



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Edwards  
**Respondent:** Reserve Forces and Cadets Association for Yorkshire  
And Humber  
**Heard at:** Leeds On: 25, 26 and 27 October 2017  
**Before:** Employment Judge O'Neill  
**Members:** Sitting alone.  
**Representation**  
Claimant: Mr Bruce Frew of Counsel  
Respondent: Ms Assunta Del Priore of Counsel

## RESERVED JUDGMENT

1. The claim for unfair dismissal succeeds.
2. The claim for wrongful dismissal succeeds.
3. There is no finding of contribution.

## REASONS

### Background and overview

1. The Claimant was a senior manager of the Respondent about whom a number of complaints had been made by staff which led to a workplace investigation under the bullying and harassment procedure. The outcome of that investigation led to the Respondent instigating disciplinary proceedings against the Claimant. The Claimant in turn raised a grievance about the conduct of the workplace investigation and the disciplinary process. He resigned and claimed constructive dismissal when the outcome of his grievance was not to his satisfaction and the Respondents decided that the adjourned disciplinary hearing would be conducted by Colonel Jason Wright about whom the Claimant had brought his grievance.

## Issues

2. At the outset of the hearing the parties through Counsel agreed the issues as set out below. The issue relating to privilege was also resolved between Counsel.
3. The issues as identified are as follows:-
  - 3.1. Did the Respondent breach an implied term in the Claimant's contract of employment that he provided with a fair transparent and reasonable grievance process.
  - 3.2. Did the Respondent without reasonable and proper cause act in a way so as to destroy or seriously damage mutual trust and confidence.
  - 3.3. The Claimant relies on the following matters as collectively giving rise to a cumulative breach of the fundamental term of mutual trust and confidence adopting the last straw doctrine:
    - a. The Respondent's handling of a breach of confidentiality in June 2006;
    - b. The provision of information to Claimant in respect of the grievances against him;
    - c. The fact that the workplace investigation report (WIR) took nine weeks to complete;
    - d. Respondent's conduct of the meetings of 19 August and 12 October 2016;
    - e. Whether Respondent provided adequate documentation to Claimant in respect of the grievances against him;
    - f. The handling of Claimant's grievance and the findings of Brigadier David Hargreaves.
    - g. The Respondent closed ranks against the Claimant;
    - h. Whether the Respondent should have made the Claimant aware that the investigator had found evidence of collusion between the witnesses;
    - i. Whether the Respondent should have made the Claimant aware of Ms Baldwin's comments regarding him;
    - j. The Claimant's working relationship with Colonel Wright and Lieutenant Colonel Bleasdale;
    - k. The wording of the brief sent by the Respondent to Ms Johnson;
    - l. Ms Johnson's handling of the Claimant's grievance appeal re-hearing and her findings.
4. Was the Respondent the repudiatory breach of contract in respect of the matters alleged above.
5. Did the Claimant resign in response to such a fundamental breach as the Tribunal finds or for some other reason.
6. Did the Claimant act in a way such as to waive such a breach/breaches as the Tribunal may find and affirm his contract of employment.

7. If the Respondent dismissed the Claimant was its reason for dismissing him potentially fair. The Respondent relies on a substantial reason of a kind such as to justify dismissal of an employee holding the position which the Claimant held namely managing and resolving workplace conflict in a proportionate manner.
8. If the Respondent dismissed the Claimant for a potentially fair reason did the Respondent act reasonably in treating it as a sufficient reason to dismiss him in all the circumstances.
9. Did the Claimant cause or contribute to his dismissal by culpable or blameworthy conduct.

## Law

10. The relevant statutory provisions are within the Employment Rights Act 1996 (ERA 1996) sections 95, 98, 122 and 123. These sections are well known and as both parties are represented I do not set them out in full.
11. The leading case on constructive dismissal is **Western Excavating (ECC) Limited v Sharp** [1978] IRLR 27 which sets out guidance summarised as follows:-

The Claimant must show that there was a fundamental breach ie a serious breach by the employer, that the Claimant resigned in response to that breach and not for any other reason, that the Claimant resigned promptly in response to that breach and did not waive the breach through delay or any other reason.

12. The leading authority on breach of the implied term of mutual trust and confidence is **Malik and Another v The Bank of Credit and Commerce International SA** [1997] IRLR 462 HL. In that case the House of Lords confirm that the following implied term was a well-established principal and fundamental term in an employment contract:

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

It is widely accepted that the above wording is better expressed as calculated or likely and I have adopted such an approach.

13. Counsel for the Respondent referred in her submissions to a number of additional authorities which I have taken into account and I found the following of particular assistance:

**W A Goold (Pearmak) Limited v McConnell** [1995] IRLR 516

**Nelson v BBC** (No 2) [1980] ICR 110CA

14. Counsel for the Claimant also referred me to a number of further authorities to which I had regard and I found the following of particular assistance namely **Nottinghamshire County Council v Meikle** [2004] IRLR 703.

## Evidence

15. There was an agreed bundle of documents of almost 800 pages.
16. Oral testimony was given by the Claimant and the following Respondent witness namely:

Colonel Jason Wright (JW) the Chief Executive Officer and the disciplinary officer.

Mr Richard Reed (RR), administrative manager of a neighbouring association who conducted the workplace investigation.

Brigadier David Hargreaves (DH), the association chairman who conducted the first grievance hearing.

Jane Johnson (JJ), independent HR consultant brought in to hear the grievance appeal.

Lieutenant Colonel Jeremy Bleasdale (JB) the Respondent's Deputy Chief Executive Officer with responsibility for HR.

The Claimant and the Respondent's witnesses each produced a written statement and were cross-examined.

17. Counsel for each party provided very helpful written submissions.

### **Findings of fact**

18. Having considered all of the evidence both oral and documentary I make the following findings of fact on the balance of probabilities which are relevant to the issues to be determined. Where I heard or read evidence on matters on which I make no finding or do not make a finding to the same level of detail as the evidence presented to me that reflects the extent to which I consider that the particular matter assists me in determining the issues. Some of my findings are also set out in my conclusions below in an attempt to avoid unnecessary repetition and some of my conclusions are set out in the findings of fact adjacent to those findings.

19. About a month after JW took up his post as chief executive officer (CEO) of the Respondent he received a letter of complaint from three members of staff concerning a number of working practices and alleged unfair treatment including fraud, bullying and harassment, discrimination and other matters. These complaints were levelled against the Respondent generally and in part were directed at the Claimant.

20. JW met with the women, asked for further particulars and decided to instigate an investigation under the bullying and harassment procedure. He asked RR to conduct the investigation. RR was the administrative manager of the North Eastern Association and was a suitably independent person to conduct the investigation.

21. I conclude that in the light of the initial letters of complaint it was reasonable for JW to have initiated this investigation in the way that he did and to have met with the women to have asked for further particulars and by so doing he did not act in bad faith or seek to influence the outcome of the investigation.

22. Those who heard the Claimant's grievance and appeal namely DH and JJ reached a similar conclusion which in turn was reasonable and well founded and made in good faith. In respect of this aspect of the Respondent's conduct I find that this did not constitute or contribute to a breach of either fundamental term relied on.

23. JW in anticipation that a significant number of the Respondent's small workforce would be interviewed decided to convene a meeting of the staff and inform them, in terms, that an investigation would be undertaken, that they should co-operate with RR in the investigation and that they should keep their conversations with him confidential.

24. In so doing I conclude that JW acted reasonably and had proper cause to hold such a meeting and that by so doing he did not breach any duty of confidence to the Claimant who was not identified in that meeting. I further conclude that those who dealt with the Claimant's grievance and appeal in reaching a similar conclusion did so in good faith and on a well founded basis. In respect of this aspect of the Respondent's conduct I find that this did not constitute or contribute to a breach of either fundamental term.
25. The Claimant undoubtedly felt exposed after having been called to a meeting with JW to discuss the fact that complaints had been levelled against him. However JW acted as discreetly as he could by calling the Claimant for the ostensible purpose of a business matter. I further find that the Claimant misheard and/or misinterpreted what JW said and I find (as did those who heard the grievance and appeal) that JW did not say that the complaints were exclusively about the Claimant.
26. As is often the case in a small workplace, gossip leaked out and the Claimant complained to JW who took immediate and proper action by instructing the supervisory staff to reinforce his message to the general staff that they must keep the strictest confidence during the course of the investigation. His enquiries as to who was responsible for the leak drew a blank. The Claimant did not offer JW the name of his own informant. There was no evidence of any impropriety on the part of JW or any other manager in respect of the leak.
27. I conclude as did those hearing the grievance and appeal that JW could have done no more. I further conclude that this aspect of the Respondent's conduct both through the CEO and through those dealing with the grievance and appeal did not constitute or contribute to a breach of either fundamental term relied on by the Claimant.
28. RR conducted the investigation. He told the Tribunal that he was not aware that the Claimant had not been given copies of the letters of complaint. It is accepted that the only information that the Claimant had been given when he came to be interviewed by RR was an abbreviated list of allegations as set out in JW's letter of 14 June 2016. I find that it is impossible to glean from this list precisely what the allegations are against the Claimant.
29. The Claimant was never told by the Respondents through Mr Reed, JW or anyone else, what he had allegedly done when and to whom. This remained the position when he was interviewed by RR during the investigation and it rendered it impossible for him to respond to the complaints.
30. During RR's investigation the Claimant was only asked a series of pre-prepared questions none of which related to the particular allegations made about him by the members of staff. His questions and answers are recorded in the workplace investigation report (WIR) and in his evidence RR accepted that these were the only questions that he had put to the Claimant.
31. I find that the Claimant had no proper opportunity to respond to the allegations that he had acted inappropriately towards the complainants or at all. In this respect I find that the Claimant was treated most unfairly by the Respondents.
32. In so finding I bear in mind that this was an investigation into the complaints of other members of staff. When RR met the Claimant it was in that context and their meeting was not convened in the context of an investigatory meeting under the disciplinary and grievance procedure.

33. Nevertheless RR's findings and recommendations as set out in the WIR triggered the disciplinary process against the Claimant and in reality served as an investigative meeting under the disciplinary process.

34. It was therefore entirely understandable that the Claimant should have wanted this defective process to be addressed in his grievance.

DH and JJ who dealt with the grievance and the appeal had before them the WIR and it should have been obvious to them from the interview between RR and the Claimant, as recorded within the WIR, that the Claimant had had no proper opportunity to respond to the complaints levelled against him and had good grounds to complain to that effect.

The Respondent sought to separate the disciplinary matter from the Claimant's grievance and refused to deal with his complaint about the workplace investigation process, notwithstanding the fact that it was that process that had triggered the disciplinary proceedings.

35. I find that their refusal to deal with this aspect of the Claimant's grievance and their failure to properly acknowledge that not only had he been given insufficient information during RR's investigation and in the disciplinary proceedings (which both DH and JJ found to be the case) but also that he had had no proper opportunity to respond to the allegations and to contribute to the workplace investigation to be a fault in the grievance procedure. This was a contributory factor in the Claimant's loss of trust and confidence.

36. The Claimant should at least have had the defects in the workplace investigation acknowledged by those hearing his grievance and steps taken to give clear direction that he should be given a proper opportunity to answer the charges and which should be put to him with some detailed particularity of what he is alleged to have done, when and to whom, if the disciplinary hearing was to go ahead.

37. In August JW was presented with a WIR from RR which included RR's recommendations that: *"on balance in addition to the comments above there are too many statements that KE is abrupt, aggressive, uses foul language to disregard the fact that this will contribute to a hostile environment even if KE does not see it that way. As KE is one grade higher than AL this situation should be monitored together. KE should be given management training and/or advice on his conduct towards other members of staff and disciplinary action may be appropriate in this instance"*. The WIR also states *"The evidence of this investigation suggests a possible requirement for some disciplinary action against individuals who have failed to meet appropriate professional standards in addition for appropriate management training and a requirement to monitor future conduct"*.

38. I do not find that JW acted in bad faith when he decided to instigate disciplinary proceedings against the Claimant. He had been presented with a WIR making the above recommendations. It is arguable that the disciplinary proceedings against the Claimant were initiated without an adequate basis for doing so and that RR's conclusions had been reached in an unreasonable way having not given the Claimant a proper opportunity to respond. Never the less I find that JW accepted the report in good faith and on the basis of the staff complaints within it had some grounds to instigate the disciplinary proceedings.

39. On 19 August 2016 JW met with the complainants and those about whom the complaints had been made, including the Claimant. According to JB there were over seven hours of taped recordings of the meetings held on that day.
40. On 19 August 2016 JW met with the Claimant together with JB who was in attendance as the note taker.

There is a significant conflict of evidence as to what JW said to the Claimant during the course of this meeting. I prefer the evidence of the Claimant. I find that in that meeting JW told the Claimant that a written warning will be issued and as a consequence revealed to the Claimant that he had pre-determined the outcome of the disciplinary process. I conclude that by so doing JW acted in breach of the fundamental term of trust and confidence.

41. I prefer the evidence of the Claimant because:

- a. It accords with the contemporaneous minute compiled by JB which says at paragraph 3 *“a disciplinary hearing would be convened at which if the finding is confirmed a written warning will be issued. It will stay on Mr Edwards’ record in his P file for 6 months”* and at paragraph 5 *“the Chief Executive concluded by stating he would write to Mr Edwards to take the process forward and he confirmed his intention would be to issue a written warning.”*
  - b. The minute was typed up by JB himself from his contemporaneous handwritten notes. In typing up the note he did not notice any mistake in its wording. I find that to be incredible given that he was responsible for HR and realise the significance of the words in the minute.
  - c. The minute was given to JW on the following day. On receipt of the minute JW did not notice any mistake.
  - d. On 29 September 2016 the Claimant raised his grievance by letter which referred specifically to the minute of the meeting of 19 August on which he relied. *“Jason confirmed at this meeting and it is minuted that his intention was to issue me with a written warning in respect of my conduct.”* It was only at this point that JB realised that the minute was incorrect and he and JW set about denying the accuracy of their own minute.
  - e. Given the limited time available a disciplinary hearing would not have been possible unless they proceeded on the basis of a deal as set out below.
  - f. The shifting account given by JB at the grievance hearing and appeal.
42. I find that JW recognised that the workplace investigation had been difficult for all concerned and that he wanted a quick way out to bring closure to the matter. I find that in order to achieve this he proposed to the Claimant what he called a compressed disciplinary hearing (CDH). There is no place for a CDH in the Respondent’s procedure and this was his own invention. In effect he offered the Claimant a deal under which it could all be over and done with on the afternoon of 19 August if the Claimant put his hands up to the charge of contributing to a hostile working environment on the basis that he would only get a written warning.
43. I conclude that this was a fundamental breach of trust and confidence and JW had no reasonable or proper cause to introduce a CDH or to propose a sanction without having heard from the Claimant and that by so doing he had indicated to the Claimant that he had predetermined the outcome of the disciplinary process.

During the grievance hearing and appeal and during the tribunal hearing JB and JW have asserted that their own minute is incorrect and the words JW used were not those contained in the minute but those set out in the letter of 19 August 2016 which says "If the allegations are found proved we may decide to issue you with a formal oral warning, a written warning or a final written warning."

44. I do not accept their evidence and find on the balance of probability that the words were those as recorded in the minute and recalled by the Claimant.
45. The letter of 19 August 2016 was drafted with the assistance of the Respondent's solicitor. The letter may well set out the words JW would have preferred to have used but I find on the balance of probability that those were not the words used.
46. From the Claimant's point of view the breach of the fundamental term of mutual trust and confidence was compounded by JW and JB when they denied what had been said in the meeting of 19 August and their own minutes.
47. The Claimant was not prepared to enter into any deal with JW and asserted his right to a full disciplinary hearing and a date was set for 5 October 2016.
48. The Claimant then lodged a grievance by a letter dated 29 September 2016 setting out a number of points of complaint similar to those encompassed in the list of issues set out above.

The Respondents quite properly adjourned the disciplinary proceedings pending the outcome of the grievance.

The grievance was heard by DH on 12 October 2016 and the appeal by JJ on 25 January 2017.

49. As Chairman, DH was the most senior person within the Respondent's organisation. Ms Johnson was an independent HR consultant brought in to provide a level of appeal in the grievance proceedings.
50. JB prepared a brief for JJ to assist her in getting to grips with the appeal. The Claimant complains that in that document JB says that the investigation by RR had been thorough and in accordance with the Acas Code when part of his grievance is that it was a flawed process. I do not find that this remark or any other part of JB's report to JJ had an unfair influence on the judgement of JJ who is an experienced and independent HR Consultant.
51. I find that DH and JJ conducted their stages of the grievance procedure in good faith and made findings and drew conclusions which for the most part were well founded. I do not find any evidence of closing of ranks on the part of either DH or JJ. JJ herself was an external professional HR consultant and had no reason to close ranks. DH, as can be seen from the transcript of the grievance hearing sought to distance himself from JB and considered removing him as soon as he suspected that there might be a conflict of evidence between JB and the Claimant.
52. Both DH and JJ find that the Claimant had not been given adequate documentation for the purposes of dealing with the disciplinary hearing and took steps to rectify that.
53. As set out above, it should have been evident to DH and JJ, from the content of the WIR, that the work place investigation process had been wanting because the Claimant had been denied the relevant documentation and had also been denied a proper opportunity to respond to the allegations. Their refusal to consider that as a



grievance complaint related to process was unreasonable and contributed to the loss of trust and confidence on the part of the Claimant.

54. The fact that such information as the Claimant had been given by JW had been given piecemeal had added to the Claimant's mistrust of JW's capacity to deal with his disciplinary matter fairly.

55. At the conclusion of the grievance appeal in February 2017 DH referred the disciplinary matter back to JW to continue with the disciplinary process. The Claimant was so informed on 13 February 2017. The Claimant resigned by letter dated 13 February 2017 in response to that decision.

56. I accept the Claimant's evidence that had the Respondent appointed someone other than JW to conduct the disciplinary hearing that he would have gone through the process.

I find that the principal reason the Claimant resigned was because JW continued to be the appointed disciplining officer and the Claimant no longer trusted him to conduct the disciplinary process fairly and with an open mind and the Claimant had good reason to hold that view.

During the grievance hearing and the appeal, the Claimant made it clear that he had lost trust and confidence in JW. Although the Claimant did not expressly tell DH that he would go through a disciplinary process with another manager, DH should have considered that option and canvassed it with the Claimant given the Claimant's clear statements about loss of trust in JW.

57. DH appears not to have made a definitive conclusion about what JW actually said at the meeting with the Claimant on 19 August. He acknowledges there was a degree of doubt. He opted to rely on the wording of the letter of 19 August 2016 as to JW's intentions for the future to the effect that there would be a range of sanctions open to JW if the charges were upheld.

58. JJ told the Tribunal that she preferred the evidence of JW as to what had been said at the meeting on 19 August but was completely unable to explain what she had weighed in the balance to override the wording of the minute, the word of the Claimant, the conduct of JB after the meeting on 19 August and during the grievance hearing and appeal.

In her grievance appeal outcome report JJ came to the conclusion that it was JW's intention to reassure the Claimant that the allegations against him were not so serious as to be a case of gross misconduct and that JW wished to let the Claimant know the extent of the allegations by outlining the possible outcomes. In her outcome report she goes on to acknowledge that it is possible that he (JW) "inadvertently used inconsistent wording". She also notes " JW acknowledges " the meeting notes and his letter are not consistent. He has told me that ... he wished to reassure you that from the range of possible outcomes you would not be dismissed. In doing so it is possible that he was not consistent in his choice of words or that the notes were not truly reflective of what he said". I infer from this that JJ had some doubts that the version of JW was correct.

59. Although both DH and JJ had confidence in the ability of JW to conduct a disciplinary hearing with an open mind as to whether to uphold the charges at all and if so what sanction (if any) was to apply that was not the view of the Claimant when he resigned. Given the conflict of evidence as to what had been said by JW and that both DH and JJ accept that there is a possibility that the Claimant may not

have been mistaken in his recall of what JW had said and that the Claimant had made it clear that he had lost trust in JW, then it was an ill-judged decision on the part of DH to insist that JW conduct the disciplinary hearing.

60. At the point of his resignation the Claimant had a genuine and well founded belief that:-
- a. He had not been properly informed of the complaints against him or given a proper opportunity to respond during the course of the workplace investigation;
  - b. JW had pre-determined the disciplinary matter having decided that a written warning would be issued;
  - c. JW had exacerbated the mistrust by denying what he had said at the meeting on 19 August 2016 and the accuracy of the Respondent's own written minute;
  - d. The Claimant had made it plain to DH and JJ that he had no faith in JW's capacity to conduct the disciplinary hearing fairly but despite this DH determined to refer the matter back to JW.

61. Turning back to the minute of the meeting of 19 August and to the part of JB in the Grievance procedure I make the following findings. The minute of the meeting of 19 August 2016 is not simply a transcript of JB's notes typed up by another, they were minutes typed up by JB himself immediately after the meeting and passed to JW the following day. He typed the minutes up from his manuscript notes. In so doing JB had an opportunity to reflect on the wording and correct if it was wrong. He did not do so. I find that incredible, as being a person responsible for HR, he recognises the importance of the words in the minute which he now seeks to deny.

Somewhat surprisingly although the meeting was taped and such recording could have resolved this conflict of evidence JB destroyed both the tapes and his handwritten notes.

I prefer the Claimant's evidence to that of JB.

62. The Claimant's also says that during the course of the day on 19 August 2016 (after his meeting with JW), JB visited the Claimant in his office and counselled him to accept the CDH option and get it over with because JW would only impose a written warning.

At the grievance meeting on 12 October 2016 with DH (which was taped and a typed transcript produced) the Claimant identified JB as being a witness to the conversation with JW on 19 August in which according to the Claimant JW said "I'm not going to sack you, I'm only going to give you a written warning". The Claimant also added that JB "came to my office and said all you're going to get is a written warning". The Claimant said this in the presence of JB who was in attendance as note taker. There then followed a discussion as to whether JB should continue as note taker during which JB is recorded as saying "I would not dispute anything that Keith (ie the Claimant) has said". This is recorded in a single passage of the transcript which is introduced by DH as bullet point 7 which is strongly indicative that he was accepting the Claimant's account under bullet point 7 including the account of the meeting on 19 August. JB did not attempt to refute that he had counselled the Claimant to accept a written warning.

63. JB deals with this remark in his written statement as follows: "at that stage I said I would not dispute anything he had said. This was only in relation to the discussion

in Keith's office on 19 August regarding my view of what he should do, not an acceptance of everything that had been said on the topic at that meeting". In his statement JB appears to be accepting at least the fact that he had counselled the Claimant to accept the written warning.

At the hearing JB told the Tribunal that he meant only that he did not contest coming into the Claimant's office which appears to be a different and more limited acceptance.

64. At the hearing JB said the words he used when he came into the Claimant's office were "no worse than a written warning". I note that this account of the words used by JB were not included in his written witness statement and appear to be different from his previous position and what he told JJ at the grievance appeal.

In the grievance appeal outcome report JJ records the following "I also talked with JB about the meeting with DH and page 12 of the transcript of the meeting where he says "oh entirely I would not dispute anything Keith has said". JB has clarified that he was confirming that he did go to your office during the afternoon of the 19 August and talk about a written warning and that he was not concurring with all aspects of the meeting prior to this point."

65. I find that this shifting account from JB is less reliable than the Claimant's account, the Claimant has been consistent in his recall and in the circumstances, I prefer the evidence of the Claimant as to what was said between JB and himself on 19 August in the Claimant's office and that JB did try and persuade the Claimant to accept a written warning.

This further reinforces my finding that the Claimant's account of what JW said on 19 August is to be preferred.

66. I have set out above my findings on the matters which I consider to be key but to complete matters I address the remaining items from the list of issues as follows.

I do not consider the length of the workplace investigation to have been a factor calculated or likely to damage the relationship or a breach of procedure, RR had a lot of issues to explore in addition to his regular work in another area.

Had the Claimant undergone the disciplinary process he would have had the WIR in full and would have had the chance to address the collusion finding in the context of the charges made against him. I make no finding about the alleged collusion which I find to be a peripheral matter and give no weight to this as a separate complaint. I have made a general finding that he was inadequately provided with information during both the Workplace Investigation by RR and by JW in respect of the disciplinary proceedings.

Similarly, I make no finding and give no weight to his complaint that he should have been made aware of Ms Baldwin's comments.

Given the complaints included an allegation that senior managers including JB and the Claimant were operating a 'boys club' and a practice of workplace swearing I find it surprising that no disciplinary action was taken against JB, particularly as he was responsible for HR in the workplace, and received only an informal reprimand of some kind from JW. However given that disciplinary action was taken against another member of staff and given that JB was reprimanded I do not find that the Claimant was singled out or made a scapegoat.

67. In her grievance appeal outcome report JJ recommends that the matter should be put back into the disciplinary process and goes on to state " It is not the case that a

disciplinary warning is automatically issued ... as it may be decided that it is unnecessary or that other alternative actions can be taken..... These include for example informal approaches, counselling, mediation and formal disciplinary warnings". This is an indication to JW that he should consider a wide range of action and not necessarily disciplinary action. I find it likely that a disciplinary officer would have taken this advice into account.

## Conclusions

68. Given my findings above, I conclude that the Respondent has breached fundamental term of trust and confidence in that:-

- a. The Claimant was not treated fairly under their processes during the workplace investigation by RR which triggered the disciplinary proceedings
- b. The Respondents failed to deal with that aspect of his grievance which went to the procedural defects of the workplace investigation.
- c. The Claimant was treated unfairly in the disciplinary proceedings by JW who supplied the key information piecemeal and incompletely;
- d. On 19 August 2016 JW indicated that he had pre-determined the outcome of the disciplinary hearing and that a written warning would be issued;
- e. JW by seeking to deny what had been said on 19 August and to deny the Respondent's own minute further seriously damaged the relationship.

69. I conclude that the Claimant has not delayed too long in responding to the breaches the part of JW and was entitled to raise his concerns under the grievance procedure. He did not waive the breaches by continuing in employment whilst pursuing his grievances. He resigned promptly shortly after the grievance procedures were exhausted and as soon as the Respondents had decided to refer the disciplinary matter back to JW, despite the Claimant having said that he had lost trust and confidence in JW.

70. Given my findings of fact and the conclusions set out above the Claimant has shown on the balance of probability that the Respondent has breached a fundamental term of trust and confidence and that the Claimant has been dismissed and that his dismissal is unfair.

71. The Respondents have failed to show that the reason for the breach constitutes a fair reason under the 'some other substantial reason' category in section 98. There has been a breach of the fundamental term of trust and confidence and in these circumstances, it cannot constitute a fair reason.

72. I make no finding of contribution. I make no finding as to whether the Claimant was guilty of culpable conduct in respect of which the disciplinary proceedings were instigated, namely that the Claimant caused/contributed to a hostile working environment because the evidence in respect that charge has not been properly explored before the Tribunal or at all. However, I find that had the disciplinary procedure gone ahead on such a charge, the most severe sanction likely to have been imposed would have been a written warning. However, in the light of JJ's comments in her grievance appeal report and in her evidence to the Tribunal, it is

not unlikely that a different approach may have been taken altogether and a lesser sanction or indeed no sanction imposed.

**Employment Judge O'Neill**

Date 5 December 2017

