EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001488/2024

Held in Glasgow on 20, 21 & 22 January 2025

Employment Judge P O'Donnell

Mr I Campbell **Claimant**

Lidl Great Britain Limited **Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's claim of unfair dismissal is not well founded and is hereby dismissed.

REASONS

Introduction

1. The claimant has brought a complaint of unfair dismissal under s94 of the Employment Rights Act 1996. The claimant argues that he was dismissed as defined in s95(1)(c) of the Act (commonly referred to as a "constructive dismissal"). He alleges that the respondent breached the implied duty of trust and confidence.

2. The respondent resists the claims. They deny that there was a breach of the duty of trust and confidence and that there was a dismissal as defined in s95(1)(c) ERA. If there was a dismissal then the respondent does not seek to argue that it was a fair dismissal in terms of s98 ERA.

3. This case almost wholly turns on the question of whether there was a dismissal as defined in s95(1)(c) ERA. Parties produced an agreed list of issues and the Tribunal has re-produced below the section of the list of issues dealing with the question of dismissal:

1 The Claimant relies on the following alleged breaches of the implied term of mutual trust and confidence:

a) During the Claimant's sickness absence from work from 22 April 2024 (whilst on suspension), the Respondent refused to pay the Claimant company sick pay;

b) The length of time that the disciplinary investigation took;

c) The disciplinary investigation was flawed in that:

i. Up to 18 individuals were not interviewed who were present at the time of the allegation, and were mentioned in other statements;

ii. Several statements of those interviewed were contradictory, anomalous or inconsistent;

iii. There were no actual "witnesses" to the allegation; however, the decision was taken to go ahead with the disciplinary; and

iv. The Claimant was specifically targeted, as there had been prior incidents similar to the index incident; however, on those occasions no formal action was taken.

d) A lack of urgency from the Respondent to address the Claimant's grievance letter dated 14 May 2024 regarding him being paid statutory sick pay whilst he was on sickness absence during his suspension; and

e) The Respondent not passing the Claimant's second grievance dated 22 May 2024 to a neutral party to investigate, which the Claimant says he was informed about by Euan Fitzpatrick on 28 May 2024.

*2. Did such a breach (or series of breaches) amount to a repudiatory breach of the contract of employment? The ET will consider whether it crossed the **Malik** threshold:*

a) Did the R conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee?

b) If so, was such conduct without reasonable and proper cause?

*3. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his resignation? The Claimant asserts the "last straw" is set out in paragraph **1(e)** above.*

4. Has the Claimant waived any breach or affirmed the contract since that act (or omission)?

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

6. If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?

7. Did the Claimant resign in response (or partly in response) to that breach?

Evidence

4. The Tribunal heard evidence from the following witnesses:

a. The claimant

b. Kerry Nelson (KN), regional head of HR for the Newton & Aycliffe region, who was appointed to hear the claimant grievance about sick pay.

c. Ross Jackson (RJ), regional head of property, who carried out the disciplinary investigation.

d. Euan Fitzpatrick (EF), regional head of supply chain, who had been appointed to chair the disciplinary hearing.

5. There was an agreed bundle of documents prepared by the parties running to 277 pages. A reference to a page number below is a reference to a page in that bundle.

6. This is not a case where the relevant facts were in significant dispute. The sequence of events leading to the claimant's resignation were almost entirely a matter of agreement between the witnesses and supported by the documents referred to in evidence.

7. There was evidence led which was not relevant to the issues to be determined. In particular, the respondent proceeded to determine the claimant's grievances even though he had left their employment and was not engaging in the process. The Tribunal heard evidence about how the grievances were investigated and the decisions made (including the claimant challenging some of the conclusions reached in respect of the grievances during his cross-examination of the respondent's witnesses). However, other than providing contemporaneous (or near contemporaneous) insight into some of the thinking behind decisions made during the internal process, this evidence had little relevance given that the decisions made in respect of the grievances occurred after the claimant had resigned and so could not have contributed to his decision to do so.

Findings in fact

8. The Tribunal made the following relevant findings in fact.

9. The respondent is a retail business operating supermarket stores across the UK.

10. The claimant started employment with the respondent in October 2003 in the role of area manager. He was a trainee area manager at first then was a logistics project manager from October 2004 to June 2005 and a transport manager from June 2005 to December 2006. He then occupied the role of area manager working in different regions across the UK. He moved to the North East Glasgow area in July 2023 and was the area manager for this area at the time of his dismissal.

11. Clause 8.1 of the claimant's contract of employment (p270) provides that he will be paid his normal salary during any period of absence on medical grounds. This is referred to a "Company Sick Pay" (CSP). The clause provides that the respondent may, at any time during any such absence, reduce this to Statutory Sick Pay (SSP). One of the circumstances in which CSP will be reduced to SSP is set out at section 2.4 of the respondent's disciplinary policy (p93) which provides that any period of sick leave during a disciplinary suspension will be paid at SSP. This is also set out at section 5.2 of the respondent's disciplinary management procedure (p78).

12. The disciplinary management procedure also deals with the issue of grievances raised during a disciplinary process at section 9.2 (pp87-88). This provides that consideration should be given to whether any such grievance can be dealt with at the same time as the disciplinary process or whether the disciplinary process needs to be paused whilst the grievance is resolved. It sets out a number of examples of different scenarios where different actions could be taken such as a grievance unrelated to the disciplinary process which could be run in parallel or an allegation of bias or discrimination by the disciplinary manager where it may be appropriate to suspend the disciplinary process for a short time to deal with the grievance. The procedure states that, *"in most cases, it is likely that the best format to consider the allegations will be the disciplinary process, insofar as the allegations amount either to a defence/explanation of the disciplinary concerns or to mitigating factors that the company should take into account".*

13. In 2021, the claimant had been subject to a disciplinary investigation related to an alleged data breach. This was resolved informally and did not proceed beyond the investigation stage.

14. In 2022, the claimant had been subject to a disciplinary investigation related to an allegation from the claimant's former line manager about a sectarian video. This was investigated and it was found that there was no basis to proceed to a disciplinary hearing. The claimant changed regions shortly after the conclusion of this disciplinary process which meant that he had a new line manager from the one who had made the complaint at the time of the events below.

15. On 22 February 2024, the claimant attended a retirement party for another employee of the respondent. There were approximately 50 employees in attendance at the party. He was then off work on leave on 23 and 24 February 2024.

16. On 25 February 2024, the claimant's line manager met with him to explain that a complaint of sexual harassment (both verbal and physical) had been made against him by another employee in relation to events alleged to have occurred at the party on 22 February 2024. It was explained to the claimant that he would be suspended on full pay whilst an investigation into the complaint was carried out. This was confirmed in a letter dated 26 February 2024 (p110) which includes an explanation that he would not be entitled to CSP during any sickness absence during his suspension and he would only be paid SSP in such circumstances.

17. The Tribunal pauses to comment that it does not intend to set out the details of the complaint against the claimant other than to note that he denied the allegations. The issues for determination in this case are not concerned with the validity of the complaint and the precise details of the complaint are not relevant to those issues.

18. RJ was appointed to carry out the investigation and he met with the complainer on 4 March 2024 to take a statement from her (pp111-116) regarding the events giving rise to the complaint. He then met with the

claimant on 6 March 2024 and took a statement from him (pp117-122) to get his version of events.

19. Based on the information from these statements, RJ identified 17 employees he believed could provide information about the party, the behaviour of the claimant and the interactions between the claimant and the complainer. He met with these people on various dates starting 8 March 2024 and finishing on 25 March 2024 taking statements from each of them. He then met with the claimant again on 5 April 2024 to get further information about matters which came up in the interviews with the other employees. A final interview was conducted on 17 April 2024 with an employee whom RJ had spoken to previously but wanted to ask further questions. This final interview was held on 17 April 2024 because both RJ and the other employee were on annual leave in the early part of April 2024.

20. RJ produced an investigation report (pp180-183) setting out who he interviewed and when. The report then sets out what facts had been established and the findings made by RJ. He identified what facts were uncontested, what facts were contested and what facts were unsubstantiated in the sense that no-one could speak to them.

21. The report identifies that no-one else was present when the alleged harassment took place and so neither the claimant's nor the complainer's version of events regarding this could be corroborated. It set out that there was evidence from some witnesses of the claimant hugging other people at the party and evidence of some physical contact between the claimant and the complainer other than that which was alleged to be harassment. A particular point that the report identified was that the complainer knew the claimant's room number at the hotel he was staying at after the party (which she says was disclosed to her as part of the allegation of verbal harassment) but the claimant denied sharing this information with her.

22. RJ concluded that, on the basis of the information available to him, there was a probability of some form of unwanted and inappropriate conduct by the

claimant towards the complainer and the case should be referred to a disciplinary hearing.

23. EF was appointed to chair the disciplinary hearing. He wrote to the claimant by letter dated 19 April 2024 (pp186-187) setting out the allegations and inviting him to attend a disciplinary hearing on 25 April 2024. The letter also enclosed RJ's investigation report, the witness statements taken by RJ during the investigation and copies of the respondent's disciplinary and anti-harassment policies.

24. The disciplinary hearing did not take place on 25 April 2024. Indeed, it did not take place at all despite being re-arranged more than once. The reason for this is that the claimant went on sick leave on 22 April 2024 and remained unfit for work (including attending any disciplinary hearing) until he resigned. As a result of going on sick leave, the claimant's pay reduced from full pay to SSP.

25. On or around 5 or 6 May 2024, the claimant started looking for alternative employment. The reason given in evidence for this was the claimant believed that he would not get a fair hearing and the outcome was pre-determined.

26. On 14 May 2024, the claimant raised a grievance regarding the payment of SSP rather than CSP by way of a letter from his solicitor (pp199-200). The grievance makes reference to the term of the claimant's contract which provides for the entitlement to CSP. It also makes reference to the financial impact on the claimant of the reduction in his pay.

27. On 15 May 2024, EF contacted the claimant by email (p207) to confirm that the solicitor who sent the grievance was acting for the claimant. The claimant confirmed this later the same day. On 17 May 2024, EF confirmed to the claimant that the grievance would be passed to HR to deal with it (p206).

28. On 21 May 2024, the claimant emailed EF confirming that he had been signed off sick for a further 4 weeks. He also raised issues about his pay repeating the points raised about the financial impact on him of being paid SSP and not CSP. He also requested that the grievance is dealt with by someone from

outside his region. The reason for this is that he asserts there is a conflict of interest in HR from his region dealing with the grievance when some of them had been involved in the disciplinary process.

29. On 22 May 2024, the claimant emailed a second grievance to EF (pp215-217). This one related to the disciplinary investigation and raises the following issues:

    a. He asks for a copy of the original grievance lodged by the complainer.

    b. He identifies 17 people mentioned in the witness statements provided to him that had not been interviewed by RJ providing a list of them at the end of the grievance. The claimant does not set out what information these people might provide if they were asked.

    c. He asks for clarification of one point raised in the complainer's statement.

    d. He asks why certain matters which he says are contradictions in different statements have not been identified.

    e. He raises an issue with the handwritten date on the investigation report apparently being changed.

    f. He identifies that one of the allegations in EF's letter of 19 April 2024 is not mentioned in the witness statements.

    g. He complains that the witness statements were sent to him in alphabetical rather than chronological order.

    h. He concludes by saying that he believes that all of this shows that the investigation was flawed and unfair.

30. EF writes to the claimant by letter dated 28 May 2024 (pp218-219) regarding the two grievances. He confirms that KN had been appointed to deal with the grievance relating to sick pay as someone from outside the claimant's region. In respect of the second grievance, EF explains that he had decided that, because this was closely related to the issues in the disciplinary case,

the grievance would be most fairly dealt with by considering it as part of the disciplinary. He goes on to say that the claimant will be given the opportunity to put his case and that the issues raised in the grievance can be dealt with as part of the disciplinary process.

31. The claimant does not reply to this letter. Indeed, he does not contact the respondent again until he resigns.

32. On 4 June 2024, KN emails the claimant (p223) to introduce herself and update him on the grievance process. The claimant did not directly reply to this email.

33. By letter dated 5 June 2024 (p224), KN invited the claimant to a grievance meeting on 12 June 2024. KN had identified this date as appropriate because she wanted to give him notice of the meeting so that he had sufficient time to prepare. The claimant did not directly reply to this letter.

34. On 5 June 2024, the claimant secured a new job with another supermarket which he started on 24 June 2024.

35. By letter dated 7 June 2024 (p226), EF invited the claimant to a re-arranged disciplinary hearing providing three dates in June on which EF was available. The claimant did not directly reply to this letter.

36. By email dated 11 June 2024 (p227), the claimant resigned from his employment with the respondent. He gave the following reasons for his resignation:

    a. An alleged lack of urgency in dealing with his grievance about being paid SSP and the financial hardship which he said this would create.

    b. A loss of faith in the disciplinary process. The claimant stated that he had identified what he considered to be anomalies, contradictions and inconsistencies in the investigation process which he felt had not been addressed correctly and his grievance about this should have been passed to a neutral third party to deal with. He also alleged that the outcome of the process would be "unduly influenced" by "several

individuals" (although he does not say who these are other than saying that they had already been involved in the investigation).

Submissions

37. Both parties produced written submissions and supplemented these orally. For the sake of brevity, the Tribunal does not intend to set out the submissions in detail. These have been noted and the Tribunal will refer to any point raised that requires to be specifically addressed in its decision below.

Relevant Law

38. Section 94 of the Employment Rights Act 1996 makes it unlawful for an employer to unfairly dismiss an employee.

39. Section 95(1) of the 1996 Act states that dismissal can arise where:

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

40. The circumstances in which an employee is entitled to terminate their contract by reason of the employer's conduct is set out in the case of *Western Excavating v Sharp* [1978] ICR 221. The Court of Appeal held that there required to be more than simply unreasonable conduct by the employer and that had to be a repudiation of the contract by the employer. They laid down a three stage test:

a. There must be a fundamental breach of contract by the employer

b. The employer's breach caused the employee to resign

c. The employee did not delay too long before resigning thus affirming the contract

41. A breach of contract can arise from an express term of the contract or an implied term. For the purposes of this case, the relevant term was the implied term of mutual trust and confidence.

42. The test for a breach of the duty of trust and confidence has been set in a number of cases but the authoritative definition was given by the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462 that an employer would not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

43. The "last straw" principle has been set out in a range cases with perhaps the leading case being *Lewis v Motorworld Garages Ltd* [1985] IRLR 465. The principle is that the conduct which is said to breach trust and confidence may consist of a series of acts or incidents, even if those individual incidents are quite trivial, which taken together amount to a repudiatory breach of the implied term of trust and confidence.

44. The "last straw" itself had to contribute something to the breach even if that is relatively minor or insignificant (*Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833).

45. The *Kaur* case also set out practical guidance for the Employment Tribunal in addressing the issue of whether a claimant had affirmed the contract in the context of a "last straw" case:

> *"(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> *(2) Has he or she affirmed the contract since that act?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in Omilaju v Waltham Forest LBC [2005] IRLR 35) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation ….)*

(5) Did the employee resign in response (or partly in response) to that breach?"

Decision

46. This case turns on the question of whether there was a constructive dismissal and the first question for the Tribunal in determining that issue is whether there was a fundamental breach of contract by the respondent.

47. The claimant relies on a breach of the implied duty of trust and confidence arising from the matters set out at 1a)-e) on the agreed list of issues. The Tribunal is, therefore, applying the *Malik* test described above in assessing whether there was a breach of the duty of trust and confidence.

48. The Tribunal will deal, first, with the "calculated" element of the *Malik* test. This requires there to be purposeful or deliberate breach of the duty of trust and confidence by the respondent and there was simply no evidence led before the Tribunal from which it could conclude that the respondent or any of the managers involved in the internal process had set out to destroy or seriously damage the employment relationship.

49. The claimant sought to suggest that he was, in some way, being targeted by senior management. However, he gave no evidence as to who it was in senior management that was targeting him. He certainly did not put anything to any of the respondent's witnesses in cross-examination that any of them (in particular, Mr Jackson and Mr Fitzpatrick) had chosen to target him or that they were under instruction to do so by someone else.

50. The claimant's view that he was being targeted was said to arise from the fact that he had been subject to disciplinary investigations in 2021 and 2022; the former related to a data breach which was resolved informally and the latter related to an allegation from the claimant's former line manager about a sectarian video which was investigated but did not proceed further. It is difficult to follow the claimant's logic that these matters indicate an intent to target him for disciplinary action; they are entirely separate matters, from each other and the present case; the line manager who initiated matters in 2022

was no longer the claimant's line manager during the events giving rise to this case and had no involvement in the investigation and disciplinary process about which this case is concerned; in both the previous matters no disciplinary action was taken against the claimant beyond an investigation.

51. There was also no apparent motive for why the claimant would be targeted by anyone for disciplinary action. In evidence he sought to suggest that it was to replace him with someone on a lower salary solely on the basis that the person who was appointed to his job after he resigned was on a lower salary. However, the Tribunal considers that this is no more than *ex post facto* speculation; the claimant did not raise this at any point during the internal process either as part of his grievances, during the investigation or otherwise; there was no evidence that the respondent had any issue with the claimant's salary; there was no evidence of anyone else in the same role or at the same level of management being pushed out to reduce costs; it is entirely unsurprising that someone new to a role would be paid less than someone who had occupied it for decades.

52. Further, there was no evidence or even the suggestion by the claimant that the complaint made against him was falsified or concocted to provide an excuse to take disciplinary action. Neither during the disciplinary process nor during the Tribunal hearing did the claimant ever make this suggestion; he simply suggested that there had been a misunderstanding or misinterpretation of events.

53. The claimant did seek to suggest that RJ had attempted to "create a narrative" about the claimant in relation to the information sought by him when interviewing witnesses. This relates to questions about the claimant's general behaviour at the retirement party as opposed to the specific complaint. As noted above, no motive for RJ to have gone looking to create a case against the claimant has been suggested beyond the claimant's speculation about his salary. There was certainly nothing put to RJ by the claimant about some motive he may have had to "create a narrative".

54. Further, the evidence from RJ was that these questions arose from information given in the interviews which he felt he felt had to be investigated to form a picture of what had happened on the night. There was nothing in the evidence from which the Tribunal could conclude that RJ had some other reason for asking these questions.

55. The Tribunal, in its industrial experience, finds it entirely unsurprising that an employer who receives a complaint of sexual harassment proceeds to investigate and deal with that complaint. Indeed, if they did not, they would open themselves up to potential legal consequences. The respondent was perfectly entitled to investigate the matter and take the action they thought appropriate.

56. The decision to proceed from an investigation to a disciplinary hearing is one of the matters the claimant relies on as giving rise to the breach of the duty of trust and confidence (as is the alleged targeting of the claimant). The Tribunal will address this in more detail below but, suffice it to say, there was no evidence that this decision was made with the purpose or intent of seriously damaging or destroying the employment relationship.

57. In these circumstances, the Tribunal considers that there is no basis on which it could conclude that the respondent's actions were calculated to destroy or seriously damage the employment relationship.

58. The Tribunal now turns to the "likely" element of the Malik test. The claimant relies on five matters (one of which is made up of four sub-matters) as breaching the duty of trust and confidence. The Tribunal will consider each of these in turn but it bears in mind that the claimant is advancing a "last straw" case and so it will also consider all of these matters as a whole in determining whether the Malik test is met.

59. One preliminary point to make is that the Tribunal agrees with the submission made on behalf of the respondent is that the Malik test is an objective one and it is not sufficient simply that the claimant feels that trust and confidence has been seriously damage or destroyed.

60. The first matter on which the claimant relies is that he was put on SSP rather than CSP when he took sick leave during his period of suspension.

61. The claimant's contract provides that the claimant is entitled to CSP during a period of sick absence with the caveat that the respondent has the power to reduce this to SSP. One circumstance in which this power is exercised is during any period of suspension; the respondent's disciplinary policy states that an employee "will" be paid SSP if they take sick leave during a period of suspension.

62. In these circumstances, the payment of SSP to the claimant is entirely in keeping with the terms of the claimant's contract and is not, in itself, a breach of contract. It is difficult to see, therefore, how this can seriously damage or destroy the employment relationship or contribute to that as part of a wider sequence of events. The Tribunal notes that the claimant was informed of what would happen if he went on sick leave during his suspension in clear terms in the letter confirming his suspension. He was, therefore, aware that this was the position.

63. The Tribunal does recognise that any contractual power which the respondent has must still be exercised reasonably. An unreasonable use or exercise of a contractual power could potentially damage the employment relationship or contribute to that. The claimant did not expressly argue that the power had been exercised unreasonably. However, the Tribunal takes account of the fact that he is a party litigant and that the thrust of his case on this point was that there had been an unreasonable use of this contractual power even if he did not express it in those terms.

64. The Tribunal pauses to note that the wording used in the disciplinary policy indicates that payment of SSP is not a choice or decision of any manager and that this is automatic. However, there was no evidence to suggest that, had any of the managers involved in the process (such as Mr Fitzpatrick or Ms Nelson) sought to pay the claimant CSP, they would not have had the power or authority to do so.

65. The claimant's position as to why he considered that the payment of SSP to contribute to a loss of trust and confidence is that this would place him at a financial hardship and impact on his ability to pay his mortgage or other bills. However, this could be said of each and every employee of the respondent who found themselves in the same position as the claimant. He was not in any different or unusual position than anyone else in the same circumstances. If the respondent was to diverge from its policy because of the financial impact on any employee then it would render the policy a nullity as it would never be put into effect.

66. In these circumstances, the Tribunal considers that there is no basis to conclude that the respondent has unreasonably exercised its power to pay SSP to the claimant in the circumstances of this case. In particular, there was no evidence that there was some specific circumstances in this case different from any other case that rendered the exercise of the power to reduce sick pay to SSP unreasonable.

67. The second matter relied on by the claimant is the length of time taken to carry out the disciplinary investigation. The Tribunal notes that the initial interview with the complainer was held on 4 March 2024, the claimant was interviewed on 6 March, a further 17 people interviewed from 8 to 25 March 2024 and the claimant interviewed on 5 April 2024. The process did not conclude until 17 April 2024 when Mr Jackson conducted a second interview with one of the people he had spoken to previously.

68. The Tribunal does not consider that, given the number of people interviewed, this timescale was excessive or that there was unreasonable delay. It is almost inevitable when such a large number of interviews have to be arranged that it will take time to do so. The bulk of the investigation was completed within one month which the Tribunal considers to be entirely reasonable given that it involved nearly 20 people.

69. The Tribunal does note that there was a delay from the claimant's second interview to the final witness interview of just under two weeks. There was no dispute that Mr Jackson was on leave for part of this time and that the

witness in question was also on leave. It accepts that this, rather than any failure to promptly arrange the interview, is the genuine reason for the gap between the claimant's second interview and the end of the process.

70. In these circumstances, the Tribunal does not consider that there was any excessive or unreasonable delay in the investigation process.

71. The third matter relied on by the claimant is that the investigation process was flawed. There are four things which the claimant relies on in saying the process was flawed.

72. First, he says that there were 17 people mentioned in the witness statements produced as part of the investigation who were not themselves interviewed. There is a considerable tension between this and the complaint about the length of the investigation; if these additional people had been interviewed then it would have doubled the number of witnesses with a consequent increase in the time needed for those witnesses to be interviewed.

73. The explanation given by Mr Jackson for why some people were interviewed and others were not was that he only sought information from those people who it appeared could provide something relevant to what he was investigating. The Tribunal considers that this is a proper and reasonable approach; an employer must be entitled to deal with any disciplinary investigation in an efficient manner to avoid delay and focus on the relevant information.

74. Importantly, the claimant did not, either during the disciplinary process, in his grievance or during the Tribunal hearing, suggest that any of the people who were not interviewed could contribute anything of significance to the investigation. He does not, for example, suggest that any of these people could provide information that would support his version of events or otherwise provide exculpatory or mitigating information.

75. In these circumstances, the Tribunal does not consider that there is any basis on which it could conclude that the fact that these 17 people were not interviewed means that the investigation was flawed.

76. Second, the claimant states that several statements were contradictory, anomalous or inconsistent and he gives examples of these in his second grievance. The fact that there are inconsistencies between the statements of different people does not inevitably lead to a conclusion that the investigation was flawed. It may simply be a fact that different people have a different recollection of events from each other.

77. To put it another way, there was no evidence that the manner in which the investigation had been conducted had caused any of the alleged inconsistencies between witnesses.

78. Further, there was no evidence that any of the inconsistencies had any bearing on the decision by RJ to recommend that the case proceed to a disciplinary hearing.

79. Finally on this point, the claimant was not, in any way, prevented from raising these matters at the disciplinary hearing and ask EF to take account of these in making his decision.

80. Third, the claimant asserts that there were no witnesses to the alleged harassment but a decision was still made to proceed to a disciplinary hearing. This, of course, ignores the fact that the complainer is a witness to the allegations and so it is not the case that the respondent has no evidence on which it can proceed to determine the complaint. Further, the lack of any other witness to the alleged harassment cuts both ways as there was no-one who corroborated the claimant's version of events.

81. The claimant complains of a lack of corroboration but the respondent is not a court of law and is not bound by rules relating to the burden or standard of proof. In circumstances where there is only one person's word against another's then the respondent would be perfectly entitled to decide whether to be believe one person over the other taking account of all the facts of the case.

82. In all these circumstances, the Tribunal does not consider that it can be said that the investigation was flawed simply because there was no-one who was

a witness to the alleged harassment. As noted above, there was no reason why the respondent could not decide to proceed to a disciplinary hearing at which the decision-maker could decide who to believe in light of all the information available to them. There was no suggestion that the claimant could not make this point at the disciplinary hearing or that EF would not take this into account.

83. Fourth, the claimant says that the investigation was flawed because there was an attempt to target him. The Tribunal has already addressed this above in the context of the "calculated" element of the Malik test and it does not propose to say anything more on this point. The Tribunal adopts what it has said above.

84. The claimant did make reference in his evidence and submissions to other matters about the investigation process that he says were flaws that were not on the list of issues. For the sake of completeness, the Tribunal can say that none of these shows any particular flaw in the investigation to such an extent that it meets the *Malik* test.

85. For example, the claimant complains about the fact that the handwritten date on the investigation report appeared to have been changed but did not explain what he said was the significance of this. The same applies to the fact that the matrix which Mr Jackson prepared showing which witnesses said what contains one error indicating that a particular witness said something which they did not. There was no evidence that this had any effect on the conclusion to proceed to a disciplinary hearing. Another example was a suggestion that RJ was asking leading questions of witnesses. The examples given by the claimant were not, in fact, leading questions in the sense that the question suggested the answer but, in any event, as already set out above, the respondent is not a court of law which has rules about how evidence is obtained.

86. The Tribunal considers that the claimant was raising these matters in order to throw as much mud at the investigation in the hope that something stuck. Even taking all these matters into account, there was nothing which rendered

the investigation flawed to such an extent that it would have been likely to seriously damage or destroy the employment relationship.

87. The fourth matter relied on by the claimant is an alleged lack of urgency in dealing with the grievance relating to sick pay. Again, it is useful to look at the timeline; the grievance was raised on 14 May 2024 by a letter from the claimant's solicitor; on 15 May 2024, Mr Fitzpatrick asks the claimant to confirm that the solicitor acts for him which he does later the same day; on 17 May 2024, Mr Fitzpatrick confirms to the claimant that the grievance will be passed to HR to appoint someone to deal with it; on 21 May 2024, the claimant asks for the grievance to be dealt with by someone outside his region; on 28 May 2024, Mr Fitzpatrick confirms to the claimant that Ms Nelson has been appointed; on 5 June 2024, Ms Nelson contacts the claimant to confirm that a grievance meeting has been arranged for 12 June 2024.

88. The Tribunal does not consider that this is an unreasonable timescale for the grievance to be progressed. It was just under a calendar month from the grievance being submitted to the date of the grievance hearing. Account has to be taken of the fact that the claimant was asking the respondent to find someone outside of his region to deal with the grievance, the time needed for that person to familiarise themselves with the issue and to give the claimant adequate notice for the grievance meeting so he had time to prepare.

89. The fifth and final matter relied on by the claimant is the fact that his second grievance was going to be dealt with by Mr Fitzpatrick as part of the disciplinary process rather than as a separate grievance by a neutral third party.

90. The Tribunal notes that the claimant did not request that a neutral third party hear his second grievance as he did with the sick pay grievance. Further, there is nothing in the respondent's disciplinary process that suggests that this would be done as a matter of course. The disciplinary procedure deals with the issue of grievances raised during a disciplinary process and it is clear that there is a considerable discretion given to managers to decide what to do in such circumstances depending on the nature of the grievance and the

extent to which it relates to the disciplinary matter. It does say that, in most cases, the best format for dealing with any grievance will be the disciplinary process itself.

91. The Tribunal can well see why it was considered appropriate to deal with the issues raised in the grievance as part of the disciplinary process. They are the very sort of issues which, in the Tribunal's experience, are regularly raised at disciplinary hearings. For example, the issues of inconsistency between witnesses or the lack of corroboration are exactly the sort of things that would be discussed at a disciplinary hearing and which the disciplinary manager would have to take into account.

92. It is worth noting that there is no suggestion that the claimant would be denied the opportunity to raise these issues at the disciplinary hearing. Indeed, Mr Fitzpatrick is clear that he would be given such an opportunity.

93. The claimant sought to suggest that there was some sort of conflict of interest in Mr Fitzpatrick hearing both the disciplinary and the grievance. The Tribunal has considerable difficulty in following the logic in this and the claimant could not provide any real explanation why he took this view. He suggested that this would be a case of Mr Fitzpatrick "marking his own homework" and whilst the Tribunal would have seen some force in this if it had been Mr Jackson dealing with the grievance but not Mr Fitzpatrick. The grievance did not contain any complaint about him.

94. Further, in evidence, the claimant accepted that there was no issue in Mr Fitzpatrick chairing the disciplinary hearing and so it is even less clear why there would be an issue in him dealing with a grievance that raised issues relevant to that disciplinary hearing.

95. The claimant also sought to suggest that the decision not to have a neutral person deal with the grievance meant that the disciplinary was pre-determined. Again, the Tribunal has real difficulty in following the logic of this. Mr Fitzpatrick had not decided any substantive issue, simply the process by which those would be dealt with. There is simply no basis on which anyone could conclude that he had pre-determined anything of substance.

96. Indeed, if the grievance and disciplinary had been dealt with separately then this would have run the risk of pre-determination. The outcome of the grievance would clearly have a bearing on issues relevant to the disciplinary process.

97. In these circumstances, the Tribunal considers that the respondent had reasonable and proper cause for it is decision to deal with the second grievance as part of the disciplinary process.

98. None of the issues above, taken on their own, satisfy the *Malik* test; there is either reasonable or proper cause for the respondent's actions or the issue in question is not sufficient to seriously damage or destroy the employment relationship.

99. However, the claimant also advances a "last straw" case and so the Tribunal has to look at these individual matters as a whole.

100. The Tribunal considers that the *Malik* test is not met even when these are looked at as a whole. The picture that is presented is one of an employer receiving a complaint of sexual harassment who takes steps to investigate and deal with that complaint through its disciplinary process. It is notable that nothing that is done by the respondent is contrary to or inconsistent with its own procedures. The decisions that were made during the process were, for the reasons set out above, ones which the respondent was entitled to make and for which they had proper and reasonable cause.

101. The claimant was undoubtedly unhappy at being subject to this process but that does not mean that the respondent was acting in a manner which was likely to seriously damage or destroy the employment relationship other than the inevitable impact on the relationship that will arise where a disciplinary process is required.

102. In these circumstances, the Tribunal does not consider that there was a fundamental breach of contract by the respondent and so the claimant was not dismissed as defined in s95(1)(c) of the Employment Rights Act.

103. For this reason, the claim of unfair dismissal is not well-founded and is hereby dismissed.

104. Given the finding as to whether there was a fundamental breach of contract, the Tribunal has not considered it necessary to determine the other issues relating to whether there was a dismissal.

Employment Judge P O'Donnell

Date sent to parties **04 February 2025**