EMPLOYMENT TRIBUNALS

Claimant: **Mr. J. Harvey**

Respondent: **Transport for London**

Heard at: London Central Employment Tribunal

On: 13, 14 & 15 February 2024

Before: Employment Judge J Galbraith-Marten (sitting alone)

Appearances

For the Claimant: Mr. I. Wright, Counsel

For the Respondent: Ms. L. Whittington, Counsel

JUDGMENT

The claimant's claim for constructive unfair dismissal is not well founded and is dismissed.

REASONS

Preliminary Issues

1. The claimant originally pursued two claims, constructive unfair dismissal and automatic unfair dismissal on the grounds of making a protected disclosure. The automatic unfair dismissal claim was withdrawn by the claimant.

2. At the outset of the hearing the respondent raised a concern regarding the scope of the claimant's constructive unfair dismissal claim. The claimant's witness statement suggested he relied on new acts that were not pleaded in the claim form nor included in the list of issues agreed on 27 September 2023.

3. The respondent submitted that so far as those matters are concerned, they are not part of the core allegations and have not been dealt with in the respondent's witness statements. Therefore, they are not matters for the Tribunal to determine. There are four allegations, as set out in the List of Issues of 27 September 2023 at paragraphs 5.1 – 5.4, regarding the respondent's conduct.

4. The claimant confirmed there was no application to amend his claim. The Tribunal was grateful for that clarification.

Application

5. The claimant pursued an application for specific disclosure. He sought disclosure of an email from the respondent's internal legal department that was referred to at the outset of the second part of his disciplinary hearing on 11 November 2022. The relevant section of the note of that meeting was included at page 388 of the bundle.

6. Mr. Tim Mirza, the disciplinary manager, read out a summary of the internal legal advice he had received regarding whether the claimant had made a protected disclosure.

7. The claimant's trade union representative, Mr. Dimitris Pharos from the TSSA, in response to the summary read out by Mr. Mirza stated, "*Picks up some of the wording of the email from legal; 30 to 70% is not a quota but an "expectation". If JH follows scoring guidelines correctly, should be expected to fall within that range but the 30 to 70% is an expectation, not an instruction. JH does use the guidelines but thinks with the wording its clear legal said it's not an instruction but an expectation. Questions what this means if following the scoring guidelines*."

8. The claimant applied for disclosure of the email from the respondent's internal legal department that was referred to by Mr. Mirza. The respondent resisted that application.

9. The claimant submitted it goes to the heart of the factual matters in the case.

10. The respondent stated it had only been requested the previous day. The document is legally privileged as it contains legal advice from the respondent's internal legal department relating to the claimant's automatic unfair dismissal claim and not the constructive unfair dismissal claim before the Tribunal. Also, the respondent does not accept that privilege has been waived in respect of this advice despite Mr. Mirza having read a summary to the claimant and his trade union representative at the outset of the second part of the disciplinary hearing. Finally, the email from the respondent's internal legal department is irrelevant and it is not the smoking gun the claimant anticipates.

The Law

11. In relation to applications for disclosure the Tribunal must give effect to **Rule 2 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1** and the overriding objective which is to enable cases to be dealt with fairly and justly meaning, the Tribunal must treat the parties equally, save expense, act proportionality in relation to the complexity of the case and avoid unnecessary delay.

12. The test regarding whether an order for disclosure of documents should be made was set out by the Court of Appeal in **Canadian Imperial Bank of Commerce v Beck [2009] IRLR 740**. This is a two-limb test in that documents will be disclosable if they are both relevant and necessary for fairly disposing of the proceedings.

13. The Tribunal's powers in relation to ordering specific disclosure are also set out in **rule 31.6 & 31.12 Civil Procedure Rules 1998** as confirmed by the Employment Appeal Tribunal in **Santander UK plc and others v Bharaj [2021] ICR 580**.

Conclusion

14. In respect of the email from the respondent's internal legal department, a summary of which was shared with the claimant and his trade union representative verbally at the outset of the second part of the disciplinary hearing, the Tribunal found that to be both relevant and necessary for fairly disposing of the proceedings. The contents of the document have already been shared with the claimant and the 30-70% range is factually at heart of this case and in particular paragraph 5.1 of the List of Issues of 27 September 2023.

15. The respondent was ordered to disclose the email in its entirety but was permitted to redact the legal advice in respect of whether the claimant had made a protected disclosure as that claim is no longer pursued.

16. The respondent disclosed the email to the claimant and the Tribunal, and it was inserted at page 549 of the bundle.

Introduction

17. The claimant was represented by Mr. I. Wright of Counsel and the respondent was represented by Ms. L. Whittington of Counsel. The parties prepared an agreed 548-page bundle and a supplemental bundle of 48 pages. The claimant gave sworn evidence under oath, Ms. Katie Chennells and Mr. Tim Mirza gave sworn evidence under oath for the Respondent. Both parties had an opportunity to cross examine the other and the witnesses were asked questions by the Tribunal and re-examined.

18. After the evidence was heard each party was given the opportunity to make submissions which they did at 1.15pm on the third day. The respondent's representative provided written submissions that were supplied to the Tribunal and the claimant. Both representatives made oral submissions.

19. Judgment was reserved and the Tribunal used the remainder of the third day to deliberate. Accordingly, the Tribunal provides the judgment and reasons outlined below.

Issues

20. The liability issues to be determined by the Tribunal in respect of the constructive unfair dismissal were as follows: -

1. Did the respondent without reasonable and proper cause, by its conduct, breach the implied term of mutual confidence and trust? The conduct relied on is:
    i. The respondent ordered the claimant to apply an unethical scoring quota that did not exist as a policy and was not contained in his job description;
    ii. The respondent initiated a disciplinary policy against the claimant for gross misconduct where there was no evidence of gross misconduct (for example no audit records or training);
    iii. The respondent singled out the claimant for disciplinary action even though others had scoring ranges that fell outside the range of 30-70%; and
    iv. The disciplinary process that was followed was prolonged, laborious and relentless causing him to become unwell.

2. If so, did the claimant affirm the contract of employment before resigning?

3. Was that conduct a reason for the claimant's resignation?

4. If the claimant was constructively dismissed: what was the principal reason for dismissal and was it a potentially fair reason in accordance with sections **98(1) and (2) Employment Rights Act 1996?** The respondent contends that the reason was misconduct.

5. If so, was the dismissal fair or unfair in accordance with the **Employment Rights Act 1996 section 98(4)** and did the respondent in all respects act within the so-called "band of reasonable responses".

Findings of Fact

21. The Tribunal's findings of fact are based on the documentary and oral evidence provided and on the balance of probabilities.

22. The claimant submitted his constructive unfair dismissal claim on 15 July 2023. A copy of the claim form was included in the bundle at pages 6 – 17.

Claimant Job Purpose

23. The claimant commenced employment with the respondent on 8 August 2011 and his employment terminated on 16 March 2023. His contract of employment was included in the supplemental bundle at pages 2-14. The claimant worked part time and his shift pattern was one week on and one week off.

24. The claimant was employed by the respondent as a Knowledge of London (KoL) examiner, and he worked in the respondent's Taxi & Private Hire department (TPH). The claimant had previously worked as a licensed taxi driver from September 2006 having passed the KoL in 2 years with a score of 75%.

25. The claimant's job description was included in the bundle at pages 260 – 263. His job purpose was to deliver "*an efficient, effective, transparent and fair topographical KoL assessments ensuring the high standard of knowledge required by licensed London taxi drivers is maintained*." In cross examination the claimant stated his role was to deliver the exam along very loose guidelines.

26. He worked in a small team of examiners (between 7 and 9 during his employment) and he reported to the KoL manager, first Ms. Nicola Danvers followed by Ms. K. Chennells.

Respondent's policies

27. The respondent's *Code of Conduct* was included in the bundle at pages 48 – 53. It states, "*TfL strives to conduct all of its activities efficiently, to the highest ethical standards and in compliance with its legal obligation*." Those ethical standards are referred to as, "*TfL aims to conduct its business with honesty and integrity and expects employees to maintain the highest ethical standards. TfL recognises the obligations it has towards the community as a whole, its employees, its partners, its suppliers and all others with whom it interacts*."

28. The respondent's employee general conduct was referred to at pages 50 and 51 of the bundle and all TfL employers must comply with "*all policies, standards and supporting guidelines, working procedures and safety instructions relevant to their job…. All employees are required to take responsibility for their own work and the proper performance of anyone they manage….. All employees must*

perform their duties diligently and as directed by their manager…. *All employees must comply with the terms and conditions of their contract of employment. All employees must avoid engaging in activities that are likely to breach that contract or bring disrepute od damage upon TfL*…"

29. The respondent's *Business Ethics* policy was also included in the bundle at pages 54 – 58. It includes the requirement that "…*employees should conduct themselves with integrity, impartiality and honesty…reject any business practice which might reasonably be deemed improper*."

Knowledge of London (KoL)

30. The respondent refers to the KoL as being of a "*Gold Standard*" and its purpose is to ensure London taxi drivers are of a sufficiently high standard and safe to drive members of the public. Candidates must pass the KoL to obtain a licence and ply for hire in London.

31. The KoL is a topographical assessment. It was introduced in 1865 and focuses on streets and places of interest within a six-mile radius of Charing Cross (this includes 25,000 streets and 20,000 landmarks). Drivers must be able to recall accurate routes between any of these points when tested by examiners.

32. Candidates use the Blue Book to learn the content of the KoL which includes 320 routes or runs to guide their study and many also attend knowledge schools. There are various KoL assessment stages. There are two multiple choice tests (stages 1 & 2) and four rounds of face-to-face examinations known as appearances at stages 3, 4, 5 & 6 which the claimant delivered. The stages become increasingly advanced, and candidates have seven opportunities to appear at each stage to gain the required number of points (12) to advance to the next stage. An A grade provides a score of 6 points and a D grade is a failure with 0 points. Examiners may test a candidate multiple times during their journey to complete the KoL.

33. When candidates sit the KoL oral tests at stages 3 onwards they attend an examination centre for an appearance and are asked four questions by examiners. This is the role the claimant performed. The appearance questions consist of asking candidates to recite four runs between two points e.g. John Lewis Oxford Circus to Craven Cottage in a time allocation of 20 minutes. The examiners score each question out of 10 possible marks and there are five areas in which marks can be lost; incorrect street names, not the most direct route, leaving from an incorrect pick up or set down point, carrying out an illegal manoeuvre and hesitation. The runs asked at stage 3 are those included in the Blue Book, but after stage 3, the examiners choose the runs.

34. Independent knowledge schools teach candidates the KoL and they collect points (the start and end point of a run) from candidates outside the examination centre after they have completed appearances. They collect both the runs asked and the name of the examiner which they upload to an app in real time so that candidates can practice past runs to prepare for their appearances in real time. The point collectors who work for the knowledge schools also track the examiner

question patterns and the examiners' shift patterns to further anticipate the examiner a candidate might get on any given day and the runs they might ask. Example knowledge school answer sheets were included in the bundle at pages 81- 92.

35. Each examiner also has a set of "*banker*" runs particular to them. Example banker runs were included in the bundle at pages 93 - 98. The claimant's banker runs were at page 93, and he stated in evidence that banker runs were questions he would always return to if appropriate. Again, the points collectors tracked the examiner banker runs for candidates.

KoL Guidelines for Examiners

36. The "*Knowledge of London One to One Appearances Guidelines for Examiners (March 2017)*" was included in the bundle at pages 290 – 295. It is not a publicly available document. The relevant sections are as follows:

Introduction

1.1 Transport for London (TfL) is committed to providing a fair, open, transparent and consistent Knowledge of London examination system and to assist in meeting this aim this document provides Knowledge of London examiners with detailed guidance for conducting one to one examinations (appearances).

Stages 3, 4 and 5 – General

2.3 Answers should be based on the shortest route available, unless otherwise specified by the examined.

Stage 3 Appearances

3.4 Candidates may be allowed to go back on a route and correct errors without being penalised.

Stage 4 Appearances

4.2 Candidates should not be allowed to go back and correct a route.

Stages 3, 4 and 5 – Marking System

6.2 Four questions should be asked. There is a maximum of 10 marks available for each question giving a potential maximum of 40 for examination.

6.4 Once the candidate has successfully located both the start and finish points they will be asked to describe the route between the two. The answer will be scored out of the number of marks remaining from the original 10. The candidate will lose marks if, for example:

- *Incorrect street names are given*

- *The route is not the most direct available;*
- *How to leave or set down at a point is described incorrectly;*
- *The route involved making banned turns or U turns, contravening "no entry" signs or travelling the wrong way down one-way streets;*
- *Hesitancy in delivering the answer indicates that the candidate cannot recall the route quickly enough to be able to drive confidently and safety in London traffic.*

6.5 Therefore, if the candidate correctly identified the first start and finish points asked and calls the run perfectly, they will be awarded 10 marks for that question. Conversely, if the candidate fails to identify 10 points the run cannot be attempted and no marks can be awarded.

6.8 The total number of marks scored over the four questions is translated into an overall grade for the appearance.

36-40	*Grade A*	*6 points*	*Very good*
32-35	*Grade B*	*4 points*	*Good*
24-31	*Grade C*	*3 points*	*Satisfactory*
<24	*Grade D*	*0 points*	*Unsatisfactory*

KoL Guidance for candidates

37. The "*Knowledge of London, an introduction to learning the Knowledge of London and the examination process for candi*dates" was included in the bundle at page 516 – 543. It is a guide for those who have had their application to become a licensed London taxi driver accepted and are due to commence learning the KoL. Alongside that, candidates are provided with the Blue Book. The appearance marking system for Stages 3 to 5 is included at section 20, and this was included at page 531 of the bundle. Candidates are informed they will lose marks for the same reasons provided in the examiner guidelines at section 6.4.

38. Again, as provided in the examiner guidelines, candidates at Stage 3 are allowed to go back and correct any errors without being penalised. This is provided at section 21, page 533 of the bundle.

Claimant training on KoL examination

39. The claimant stated in evidence that he had no formal training on how to conduct appearances. He shadowed other examiners during 16 appearances at the beginning of his employment, but he was mainly self-taught. Also, there was no continuous professional development provided during his employment and therefore examiners interpreted the guidelines as they saw fit.

40. The claimant acted up as the KoL examiner manager for a period during 2012. He referred the Tribunal to the training programme he completed in respect of that role included in the bundle at pages 64 – 67. The claimant stated that was the only training he was provided with during his employment.

41. The KoL manager training programme document referred to the requirement to organise regular team meetings (usually monthly). Page 65 also referred to the manager sitting in on appearances, completing audit forms and offering guidance/recommendations to examiners. Page 70 referred to monthly appearance monitoring including, managing the diary monthly for appearance monitoring and ensuring all examiners are monitored at least once per month. Ms. Chennells confirmed in evidence that she found this document at the bottom of a filing cabinet, and she had not been provided with the same training programme when she became the KoL manager. The claimant's evidence was that all KoL managers would be expected to adhere to those standards.

42. The Tribunal accepts that was the training programme the claimant was provided with when he acted up, but the Tribunal also accepts Ms. Chennells was not provided with the same training as she took up the examiner role five years later.

43. During evidence the claimant stated weekly team meetings were not conducted. They rarely happened and were often scheduled when he was not able to attend as he worked part time. He also stated there was not a collaborative approach between the examiners albeit they did chat during tea breaks and during lunch breaks. The claimant confirmed during cross examination that he was aware unofficially that other examiners had "*drifted away from the spirit of the guidelines*" but it was not his job to take advice from other examiners nor raise issues about how they conducted their work.

KoL Manager

44. Ms. Chennells was promoted to KoL manager in January 2017. Prior to that she had also worked as an examiner and a London taxi driver, and she also completed the KoL.

45. Her job description was included in the bundle at pages 73 – 76. Her job purpose is to, "*Manage the day to day delivery of efficient, effective, transparent and fair topographical Knowledge of London assessment processes including the day to day management of all examiners, maintaining the level of quality and standard and the delivery and implementation of identified changes and efficiencies to the process as agreed with the Head of Compliance*." Her principal accountabilities include, "*management of the delivery of fair, open, transparent, consistent and proportionate Knowledge of London examination system for both assessment processes ensuring that licenced London taxi drivers have a topographical knowledge that meets the required standards*" and "*responsibility for the effective monitoring of the examination process and the management and delivery of the assessment processes as a whole and of individual examiners whilst ensuring consistency and promoting best practice between them*."

46. Her role entailed auditing the examiners' work. In evidence she confirmed she conducted paper audits and sat in on examiner appearances (in person audits) at least twice per month for the claimant as he worked part time. She also stated there was a folder of audited appearances, but the respondent no longer had

that folder. The claimant disputed that Ms. Chennells audited him regularly or effectively.

47. Ms. Chennells stated that in her experience, in person audits weren't as reliable, as she found examiners were on their best behaviour when she was sitting in, and she believed the most effective way to review the team's scores (including the claimant's) was to consider every paper record of appearances and conduct paper audits which she implemented when she took up the role of KoL manager. She asked the examiners to complete weekly sheets containing the number of appearances completed and the scores they had provided.

Scores

48. During 2017 the claimant's annual average was 85% and he was the highest scoring examiner that year. The lowest scoring examiner had an average of 25%. Those scores were included in the bundle at page 222. The department average score or pass rate was 51%.

49. In early 2018, Ms. Chennells received concerns from the knowledge schools that some examiners were giving high scores, some were giving low scores and as a result, some of the examiners had a reputation for being either too hard or too easy. The knowledge schools were able to track this based on their intelligence gathering. Ms. Chennells discussed this with each examiner during their end of year performance reviews (in respect of 2017) in early 2018.

50. During those performance reviews Ms. Chennells informed the examiners that she expected them to have a rolling average score of between 30-70% which she believed was achievable given the department average was 51%. Ms. Chennells stated in evidence she wanted the scores to be consistent to ensure the integrity of the KoL as required by her job description. During cross examination the claimant was asked if it was a legitimate concern if there was inconsistency in the scores and he confirmed it was.

51. Ms. Chennells set out in her witness statement and during her evidence to the Tribunal that she was not asking the examiners to purposely fail candidates, she wanted the examiners to do their job in accordance with the KoL Examiner Guidelines and assess the candidates to the department standards. She wanted the KoL to be as fair and consistent as possible to maintain its "*Gold Standard*" and to deliver the best taxi drivers in the world.

52. Ms. Chennells spoke with two examiners regarding their low scores in respect of 2017 which fell outside the range she had identified (one had a yearly average of 25% and the other a yearly average of 28%). In evidence she stated they accepted her guidance to score within the 30-70% range and their scores improved. During 2018 both their annual average was 34% as set out at page 222 of the bundle.

53. Ms. Chennells raised the claimant's scores with him on 16 March 2018 during his end of year performance review. His scores were noticeably higher than his colleagues, a yearly average of 85% in 2017, 85% in January 2018 and 80% in

February 2018. Ms. Chennells suggested that one area of concern that could be inflating his scores was the level of repeat questions he was asking i.e. the points collectors tracked his questions so that candidates could rehearse his questions and give perfect answers resulting in higher scores.

54. Ms. Chennells' evidence was the claimant agreed to keep an eye on using repeat questions during his end of year performance review. The claimant stated in evidence that he couldn't recall that conversation, but he agreed a conversation took place, but he didn't take on board Ms. Chennells' comments as being specific to his performance rather, he understood it was the whole team's performance as he aware that all examiners asked repeat and "*banker*" questions. The Tribunal prefers Ms. Chennells evidence on this issue as it accords with her timeline of events included in the bundle at page 223 and it would have been unusual to discuss the team's performance at the claimant's individual end of year performance review.

55. Ms. Chennells continued her paper audits and spoke with the claimant about his scores again on 22 October 2018 during his mid-year review and she confirmed that his scores remained noticeably higher than the other examiners. Ms. Chennells informed the claimant she would have to monitor the situation. She then reviewed 32 appearances the claimant conducted on the 23, 24 & 25 October and the 6 & 7 November 2018 and she found the claimant's scores ranged between 83-100% providing an average of 91%. She noted the claimant asked a lot of repeat questions. This is reflected in the notes she made of their discussion included at page 475 of the bundle and the claimant's appearance score sheets included at pages 478 - 481. At page 478 & 479 the claimant asked all the candidates on the same stage the same questions.

56. She spoke to the claimant again on 20 November 2018 and he told Ms. Chennells he was unhappy that she had instructed him how to score a certain percentage of candidates and he could not be made to adhere to that target as it meant he had to doctor his scores to fail candidates. Ms. Chennells stated 30-70% was a rolling average not a daily target. She reminded the claimant the department average was around 50% but his average was around 85%.

57. In evidence, the claimant accepted that Ms. Chennells did not refer to this range as a scoring quota, that was his term, but he maintained that Ms. Chennells was insistent and persistent that he aimed very seriously to achieve those scores. Again, in evidence, the claimant accepted Ms. Chennells never used the term doctoring scores and that was his interpretation. Ms. Chennells' note of that conversation was included at page 482 of the bundle and she recorded the claimant stormed out of the office and stated he would not change the way he did things. The claimant refuted that.

58. Ms. Chennells and the claimant had a second conversation later that day which does support Ms. Chennells' version of events that there was a disrupted conversation earlier in the day. The claimant came back to speak to Ms. Chennells having considered their earlier conversation. Ms. Chennells shared her recent reviews and noted there were cases of repetition in the claimant's questions and the points collectors from the knowledge schools were informing

the candidates of those questions and therefore the candidates were able to learn those runs by heart. Ms. Chennells informed the claimant she would continue to monitor his scoring patterns and the claimant agreed to mix up his questions to avoid repetition and he would only ask repeat questions on back-to-back appearances when the second candidate could not avail themselves of the first candidate's questions due to the timing of the appointments.

59. Ms. Chennells continued to monitor the claimant's scores between 21 November 2018 and 4 January 2019 and the claimant's average score reduced to 76% which indicated to Ms. Chennells that he had taken on board her comments regarding repeat questions. A copy of his appearance score sheets during that period were included in the bundle at pages 483 - 493.

60. In 2019 the claimant's average yearly score was 78%, the department's average was 51%. A table of the 2019 scores was included in the bundle at page 225. Ms. Chennells felt there had been an improvement and progress had been made. In September 2019 Ms. Chennells went on maternity leave and was away from the business.

61. During 2020 the claimant's scores crept up slightly to an average of 82% compared to the department average of 54% and he was the highest scorer that year. The 2020 scores were included in the bundle at page 225. None of the other examiners scored outside the range. However, fewer examinations took place during 2020 because of the Covid-19 pandemic.

62. Ms. Chennells returned to work, and she sat in on an appearance with the claimant on 14 July 2021. Her monitoring form recording that was included in the bundle at page 102. She recorded that the claimant gave "*good constructive feedback at end. Feedback on all questions. Candidate left room knowing areas were need improvement. Professional manner and good customer service*!". Both the claimant and Ms. Chennells signed the form confirming they both agreed its contents.

63. In 2021 the claimant's average scores reached 92% to be contrasted with the department average of 60%. None of the other examiners had an average below 30% but two others had an average of 77% & 73%. A copy of the 2021 scores was included in the bundle at page 226.

64. Ms. Chennells met with the claimant on 3 November 2021 to conduct his mid-year review and she raised his high scores again. She told him again she would need to monitor and review the situation. She again asked that he not repeat questions and also he should not prompt candidates to repeat their answers as that indicated their first answer was wrong. Ms. Chennells stated she would review the claimant's scores for two months (November and December 2021) and if he required any help, support or training he should ask her. This is reflected in her note included in the bundle at page 226.

65. Ms. Chennells also sent the claimant an email on 4 November 2021 following the mid-year review and that was included in the bundle at pages 246 & 247. In that email Ms. Chennells noted the claimant felt his higher scores reflected his

leniency on the examination guidelines. Ms. Chennells also stated the two-month review period would give the claimant time to deliver what he had committed to i.e. follow the examination guidelines more closely to score the candidates more accurately. She stated, "*I appreciate the above review actions may sound quite daunting. After yesterday's conversation I am more than confident that you have this in hand as you were clear about what changes you needed to make, however if you do feel like at points you're having difficulties or that our agreed change of approach isn't working please let me know*."

66. In evidence the claimant couldn't recall that meeting, but he did recall not replying to Ms. Chennells' email as he had verbalised what he wanted to say to her during the meeting. He also stated he didn't admit leniency during the meeting, he didn't recall agreeing to any changes and he refuted Ms. Chennells' guidance of what she expected of him was made clear during that meeting. He understood she wanted him to mark more harshly to get closer to the 30-70% range which meant doctoring his scores. The Tribunal accepts Ms. Chennells version of events. The claimant did not respond to Ms. Chennells email and if he did not admit delivering the exam leniently or to making any changes during their meeting that would have been an issue of the utmost importance for the claimant to refute but he did not do so.

67. A stage 3 candidate's scores were included in the bundle at page 99, that candidate was scored C's and D's by all the other examiners save for the claimant who provided him with an A on 2 December 2021.

68. The claimant's grades on 29 December 2021 were included in the bundle at page 63. He awarded 2 x D grades, 3 x C grades and 4 x A grades. Contrasted with two other examiners working that day who scored 1 x A grade between them.

69. Ms. Chennells had a meeting with Simon Buggey from the respondent's policy department on 12 April 2022. A short note of their meeting was included in the bundle at page 202. Ms. Chennells was asking for advice on how to include the 30-70% rolling average range into the Examiner Guidelines.

70. Ms. Chennells conducted another in person audit with the claimant on 20 April 2022. The candidate was a stage 3 appearance and the claimant's score sheet was included in the bundle at page 205. The claimant provided the candidate with 37 marks out of 40 that equated to an A grade.

71. On that occasion Ms. Chennells did not use the monitoring form she had completed on 14 July 2021. In evidence she stated she wrote notes during the appearance on her ipad and she typed them up after and she had concerns regarding the claimant's marking as recorded in her note. She was concerned the candidate had been prompted by the claimant to have a second attempt on the first and second run he was asked to recite, and the candidate had recited incorrect street names. Ms. Chennells was also concerned regarding the candidate's hesitation. Ms. Chennells did not believe this was an A grade appearance.

72. The claimant deducted the candidate three marks for incorrect street names but did not deduct marks for hesitation nor did he reflect the fact he prompted the candidate twice in his scoring. The claimant refuted Ms. Chennells' critique of that appearance as she didn't complete the correct monitoring form and he therefore had not signed that form to indicate his agreement with her feedback.

73. He also stated in evidence that he could use his discretion within the Examiner Guidelines to arrive at the score he did. From his point of view there is no leeway in marking the shortest route available as that is a scientific answer and shortest means the most direct. He also stated he might deduct a half a mark for an incorrect street name and not a full mark if the candidate gave the correct name for a street but used e.g. Avenue rather than Terrace. In terms of deducting marks for hesitation, the claimant informed the Tribunal that some examiners deducted marks if a candidate paused for breath before answering but he would not. He stated he never marked down candidates for hesitation at stage 3 and candidates are permitted to correct an incorrect answer at stage 3.

74. The Tribunal accepted the Examiner Guidelines at section 6.4 allow candidates at stage 3 to go back on a route and correct errors without being penalised, but it is implied that is because of their own initiative and not the examiners. Section 6.4. also states that marks will be lost if incorrect street names are given and if there is hesitation in delivering the answer. The guidelines do not state how many marks should be deducted so that implies the examiner can use their discretion in that regard. The Tribunal finds the claimant's practice of deducting half a mark for a partially incorrect street name to be fair but there is no allowance in the guidelines for no marks to be deducted for hesitation at stage 3 but it must be judged by the experience of the examiner.

75. Ms. Chenells also conducted the claimant's end of year review that day. Her note of that conversation was included at page 227 of the bundle. She informed him there had been no change in his scoring pattern since their meeting on 3 November 2021 and his colleagues had raised concerns. She also shared examples of his high scoring. The claimant stated that he was confident in his performance, he wasn't breaking any rules and delivering the KoL his way was the right thing to do. In evidence Ms. Chennells stated she had advised the claimant that he was going to get into trouble, and she recalls he informed her he was willing to fall on his sword. She said it was clear to her the claimant saw himself as a martyr.

76. During this meeting Ms. Chennells informed the claimant that she no longer saw his scores as a performance issue. Ms. Chennells' note of the conversation was included in the bundle at page 228. The claimant disputed the contents of that note as an accurate record of their conversation. The Tribunal preferred Ms. Chennells' evidence as corroborated by her note. By this stage, it was clear the claimant was both frustrated and exasperated by Ms Chennells' monitoring and he was indignant that his method of examining using his interpretation of the guidelines was the correct way of doing it and he was going to stand by that regardless. The claimant had convinced himself that what Ms Chennells was asking him to do was unethical and his position was unmovable on that.

77. By the end of May 2022, the claimant's scoring average was 90%, and again he was the highest scoring examiner in the department. The table of scores up to May 2022 was included in the bundle at page 237.

78. Ms. Chennells and the claimant had another conversation about his scores during a 1:1 performance review on 31 May 2022 and she followed this with an email to the claimant the same day included in the bundle at page 248 – 249. During that meeting Ms. Chennells highlighted the claimant did not ask questions from the set list on the shared drive during an appearance on 17 May 2022. The claimant refuted he was required to. The Tribunal was not provided with any evidence in respect of the requirement to use questions from the set list.

79. Ms. Chennells also recapped on their previous discussions on 3 November 2021 and 20 April 2022. In her email she stated, "*As discussed; I feel like we have reached a point whereby we both agree the issues I have continued to raise around your scoring/grading patterns should no longer be treated as a performance issue. I am confident that you are not lacking in the skills or experience needed to deliver what I have asked and therefore at this stage a performance review would not be an appropriate step. As previously discussed in April, I have to ask – is this a case of "can't change" or "won't change" and it's been made clear to me that we are in the territory of "won't change" and that you have your reasons for this. In April you referred to "falling on your sword" and I asked you to go away and carefully consider what this may mean for you moving forward. I understand that you have your reasons for delivering appearances the way in which you do and you have made clear to me that you feel strongly about this. Next steps – I will kindly ask that you confirm receipt of this email by COP today. You raised some points in today's meeting as to why and how you deliver KoL appearances the way in which you do so. Please feel free to add these points to your response. I will then go away and consult with HR. As discussed, it is likely the next step will be for someone independent to come and assess the situation*." The claimant again agreed a conversation took place on this date, but refuted Ms. Chennells' recollection of the meeting. He stated in evidence he didn't understand her point, he felt that he was performing his duties correctly and consistently.

80. The claimant acknowledged receipt of the email on 31 May 2022 and asked for an extension to reply by close of play on Tuesday 2 June 2022. His email was included in the bundle at page 250. Ms. Chennells responded and extended the deadline to 10.30am on 1 June 2022 as 2 June 2022 was a bank holiday. She asked the claimant to include in his response the following, "*If you disagree with any of the points mentioned then please let me know in your response. If not, I will report back to HR and confirm that a performance review is not needed*." Her email was included in the bundle at page 252.

Disciplinary Process

81. The claimant did not respond to the email substantively by 1 June 2022. He stated that he had simply got to the end of the line as Ms. Chennells had failed to do her job properly. As there was no response from the claimant, Ms.

Chennells requested that a disciplinary investigation be undertaken as the claimant's alleged refusal to comply with her instructions had turned from a performance issue i.e. the claimant couldn't do something to a wouldn't do as he was asked i.e. insubordination. In evidence the claimant accepted he was passing a higher number of candidates than the other examiners, but he did not accept that should have resulted in a disciplinary investigation. He felt it should have been dealt with as a departmental wide review of the KoL generally to understand how the exam could be delivered in a modern way.

82. On 13 June 2022 the claimant was informed about the disciplinary investigation. Ms. Chennells' letter was included in the supplementary bundle at pages 18 & 19. It stated, "*I am currently investigating the ongoing issue already discussed around your scoring patterns when delivering Knowledge of London appearances and I would like you to attend a meeting with Ivana Sannino to discuss the matter further. This meeting will be organised in order to assist the investigating manager to fully understand the issue and to establish the facts in the case and to determine if action in accordance with Transport for London Discipline at Work Policy & Procedure is appropriate. To allow a full investigation to take place, you are being stood down from your normal duties right aw*ay." With immediate effect the claimant was placed on administrative duties at home. Both the claimant and Ms. Chennells agreed that had he continued working in the office, it would have been uncomfortable for all.

83. The respondent's Discipline at Work Policy & Procedure was included in the supplemental bundle at pages 20-34. The policy states, "*Gross misconduct occurs when an employee's misconduct is so serious that it undermines the contract of employment, causing a breakdown in the on-going relationship between employer and employee*." Serious insubordination and wilful neglect of duty or failure to follow local or departmental instructions which has seriously damaged or has the potential to seriously damage TfL's business or operational interests are included as examples of gross misconduct as set out in section 3. The investigating manager is referred to as a fact finder at section 8.3 and can be a person from within or outside the department. Restriction of duties is provided at section 8.3.3 and is applicable when circumstances do not warrant suspension from work but when considered appropriate for an employee not to carry out their normal duties. Following a disciplinary hearing a summary note of the meeting is to be given to the employee within 3 working days as set out at section 8.7.2.

84. The Investigating Manager/Fact Finder was Ms. Ivanna Sannino who was also based in the TPH department, and the claimant objected to her involvement given she was an internal departmental manager as set out in his email at page 40 of the supplemental bundle. The respondent's HR department confirmed that she was able to act as the fact finder in an email from Charlie Loffel to Ms. Chennells (which she forwarded to the claimant) at page 38 of the supplemental bundle. This is also provided for at section 8.3 of the respondent's disciplinary policy.

85. Ms. Sannino conducted a first fact-finding meeting with the claimant on 16 June 2022. The notes of that meeting, including the claimant's annotations in yellow, were included in the bundle at pages 265 – 269.

86. During that meeting, the claimant referred Ms. Sannino to the Strategic Problem Solving (SPS) review of the KoL that had recently been undertaken. In evidence the claimant stated the outcome of the review aligned with how he believed he was delivering the exam.

87. In March 2022 the SPS high level review of the KoL was produced in draft and it was included in the bundle at pages 104 - 200. SPS was commissioned by the TPH department to conduct a ten-week high level review of the KoL and it made ten draft recommendations to encourage more candidates to become London taxi drivers. This review was conducted against the backdrop of a reduction in the number of licensed taxi drivers working in London, its aging workforce and the time taken to complete the KoL being on average more than five years. The purpose of the review was to review the process in order to succession plan and avoid a crisis with the number of tax drivers dropping. The review concentrated on three areas: the context of the exam, the process and presentation.

88. Content related to the information the candidates must learn. The SPS found no other taxi driver assessment was comparable to the KoL in scope or difficulty anywhere else in the world. The content of the exam ensures taxi drivers know London's geography and can get customers where they want to go via the most direct route. However, the content of the exam has become more complex over time as London has expanded and due to new traffic restrictions.

89. So far as the exam was concerned, the SPS recommendations included a published points list, rewriting the Blue Book to reflect published points, and examiners should only ask straightforward runs. The SPS also found the six mile radius is no long reflective of the journeys now taken. Also, the impact of technology, means memorising the addresses of specific points is less relevant to customer expectation given GPS, google maps and smart phones. However, the uniqueness of being able to navigate London without technology remains a unique selling point for the KoL.

90. The SPS found the process candidates must complete to pass the KoL is extensive, complex and includes multiple rounds of assessment which appears excessive. A lack of transparency allows for a perception of unfairness from candidates, as set out at page 138 of the bundle. Candidates can only access previously asked questions via the knowledge schools, as there is no published list of points beyond the Blue Book which only assists at Stage 3.

91. The SPS set out five key draft aspirations for the KoL at page 150 of the bundle including "*A contained and transparent syllabus, reflective of the skills and knowledge required for a world class taxi driver*" and, "*a straight forward assessment process, with visible progress which candidates are able and incentivised to complete in less than two years*."

92. During the fact finding meeting with Ms. Sannino, the claimant stated he was already applying what the report recommended in that "*He doesn't penalise a candidate for hesitations, he is open to consider an answer more widely (a journey from A to B could be done in more than one way). There are no guidelines on what the best answer is, he needs to rely on his own knowledge. He has not been trained on how to do the assessment and also, none of his appearances has been audited. The auditing should be done regularly on all examiners, this is the only way you can check the discrepancies, not on some stats. This is a problem that should be addressed to all in the department, not just him that's why when he stated his conversation with IS outside the meeting room, he said he was perplexed of having to have this meeting*."

93. The claimant disagreed with the note and added the following to that entry, "*JH said that even prior to the overview taking place, he had been attempting to deliver a "modern KoL" which happens to align itself with the report. He penalises hesitation fairly in relation to which stage each candidate is on. He is open to reward candidates for more than one valid route from A to B and suggests that this approach isn't necessarily carried out by all examiners. He underlined that no formal training has ever taken place, so he is self-taught (as are all the other examiners). He stresses that he considers his "style" of examination to be relevant to driving a taxi in 2022. No regular auditing takes place and appearances (amazingly for 2022) are not recorded for quality control and review. He strongly disagrees that statistics alone should determine how an exam is delivered. He says the problem is department wide and said he was perplexed that he appeared to be the only one subject to a fact find interview*."

94. In cross examination it was put to the claimant that he sought out this report and referred Ms. Sannino to it as it supported his belief the KoL should be easier. The claimant stated his beliefs had nothing to do with how he conducted his work but he believed his practice aligned with a "modern KoL" as envisaged by the SPS review. At page 268 of the fact-finding meeting notes the claimant stated, "*his aim in the appearances is to see if the candidate can do the job in real life*".

95. Ms. Sannino met with Ms. Chennells on 23 June 2022. The notes of that meeting were included in the bundle at pages 271 – 277. Ms. Chennells informed Ms. Sannino that she never doubted the claimant's ability to do his job properly. She was confident he fully understood the role and had all the tools, knowledge, training and experience to do what was being asked of him.

96. Ms. Chennells informed Ms. Sannino that she had " *..been clear to JH that she is not asking him to fail candidates purposely on a daily/weekly basis, as she agrees this would be an unreasonable request. She has asked him to do his job in line with KoL examiner guidelines and assess the candidates to the department standards. KoL examiners have all been asked (as of 2018) for their scoring averages to fall within a 30-70% range. This is based on a department average of 50% and is a "target" (word to be used in the correct manner) based on rolling averages*."

97. In relation to the SPS review, Ms. Chennells confirmed it was still in draft and the claimant should not seek to utilise information from the report to "*justify the lowering of his standards when assessing candidates*."

98. In relation to scoring being entirely based on the examiner's knowledge, Ms. Chennells disagreed. She told Ms. Sannino there are five categories to mark against for each of the four questions asked and in respect of two of them the examiner can decide i.e. the most direct route and if there was hesitation but in respect of the other three, they are yes or no answers i.e. did the candidate use the correct street names, did the candidate know the points and did the candidate commit an illegal manoeuvre. Furthermore, training on how to exam candidates is provided when examiners start their employment, and they shadow other examiners.

99. She elaborated on that comment at page 274 of the bundle. "*On the whole she has no cause for concern with regards to JH marking around the 2 discretional categories (which are the hardest to train an examiner on as it is a case of them using their judgment). Sometimes she has discussed the hesitation category with JH as he's been vocal in recent years that he's not always keen to deduct marks for this category. She has no reasons to believe JH incorrectly marks people on the "route used" category. As she has no concern with this category, she doesn't think the fact find needs to focus on this area. There are other areas whereby KC and JH both agree JH marks different compared to other examiners and does do on purpose which is why KC thinks the fact find should focus on these areas. JH has clearly stated that he incorrectly marks candidates (shows leniency on YES/NO categories). KC says this is nothing to do with lack of training. She wishes for the fact find to highlight these issues. KC said that JH has also admitted (plus she has witnessed) him giving candidates multiple chances to recall their answer. KC has explained to JH that he should not do this. By asking a candidate to repeat their answer the examiner is indicating to the candidates that their first answer was incorrect. JH was warned not to do this in a conversation in November 2021 (backed by email). JH said he would go away and follow guidelines more closely and understand KC's feedback. JH has failed to comply and continues to ask candidates to go back and repeat parts of their answer which is having a direct negative impact on the way he marks candidates. This change requires no training. JH is making a conscious decision not to change his ways*."

100. Ms. Chennells also highlighted to Ms. Sannino the number of bookings between October 2021 and April 2022, appeared to be higher during the weeks the claimant was working than the following weeks when he was not. She believed that was a clear indication that candidates were trying to be assessed by him as he had a reputation for being "*easy*".

101. Finally, she informed Ms. Sannino the claimant's role as an examiner was to test the candidates to maintain the overall "*Gold Standard*" of taxi drivers, he shouldn't be testing them only on what he deemed to be enough to do the day job. He should not be lowering the standard. This had also led to discontent within the team as they perceived their reputations were potentially being jeopardised by the claimant not fulfilling his role and although she had attempted

to work with the claimant for 4 years to resolve this, she had decided it was no longer a performance issue that she could manage.

102. The claimant attended a second fact finding meeting with Ms. Sannino on 27 July 2022. The notes of that meeting were included in the bundles at pages 280 – 288. The claimant advised Ms. Sannino that when he started, he was not formally trained on how to conduct the exam and there was a departmental culture which expected examiners to fall in line with the majority and that invariably led to lower pass rates.

103. The claimant stated there was no standard approach to dealing with minor errors. Also, regular review of score sheets is not sufficient to audit how appearances are conducted. There is no external scrutiny and no recorded appearances. He was asked whether he told Ms. Chennells he was prepared to fall on his sword, and he denied making that statement, but he was prepared to robustly defend his position.

104. When asked about the guidelines the claimant commented, "*Yes – I make my own rules because there are no rules. All examiners deliver the exams subjectively*." There was nothing in his job description that required him to adopt the approach Ms. Chennells requested.

105. The fact find summary report was provided on 26 August 2022 and included in the bundle at page 207 – 219. The appendices attached to the fact-finding investigation report were included in the bundle at pages 220 – 351. Ms. Sannino found there was a case to answer and the claimant was invited to a disciplinary hearing in respect of the following allegation; "*Serious insubordination; in that JH has failed to follow reasonable management instructions that were given initially to him and the team in 2018, and then directly to him following performance reviews on 4 November 2021 and 20 April 2022, which sought to ensure that his marking in the Knowledge of London examinations complied with the Knowledge of London Appearances Guidelines and Management guidance to maintain the integrity and consistency of the tests and that through his actions that this has the potential to seriously damages TfL's business or organisation reputation*." Contrary to the respondent's Code of Conduct sections 3.1.4 & 4.3 & 5.1.1 and the Knowledge of London Appearances Guidelines section 6.4.

106. On the 25 August 2022 the claimant received a letter from Ms. Sannino informing him that she found there was a case to answer, and she was referring him to a disciplinary hearing for gross misconduct to be considered. Her letter was included in the bundle at page 351.

107. The claimant received the invite to the disciplinary hearing by letter dated 26 September 2022. The hearing would consider the following charge, "*Serious insubordination; in that JH has failed to follow reasonable management instructions that were given initially to him and the team in 2018, and then directly to him following performance reviews on 4 November 2021 and 20 April 2022, which sought to ensure that his marking in the Knowledge of London examinations complied with the Knowledge of London Appearances Guidelines*

and Management guidance to maintain the integrity and consistency of the tests and that through his actions that this has the potential to seriously damage TfL's business or organisational reputation." Contrary to sections 3.14, 4.3 & 5.1.1 of the respondent's Code of Conduct and section 6.4 of the Knowledge of London Appearances Guidelines (March 2017).

108. Following receipt of that invitation the claimant raised a grievance on 7 October 2022 and that was included in the bundle at pages 546-548. He stated he believed he had been accused of gross misconduct because he had made a protected disclosure and he had been instructed to implement a practice contrary to the respondent's Business Ethics policy. He commented, "*I am a licenced London taxi driver myself, I am immensely proud of the licenced London taxi trade and of the professionalism instilled in drivers who undertake the Knowledge of London. I would never take any steps to undermine this institution*." He further complained that he had worked in his role for 11 years without complaint and the practice Ms Chennells had directed him to follow was unfair to the candidates and quite probably unlawful. He also reiterated that he had received no formal training on how to ensure a pass rate of between 30-70%. He was also clear the grievance was not in relation to the forthcoming disciplinary hearing but the quota he had been instructed to implement. However, the two were inextricably linked.

109. The disciplinary hearing was scheduled to take place on 21 October 2022. The claimant was provided with the fact find summary report and appendices with the invite. The claimant was also informed If the disciplinary charge was upheld, he could be dismissed and he had a right to representation at the hearing. That letter was sent in the name of Mr. Mirza, Disciplinary Manager, but it was drafted and pp'ed on his behalf by Mr. Darren Clare, HR representative. The letter was included in the bundle at page 353-356.

110. The disciplinary hearing took place on 21 October 2022. The notes of the meeting were included in the bundle at pages 364 – 383. The claimant's comments on the notes were included at pages 429 – 453.

111. The claimant was represented by his TSSA representative, Mr. Dimitris Phanos. Mr. Mirza chaired the hearing, and he was supported by Mr. Clare. Mr. Mirza is employed by the respondent as a Technology & Data Product Manager, but he was on secondment from that role to the TPH department between May 2022 and June 2023. His substantive role requires him to understand the examination appearance system and he has sat in on three appearances. This was the third disciplinary process in which he had acted as a Disciplinary Manager for the respondent.

112. During the hearing the claimant informed the panel he felt hoodwinked regarding the process as he believed an independent person was going to be commissioned to investigate the issues across the department and not him individually and the letter of 13 June 2022 was the first time this had been raised with him.

113. The claimant maintained that he was instructed to fail 30% of candidates and the KoL stakeholders weren't aware of that. He believed it was a quota and contrary to the respondent's Business Ethics policy. The claimant informed Mr. Mirza that he had not been provided with training to deliver the exam, his work had not been properly audited and without recorded appearances, his work could not be accurately judged.

114. He also submitted he didn't give candidates second chances; he asked candidates to repeat their answers if he couldn't hear them. He repeated throughout the hearing that Ms. Chennells' concerns regarding the scores was a team issue and not specific to him and it was an issue with the exam itself. He delivered the exam along the very loose guidelines provided to examiners.

115. In relation to providing candidates with A grades the claimant stated during the disciplinary hearing that he was, "*entitled as an examiner to follow guidelines and award people on merit. Talks about the locker room/canteen mentality not to award A's. Says he reads and interprets the guidelines and provides a fair assessment on how they should be interpreted as feels entitled to use entire range of scoring*."

116. Mr. Mirza explored the issue of repeat questions with the claimant and he confirmed he dealt with that when asked by Ms. Chennells in 2018. Also, the claimant didn't feel it was problematic to ask the first two candidates on any given day repeat questions as there would be limited opportunity for those candidates to confer but it would be more problematic with the third candidate of the day and the candidates thereafter as they may have had an opportunity to consult the other candidates or receive the information via the knowledge schools app.

117. There was a long discussion regarding whether candidates could repeat answers, whether that was open to interpretation and should marks be deducted for incorrect street names and if so how many marks. The claimant's position was, "*Says guidelines not clear, asked to be clearer, and states he is taking an intelligent approach and is an expert. Says he is taking an overview of the minor errors and noted and if there is a pattern of this can find them*."

118. The claimant informed Mr. Mirza that he had been asked to score candidates below 70% and he interpreted that as meaning he needed to doctor his scores and reduce his marks. The claimant informed Mr. Mirza that, "*he won't change the way he scores and believes unjust scoring system and reason he can't change is twofold because not given training on how to move forward*."

119. The claimant stated in evidence that Mr. Mirza was aggressive during the disciplinary hearing but there was nothing recorded in the notes to suggest that, and Mr. Mirza disputed that. At the conclusion of the hearing Mr. Mirza thanked the claimant and his trade union rep for the reasonable tone and manner in which the hearing had been conducted. The Tribunal did not accept Mr. Mirza behaved aggressively during the hearing. The claimant or his trade union representative would have commented on that if it had transpired and it would have been reflected in the minutes and it was not.

120. The disciplinary hearing was conducted in two parts and the second part took place on 11 November 2022. The summary notes of that part were included in the bundle at pages 388 – 428. At the outset of the hearing Mr. Mirza commented, "*as last time lets conduct in the same professional way, calm and respectful*. *Wants to start with summary of Legal's response to claim of Protective Disclosure. Then we will go into the Grievance*."

121. The respondent's grievance policy was included in the bundle at pages 38 – 47. Section 4 in the policy at page 39 refers to exceptions and states, "*Concerns regarding the breach of, or a decision made under one of the below policies and procedures would not be considered as a grievance as it would be dealt with at the hearing or appeal within the respective policy/procedure…. Discipline at work policy and procedure….Only where there are specific complaints regarding delays or the application of one of the above policies/procedure which has a distinct negative impact on the employee, would there be a brief suspension in proceedings to deal with the complaint*."

122. Therefore, Mr. Mirza was tasked with dealing with both the disciplinary and the claimant's grievance. However, the grievance was restricted to whether the claimant had been victimised because he made a protected disclosure and not the disciplinary process. The claimant did not believe Mr. Mirza dealt with his grievance during the process.

123. Mr. Mirza summarised the legal advice he had received from the respondent's internal legal department. The thrust of the advice related to whether the concerns the claimant had raised in his grievance of 7 October 2022 amounted to a protected disclosure. The advice also referred to the 30-70% range as an expectation and not an instruction and that was confirmed in the redacted email of the advice that was slotted into page 549 of the bundle. As the internal legal advice referred to the range as an expectation, the claimant queried why he was subject to a disciplinary hearing if he wasn't in fact instructed to comply at all.

124. The claimant queried whether he could appeal the outcome of the internal legal advice and Mr. Mirza stated that depended on the outcome of the process, "*If this process concludes "no case to answer", then they (JH) can be taken as a grievance; in relation to advice TM has got. Depends on the outcome of this hearing*."

125. The parties then reviewed Ms. Chennells's timeline of events and the appendices attached to Ms. Sannino's investigation report. There was discussion regarding banker questions and allowing candidates to repeat answers. The claimant confirmed he only allowed candidates to repeat themselves if he didn't hear the answer or if English was not their first language. He felt his role as an examiner was to make candidates feel at ease so that he got the best out of them during appearances.

126. The claimant submitted he felt let down by Ms. Chennells and there was no proof he did not follow the guidelines. He stated, "*It is clear I am delivering*

the type of journeys candidates will undertake (when I exam them). Again, no formal training as proven by two examiners and no policy in place where minimum passing is 30% and maximum is 70% as mentioned a quota." The claimant felt that candidates needed to be informed there was a scoring quota which he interpreted as meaning he had to fail 3 out of 10 candidates.

127. The claimant strongly asserted that Ms. Chennells made the quota up and she did not have the expertise to do that. Furthermore, and to address anomalies in the scoring, she should have approached the issue by way of auditing the whole team and offering retraining not by disciplinary action.

128. There was also a discussion regarding the SPS review and Mr. Mirza asked the claimant whether he was his delivering a modern KoL with authorisation from Ms. Chennells? The claimant responded, "*Modern KoL is an interpretation of the current guidelines, but modern KoL is not doing what has been told to do in the canteen…. Relevant, appropriate and accountable knowledge which means aligned with guidelines and rules."* The claimant referred to the guidelines as being old fashioned and that he followed them in a modern way.

129. The claimant was asked if he thought his marking was generous and he responded, "*No, appropriate in marking, not generous. Again, need to stress if marking is statistically higher than someone else's it's because of no training and no audit, no help, and no clear direction in department*." He disputed that Ms. Chennells could be confident that her interpretation of his scores was correct as she only sat in on a few in person audits, the rest of her evidence was based on paper audits. The claimant stated the only proper way to have reviewed the situation was to have dealt with the inconsistency in scores as a department wide issue as the issue was the KoL system as the number of candidates applying is reducing and the time taken to complete it is increasing.

130. The claimant explained to Mr. Mirza that because of the ability of the examiner to formulate the questions, there was disparity between them as a group as one examiner may feel a particular hotel is a prominent point and therefore ask a run about that at stage 3, but another may view it as a more obscure point and ask that run as a more difficult question at stage 4. Asking more difficult questions at stage 3 invariably reduces scores. He also emphasised the rolling average was undefined in terms of time. The Tribunal accepted the rolling average was measured in terms of calendar years.

131. Mr. Mirza asked the claimant if Ms. Chennells was permitted to give instructions and guidelines as a manager without it being in an official document and the claimant agreed she could but only if her instructions were reasonable.

132. At various points during the meeting Mr. Mirza stated he was going to ask Ms. Chennells for further information in response to the claimant's comments. Those references were included are at paragraphs 371 & 378 on page 416 of the bundle, at paragraph 393 on page 417, and paragraph 410 & 414 on page 420.

133. Mr Mirza asked the claimant about the team scores that had been produced at appendix 2 of the investigation report. The claimant pointed out that he was not the only examiner that had scored outside the 30-70% yet no action had been taken against those examiners.

134. The claimant was asked whether he had informed Ms. Chennells that he wouldn't change his scoring. He denied saying that and stated, "To *be clear, it was a refusal to carry out an unreasonable order. KC considers that to be reasonable request, I continue to say it's not reasonable. Yes, refusing to administer an unreasonable request from management*."

135. Finally, the claimant strongly refuted that Ms. Chennells had informed him his actions would lead to a disciplinary process, he felt that he had been hoodwinked or worse lied to and he understood the department was to be investigated and not him as an individual. The Tribunal accepts the claimant did not understand that he personally was to be investigated in accordance with the disciplinary policy during his conversation with Ms. Chennells on 31 May 2022. She informed him that an independent person would be tasked with reviewing the scoring and he understood that to mean the whole team and there was no mention of the disciplinary process and procedure. It wasn't until the claimant received the respondent's letter of 13 June 2023 did he understand that he was to be investigated under the respondent's disciplinary policy. Ms. Chennells was not explicit that was what she meant by asking an independent person to review the scoring.

136. At the conclusion of the hearing Mr. Mirza confirmed he would need time to gather further evidence as set out at paragraph 511 on page 426 of the bundle.

137. The notes of the meeting should have been shared with the claimant within three working days but that did not occur. Mr. Mirza emailed the claimant on 18 November 2022 and informed him the note taker was on sick leave but was expected to return shortly and he would get the notes to the claimant for his review by the following Tuesday. Mr. Mirza also informed the claimant that he had "*continued to gather further evidenc*e" and he was hoping to deliver an outcome by 1st or 2nd December 2022. A copy of that email was included in the bundle at page 38.

138. However, that did not happen as Mr. Mirza was then on sick leave due to a bereavement. In evidence, the claimant stated Mr. Mirza did not deliberately delay the process and Mr. Mirza stated sickness absence combined with the Christmas break and workload meant the notes of the hearing were not sent out as promptly as they should have been.

139. The claimant was then signed off as unfit for work for two months from 5 January 2023 until 4 March 2023. His statements of fitness for work were included in the supplemental bundle at pages 43 & 45. The reason was stress at work.

140. Mr. Mirza eventually provided the claimant with a copy of the hearing notes from day one and two on 20 January 2023. He asked the claimant whether he was able to review the notes while he was off sick or if he would prefer to wait until he had recovered. A copy of that email was included in the bundle at page 387.

141. On 9 February 2023 the claimant emailed Jaquelyn Smith, the Head of Driver Assessment in the TPH department. Ms. Smith is Ms. Chennells line manager. His email to Ms. Smith was included in the bundle at pages 461 – 462. He informed Ms. Smith the 30-70% quota set by Ms. Chennells was an expectation, as confirmed by the internal legal advice, rather than a requirement and he had been singled out and victimised for failing to implement an unofficial policy. Also, other examiners had not met the quota, but they had not been disciplined.

142. The claimant outlined there were no grounds to substantiate a charge of gross misconduct against him and the length of the disciplinary process had a detrimental impact on his health. Furthermore, the additional evidence sought by Mr. Mirza after the disciplinary hearing had taken place was an abuse of process. In all, the claimant believed he had grounds to pursue a constructive unfair dismissal and whistleblowing claim against the respondent and he asked that Ms. Smith intervene and reinstate him to prevent him taking that action. The claimant believed it was appropriate for him to send the email and it was his belief she would intervene, but Ms. Smith did not.

143. On 17 February 2023 Mr. Mirza sent the claimant and his trade union representative an email providing him with a document entitled further evidence and clarifications and another document titled JH hearing further evidence appendix and index. The claimant who was still signed off sick at this time was asked to review and comment on that evidence and he was also reminded to review and comment on the disciplinary hearing notes he had been provided with on 20 January 2023 by 27 February 2023. The claimant was not due back to work until 4 March 2023. Mr Mirza indicated that he would be able to deliver his decision on 7 March 2023. A copy of his email was included in the bundle at page 462.

144. In cross examination it was suggested that it was inappropriate for Mr. Mirza to send that email when the claimant was signed off sick with work related stress. Mr. Mirza stated that he thought about it carefully before sending the email. He understood how challenging the situation was and he wanted to give the claimant an opportunity to respond. He didn't want to cause any additional stress, he wanted to reach a conclusion whilst maintaining the integrity of the process and remaining sensitive to the claimant.

145. The further evidence and clarifications document was included in the bundle at pages 463 – 469. It was a series of written questions and answers provided by Ms. Chennells. Mr. Mirza asked Ms. Chennells how many appearances she observed in person with the claimant. She explained that she conducted paper audits weekly and random in person audits of each examiner every few weeks. However, that documentation was lost during an office move

around December 2019/January 2020. Also, post the covid 19 pandemic, in person audits had diminished due to air quality in the examination room. However, the claimant disagreed with that proposition in evidence as there was alternative accommodation that could have been utilised to conduct in person audits.

146. In addition to in person audits, Ms. Chennells advised Mr. Mirza that she receives a daily email from the knowledge schools setting out the questions the examiners have asked the candidates, and she is aware of the number of daily appearances and the scores provided. She also deals with appeals and complaints meaning she does have a clear overview of how the KoL department is performing.

147. Ms. Chennells also referred to the "*fall on my sword*" comment in this document. She explained to Mr. Mira this had occurred during the April 2022 meeting when she had informed the claimant that another person would have to come in and review the situation and if that person disagreed with the claimant, he said he was willing to "*fall on his sword*" as he believed what he was doing was right. To fall on one's sword means to take responsibility for something that has gone wrong. In this situation, the claimant appeared to be saying he was prepared to slavishly maintain his position which is different. Notwithstanding that, the Tribunal accepts Ms. Chennells evidence that the claimant used this term during their meeting on 20 April 2022 as it accords with his entrenched position by that time and his unwillingness to comply with her instruction.

148. The claimant's trade union representative replied to Mr Mirza's email of 17 February 2023 on 27 February 2023. He confirmed the claimant's new return to work date was 20 March 2023 and he would respond to the request shortly after that date or sooner if he could. That email was included in the bundle at page 472.

149. It was suggested to Mr. Mirza that a more appropriate course of action would have been to reconvene the disciplinary hearing for a third time after the claimant's return and to address the new evidence he had gathered. Mr. Mirza stated if the claimant had responded to the documents and his responses justified another hearing he would have reconvened it. That was the advice he had received from the respondent's HR department. However, the claimant did not respond.

150. Mr. Mirza informed the Tribunal he did not deliberate and reach a conclusion on either the disciplinary allegation or the claimant's grievance before the claimant resigned from his employment. However, if he had found there was no case to answer in respect of the disciplinary allegation, he would have dealt with the claimant's grievance separately.

Resignation

151. On the 13 March 2023 the claimant emailed Ms Chennells and offered his resignation. He did not provide any grounds for his resignation in the email, and it was included in the bundle at page 497. In evidence he stated he couldn't

risk being dismissed and he was certain the outcome of the disciplinary process would have been dismissal on the grounds of gross misconduct and he couldn't afford to have that on his record. Ms. Chennells accepted the claimant's resignation on 16 March 2023 and confirmed that was his last day in service in her letter of the same date included in the bundle at pages 498-499.

Submissions

Respondent

152. The respondent invited the Tribunal to dismiss the claim. The claimant commenced employment with the respondent on 11 August 2011 until his resignation on 13 March 2023. His last day of service was 16 March 2023. In his role as a KoL examiner the claimant was not required to make business or strategic decisions and he reported to Ms. Chennells.

153. The claimant was instructed to apply the Guidelines for Examiners included at pages 290-296 of the bundle and comply with management instructions on how to interpret the guidelines. As a result of external stakeholder concerns regarding the consistency of the scores within the department Ms. Chennells informed the team that she expected the average pass rate to fall within the 30-70% bracket.

154. Ms. Chennells monitored the claimant's scores between March 2018 and April 2022. During that period she observed three areas where the claimant was failing to deduct marks in accordance with the Examiner Guidelines and her instructions. On 31 May 2022 Ms. Chennells informed the claimant that would no longer be treated a performance issue, and an independent person would be tasked with considering the claimant's scoring. The claimant was stood down from his duties on 13 June 2023.

155. The disciplinary investigation resulted in the claimant being referred to a disciplinary hearing conducted by Mr. Mirza. During that hearing the claimant was given a full opportunity to respond to the allegations and evidence presented and he would also deal with the claimant's grievance. The claimant resigned from his role before the process concluded.

156. The respondent submitted that so far as the disputes of facts are concerned, the Tribunal should prefer Ms. Chennells' evidence which accords with the contemporaneous records in the bundle. The claimant did not challenge the emails and now claims they are inaccurate or worse a fabrication, and it is not likely Ms. Chennells would do that. On the balance of probabilities, the events happened as Ms. Chennells described, and her account should be preferred.

157. The claimant was not a credible historian, he did not have a clear recollection of what was discussed during his meetings with Ms. Chennells and his version of events was muddled and inconsistent. In cross examination he answered the questions he had in mind and not those he was asked. His evidence was dogmatic, and he repeated there was a quota which required him

to doctor his scores despite conceding Ms. Chennells never used the language of a quota or doctoring his scores, that was his interpretation.

158. The claimant also made serious allegations, there had been conspiracy and/or collusion between Ms. Chennells, Ms. Sannino and Mr. Mirza to ensure he was removed from the respondent's business, but he presented no evidence in that regard.

159. The respondent submitted the claimant was not a reliable witness, he was prone to exaggeration and re-writing of history to suit his own narrative. There were also major inconsistencies in his evidence. He stated he was bullied but he never complained about it. In his witness statement the claimant claimed to have been ostracized, but he chose to work from home. The claimant repeated he had been ordered to apply a quota and doctor his scores, but he accepted in evidence that was not language Ms. Chennells used.

160. The respondent's expectation that KoL examiner scores fall within the range of 30-70% was to improve the department for candidates and to maintain the KoL's reputation. In relation to the disciplinary hearing, Mr. Mirza was helpful and measured. He was not agitated or aggressive as alleged.

161. In relation to the respondent's conduct that amounted to a breach of the implied term of mutual trust and confidence, as set out at paragraphs 5.1 – 5.4 of the List of Issues dated 27 September 2023, cumulatively or separately, it cannot amount to a breach of contract. The respondent had reasonable and proper cause and it was not calculated or likely judged objectively to seriously damage trust and confidence.

162. First, the respondent did not order the claimant to apply an unethical scoring quota and therefore it cannot amount to a fundamental breach of contract. In any event, Ms. Chennells was consistent throughout that she was trying to ensure consistency within the department and that was an entirely reasonable and proportionate management instruction.

163. The claimant accepted in cross examination that he was never told there was a quota and he was not told to doctor his scores, that was his interpretation. Therefore, the claimant was not directed to apply an unethical quota and those instructions were not calculated to destroy mutual trust and confidence. Those instructions were provided in order to improve fairness in the KoL and the other examiners were not unhappy with this instruction. Viewed objectively it was not a breach of the implied term of mutual trust and confidence.

164. In relation to the disciplinary process, the respondent had reasonable and proper cause for initiating the procedure. The claimant failed to comprehend he was doing anything wrong; he believed his way of conducting the KoL was the way to deliver a modern KOL and that was the correct approach. He could not be persuaded otherwise.

165. Ms. Chennells had no choice but initiate the process as the claimant informed her that he would not change. The claimant was given the opportunity

to attend two meetings with Ms. Sannino to set out his position. However, he did not indicate he accepted the concerns raised by Ms. Chennells or that he would be willing to change moving forward. Therefore, the outcome of the disciplinary investigation justified there was a case to answer.

166. Furthermore, the claimant was not singled out. His scores were outside the range. Other examiners did also fall outside the range, and they were spoken to by Ms. Chennells and their scores improved and therefore no disciplinary action was required. To be contrasted with the claimant who consistently fell outside the expected range and by a margin.

167. The disciplinary process was conducted in a fair and proportionate manner by Mr. Mirza. It was the claimant who was passionate and emotional during the hearing not Mr. Mirza. The investigation report was finalised on 26 August 2022 and the claimant was not invited to the disciplinary hearing until 26 September 2023, but the respondent submits that time frame was reasonable. It would have been entirely inappropriate to have reinstated the claimant during that period as the disciplinary process was yet to complete. He would only have been restored to duties if there was no case to answer.

168. It was also entirely reasonable for the disciplinary process to take several months given the volume of evidence available. The claimant was absent from work for two months between the 5 January and 5 March 2023. No pressure was placed on the claimant to participate whilst he was absent. The claimant accepted that his grievance was discussed during the disciplinary process. Any delay in the disciplinary or grievance process was not calculated to destroy or seriously damage trust and confidence.

169. Finally, the claimant resigned as he feared a disciplinary sanction would be imposed or that he would be dismissed. The respondent submits he would have resigned in any event irrelevant of any defect in the process, which is denied.

Claimant

170. It is still unclear what the respondent's instruction was, and it is not clear if there was one at all. Loosely, it was to apply the guidelines less leniently.

171. That was never reduced to a policy or procedure. The rolling period was never defined. The respondent was never able to start disciplinary proceedings that the claimant had failed to comply with a procedure, it was an expectation that candidates should score within the 30-70% bracket. Therefore, it was shoe-horned, into something called serious insubordination.

172. A clearly issued instruction together with a sanction of what would happen if he did not comply was never provided to the claimant. The KoL Examiner Guidelines, even with proper application can lead to a wide disparity between examiners, as borne out by the scores.

173. The KoL examiner guidelines are imprecise and to achieve greater consistency as the respondent wanted it should have revised the guidelines and made some changes to the format of the examination itself, but it did not.

174. As an examiner the claimant was presentable and amenable, and his demeanour enabled candidates to perform well. The respondent does not provide scripts to examiners, and that is why there is so much variation between them. Examiners are permitted to ask repeat questions and banker questions. The scoring assessment criteria are imprecise, and there is no definition of what amounts to hesitation. Is it stumbling or a pause? There are all sorts of reasons, but they are not defined in the examiner or candidate guidelines. Even when looking at the criteria at 6.4 and when marks are to be deducted, there is no definition of how many marks, save for if there is a serious error when 10 marks can be removed. In respect of a wrong street name, should 1 or 2 marks be deducted? The guidelines do not say. Also, it is permissible at stage 3 for candidates to repeat an answer.

175. Therefore, the scoring guidelines are imprecise, and some examiners had a reputation for being stricter than others. In evidence Mr. Mirza accepted there was an expectation that 30% of candidates would fail the examination. The claimant's success rate was in excess of 70%, and if the respondent wanted him to change his scoring, and if he was applying the guidelines appropriately, that is why he says the instruction was unethical as he was being required to fail 30% of candidates.

176. The instruction was not reduced to a policy or procedure. It was word of mouth from Ms. Chennells. There was no full review of the claimant's appearances. Her evidence the claimant was applying the Examiner Guidelines incorrectly, was based on one in person audit and one disputed audit when Ms. Chennells didn't use the monitoring form. She didn't record her comments, she produced a file note with which the claimant disagreed. He was not asked to sign a record of the file note to agree it was accurate.

177. Ms. Chennells expected the claimant to bring his pass rate down to between 30-70% and it is difficult to pull anything out of there amounting to an instruction. The claimant did understand it was an expectation.

178. There was no evidence of gross misconduct except for Ms. Chennells' notes, there is nothing else. There was very little effective auditing by Ms. Chennells. She accepted for a part time employee like the claimant there should have been two in person audits per month but there was not.

179. Others did have scores outside that range, but the claimant was the only examiner disciplined. Others exceeded 70% but no action was taken.

180. In relation to the disciplinary process, on 13 June 2022 the claimant was stood down from his duties but that was not in accordance with the policy as the letter of 13 June 2022 explained that would only be the case whilst the disciplinary investigation was carried out. The report was finalised on 26 August 2022 and the claimant should have been suspended at that point or he should

have been able to resume his duties, but he remained stood down. The claimant was effectively in limbo and that was no way to proceed, and it remained the case for nine months until the claimant's resignation.

181. The disciplinary hearing notes were delayed when they were meant to be produced within three working days and they were eventually provided two and three months later. The claimant was asked to review and return his comments to Mr. Mirza within a short period of time when he was off sick. Expectations were made of the claimant that the respondent didn't meet themselves.

182. It was crystal clear Mr. Mirza had already reached a firm provisional decision there was serious insubordination and it didn't matter whether 30-70% was an instruction or expectation, it was semantics. He went off track by asking Ms. Chennells for further evidence and there was no additional hearing convened to deal with it, the claimant was simply asked to comment in writing when a third hearing should have been arranged. This indicated there was pre-judgment of the issue on Mr. Mirza's part. There was also a prolonged disciplinary process that continued for nine months. The respondent also didn't follow it's discipline at work procedure, and it became relentless in the sense the claimant became unwell as a result of the process between January and March 2023.

183. The claimant resigned because of the respondent's conduct. In his email to Ms. Smith at page 461 of the bundle and dated 9 February 23, he identified the reasons for his resignation if she were not able to intervene and halt the disciplinary process. Also, facing the prospect of certain dismissal, the claimant couldn't afford to be dismissed and he resigned.

184. In conclusion there was good evidence the respondent breached the implied term of mutual trust and confidence. There is little doubt the respondent's conduct was the reason for the resignation. The claimant was entitled to resign, and he did not delay too long in doing so. It was apparent he was thinking about resigning from his position on 9 February 2023 and there was only a short period before he did so on 13 March 2023.

The Law

Constructive Unfair Dismissal

185. An unfair dismissal claim can be pursued only if an employee has been dismissed. As set out in **Section 95(1)(c) and s.136(1)(c) ERA 1996** an employee is dismissed by her employer if: "*the employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct*."

186. In the leading case of **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221** Lord Denning stated:*" 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." This is an objective test, and it is not sufficient the employee subjectively perceives a fundamental breach of contract.

187. Therefore, to claim constructive unfair dismissal an employee must establish; (i) there was a fundamental breach of contract on the part of the employer, (ii) that caused the employee to resign and, (iii) he did not delay too long in doing so thereby affirming the breach.

188. One of the implied terms of employment contracts is the implied term of mutual trust and confidence as confirmed in **Courtaulds Northern Textiles Limited v Andrew [1979] IRLR EAT**. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606**, the House of Lords stated an employer shall not "…*without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee*."

189. In **Morrow v Safeway [2002] IRLR 9**, the EAT held that a breach of the implied term of mutual trust and confidence, is inevitably fundamental. The Tribunal must determine whether the employer's conduct complained of by the employee has a reasonable and proper cause, and if not, whether the conduct was calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence.

190. The EAT held in **Blackburn v Aldi Stores Ltd UKEAT0185/12** that failure to provide for an impartial grievance appeal process might contribute to or of itself amount to a breach of the implied term of mutual trust and confidence.

191. In **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**, the Court of Appeal listed five questions that it should be sufficient to ask to determine whether an employee was constructively dismissed:

- What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered their resignation?
- Has the employee affirmed the contract since that act?
- If not, was that act (or omission) by itself a repudiatory breach of contract?
- If not, was it nevertheless a part (applying the approach explained in **Waltham Forest v Omilaju [2004] EWCA Civ 1493**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of mutual trust and confidence?
- Did the employee resign in response (or partly in response) to that breach?

Conclusion

192. Did the respondent without reasonable and proper cause, by its conduct, breach the implied term of mutual confidence and trust? The conduct relied on is:

i. The respondent ordered the claimant to apply an unethical scoring quota that did not exist as a policy and was not contained in his job description;
ii. The respondent initiated a disciplinary policy against the claimant for gross misconduct where there was no evidence of gross misconduct (for example no audit records or training);
iii. The respondent singled out the claimant for disciplinary action even though others had scoring ranges that fell outside the range of 30-70%; and
iv. The disciplinary process that was followed was prolonged, laborious and relentless causing him to become unwell.

193. In relation to the 30-70% scoring range, Ms. Chennells was consistent during the disciplinary process, in her witness statement and during her evidence that she did not instruct the claimant to only score candidates within the range of 30-70%. She recognised that would be an unreasonable management request.

194. Her role as the KoL manager was to ensure fairness, transparency and consistency in the process as set out in her job description. That is why she undertook to implement a paper audit system when she took up the role of KoL manager to understand the team's overall scoring patterns. That was even more relevant when the knowledge schools contacted her in early 2018 informing her that some of her examiners were at opposite ends of the spectrum in terms of their scores and she sought to understand that.

195. To ensure consistency within the team, Ms. Chennells informed the examiners she expected their scores to fall within a range of 30-70%. She did not believe that was unachievable as the department's average at that time was 51%.

196. Ms. Chennells worked with the claimant and two other examiners whose scores were out with the department average and the range. Initially, the claimant did take on board Ms. Chennells' comments, and his scores reduced during 2019. However, when she took maternity leave and returned to work, the claimant's scores had increased again.

197. Ms. Chennells tried to tackle the situation by monitoring the claimant's scores and providing feedback to encourage him to adhere to the Examiner Guidelines more closely but by April 2022, it became apparent the claimant was not prepared to do so. The claimant had convinced himself the only way he could achieve an average rolling score of between 30-70% was by doctoring his scores and deliberately failing 30% of candidates and in his mind that was unethical.

198. The Tribunal accepts if Ms. Chennells had asked the claimant to doctor his scores and deliberately fail 30% of candidates that would have been an unethical scoring policy, but she did not. The claimant himself accepted Ms. Chennells did not use that language, it was his interpretation.

199. Therefore, the Tribunal finds Ms. Chennells did ask her team to ensure their rolling average scores fell between a range of 30-70% from 2018 onwards but that was not an unethical scoring quota. It was a reasonable management instruction to ensure consistency of the KoL in accordance with the Examiner Guidelines and Ms. Chennells' job description.

200. In relation to the disciplinary process and whether the respondent had evidence of gross misconduct, the Tribunal finds that it did. By April 2022, the claimant had made it clear to Ms. Chennells that he was prepared to fall on his sword, and he was not prepared to alter his scoring. On 31 May 2022, Ms. Chennells effectively give the claimant one last chance to work with her to improve his performance or she was going to ask an independent person to assess the situation instead.

201. Ms. Chennells was not clear she meant a fact-finding assessment to determine whether there was a case to answer with reference to the respondent's disciplinary procedure and the claimant understood she would be asking an independent person to review the whole team, akin to the SPS review. It was only when the claimant received her letter of 13 June 2022, did he understand that was the outcome.

202. Ms. Chennells collated the average scores for her team for each year from 2017 onwards as she conducted paper audits of every appearance undertaken. She also conducted two in person audits of the claimant's appearances, and she conducted paper audits of his appearances between 2018 and May 2022 to try and ascertain why his scores were so much higher than the rest of the team. It was she and not the claimant who had got to the end of the line with the claimant not doing his job properly and not the other way round. She had run out of options when she initiated the disciplinary procedure as it became apparent the claimant was not going to change and that was deliberate. It was only at that point, four years after she originally raised her concerns regarding the claimant's scores, that the disciplinary process was initiated albeit opaquely by Ms. Chennells during the meeting of 31 May 2022.

203. Serious insubordination is provided as an example of gross misconduct in the respondent's disciplinary policy. Ms. Chennells' notes of the meetings of 20 April 2022 and 31 May 2022 supported her contention the claimant was refusing to act on her direction as required by his contract of employment. The claimant stated in his fact-finding meeting with Ms. Sannino and during the disciplinary hearing chaired by Mr. Mirza that he had refused to comply with Ms. Chennells instruction as he (mistakenly) believed that it was unreasonable. Therefore, the claimant's acknowledgement of his intransigence was justification and reasonable and proper cause for instigation of the disciplinary process.

204. The claimant alleges he was singled out for disciplinary action and the scores were a departmental problem that should have been addressed across the whole team. That is precisely what Ms. Chennells was doing when she told the team she expected them to score within a range of 30-70%. That was an expectation of all the team not just the claimant.

205. Ms. Chennells confirmed that two other examiners scored below 30% and she addressed that with them in early 2018 and their scores improved. Two other examiners did score in the high 70s in 2021 and 2022 whereas the claimant's scores were consistently higher save for 2019. Furthermore, the claimant refused to take on board Ms. Chennells' guidance in order to score within the range, he simply refused to do so, and no evidence was presented that any other examiner when challenged about their scores behaved in the same way. That is why the claimant was subject to disciplinary action and not any other examiner and the respondent had reasonable and proper cause for doing so. Therefore, the claimant was not singled out for disciplinary action.

206. The disciplinary process was ongoing between 13 June 2022 and 13 March 2023, a total of nine months during which the claimant became unwell between January and March 2023. The claimant alleges the process was prolonged, laborious, and relentless but he agreed in evidence that Mr. Mirza did not deliberately prolong the process when he became involved from 11 October 2022.

207. The claimant worked part time, the factfinding investigation was conducted during the summer period when many staff take annual leave and although only two witnesses were questioned during the investigation, the claimant and Ms. Chennells, Ms. Sannino required two meetings with the claimant to get his views on the documentation produced by Ms. Chennells that was technical and extensive.

208. The Tribunal finds that a combination of those factors, resulted in the period prior to the first disciplinary hearing taking four months to complete and the Tribunal acknowledges that must have been an anxious time for the claimant. The period between the first disciplinary hearing and the claimant's resignation was also beset by delays for reasons including a variety of sickness absence including's the claimant's which meant the process did not conclude prior to the claimant's resignation.

209. No evidence was presented that suggested the respondent deliberately prolonged the proceedings. Although nine months was a long time and the claimant did become unwell, it could not be said the process was laborious or relentless and the claimant did not present any evidence to support those assertions. Neither the claimant nor his trade union representative made no complaint to the respondent in that regard. That is not to say the process was handled well by the respondent as it had many shortcomings including combining the disciplinary allegation and the claimant's grievance and the collection of evidence post the disciplinary hearings, which may or may not have

resulted in a third disciplinary hearing, but that was not conduct calculated or likely to or seriously damage mutual trust and confidence between them.

210. Therefore, the Tribunal finds that in respect of the four allegations regarding the respondent's conduct, they neither cumulatively or separately, amounted to a fundamental breach of contract entitling the claimant to resign and claim constructive unfair dismissal and as such the claimant was not dismissed.

211. In the circumstances, the claimant's claim for constructive unfair dismissal is not well founded and is dismissed.

Employment Judge J Galbraith-Marten

4 March 2024

SENT TO THE PARTIES ON

12 March 2024

FOR THE TRIBUNAL OFFICE