these situations to facilitate these job changes however, Mr Flowers repeats that it is not about the process that was followed but the style of communication.

194. Throughout the meeting the claimant is asked whether he would communicate differently in the future. The claimant refers at one point to '*slightly less reserve passing comment*' but then when asked about the level of communication he did engage in, he states near the end of the meeting that he felt the level of communication was appropriate, that is showed he was taking it seriously and the level of detail he provided he felt helped DH;

" …*If I had given wishy washy answers DH may have given up the role and I would have been going back to square one, champion his case . And tying [sic] to be honest with DH". [p.207]*

195. Prior to the adjournment the claimant confirms that he has nothing further to add.

196. There is a short adjournment of 10 minutes after which Mr Flowers sets out his decision to issue a first written warning and his right to appeal;

"…*due to poor conduct as a result of the grievance raised by [DH] , partly caused by misleading information and email sent by yourself. Whereby I feel you have inappropriately communicated to DH on virous[sic] occasions that's lead [sic] him*

believing he has been promised pay /back pay and or position.

In the hearing you were unable to reassure me that you take responsibility for your communication to staff and would make changes if presented in the future to be clear and honest allowing staff to make decisions until you had full authorisation. *It is important to get full authorisation. It's important to get full authorised [sic] this is the key bit.* ***This communication has somewhat disassociated yourself from the decision making process as department manager which is the challenging bit you have to deal with****".* [p.207] Tribunal stress.

197. The claimant accepts that Mr Flowers had no 'axe' to grind with him and the claimant had no reason to object to him dealing with the disciplinary.

198. The claimant gave evidence under cross examination that Mr Flowers dealt with the hearing almost like a mentoring session and that he; "*gave an honest view of how I should have dealt with it differently."*

Written warning

199. The claimant was issued with a written warning. The outcome letter of the 2 March 2022 explained the reason for the warning which is consistent with what he was told at the conclusion of the disciplinary hearing [p.209-210]:

200. Within the outcome letter of the 2 March 2022 [p.209-210] he comments that;

"you confirmed that with reflection; you would not have changed your communication and what you told [DH] throughout this situation"; and

" You confirmed that you do not feel that you have disassociated yourself from the management team, undermined your managers and yourself and the confidence in you and management"

201. The letter states that the warning would remain on his file for 12 months and that because he had a live warning he would not be eligible for any pay increased or profit share payments that would otherwise be due from the respondent.

202. The claimant complains of a failure to take into account mitigation and failure to follow up on issues he raised about Ms Sisson and Mr Musson, however, Mr Flowers had expressly acknowledged the frustration and the need for the duties DH performed.

203. The claimant quite understandably complains that the reason DH raised a grievance was because he had not been paid as he should have been and was not given the fair recognition which ultimately he received through the grievance process and this was the cause of his grievance. He also gave evidence that he felt the company Pay Policy meant DH was entitled to the back pay and that; *" I believe it should have happened – I communicated in such a way that he should be confident it would have happen – I didn't understand it didn't."*

204. In cross examination the claimant accepted that it was correct that he did not accept that he had done anything wrong in the way he communicated with the claimant.

205. The claimant also gave evidence in cross examination that unless how he had communicated had been dealt with as a conduct issue by the respondent, it was "*quite possibly*" the case that he would not have changed how he would deal with such a situation again in the future.

206. While the claimant then went on in cross examination, to assert that the respondent could have tried mentoring and given him a Letter of Concern, he nonetheless did not agree with Mr Flower's methods and did not believe them to be any better than his own.

207. The claimant in cross examination gave evidence that if he had been issued with a Letter of Concern only and not a formal warming he would still have taken umbrage but he would not have necessarily resigned.

Appeal

208. The claimant was informed of his right to appeal but did not appeal because he complains that the respondent's behaviour had destroyed the relationship of trust and confidence.

209. In response to a question from the Tribunal he explained that he had not appealed because he felt the decision was predetermined; that it was not a decision made just by Mr Flowers but that it was a 'financial decision' . He felt that given the comments about him 'disassociating himself from senior management, this decision had come from 'higher up'. This was denied by Mr Flowers and there was no evidence to support this suspicion by the claimant.

210. The claimant confirmed however that the respondent is a large organisation and that there are a dozen or more people at the level of Mr Musson (i.e. in positions senior to Mr Flowers) who could have dealt with the appeal across other divisions. His evidence was that he did not consider appealing and asking for it to be dealt with by another division. He did not explain to the respondent at the time that his decision not to appeal was because he felt other senior managers in the manufacturing division had been involved in the decision.

7 March 2022

211. The claimant submitted his resignation [p.229]. In his letter he gives his reasons as follows;

"*The outcome of [DH] grievance investigation shocked me, and the approach to the subsequent disciplinary proceedings has been underhand,contrived and poorly conducted resulting in an unwarranted, punitive sanction. The whole process has been manifestly unreasonable and I believe is part of a plan to force me from the business. The treatment I have received has irrecoverably broken my trust and confidence in Games Workshop",*

212. The claimant in his evidence in chief alleges that the sanction which meant he was not eligible for a pay increase or profit share was done to "*offset any cost to the respondent as a result of its decision to uphold [DH's] grievance"* [w/s para 77]. He asserts that a pay increase of 3 % (approximately £1,700) and bonuses based on the previous two years (£5,000) would equate to about £6,700, close to the sum awarded to DH as a result of the grievance.

213. Ms Genders in answer to a question from the Tribunal, gave unchallenged evidence which the Tribunal accept, that the company bonus is discretionary and based on business performance. That the bonus paid out on May 2022 was only £1,000 and in December 2022 was only £1,500 . In previous years the profit share had been £5,000 .The pay rise for 2022 was set at 3%. Had the claimant not received a disciplinary sanction, he would have received a pay rise and a bonus in 2022 of not £5,000 but £2,500.

214. The claimant in answer to a question from the Tribunal explained that the implications of the warning, in terms of his pay and bonus, was a factor in the decision to resign and his belief that the outcome was predetermined so that the financial penalty he would suffer would offset the cost to the business. He went on to clarify that there were three things which 'played' into his decision to resign and these were;

- The fact that he felt the grievance investigation had been arrived at in a way which was not transparent, in that he was not asked any questions which accused him of misconduct

- The way he felt the wording of the accusation had been 'twisted' between the grievance hearing and the disciplinary. The disciplinary did not feel like a disciplinary in that he was not given examples of what rules he had broken or how he should have done it differently; and

- That he felt no weight was given to mitigation and he believed that this was because the outcome was predetermined in order to fund the pay uplift to DH (by removing the claimant's right to a bonus and pay rise).

215. The claimant confirmed that it was those 3 things which lead to him feeling devalued. The fact that others had not been subject to any disciplinary action was not a factor in his decision but he felt it should have been acknowledged that he had asked 3 direct line managers about DH's situation and he had received no responses and that the responsibility pay had been approved only to be cancelled a few days later, all of that contributed to the situation where DH was not treated fairly and led to his grievance. DH had a Letter of Concern but this had not prevented DH from carrying out the Supervisor role in practice and indeed he continued to do the job after this issues were raised by the People Team.

216. The claimant simply does not accept that how he communicated had caused the grievance.

<u>Submissions</u>

217. The parties gave oral and written submissions of some length, those have been considered in full but are set out only in summary in this judgment.

<u>Respondent submissions</u>

218. Counsel for the respondent submitted a written skeleton which the Tribunal has considered carefully and made further oral submissions.

219. In oral submission counsel acknowledged being surprised by the evidence of Mr Flowers that he had not seen the investigation notes at the disciplinary hearing but he invites the Tribunal to consider that the documents were sent by Ms Genders and that Mr Flowers is giving evidence a year later and he submits had a 'slip of the memory' however, the disciplinary hearing notes show that the focus was on the email evidence. He also submits that it is not part of the claimant's case that Mr Flowers did not have or consider the investigation notes.

220. Counsel referred to the following case authorities of: **Buckland v Bournemouth University [2010] IRLR 445 CA; Sharudeen v Home Bargains UKEAT/0272/16; London Borough of Lambeth v Agoreyo [2019] IRLR 560 CA; Burn v Alder Hey [2022] IRLR 306; Coventry University v Mian [2014] EWCA Civ 1275;Rentplus v Coulson [2022] IRLR 664 EAT Wright v North Ayrshire Council [2014] IRLR 4**

EAT. *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA*, Malik v Bank of Credit and Commerce International [1998]AC 20

221. Counsel submits the Coventry case is to be distinguished from Buckland and Sharudeen because the cases are concerned with matters of contract.

222. It is submitted that in terms of whether an implied term to act fairly in disciplinary proceedings, and whether it is part of the Malik test, the breach must still be fundamental.

223. Counsel submits that neither the particulars of claim, the schedule of loss or skeleton argument of the claimant, alleges any breach of the ACAS code (and nor was it put to the respondent witnesses in cross examination) and thus it cannot be the case that there has been a fundamental breach in the procedure which was followed

224. Further, it is submitted that there is no breach of the respondent's own disciplinary process and it submitted no grounds to support an allegation that the disciplinary process was a sham and Mr Flowers was acting in bad faith.

225. It submitted that Mr Flowers had reasonable and proper cause to convene a disciplinary hearing and that there was no acceptance by the claimant of his wrongdoing and a warning was therefore the 'only marker'.

226. It is submitted that in terms of the reason for the resignation, counsel made very brief submissions, accepting that the breach does not have to be the sole or principal reason.

227. Counsel in written submissions referred to the cause of his resignation being that he believed the disciplinary process was not bona fide and therefore, regardless of any other alleged breaches, there was a chance he may have left the respondent's employment in any event however, counsel went on to submit that *"this latter Polkey argument has been comprised and the issue is no longer before the ET".*

228. Counsel in oral submissions referred to not having challenged the claimant on causation and that he had not put it to the claimant that he had affirmed the contract however the Tribunal has to be "*satisfied on that*" . He made no further submissions on the point.

<u>Claimant</u>

229. The claimant submitted lengthy written submissions which the Tribunal has considered in full. Counsel made further oral submissions.

230. In terms of an implied term to carry out a fair disciplinary process, counsel in oral submissions referred to the case **of Braganza v BP Shipping Limited and another [2013] EWCA Civ 230** in support of his case that such an implied term exists.

231. Counsel referred to paragraph 53 where Lord Hodge stated;" …*I think that it is difficult to treat as rational the product of a process of reasoning if that process is flawed by the taking into consideration of an irrelevant matter or the failure to consider a relevant matter. While the courts have not as yet spoken with one voice, I agree that ,in reviewing at least some contractual discretionary decisions, the court should address both limbs of Lord Green's test in Associated Picture Houses Ltd v Wednesday Corporation [1948] 1 KB 223 …"*

232. Counsel in oral submissions also referred *to **Dr Chakrabarty v Ipswich Hospital NHS***

Trust v The National Clinical Assessment Service [2014] EWHC 2735 and specifically page 48 paragraph 113;

"*Whilst Mr Edis also contends for a free standing , discrete implied term of fairness, I am not persuaded that a general obligation to act fairly is properly to be implied into a contract of employment. Rather where the authorities contemplate questions of fairness, they do so in the context of the implied term of trust and confidence , or on a narrower basis by reference to an implied term that disciplinary processes will be conducted fairly, without unjustified delay*."

233. Counsel also relies on **Sasha Burn v Alder Hey Children's NHS foundation Trust [2021] EWCA Civ 171** and paragraph 47;

" However , when it comes to procedural fairness, I am not presently persuaded that the only way in which this can be implied into the employment relationship is through the implied term of mutual trust and confidence, As Simler J suggested in Chakrabarty , there may be a narrower basis for an implied term that disciplinary processed will be conducted fairly, which is not conceptually linked to the implied term of trust and confidence."

234. Counsel relies firstly on a breach of trust and confidence and secondly an implied duty to act fairly in matters of discipline.

235. As for Mr Flowers evidence about the investigation notes, counsel submits that the Tribunal may find that he is not correct when he says he did not get copies, but that he could not recall and invites the Tribunal to find that this is because he did not prepare properly and address his mind correctly to the case.

236. In his written submission counsel refers to other concerns as to the claimant's performance which were in the minds of the claimant's senior managers but never put to the claimant at the disciplinary hearing (para 46 (e)). However, counsel accepted that he had not actually put that allegation to the respondent witnesses, and more particularly to Mr Flowers.

237. The Tribunal also asked counsel to address it on the claimant's contention that the a reason he resigned was because he believed he was issued with the warning to cover the cost to the respondent of the outcome of DH's grievance. Counsel remarked that ; *"I recognise that having heard the evidence there is not a lot to support that proposition".* Counsel went on to submit that there is enough in the other matters to support that there was a breach of trust and confidence.

238. Counsel also relies on **Malik** and **Buckland.** Counsel cites the summary at page 103 of Buckland in support of the approach to be taken and that the test of reasonable responses is only relevant to the stage where it is open to the employer to show that such dismissal was for a potentially fair reason.

239. Counsel submits it was outside the scope of Mr Foreman's grievance investigation to decide it was a disciplinary issue, that different styles of communication was a training issue not disciplinary issues. It is submitted that there is no evidence that he was misleading DH in what he said and he could not be said therefore to be acting improperly. Counsel submits that the failure to pay was the cause of the grievance and not the claimant's action, the claimant was ' trying to put it right' .

240. Counsel also submits that there was disparity in the treatment of the claimant and counsel relies on : **Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677.**

Legal Principles

Constructive unfair dismissal

241. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that there is a *dismissal* when the employee terminates the contract, with or without notice, in circumstances such that he or she is *entitled* to terminate it without notice by reason of the employer's conduct, a constructive unfair dismissal situation.

242. The leading case in this area is ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA***, where the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must *involve* a repudiatory breach of contract. As Lord Denning MR put it:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.'

243. In order to claim constructive dismissal, the employee must establish that: a) there was a *fundamental* breach of contract on the part of the employer b) the *employer's* breach caused the employee to resign and c) the employee *did* not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

244. A constructive dismissal is not however necessarily an unfair one: ***Savoia v Chiltern Herb Farms Ltd 1982 IRLR 166, CA*.**

Implied term of trust and confidence

245. Turning first to the existence of the implied term of mutual trust and confidence, the existence of such a term in a contract of employment was approved by the House of Lords in ***Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL*.** The duty is that neither party will, *without reasonable and proper cause*, conduct itself in a manner *calculated or likely* to destroy or seriously damage the relationship of trust and confidence between employer and employee.

246. Any breach of the implied term of trust and confidence will be regarded as repudiating the contract of employment: ***Woods v WM Car Services (*Peterborough*) Ltd 1981 ICR 666, EAT*, Morrow v Safeway Stores plc 2022 IRLR 9, EAT.**

247. Applying the House of Lords' formulation of the implied term there are two questions to be asked when determining whether the term has been breached: Was the conduct 'calculated or likely to destroy or seriously damage trust and confidence'? Was there 'reasonable and proper cause' for the conduct?

248. A breach of the implied term as formulated in **Malik** will only occur where there was no 'reasonable and proper cause' for the conduct in question. The burden of proving the absence of reasonable and proper cause lies on the party seeking to rely on such absence: ***RDF Media Group plc and anor v Clements 2008 IRLR 207, QBD*.**

249. As the Court of Appeal set out in **Buckland;**

"28. It is nevertheless arguable, I would accept, ***that reasonableness is one of the tools*** *in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal requirement. Take the simplest and commonest of fundamental breaches on an employer's part, a failure to pay wages. If the failure is due, as it not infrequently is, to a major customer defaulting on payment, not paying the staff's wages is arguably the most, indeed the only, reasonable response to the situation. But to hold that it is not a fundamental breach would drive a coach and four through the law of contract, of which this aspect of employment law is an integral part.*

29. Where, if at all, the reasonableness of the employer's conduct may enter the picture is through the statutory additions to the law of contract. Assuming, in other words, that there can be conduct which is both reasonable and a fundamental breach of contract, a constructive dismissal claim would be impossible to decide unless stage (1) was tested objectively on ordinary principles and reasonableness deferred to stage (4)." Tribunal stress

Conduct must have been 'calculated or likely to seriously damage or destroy trust and confidence

250. The conduct must have been 'calculated or likely to seriously damage or destroy trust and confidence'. A breach of this fundamental term will not occur simply because the employee subjectively feels that such a breach has occurred, no matter how genuinely that view is held.

251. The legal test entails looking at the circumstances *objectively*, from the perspective of a reasonable person in the claimant's position: ***Tullett Prebon plc and ors v BGC Brokers LP and ors 2011 IRLR 420, CA.***

252. ***Alexander Russell plc v Holness EAT 677/93***: the EAT upheld an employment tribunal's finding that an employer had been oppressive in summoning an employee to a disciplinary hearing and giving him a final written warning for poor timekeeping, where he had been given a written warning for the same thing only 24 hours earlier.

253. ***Stevens v University of Birmingham 2015 IRLR 899, QBD*: t**he High Court held that the University's refusal to allow the employee, a medical consultant, to be accompanied at a disciplinary investigation by a member of the Medical Protection Society (MPS) on the facts of that case, including the seriousness of the ramifications for the employee and unavailability of work colleague or union representative, breached the implied term of trust and confidence.

Implied duty to conduct disciplinary procedures promptly and fairly

254. Employers may be under an implied duty to conduct disciplinary procedures promptly and fairly. In ***Lim v Royal Wolverhampton Hospitals NHS Trust [2011] EWHC 2178, QBD,*** in the expressed opinion of the High Court: "*it is no doubt an implied term of contracts of employment that disciplinary processes be conducted fairly and without undue delay*".

255. The Supreme Court's decision in *Braganza v BP Shipping Ltd and anor 2015 ICR 449, SC*, introduced the public law concept of 'Wednesbury reasonableness' into an employer's exercise of contractual power. In Braganza the Supreme Court specifically rooted the requirement to *act* rationally when exercising fact-finding powers within the implied term. Lord Hodge:

"Because employment is a relational contract, an employer may require cogent evidence before it makes a finding that has such consequences for an employee or his family, including the loss of the death-in-service benefit. ***I am inclined to think that it is consistent with the duty of trust and confidence*** *that where, as here, the evidence is exiguous, the employer should ask itself whether there was evidence of sufficient quality to justify the finding …"*

256. ***Patural v DG Services (UK) Ltd 2016 IRLR 286, QBD,*** the High Court accepted that, following Braganza the Wednesbury test had clearly been imported into the law relating to employment contracts but sounded a note of caution, since public authorities have only those powers that are conferred on them by law and must act in the public interest. Private employers, on the other hand, do not necessarily have the same duties. They may do so but this depends on the context.

257. **Court of Appeal in *IBM United Kingdom Holdings Ltd and anor v Dalgleish and ors 2018 ICR 1681, CA***, where the Court confirmed that, in deciding whether an employer's exercise of discretionary power (whether express or implied) breaches the implied duty of trust and confidence, 'a rationality approach equivalent to the Wednesbury test (including both its limbs) should be adopted, taking into account the employment *context'*

258. The public law test of rationality was invoked in ***Watson and ors v Watchfinder.co.uk Ltd 2017 EWHC 1275 (Comm), QBD.***

259. ***Burn v Alder Hey Children's NHS Foundation Trust [2022] ICR 492, CA*** Lord Justice Underhill stated that, while there may not be a general implied duty on an employer to act fairly in all contexts, such a term is very readily implied in the context of disciplinary processes and gave 'strong provisional view' that it is preferable to treat that duty as *arising* from the nature of the disciplinary process than as an aspect of the general implied term of mutual trust and confidence. Lord Justice Singh agreed and added some obiter observations;

"46: For my part, I can well understand why the law does not imply a general obligation to act fairly into a contract of employment. If it did, it might be thought that there would have been no need for Parliament to create the law of unfair dismissal…. ***But it must be recalled that fairness can have either a substantive aspect or a procedural aspect****. I can well see that the common law will* ***not*** *imply a requirement that there should be* ***substantive fairness*** *in the employment context, otherwise this would cut across the fundamental principle that an employer has the power to dismiss at common law provided it acts in accordance with its contractual obligations, for example by giving the appropriate notice to terminate the contract . Substantive fairness and not only procedural fairness, is required by the law of unfair dismissal.*

47. However, when It comes to ***procedural fairness****, I am not presently persuaded that the only way in which this can be implied into the employment relationship is through the implied term of mutual trust and confidence's Simler J suggested in Chakrabarty ,* ***there may be a narrower basis for an implied term that disciplinary processes will be conducted*** **fairly**, which is not conceptually linked to the implied term of trust and confidence" Tribunal's own stress

260. In ***Chakrabarty v Ipswich Hospital NHS Trust and anor 2014 EWHC 2735, QBD***, the High Court had to consider whether aspects of the 'Maintaining High Professional Standards' (MHPS) agreement, the nationally agreed medical standards procedure in the NHS, were incorporated into a doctor's contract of employment. Mrs Justice Simler observed (para 113 and 114):

"… ***I am not persuaded that a general obligation to act fairly is properly to be implied into a contract of employment****. Rather where the authorities contemplate questions of fairness, they do so in the context of the implied term of trust and confidence or on a narrower basis by reference to an implied term* ***that disciplinary <u>processes</u> will be conducted fairly without unjustified delay."*** *Tribunal stress*

261. Counsel for the respondent submits that Braganza and such cases are not concerned with whether there was a fundamental breach but whether a specific term was breached but in any event the Wednesday test is similar to the reasonable responses test which in Buckland the Court of appeal held was not applicable to the test of whether there had been a fundamental breach of the implied term. Counsel invites the Tribunal to follow the Court of Appeal decision in Buckland.

262. In ***Johnson v Unisys Ltd 2001 ICR 480, HL,*** the House of Lords ruled by a majority (Lord Steyn dissenting) that the implied term of trust and confidence does not apply in connection with the manner of dismissal. In their Lordships' opinion, the implied term of trust and confidence term is only concerned with preserving the continuing relationship between employer and employee and does not apply to the way that that relationship is terminated. An implied term to the effect that the employer's power of dismissal would only be exercised fairly and in good faith would develop a common law right covering the same ground as the statutory right not to be unfairly dismissed (and the applicable statutory cap on compensation) and cut through the statutory scheme under S.118 of the Employment Rights Act 1996 (ERA).

<u>Reasonable and proper cause' element</u>

263. In ***Hilton v Shiner Ltd — Builders Merchants 2001 IRLR 727, EAT*** Mr Recorder Langstaff QC stated in dealing with the formulation of the trust and confidence term held that:

"*To take an example, any employer who proposes to suspend or discipline an employee for lack of capability or misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence between employer and employee, whatever the result of the disciplinary process. Yet it could never be argued that an employer was in breach of the term of trust and confidence if he had reasonable and proper cause for the suspension, or for taking the disciplinary action."*

264. ***Sharfudeen v TJ Morris Ltd t/a Home Bargains EAT 0272/16.*** There, the EAT confirmed that, even if the employee's trust and confidence in the employer is in fact undermined, there ***may be no*** breach if viewed ***objectively*** the employer's conduct was not unreasonable. The EAT rejected an argument that the tribunal *had* wrongly imported a 'range of reasonable responses' test what it had one was properly had regard to the 'reasonable and proper cause' element of the Malik test.

Causation.

265. Where there are mixed motives, a tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation. However, the breach need not be 'the' effective cause : ***Wright v North Ayrshire Council 2014 ICR 77, EAT.***

266. As Mr Justice Elias, then President of the EAT, stated in ***Abbycars (West Horndon) Ltd v Ford EAT 0472/07,*** 'the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors

relied upon'.

Affirmation.

267. In the words of Lord Denning MR in ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA***, the employee 'must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to *treat* himself as discharged'. This was emphasised again by the Court of Appeal in ***Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA,*** although Lord Justice Jacob did point out that, given the pressure on the employee in these circumstances, the law looks very carefully at the facts before deciding whether there really has been an affirmation.

268. Court of Appeal in ***Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA***, which held that, if the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by *continuing* to work after previous incidents which formed part of the same course of conduct.

Acas Code

269. The Acas Code of Practice on Discipline and Grievance Procedures states that the employer should inform the employee in writing of the charge(s) against him or her and the possible *consequences* of the disciplinary action (see para 9). This communication should contain enough information to enable the employee to prepare an answer to the case and should give details of the time and venue for the disciplinary hearing (see para 10). It would normally be appropriate to provide copies of any written evidence, including witness statements.

270. It is important that the employee knows the full allegations against him or her. The Court of Appeal has stated that disciplinary charges should be precisely framed, and that evidence should be limited to those particulars: ***Strouthos v London Underground Ltd 2004 IRLR 636, CA***.

271. Where the employee is fully aware of that case and has a full opportunity to respond to the allegations and the obtained statements are peripheral to the decision reached, the failure to disclose will not render a dismissal unfair: ***Hussain v Elonex plc 1999 IRLR 420, CA.***

272. ***Hotson v Wisbech Conservative Club 1984 ICR 859, EAT***: The EAT held that the difference between inefficiency and dishonesty was more than a mere change of label. The charge of dishonesty should have been stated at the outset or not stated at all: at the very least, the employee should have had the fullest opportunity to consider the implications of the charge and to answer it.

273. ***A v B 2003 IRLR 405, EAT*****:** The EAT held that the dismissal was unfair. It acknowledged that it will often be enough if an employee knows the gist of the evidence against him. Additionally, if an employer reasonably forms a view that certain evidence is immaterial and cannot assist the employee, then it need not necessarily be disclosed.

Consistency of treatment

274. As the Acas guide points out, fairness does not mean that similar offences will always call for the same disciplinary action (page 28).

275. In ***Newbound v Thames Water Utilities Ltd 2015 IRLR 734, CA*:** Lord Justice Bean observed that he had 'rarely seen such an obvious case of unjustified disparity' .

276. Section 98(4)(b) ERA requires tribunals to determine the reasonableness of a dismissal 'in accordance with equity and the substantial merits of the case' and equity can be invoked where an employee complains that his employer has dealt more leniently with other employees in similar circumstances, although its application is not confined to this scenario. Inconsistency of punishment for misconduct may give rise to a finding of unfair dismissal: ***Post Office v Fennell 1981 IRLR 221, CA.*** In the Court of Appeal, Brandon LJ observed that it is for the tribunal to decide whether, on the facts, there was sufficient evidence of inconsistent treatment and that while a degree of consistency was necessary, there must also be considerable latitude in the way in which an individual employer deals with particular cases.

277. In ***Hadjioannou v Coral Casinos Ltd 1981 IRLR 352, EAT*** The EAT there also recognised the importance of consistency of treatment but placed more emphasis on the employer's ability to be flexible in such matters. The EAT accepted the argument that a complaint of unreasonableness by an employee based on inconsistency of treatment would only be relevant in limited circumstances:

- where employees have been led by an employer to believe that certain conduct will not lead to dismissal

- where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason

- where decisions made by an employer in truly parallel circumstances indicate that it was not reasonable for the employer to dismiss.

278. The EAT in *Hadjioannou* went on to state that cases for comparison would have to be 'truly similar or sufficiently similar', rather than 'truly parallel'.

279. In any event, the EAT in *Hadjioannou* stressed the danger inherent in attaching too much weight to consistency of treatment when the proper emphasis under S.98(4) is on the 'particular circumstances of the individual employee's case'.

280. The Court of Appeal in ***Securicor Ltd v Smith 1989 IRLR 356, CA*** The Court of Appeal held the dismissal to be fair on the ground that there was a clear and rational basis for distinguishing between the cases

281. In considering disparity of treatment, employment tribunals must be careful not to substitute their own view for that of the employer. In ***Kier Islington Ltd v Pelzman EAT 0266/10***

<u>Intransigent behaviour</u>

282. The Acas Code states that where misconduct is confirmed it is usual to give the employee a written warning (see para 19). The employee should also be given sufficient time in which to improve. However, *it* may not be necessary to give the employee an opportunity to improve where there is evidence that he or she is unlikely to change his or her behaviour in future.

283. In ***Perkin v St George's Healthcare NHS Trust 2006 ICR 617, CA,*** the employee's

style of management seriously undermined the proper running of the healthcare trust at a most senior level and *adversely* reflected on the trust both internally and externally. The Tribunal found that he was unlikely to change his behaviour and the dismissal was held to be a reasonable response.

Wrongful dismissal

284. An action for wrongful dismissal is a common law action based on breach of contract. The reasonableness or otherwise of an employer's actions is irrelevant; the only consideration is whether the employment contract has been breached: ***Enable Care and Home Support Ltd v Pearson EAT 0366/09***

Conclusion and Analysis

Did the respondent conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee and/or commit a breach of the implied term that the disciplinary process will be dealt with fairly.

285. The Tribunal concludes after consideration of the case authorities and submissions, that there is authority to support the claimant's case that there is an implied term in contracts of employment, that disciplinary proceedings will be conducted fairly and without undue delay. That term and those obligations relate to the process to be followed.

286. Where the breach (whether singular or cumulatively) is so serious that objectively it is fundamental or repudiatory, the employee may resign and treat the contract as at an end as a result of the employer's conduct. Outside of the processes followed, there is no implied contractual obligation to ensure substantive fairness in terms of a dismissal, because such a term would trespass on an employer's contractual right to terminate the contract in accordance with its contractual terms i.e. in accordance with the notice provisions.

287. There is a distinction to be drawn between events leading up to a dismissal, in respect of which a common law breach of contract claim may be brought (whether on the basis of the implied term of mutual trust and confidence, any breach of which is repudiatory, or the narrower implied term to act fairly in the nature and operation of the disciplinary process, which may or may not be serious enough to amount to a fundamental breach) and any dismissal itself.

288. In terms of the surrounding circumstances, which counsel for the claimant submits it is important to take into consideration, the Tribunal accepts that the claimant genuinely and reasonably considered that DH deserved to be remunerated for the additional responsibilities that he had taken on, duties he had performed at the request of the claimant. While DH may have welcomed the chance to prove himself and develop, he fulfilled a need to have a 'go to' person on that night shift when the workload increased and agency staff were taken on. It was as Mr Coombe recognised, a "*key role*" which he was performing for the respondent and ultimately that was recognised following the grievance, with back pay and a not insignificant increase in salary.

289. It must be said that the claimant appears to have been, at times, himself less than proactive in resolving DHs situation. He chased for a resolution often only when chased by DH, and in February 2021 due to his own oversight was late in sending a chasing

email which he should have sent in December 2020.

290. The claimant was also it seems content to await the outcome of the proposal to introduce new roles during the period from March 2021, rather than chase the issue of 'responsibility pay'. He only raised a formal request in December 2021 after it had become clear in August/September 2021, that the new role of Senior Operative was paused for review and consideration until the next financial year.

291. That said, the Tribunal accept that the claimant had raised ''responsibility pay' with Mr Musson as early as 2018 and informally 2019.

292. Mr Musson and Mr Coombe however, could and should have addressed this situation sooner but failed to attach, it seems, much importance to it. It may well be that not having sight of the emails from DH to the claimant they did not appreciate the expectation DH had formed and his growing impatience. There may also have been an element of trying to avoid or delay incurring additional cost, which would explain the suggestion by Mr Coombe when he did support the request in December 2021, to ignore the claimant's comments about back pay.

293. The Tribunal accept that there may have been an element of trying to take advantage of DH and not rewarding him fairly for the work he was doing. Costs were clearly a consideration for the business, hence the decision to delay introducing new roles on costs grounds until the new financial year and Mr Coombes not being prepared to support a request for back pay despite this being raised with him back in March 2021. The claimant was genuinely concerned about how DH was being treated and the consequences for the business of the claimant deciding not to continue with the supervisory duties. Those concerns were honestly held and legitimate.

294. The claimant did not however raise any complaint himself or complain about the process using the 'official' internal grievance process, and nor did he advise DH that he could do so. Those options were the 'official' channels open to him if he felt frustrated by the process and that DH was not being treated fairly or in accordance with the Pay Policy.

Implied term of trust and confidence and implied duty to deal with disciplinary proceedings fairly.

295. I turn now to address the conduct relied on in the claimant's submissions to show how objectively the taking of disciplinary action was likely to destroy trust and confidence and/or breach the implied term requiring employers to deal with disciplinary proceedings fairly.

296. I shall address each of the alleged acts of conduct, which counsel sets out in his written submissions. He submits that there is a considerable over-lap between the alleged breach of the implied duty of trust and confidence and the implied term that the respondent should deal fairly with the claimant in matters relating to discipline.

297. The allegations against the claimant refer to conduct that "*partly caused*" the grievance of DH. Counsel points out that no disciplinary action seems to have been contemplated against any other managers who were also partly responsible for not addressing this situation earlier. While the Tribunal accept that is correct, the disciplinary action ultimately was concerned with the claimant's method of communication. Mr Coombe and Mr Musson in particular, were on any reasonably objective basis partly to blame for DH becoming so frustrated that he raised a grievance, because they could and should have taken steps sooner to at least organise responsibility pay for DH. Mr

Coombe conceded he could have acted quicker and Mr Musson conceded it would have been the fair thing to have done.

298. The claimant had also arguably not been as proactive as he could have been. He did not make a formal written request until December 2021 and seemed content for several months from March 2021 to await the roll out of the new roles to resolve the situation . He was not criticised as part of this process for any potential delay on his part.

299. Further, the claimant in his evidence did not consider the absence of any disciplinary action against the senior management team, to be a factor in his decision to resign. While this is more of an issue of causation (whether any alleged breach caused him to resign), it is difficult to see how it can be said to be conduct calculated or likely to destroy or seriously damage trust and confidence objectively from the perspective of a reasonable person in the claimant's position(**Tullet Prebon**) when it was not something which played into his decision to resign, and where it can reasonably be assumed therefore that this did not cause the claimant any particular concern or undermine his relationship, in his view, with the respondent. In any event, this is not a case where there was, objectively, inconsistent treatment. This is addressed in more detail further on in the judgment.

300. It is submitted by the claimant, that the grievance was accepted and objectively DH was being 'shoddily' treated in a way contrary to the company's own pay policy. It is submitted that it is hard to see why in such *circumstances* "*partly causing the grievance to be raised"* should be considered a disciplinary offence for the claimant at all. While the Tribunal has some sympathy with that argument, it remains the case that the claimant was not informing DH of his right to issue a grievance. He was not subject to disciplinary proceedings simply because DH was complaining about his treatment he concern was more fundamentally about how the claimant had managed the situation in his position as a member of the management team and more particularly his communication style. It was made clear that the concern was whether his style of communication was appropriate, whether he had misled DH into believing not only that he would get the responsibility pay and back pay but a new role as Supervisor in circumstances where the pay rise had not been authorised and there was going to be a competitive process for the new jobs.

301. The Tribunal do not conclude that objectively, from the perspective of a reasonable person in the claimant's position, to invoke the disciplinary process was unfair or likely to seriously damage or destroy trust and confidence. He himself appeared to concede that he had communicated in a manner which betrayed his frustration and personal feelings rather than in a neutral tone. He accepted that without this being dealt with as a conduct issue he probably would not have changed his approach. The Tribunal do not accept that to invoke the disciplinary process where there were genuine and legitimate grounds for concern around his communication with his team, (regardless of whether he had grounds for being upset or frustrated with the senior management team), is either unfair or conduct calculated or likely to destroy trust and confidence. The reason for such behaviour is potentially a matter to consider in mitigation and sanction.

302. The grievance seen in its full context was not simply that DH felt that he had been treated 'shoddily' by not being paid responsibility pay for instance, but that he had been led to believe that he would get responsibility pay, and backpay and a promotion, because of the nature of how he had been communicated with. The claimant did not however have the authority to offer those things to him or his communication was such that he had given DH the impression these would or should be offered. The Tribunal do not accept that it was a breach of an obligation to deal with the disciplinary process

fairly or likely to breach trust and confidence, to decide to deal with this communication issue as a disciplinary matter.

303. It is not submitted by the claimant that the respondent had breached its own disciplinary policy in referring this matter to a hearing. While reasonableness is only a tool which a tribunal may use to find whether there has been a fundamental breach (**Buckland**), the Tribunal consider that it was objectively reasonable and within the band of reasonable responses, to hold a disciplinary hearing and further, objectively from the perspective of a reasonable person in the claimant's position, it was a reasonable step for the respondent to take : **Tullet Prebon.**

304. Although the Tribunal accept that the claimant felt that his actions did not warrant disciplinary action, his subjective views do not determine whether there has been a breach. The matter the Tribunal consider, potentially justified further action.

305. Counsel for the claimant submits that the e-mail of the 22 December 2021 at 09.53 from Mr. Coombes [p. 243] suggests that he was irritated by the claimant continuing to canvass support for DH but that there were other undefined concerns as to the claimant's performance which played into the decision. It is submitted that 'these were clearly in the minds of the claimant's senior managers but were never put to the claimant'. However, that these concerns about the claimant's performance were a reason for the decision to take disciplinary action was never put to the respondent witnesses and in particular Mr Flowers. Counsel for the claimant in submissions informed the Tribunal he should have put this to Mr Flowers however he had neglected to do so. There is no evidence to support the assertion that other concerns including over the claimant's performance, played any part in the decision to refer this matter to a disciplinary hearing or take disciplinary action, thus the Tribunal conclude no such conduct has been proven.

306. It is submitted that the way in which the disciplinary offences were described to the claimant were ill-defined and changed over time:

The suggestion that the Claimant was "too open and honest" said by Ms. Genders on the 18 February 2022 – see paragraph 4 of her statement and paragraph 42 of the Claimant's statement and also 28 February 2022 [page 200]

"the level of communication was inappropriate" – 18 February 2022 [page 194]

"poor conduct" providing "misleading information" and causing "a cost to the business" – 28 February 2022 [page 196]

"conversations with Damian I deem inappropriate…this has led to GW needing to pay out £5,796.61" – 23 February 2022 [page 234]

"it was leading Damian on to believe he should be paid and put in that role and that it was either his managers or GW as a whole that were stopping it" – also 23 February 2022 [page 23]

"poor conduct as a result of the grievance raised by Damian Haczynski partly caused by misleading information and e-mails sent" - 28 February 2022 (page 200)

"your communication has dissociated yourself from the decision-making process as department manager" – 02 March 2022 [page 210]

307. The issue however was essentially about the claimant's communication style as a

manager and while slightly different language may have been used, the essence of the concern was clear, that he had given information which gave DH a 'misleading' impression of the situation and was inappropriate. Indeed the claimant accepted, to an extent in the disciplinary hearing, that his manner of communication may have given DH an impression which he had not intended. There was no issue that he was being dishonest but what he had said was misleading.

308. During the disciplinary hearing time was taken by Mr Flowers to look at each of the relevant emails and he pointed out what the issue was with each. The claimant under cross examination explained that he considered that Mr Flowers had given him an 'honest view' of how he should have dealt with it differently.

309. The Tribunal accept the submissions of the respondent that the nature of the conduct was sufficiently clear from the invitation letter and the evidence provided and during the hearings. At the meeting on the 18 February the claimant was told that the emails were misleading about his pay and new role, he was told that the communication was not appropriate and that they indicated DH **would** be appointed into the role, a role the claimant knew was to be open for others to apply for internally.

310. At no point during the disciplinary hearing did the claimant raise a concern that he needed more time to prepare or was unable to address the concerns raised with him over what were a relatively small number of emails. In terms of the impact on costs, this was raised but it was made clear at the outset of the disciplinary hearing that this was not a factor Mr Flowers was concerned with, it was only about the manner of his communication. It is not unusual or unfair for a disciplinary officer to decide that certain charges or elements of an offence do not warrant any disciplinary action on closer inspection.

311. Counsel for the claimant also refers to the string of e-mails from page 245 to 243 and submits they require close analysis, in that Mr Coombe at firsts supports the application and it is approved but by the time of the e-mail on Wednesday 15 December 2021 Mr. Coombe had changed his mind 'radically' and refers to what the Tribunal notes are fairly minor inconsistences in Mr. Coombe's statement (paragraphs 16 and 17) and Ms. Sisson's statement (para 11). As set out in the findings, the Tribunal do not find that there was any reason for the change in Mr Coombe's approach other than concern about the conduct of DH which had been raised by Ms Sisson. The claimant may have felt that those concerns should not have been an issue however, the Tribunal accept they were not known previously by Mr Coombe and caused him serious and genuine concern. However this was not relevant to the claimant's communication style, it was relevant to why the situation with DH had not been resolved. However, the fact there was frustration with the process was acknowledged by Mr Flowers.

312. The financial consequences to the claimant of being issued with a warning, were the Tribunal accept, significant. It is not submitted that this was a breach of an express term of the contract. It is not disputed that the respondent had a discretion whether to award pay rises or bonus payments. Its policy sets out how that discretion is exercised where there was a live disciplinary sanction. It is not submitted that the exercise of that discretion was irrational or perverse in this case. It is submitted merely that the consequences of a warning mean that an unfair process is likely to destroy trust and confidence. In principle the Tribunal accept that where there are significant consequences arising from a disciplinary sanction, an unfair process may be more likely to breach trust and confidence.

313. Counsel submits that there is a considerable over-lap between the alleged breach of the implied duty of trust and confidence and the (disputed) implied term that the

respondent should deal fairly with the claimant in matters relating to discipline and much of the above issues are advanced in the context of the duty of fairness but he identified further specific conduct which he alleges is targeted at the implied term around a fair disciplinary process as follows:

314. It is submitted that the decision that disciplinary action was to be taken against the claimant had not been explained and that the first step is that counselling, informal discussion, or letters of concern are no longer appropriate and that disciplinary procedure at page 71 indicates that there should be investigation before any procedure begins. It is submitted that it is 'hard to see' how Mr. Foreman can have assumed responsibility for that decision, or why it should part of a grievance handling process or why it should it be described as a learning outcome.

315. The Acas code provides (para 5) that: "*It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case.* ***In some cases this will require the holding of an investigatory meeting*** *with the* employee *before proceeding to any disciplinary hearing.* ***In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing".***

316. The respondent's policy does provide for an investigation before any disciplinary process however, it does not provide what form this takes. In the Tribunal's judgment, there had been an investigation into this situation during the grievance investigation and what communication there had been between the claimant and DH. The documents, in a sense, spoke for themselves in terms of what had been communicated and how. That was the Tribunal consider, a satisfactory investigation at that stage . It was not unfair and it was certainly not irrational or perverse and nor were its preliminary findings. It was not a breach of either pleaded implied term.

317. In terms of Mr Foreman recommending disciplinary action, there is nothing in the respondent's disciplinary policy or indeed Acas code that suggests he has no authority to make this type of recommendation. It was not the Tribunal consider a failure to act fairly for Mr Foreman who dealt with the investigation and then to put forward the recommendation which he did. He had the Tribunal accept, a genuine and objectively reasonable concern about the style of the claimant's communication with DH and its impact.

318. In terms of whether there was a failure to consider alternatives such as a Letter of Concern, counselling or training, the respondent's policy does state that normally minor misconduct issues with be dealt with informally however when dealing with potential disciplinary issues there is a discretion to be exercised. The view was taken by Mr Foreman that this was a conduct issue and not a performance issue [p.234]. To refer the matter to a disciplinary was not the Tribunal conclude, outside the range of what the policy provided for: ***Abbey National plc v Holmes EAT 406/91.*** The decision to deal with this issue through a disciplinary process was not unreasonable, it was certainly not perverse or irrational, it was not unfair. There is the Tribunal conclude no basis on which to find that the respondent's conduct in invoking its disciplinary procedure was calculated or likely to destroy or seriously damage trust and confidence in this case, or otherwise amounted to procedural unfairness.

319. In terms of fairness, while the range of reasonable responses is not the test of whether there has been a contractual breach, proceeding to a disciplinary hearing the Tribunal considers, was objectively reasonable and within the range of reasonable responses open to the respondent. In the Tribunal's judgment this did not give rise to a breach of either of the pleaded implied terms. There was no recommendation by Mr Foreman

about what action should be taken by Mr Flowers.

320. The Tribunal find that the respondent had a reasonable basis for suspecting that the claimant may have committed misconduct, and deciding that there should be a disciplinary hearing to consider that further is not conduct which breached either of the pleaded implied terms. It remained open to the respondent to consider counselling or a Letter of Concern at the disciplinary hearing as the appropriate outcome.

321. In any event, any alleged breach as a result of a failure to consider alternatives to a disciplinary hearing, would not, the Tribunal consider in this case, be sufficiently serious to amount to a fundamental or repudiatory breach. (This was also on the claimant's own evidence, not an effective cause of his decision to resign).

322. Counsel submits that the lack of clarity as to the precise offence is profoundly unfair as it affects the way in which an individual can prepare their defence and refers to the cost having been mentioned. However, taking into account the circumstances, this offence was about his communication and he does not at any point complain in the disciplinary hearing that he is not in a position to deal with that. It is made clear at the outset that cost is not an issue but his style of communication is. It is not accepted that this placed the claimant at any prejudice in that meeting. The claimant does not allege that he would have answered any differently to the charges and in fact continued during this hearing to defend how he communicated with DH. He knew what the charges were he accepted under cross examination, hence why he disagreed with them.

323. Counsel refers to the disparity between disciplinary action being taken against the claimant and no action against anyone else: *Newbound v Thames Water Utilities plc (2015) EWCA Civ 677*

324. Counsel did not identify which of the Hadjioannou 'scenarios' he alleges applied. He does not assert for example that it is evidence that the real reason for disciplinary action was something other than what is stated, but if that were the argument, the Tribunal consider that the evidence does not support that submission. There is no evidence to support any assertion that the motivation to issue a written warning or invoke disciplinary process was really about wider issues about the claimant's performance or to offset the cost of the grievance by removing the claimant's right to a pay rise and bonus.

325. In terms of there being sufficiently similar circumstances which mean it was unfair to treat the claimant differently from others who had been involved in the failure to deal with DH's situation; the conduct at play was different. The claimant was not criticised for not being sufficiently proactive in resolving the situation. The criticism is unique to him in that it is about his communication style, what he led DH to believe was the situation and otherwise inappropriate communication. The situation is not sufficiently similar. In any event, there is a rational basis for distinguishing between the types of conduct. There was a view that the claimant had 'disassociated' himself from the management team. The Tribunal do not consider that the failure to take action against all those involved who failed to action responsibility pay or backpay, was unreasonable or otherwise unfair, it was not the Tribunal consider a breach of either implied term. (This was also, on the claimant's own evidence, not an effective cause for the claimant's decision to resign)

326. Mr. Flowers statement suggests that matters outside the scope of the disciplinary enquiry were also important to him:

i) he devalued the recruitment process (paragraph 11)

ii) he confided in Mr. Haczynski that he felt ignored by the management above him (paragraph 13)

iii) he inappropriately protected his own position with Mr. Smith and did not promote the Respondent's position as a whole (paragraph 15)

iv) he gave Mr. Haczynski too much information (that someone else had a pay rise in similar circumstances) (paragraph 16)

v) he disclosed matters to Mr. Haczynski without prior written approval from Mr. Musson (paragraph 24)

vi) he dissociated himself from the decision making process (paragraph 28)

vii) he failed to acknowledge that his communications were inappropriate (paragraph 30) and "failed to acknowledge wrongdoing" (paragraph 30)

327. It is submitted that the last of these issues seems to have been the matter uppermost in Mr. Flowers mind because initially, he "*did not consider that the allegations against the claimant were necessarily very serious"*. It is submitted that if the allegations were not serious, a lack of contrition should not be regarded as material.

328. The Tribunal do not accept that the issues Mr Flowers discussed were not all part of the same broad concern and charge, that the claimant was not communicating appropriately, had mislead DH and given him the impression that he would get the job (despite it being a competitive exercise). They are examples of what was inappropriate and the consequences of it. The claimant was able to engage during the hearing with each of those issues and did so. While it appears Mr Flowers was not initially considering the conduct warranted formal disciplinary action, the Tribunal accept that he had genuine and legitimate concerns during the hearing that the claimant, who was in a management position, was exhibiting an intransigent attitude.

329. Despite being asked on a number of occasions and given opportunities to reflect and assure the respondent that he would communicate differently, he was indicating, on any objective assessment, that he was unlikely to change his behaviour. The claimant himself accepted that if this had not been treated as a conduct issue, he was probably unlikely to change. It cannot in those circumstances be deemed a failure to conduct a fair process to issue a written warning. It was a sanction which was it was objectively reasonable to issue and was within the range of sanctions open to the respondent, (albeit the latter the Tribunal recognise is not the test of contractual fairness).

330. The Tribunal simply do not accept the submission that if an offence is not serious in itself, it is unfair to issue a warning where the employee makes it clear that he will not change and is likely to repeat the offence. The sanction was issued because the claimant appeared not to be taking the matter sufficiently seriously and there was a risk of repetition. It was reasonable and fair to consider that a warning was required to set a marker about what the claimant must change going forward and what the consequences would be of not doing so.

331. Whilst the Tribunal understand that the claimant believed that DH deserved recognition for the additional work he was doing and that the respondent had an obligation under its own policies to pay him fairly for that work, the Tribunal consider that as a manager it would be reasonable to expect him to have expressed those frustrations within the

senior management team informally or raise a formal concern or grievance, and not express his frustration and personal feelings to more junior members of the team. The claimant no doubt considered that DH should be given one of the new roles, however he had been told that he had to implement a competitive process and it was reasonable for the respondent to reach the finding that gave DH the deliberate impression that DH would get the job. That would not have been fair to other applicants and objectively it did make the recruitment process appear to be a sham. It was objectively reasonable and fair, for the respondent to consider that the claimant, who was managing in this way, was undermining its senior management team and its recruitment procedures. Indeed he made the statement at the hearing that; "*If they choose to think badly of the SMT that's for them".*

332. The claimant's evidence was that there were 3 reasons why he resigned and he reduced his reasons, despite counsel's extensive submissions, down to these three factors:

333. Firstly, that the grievance investigation had been arrived at in a way which was not transparent, in that he was not asked any questions which accused him of misconduct.

334. The Tribunal, accept that at the grievance hearing he was not accused of any inappropriate communication. However, he was aware of the nature of the grievance and indeed had been sent the note of what DH had said to Mr Smith which was that he felt promises had been made to him. While issues with his conduct may not have been raised at this hearing, the reason for the decision to implement disciplinary proceedings was explained at the follow up hearing on 18 February 2022 and at the disciplinary hearing. The Tribunal do not consider that it was unfair during that first meeting when Mr foreman was fact finding, to address issues of his conduct rather than refer those matters to another manager after the grievance investigation was concluded. The Tribunal do not consider that to not raise conduct during this initial fact find amounted to a failure to deal with the process fairly.

335. Secondly, the claimant complains that the allegation had been 'twisted' between the grievance and the disciplinary. The Tribunal has addressed this in some detail above. It is not accepted that the allegations were 'twisted'. He was told that his communication in the emails between him and DH were misleading and inappropriate and that he had indicated DH would get one of the new jobs. The issue of costs was not pursued at the disciplinary hearing. The allegations were not 'twisted' and the Tribunal conclude that that the allegations in the way they were put to him were not unfair and did not amount to a breach in any event sufficient to amount to a fundamental or repudiatory breach of an implied term to deal with the disciplinary process fairly or amount to a breach of trust and confidence.

336. Finally, in terms of the failure to consider mitigation, Mr Flowers gave clear evidence that it was not an issue about process but it was about the claimant's communication. He took on board the frustration. The Tribunal accept that Mr Flowers would not have issued a warning but for the claimant's unwillingness to accept that he would in future manage his communications with staff differently. His mitigation did not address that issue.

337. As for his belief that the sanction was being applied unfairly to offset the cost of DH's grievance, not only does the Tribunal find this was not in fact the case, there were no reasonable grounds for the claimant to hold that belief, that was pure conjecture on his part.

Did the respondent have reasonable and proper cause for the conduct which breached

the contract?

338. The respondent submits that Mr Flowers had reasonable and proper cause to believe that the actions of the claimant had contributed to the grievance and to issue a warning in light of the refusal by the claimant to accept that his communication was inappropriate and that he would change going forward

339. The claimant argues in its submissions that the Tribunal should find that the behaviour of the claimant gave rise to a breach of the implied term or there was no reasonable and proper cause for how the disciplinary action was handled so badly in circumstances where the issue should have been treated as a training issue of the claimant and others. Within the submissions there is it appears, a tacit acceptance that some action was warranted even if this was only retraining or a Letter of Concern.

340. The Tribunal conclude that there was no breach of the implied term or narrower duty to conduct disciplinary processing fairly such that it give rise to a repudiatory breach however, even if the mere act of holding a disciplinary hearing and issuing a warning is an act which is capable of seriously damaging or destroying the relationship of trust and confidence between employer and employee, (particularly where there are significant financial consequences), the respondent had reasonable and proper cause for taking this action, given the nature of the offence (i.e. misconduct) and the unwillingness of the claimant to acknowledge the need to change his style of communication. The claimant evidently knew what was required, he accepted in the disciplinary hearing that he tried to keep his tone neutral and not express his personal feelings, but regardless of how he knew he should frame his communications, he failed to do that. Further, he was unwilling to accept that he would behaviour differently if the same or similar circumstances presented themselves in the future: ***Hilton v Shiner Ltd — Builders Merchants 2001 IRLR 727, EAT.***

341. In terms of the reasons for his resignation put forward by the claimant; in the Tribunal's judgment the respondent had reasonable and proper cause not to address any potential misconduct on the claimant's part as part of the grievance process but to complete the investigation into the grievance and consider after that investigation process was complete, whether there were matters which should be addressed separate to the grievance process as disciplinary matter. There were legitimate grounds for concern, which even counsel for the claimant appears to tacitly accept, in that he argues not that any action was without reasonable and proper cause but submits that the respondent should have considered retraining first, counselling or a Letter of Concern. However, the claimant own evidence which goes some way to supporting the view the respondent took, was that if it had not been treated as a conduct issue (i.e. rather than performance) he would probably have been unlikely to change his behaviour. It was clear in the disciplinary meeting that he had been told that an internal competitive recruitment process had to be followed and he knew that he should keep his frustrations and personal feelings out of communications with his junior reports, but he did not do so on occasions and this was evident on any objectively reasonable assessment of the email evidence.

342. The respondent also had reasonable and proper cause to explore further at the disciplinary hearing the nature of his communications with DH and the consequences of it. These all related to the issue of how he had communicated and the extent to which that was misleading and/or otherwise inappropriate.

343. Further, the respondent had reasonable and proper cause to issue a warning. Mr Flowers took into account the frustration and the lack of process but essentially he was concerned with the manner of the claimant's communication. The reason for the

sanction which was applied was the concern that the claimant was not taking on board what was being said about his conduct and the risk of repetition. In issuing a warning the claimant was left in no doubt about the need for a different style of communication and the consequences of failing to communicate in a manner which was in line with the expectations of the respondent for its management team.

344. The Tribunal conclude that it was objectively reasonable and it was fair, for the respondent to form a belief at the disciplinary hearing, that the claimant would continue to communicate in the same manner with his direct reports and further, that it was objectively reasonable for an employer to require from its management team effective communication with their team, avoiding expressing their own frustration with the organisation or their senior managers which may demotivate and engender a loss of trust and loyalty from more junior staff. It is the Tribunal conclude, objectively reasonable for an employer to hold the view that simply because a manager is honest and well intentioned, that does not mean that the manager is communicating in a way which is effective or appropriate for someone in a managerial position.

345. The Tribunal conclude that Mr Flowers had reasonable and proper cause to deal with this situation through a disciplinary process and to issue the warning in circumstances where the claimant was unwilling to change his method of communication. It could have been dealt with by training and as a performance issue however, it was equally reasonable the Tribunal conclude, to treat this as a deliberate 'won't do' situation rather than a 'can't do' and as such as a conduct issue.

346. The Tribunal conclude that the delay in dealing with DH and the failure to communicate with him about why responsibility pay had not been awarded in December 2021, doubtless had been a factor in him losing patience and raising a grievance. Mr Flowers did not however lay all the blame on the claimant, he felt his communication played a part and that was the Tribunal conclude objectively a reasonable view to take. The decision not to address the other causes with those concerned including Mr Musson, Ms Coombe and Ms Sisson appears to fail to address their failings as managers in this process however, that was not part of the reason for the claimant's decision to resign and it does not detract from the core issue at the disciplinary hearing which was the claimant's method of communication.

347. The arguments around whether the disciplinary action was in line with the charges he Tribunal find is a tenuous argument. The charge was about misleading and inappropriate communication, it was fundamentally about how the claimant was communicating. It was not until Mr Flowers discussed the communication with the claimant that it became apparent that the claimant appeared unwilling to take the concerns on board and his response influenced the sanction.

348. It is not alleged by the claimant that there was a failure to comply with the Acas Code which sets out the requirements for a fair process that accords with natural justice. In any event, the claimant knew the charges in sufficient detail, he had the relevant evidence and he was given an opportunity to respond to the charges.

If the claimant was dismissed constructively, was the dismissal for a fair reason?

349. The Tribunal conclude that there was no dismissal. There was no breach of the implied term of trust and confidence and no breach or breaches of any implied duty to carry out the disciplinary process fairly and in terms of the latter, even if there were some issues of fairness they did not amount to a repudiatory or fundamental breach giving rise to a constructive unfair dismissal.

350. Counsel for the claimant submits that the respondent might have recognised that the way in which the claimant acted was not consistent with the respondent's management style and put in place some HR training, that his actions were not for personal gain and reflected an 'impressive' motivation to treat DH fairly and the actions of the claimant cannot properly be considered a potentially fair reason to discipline.

351. The Tribunal conclude that regardless of the claimant's motivation (and indeed there was no suggestion by Mr Flowers that his motivation or intentions were insincere), it is naïve to expect that as a manager any behaviour no matter what its impact or potential impact on the business, if it is motivated by an intent to be fair to a particular employee, is consistent with good and effective management.

352. The claimant himself on reflection accepted at the hearing that his communication may have given certain incorrect impressions and alluded to being aware of the need to stay neutral and not express his personal feelings of frustration. He appeared to accept that he had at times failed in that regard; "*I tried to keep them even tone and factual as much as I can. I can understand he can misconstrue it. Tried to keep my emotions out of it. I can understand reading back now"* and yet he also makes the comment; "…*If they choose to think badly of the SMT that's for them…."* [p.205].

353. It was the Tribunal conclude, within the range of reasonable responses to elect to issue a written warning rather than a Letter of Concern or retraining, where there is intransigence and an willingness to take on board the respondent's expectations around how its managers communicate in circumstances where he knew how he should communicate. There is for any employer a range of reasonable responses and this sanction fell within that range.

354. The claimant felt he was doing the right thing, that members of the respondent's senior management team had not addressed the situation with DH promptly. However, while that is not really disputed, a reasonable employer, acting reasonably, could find that his style of communication was not helpful to the respondent and not helpful in ensuring DH had an accurate understanding of the situation.

If there was a potentially fair reason, was the dismissal within the range of reasonable responses and substantively and procedurally fair?

355. The Tribunal conclude that the disciplinary was for a potentially fair reason namely conduct and the disciplinary process was for the reasons already set out in this judgment above, both substantively and procedurally fair.

356. The procedure that the respondent followed was the Tribunal conclude, within the band of reasonable responses as was the sanction applied.

<u>Causation</u>

357. Counsel for the respondent submits that the claimant resigned because he believed the disciplinary process had been underhand and not bona fide but no such conspiracy has been established.

358. The claimant identified that three things played into his decision to leave.

359. The Tribunal accept that all the three reasons put forward by the claimant were an effective cause of his resignation. The claimant's evidence is however that he may not have resigned had he been issued with a Letter of Concern rather than a warning, this would appear to indicate that the principal reason for resigning was the issuing of the

written warning.

360. However, while his reasons the Tribunal conclude were all an ‘effective’ reason for his decision to resign, the Tribunal conclude that those reasons did not amount to a breach of the implied duty of trust and confidence or any narrower implied to deal with the disciplinary process fairly.

361. If there was any unfairness in the process, it was not such that the Tribunal consider it amounted to a breach of the implied term of mutual trust and confidence or in terms of the narrower implied term, was so serious as to amount to a repudiatory breach giving rise to a constructive unfair dismissal.

Affirmation

362. Counsel for the respondent did not put to the claimant that he had affirmed the contract and made no submissions on this point, other than to submit that it was for the Tribunal to be satisfied that he had not affirmed any breach.

363. The claimant resigned promptly on the 7 March 2022 after being informed of the outcome of the disciplinary hearing on 2 March 2022. His schedule of loss is not in dispute and shows that he obtained other work from 4 July 2022. It was not put to the claimant that he had left because he had already secured another role.

364. The claimant resigned because of a number of what he alleges to be breaches including the outcome of the disciplinary hearing. He had 5 days in which to challenge the decision by way of appeal, within that time scale he opted not to exercise the right to appeal but to resign.

365. The claimant complains of acts prior to the outcome of the disciplinary hearing however he argues a number of acts which are a course of conduct that amounts to a breach ending with the issuing of the written warning: ***Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA*****.**

366. Taking into account that he took only a few days before deciding to leave, within the time scale he was given to appeal, the Tribunal conclude that had the conduct he complains of entitled him to resign, he would not have affirmed that breach by remaining in employment for another 5 days while he decided whether to appeal or resign: ***Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA*** and ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA***.

367. However, the claimant has not established a breach of the implied duty of mutual trust and confidence or a fundamental or repudiatory breach of any implied term to deal with the disciplinary process fairly and even if such conduct was by its nature an act which is capable of seriously damaging or destroying the relationship of trust and confidence, the respondent had reasonable and proper cause for such conduct .

The claim of constructive dismissal is not well founded and is dismissed.

Wrongful dismissal

368. Neither party addressed this complaint in submissions however the Tribunal conclude that the employment contract was not breached, the claimant resigned without serving notice and he resigned in circumstances where he was not constructively dismissed.

The claim of wrongful dismissal therefore is not well founded and is also

dismissed.

Employment Judge R Broughton

Date: 1 July 2023

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